THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2017-002598

ALC Case Nos. 17-ALJ-07-0041-CC; 17-ALJ-07-0042-CC; 17-ALJ-07-0039-CC

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, ... Respondents,

v.

South Carolina Department of Health and Environmental Control and David Coggins Broilers, ... Petitioners;

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, ... Respondents,

v.

South Carolina Department of Health and Environmental Control and Heath Coggins Broilers, ... Petitioners;

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, ... Respondents,

v.

South Carolina Department of Health and Environmental Control and Jim Young Broilers, ... Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

CERTIFICATION OF COUNSEL

Counsel for Petitioners hereby certifies that a timely Petition for Rehearing was made to the Court of Appeals on August 10, 2022, which the Court of Appeals finally ruled upon and denied on January 13, 2023.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err by failing to give appropriate deference to the Department's interpretation of Regulations 61-9.122.23 and 61-43 Part 200, which concern the same subject matter, are inherently ambiguous, and must be read together to produce a harmonious result?

II. Did the Court of Appeals err as a matter of law by failing to give effect to the intent of the legislature under Regulation 61-43?

III. Did the Court of Appeals err as a matter of law by failing to give appropriate deference to the Department's interpretation of certain permit evaluation criteria within Part 200 of Regulation 61-43?

STATEMENT OF THE CASE

This case concerns giving due effect to the intent of the legislature, and providing the appropriate level of deference to a state agency's interpretation of ambiguous regulations under its purview. By failing to accomplish both of these fundamental principles of law, the Court of Appeals has created conflicting requirements on regulated entities, which constitutes a special and important reason to grant certiorari. *See* Rule 242(b), SCACR.

STATEMENT OF FACTS

In 2016, Petitioners David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers (collectively, "Broilers") separately filed applications with Petitioner South Carolina

Department of Health and Environmental Control (the "Department") for agricultural animal facilities permits to construct and operate broiler facilities on a 255-acre tract located in the Little River watershed in the Mountville area of Laurens County. [R. pp. 1215-1331; pp. 1332-1491; and 1492-1660.]

After reviewing the applications in accordance with applicable statutory and regulatory requirements, the Department issued the requested permits in November and December of 2016. [R. pp. 1702-1704; pp. 1707-1709; and 1492-1660.] The permits require the facilities to operate in compliance with regulatory requirements as "no-discharge" facilities to prevent discharges to the environment. [*Id.*] The Respondents challenged the permits by filing a Request for Review as to each permit to the Department's Board asserting the Department failed to follow the procedure for determining whether the facilities had "no potential to discharge," as set forth in Regulation 61-9.122.23(d)(2), and that Broilers were potentially required to obtain a National Pollutant Discharge Elimination System ("NPDES") discharge permit pursuant to Regulation 61-9.122.23. [R. pp. 36-39; pp. 40-43; and 44-47.]

After the Board declined Respondents' requests, Respondents filed a request for a contested case hearing with the South Carolina Administrative Law Court ("ALC") as to each permit and the cases were consolidated. [R. p. 5; pp. 78-90; pp. 91-101; and 102-113.] After holding a merits hearing, the ALC granted partial summary judgment in favor of Petitioners, concluding that that the Projects have no "potential to discharge" and no NPDES permit was required. [R. pp. 4-35.] Specifically, the ALC deferred to the Department's interpretation of Regulations 61-43.200 and 61-9.122.23 that by issuing an agricultural permit pursuant to Regulation 61-43.200, the Department also determined the facility had no potential to discharge. [R. p. 31]

