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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Case No. 08-ALJ-07-0425-CC
Court of Appeals Unpublished Opinion No. 2011-UP-380 filed August 4, 2011

Engaging and Guarding Laurens County's Environment ("EAGLE") . . . . Petitioner,

v.

South Carolina Department of Health and Environmental Control and
MRR Highway 92, LLC . . . . Defendants,

of whom MRR Highway 92, LLC is . . . . Respondent.

BRIEF OF RESPONDENT MRR HIGHWAY 92, LLC

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CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 4

ARGUMENTS 10

I. THE COURT OF APPEALS PROPERLY HELD THAT IT WAS WITHIN DHEC'S DISCRETION TO DECLINE TO CONSIDER ADDITIONAL FACTORS IN ISSUING THE DON TO MRR. 12

II. EXCESS PERMITTED DISPOSAL CAPACITY IN A PLANNING AREA CANNOT BE AN "ADDITIONAL FACTOR" UNDER SUBSECTION (D)(3)(d) OF THE DON REGULATION 22

III. DENIAL OF A DON REQUEST BASED ON EXCEES DISPOSAL CAPACITY WOULD ALLOW DHEC UNRESTRAINED DISCRETION IN THE APPLICATION OF THE DON REGULATION. 23

IV. THE ALC'S FINDING THAT THE PROPOSED LANDFILL IS NOT NEEDED IS ARBITRARY AND CAPRICIOUSE. 26

VII. THE ALC'S HOLDING THAT THE PROPOSED LANDFILL IS NOT NEEDED IS NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE ON THE RECORD. 28

VI. THE ALC ERRED IN ADMITTING INTO EVIDENCE REPORTS WHICH DID NOT EXIST AT THE TIME OF DHEC'S DECISION. 31

CONCLUSION 32

CASES

Byerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992) 22

Concord Street Neighborhood Ass'n v. Campsen, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992) 23

Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002) 32

Deese v. S.C. State Bd. of Denistry, 286 S.C. 182, 332 S.E.2d 239 (Ct. App. 1985) 18

Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006) 23

Heyward v. South Carolina Tax Commission, 240 S.C. 347, 126 S.E.2d 15 (1962) 24

Marlboro Park Hospital v. South Carolina Department of Health and Environmental Contro, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004) 32

McKinney v. Kimberly Clark Corp., 376 S.C. 636, 658 S.E.2d 112 (Ct. App. 2008). 21

Media Gen. Comm., Inc. v. S.C. Dep't of Health and Envtl. Control, 388 S.C. 138, 694 S.E.2d 525 (2010) 19-20

Murphy v. South Carolina Dep't of Health and Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012) 18

Sandlands C&D, LLC v. County of Horry, 394 S.C. 451, 716 S.E.2d 280 (2011) 17

South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control, 363 S.C. 67, 610 S.E.2d 482 (2005) 11, 24-25

Southeast Resource Recovery, Inc. v. South Carolina Department of Health and Environmental Control, 358 S.C. 402, 595 S.E.2d 468 (2004) 19

Triska v. Dep't of Health and Envtl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987). 23

Young v. South Carolina Dep't of Highways and Public Transp., 287 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985) 19, 23-24

STATUTES

S.C. CODE ANN. § 1-23-110 5

S.C. CODE ANN. § 1-23-120 .... 5, 20

S.C. CODE ANN. § 44-1-60 30

S.C. CODE ANN. § 44-96-20 15-16

S.C. CODE ANN. § 44-96-240 15

S.C. CODE ANN. § 44-96-290(E) 4-5, 11-13, 15, 18-23, 27

REGULATIONS

25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008) 1, 5-7, 10, 14, 20-22
25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2012) 5, 20
S.C. CODE ANN. REGS. § 30-12(N) 25

STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals correctly hold that was within the discretion of the South Carolina Department of Health and Environmental Control ("DHEC") to decline to consider additional factors under Subsection (D)(3)(d) of S.C. CODE ANN. REGS. § 61-107.17(D)(3)(d) ("DON Regulation") in making a demonstration of need to MRR Highway 92, LLC ("MRR") for construction of a Part IV C&D landfill ("Proposed Landfill")?

2. Did the Administrative Law Court ("ALC") err in holding that excess disposal capacity could be an additional factor under Subsection (D)(3)(d) of DON Regulation?

3. Would consideration of excess permitted disposal capacity as an additional factor under Subsection (D)(3)(d) of DON Regulation allow DHEC unrestrained discretion to deny DON request?

4. Is the ALC's finding that the Proposed Landfill is not needed arbitrary?

5. Is the ALC's finding that the Proposed Landfill is not needed supported by substantial evidence in the record?

6. Did the ALC err in admitting into evidence reports which did not exist at the time of DHEC's decision on MRR's request for a demonstration of need for the Proposed Landfill?

STATEMENT OF THE CASE

On March 3, 2006, the South Carolina Department of Health and Environmental Control ("DHEC") issued a demonstration of need ("DON") determination to Respondent MRR Highway 92, LLC ("MRR") for a Long-Term Construction, Demolition and Land-

Clearing Debris Landfill ("Part IV C&D Landfill") to be located 322 Choice Road, Gray Court in Laurens County ("Proposed Landfill"). (*See* March 3, 2006 letter from Joan Litton to Ronald C. Gilkerson, Pet. Ex. 8, R. p. 367, App. p. 368). Following receipt of the DON approval, MRR submitted an application for a permit for the Proposed Landfill. (Trial Tr., p. 147, ll. 1-11, R. p. 228). On July 18, 2008, DHEC issued a permit for construction and operation of the Proposed Landfill ("Landfill Permit"). (Pet. Ex. 22, R. pp. 406-13, App. pp. 407-14). On July 24, 2008, DHEC authorized discharge of storm water associated with the construction of the Proposed Landfill under the State NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 ("NPDES General Permit"). (*See* July 24, 2008 letter from Jill C. Stewart to Ronald C. Gilkerson, R. pp. 799-804, App. pp. 800-805). On August 4, 2008, Petitioner Engaging and Guarding Laurens County's Environment ("EAGLE") requested that the Board of Health and Environmental Control ("Board") review the DHEC staff's decision to issue the Landfill Permit and authorize coverage under the NPDES General Permit for discharge of storm water associated with the construction of the Proposed Landfill. (*See* Request for Final Review Conference dated August 4, 2008, R. pp. 805-10, App. pp. 806-811). On August 21, 2008, the Board advised EAGLE of its decision not to conduct a review of the staff decision. (*See* August 21, 2008 letter, R. pp. 811-12, App. pp. 812-13). Thereafter, on September 16, 2008, EAGLE filed a Request for Contested Case Hearing, seeking review of DHEC's decision by the Administrative Law Court ("ALC"). (*See* Request for Contested Case Hearing dated September 16, 2008, R. pp. 813-20, App. pp. 814-21).

