RECEIVED

Apr 13 2023

S.C. SUPREME COURT

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.

PETITIONERS' JOINT REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

STATEMENT OF FACTS

The facts necessary to resolve this case are fully set forth in the Petition. However, to respond to Respondents' arguments and counter-statement of the case, Petitioners David Coggins Broilers, Heath Coggins Broilers, Jim Young Broilers (collectively "Broilers"), and the South Carolina Department of Health and Environmental Control ("Department") submit the following additional facts.

Prior to the merits hearing on Respondents' request for a contested case, the Administrative Law Court ("ALC") heard arguments on and granted Petitioners partial summary judgement on the issue of whether the Broilers were required to obtain a National Pollutant Discharge Elimination System ("NPDES") permit pursuant to S.C. Code Ann. Regs. 61-9.122.23 in order to build and operate new poultry facilities. The ALC deferred to the Department's interpretation of its own regulations that NDPES permits were not required if the Department already had made the determination that the facilities had "no potential to discharge" pursuant to an agricultural permit governed by Regulation 61-43.200. (R. p. 5). The merits hearing then commenced and the parties presented evidence that was reviewed and considered by the ALC in its Findings of Fact and Conclusions of Law. Important to this response, the ALC found that each of the proposed facilities were required to meet or exceed the following regulatory siting distances:

1) Portable wells (required: 200 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (require: 100 feet)'
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required: 100 feet);
4) Ephemeral or intermittent streams located downslope (required: 100 feet);
5) Ditches or swales located downslope (required: 50 feet);
6) Occupied permanent residence (required: 1,000 feet).

(R. p. 14.) The ALC found that in their applications, each of the Broilers significantly exceeded the minimum siting distances required by regulation.[1] (R. p. 15.) Specifically, the ALC found that the siting requirements proposed for each of the facilities were as follows:

> D.C. Broilers
> 1) 2,238 feet from waters of the State located downslope (required 100 feet);
> 2) 448 feet from an ephemeral or intermittent stream located downslope (required 100 feet);
> 3) 204 feet from a ditch or swale located downslope (required 50 feet.
>
> H.C Broilers
> 1) 834 feet from waters of the State located downslope (required 100 feet);
> 2) 278 feet from an ephemeral or intermittent stream located downslope (required 100 feet);
> 4) 135 feet from a dich or swale located downslope (required 50 feet).
>
> J.Y. Broilers
> 1) 1,672 feet from the waters of the State located downslope (required 100 feet);
> 2) 538 feet from an ephemeral or intermittent stream located downslope (required 100 feet);
> 3) 127 feet from a ditch or swale located downslope (required 50 feet).

(*Id.*).

The ALC also found that even when some of these siting distances were modified by the Broilers to accommodate the request of a neighboring landowner, a member of Respondent South Carolinians for Responsible Agricultural Practices ("SCRAP"), each facility was still located further than the minimal distance requirement mandated by law.[2] (R. pp.16-17.)

---

[1] Factors 1, 3, and 6 were not issues in the merits hearing and were therefore not discussed by the ALC. (R. p. 14.)

[2] With irony, the ALC noted that despite the fact that the change in location of the facilities was "made to resolve some of the concerns of Ms. Basel [(that the D.C. and J.Y. Broilers facilities would be located too close to the proposed site of her residence despite the regulatory requirement

Finally, despite recognizing Respondents' arguments concerning Ms. Basel's accommodations, even though the underlying facts were not proven by the preponderance of the evidence during the hearing, the ALC still ordered that the permits be modified, in pertinent part, so the "D.C. Broilers and J.Y Broilers shall be permitted at the sites proposed in their original applications." (R. pp. 33-34.)

ARGUMENT IN REPLY

A. RESPONDENTS ERRONOUSLY ARGUES THAT THE COURT OF APPEALS'S CONSTRUCTION OF S.C. CODE ANN. REGS. 61-9.122.23 AND 61-43 PRODUCES A HARMONOUNS RESULT TO JUSTIFY DEPARTURE FROM THE WELL SETTLED PRINCIPLE THAT AN AGENCY'S INTERPRETATION OF ITS OWN REGULATIONS IS ENTITLED TO DEFERENCE.

