

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Case No. 2017-002598

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.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This case concerns the South Carolina Department of Health and Environmental Control's ("DHEC" or "Department") approval in 2016 of three agricultural animal facility permits ("Permits") issued to David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers ("Permittees") under S.C. Code Ann. Regs. 61-43 Part 200 for industrial poultry growing operations. Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices (collectively, "SCRAP") timely filed Requests for DHEC Board Review of the Department's decision to issue the Permits (R. p. 36-39); (R. p. 40-43); (R. p. 44-47). In January and February 2017, the Department notified SCRAP that the DHEC Board declined to conduct a final review conference concerning the Permits. On February 17, 2017, SCRAP timely filed petitions for a contested case with the Administrative Law Court, arguing in relevant part that: 1) DHEC erred in failing to comply with State National Pollutant Discharge Elimination System Permit ("NPDES") regulations applicable to large concentrated animal feeding operations ("CAFO NPDES Regulation"), S.C. Code Ann. Regs. 61-9.122.23, that must be met in conjunction with Permittees' agricultural animal facility permits, S.C. Code Ann. Regs. 61-43 Part 200; and 2) DHEC erred in failing to evaluate the Permit applications for additional or more stringent requirements as required under Part 200.140(B) and (C)(2) of the State's agricultural animal facility permitting regulations ("Agricultural Animal Facility Regulation"). (R. p. 79-113). On March 29, 2017, the Administrative Law Court ("ALC") consolidated the cases for hearing purposes. (R. p. 1-3).

On August 4, 2017, Permittees filed a motion for partial summary judgment as to whether they must obtain an NPDES permit to operate their proposed poultry growing facilities. (R. p. 221-245). Arguments concerning the motion, as well as a hearing on the merits, were held

before the Honorable Ralph King Anderson, III on August 15-17, 2017. (R. p. 340 – p. 345; R. p. 372, line 1 – p. 390, line 22).

The State’s Agricultural Animal Facility Regulation expressly states that the CAFO NPDES Regulation may apply to agricultural animal facilities. S.C. Code Ann. Regs. 61-43.200.40(D). An applicant seeking an agricultural animal facility permit must include in its application an Animal Facility Management Plan that contains an NPDES permit if applicable. S.C. Code Ann. Regs. 61-43.200.50(B)(2)(a). If a facility is classified as a CAFO under NPDES Regulation 61-9, then the permit term for an agricultural animal facility permit is no more than five years. S.C. Code Ann. Regs. 61-43.200.70(I).

NPDES permits are issued under the authority of the federal Clean Water Act and the South Carolina Pollution Control Act. S.C. Code Ann. Regs. 61-9.122.1(a)(1). In 2003, the State of South Carolina adopted the U.S. Environmental Protection Agency’s (“EPA”) NPDES regulations applicable to CAFOs. Vol. 27-12 S.C. REG. 50 (Dec. 26, 2003). Under S.C. Code Ann. Regs. 61-9.122.23(a), “[c]oncentrated animal feeding operations, as defined in paragraph (b) of this section, are point sources that require NPDES permits for discharges or potential discharges.” “Once an operation is defined as a CAFO, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals ...” *Id.*

To be deemed a CAFO as defined within S.C. Code Ann. Regs. 61-9.122.23, the definition of an “animal feeding operation” (“AFO”) must first be met, followed by tiered categories of AFOs based upon the size of the operation. S.C. Code Ann. Regs. 61-9.122.23(b)(1) and (2). Whether an “animal feeding operation” is a CAFO then turns on whether the operations meet any of the

following definitions: 1) a Large CAFO; 2) a Medium CAFO; or 3) a Small CAFO. An “animal feeding operation” for production of broilers is a Large CAFO if it confines 125,000 or more birds per year. S.C. Code Ann. Regs. 61-9.122.23(b)(4)(x). In this case, each of the Permittees’ proposed poultry operations sought to confine over 125,000 birds per year. (R. p. 1218); (R. p. 1335); (R. p. 1495). The ALC found that the Permittees’ proposed poultry operations met the definition of a Large CAFO. (R. p. 9).