On March 17, 2009, MRR filed a motion for partial summary judgment on all

issues raised in EAGLE's Request for Contested Case Hearing regarding DHEC's issuance of the permit for the Proposed Landfill. (*See* Respondent MRR Highway 92, LLC's Motion for Partial Summary Judgment and Respondent MRR Highway 92, LLC's Memorandum of Law in Support of its Motion for Partial Summary Judgment, R. pp. 439-550, App. pp. 440-551). On March 17, 2009, MRR also filed a motion to make more definite and certain with respect to EAGLE's Request for Contested Case Hearing as to the authorization for coverage under the NPDES General Permit. (*See* Respondent MRR Highway 92, LLC's Motion to Make More Definite and Certain, R. pp. 551-71, App. pp. 552-72). On May 1, 2009, EAGLE filed a motion for summary judgment and response to MRR's motions. (*See* Petitioner's Motion for Summary Judgment and Response to MRR Highway 92, LLC's Motion for Summary Judgment, R. pp. 572-711, App. pp. 573-712). In the letter accompanying EAGLE's motion and response, EAGLE advised the ALC that it was withdrawing all grounds for appeal of DHEC's decisions except for those related to DHEC's issuance of the DON on March 3, 2006. (*See* May 1, 2009 letter, R. p. 837, App. p. 838). On May 18, 2009, MRR and DHEC filed a joint reply to EAGLE's motion for summary judgment and response to MRR's motion for summary judgment. (*See* Respondents' Joint Reply to Petitioner's Motion for Summary Judgment and Response to MRR Highway 92, LLC's Motion for Summary Judgment, R. pp. 712-18, App. pp. 713-19).

On May 27, 2009, the ALC heard the parties' arguments on the motions for summary judgment. (*See* Transcript of the Testimony of EAGLE v. SCDHEC, et al.m R. pp. 25-81. App. pp. 26-82). The ALC denied both motions for summary judgment, ruling that there was a genuine issue of material fact as to whether DHEC should have

denied the permit for the Proposed Landfill based on DHEC's discretion to consider additional factors under subsection (D)(3)(d) of the DON Regulation. (*See* Order Denying Petitioner's Motion for Summary Judgment and Order Denying Respondent MRR Highway 92, LLC's Motion for Partial Summary Judgment, R. pp. 6-15, App. pp. 7-16). On July 22, 2009, a hearing on the merits was held before the ALC. (*See* Transcript of Administrative Hearing on July 22, 2009, hereinafter "Trial Tr.," R. pp. 82-287, App. pp. 83-288).[1] On October 29, 2009, the ALC issued its Final Order and Decision, finding that the Proposed Landfill is not needed and thus reversing DHEC's issuance of the permit to MRR.

On November 13, 2009, MRR filed a notice of appeal to the Court of Appeals. On May 3, 2011, the Court of Appeals heard oral arguments on the appeal. On August 4, 2011, the Court of Appeals reversed the ALC decision "because the Department acted within its discretion by declining to consider additional factors in issuing a demonstration of need to MRR." (Unpublished Opinion No. 2011-UP-380, hereinafter "Opinion," p. 2, App. p. 993).

STATEMENT OF THE FACTS

Section 44-96-290 of the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* ("Solid Waste Act"), sets forth the statutory permitting requirements for solid waste management facilities, including Part IV C&D Landfills. These permitting requirements include the requirement that DHEC approve a demonstration of need ("DON") for any new or expanded solid waste

[1] In its brief, EAGLE asserts that "[n]either DHEC nor MRR presented any witnesses" at the hearing on the merits. While it is true that neither DHEC nor MRR called witnesses after EAGLE presented its case in chief, it is was unnecessary as DHEC and MRR were able to present testimony and introduce evidence in support of its case through witnesses called by EAGLE.

management facility. Specifically, Section 44-96-290(E) of the Solid Waste Act provides that no permit for a solid waste management facility, including a Part IV C&D Landfill, "may be issued until a demonstration of need is approved by the department." S.C. CODE ANN. § 44-96-290(E (2002). On February 21, 2006, MRR submitted a request for a demonstration of need determination for the Proposed Landfill to DHEC. (*See* February 21, 2006 letter from Rudy M. Curtis to Joan Litton, Pet. Ex. 7, R. p. 366, App. pp. 367). On March 3, 2006, DHEC issued a DON approval for the Proposed Landfill, advising MRR that "pursuant to the provisions of R.61-107.17, *Demonstration of Need*, there is a need for this type of facility in the corresponding planning area." (*See* March 3, 2006 letter from Joan Litton to Ronald C. Gilkerson, Pet. Ex. 8, R. p. 367, App. p. 368).

DHEC promulgated S.C. CODE ANN. REGS. § 61-107.17 ("DON Regulation") in 2000 in accordance with the procedural requirements of the South Carolina Administrative Procedures Act ("APA"), which includes public notification of proposed regulations and submittal to the General Assembly. *See* 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008) (prior to amendment effective June 29, 2009)[2]; S.C. CODE ANN. §§ 1-23-110 and 1-23-120 (Supp. 2012). The DON Regulation establishes specific and detailed criteria for the demonstration of need for the construction of a new Part IV C&D Landfill. 25A S.C. CODE ANN. REGS. § 61-107.17(A)(1) (Supp. 2008). The Regulation employs a process which establishes a "planning area" around the Proposed Landfill "for determining the need for new disposal facilities and expansions of existing disposal facilities." 25A S.C. CODE ANN. REGS. § 61-107.17(B)(6)(a) (Supp. 2008). Pursuant to

[2] Effective July 29, 2009, DHEC promulgated an amendment to the DON Regulation. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2012). While this amendment changed the size of the planning area for Part IV C&D Landfills (now Class Two landfills) and the manner in which disposal capacity is determined, the Regulation still operates to provide disposal capacity in excess of the amount of waste generated within the host county and the counties in proposed facility's planning area.

Subsection (B)(6) of the DON Regulation, the planning area for a Part IV C&D Landfill is a ten-mile radius around the Proposed Landfill. 25A S.C. CODE ANN. REGS. § 61-107.17(B)(6)(a) (Supp. 2008) Specifically, in setting forth the criteria for determining need for a Part IV C&D Landfill, the DON Regulation provides as follows:

> 3. In determining if there is a need for a new or expansion of an existing solid waste disposal facility, the Department will use the criteria outlined below:
>
>   a. Where there are at least two (2) commercial disposal facilities under separate ownership within the planning area that meet the disposal needs for the area, e.g., that accept special waste and, if applicable, are capable of handling additional tonnage, no new disposal capacity will be allowed. Disposal facilities that accept only waste generated in the county or region in which the disposal facility is located will not be considered in determining need.
>
>   b. Each disposal facility in the planning area will be allowed up to a maximum yearly disposal rate equal to the total amount of solid waste destined for disposal that is generated in the county or counties that fall, either all inclusive or a portion thereof, within the planning area. Disposal rates for existing facilities shall not be reduced pursuant to this provision.
>
>   c. In determining the amount of solid waste destined for disposal, the Department will use figures in the current Solid Waste Annual Report for the proposed waste stream, e.g., the generation rate for a Part IV construction, demolition debris and land-clearing debris landfill will be determined by adding the amounts of construction and demolition debris, and land-clearing debris destined for disposal in permitted construction, demolition, and land-clearing debris landfills in the counties that fall within the planning area.
>
>   d. The Department reserves the right to review additional factors in determining need on a case-by-case basis.

25A S.C. CODE ANN. REGS. § 61-107.17(D)(3) (Supp. 2008). There is no dispute that DHEC conformed to the requirements of Subsections (D)(3)(a)-(c) in issuing the DON approval for the Proposed Landfill.