The Petition demonstrates that the two regulations at issue, S.C. Code Ann. Regs. 61-43 Part 200, the Standards for Animal Facilities other than Swine Regulation and S.C. Code Ann. Regs. 61-9.122.23, the Confined Animal Feeding Operations ("CAFOs") Regulation, create ambiguity when read together. This ambiguity arises from the inescapable fact that the CAFOs Regulation expressly authorizes wastewater discharges that Regulation 61-43 expressly prohibits. (Petition p. 4.) To produce a single harmonious result from these regulations, as it must under well settled law, *see Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229,231 (2001), the Department has construed the "no discharge" requirement contained in Regulation 61-43 as a "no potential to discharge" determination under Regulation 61-122.23. (*Id.*) By construing the regulations in this fashion, the Department created a single harmonious reading of the regulations at issue that prohibits the discharge of wastewater into the surface waters of the State. (*Id.*)

---

that only actual residences are entitled to a minim set back distance)], she as well as the other [Respondents] used this accommodation to increase the concerns that D.C. Broilers and J.Y. Broilers' houses are located too close to the Little River and to certain ditches or swales existing on the property." (R. p. 32.)

Since the Department is the agency charged by statue with the administration of these two regulations, its interpretation of the regulations is entitled to deference by the courts and will not be disturbed "unless there is a compelling reason to differ." (Petition pp. 4-5 (citing *S.C. Coastal Conservation League*, 363 S.C. 67, 75, 610 S.E.2d 482, 486; *Barton v. S.C. Dep't of Prob., Parole & Pardon Servs*., 403 S.C. 395, 415, 745 S.E.2d 110, 121 (2013) (stating that an agency's interpretation "will not be overruled absent compelling reasons)).)

In their Return, Respondents do not address the logic behind the Department's interpretation. Instead, they make several arguments that will be addressed in turn. First, Respondents claim that provisions of the Code of Federal Regulations demonstrate there is no conflict between the CAFOs Regulation and Regulation 61-43 Part 200. Specifically, Respondents cite 40 C.F.R. § 412.46(a), as amended in 2008, for the proposition that the CAFOs Regulation expressly requires "no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area" of large CAFOs. (Return p. 9-10.) Respondents' interpretation of the regulation omits the language from subsections (1)-(3) which conditions the language regarding production area discharges quoted by Respondents.

The original 2003 version of the regulation provided that if the facility is designed, constructed, operated, and maintained so that it could withstand the direct precipitation and runoff from a 100-year, 24-hour rain event, then the generally applicable NPDES provisions pertaining to bypast/upset contained in 40 C.F.R. § 122.41(m)-(n) will apply. 68 FR 7273 Feb. 14, 2003. The 2008 amended version clarified that the language regarding production area discharges included open surface manure storage structures if the facility is designed, constructed, operated, and mains such structures. 73 FR 70485 Nov. 20, 2008.

Moreover, Respondents' reliance on current federal law to interpret Regulation 61-9.122.23 in its favor is a particularly noteworthy concession by Respondents, as Respondents argued before both the ALC and the Court of Appeals that federal law such as the vacatur of the "no potential to discharge" determination requirement by the Second Circuit in *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005), is inapplicable to the instant issues. Accordingly, Respondents' reliance on federal law to support its claim that Regulation 61-43 and the CAFOs Regulation are not in conflict under federal law creates a logical fallacy that cannot be sustained.

Second, Respondents' claim that "the Court of Appeals did not err by failing to construe S.C. Code Ann. Regs. 61-43 . . . and S.C Code Ann. Regs. 61-9.122.23 . . . in a manner that produces a single harmonious result" is meritless. Both the Court of Appeals and Respondents misapprehend the basis of the Department's use of discretion to harmonize the two regulations. The Department never claimed that the regulations were silent on the issue. Rather the Department has consistently stated that a conflict arises because one regulation states that there can be no discharge, S.C. Code Ann. Regs. 61-43, while the other regulation, S.C. Code Ann. Regs. 61-9.122.23, requires a threshold determination by the Department of "no potential to discharge." If the Department finds there is a potential to discharge under S.C. Code Ann. Regs. 61-9.122.23, a permit must be sought which would impose specific requirements on the facilities to regulate the potential discharges. Contrary to the position of the Court of Appeals, the Department's interpretation allowing reviews under the more stringent "no discharge" standard to satisfy the "no potential to discharge" requirement harmonizes the regulations since the practical effect nullifies any further inquiry under S.C. Code Ann. Regs. 61-9.122.23 because the Department would have already determined that a facility had no potential to discharge into waters of the State to necessitate further regulation. *Compare* S.C. Code Ann. Regs. 61-43 § 200.20(B) *with* S.C Code

61-9.122.23. By focusing on the practical result of the "no potential to discharge" determination, the Department's interpretation harmonizes the regulations so that the intent of the legislature is effectuated without the absurd results posited by the Court of Appeals' interpretation. Respondents' reliance on the Court of Appeals interpretation is therefore without merit.

