

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

ON WRIT OF CERTIORARI

Case No. 08-ALC-07-0425-CC

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

vs.

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

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

**APPENDIX
VOL II OF II
(Pages 000498-000982)**

Amy E. Armstrong, Esquire
SOUTH CAROLINA ENVIRONMENTAL
LAW PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone: (843) 527-0078
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Attorney for the Petitioner, EAGLE

October 24, 2011

W. Thomas Lavender, Jr., Esquire
Joan W. Hartley, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
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Attorneys for MRR
Highway 92, LLC

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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Case No. 08-ALC-07-0425-CC

RECEIVED

OCT 25 2011

S.C. Supreme Court

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

vs.

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

of whom MRR Highway 92, LLC, is Respondent.

**APPENDIX
VOL II OF II
(Pages 000498-000982)**

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Columbia, South Carolina 29202
(803) 771-8900
Attorneys for Appellant MRR
Highway 92, LLC

Attorney for the Petitioner, EAGLE

October 24, 2011

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Exhibit 7



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

July 26, 2006

CERTIFIED MAIL
Return Receipt Requested

Mr. Ronald Gilkerson
11743 Trails End Lane
Huntersville, NC 28078

RE: Final Consistency Determination and Permit Denial

Site: Proposed Hwy 92 Part IV C&D/LCD Landfill
Formerly known as Laurens Recycling and Reclamation Center Part IV C&D Landfill
Coordinates: 34 degrees 37 minutes 20.91 seconds Latitude
-82 degrees 05 minutes 13.61 seconds Longitude

Plan Reviewed: 1997 Laurens County Solid Waste Management Plan, revised July 17, 2006

Dear Mr. Gilkerson:

On February 21, 2006, the Department received a request for a consistency determination for the proposed Hwy 92 Part IV Construction & Demolition Debris Landfill (formerly known as the Laurens Recycling and Reclamation Center Part IV C&D Landfill) in Laurens County.

As you were notified, the Department reviewed the county plan of record, the 1997 Laurens County Solid Waste Management Plan, and on March 14, 2006 issued a preliminary determination that the facility was consistent with the county plan. In the notification, the Department indicated that the initial determination was preliminary, and that a final determination would be necessary prior to issuance of a permit.

On July 18, 2006, the Department was notified that Laurens County had changed their solid waste management plan. The Department has reviewed the revised plan and determined that the proposed Part IV C&D/LCD landfill is prohibited by the Laurens County Solid Waste Management Plan, revised July 17, 2006. Specifically, Section IIA 3.a.) of the revised plan states:

"No more than one (1) privately owned and operated, long-term Construction and Demolition Debris landfills will be allowed to operate in Laurens County at any given time."

Because Laurens County currently hosts one privately owned and operated long-term C&D landfill, the Department has determined that the proposed Hwy 92 landfill is not consistent with the 1997 Laurens County Solid Waste Management Plan, revised July 17, 2006.

Section 44-96-290 (F) of the Solid Waste Policy and Management Act of 1991 states, "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility within a county or municipality may be issued by the Department unless...the proposed facility or expansion is consistent with the local or regional solid waste management plan."

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-9432 • www.scdhec.gov

DHEC-0177

July 26, 2006
Permit Denial
Site: Hwy 92 C&D/LCD Landfill
Laurens County
Page 2 of 2

Because the proposed landfill is not consistent with the 1997 Laurens County Solid Waste Management Plan, revised July 17, 2006, the Department cannot issue a permit for the proposed site and the permit application is hereby denied.

This decision becomes the final agency decision 15 days after notice of the decision unless a written request for final review is filed with the Department. This decision may be appealed by complying with the requirements described in the Notice of Appeal Procedure enclosed.

If you require further assistance, please feel free to contact me (803/896-4202, braswead@dhec.sc.gov) or Jana White (803/896-4221, whitejm@dhec.sc.gov) regarding this matter.

With kindest regards,



Arthur D. Braswell, Director
Division of Mining and Solid Waste Management
Bureau of Land and Waste Management

ADB/jmw

cc: Mr. Ernest B. Segars, Administrator, Laurens County, PO Box 445, Laurens, SC 29360
Rudy Curtis, B.P. Barber PO Box 1116 Columbia, SC 29202-1116
Ms. Joan Litton, Manager, Solid Waste Facility Engineering Section
Mr. Van-Keisler, P.G., Manager, Solid Waste Hydrogeology Section

enclosure

DHEC-0178

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No. 387:

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the Department decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.
2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3323:

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

3. The request for final review should include the following:
 - a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
 - b. a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
 - c. a copy of the Department's decision or action under review
4. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the Department decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due.
5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.
6. The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.
7. If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

Notice

TO: Interested Parties

FROM:  Jana White

DATE: July 26, 2006

RE: Proposed Hwy 92 Part IV C&D/LCD Landfill
Formerly known as the Laurens Recycling and Reclamation Center
Part IV C&D Landfill
Coordinates: 34 degrees 37 minutes 20.91 seconds Latitude
-82 degrees 05 minutes 13.61 seconds Longitude

This is to inform you that after careful consideration, the S.C. Department of Health and Environmental Control (Department) has denied the permit application for the proposed Hwy 92 C&D Landfill in Laurens County. A copy of the letter to the applicant explaining the denial is enclosed.

This decision becomes the final agency decision 15 days after notice has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person. Procedures for filing an appeal of this decision are also enclosed.

If we can be of assistance, please contact me (803/896-4221 whitejm@dhec.sc.gov) or Art Braswell (803/896-4202, braswead@dhec.sc.gov) regarding this matter.

DHEC-0180

Exhibit 8

Aut

County of Laurens
Department of Public Works
Post Office Box 238
Laurens, South Carolina 29360-0238
Telephone (864) 984-6812
Fax (864) 984-3726

RECEIVED

February 20, 2007

FEB 22 2007

Jana M. White, Section Mgr.
South Carolina Department of Health and Environmental Control
Solid Waste Planning, Div. Of Mining and Solid Waste Management
2600 Bull Street
Columbia, South Carolina 29201

OFFICE OF SOLID WASTE
REDUCTION & RECYCLING
BLWM

Re: Laurens County Solid Waste Management Plan
MRR Southern Proposed Hwy. 92 C&D Reclamation and Reprocessing Center

Dear Ms. White:

I have enclosed a copy of Laurens County Ordinance 635 (amendment to the Laurens County Solid Waste Management Plan, Ordinance 425) that was passed by Laurens County Council on February 13, 2007. This ordinance repeals Ordinance 622. Please add this ordinance to the official Laurens County Solid Waste Management Plan on file with SC DHEC.

With the passage of Ordinance 635, we would agree that the MRR Southern facility referenced above, would be consistent with the County's current Solid Waste Management Plan (based on the previous information we had been furnished concerning the MRR Southern proposed facility). As Always, we will rely on careful review by SC DHEC in determining if the site is environmentally suitable for the proposed use and can be operated in a manor that meets all regulatory requirements and protects the health and safety of our citizens.

Sincerely,

Scott Holland

Scott Holland, Dir.

c.c. A Cruickshanks, IV

DHEC-0188

STATE OF SOUTH CAROLINA)
)
COUNTY OF LAURENS)



ORDINANCE #635

AN ORDINANCE TO REPEAL, RESCIND AND DECLARE NULL AND VOID,
ORDINANCE #622 WHICH AMENDED SECTION II
OF THE LAURENS COUNTY SOLID WASTE MANAGEMENT PLAN

WHEREAS, Laurens County Council on January 28, 1997 enacted Ordinance #425 (amended by Ordinance #526, March 13, 2000) which established, among other things, the Solid Waste Management Plan for Laurens County, South Carolina; and

WHEREAS, Laurens County Council amended Section II of Ordinance #526 by the enactment of Ordinance #622; and

WHEREAS, Laurens County Council, at the time of enactment of Ordinance #622, believed that such action was enforceable, applicable and in the best interest of the citizens of Laurens County and took such action for the benefit and protection of the citizens of the county; and

WHEREAS, Laurens County Council has been advised that the actions taken in enacting Ordinance #622 may be of questionable legal basis and may not be in keeping with the rule of law as it relates to the matters enacted by the Ordinance; and

WHEREAS, by the provisions therein and pursuant to the powers vested in the Laurens County Council, corrective action is necessary to preserve the continued enforcement and application of the provisions of Ordinance #425 as amended by Ordinance #526; and

WHEREAS, Laurens County Council in order to rectify and correct the alleged legality of the action previously taken, desires to repeal, rescind and to declare Ordinance #622 null, void and of no further force or effect.