Subsection (D)(3)(a) provides that there may be two Part IV C&D Landfills

within the ten-mile radius planning area. At the time of the request for a DON determination for the Proposed Landfill, Curry Lake C&D Landfill was the only commercial Part IV C&D Landfill located in Laurens County and the only commercial Part IV C&D Landfill in the ten-mile planning radius for the Proposed Landfill. (Pet Ex. 24, p. 73, R. p. 418, App. p. 419). The DHEC staff therefore concluded that MRR's Proposed Landfill was allowed under Subsection (D)(3)(a) of the DON Regulation. (Transcript of Administrative Hearing on July 22, 2009, hereinafter "Trial Tr.," p. 90, ll. 3-25, R. p. 171, App. p. 172). Pursuant to Subsection (D)(3)(b), the maximum annual rate for a proposed landfill is the total of the waste generated in the counties any portion of which falls within the proposed landfill's planning area. In calculating the annual disposal rate for a Proposed Landfill, the DON Regulation provides that "[e]ach disposal facility in the planning area will be allowed up to a maximum yearly disposal rate equal to the total amount of solid waste destined for disposal that is generated in the <u>county or counties</u> that fall, either all inclusive or a portion thereof, within the planning area." S.C. CODE ANN. REGS. § 61-107.17(D)(3)(b) (Supp. 2008) (emphasis added). The ten-mile planning radius for the Proposed Landfill includes portions of Laurens, Spartanburg, and Greenville Counties. (Trial Tr., p. 95, ll. 2-4, R. p. 176, App. p. 177). Pursuant to Subsection (D)(3)(c), DHEC utilized the C&D waste generation rates for Laurens, Greenville, and Spartanburg Counties as reported in the 2005 Solid Waste Management Annual Report, the current annual report at the time of DHEC's decision on MRR's DON request. Specifically, Laurens County reported 8,434 tons of C&D waste generated in 2004. For that same period, Greenville County reported 87,157 tons and Spartanburg County reported 58,803 tons. (Pet. Ex. 24, p. 75, R. p. 420, App. p. 421). Accordingly,

DHEC issued the DON approval to MRR with a maximum annual disposal limit of 154,000 tons per year—the amount of C&D waste generated in Laurens, Greenville, and Spartanburg Counties for calendar year 2004. (Trial Tr., p. 95, ll. 2-4, R. p. 176, App. p. 177).

The only issue before the ALC was the consideration of "additional factors" under Subsection (D)(3)(d) of the DON Regulation. EAGLE argued that the existing permitted disposal capacity in the counties in the Proposed Landfill's planning area was an "additional factor" which precluded a DON approval for the Proposed Landfill. The site of the Proposed Landfill is approximately three miles from the Curry Lake C&D Landfill, also in Laurens County. (Trial Tr. p. 186, ll. 18-21, R. p. 267, App. p. 268). Kent Coleman, DHEC's Director of the Division of Mining and Solid Waste Management, testified that the planning area established in the DON Regulation is a regional concept. (Trial Tr. p. 100, ll. 12-14, R. p. 181, App. p. 182). Indeed, for the fiscal year 2005, Curry Lake C&D Landfill accepted for disposal 23,780 tons of C&D waste from Greenville County and 25,450 tons from Spartanburg County. (Pet. Ex. 26, R. p. 437, App. p. 438). Additionally, for the fiscal year 2005, Curry Lake C&D Landfill reported accepting for disposal waste from five other counties outside the three-county planning area for the Proposed Landfill. (Pet. Ex. 26, R. p. 437, App. p. 438). Mr. Coleman testified that many of the Part IV C&D Landfills in the three-county planning area for the Proposed Landfill accept waste from other counties. (Trial Tr. p. 105, ll. 2-10, R. p. 186, App. p. 187). Mr. Coleman further testified that one of the goals of siting more than one commercial landfill within the ten-mile planning area is to address the need for competition and encourage facilities to compete with each other in terms of price. (Trial

Tr., p. 177, ll. 5-24, R. p. 258, App. p. 259). James Martin, a member of EAGLE and owner of a construction business in Laurens County, testified that if there is more than one landfill within the same distance from a construction site, he would select the landfill for disposal of C&D waste according to price. (Trial Tr. p. 189, ll. 6-8, R. p. 270, App. p. 271).

During the review of the DON request for the Proposed Landfill, the DHEC staff was aware of the permitted annual disposal rate for Part IV C&D Landfills located in Laurens, Spartanburg, and Greenville Counties and of the amount of C&D waste generated in those counties. (Trial Tr. p. 157, l. 21 – p. 158, l. 21, R. pp. 238-39, App. pp. 239-40; p. 166, l. 19 – p. 167, l. 2, R. pp. 247-48, App. pp. 248-49; p. 159, ll. 5-20, R. p. 240, App. p. 241). According to the 2007 South Carolina Solid Waste Management Annual Report, Greenville County generators were unquestionably sending waste outside the county for disposal since the Part IV C&D Landfills in Greenville County accepted for disposal only 137,084 tons of the 161,738 tons of waste generated in Greenville County. (Pet. Ex. 24, pp. 72, 74, R. pp. 417, 419, App. pp. 418, 420). Similarly, in 2007 Spartanburg County had only one permitted Part IV C&D Landfill, Wasp Nest Road C&D Landfill ("Wasp Nest Landfill"), and it only had an estimated remaining life of Wasp Nest Landfill of only 1.6 years. (Pet. Ex. 24, p. 73, R. p. 418, App. p. 419). Additionally, the DHEC staff was aware that Curry Lake C&D Landfill in Laurens County accepted waste from counties beyond the three-county planning area. (Trial Tr. p. 101, l. 7-11, R. p. 182, App. p.183). Kent Coleman testified that even though DHEC had information on the permitted disposal capacity and amount of C&D waste generated in Laurens, Spartanburg, and Greenville Counties during its review of the DON request

for the Proposed Landfill, such considerations did not warrant denial of the DON request. (Trial Tr. p. 159, ll. 5-20, R. p. 240, App. p. 241; p. 161, l. 13 – p. 162, l. 6, R. pp. 242-43, App. pp. 243-44).

At the time of the DON determination for the Proposed Landfill, no other information was submitted to DHEC for consideration in making that determination. (Trial Tr. p. 158, l. 23 – p. 159, l. 6, R. pp. 239-40, App. pp. 240-41). Following receipt of the DON approval, MRR prepared and submitted an application for the Landfill Permit. (Trial Tr., p. 147, ll. 1-11, R. p. 228, App. p. 229). The Department received comments regarding the Proposed Landfill throughout the permitting process, including comments regarding the need for the Proposed Landfill. (Trial Tr. p. 147, l. 12 – p. 149, l. 25, R. pp. 228-30, App. pp. 229-31; p. 160, ll. 3-25, R. p. 241, App. p. 242). The Department reviewed all of the comments submitted to DHEC, but none of the comments caused DHEC to reconsider is the 2006 DON approval for the Proposed Landfill. (Trial Tr. p. 149, l. 21 – p. 150, l. 6, R. pp. 230-31, App. pp. 231-32). On July 18, 2008, DHEC issued a permit for construction and operation of the Proposed Landfill. (Pet. Ex. 22, R. pp. 406-13, App. pp. 407-14).

ARGUMENT

At issue in this case is the interpretation of Subsection (D)(3)(d) of the DON Regulation which provides as follows: "The Department reserves the right to review additional factors in determining need on a case-by-case basis." 25A S.C. CODE ANN. REGS. § 61-107.17(D)(3) (Supp. 2008). In denying MRR's motion for summary judgment, the ALC held that Subsection (D)(3)(d) is discretionary and therefore EAGLE

was entitled to present evidence to show that DHEC failed to exercise that discretion to consider the existence of excess permitted disposal capacity in the region to be served by the Proposed Landfill. (*See* Order Denying Respondent MRR Highway 92, LLC's Motion for Partial Summary Judgment p. 4, R. p. 14, App. p. 15). The Court of Appeals reversed the ALC's decision "because the Department acted within its discretion by declining to consider additional factors in issuing a demonstration of need to MRR." (Court of Appeals Unpublished Opinion No. 2011-UP-380 filed August 4, 2011, hereinafter "Opinion," p. 2, App. p. 993). In so holding, the Court of Appeals cited to *S.C. Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 363 S.C. 67, 610 S.E.2d 482 (2005) in which this Court held that "Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." (Opinion, p. 2, App. p. 993). EAGLE argues DHEC is not entitled to deference with respect to its interpretation of the DON Regulation because such interpretation is in "direct conflict with the plain language of the statutory mandate."