For Large CAFOs, S.C. Code Ann. Regs. 61-9.122.23 recognizes that a discharge of pollutants may occur simply due to its size, thereby triggering a mandatory requirement to obtain an NPDES permit. In contrast, an AFO confining less than 125,000 birds can only be deemed a CAFO if the facility will in fact discharge pollutants into waters of the State or is designated by DHEC as a significant contributor of pollutants to waters of the State. *Compare* S.C. Code Ann. Regs. 61-9.122.23(b)(4) with 61-9.122.23(b)(6) and (9).

The CAFO NPDES rule imposes upon Large CAFOs a duty to apply for a permit in order “to identify and ultimately to prevent actual unauthorized discharges” 68 FED. REG. 7176, 7201 (Feb. 12, 2003). The EPA explained that this duty to apply was justified due to the unique characteristics of CAFOs and a historical record of Large CAFOs failing to report discharges or ignoring altogether NPDES permitting requirements. *Id.* “New source” poultry CAFOs, such as the Permittees, are prohibited from discharging manure, litter, or process wastewater into waters of the State. S.C. Code Ann. Regs. 61-9.122.2 (defining “new source” as any facility from which there is or may be a discharge of pollutants, the construction of which commenced after promulgation of standards of performance under section 306 of Clean Water Act); S.C. Code Ann. Regs. 61-9.122.44(a) (stating that each NPDES permit must include new source performance

standards promulgated under section 306 of the Clean Water Act); 40 C.F.R. § 412.40 (applying new source performance standard to Large CAFOs only); 40 C.F.R. § 412.46(a) (“For CAFO production areas, there must be no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area”). In other words, a CAFO NPDES permit would impose a “no-discharge” standard upon the Permittees.

The requirement that a Large CAFO obtain an NPDES permit can be avoided if the Large CAFO requests and receives from DHEC a determination that the CAFO “has no potential to discharge manure, litter, or process wastewater.” S.C. Code Ann. Regs. 61-9.122.23(d)(2). In making this determination, DHEC must:

... consider the potential for discharges from both the production area and any land application areas. The Department must also consider any record of prior discharges by the CAFO. In no case may the CAFO be determined to have “no potential to discharge” if it has had a discharge within the 5 years prior to the date of the request submitted under paragraph (f)(2) of this section. For purposes of this section, the term “no potential to discharge” means that there is no potential for any CAFO manure, litter, or process wastewater to be added to the waters of the State under any circumstance or climatic condition. S.C. Code Ann. Regs. 61-9.122.23(f)(1).

Before the Department makes a determination as to whether a Large CAFO has no potential to discharge, the Department must provide public notice of the request along with the factual basis upon which the request is based and the procedure for reaching a determination. S.C. Code Ann. Regs. 61-9.122.23(f)(3). The Department’s determination must be based upon the administrative record. *Id.* The public notice and comment process is intended to prevent any State abuse of a “no potential to discharge” determination to the extent that a State merely rubber stamps a request to avoid permitting. 68 FED. REG. 7176, 7203 (Feb. 12, 2003). Absent

this determination, a Large CAFO must apply for an NPDES permit. S.C. Code Ann. Regs. 61-9.122.23(d)(1).