NOW, THEREFORE, Laurens County Council, pursuant to the authority granted by the Constitution of the State of South Carolina and the General Assembly of this State, hereby repeals, rescinds and does declare Ordinance #622 to be null, void and of no further force or effect.

BE IT ORDAINED BY THE LAURENS COUNTY COUNCIL:

1. **PURPOSES:** It is the stated purpose of this Ordinance to protect the general health, safety and public welfare of the citizens of Laurens County, South Carolina; to comply with the laws and Constitution of this State and to reinstate specific elements of the solid waste management plan and the enforcement provisions therein contained.
2. **AUTHORITY:** This Ordinance is adopted under the authority and process granted by the General Assembly of the State of South Carolina and the Constitution of this State. Jurisdiction shall be exclusively within Laurens County.
3. **APPLICABILITY:** The provisions of this Ordinance shall apply to all unincorporated areas of Laurens County, South Carolina, and those municipalities which, by written agreement, contract to have these provisions administered within their municipal limits.

ORDINANCE #635
AMENDING ORDINANCE #622
SOLID WASTE MANAGEMENT PLAN

1

DHEC-0189

4. LANGUAGE: The language used in this Ordinance, if used in the present tense, shall include the future tense. Words used in the singular shall include the plural, and the plural the singular, unless, however, the context clearly indicates the contrary. The use of the word "shall" is mandatory and the word "may" is permissive.
5. REAFFIRMATION: In all respects the provisions of Ordinance #425, as amended by Ordinance 526, are hereby reaffirmed.
6. EFFECTIVE DATE: The effective date of this Ordinance shall be upon three (3) readings and a public hearing as required by law.
7. SEVERABILITY: Should any paragraph, clause, phrase, or provision of this Ordinance be judged invalid or held unconstitutional by a Court of competent jurisdiction, such declaration shall not effect the validity of any other section of the Ordinance as a whole or any part or provision thereof, other than the part so decided to be invalid or unconstitutional. All meanings, enforcement and interpretations shall be pursuant to the laws of the State of South Carolina.

BE IT SO ORDAINED by Laurens County Council.

ATTEST:

Ernest B. Segars
Ernest B. Segars, Administrator
Laurens County Council
Laurens County, South Carolina

Betty C. Walsh
Betty C. Walsh, Clerk
Laurens County Council
Laurens County, South Carolina

First Reading: January 9, 2007
Second Reading: January 23, 2007
Public Hearing: February 13, 2007
Third Reading: February 13, 2007

LAURENS COUNTY COUNCIL:

James A. Coleman
James A. Coleman, Chairman

Diane B. Anderson
Diane B. Anderson, Vice Chair

Edward A. McDaniel
Edward A. McDaniel, Council Member

-OPPOSED - (bw)
Ted G. Nash, Council Member

- OPPOSED - (bw)
P. Keith Tollison, Council Member

-ABSTAINED - (bw)
David E. Tribble, Jr. Council Member

Joseph E. Wood, Jr.
Joseph E. Wood, Jr. Council Member

Exhibit 9



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

RECEIVED

APR 5 2007

DIVISION OF MINING &
SOLID WASTE MANAGEMENT
BLWM

April 4, 2007

CERTIFIED MAIL

7006 0810 0003 6041 4747

Mr. Ronald Gilkerson, PG, MRR
Southern Company
11925 Sam Roper Drive, Suite C, Office 2
Charlotte, North Carolina 28269

RE: Preliminary Consistency Determination - Consistent
Site: Proposed MMR Hwy 92
Part IV C&D Landfill and Reprocessing Center
Location: Choice Road, Gray Court, South Carolina,
Coordinates: 34 degrees 37 minutes 20.91 seconds Latitude
-82 degrees 05 minutes 13.61 seconds Longitude
County: Laurens County
Plan Reviewed: 1997 Laurens County Solid Waste Management Plan as amended February
13, 2007.

Dear Mr. Gilkerson:

On February 22, 2007 the Department received notification that the Laurens County Solid Waste Plan had been amended on February 13, 2007. At your request, the Department has performed a review of the amended plan to determine if the proposed facility indicated above is consistent with the current Laurens County Plan.

The Department has determined that the proposed Hwy 92 Part IV C&D/LCD Landfill to be located in Gray Court is consistent with the 1997 Laurens County Solid Waste Management Plan as amended February 13, 2007.

The Department will continue to move forward based on the preliminary determination. As a reminder, this is a preliminary review. A final consistency determination will be made when the permit is ready for issuance.

If you require further assistance, please feel free to contact me 803/896-4221, whitejm@dhec.sc.gov or Art Braswell 803/896-4202, braswead@dhec.sc.gov regarding this matter.

With kindest regards,

Jana M. White, Section Manager
Solid Waste Planning and Grants
Division of Mining and Solid Waste Management
Bureau of Land and Waste Management

JMW/jmw

cc: ☒ Mr. Ernest B. Segars, Administrator, Laurens County, PO Box 445, Laurens, SC 29360
☒ Ms. Joan Litton, Manager, Solid Waste Facility Engineering Section
Mr. Van Keisler, P.G., Manager, Solid Waste Hydrogeology Section

DHEC-0195

Exhibit 10



C. Ead Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

February 14, 2008

CERTIFIED MAIL

91 7108 2133 3932 9270 0080

Mr. Ronald C. Gilkerson, P.G.
MRR Highway 92, Inc.
11743 Trails End Lane
Charlotte, NC 28078

RE: Draft Permit for Proposed Highway 92 Construction, Demolition and Land-Clearing Debris
Landfill and Reprocessing Center
Location: 34° 37' 20.91" N, 82° 5' 13.61" W
Laurens County

Dear Mr. Gilkerson:

The Department has completed the review of your submittal dated June 2006, and July 2007 with the revisions dated October 2007. Enclosed is a draft permit for the proposed Highway 92 Construction, Demolition and Land-Clearing Debris Landfill and Reprocessing Center in Laurens County. If you have any comments regarding the permit conditions, please respond by March 21, 2008.

The Public Notice of the draft permit and Public Hearing will be published in *The Laurens County Advertiser* on February 20, 2008, and *The Greenville News* on February 14, 2008. (Copy Attached)

If you should have any questions, please contact Timothy M. Elcazer at (803) 896-4217.

Sincerely,

Joan F. Litton, Manager
Solid Waste Permitting Section
Division of Mining and Solid Waste Management
Bureau of Land and Waste Management

JFL/TME/tmc

Enclosures

cc: Tyler Smith, Region 1, Greenwood EQC Office
Keith Collinsworth, P.G. Manager, Solid Waste Groundwater Section
Marty Lindler, Manager, Solid and Hazardous Waste Compliance
Jeff Herbig, P.E., B.P. Barber and Associates, Columbia, SC
BLWM File # 021153

DHEC - 1024

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

2400 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.net



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

OFFICE OF ENVIRONMENTAL QUALITY CONTROL
BUREAU OF LAND AND WASTE MANAGEMENT
CONSTRUCTION, DEMOLITION, AND LAND-CLEARING DEBRIS LANDFILL
FACILITY ID #####

Permit Issued Date: _____ Permit Effective Date: _____

Permission is hereby granted to:

Name of Facility: Highway 92 Construction, Demolition and Land-Clearing Debris Landfill
and Reprocessing Center
Permittee: MRR Highway 92, LLC
Address: 11743 Trails End Lane
Charlotte, NC 28078
Supervisor: Mr. Ronald C. Gilkerson
Phone: (704) 947-6652

for the operation of a Construction, Demolition, and Land-Clearing Debris Landfill located at 322 Choice Road off SC Highway 92 two (2) miles east of _____ South Carolina.

This permit is issued pursuant to Sections 96-10 *et seq.* (Supp. 2007) and 25A S.C. Code Regs. 61-107.11 (Supp. 2007). The authority granted hereunder is subject to the requirements of the aforementioned laws and regulations and the attached conditions.