At the heart of this argument is EAGLE's contention that DHEC's application of the substantive provisions of Subsection (D)(3) allowed for permitted annual disposal capacity in excess of the amount of waste generated in the counties within the Proposed Landfill's planning area and there could therefore be no "need" for the Proposed Landfill. Simply stated, EAGLE argues that the DON Regulation as promulgated by DHEC and submitted to the General Assembly pursuant to the APA does not determine "need" as required by Section 44-96-290(E) of the Solid Waste Act unless DHEC exercises its discretion under Subsection (D)(3)(d) to ignore the operation of Subsections (D)(3)(a)-(c)

when the application of these provisions results in excess disposal capacity. As discussed more fully below, excess disposal capacity is an operation of the substantive provisions of Subsection (D)(3) of the DON Regulation and promotes the legislative goals of the Solid Waste Act. In particular, the DON Regulation employs a planning area approach which considers the need for solid waste management facilities on a regional basis and determines disposal capacity in a manner which promotes competition and cost-efficient options for disposal of waste within the State. As such, DHEC's interpretation of the DON Regulation is consistent with the Solid Waste Act and the Court of Appeals' deference to DHEC's interpretation of Subsection (D)(3)(d) of the DON Regulation is proper.

As additional sustaining grounds for the Court of Appeals' reversal of the ALC decision, DHEC's consideration of excess permitted capacity as an additional factor under Subsection (D)(3)(d) to deny a DON request would result in an arbitrary decision by DHEC. Indeed, the ALC's finding that excess landfill capacity required denial of MRR's DON request is arbitrary and capricious. Moreover, the ALC's finding of excess capacity with the counties in the Proposed Landfill's planning area is not supported by the substantial evidence on the record. Accordingly, even if the Court of Appeals' decision based on its interpretation of Subsection (D)(3)(d) of the DON Regulation were improper, which it is not, the Court of Appeals' reversal of the ALC decision should be sustained.

I. THE COURT OF APPEALS CORRECTLY HELD THAT IT WAS WITHIN DHEC'S DISCRETION TO DECLINE TO CONSIDER ADDITIONAL FACTORS IN ISSUING THE DON TO MRR.

EAGLE contends that the Court of Appeal erred in giving deference to DHEC's interpretation of the DON Regulation and Section 44-96-290(E) of the Solid Waste Act

because DHEC's interpretation is "in direct conflict with the plain language of Section 44-96-290(E)." (Brief, p. 17). As discussed more fully below, excess permitted disposal capacity is an intended result of the application of the DON Regulation and is consistent with the legislative goals of the Solid Waste Act. Accordingly, the Court of Appeals' deference to DHEC's interpretation in not only proper—it is required under the applicable state law.

A. Excess disposal capacity is an operation of the substantive provisions of Subsection (D)(3) of the DON Regulation and fulfills the legislative goals of the Solid Waste Act.

In appealing the DON approval for the Proposed Landfill, EAGLE did not dispute that DHEC properl y determined that the Proposed Landfill met the requirements of Subsections (D)(3)(a)-(c) of the DON Regulation. (*See* Petitioner's Motion for Summary Judgment and Response to MRR Highway 92, LLC's Motion for Summary Judgment, pp. 13-14, R. pp. 584-85). Instead, EAGLE argued that excess permitted capacity in Laurens County and the other counties within Proposed Landfill's planning area should have been considered as an "additional factor" under Subsection (D)(3)(d). *Id.* Specifically, EAGLE argued that the three counties encompassed by the Proposed Landfill's planning area had a permitted disposal capacity in excess of the amount of waste generated in those three counties. (*See* Petitioner's Motion for Summary Judgment and Response to MRR Highway 92, LLC's Motion for Summary Judgment, pp. 2-4, R. pp. 573-75). Contrary to EAGLE's assertions, this excess disposal capacity is not in conflict with the plain language of Section 44-96-290(E) and does not support its claim that the Court of Appeals erred in giving deference to DHEC's interpretation of the DON Regulation and Section 44-96-290(E).

Specifically, Subsection (D)(3)(b) provides as follows: "Each disposal facility in

the planning area **will** be allowed up to a maximum yearly disposal rate equal to the total amount of solid waste destined for disposal that is generated in the county or counties that fall, either all inclusive or a portion thereof, within the planning area. Disposal rates for existing facilities **shall not be reduced** pursuant to this provision." 25A S.C. CODE ANN. REGS. § 61-107.17.D(3)(b) (emphasis added). This provision of the DON Regulation clearly provides that the combined maximum yearly disposal rate for all facilities within a county may exceed the waste disposal needs of the host county. First of all, when there is more than one facility in ten-mile radius planning area, each is allowed a maximum yearly disposal rate up to the total amount of waste generated in the host county and any other county in the planning area for the Proposed Landfill. As such, even if there are only two facilities within the boundaries of a county, the combined maximum yearly disposal rate for those two facilities will always exceed the total amount of waste generated in the host county. Moreover, since the DON Regulation assesses the need for proposed facilities based on a defined planning area without regard to the number of facilities permitted elsewhere in the host county, there could be any number of facilities located within a county—each with a permitted maximum annual disposal rate equal to the total annual waste generated in the host county and any other county within the facility's planning area. Indeed, as is the case with the Proposed Landfill, the maximum yearly disposal rate for a proposed landfill will always exceed the amount of waste generated within the host county when the ten-mile radius planning area for a Proposed Landfill touches on more than one county. Similarly, this excess permitted disposal capacity may also exist in the other counties in a Proposed Landfill's planning area, depending on the number of facilities in these counties and the reach of the planning

areas for those facilities. Clearly, this excess permitted disposal capacity is an intended consequence of the calculation of the maximum annual disposal rate pursuant to Subsection (D)(3)(b).

EAGLE argues that any interpretation and application of the DON Regulation to allow excess permitted disposal capacity is in direct conflict with Section 44-96-290(E) of the Solid Waste Act. To the contrary, this excess disposal capacity is consistent with and furthers the goals of the Solid Waste Act. As a preliminary matter, Section 44-96-290(E) does not require DHEC to assess the need for a new solid waste management facility or expansion of an existing facility within the confines of the needs of a particular county. S.C. CODE ANN. § 44-96-290(E (2002). In enacting the Solid Waste Act, the General Assembly made the specific finding that "a coordinated statewide solid waste management program is needed to protect public health and safety, protect and preserve the quality of the environment, and conserve and recycle natural resources." S.C. CODE ANN. § 44-96-20(A)(13) (2002). The DON Regulation carries out that directive to implement a statewide program by assessing need for commercial facilities within defined planning areas. *See* 25A S.C. CODE ANN. REGS. § 61-107(17)(B)(6)(a) (Supp. 2008). Pursuant to the DON Regulation, capacity for a Proposed Landfill is determined based on the total yearly waste generated in <u>all counties</u> within the ten-mile radius planning area. Accordingly, the DON Regulation provides for sufficient disposal capacity to serve the needs of generators within the entire region to be served by a Proposed Landfill.