In response to SCRAP's arguments, Permittees asserted that they were not required to obtain an NPDES permit or otherwise seek a determination that their proposed operations have "no potential to discharge" because agricultural animal facilities operate under a "no-discharge" standard under the Agricultural Animal Facility Regulation, S.C. Code Ann. Regs. 61-43.200; therefore, "animal facilities do not require NPDES permits because no discharge should occur." (R. p. 181). Similarly, DHEC asserted that it "does not designate any Animal Feeding Operation ("AFO"), which is defined in 3 S.C. Code Ann. Regs. 61-43 [and] 61-9.122.23(b)(1), as a CAFO because the Department does not allow any AFO to contribute pollutants to the Waters of the State ("WOS")," citing to its agricultural animal facility regulations, S.C. Code Ann. Regs. 61-43 Part 200.20 ("Permits issued under this regulation are no-discharge permits") and Part 200.140(A) ("There shall be no discharge of pollutants from the operation into surface waters of the State"). (R. pp. 1722 – 1723). DHEC further reasoned that if "an AFO was considered a CAFO by the Department and issued a [NPDES permit] ... the NPDES permit would authorize the AFO to discharge to WOS." (R. p. 1723). DHEC went on to explain that when it issues a notification of a determination to issue an agricultural animal permit under S.C. Code Regs. 61-43 Part 200, that notification constitutes a determination that the AFO has "no potential to discharge" under S.C. Code Ann. Regs. 61-9.122.23(d)(2). (*Id.*).

The ALC agreed, ruling that "the Department's application of Regs. 61-43 [sic] in keeping with the regulation of CAFOs under the NPDES provisions is entitled to deference." (R. p. 9). The Court found that an issued agricultural animal facility permit "is congruous with the requirements

of Regs. 61-9.122.23 that the Department determine whether Respondents' facilities have no potential to discharge manure, litter, or process wastewater." (R. p. 10).

In addition to its CAFO argument, SCRAP contended that DHEC failed to comply with a requirement under S.C. Code Ann. Regs. 61-43. 200.140(C)(2), that it "evaluate [permit applications] for additional or more stringent requirements" where the facilities are located upstream from a 303(d) impaired waterbody.¹ DHEC's permit checklists state that the proposed facilities are located upstream from an 303(d) impaired waterbody – a portion of the Little River - that is the subject of a Total Maximum Daily Load ("TMDL") due to excessive fecal bacteria within the Little River watershed. (R. p. 1692; R. p. 1681; R. p. 1670; *see also* R. p. 1165, line 20 – p. 1166, line 23). This fact triggers mandatory evaluation of the permit applications pursuant to Part 200.140(C) for any additional or more stringent permit requirements. DHEC nonetheless concluded that because the permits are "no-discharge" permits, agricultural animal facilities do not contribute to water quality impairment. (R. p. 1184, lines 1-15). In other words, DHEC rejected consideration of additional requirements because the permit is a no-discharge permit; thus, no additional requirements within the Permits were warranted. The ALC concluded that DHEC properly fulfilled its obligations under S.C. Code Ann. Regs. 61-43.200.140(C).

The Court of Appeals reversed the ALC. Concerning the CAFO NPDES Regulation, the Court ruled that the "ALC erred in deferring to the Department's interpretation of regulation 61-9.122 and part 200 of regulation 61-43 and in concluding Broilers were not required to apply for

¹ "All states are required to develop a list of waterbodies that do not meet water quality standards." *South Carolina 303(d) List of Impaired Waters and TMDLs*, DHEC, BUREAU OF WATER, <https://scdhec.gov/bow/south-carolina-303d-list-impaired-waters-tmdls#1> (Last Visited March 25, 2023). "This requirement comes from Section 303(d) of the Clean Water Act, hence the common name for the list." *Id.* "The waterbodies on this list do not meet water quality standards even after controls for point and nonpoint source pollution have been put in place and/or a Total Maximum Daily Load (TMDL) for the pollutant has not been developed." *Id.*