Kent M. _____, P.G., Director

R. Craig Kennedy, P.G., Assistant Director

Division of Mining and Solid Waste Management
Bureau of Land & Waste Management

Facility ID #####
February 14, 2008
Page 1 of 4

DHEC - 1025

HIGHWAY 92 CONSTRUCTION, DEMOLITION, AND LAND-CLEARING DEBRIS LANDFILL
FACILITY ID 302####-####

A. SPECIAL CONDITIONS

1. The Permittee shall adhere to the Design Drawings and Engineering Report submitted to the Department dated June 27, 2006, and July 30, 2007 with the permit dated October 26, 2007, unless permit conditions state otherwise.
2. The allowable rate of disposal for this facility is one hundred fifty thousand (150,000) tons per-fiscal year (July 1 to June 30). Information concerning the facility's previous fiscal year's waste receipts is due in the form of an annual report to the Department no later than October 15th of each year, as required by Section F.4 of R.61-107.11, to the attention of:

Manager, Solid and Hazardous Waste Compliance Section
SC DHEC Bureau of Land and Waste Management
2600 Bull Street
Columbia, South Carolina 29208

3. This permit is limited solely to the disposal of items listed in Appendix I of R.61-107.11.
4. The total surface area within the permitted waste disposal footprint that has not been deemed closed by the Department is limited to twelve (12) acres. For an area to be considered closed, the following items shall be completed:

- a. Official certification from a Professional Engineer registered in the State of South Carolina that the area has been closed in accordance with final cover requirements pursuant to Regulation 61-107.11.

The area shall be inspected and deemed closed by Department staff.

5. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that the total surface area within the permitted waste disposal footprint that has not been deemed officially closed by the Department pursuant to Special Condition No. 4 (above) is equal to or less than 12 acres (at the time of the certification). The certification shall have been completed within the last sixty (60) days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.

6. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that enough soil is currently available to use for final cover (38,720 yd³ of soil for 12 acres with 2' thickness). The certification shall have been completed within the last 60 days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.
7. The financial assurance mechanism must be in place before accepting construction, demolition, and land-clearing debris waste.
8. All waste, excluding non-friable asbestos containing material, shall be covered at least every thirty (30) days with a minimum of six (6) inches of soil.
9. Non-friable asbestos containing material shall be covered immediately upon receipt with at least six (6) inches of clean soil.

B. GENERAL PERMIT CONDITIONS

1. If the landfill should become inundated with water, the water shall be removed before continuing disposal of waste.

C. ENVIRONMENTAL MONITORING PERMIT CONDITIONS

1. GROUNDWATER DETECTION MONITORING SYSTEM

- a) The Permittee shall maintain a groundwater detection monitoring system consistent with the most recently approved Groundwater Sampling and Analysis Plan. The groundwater detection monitoring system shall consist of monitoring wells as designated in the most recently approved Groundwater Sampling and Analysis Plan and any other monitoring wells specified by the Department.
- b) The Permittee shall perform all groundwater activities in accordance with the most recently approved Groundwater Sampling and Analysis Plan.
- c) The Permittee must evaluate analytical results in accordance with the most recently approved Sampling and Analysis Plan and any subsequent modifications required by the Department.
- d) The Permittee must determine during each sampling event the elevation of the groundwater surface in each well relative to mean sea level (MSL) to the nearest hundredth of a foot. All elevations should be determined on the same day. The Permittee shall determine the total depth of each well on an annual basis.

- e) Groundwater samples shall be analyzed by a laboratory certified by the State of South Carolina.

2. ASSESSMENT OF GROUNDWATER IMPACT

If the Permittee determines that a groundwater protection standard has potentially been exceeded for one or more constituents for routine monitoring at any monitoring well at the relevant point of compliance, then the Permittee shall perform any necessary assessment actions.

3. REPORTING

- a) The Permittee shall submit to the Department the results of the groundwater monitoring program as specified in the most recent approved Groundwater Sampling and Analysis Plan, in accordance with the following schedule:

Sampling Schedule

March
September

Results Due

May 15
November 15 (Annual Report)

- b) The Permittee shall submit an annual report prepared by a South Carolina certified groundwater scientist summarizing the semi-annual determinations of groundwater flow direction and rate. In addition, the report shall also make a determination as to whether the monitoring well network continues to meet requirements of permit condition C.1.a.
- c) The established groundwater data collected in the implementation of the groundwater monitoring program as specified by this Permit shall be submitted to the SCDHEC Bureau of Land and Resource Management Division of Hydrogeology Solid Waste Groundwater Section, and the Solid Waste Consultant in Region 1EQC (Greenwood).

SC DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

NOTICE OF PUBLIC HEARING

Topic: Public Hearing for the proposed Highway 92 Construction, Demolition and Land-Clearing Debris (C&D) Landfill and Reprocessing Center

Date: Thursday, March 13th, 2008

Time: 6:30 pm

Location: Gray Court - Owings Middle School Auditorium
9210 Highway 14, Gray Court, SC 29645

The South Carolina Department of Health and Environmental Control's (SCDHEC) Solid Waste Permitting Section has received a permit application from MRR Highway 92, LLC for the construction and operation of a new Long-Term, Construction, Demolition and Land-Clearing Debris Landfill and Reprocessing Center, to be located at 322 Choice Road, Gray Court, SC 29645, approximately one (1) mile NE of the City of Gray Court, SC off SC Highway 92 in Laurens County, South Carolina. The proposed landfill is estimated to have a disposal lifetime of more than fifty (50) years.

SCDHEC requires that a permit be issued for C&D landfills pursuant to SC Code Ann. Sections 44-96-10 et. Seq. (Supp. 2007) and 25A SC Code Reg. 61-107.11, *Construction, Demolition and Land-Clearing Debris Landfills* (Supp. 2007). The types of wastes that can be accepted at the Highway 92 C&D Landfill and Reprocessing Center are described in Appendix I of the above-mentioned regulation. Acceptable wastes include, but are not limited to, land-clearing debris, bricks, blocks, shingles, untreated lumber, and other wastes listed in Appendix I that have not been in contact with lead-based paint, hazardous constituents, or petroleum products. Wastes that are not acceptable at C&D landfills include household garbage, hazardous waste, and infectious waste. For a more detailed description of Appendix-I-acceptable wastes, please contact one of the persons below to view the application or to request a C&D landfill fact sheet. A copy of the regulation may also be viewed at the following website: <http://www.scdhec.gov/environment/lwm/regulatory.htm>.

At this time, the Solid Waste Permitting Section has completed its review of the permit application and found that the application meets all technical requirements of R.61-107.11. The Solid Waste Permitting has completed a draft permit and hereby gives notice to the public. During the public comment period the Department will be taking comments from the public concerning the draft permit and/or the permit application. The Public Hearing has been scheduled to allow members of the public the opportunity to ask questions and make comments regarding all aspects of the permit application and draft permit.

Who to contact? Copies of the permit application are available by appointment for public viewing during normal working hours at the following locations:

Bureau of Land and Waste Management
SC Department of Health and Environmental Control
8911 Farrow Road
Columbia, SC 29223
Contact: Timothy M. Eleazer, (803) 896-4217
E-mail: eleazetm@dhec.sc.gov

Environmental Quality Control Regional Office
SC Department of Health and Environmental Control
Region 1
613 South Main Street
Greenwood, SC 29646
Contact: Tyler Smith, (864) 223-0333
E-mail: smithtg@dhec.sc.gov

Any interested person(s) may submit written comments concerning the proposed landfill permit application and/or draft permit to: Mr. Timothy M. Eleazer, SCDHEC BLWM, 2600 Bull Street, Columbia, SC 29201.

To be considered, all comments or requests must be received no later than Friday, March 21, 2008, at which time the public comment will end. Any individuals with disabilities or special needs who want to review the permit application should contact the Department to discuss any special services needed. A minimum of one (1) week's prior notice is requested to allow the Department to make any necessary arrangements.



UNITED STATES
POSTAL SERVICE

Date: 03/05/2008

Tammy Whittle:

The following is in response to your 03/05/2008 request for delivery information on your Certified item number 7108 2133 3932 9270 0080. The delivery record shows that this item was delivered on 02/27/2008 at 11:50 AM in HUNTERSVILLE, NC 28078. The scanned image of the recipient information is provided below.