Additionally, Section 44-96-240(A)(6) of the Solid Waste Act provides that a "regional approach to the establishment of solid waste management facilities should be

strongly encouraged in order to provide solid waste management services in the most efficient and **cost-effective** manner." S.C. CODE ANN. § 44-96-20(A)(13) (2002) (emphasis added). Excess permitted disposal capacity for commercial facilities within a planning area and the surrounding region clearly promotes competition within the C&D waste disposal market. Kent Coleman, Director of the Division of Mining and Solid Waste Management, testified that one of the goals of siting more than one commercial landfill within the ten-mile planning area is to address the need for competition and encourage facilities to compete with each other in terms of price. (Trial Tr., p. 177, ll. 5-24, R. p. 258, App. p. 259). Indeed, Mr. James Martin, a member of EAGLE and owner of a construction business in Laurens County, acknowledged that availability of multiple permitted facilities within a planning area promotes competitive pricing within the market. Specifically, Mr. Martin testified that if there is more than one landfill within the same distance from a construction site, he would select the landfill for disposal of C&D waste according to price. (Trial Tr. p. 189, ll. 6-8, R. p. 270, App. p. 271).

Similarly, excess permitted disposal capacity throughout the region to be served by a Proposed Landfill promotes this goal. Commercial Part IV C&D Landfills often compete for waste beyond the counties within their planning area. Kent Coleman, Director of the Division of Mining and Solid Waste Management, testified that the planning area established in DHEC's DON Regulation is a regional concept. (Trial Tr. p. 100, ll. 12-14, R. p. 181, App. p. 182). Mr. Coleman testified that many of the Part IV C&D Landfills in the three-county planning area for the Proposed Landfill accept waste from other counties. (Trial Tr. p. 105, ll. 2-10, R. p. 186, App. p. 187). Indeed, for the fiscal year 2005, Curry Lake C&D Landfill, the only commercial Part IV C&D Landfill

in Laurens County, reported accepting for disposal waste from five other counties outside the three-county planning area for the Proposed Landfill. (Pet. Ex. 26, R. p. 437, App. p. 438). As such, the excess permitted disposal capacity allowed under Subsection (D)(3)(b) affords a facility sufficient capacity to accept waste beyond the counties in its planning area and thus increases competition within the larger region served by the facility. Accordingly, Subsection (D)(3)(b) of the DON Regulation clearly conforms to the goals set forth by the General Assembly in the Solid Waste Act.

In the preamble to the DON Regulation, DHEC stated the following purpose for promulgating the Regulation:

> This regulation is needed so that solid waste disposal capacity is managed to meet the long-term disposal needs of the State while protecting the State's natural resources. This regulation is reasonable because it encourages competition within planning areas and regionalization of landfills, while at the same time ensuring there is more than adequate capacity to meet the State's disposal needs.

24 S.C. Reg. 46 (June 23, 2000). In this preamble, DHEC clearly acknowledges that the DON Regulation was drafted to address the stated findings of the General Assembly and to meet the express goals and policies of the Solid Waste Act. The DON Regulation promotes the goals of the Solid Waste Act by encouraging competition and ensuring adequate disposal capacity. Moreover, this Court has recently recognized that "the DON Regulation serves as a planning tool to ensure the state is prepared to meet the waste disposal needs of the population by providing adequate landfill capacity and to assist the counties in that endeavor." *Sandlands C&D, LLC v. County of Horry*, 394 S.C. 451, 471, 716 S.E.2d 280, 290 (2011). Accordingly, there is no basis for the Petitioner's assertion that DHEC's interpretation of the DON Regulation is in direct conflict with the Solid Waste Act.

B. DHEC's interpretations of the DON Regulation and Section 44-96-290 of the Solid Waste Act are entitled to the Court's deference.

The Court of Appeals appropriately deferred to DHEC's interpretation of the discretionary nature of Subsection (D)(3)(d) of the DON Regulation. While EAGLE contends that DHEC's failure to consider additional factors in making its DON determination for the Proposed Landfill is an "abuse of discretion," EAGLE cites to no case law interpreting the effect of regulatory provision in which the agency "reserves the right" to take some action. (Brief, p. 24). While acknowledging that that the judicial standard for abuse of discretion does not apply to an agency's purported failur e to exercise discretion, EAGLE nonetheless suggests that DHEC's failure to consider additional factors in its decision on MRR's DON request subjects DHEC's decision to judicial review when such exercise of discretion is arbitrary and capricious. (Brief, p. 24). For the standard of such judicial review, EAGLE cites to *Deese v. South Carolina State Board of Dentistry* for the following holding: "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App.1985). As discussed at length in Section II below, the interpretation of Subsection (D)(3)(d) to allow DHEC unrestrained discretion to totally disregard the substantive provisions of Subsection (D)(3)(a)-(c) results in an arbitrary decision. As such, the interpretation of Subsection (D)(3)(d) advocated by EAGLE fails. Moreover, DHEC's interpretation of the phrase "reserves the right" in Subsection (D)(3)(d) is entitled to the deference. This Court has held that an agency's interpretation of undefined terms in a regulation is entitled to the Court's deference. *Murphy v. South*

Carolina Dep't of Health and Envtl. Control, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012). The Court of Appeals' deference to DHEC's interpretation of Subsection (D)(3)(d) is therefore proper.

Additionally, DHEC's interpretation of "demonstration of need" under Section 44-96-290(E) of the Solid Waste Act as set forth in the DON Regulation is also entitled to deference. As discussed *supra*, Section 44-96-290(E) of the Solid Waste Act provides that no permit "may be issued until a demonstration of need is approved by the department." S.C. CODE ANN. § 44-96-290(E (2002). The Solid Waste Act does not specify procedures for DHEC to follow in making need determinations. *Southeast Resource Recovery, Inc. v. South Carolina Department of Health and Environmental Control*, 358 S.C. 402, 408, 595 S.E.2d 468, 471 (2004). When the General Assembly does not define a term in a statute, the administrative agency implementing that statute may be authorized "'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *Young v. South Carolina Dep't of Highways and Public Transp.*, 287 S.C. 108, 113, 336 S.E.2d 879, 882 (Ct. App. 1985) (citations omitted). In promulgating the DON Regulation, DHEC defined "demonstration of need" as directed by the General Assembly in Section 44-96-290(E) of the Solid Waste Act.

EAGLE cites to *Media General Communications, Inc. v. South Carolina Department of Revenue* for this Court's holding that an agency interpretation of a statute is not entitled to deference when is contrary to the plain language of the statute. 388 S.C. 138, 140, 694 S.E.2d 525, 526 (2010). However, the holding in *Media General* is easily distinguishable from the present case. *Media General* examined the Department of

Revenue's application of a statutory provision allowing a corporate taxpayer to use "any other method to effectuate the equitable allocation and apportionment of the taxpayer's income." *Id.* at 143, 694 S.E.2d at 527. Unlike the present case, the Department of Revenue had not promulgated a regulation defining "any other method" allowed under the statute, but merely argued th at the proposed method was not allowed under its interpretation of the application. In rejecting the Department of Revenue's argument, the Court held that the legislation clearly provided for "any other method" and that the Department's interpretation was inconsistent with this express provision of the statute. *Id.* at 138, 694 S.E. 2d at 530. In contrast, the General Assembly unquestionably directed DHEC to promulgate a regulation to implement the demonstration of need provision of Section 44-96-290(E) of the Solid Waste Act. S.C. CODE ANN. § 44-96-290(E) (2002). As such, there is no doubt that Section 44-96-290(E) of the Solid Waste Act authorizes DHEC to define need in the regulations promulgated under that section. In promulgating the DON Regulation, which was submitted to and approved by the General Assembly pursuant to the APA, DHEC set forth a clear formula for determining need for new Part IV C&D Landfills. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008); S.C. CODE ANN. § 1-23-120. Indeed, in 2009 DHEC promulgated an amendment to the DON Regulation which once again employed this planning area approach to determining need and disposal capacity. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2012). While this amendment changed the size of the planning area for Part IV C&D Landfills (now Class Two landfills) and the manner in which disposal capacity is determined, the Regulation still operates to provide disposal capacity in excess of the amount of waste generated within the host county and the counties in proposed facility's planning area. 25A S.C.