Thereafter, the Respondents appealed to the Court of Appeals. The Court of Appeals reversed primarily based on its erroneous conclusion that the plain language of Regulation 61-9.122.23 requires an NPDES permit unless the Department conducts a superfluous evaluation to determine a facility has no potential discharge. Opinion No. 5911, filed May 25, 2022, (hereinafter "Opinion") at 6-7. Despite acknowledging that Regulation 61-43 prohibits discharges, the Court held that the Department's issuance of a "no discharge" permit pursuant to Regulation 61-43 does not satisfy the requirement in Regulation 61-9.122.23 for the Department to make a case-specific evaluation under all climactic circumstances. *Id.* Additionally, the Court of Appeals found that the Department failed to evaluate the factors set forth in Regulations 61-43.200.70(E) to (F) and 61-43.200.140(C) even though it was established before the ALC that further evaluation was unnecessary because the permit applicants were not considered to contribute to the Total Maximum Daily Load ("TMDL") and would not increase pollution of the waters of the State. *Id.* at 7-8.

On August 10, 2022, Broilers and the Department filed a joint petition for rehearing of the Opinion. Petitioners argued that the Court of Appeals' construction of Regulations 61-9.122.23 and 61-43 Part 200 overlooks and misapprehends key points of law, erroneously substitutes its judgment for that of the trial court on findings of fact and fails to appropriately defer to the Department implementing its own regulations. The Court of Appeals disagreed and denied the petition for rehearing on January 13, 2023.

ARGUMENT IN SUPPORT OF PETITION

I. THE DEPARTMENT'S INTERPRETATION OF REGULATIONS 61-9.122.23 AND 61-43 PART 200 ARE ENTITLED TO DEFERENCE BECAUSE, IN DEALING WITH THE SAME SUBJECT MATTER, THE REGULATIONS ARE INHERENTLY AMBIGUOUS AND MUST BE READ TOGETHER TO PRODUCE A HARMONIOUS RESULT. WITHOUT A HARMONIOUS

RESULT, REGULATED ENTITIES ARE CONFRONTED WITH CONFLICTING REQUIREMENTS.

In the instant case, the Department was charged with the construction and implementation of two distinct regulations, both addressing standards for the permitting of an agricultural animal facility. Regulation 61-43 Part 200 provides standards for a broad range of agricultural animal facilities while Regulation 61-9.122.23 addresses only the wastewater discharges from Concentrated Animal Feeding Operations ("CAFOs"), a subset of agricultural animal facilities.

Regulation 61-43 dictates that all agricultural animal facilities shall produce "no discharge of pollutants from the operation into surface Waters of the State (including ephemeral and intermittent streams)." S.C. Code Ann. Regs. 61-43 Part 200.140. On the other hand, Regulation 61-9.122.23 requires operators of a CAFO to seek a permit to discharge even though such a permit would directly violate Regulation 61-43 and the required permit issued thereunder. In effect, a permit to discharge wastewater pursuant to Regulation 61-9.122.23 would subject facilities that are required to comply with the no discharge requirements of Regulation 61-43 to illogical and contradictory compliance requirements. The two regulations when read together, as they must be, creates ambiguity.

As noted by the ALC, "regulations that deal with the same subject matter are *in pari materia* and 'must be construed together, if possible, to produce a single, harmonious result.'" (R. p. 7-8, citing *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001)); *see also Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). The Department construed Regulation 61-43 as including a "no potential to discharge" determination under Regulation 61-9.122.23 which exempts CAFOs from being required to obtain a permit to discharge. This creates a single, harmonious reading of the two regulations at issue and prohibits a discharge of pollutants into surface Waters of the State. Our courts are charged to defer to an

agency's interpretation of its own regulations "unless there is a compelling reason to differ." *S.C. Coastal Conservation League*, 363 S.C. 67, 75, 610 S.E.2d 482, 486; *see also, e.g., Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013) (stating that an agency's interpretation "will not be overruled absent compelling reasons."). There are no such compelling reasons in this case. Rather, the Court of Appeals reads Regulation 61-9.122.23 in a vacuum, without appropriately applying the doctrine of *in pari materia*. Thus the Court of Appeals erred by concluding that the Department's interpretation of the two regulations is contrary to the plain language of Regulation 61-9.122.23, in part because the Court of Appeals failed to read that regulation in conjunction with Regulation 61-43 Part 200 and give appropriate deference to the agency charged with implementing each of those Regulations harmoniously. The ALC's deference to the Department on this issue was necessary, appropriate, and should have been upheld. This Court therefore should grant certiorari to resolve the conflict created by the Court of Appeals.