Signature of Recipient:

RONALD C. GILKREAN
[Handwritten signature]

Address of Recipient:

11743 RAISENDA LANE

Thank you for selecting the Postal Service for your mailing needs. If you require additional assistance, please contact your local Post Office or postal representative.

Sincerely,

United States Postal Service

DHEC - 1030

Exhibit 11



Agenda for Public Hearing
Proposed Hwy. 92 Construction & Demolition (C&D) Landfill
March 13, 2008
6:30 PM

Welcome/Introductions.....Donna Rowe, SCDHEC Meeting Facilitator
Public Officials
DHEC Staff

Public Hearing Opening Remarks.....Hearing Officer-Scott Wilson

Application Overview Presentation.....BLWM Project Manager- Tim Eleazer
BOW Storm Water Manager- Jill Stewart

Formal Public Comment Period Ron Gilkerson, MRR Hwy. 92 LLC

Public Officials

Citizen Group Representative(s)

Individual Citizens

Closing Remarks for Public Hearing.....Hearing Officer

(Short break)

Question/Answer Session

If you have any additional questions, please contact:

Tim Eleazer, Solid Waste Project Engineer.....(803) 896-4217

Sarah Daniels, EQC Region 1, Greenwood Office.....(864) 223-0333

Or mail your written comments to:

SCDHEC- BLWM
Attention Tim Eleazer
2600 Bull St.
Columbia, SC 29201

DHEC - 1040



Fact Sheet

SC Department of Health and Environmental Control • 2600 Bull Street • www.scdhec.gov • Promoting and protecting the health of the public and the environment

Project Name: Proposed Highway 92 Construction, Demolition and Land-Clearing Debris (C&D) Landfill and Reprocessing Center

Project Location: In Laurens County, 322 Choice Road, Gray Court, South Carolina. Approximately 2 miles east of Gray Court, South Carolina off SC Highway 92.

Applicant: MRR Highway 92, LLC
Represented By: Mr. Ronald C. Gilkerson

Project Details:

- Total property for landfill is 130 acres; 69 acres will be used for waste placement
- Lowest point of the property before land filling is 670 feet; after land filling, the expected highest point of the property will be 830 feet, a net increase of 160 feet.
- Limited to 12 acres open for disposal at any one time
- Maximum rate of disposal: 154,000 tons per year
- Estimated total disposal capacity: 7,800,000 cubic yards
- Estimated landfill life expectancy: 31-73 years
- Operations on Monday through Friday, 7:00 am – 6:00 pm, Saturday, 7:00 am – 12:00 pm
- Proposed landfill site has no applicable zoning

DHEC Requirements for C&D Landfills (not a complete list):

- Landfill must be greater than:
 - 1000 feet from any school, residence, day care, hospital, park
 - 200 feet from any surface water body
 - 100 feet from any property line
 - 100 feet from any drinking water well
- Landfill bottom will be a minimum of 5 feet above seasonal high groundwater table.
- Must make available to DHEC a source of funding to properly close landfill (\$333,200 for 12 acres).
- Wastes that are listed in Appendix I of Regulation 61-107.11 are approved for disposal (copies of Appendix I are available). Examples include: brick, concrete block, plaster/plasterboard, shingles, insulation, structural steel, lumber, tile, glass, hardened concrete/cement
- Groundwater monitoring will be conducted semi-annually at the landfill site.

For more information: The South Carolina Regulation covering C&D Landfills, R.61-107.11, can be found at <http://www.scdhec.gov/environment/lwm/regulatory.htm>

All comments must be submitted by Friday, March 21, 2008. Comments should be sent to the attention of Mr. Timothy M. Eleazer at the mailing address provided on the back.

DHEC Feedback Survey: Public Meeting

Thank you for your answers, which will be kept anonymous.



Meeting name: Hwy. 92 C&D Landfill Location: Gray Court-Owings Middle Sch
DHEC Program Area: BLWM/BOW Date: 03/13/08

1. Please tell us how you heard about this meeting (check all that apply):

☐ radio ☐ television ☐ newspaper ☐ flyer(s) ☐ notice (posted) ☐ notice (mail)
☐ word of mouth ☐ DHEC website ☐ other (please specify) _____

2. What other ways would you like to hear about these type of meetings?

3. Did you receive any background information about what was being discussed tonight? ☐ Yes ☐ No

- If yes, was it understandable? ☐ Yes ☐ No

- If yes, did it give you a way to contact someone for more information? ☐ Yes ☐ No

4. Did you ask for specific information prior to the meeting? ☐ Yes ☐ No

- If yes, did you receive the information you requested? ☐ Yes ☐ No

For the following, please indicate how you feel on each comment	Strongly Dislike	Dislike	Like	Strongly Like
5. The notice about the meeting clearly explained the purpose.				
6. The time that the meeting was held was convenient.				
7. The length of the meeting was about right.				
8. The location of the meeting was convenient.				
9. The purpose of the meeting was what I expected.				
10. The speakers were easy to hear.				
11. I understand the role of DHEC in this process.				
12. The speakers at the meeting were easy to hear.				
13. The speakers at the meeting used language I could understand.				
14. The presentation today was easy to understand.				
15. The written materials I received at the meeting were easy to understand.				
16. The meeting met my needs.				
17. Participants' input will make a difference.				
18. My concerns were heard.				
19. I know how to get follow-up information.				
20. I know who I can go to participate in this process.				
21. I understand the "next steps" in the process.				
22. I trust the information from DHEC.				

23. How could this meeting have better met your expectations?

24. Please indicate which group(s) you represent:

☐ neighborhood group ☐ state or tribal or local government ☐ business/industry/trade association
☐ local non-profit organization ☐ federal government ☐ other (please specify)
☐ national environmental organization ☐ resident

25. Additional comments about how to improve this meeting or this survey:

Exhibit C

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's
Environment ("EAGLE"), a non-profit
membership organization,

Petitioner,

vs.

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

Respondents.

Docket No. 08-ALC-07-0425-CC

PREHEARING STATEMENT
OF
PETITIONER

Engaging And Guarding Laurens County's Environment ("EAGLE") hereby submits the following as its Prehearing Statement:

1. The nature of this proceeding.

This proceeding is a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control to issue a Class 2 Solid Waste Landfill Permit, and to approve a Stormwater and NPDES general permit to MRR Highway 92, LLC, for the proposed Highway 92 C&D landfill in Laurens County.

2. Statutory provisions conferring subject matter jurisdiction to the agency and other applicable statutes and regulations.

S.C. Code Ann. §§ 1-23-310, *et seq.*, SC Code Ann. § 1-23-600, and S.C. Code § 1-23-650 *et seq.* (1987 & Supp. 2006); S.C. Code Ann. § 48-1-10, *et seq.*; SC Code Ann. § 44-1-60(F); South Carolina Solid Waste Management Act, S.C. Code Ann. § 44-96-10 *et seq.*; DHEC Regulation R.61-107; the Stormwater Management and Sediment Reduction Act of 1991, S.C. Code Ann. §§ 48-14-10, *et seq.*; Stormwater regulations, S.C. Code Ann. Regs. §§ R.72-300 through 316; Water quality standards, S.C. Code Ann. Regs. § R.61-68.

3. The issues presented for determination.

- Section 44-96-290(E) of the Solid Waste Management Act states: "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." There is no need for this landfill, and there has been no demonstration of need:

- The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill.
- Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste.
- There is an existing commercial Class Two solid waste landfill, known as the Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton.
- The needs test provided in DHEC Regulation 61-107.17 fails to comply with the "demonstration of need" requirement of Section 44-96-290 of the Act, in that said regulation does not in fact measure need at all. Even if R.61-107.17 could allow for a true and objective determination of need, the regulation is applied by DHEC in an arbitrary and capricious manner in which no true assessment of need is made. The permit proposed for the MRR landfill is a perfect example of the arbitrary and capricious result that is obtained using Regulation 61-107.17 in the manner in which it is presently interpreted and applied by the DHEC staff - resulting in a purported determination of need where clearly there is no objective need.
- Section 44-96-80 of the South Carolina Solid Waste Policy and Management Act of 1991 authorizes and directs each county to prepare and maintain a solid waste management plan, and allows each county the option of having its own county plan or participating in a regional plan. Section 44-96-80(A) states in part that each solid waste management plan "must provide for public participation and include, at a minimum, the following:
 - (1) an estimate of the amount of solid waste currently disposed of at solid waste disposal facilities within that county or region and a projection of the amount of solid waste which will be disposed of at solid waste disposal facilities during the twenty-year period following this chapter's effective date;
 - (2) an estimate of the current capacity within that county or region to manage solid waste, including identification of each solid waste management facility and a projection of its useful life;
 - (3) an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period;
- DHEC is charged with the responsibility for reviewing each county or regional solid waste management plan.