CODE ANN. REGS. § 61-107.17(D)(3) (2012). Again, as required by the APA, this amendment of DON Regulation was submitted to the General Assembly for approval. As such, as discussed below, DHEC's interpretation of "demonstration of need" in the DON Regulation is entitled to the Court's deference.

The ALC thus erred in failing to give deference to DHEC's interpretation of Section 44-96-290(E) of the Solid Waste Act as set forth in the DON Regulation. "The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason." *McKinney v. Kimberly Clark Corp.*, 376 S.C. 636, 638, 658 S.E.2d 112, 113 (Ct. App. 2008) (quoting *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000)). The DON Regulation is DHEC's interpretation of how it determines the "need" for new facilities under Section 44-96-290(E). As discussed *supra*, the criteria established in the DON Regulation unquestionably provides for excess permitted disposal capacity in the host county and the counties encompassed by a Proposed Landfill's planning area. There can be no doubt that DHEC intended to provide for permitted disposal capacity in excess of the amount of waste generated in the host county and the other counties in a Proposed Landfill's planning. Moreover, if DHEC had intended to limit this excess capacity to a specific percentage relative to the waste generated within the counties encompassed by a Proposed Landfill's planning area, DHEC certainly could have drafted the DON Regulation to do so. However, DHEC did not, and as discussed above, its interpretation of need as promulgated in the DON Regulation plainly meets the General Assembly's goals and directives as set forth in the express provisions of the Solid Waste Act.

Accordingly, DHEC's interpretation of "demonstration of need" in Section 44-96-290 is entitled to deference and the ALC erred in failing to give deference to such interpretation.

II. EXCESS PERMITTED DISPOSAL CAPACITY IN A PLANNING AREA CANNOT BE AN "ADDITIONAL FACTOR" UNDER SUBSECTION (D)(3)(D) OF THE DON REGULATION.

As an additional sustaining ground for the Court of Appeals' reversal of the ALC decision, excess permitted disposal capacity cannot be an "additional" factor under Subsection (D)(3)(d). Subsection (D)(3)(d) of the DON Regulation provides that DHEC "reserves the right to review **additional** factors in determining need on a case-by-case basis." 25A S.C. CODE ANN. REGS. § 61-107.17(D)(3)(d) (Supp. 2008) (emphasis added). While this subsection of the Regulation gives DHEC discretion to consider factors beyond those set forth in Subsection (D)(3)(a)-(c), it does not allow DHEC the discretion to disregard the formulae set forth in those express provisions. "The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction **to limit or expand the regulation's operation**." *Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992) (emphasis added). Under its plain and ordinary meaning, "additional" must be something other than that already provided for in the express terms of this subsection of the DON Regulation. As discussed, permitted annual rate of disposal is an operation of an express formula set forth in Subsection (D)(3)(b). As such, it cannot be an "additional factor" for consideration in DHEC's decision on MRR's DON request. Moreover, the consideration of excess permitted disposal capacity as an additional factor in determining that there is no need for the Proposed Landfill unquestionably **limits** the operation of the regulation's express provisions. The ALC therefore erred in holding that excess permitted disposal capacity was an "additional factor" to be considered by DHEC in its decision on MRR's DON

request.

III. DENIAL OF A DON REQUEST BASED ON EXCESS DISPOSAL CAPACITY WOULD ALLOW DHEC UNRESTRAINED DISCRETION IN THE APPLICATION OF THE DON REGULATION.

As an additional sustaining ground for the Court of Appeals' reversal of the ALC decision, DHEC could not consider excess permitted disposal capacity to deny MRR's DON request because such decision would be contrary to the express provisions of the DON Regulation and would therefore result in an inconsistent application of the DON Regulation. "An administrative agency is generally not bound by the principle of *stare decisis*, but it cannot act arbitrarily in failing to follow established precedent." *Concord Street Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992). The Solid Waste Act required DHEC to promulgate regulations governing the approval of a DON request. S.C. CODE ANN. § 44-96-290(E) (2002). The Department promulgated the DON Regulation and submitted it the General Assembly pursuant to the APA. "Regulations authorized by the legislature have the force of law." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 227, 628 S.E.2d 262, 269 (Ct. App. 2006) (citation omitted). "DHEC must also follow its own regulations." *Triska v. Dep't of Health and Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). As such, DHEC is required to make a decision on a DON request in accordance with the express provisions of the DON Regulation.

In *Young v. South Carolina Department of Highways and Public Transportation*, this Court addressed facts similar to the instant case. 287 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985). In *Young*, this Court upheld a Department of Highways and Public Transportation regulation which defined the term "transient or temporary," holding as follows:

> While the General Assembly did not define "transient or temporary" by statute, it has implicitly authorized the Department to interpret, clarify and explain the statute by authorizing the Department to promulgate regulations governing outdoor sign permits. Administrative agencies may be authorized" 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *Heyward v. South Carolina Tax Commission*, 240 S.C. 347, 355, 126 S.E.2d 15, 19-20 (1962); 73 C.J.S. Public Administrative Law and Procedure Section 67 (1983) (in the first instance, defining a particular statutory term is an administrative function). We hold the Department's definition is not overly restrictive and further the definition provides specific time limitations which will assure that the statute will be applied in a consistent manner. *See Boucher Outdoor Advertising Co. V. Minnesota Department of Transportation*, 347 N.W.2d 88, 91 (Minn. App. 1984).

Id. at 113, 336 S.E.2d at 882. The *Young* case is on all fours with the instant case. The General Assembly did not define "need" in Section 44-96-290(E), but instead mandated that DHEC promulgating regulations defining the term. Significant to the holding in *Young* is this Court's determination that the definition set forth in DHEC's regulation ensured that the directive of the statute "will be applied in a consistent manner." *Id.* In the instant case, the denial of a DON request based on excess permitted disposal capacity in the counties within the defined planning area would result in inconsistent determinations by DHEC. Specifically, it would allow the DHEC staff the absolute discretion to deny a DON request even though the DON request met the express test set forth in the DON Regulation. Such discretion would unquestionably result in inconsistent determinations by DHEC.