II. THE COURT OF APPEALS IMPROPERLY CONSTRUED REGULATION 61-9.122.23 AND FAILED TO GIVE EFFECT TO THE INTENT OF THE STATE LEGISLATURE WHICH HAS ADOPTED MORE STRINGENT REQUIREMENTS UNDER REGULATION 61-43 PART 200.

The Court of Appeals' proposal that the Department issue two distinct permits under separate regulatory schemes to the same facility could not have been intended by the Legislature because it would render one permit either meaningless or superfluous. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C 271, 275, 440 S.E.2d 364, 366 (1994).

The Court of Appeals improperly construed Regulation 61-9.122.23 as requiring the Department to analyze whether a CAFO has the "potential to discharge" and therefore is required to obtain an NPDES permit. This analysis is not required to maintain consistency with federal law after the U.S. Environmental Protection Agency amended its regulatory requirements following

the decision in *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d. Cir. 2005). The Court of Appeals found that *Waterkeeper* is not controlling, in part because Regulation 61-9.122.23 has not changed since the 2005 *Waterkeeper* decision[1], and in part because the South Carolina Regulation implements elements of both the Clean Water Act and the South Carolina Pollution Control Act ("PCA"), and the PCA grants the Department additional authority above what is conveyed by the Clean Water Act. This finding contravenes the intent of the South Carolina legislature which has adopted more stringent regulatory requirements in Regulation 61-43 Part 200, than those requirements prescribed by Regulation 61-9.122.23 for the same regulated entities.

While Regulation 61-9.122 implements elements of both the Clean Water Act and the PCA (*see* S.C. Code Ann. Regs. 61-9.122.1(a)(1)), neither the regulatory language nor the legislative history (and lack of legislative review) associated with Regulation 61-9.122.23 evidence an intent by the legislature to exceed the wastewater regulatory requirements necessary to maintain consistency with federal law. Indeed, while the PCA, at Section 48-1-20, states a general policy that the Department has the authority to abate, control, and prevent pollution, that provision is nowhere cited as authority under the NPDES regulations. *See* S.C. Code Ann. Regs. 61-9.122.1(g). What is repeatedly cited as authority for the NPDES regulations are specific provisions of the Clean Water Act itself, the benefits of which the PCA gives the Department the statutory authority to secure to the State using "all action necessary and appropriate." S.C. Code Ann. § 48-1-50(17); *see also* S.C. Code Ann. Regs. 61-9.122.1(g)(1)-(10). To the extent there is evidence sufficient to

[1] As pointed out in the Department's Final Brief, state law at the time of the *Waterkeeper* decision made no provision for the repeal of a regulation promulgated to comply with federal law that is no longer enforceable because of a change in the underlying federal law. Department Final Brief p. 20, n.15, *citing* S.C. Code Ann. § 1-23-120.

ascertain and effectuate the legislative intent behind Regulation 61-9.122.23, the most logical conclusion is that the pre-*Waterkeeper* federal CAFO rule promulgated by EPA was adopted by the state to maintain consistency with federal law, and nothing more.