an NPDES permit or obtain an exemption.” *Blackmon v. S.C. Dep't of Health & Env't Control*, No. 2017-002598, 2022 WL 18396263, at *6 (S.C. Ct. App. May 25, 2022). It ruled that DHEC’s “conclusion that a ‘no discharge’ permit—which prohibits a facility from discharging pollutants into the waters of the state—is the equivalent of a determination under regulation 61-9.122.23(f) that the facility has “no potential to discharge” is manifestly contrary to the language of the regulation, which requires the Department to make a case-specific evaluation.” *Id.* at *6. Concerning DHEC’s permit evaluation under the Agricultural Animal Facility Regulation, the Court ruled that DHEC “failed to meaningfully evaluate the factors set forth in ... 61-43.200.140(C) in issuing permits to Broilers and that the ALC erred by deferring to the Department's interpretation of the regulations.” *Id.* at *7. The Court found that DHEC arbitrarily “bypassed this case-specific evaluation by concluding agricultural facilities are not considered to contribute to the TMDL.” *Id.* at *8. Permittees filed a Petition for Rehearing on August 10, 2022. SCRAP filed a Return on September 19, 2022. The Court of Appeals denied the Petition for Rehearing on January 13, 2023.

ARGUMENT

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. The following factors, while not exclusive, are illustrative of the type of “special and important reasons” this Court considers when deciding to grant a writ of certiorari:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

In articulating their “special and important reasons,” Petitioners complain that the Court of Appeals failed to adhere to the intent of the legislature and failed to give deference to DHEC’s interpretation of what it describes as ambiguous regulations, which Petitioners believe creates “conflicting requirements on regulated entities.” Petition, p. 1. Respectfully, Petitioners questions of statutory interpretation and legislative intent do not present exceptional circumstances warranting review by this Court, and in any event, Petitioners are mistaken in their characterization of the Court of Appeals’ decision.

1. DHEC’s interpretation of S.C. Code Ann. Regs. 61-9.122.23 and 61-43 is not entitled to deference, and the Court of Appeals did not err in its reading of these regulations.

Petitioners argue that the State’s Agricultural Animal Facility Regulation prohibit the discharge of pollutants from poultry operations into Waters of the State; whereas the State’s CAFO NPDES Regulation requires CAFOs to obtain a permit that would allow a discharge of pollutants into Waters of the State, thus creating contradictory and ambiguous compliance requirements that the Court of Appeals should have resolved by deferring to DHEC’s interpretation of the two regulatory schemes. Petition, p. 4. DHEC construed its Agricultural Animal Facility Regulation as including or subsuming the determination under the CAFO NPDES Regulation 61-9.122.23(d)(2) that Large CAFOs must seek and obtain a finding that it has “no potential to discharge” pollutants. As a result, DHEC’s interpretation gives the Permittees, even though they meet the definition of a Large CAFO under the CAFO NPDES Regulation, a free pass

to completely avoid compliance with the requisites of the CAFO NPDES Regulation. This interpretation is flawed for two reasons.

First, DHEC misstates the relevant sections of its NPDES regulations. At issue here are agricultural animal facilities deemed to be a “new source” that meet the definition of Large CAFOS under S.C. Code Ann. Regs. 61-9.122.23(b). A “new source” is defined as “any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced ... after promulgation of standards of performance under section 306 of CWA which are applicable to such source” S.C. Code Ann. Regs. 61-9.122.2. Further, a source is a “new source” if it is “constructed at a site at which no other source is located.” S.C. Code Ann. Regs. 122.28(b)(1)(i). In July, September, and December 2016, Petitioners submitted applications to construct and operate new poultry farming facilities on previously undeveloped land. (R. 1221 – 1225); (R. 1337 – 1342); (R. 1496 – 1500) (all stating that Permittees proposing to construct new facilities on the property as opposed to expanding an existing facility). The Large CAFO New Source Performance Standard was originally promulgated in 2003 and amended on November 20, 2008. 40 C.F.R. § 412.46 (73 FR 70485 Nov. 20, 2008). Clearly, Permittees sought to commence construction of poultry facilities well after the Large CAFO New Performance Standard was amended in 2008; therefore, they are “new sources” under the NPDES regulations.