- The Laurens County solid waste management plan fails to meet the requirements of Section 44-96-80, in that it fails to provide the estimates and analysis required by the subsections quoted above. Notwithstanding this failure, the DHEC staff has not informed the county of the failure, nor has it considered the inadequacy of the Laurens County plan in this permitting decision.
- The proposed permit violates the South Carolina Solid Waste Policy and Management Act and the DHEC regulations implementing the Act, in the following respects:
 - The permit was issued in violation of Section 44-96-80 of the Act, in that the permit was based in part on a county solid waste management plan that fails to comply with the requirements of Section 44-96-80.
 - The permit is in violation of Section 44-96-180(E) and DHEC Regulations 61-107.17, in that there is no need for this landfill.
 - The DHEC staff erroneously applied Regulation 61-107.17 to imply a need for the landfill solely upon determining that there is one other such landfill within a 10-mile radius. This determination plainly and simply does not meet the demonstration of need requirements of Section 44-96-290(E) of the Act.
 - Because Laurens County generates less than 20,000 tons per year of Class II solid waste, and because the county already contains a commercial Class II solid waste landfill permitted for a capacity of 150,000 tons per year, there is no need for this landfill. The permitting of a second commercial Class II solid waste landfill in Laurens County would result in a capacity for disposal of such waste at least 15 times the actual amount of waste generated within Laurens County. Such a situation plainly would violate Section 44-96-290(E) of the Solid Waste Management Act.
 - The permit is in violation of DHEC Regulation 61-107.19, in that the landfill is incompatible with local land use, and the DHEC staff erroneously and improperly limited its examination of land use in this area. The landfill is incompatible with the homes, schools, recreation areas and roads within its immediate vicinity.
 - The permit is in violation of DHEC Regulation 61-107.19, in that the proposed landfill is not located on roadways that "are of all-weather construction and capable of withstanding anticipated load limits." The DHEC staff erroneously and improperly disclaimed responsibility for assessing road traffic, despite the express mandate of the regulations.
 - The proposed landfill would be located on a tract of land containing wetlands and adjacent to Lake Martin, an emergency water supply for Laurens County. EAGLE believes that this location is inappropriate and that the applicant has failed to demonstrate that this landfill will not cause significant negative impacts to the wetlands and lake.

- Upon information and belief, the stormwater plan for this landfill fails to comply with applicable state and federal requirements, fails to protect the waters of this state from the potential pollution from this landfill, and fails to minimize the potential for floodwaters to come into contact with waste.
- Upon information and belief, the landfill is likely to lead to injurious effects on groundwater in an area where the residents rely primarily upon well water.
- Upon information and belief, the owners of the applicant limited liability company have a history of landfill permit violations and closures in North Carolina.
- Upon information and belief, a former official of the South Carolina Department of Health and Environmental Control is presently working as a consultant for MRR, creating at a minimum, the appearance of impropriety.
- The Petitioner believes that there are additional violations that will be revealed through the process of discovery during this contested case proceeding.

5. A brief summary of the facts to be presented at the hearing.

Engaging And Guarding Laurens County's Environment ("EAGLE") is a non-profit, membership-based organization existing under the laws of the State of South Carolina. EAGLE is devoted to the conservation, protection and preservation of natural resources and to the education of the public to accomplish these ends. EAGLE represents its members, who use and enjoy the waters, wetlands and other natural resources of Laurens County in the vicinity of this project, and whose use and enjoyment are adversely affected by activities that impair or destroy these resources.

EAGLE and its members have vital interests in the protection of the land, air, waters, wetlands, and other natural resources in Laurens County, through the implementation and enforcement of the Solid Waste Management Act and the regulations promulgated thereunder. Members of EAGLE regularly use and enjoy the land, air, waters, wetlands, and other natural resources that are threatened and would be impacted by the landfilling activities that would be authorized by the permit at issue in this proceeding. These members enjoy bird-watching, observing nature, fishing, and recreating in the creeks, canals, and marshes in the area of the proposed landfill, and many of them live on the banks of the lake adjacent to which the proposed landfill is located. The existence and operation of the proposed landfill in this particular location will decrease the enjoyment of the area and its natural resources by members of EAGLE.

In 2006, MRR Highway 92, LLC, filed applications for permits to construct and operate a Construction, Demolition, and Land-Clearing Debris Landfill at a site on Choice Road off Highway 92 near Gray Court in Laurens County, South Carolina.

On July 18, 2008, the DHEC Bureau of Land and Waste Management gave notice of the

proposed issuance of a Class 2 Solid Waste Landfill permit to MRR Highway 92, LLC, pursuant to the new landfill regulations that became effective in May, 2008. On July 24, 2008, the DHEC Stormwater Permitting Section gave notice of the approval of a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES general permit.

On August 4, 2008, EAGLE filed a timely request for a final review conference before the DHEC Board. On August 20, 2008, the Board voted to deny EAGLE's request for a final review conference.

The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill. Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste. There is an existing commercial Class Two solid waste landfill, known as the Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton. Accordingly, there is no need for this landfill.

Additional factual statements are set forth above in the statement of issues.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.

None identified to date. If any such motions are identified, this statement will be amended or supplemented.

7. A list of proposed witnesses and exhibits.

Witnesses:

Members of the Petitioner to establish standing: Jeff Nichols, Jimmy Martin, Jacqui Lanier and others

Art Braswell

Kent Coleman

Sarah Daniels

Keith Colingsworth

Marty Lindler

Jeff Herbig

Ronald C. Gilkerson

Jill Stewart

Jana White

Senator Daniel B. Verdin III

Representative Michael A. Pitts

Representative Jeffrey D. Duncan

Representative J. Adam Taylor

Jeff Field

Fred Counts

W. Dennis Ginn

J. Michael Reddeck

Joan Litton

Exhibits

Documents from the DHEC files related to this project

Maps and photographs of the landfill site and surrounding lands

Documents relating to waste generated in Laurens County

Documents relating to existing Class II landfills in and around Laurens County

Additional documents to be listed in an amended or supplemental prehearing statement

8. A statement regarding the necessity for discovery.

The Petitioner is serving a set of standard interrogatories and a first request for production of documents upon the Respondents simultaneously with the filing of this prehearing statement.

The Petitioner anticipates the possibility of additional requests for production of

documents and the need to take at least the three depositions allowed under the rules. The Petitioner may need to take additional depositions, and will make this decision after reviewing the prehearing statements of the Respondents and reviewing their responses to the initial round of discovery.

The Petitioner requests that the Court allow at least 90 days from the date of this prehearing statement for discovery and trial preparation.

9. The estimated length of the hearing.

Two to four days.

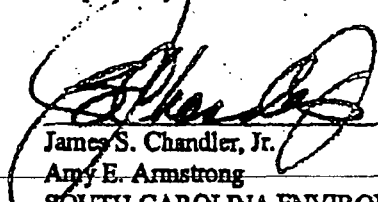
10. Any dates in the next one hundred twenty (120) days when you will not be available for a hearing.

December 2, 9-11, 15-17; January 19-21, February 5

11. An email address where you can be reached.

jchandler@sceelp.org
amv@sceelp.org

Respectfully submitted,



James S. Chandler, Jr.
Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for Engaging And Guarding Laurens County's
Environment ("EAGLE")

Georgetown, South Carolina

November 17, 2008

FILED

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MAR 17 2009
SC ADMIN. LAW COURT

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

Petitioner,

vs.

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

Respondents.