Additionally, the South Carolina Supreme Court holding in *S.C. Coastal Conservation League v. South Carolina Department of Health and Environmental Control* addressed the issue of agency discretion to make permitting determinations. 363 S.C. 67, 610 S.E.2d 482 (2005). In *S.C. Coastal Conservation League*, the issue was

whether an island was a "small island" subject to regulation under S.C. CODE ANN. REGS. § 30-12(N). *Id.* at 71, 610 S.E.2d at 48. Neither the Small Island Regulation nor the statute under which the Small Island Regulation was promulgated defined the term "small." *Id.* at 74, 610 S.E.2d at 486. The Court held that the failure to define "small" allowed the OCRM staff "unrestrained discretion" in determining what islands were subject to the Small Island Regulation. The Court held as follows:

> The circuit court also held that Park Island was a small island, using no test but rather deferring to OCRM staff. OCRM and Respondents assert that "small" is a term of common understanding, so no particular test is necessary. We disagree.
>
> "Small" is a term of subjective relativity, and the regulations provide no benchmark for comparative size. Smallness arguably could be determined per watershed, with respect to all of South Carolina's islands, or on an absolute scale. The problem is that there is nothing to interpret or apply. **Allowing OCRM to exercise unrestrained discretion is inconsistent with the statute requiring the agency to evaluate permit applications pursuant to regulation**. *See Captain's Quarters Motor Inn, Inc.*, 306 S.C. at 490-91, 413 S.E.2d at 14 (invalidating a test used by OCRM's predecessor in evaluating permit applications because it was not promulgated by regulation); *see also Edisto Aquaculture Corp. v. S.C. Wildlife and Marine Res. Dep't*, 311 S.C. 37, 40, 426 S.E.2d 753, 755 (1993) (distinguishing mandatory agency enabling statutes from permissive ones).

Id. at 74-75, 610 S.E.2d at 486 (emphasis added). The holding in *S.C. Coastal Conservation League* unequivocally provides that a regulation establishing procedures for evaluating permit applications must set forth a clear test for assessing applications and that such regulation cannot allow "unrestrained discretion" to the agency staff. In the instant case, consideration of excess permitted disposal capacity under Subsection (D)(3)(d) of the DON Regulation would effectively negate the test for determining maximum annual disposal rate under Subsection (D)(3)(b) of the DON Regulation. Accordingly, to the extent that Subsection (D)(3)(d) allows DHEC discretion to consider

"additional factors" in evaluating a DON request, such discretion may not be exercised in a manner that is inconsistent with the established test for determining need for new facilities as set forth in the DON Regulation. The Department staff could not have considered excess permitted disposal capacity as an additional factor. The ALC therefore erred in holding DHEC staff had such discretion.

IV. THE ALC'S FINDING THAT THE PROPOSED LANDFILL IS NOT NEEDED IS ARBITRARY AND CAPRICIOUS.

In its Final Order and Decision, the ALC held that the Proposed Landfill was not needed because the three-county region of the planning area for the Proposed Landfill "is generating less than 300,000 tons of C&D waste per year, and even excluding the Wasp Nest landfill, it has over 700,000 tons of existing annual C & D landfill capacity." (Final Order and Decision, p. 9, R. p. 24, App. p. 25). As an additional sustaining ground for the Court of Appeals' reversal of the ALC decision, this finding is contrary to the express provisions of the DON Regulation which clearly provide for excess permitted disposal capacity within the host county and the larger region served by a Proposed Landfill. Indeed, in its Final Order and Decision, the ALC acknowledged that the operation of Subsection (D)(3)(b) results in excess permitted disposal capacity and that such excess capacity is not an "additional factor" under Subsection (D)(3)(d). Specifically, the ALC held as follows:

> Additionally, the excess permitted disposal capacity within Laurens County does not constitute an additional factor requiring denial of the demonstration of need request for the Proposed Landfill. Such disposal capacity is a result of an express provision of the DON Regulation which sets forth the mechanism for determining the annual disposal rate for a Proposed Landfill.

(Final Order and Decision, p. 7, R. p. 22, App. p. 23). However, despite this conclusion

of law, the ALC found that the Proposed Landfill was not needed because "the 32.9% utilization of existing capacity [in the three-county region] simply does not reflect a need for another landfill in the area." (Final Order and Decision, p. 9, R. p. 24, App. p. 25). There is simply no statutory or regulatory basis for this obviously conflicting conclusion. Neither Section 44-96-290(E) of the Solid Waste Act nor the DON Regulation promulgated thereunder establishes any criteria for determining need based on the utilization of current permitted capacity within broader region to be served by a Proposed Landfill. Indeed, as previously discussed, had DHEC intended to impose a cap on the total percentage of permitted disposal capacity relative to the waste generated in the region to be served by a Proposed Landfill, DHEC was certainly capable of drafting such limitation into the criteria for determining maximum annual rate of disposal in Subsection (D)(3)(b) of the DON Regulation.

Despite the absence of any statutory or regulatory basis for so holding, the ALC has determined that 32.9% utilization of existing capacity required DHEC to deny MRR's DON request because there is no need for the Proposed Landfill. Yet, while the ALC held that 32.9% utilization of existing capacity was sufficient to meet the needs of the region to be served by the Proposed Landfill, the ALC failed to provide a threshold percentage by which DHEC should have made such determination. Would greater utilization of the existing capacity—perhaps 40 percent or 50 percent—indicated the need for the Proposed Landfill? No such guidance is provided by the ALC. Indeed, no such guidance can be provided because such determination is contrary to the express provisions of the DON Regulation, and without such guidance in the DON Regulation itself, the DHEC staff could not deny the DON request based of such considerations. As

discussed in Section IV above, DHEC's consideration of existing capacity to assess the need for a Proposed Landfill would result in an arbitrary decision. The ALC's holding clearly demonstrates the arbitrary nature of such a determination. A decision on the need for the Proposed Landfill based on excess disposal capacity would constitute "unrestrained discretion" by the DHEC staff in making such a decision as such consideration of excess capacity is in direct conflict with the express criteria for determining maximum annual disposal rate under Subsection (D)(3)(b) of the DON Regulation. Such decision by DHEC would have been arbitrary. Likewise, such determination by the ALC is also arbitrary.

V. THE ALC'S HOLDING THAT THE PROPOSED LANDFILL IS NOT NEEDED IS NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE ON THE RECORD.

As an additional sustaining ground, the evidence on the record does not support the ALC's ruling that the Proposed Landfill is not needed in the three-county region to be served by the Proposed Landfill. To the contrary, the evidence on the record clearly supports a finding that the Proposed Landfill is needed. For example, the three-county planning area for the Proposed Landfill includes Spartanburg County. According to the 2007 South Carolina Solid Waste Management Annual Report, Wasp Nest Landfill is the only permitted C&D landfill in Spartanburg County. (Pet. Ex. 24, p. 73, R. p. 418, App. p., 419). In 2007, the estimated remaining life of Wasp Nest was only 1.6 years in 2007. (Pet. Ex. 24, p. 73, R. p. 418, App. p. 419). In its Final Order and Decision, the ALC held that "the remaining life of the Wasp Nest Landfill which has an annual disposal rate of 80,000 tons per year is basically finished." (Final Order and Decision, p. 8, R. p. 23, App. p. 24). Accordingly, with the loss of Wasp Nest Landfill, Spartanburg County has **no** C&D disposal capacity within the county. Such evidence is clearly contrary to the

ALC's finding that the Proposed Landfill is not needed within the three-county planning area.

Additionally, the ALC held that the excess permitted disposal capacity in Laurens County did not warrant a denial of the DON request for the Proposed Landfill. (Final Order and Decision, pp. 7-8, R. pp. 22-23, App. pp. 23-24). As such, the disposal capacity in Greenville County facilities would be the only consideration supporting the ALC's holding that the Proposed Landfill is not needed. However, the evidence on the record demonstrates that the Greenville County facilities accept for disposal less waste than that generated within Greenville County itself. Specifically, in 2007 the C&D landfills in Greenville County accepted for disposal only 137,084 tons of the 161,738 tons of waste generated in Greenville County. (Pet. Ex. 24, pp. 72, 74, R. pp. 417, 419, App. pp. 418, 420). Indeed, in 2005 Curry Lake C&D Landfill in Laurens County accepted approximately 23,780 tons of C&D waste from Greenville County. (Trial Ex. 26, R. p. 437, App. p. 438). Thus, both Greenville County and Spartanburg County evidence an actual need for additional disposal capacity outside those counties. This evidence is further supported by the testimony of Kent Coleman regarding the purpose of siting more than one commercial facility within a planning area in order to promote competition within the C&D disposal market. (Trial Tr., p. 177, ll. 5-24, R. p. 258).