Pursuant to S.C. Code Ann. Regs. 61-9.122.44(a), all NPDES permits, including CAFO NPDES permits, must include applicable new source performance standards promulgated under section 306 of the Clean Water Act. The New Source Performance Standard for Large CAFOS was promulgated under authority of Section 306 of the Clean Water Act. See 68 FR 7186 at (d) (April

4, 2003). Applicable to Large CAFOs only, the New Source Performance Standard requires “no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area” 40 C.F.R. § 412.40 and 40 C.F.R. § 412.46(a). Given that Permittees are new source Large CAFOs subject to a “no discharge” standard under the CAFO NPDES Regulation, Petitioners are wrong in asserting that the CAFO NPDES Regulation imposes a standard that conflicts with the Agricultural Animal Facility Regulation.²

Second, the Court of Appeals did not err by failing to construe S.C. Code Ann. Regs. 61-43 (Agricultural Animal Facility Regulation) and S.C. Code Ann. Regs. 61-9.122.23 (CAFO NPDES Regulation) in a manner that produces a single harmonious result. Under the Agricultural Animal Facility Regulation, an applicant seeking an agricultural animal facility permit must submit an Animal Facility Management Plan that contains the facility’s National Pollutant Discharge Elimination System (“NPDES”) Permit, if applicable. S.C. Code Ann. Regs. 61-43.200.50(B)(2)(a). Under the CAFO NPDES Regulation, Large CAFOs are required to either obtain an NPDES permit or demonstrate to DHEC that the proposed operations have “no potential to discharge” of manure, litter or process wastewater. S.C. Code Ann. Regs. 61-9.122.23(d)(1) and (2); S.C. Code Ann. Regs 61-9.122.23(f)(1). If a Large CAFO cannot show that its operations will have “no

² Although both regulatory schemes impose a “no discharge” standard, a Large CAFO NPDES permit involves more scrutiny and additional measures intended to protect water resources. The federal standards for Large CAFOs are intended to be the absolute minimum that States must apply and enforce via a general permit or site-specific individual permits written and issued by DHEC. 33 U.S.C. § 1370. A State may write a general or individual permit for Large CAFOs that adds to or exceeds the minimum federal standards. Put another way, a Large CAFO NPDES permit may include provisions that exceed what the agricultural animal facility regulations require. Moreover, unlike agricultural animal facility permits, any general or individual NPDES permit for Large CAFOs is subject to the review and conditioning authority of federal and state natural resource agencies. S.C. Code Ann. Regs. 61-9.124.59(b). Further, the federal Large CAFO regulations include monitoring and reporting requirements that exceed those found in the agricultural animal permit regulation. *Compare* 40 C.F.R. § 412.37 to S.C. Code Ann. Regs. 61-43.200.170 and 180. And NPDES permit holders are subject to citizen suit actions for Clean Water Act violations. 33 U.S.C. § 1365(a).

potential to discharge” pollutants, then it is subject to standards and limitations found within an individual or general Large CAFO NPDES permit. S.C. Code Ann. Regs. 61-9.122.23(d)(1).

The Court of Appeals rejected DHEC’s interpretation that a “no discharge” permit under the Agricultural Animal Facility Regulation amounts to a “no potential to discharge” determination exempting Large CAFOs from their duty to apply for an NPDES permit. “[I]t is not the court's place to change the meaning of a clear and unambiguous [regulation].” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). To interpret the “no potential to discharge” test for exempting Large CAFOs from its duty to apply for a CAFO NPDES permit as the same as “no discharge” within the Agricultural Animal Facility Regulation impermissibly reads “no potential to discharge” out of the CAFO NPDES Regulation. Courts will not construe a regulation in a way that renders a phrase or paragraph meaningless. *State v. Cty. of Florence*, 406 S.C. 169, 174, 749 S.E.2d 516, 518 (2013). Construing the CAFO NPDES Regulation and the Agricultural Animal Facility Regulation together, the Permittees must obtain an agricultural animal facility permit along with a CAFO NPDES permit unless they can demonstrate “no potential to discharge” such that they are exempt from the CAFO NPDES permitting program. The Court of Appeals properly gave effect to both regulatory schemes. *See Hodges v. Rainey*, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000) (stating that all statutes covering the same subject must be given effect, if it can be done by any reasonable construction).