Docket No. 08-ALJ-07-0425-CC

RESPONDENT MRR
HIGHWAY 92, LLC'S MEMORANDUM
OF LAW IN SUPPORT OF ITS MOTION
FOR PARTIAL SUMMARY
JUDGMENT

Respondent MRR Highway 92, LLC ("MRR") submits this memorandum of law in support of its Motion for Partial Summary Judgment ("Motion"), filed contemporaneously herewith.

I. STATEMENT OF FACTS

This action is an appeal of the decision of Respondent South Carolina Department of Health and Environmental Control (the "Department") to issue a permit to MRR for construction and operation of a Class Two Landfill to be located 322 Choice Road, Gray Court in Laurens County ("Proposed Landfill").

On February 21, 2006, a request for a demonstration of need determination was submitted to DHEC for the Proposed Landfill. (See February 21, 2006 letter from Rudy M. Curtis to Joan Litton, Exhibit 4 to the 30(b)(6) Deposition of South Carolina Department of Health and Environmental Control by Kent Coleman, P.G., on February 12, 2009, hereinafter "DHEC 30(b)(6) Dep.," attached to the Motion as Exhibit A). At that time, there were fewer than two commercial Part IV C&D landfills within a ten-mile radius of the location of the Proposed Landfill. (See DHEC 30(b)(6) Dep., p. 44, ll. 13-

16, attached to the Motion as Exhibit A). On March 3, 2006, the Department issued a demonstration of need ("DON") determination for the Proposed Landfill. (See March 3, 2006 letter from Joan Litton to Ronald C. Gilkerson, Exhibit 5 to DHEC 30(b)(6) Dep., attached to the Motion as Exhibit A). The DON approval for the Proposed Landfill established a maximum annual disposal limit of 154,000 tons per year. *Id.* This disposal rate was based on the amount of C&D waste generated in Laurens, Greenville, and Spartanburg Counties for calendar year 2004. (*Id.*; see also DHEC 30(b)(6) Dep., p. 41, l. 22 – p. 42, l. 5). 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. *Id.* Accordingly, the total C&D waste generated in these counties in 2004 was 154,394.

On February 21, 2006, MRR requested a consistency determination for the Proposed Landfill. (See February 21, 2006 letter from Rudy M. Curtis to Jana White, Exhibit 1 to Affidavit of Joan W. Hartley, hereinafter "Hartley Aff.," attached to the Motion as Exhibit B). On March 14, 2006, the Department issued a preliminary consistency determination, finding the Proposed Landfill to be consistent with the 1997 Laurens County Solid Waste Management Plan ("1997 County Plan"). (See March 14, 2006 letter from Jana M. White to Ronald Gilkerson, Exhibit 2 to Hartley Aff., attached to the Motion as Exhibit B). On June 27, 2006, MRR submitted a permit application for the Proposed Landfill to the Department. (See June 27, 2006 letter from Rudy M. Curtis to Joan Litton, Exhibit 3 to Hartley Aff., attached to the Motion as Exhibit B). The permit application included a jurisdictional determination, identifying 8.3 acres of wetlands on the property on which the Proposed Landfill would be constructed. (See April 23, 2007 letter from Amy Capellino to Britt Felder, Exhibit 4 to Hartley Aff.,

attached to the Motion as Exhibit B). The approved design for the construction and operation of the Proposed Landfill does not disturb the wetlands identified on the property. (See July 18, 2008 Memorandum from Kent M. Coleman to Concerned Citizens, Exhibit 5 to Hartley Aff., attached to the Motion as Exhibit B).

On July 17, 2006, the Laurens County Council passed Ordinance No. 622, which purportedly reduced the number of allowable privately owned long-term construction, demolition, and land-clearing debris landfills from three to one. (See July 18, 2006 Memorandum from Scott Holland to Jana White, Exhibit 6 to Hartley Aff., attached to the Motion as Exhibit B). By memorandum dated July 18, 2006, Scott Holland of the Laurens County Department of Public Works advised the Department that Ordinance No. 622 had passed and requested that the Department amend the 1997 County Plan to include this ordinance. *Id.* By letter dated July 26, 2006, the Department notified MRR of its final consistency determination and denied the permit for the Proposed C&D/LCD Landfill. (See July 26, 2006 letter from Arthur D. Braswell to Ronald Gilkerson, Exhibit 7 to Hartley Aff., attached to the Motion as Exhibit B). On February 13, 2007, Laurens County Council enacted Ordinance No. 635 which repealed Ordinance No. 622. (See February 20, 2007 letter from Scott Holland to Jana M. White, Exhibit 8 to Hartley Aff., attached to the Motion as Exhibit B). By letter dated February 20, 2007, Scott Holland advised the Department of the passage of Ordinance No. 635. *Id.* Accordingly, on April 4, 2007, the Department issued another preliminary consistency determination for the Proposed Landfill, advising MRR that it would be moving forward with review of the permit application. (See April 4, 2007 letter from Jana M. White to Ronald Gilkerson, Exhibit 8 to Hartley Aff., attached to the Motion as Exhibit B). On February 14, 2008, the Department issued a draft permit for the Proposed Landfill. (See February 14, 2008

letter from Joan F. Litton to Ronald C. Gilkerson, Exhibit 10 to Hartley Aff., attached to the Motion as Exhibit B). On March 13, 2008, the Department held a public hearing on the permit. (See March 13, 2008 Agenda for Public Hearing and Fact Sheet, Exhibit 11 to Hartley Aff., attached to the Motion as Exhibit B). On July 18, 2008, the Department issued MRR a permit for construction and operation of the Proposed Landfill. (See July 18, 2008 Memorandum from Kent M. Coleman to Concerned Citizens, Exhibit 5 to Hartley Aff., attached to the Motion as Exhibit B). The Department's Staff Decision Summary Report indicated that the design for the Proposed Landfill satisfies the buffer requirements of the permitting regulation. *Id.*

II. PROCEDURAL HISTORY

On August 4, 2008, EAGLE requested that the Board of Health and Environmental Control ("Board") review the Department's decision to issue a permit for the Proposed Landfill. On August 20, 2008, the Board advised EAGLE of its decision not to conduct a review of the staff decision. Thereafter, on September 16, 2008, EAGLE filed a Request for Contested Case Hearing, seeking this Court's review of the Department's decision. With respect to the Department's issuance of the permit for the Proposed Landfill, EAGLE alleges the following violations of the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* ("Solid Waste Act"), and regulations promulgated by the Department thereunder:

- (a) The permit was issued in violation of the Solid Waste Act and S.C. CODE ANN. REGS. § 61-107.17 ("DON Regulation) because there is no actual need for the Proposed Landfill;
- (b) The permit was issued in violation of the Solid Waste Act because the 1997 County Plan fails to comply with Section 44-96-80 of the Act;
- (c) The permit was issued in violation of S.C. CODE ANN. REGS. § 61-107.19 because:

- (1) the Proposed Landfill is incompatible with homes, schools, recreation areas and road within its vicinity;
- (2) The Department failed to assess road traffic associated with operation of the Proposed Landfill;
- (3) The Proposed Landfill will be located on property containing wetlands and "adjacent to Lake Martin";
- (4) The Proposed Landfill will cause injury to the groundwater in the area;
- (d) The applicant's owner has a history of landfill permit violations and closures in North Carolina; and
- (e) A former official of the Department allegedly works as a consultant for MRR.

(See Pre-Hearing Statement of Petitioner served on November 17, 2008, hereinafter "EAGLE's Pre-Hearing Statement," attached to the Motion as Exhibit C).

III. LEGAL STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment shall be granted if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." S.C. R. Civ.

P. 56(c). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001) (citation omitted). Summary judgment should be granted "when plain, palpable and undisputed facts exist on which reasonable minds cannot differ." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) (citation omitted). The non-moving party may not rest upon the mere allegations or denials of the pleadings, but a response by affidavit or otherwise as provided in the rules must set forth specific facts creating a genuine issue for trial. S.C.R. Civ. P. 56 (e); *Moody v. McLellan*, 295 S.C.

157, 163, 367 S.E.2d 449, 452-53 (Ct. App. 1988). Thus, the existence of a mere scintilla of evidence in support of a non-moving party's position is insufficient to overcome a motion for summary judgment. *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 526, 469 S.E.2d 630, 632 (Ct. App. 1996) (citing *Bravis v. Dunbar*, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994)).