The ALC's reliance on the raw statistics comparing the permitted disposal capacity to the amount of waste generated with the three-county planning area for the Proposed Landfill simply ignores the evidence of the regional aspect of the C&D waste market and the flow of C&D waste beyond the counties within a Proposed Landfill's planning area. Kent Coleman, Director of the Division of Mining and Solid Waste

Management, testified that the planning area established in DHEC's DON Regulation is a regional concept. (Trial Tr. p. 100, ll. 12-14, R. p. 181, App. p. 182). Mr. Coleman testified that many of the C&D landfills in the three-county planning area for the Proposed Landfill accept waste from other counties. (Trial Tr. p. 105, ll. 2-10, R. p. 186, App. p. 187). Indeed, for the fiscal year 2005, Curry Lake C&D Landfill, the only commercial C&D landfill in Laurens County, reported accepting for disposal waste from five other counties outside the three-county planning area for the Proposed Landfill. (Pet. Ex. 26, R. p. 437, App. p. 438). As such, the evidence on the record clearly supports the need for the Proposed Landfill despite the raw statistics cited by the ALC in making its ruling.

Finally, the ALC failed give the required consideration to DHEC's specialized knowledge in weighing the evidence in this case. Pursuant to S.C. CODE ANN. § 44-1-60, the ALC is required to "give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge." S.C. CODE ANN. § 44-1-60(F)(2) (Supp. 2008). During the review of the DON request for the Proposed Landfill, the DHEC staff was aware of the permitted annual disposal rate for C&D landfills in Laurens, Spartanburg, and Greenville Counties and of the amount of C&D waste generated in those counties. (Trial Tr. p. 157, l. 21 – p. 158, l. 21, R. pp. 238-39, App. pp. 239-40; p. 166, l. 19 – p. 167, l. 2, R. p. 247-48, App. p. 248-49; p. 159, ll. 5-20, R. p. 240, App. p. 241). The Department staff was also aware that Curry Lake C&D Landfill in Laurens County and other landfills within the planning area for the Proposed Landfill accepted waste from counties beyond the three-county planning area. (Trial Tr. p. 101, l. 7-11, R. p. 182, App. p. 183). Kent Coleman testified that such information did not

warrant the denial of the DON request for the Proposed Landfill. (Trial Tr. p. 159, ll. 5-20, R. p. 240, App. p. 241; p. 161, l. 13 – p. 162, l. 6, R. pp. 242-43, App. pp. 243-44). The ALC's ruling ignored DHEC's specialized knowledge with respect to the C&D waste needs within the region to be served by the Proposed Landfill and instead focused on one raw statistic in reversing DHEC's decision. There is no question that DHEC is in the unique position to fully evaluate the significance of such statistics within the context of the state waste management program over which it has oversight pursuant to the Solid Waste Act. The ALC's ruling gives undue weight to a single raw statistic to determine that the Proposed Landfill is not needed while ignoring the substantial evidence to the contrary and disregarding DHEC's specialized knowledge (as well as the plain language of the DON Regulation) in assessing the totality of the statistics in the possession of DHEC at the time that it made the decision on MRR's DON request.

VI. THE ALC ERRED IN ADMITTING INTO EVIDENCE REPORTS WHICH DID NOT EXIST AT THE TIME OF THE DEPARTMENT'S DECISION.

At the hearing on the merits, the ALC admitted into evidence two reports which did not exist at the time of DHEC's decision. Specifically, the ALC admitted a portion of the Fiscal Year 2008 South Carolina Solid Waste Management Annual Report. (Trial Tr. p. 78, R. p. 159; Pet. Ex. 25, R. pp. 422-29, App. pp. 423-30). The ALC also admitted reports summarizing the amount of waste disposed of at the Curry Lake C&D Landfill from 2006 through 2009. (Trial Tr. p. 47, R. p. 128; Pet. Ex. 26, R. pp. 430-37, App. pp. 431-38). The DON approval was issued to MRR by DHEC on March 3, 2006. MRR objected to the admission of any evidence which did not exist at the time of DHEC's issuance of the Landfill Permit on July 18, 2008. (Trial Tr. pp. 32-38, R. pp. 113-19; pp. 46-47, R. pp. 127-28, App. pp. 128-29; pp. 74-78, R. pp. 155-59, App. pp.

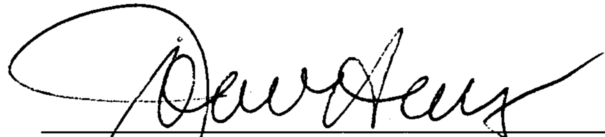
156-60). In *Marlboro Park Hospital v. South Carolina Department of Health and Environmental Control*, this Court held that in a *de novo* hearing the ALC could consider evidence which was not part of the administrative record at the time of the staff decision. 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). However, such holding does not allow the admission of evidence which did not exist at the time of DHEC decision and could not have been considered by DHEC. This Court explained the purpose of allowing evidence beyond that in the administrative record:

> Moreover, when reviewing a contested case on appeal, "[t]he ALJ, as the fact-finder, must make sufficiently detailed findings supporting the denial [or grant] of a permit application." *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control,* 350 S.C. 39, 46, 564 S.E.2d 341, 345 (Ct. App. 2002). "Detailed findings enable [an appellate court] to determine whether such findings are supported by the evidence. . . ." *Id.* Here, because the ALJ was conducting a *de novo* hearing, we find that he properly considered the evidence presented in his pursuit to make "sufficiently detailed findings" of fact for subsequent review.

Id. While such holding clearly allows the ALC to consider any evidence that could have impacted the "denial [or grant] of a permit application" in making detailed findings in its review of DHEC's decision, such holding does not allow the ALC to consider evidence which could not impact DHEC's decision because it did not exist at the time of such decision. Accordingly, the ALC improper admitted evidence which did not exist at the time of DHEC's decision on the Landfill Permit on July 18, 2008.

CONCLUSION

For the foregoing reasons, MRR respectfully requests that this Court affirm the Court of Appeals opinion reversing the decision of the ALC.



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July 8, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Case No. 08-ALJ-07-0425-CC
Court of Appeals Unpublished Opinion No. 2011-UP-380 filed August 4, 2011

Engaging and Guarding Laurens County's Environment ("EAGLE") .... Petitioner,

v.

South Carolina Department of Health and Environmental Control and
MRR Highway 92, LLC .... Defendants,

of whom MRR Highway 92, LLC is.. Respondent.

PROOF OF SERVICE

I certify that I have served Brief of Respondent MRR Highway 92, LLC on counsel of record for Engaging and Guarding Laurens County's Environment ("EAGLE") by depositing a copy of it in the United States Mail, postage prepaid, on July 8, 2013, addressed to:

Amy E. Armstrong, Esquire
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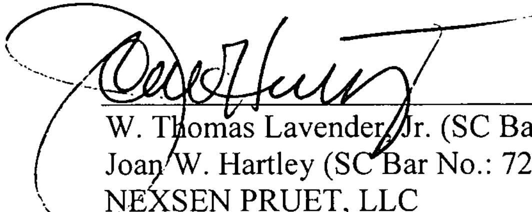

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