By contrast, the legislative intent of Regulation 61-43 Part 200 is ascertainable as it relates to animal facilities, since this regulation was actually reviewed by the legislature, and the purpose of the regulation is plainly stated, in part, "[t]o establish standards for the growing or confining of animals, processing of animal manure and other animal by-products, and land application of animal manure and other animal by-products *in such a manner as to protect the environment, and the health and welfare of citizens of the State from pollutants generated by this process*." S.C. Code Ann. Regs. 61-43 Part 200.10(A)(1)(emphasis added). Regulation 61-43 Part 200 sets forth comprehensive requirements for such facilities, which includes and encompasses discharge limitations through the "no discharge" provision in Part 200.140. This provision creates a more stringent wastewater discharge requirement than even the pre-*Waterkeeper* federal CAFO regulations. Under Part 200.140, these facilities cannot discharge, period. Under the CAFO regulations, discharges are permissible. The legislative intent which can be ascertained from a complete reading of Regulation 61-43 Part 200 is that agricultural facilities are intended to be comprehensively regulated under this more stringent standard. The Department's interpretation of the regulations at issue, incorporating the "no potential to discharge" element of Regulation 61-9.122.23 into the comprehensive permitting decision of Regulation 61-43, effectuates the ascertainable intent of the legislature. The Court of Appeals' decision, which requires the Department to perform a superfluous permitting analysis under Regulation 61-9.122.23, neither attempts to ascertain the intent of the General Assembly, nor gives effect to that intent, and is consequently in error. This Court should grant certiorari.

III. THE COURT OF APPEALS FAILED TO GIVE APPROPRIATE DEFERENCE TO THE DEPARTMENT'S INTERPRETATION OF CERTAIN PERMIT EVALUATION CRITERIA WITHIN PART 200 OF REGULATION 61-43.

By misapprehending the facts in the record on appeal, the Court of Appeals improperly failed to give proper deference to the Department's discretion to impose more stringent requirements on a facility where it evaluates and determines it to be necessary pursuant to Regulation 61-43 Part 200.140.

The record in this matter makes clear that the Department performed the required evaluation. The proposed agricultural facilities are located in the same watershed as the Little River, an impaired waterbody with a TMDL for fecal coliform. The proposed facilities are each sited to "well exceed the minimum setback requirements" such that that additional or more stringent requirements contemplated by the Regulation are already in place. (R. p. 30). The record clearly establishes that the Department reviewed the 2004 watershed report upon which the TMDL was based, and determined the county wastewater facility, not agricultural facilities, was the greatest contributor of fecal coliform to the watershed. (R. p. 1183, lines 13-17). The Department's agricultural permit writer also consulted with the watershed manager for the Little River, who confirmed that no additional setbacks were required for these facilities. (R. p. 1166, lines 8-23). The Department review under R. 61-43 also included a review of the applicants' manure management plans, and the applicants' arrangements with manure brokers. (R. p. 1167, lines 3-19). As the ALC noted, "[b]ecause manure will not be disposed of or discharged from the proposed Project sites, the Projects will have no impact on the Little River as an impaired water body." (R. p. 23).

Despite the record and the findings of the ALC, the Court of Appeals determined that the Department failed to "meaningfully evaluate" the factors set forth in Regulation 61-43 Part 200.70

and 200.140. "The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton v. S.C. Dep't of Probation and Parole Services,* 404 S.C. 395, 401, 745 S.E.3d 110, 113 (2013); *see also* S.C. Code Ann. §1-23-610(B). In a *de novo* hearing before the ALC, that court determined that the Department appropriately evaluated the need for additional measures, and made factual findings that the projects would not contribute pollutants to impaired waters. The Court of Appeals, while framing the issue as an error of law, substituted its factual judgment for that of the ALC on the subjective issue of the *quality* of the Department's evaluation of the need for additional or more stringent requirements. Stated otherwise, the Court disagreed with the ALC on the weight of evidence supporting the Department's evaluation. Moreover, the Department was entitled to deference in how it interpreted its evaluative duties under this regulatory provision, and Appellants, who bore the burden of persuasion below, offered no "compelling reason to differ" from the agency's interpretation, nor is such a reason apparent in the record. *S.C. Coastal Conservation League,* 363 S.C. at 75, 610 S.E.2d at 486. The ALC's judgment on this issue should have been upheld. Certiorari therefore is warranted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review, and ultimately reverse, the decision of the Court of Appeals in this matter.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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