IV. CITATION OF AUTHORITY AND ARGUMENT

As discussed below, there are certain material facts related to each of EAGLE's allegations which are not in dispute. Such facts are sufficient to demonstrate that MRR is entitled to judgment as a matter of law as to each of the allegations asserted by EAGLE with respect to the Department's issuance of the permit for the Proposed Landfill.

A. The Department properly approved a demonstration of need for the Proposed Landfill in accordance with S.C. CODE ANN. REGS. § 61-107.17.

In its Pre-Hearing Statement, EAGLE contends that the Department erred in approving a demonstration of need for the Proposed Facility because there is no actual need for additional disposal capacity to meet the needs of Lauren County. (See EAGLE Pre-Hearing Statement, p. 3, attached to the Motion as Exhibit C). EAGLE does not argue that the Department staff failed to make the DON determination in accordance with the demonstration of need regulation, 25A S.C. CODE ANN. REGS. § 61-107.17 ("DON Regulation"). Instead, EAGLE argues the Department's determination pursuant to the DON Regulation "plainly and simply does not meet the determination of need requirements of Section 44-96-290(E) of the Act." (See EAGLE Pre-Hearing Statement, p. 3, attached to the Motion as Exhibit C). As discussed more fully below, contrary to these assertions, the Department staff is required to approve a demonstration of need which meets the criteria established in the DON Regulation and thus properly issued the demonstration of need approval for the Proposed Landfill.

Section 44-96-290(E) of the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* ("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 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). Pursuant to Section 44-96-290(E), the Department was required to promulgate regulations governing the approval of the demonstration of need for proposed facilities. S.C. CODE ANN. § 44-96-290(E) (2002). The current DON Regulation was promulgated in 2000 in accordance with the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA"), which requires public notification of proposed regulations and submittal to the General Assembly. *See* S.C. CODE ANN. §§ 1-23-110 and 1-23-120 (Supp. 2008). The DON Regulation includes criteria for demonstration of need determinations for solid waste management facilities, including Part IV (long-term) construction, demolition, and land-clearing debris landfills. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008).¹ "An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation." *Hunter & Walden Co. v. South Carolina State Licensing Bd. for Contractors*, 272 S.C. 211, 213, 251 S.E.2d 186, 187 (1978) (citation omitted). "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

¹ Prior to the Department's decision on MRR's permit application, the Department promulgated new regulations governing the permitting and operation of landfills. *See* 25A S.C. CODE ANN. REGS. § 61-107.19. Under the new Landfill Regulation, C&D landfills are permitted as Class Two Landfills. However, the new Landfill Regulation expressly provides that a determination of need made prior to the effective date of the new Regulation "shall remain applicable and become the agency's final determination." S.C. CODE ANN. REGS. § 61-107.19 Part I.D.1.b. Accordingly, the Department's demonstration of need approval as a Part IV C&D Landfill conforms to the requirements for a Class Two Landfill.

(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). EAGLE makes no claim that the DON Regulation was not validly promulgated pursuant to APA.

Pursuant to the DON Regulation, need for a new Part IV C&D landfill is demonstrated when there are fewer than two commercial Part IV C&D landfills within a ten-mile radius planning area of the proposed landfill. 25A S.C. CODE REG. § 61-107.17.D.3.a (Supp. 2007). When there are less than two commercial Part IV C&D landfills within this planning area, there are no other criteria to be considered by the Department in making the determination that an additional Part IV C&D landfill is needed within this planning area. When the Department staff reviewed MRR's request for a demonstration of need for the Proposed Landfill, there was only one other commercial Part IV C&D landfills within a ten-mile radius of the location of the Proposed Landfill. (See DHEC 30(b)(6) Dep., p. 44, ll. 13-16, attached to the Motion as Exhibit A). Accordingly, unless EAGLE can present evidence to create a question of fact with respect to the number of commercial Part IV C&D landfills within the ten-mile radius of the Proposed Landfill, MRR is entitled to judgment as a matter of law on the Department's approval of the demonstration of need for the Proposed Landfill.

B. The DON Regulation allows for permitted capacity in excess of the needs of the host county.

In its Pre-Hearing Statement, EAGLE contends that the Department erred in approving the demonstration of need for the Proposed Landfill "[b]ecause Laurens County generates less than 20,000 tons per year of Class II solid waste, and because the county already contains a commercial Class II solid waste landfill permitted for a capacity of 150,000 tons per year." (EAGLE Pre-Hearing Statement, p. 3, attached to the

Motion as Exhibit C). As a preliminary matter, there is no statutory basis for EAGLE's assertion that the Proposed Landfill is not needed because there is no need for additional capacity in Laurens County. On the contrary, Section 44-96-290(E) does not require the Department to assess the need for new solid waste management facility or expansion of an existing facility within the confines of needs of a particular county. S.C. CODE ANN. § 44-96-290(E) (2002). Indeed, 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 all counties within the ten-mile radius planning area. Specifically, the DON Regulation 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 REG. § 61-107.17.D.3.b (Supp. 2008). 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, each is allowed a maximum yearly disposal rate up to the total amount of waste generated in the host county. Moreover, depending on the size of the county, there could be any number of

facilities located within the county—each with a permitted maximum annual disposal rate equal to the total annual waste generated in the host county.

Finally, 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 facility touches on more than one county. The maximum annual disposal rate for the Proposed Landfill was based on the amount of C&D waste generated in Laurens, Greenville, and Spartanburg Counties for calendar year 2004. (See March 3, 2006 letter from Joan Litton to Ronald C. Gilkerson, Exhibit 5 to DHEC 30(b)(6) Dep., attached to the Motion as Exhibit A; *see also* DHEC 30(b)(6) Dep., p. 41, l. 22 – p. 42, l. 5). 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. *Id.* Since the total C&D waste generated in these counties in 2004 was 154,394, the Department properly issued a DON approval for the Proposed Landfill with a maximum annual disposal rate of 154,000 tons. The Department staff clearly issued the DON approval in accordance with the DON Regulation. The fact that the approved disposal rate for the Proposed Landfill exceeds the current waste generation rate of the Laurens County in no way supports EAGLE's claim that the Department erred in approved a demonstration of need for the Proposed Landfill, and MRR is entitled to judgment as a matter of law on this issue.

C. **The Department properly determined that the Proposed Landfill met the siting requirements established in S.C. CODE ANN. REGS. § 61-107.19.**

In its Pre-Hearing Statement, EAGLE alleges that the Department erred in failing to consider the potential off-site impacts in the siting of the Proposed Landfill. (See EAGLE Pre-Hearing Statement, p. 3-4, attached to the Motion as Exhibit C). However,

as discussed more fully below, EAGLE does not allege any specific violation of the regulations governing the permitting of landfills. Specifically, Section 44-96-290(D) of the Solid Waste Act requires the Department to "promulgate regulations for the permitting of solid waste management facilities." S.C. CODE ANN. § 44-96-290(D) (2002). When MRR submitted its permit application to the Department, the applicable permitting regulation for C&D landfills was found at S.C. CODE ANN. REGS. § 61-107.11. Prior to the Department's decision on MRR's permit application, the Department promulgated new regulations governing the permitting and operation of landfills. S.C. CODE ANN. REGS. § 61-107.11 was repealed by S.C. CODE ANN. REGS. § 61-107.19 ("Landfill Regulation"), effective May 23, 2008. (*See* 25A S.C. CODE ANN. REGS. § 61-107.19 Part I.A.2). Under the new Landfill Regulation, C&D landfills are permitted as Class Two Landfills. (*See* DHEC 30(b)(6) Dep., p. 21, ll. 11-20, attached to the Motion as Exhibit A). The Department promulgated these permitting requirements pursuant to Section 44-96-290(D) and in accordance with the APA, which requires submittal to the General Assembly. *See* S.C. CODE ANN. § 1-23-120 (Supp. 2008). Regulations authorized by the legislature have the force of law and must be followed by the agency. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 227, 628 S.E.2d 262, 269 (Ct. App. 2006); *Triska v. Dep't of Health and Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). As such, the Department staff is required to permit a landfill which meets the requirements of the Landfill Regulation. As discussed more fully below, EAGLE has failed to allege that the Proposed Landfill does not meet the specific permitting criteria established in the Landfill Regulation.