If a regulation “is silent or ambiguous with respect to the specific issue,” the court must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.” *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014). There is no silence or ambiguity in the

regulatory schemes at issue here. Instead, the Court of Appeals followed this Court's direction that if the plain language of the regulation is contrary to an agency's interpretation, a court must reject the agency's interpretation. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). DHEC's interpretation is not entitled to deference because it is plainly contrary to both S.C. Code Ann. Regs. 61-43.200 and S.C. Code Ann. Regs. 61-9.122.23. The Court of Appeals rejected Petitioner's interpretation because it rendered as meaningless the requirement that Large CAFOs can avoid its duty to obtain a CAFO NPDES permit only if they demonstrate that their operations have "no potential to discharge." See *Florence Cnty. Democratic Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (stating that courts "will not construe a statute in a way which leads to an absurd result or renders it meaningless.").

The Court of Appeals read the Agricultural Animal Facility Regulation and the CAFO NPDES Regulation *in pari materia* and properly concluded that the plain language of the regulations required Large CAFOs not just to obtain an agricultural animal facility permit, but also to apply for a CAFO NPDES permit or show that the "no potential to discharge" exemption is met. If a regulation's language is plain and unambiguous, courts have "no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

2. The Court of Appeals properly construed S.C. Code Ann. Regs. 61-9.122.23 in a manner consistent with the intent of S.C. Code Ann. Regs. 61-43.

Petitioners argue that the Court of Appeals erred in ruling that both the Agricultural Animal Facility Regulation and the CAFO NPDES Regulation apply to Large CAFOs because this result could not have been intended by the Legislature. Petition, p. 5. According to Petitioners,

the legislature intended that the Agricultural Animal Facility Regulation provide comprehensive regulation under a “no-discharge” standard and that DHEC’s incorporation of the “no potential to discharge” element of the CAFO NPDES Regulation into its decision-making under the Agricultural Animal Facility Regulation “effectuates the ascertainable intent of the legislature.” Petition, p. 7. Thus, requiring DHEC to perform a “no potential to discharge” permitting analysis under the CAFO NPDES Regulation is superfluous and erroneously contravenes the intent of the General Assembly. *Id.* Respectfully, Petitioners’ analysis is incorrect.

Again, as explained above, Petitioners’ attempt to frame the Agricultural Animal Facility Regulation as more restrictive than the CAFO NPDES Regulation ignores the undisputable fact that Permittees’ proposed poultry operations are “new source” Large CAFOs, and as such, they are subject to a “no-discharge” standard under the CAFO NPDES Regulation. Further, a Large CAFO NPDES permit involves more scrutiny and additional measures intended to protect water resources. *See* fn. 2. Therefore, Petitioners’ broad assertion that the legislature intended animal agricultural facilities to be comprehensively regulated under the more stringent “no-discharge” standard within the Agricultural Animal Facility Regulation does not accurately reflect the context at issue here. SCRAP’s arguments concern Large CAFOs.

Moreover, “[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002). The State’s Agricultural Animal Facility Regulation expressly states that the CAFO NPDES Regulation may apply to agricultural animal facilities. S.C. Code Ann. Regs. 61-43.200.40(D). An applicant seeking an agricultural animal facility permit must include in its application an Animal Facility Management Plan that contains its NPDES permit if applicable. S.C. Code Ann. Regs. 61-

43.200.50(B)(2)(a). If a facility is classified as a CAFO under NPDES Regulation 61-9, then the permit term for an agricultural animal facility permit is no more than five years. S.C. Code Ann. Regs. 61-43.200.70(I). Clearly, the legislature recognized that agricultural animal facilities could also be subject to an additional permit under the CAFO NPDES Regulation.