Third, Respondents incorrectly argue that Petitioners' claim that the legislature did not intend S.C. Code Ann. Regs. 61-9.122.23 to exceed EPA's minimum standard is speculative. As noted in its Final Brief before the Court of Appeals, the Department set forth in detail why Respondents' claim that the legislature intended the state CAFO Regulation to be more restrictive than the federal version is belied by the facts. (Resp. Br. pp. 34-38.) Specifically, the Department noted that the Administrative Procedures Act ("APA"), in pertinent part, provides that regulations maintaining compliance with federal laws are not required to undergo legislative review and approval. (Resp. Br. p. 36 (citing S.C. Code Ann. §§ 1-23-120(A) and (G), and -120(H)).) In addition, the Department noted that the APA expressly provides that any portion of a regulation enacted for the purpose of maintaining consistency with federal law will not be exempt from the requirements that an agency must prepare an assessment report and undergo legislative review and approval when the regulation is stricter than the federal law. (Resp. Br. p. 36 (citing S.C. Code ann. § 1-23-115(e)(1); *Myers v. S.C. Health and Human Services*, 418 S.C. 608, 621, 795 S.E.3d 301, 308 (Ct. App. 2016) (noting that under state law an agency cannot impose a regulation necessary for consistency with federal law with more stringent requirements that has not gone through the state process of promulgating regulations)).) When the regulation was published in the State Register, the Preamble provided that: 1) the State NPDES regulations were being amended to maintain consistency with 40 C.F.R. §§ 123.25 and 36; and 2) as a result thereof, the Department was exempted from preparing a preliminary fiscal statement and assessment report for the

regulation and the regulation was exempt from legislative review and approval. (Resp. Br. p. 37 (citing 27 S.C. Reg. 50 (Dec. 23, 2003)).) The lack of legislative review and approval of S.C. Code Ann. Regs. 61-9.122.23 evidenced an intent that it was not intended to exceed EPA's minimum standard. Thus, Respondents' argument that the legislature intended for the provisions of S.C. Code Ann. Regs. 61-9.122.23 to be more stringent that federal law must fail.

Finally, Respondents' claim that the Court of Appeals correctly found that the Department failed to conduct a proper review of the Broilers' applications under S.C. Code Ann. Regs. 61-43.140(C) is also meritless. Although the Department did not recommend additional setback distances from the Little River, nothing in the application before the Department indicated that additional distance from the river was necessary given the "no discharge" determination. As noted in the supplemental facts set forth above, the ALC found that each of the Broilers' facilities were located significantly further than the minimum distances required by S.C. Code Ann. Regs. 61-43.200.60. For example, the ALC noted that the closest of the Broilers' facilities to the Little River was 834 feet away, with the furthest facility being 2,238 feet away, whereas the regulations require a minimum distance of only 100 feet. (R. p. 15.) Moreover, the staff charged with maintaining the Department's compliance with Section 303(d)'s impaired water requirements determined that animal facilities constructed, operated, and maintained in accordance with S.C. Code Ann. Regs. 61-43. Thus, when considering that the closest facility was located more than eight times the regulatorily required distance, there is no objective factual basis for the Court of Appeals or Respondents to conclude that the Department's determination that no further distances were

required was arbitrary and not within its discretion as the agency with expertise in the administration of the applicable regulation.[3]

CONCLUSION

For the forgoing reasons and the reasons set forth in the Petition for a Writ of Certiorari, Petitioners respectfully request that this Court issue a writ of certiorari to review, and ultimately reverse, the decision o the Court of Appeals in this matter.

[SIGNATURE PAGE FOLLOWS]

[3] There is no requirement in S.C. Code Ann. Reg. 61.43.200.60, as then in effect, that required the Department to increases the setback distances of a facility that is already located further than required by law if the Department's review did not determine a need for further review.

Respectfully submitted,

s/Mitchell Willoughby
Mitchell Willoughby, S.C. Bar No. 6161
WILLOUGHBY & HOEFER, P.A.
930 Richland Street (29201)
P.O. Box 8416
Columbia, SC 29202-8416
(803) 252-3300
mwilloughby@willoughbyhoefer.com

Attorney for Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers

s/Stephen P. Hightower
Stephen Philip Hightower, S.C. Bar No. 72265
Sara V. Martinez, S.C. Bar No. 74822
SOUTH CAROLINA DEPARTMENT OF HEATH AND ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, SC 29201
(803) 898-3350
hightosp@dhec.sc.gov
martinsv@dhec.sc.gov

Attorneys for Respondent S.C. Department of Health and Environmental Control

Columbia, South Carolina
April 13, 2023