Petitioners attempt to cast the legislative intent behind the State's CAFO NPDES Regulation as somehow instructing DHEC to ignore its CAFO NPDES Regulation once the EPA amended its CAFO NPDES regulations following *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2nd Cir. 2005). Petition, p. 5-7. In *Waterkeeper*, the Second Circuit concluded that the EPA lacked authority to require an NPDES permit for potential discharges. *Id.* at 505. *Waterkeeper* is binding upon the EPA, not States. It addresses the EPA's scope of authority, not South Carolina's scope of authority. Under 33 U.S.C. § 1251(b) and 33 U.S.C. § 1370, States are recognized as having the primary responsibility to "prevent, reduce, and eliminate pollution," and are expressly authorized to promulgate rules that exceed federal regulations. *Waterkeeper* simply has no relevance in ascertaining the intent of the South Carolina General Assembly concerning the State's CAFO NPDES Regulation.

Turning to the State's CAFO NPDES Regulation, Petitioners speculate that the legislature never intended for this Regulation to exceed the EPA's minimum requirements. Petitioners do not cite to any Resolution of the Senate or House of Representatives expressing displeasure with the CAFO NPDES Regulation after *Waterkeeper* was decided. Their only supporting argument relies on a cherry-picked citation of authority within the State's NPDES regulations that does not include the S.C. Pollution Control Act's specific provision giving DHEC the authority to prevent pollution, S.C. Code Ann. § 48-1-20. Petition, p. 6, *citing to* S.C. Code Ann. Regs. 61-9-122.1(g).

Petitioners ignore S.C. Code Ann. Regs. 61-9.122.1(a) which cites the entire S.C. Pollution Control Act as authority to implement the NPDES regulations. Petitioners fruitlessly hunt for legislative intent hidden somewhere in the State's NPDES regulations that would allow DHEC to turn a blind eye to its CAFO NPDES Regulations.

Petitioners' complaint that the Court of Appeals erred by failing to ascertain the intent of the General Assembly is unavailing. As is the case here, "when the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper." *Blackmon v. S.C. Dep't of Health & Env't Control*, No. 2017-002598, 2022 WL 18396263, at *5 (S.C. Ct. App. May 25, 2022) citing to *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 39, 766 S.E.2d 707, 720-721 (2014). DHEC's reading of the CAFO NPDES Regulations in relation to the Agricultural Animal Facility Regulation rendered sections applicable to Large CAFOs as meaningless, contrary to well-settled rules of regulatory construction. See *State v. Cty. of Florence*, 406 S.C. 169, 174, 749 S.E.2d 516, 518 (2013)(stating that courts will not construe a regulation in a way that renders a phrase or paragraph meaningless); *Prot. & Advocacy for People with Disabilities, Inc. v. Buscemi*, 417 S.C. 267, 274, 789 S.E.2d 756, 761 (Ct. App. 2016) (stating that under the rules of statutory construction, "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."). The Court of Appeals did not err.

3. The Court of Appeals correctly ruled that DHEC's effort to avoid complying with S.C. Code Ann. Regs. 61-43.140(C) was arbitrary.

Petitioners argue that "[b]y 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.” Petition, p. 8. Under S.C. Code Ann. Regs 61-43.200.140(C), “the following cases shall be evaluated for additional or more stringent requirements ... facilities and manure utilization areas located upstream of a [303(d)] impaired waterbody.” The Permittees’ proposed poultry operations are located upstream of the Little River, a 303(d) impaired waterbody. (R. p. 1681; R. p. 1692; *see also* R. 425, line 22 – p. 426, line 5; R. 851, lines 4-6; R. 863, line 7 – p. 869, line 23; R. p. 1165, line 20 – p. 1166, line 23). Therefore, DHEC is mandated to evaluate the permit applications for additional or more stringent requirements, whether that be stricter control of on-site manure stockpiles,³ stormwater runoff, land application of manure within impaired watersheds, or any other appropriate condition.

According to Petitioners, testimony in the record establishes that DHEC performed the required evaluation. Petitioners point to the setbacks in the permits that exceed minimum setback requirements found in S.C. Code Ann. Regs. 61-43.200.80(A). Petition, p. 8. They assert that DHEC did review the Little River TMDL report, but concluded that “the county wastewater facility, not agricultural facilities, was the greatest contributor of fecal coliform to the watershed.” *Id.* Petitioners cite to testimony by DHEC’s permit reviewer, who said he consulted with DHEC’s watershed manager and he confirmed that no additional setbacks were required for the Permittees. *Id.* However, the watershed manager concluded that no additional setbacks were needed because of DHEC’s position that the Agricultural Animal Facility Regulation imposes a “no-discharge standard, therefore, there is no discharge.” (R. p. 1184, lines 1-15). The permit

³ Under S.C. Code Ann. Regs. 61-43.200.100(B)(21), at the time DHEC issued the Permits, Permittees were allowed to stockpile manure outdoors without cover for up to three days.

reviewer also testified that no additional requirements were needed because agricultural animal facilities do not contribute to the TMDL. (R. p. 1166, line 8 – 1167, line 2). Petitioners state that DHEC reviewed the Permittees’ manure management plans and their arrangements with manure brokers. Petition, p. 8 citing to (R. p. 1167, lines 3-19). And the ALC concluded that because manure brokers will haul manure off-site, the “Projects will have no impact on the Little River as an impaired water body.” *Id.* citing to (R. p. 23). None of these facts change the Court of Appeals’ decision.

Part 200.140(C) mandates that proposed poultry operations located upstream from an impaired waterbody must be evaluated for imposition of additional or more stringent permit requirements. This regulation does not state that additional or more stringent permit requirements are only required if DHEC determines that agricultural animal facilities are contributors to the water quality impairment, or that agricultural animal facilities are the greatest contributor to the water quality impairment. Part 200.140(C) does not excuse DHEC from performing its evaluation because the Permittees contracted with a manure broker. What this regulation does say is this – “the following cases shall be evaluated for additional or more stringent requirements ... facilities and manure utilization areas located upstream of a [303(d)] impaired waterbody.” The Little River downstream from the proposed poultry operations is an impaired waterbody; therefore, DHEC must consider additional or more stringent requirements. DHEC failed to comply with this mandate.

Instead of performing its duty under Part 200.140(C), DHEC concluded that no additional requirements were needed because “ag facilities are not considered as contributors to the TMDL.” (R. p. 1692; R. p. 1681; R. p. 1670; *see also* R. p. 1165, line 20 – p. 1166, line 23). DHEC

ultimately rejected consideration of additional requirements or setbacks because the permit is deemed a “no-discharge” permit; thus, no additional setbacks or requirements are warranted. (R. p. 1184, lines 1-15). Contrary to Petitioner’s assertion, the Court of Appeals did not substitute its factual judgment for that of the ALC; instead, it found that the ALC erred in accepting DHEC’s interpretation that no evaluation was needed because SCRAP did not sufficiently prove that poultry facilities actually increase pollution to the Little River. (R. p. 29); *Blackmon v. S.C. Dep’t of Health & Env’t Control*, No. 2017-002598, 2022 WL 18396263, at *7 (S.C. Ct. App. May 25, 2022). Courts must apply the plain and ordinary meaning of a regulation “without resort to subtle or forced construction to limit or expand the regulation’s operation.” *Murphy v. S.C. Dep’t of Health & Env’t Control*, 396 S.C. 633, 639-40, 723 S.E.2d 191, 195 (2012). The Court of Appeals correctly held that DHEC impermissibly bypassed the case-specific evaluation under Part 200.140(C) “by concluding agricultural facilities are not considered to contribute to the TMDL.” DHEC’s reading of Part 200.140(C) was arbitrary because it read into Part 200.140(C) language that did not exist. The Court of Appeals did not err in its conclusion.

CONCLUSION

For the above-stated reasons, this Court should deny Petitioners’ Petition for a Writ of Certiorari in this matter.

Respectfully Submitted,

s// Robert Guild

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