1. **The Department properly considered local land use in accordance with S.C. CODE ANN. REGS. § 61-107.19.**

In its Pre-Hearing Statement, EAGLE claims that the permit for the Proposed

Landfill was issued in violation of Landfill Regulation because the Proposed Landfill "is incompatible with the homes, schools, recreation areas and roads within its immediate vicinity." (EAGLE Pre-Hearing Statement, p. 3, attached to the Motion as Exhibit C). The Landfill Regulation provides that the boundary of the fill area of a Class Two landfill "shall not be located within 1,000 feet of any residence, school, day-care center, church, hospital, or publicly owned recreational park area." 25A S.C. CODE ANN. REGS. § 61-107.19 Part IV.B.1.a. (Supp. 2008). EAGLE does not allege that the Proposed Landfill fails to satisfy this buffer requirement. In fact, the Department found that the Proposed Landfill met this buffer requirement. (See July 18, 2008 Memorandum from Kent M. Coleman to Concerned Citizens, Exhibit 5 to Hartley Aff., attached to the Motion as Exhibit B). Additionally, to the extent that there is a dispute regarding the satisfaction of these criteria, the Regulation clearly provides that the Department's determination that the Proposed Landfill conforms to such requirements is within the discretion of the Department. The Regulation provides that a proposed landfill shall meet the standards contained therein. "[u]nless otherwise approved by the Department." 25A S.C. CODE ANN. REGS. § 61-107.19 Part IV.B.1 (Supp. 2008). Accordingly, even if EAGLE made a claim that the Proposed Landfill fails to meet these requirements, which it has not, such claim would have no merit.

In its Pre-Hearing Statement, EAGLE further contends that the Proposed Landfill is incompatible with local land use and the Department staff thus "erroneously and improperly limited its examination of land use in this area." (EAGLE Pre-Hearing Statement, p. 3, attached to the Motion as Exhibit C). To the extent that EAGLE is arguing that the Department should have considered factors other than the required buffers and a determination of consistency with local zoning ordinances in assessing the

compatibility of the Proposed Landfill with the surrounding land uses, any further consideration of such compatibility with existing land use would clearly fall within the purview of local zoning authorities. In such case, this Court's review of such considerations would not be appropriate as "the court has no power to zone property." *Bear Enters. v. County of Greenville*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) (citation omitted). Accordingly, MRR is entitled to judgment as a matter of law on EAGLE's claim that the Proposed Landfill is "incompatible with the homes, schools, recreation areas and roads within its immediate vicinity."

2. The Department properly determined that the Proposed Landfill conforms to the Landfill Regulation's requirements concerning wetlands and surface water.

In its Pre-Hearing Statement, EAGLE contends that the Department erred in issuing the permit for the Proposed Landfill, alleging as follows:

The proposed landfill would be located on a tract of land containing wetlands and adjacent to Lake Martin, an emergency water supply for Laurens County. EAGLE believes that this location is inappropriate and that the applicant has failed to demonstrate that this landfill will not cause significant negative impacts to the wetlands and lake.

(EAGLE Pre-Hearing Statement, p. 3, attached to Motion as Exhibit C). The Landfill Regulation provides that the Proposed Landfill "shall be in compliance with applicable requirements concerning wetlands imposed by the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the Department." 25A S.C. CODE ANN. REGS. § 61-107.19 Part IV.B.1.c (Supp. 2008). The U.S. Corp of Engineers issued a jurisdictional determination for the property on which the Proposed Landfill is to be constructed, identifying 8.3 acres of wetlands on the property. (See April 23, 2007 letter from Amy Capellino to Britt Felder, Exhibit 4 to Hartley Aff., attached to the Motion as Exhibit B). MRR submitted this jurisdictional determination with its application for the

permit for the Proposed Landfill. *Id.* The approved design for the construction and operation of the Proposed Landfill does not disturb the wetlands identified on the property. (See July 18, 2008 Memorandum from Kent M. Coleman to Concerned Citizens, Exhibit 5 to Hartley Aff., attached to the Motion as Exhibit B). As such, a permit under Section 404 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, is not required for the construction and operation of the Proposed Landfill, and the Department properly determined that the Proposed Landfill meets the requirements of the Landfill Regulation with respect to compliance with applicable requirements concerning wetlands.

Similarly, with respect to EAGLE's allegations concerning Lake Martin, the Landfill Regulation provides that the boundary of the fill area of a Class Two Landfill "shall not be located within 200 feet of any surface water that holds visible water for greater than six consecutive months, excluding drainage ditches, sedimentation ponds and other operational features on the site." 25A S.C. CODE ANN. REGS. § 61-107.19 Part IV.B.1.f (Supp. 2008). EAGLE makes no claim that the Proposed Landfill does not meet this buffer requirement. Accordingly, EAGLE's claim regarding the siting of the Proposed Landfill relative to Lake Martin has no statutory or regulatory basis, and MRR is entitled to judgment as a matter of law on this claim.

3. The Department properly considered the impact to drinking wells pursuant to the Landfill Regulation.

In its Pre-Hearing Statement, EAGLE alleges that the Proposed Landfill "is likely to lead to injurious effects on groundwater in an area where the residents rely primarily upon well water." (EAGLE Pre-Hearing Statement, p. 4, attached to Motion as Exhibit C). The Landfill Regulation provides that the boundary of the fill area for a Class Two Landfill "shall not be located within 100 feet of any drinking water well." 25A S.C. CODE ANN. REGS. § 61-107.19 Part IV.B.1.g (Supp. 2008). Again, EAGLE makes no

claim that the Proposed Landfill does not comply with this buffer requirement. In fact, the Department found that the Proposed Landfill met this buffer requirement. (See July 18, 2008 Memorandum from Kent M. Coleman to Concerned Citizens, Exhibit 5 to Hartley Aff., attached to the Motion as Exhibit B).

Moreover, the Landfill Regulation and the express conditions of the permit for the Proposed Landfill require MRR to implement a groundwater monitoring system and submit semi-annual reports on its monitoring results to the Department. (See 25A S.C. CODE ANN. REGS. § 61-107.19 Part IV.E (Supp. 2008); see also July 18, 2008 Memorandum from Kent M. Coleman to Concerned Citizens, Exhibit 5 to Hartley Aff., attached to the Motion as Exhibit B). The Landfill Regulation also requires assessment and remediation, as may be necessary, when any constituent exceeds the maximum contaminant level ("MCL") established in State Primary Drinking Water Regulations or the EPA Region IV drinking water risk-based number for constituents for which no MCL has been promulgated. 25A S.C. CODE ANN. REGS. § 61-107.19 Part IV.E (Supp. 2008).

Accordingly, there is no statutory or regulatory basis for EAGLE's claim that the Department failed to consider the impact on drinking water wells, and MRR is entitled to judgment as a matter of law on this claim.

D. EAGLE's claim that the Department erred in failing to require a traffic study for the Proposed Landfill is without merit.

Contrary to EAGLE's claim, the Landfill Regulation does not require the permit applicant to submit a traffic study for the Department's consideration. Citing to the Landfill Regulation, EAGLE asserts that the Department staff "erroneously and improperly disclaimed responsibility for assessing road traffic, despite the express mandate of the regulations." (EAGLE Pre-Hearing Statement, p. 3, attached to the Motion as Exhibit C). The provision which EAGLE cites for this purported "express

mandate" is found in the Section entitled "Operation Criteria for Class Two Landfills" and provides as follows:

The landfill shall be adjacent to or have direct access to roads which are of all-weather construction and capable of withstanding anticipated load limits.

25A S.C. CODE ANN. REGS. § 61-107.19 Part IV.C.20 (Supp. 2008). This provision addresses the condition of the road adjacent to the Proposed Landfill and in no manner requires a traffic study. Accordingly, EAGLE's claim that the Department erroneously failed to require a traffic study is without merit, and MRR is entitled to judgment as a matter of law on this claim.

E. The Solid Waste Act does not authorize the Department to deny a permit application based on a history of permit violations of the owner of the applicant.

In its Pre-Hearing Statement, EAGLE alleges that the Department issued the permit in error because "the owners of the applicant limited liability company have a history of landfill permit violations and closures in North Carolina." (EAGLE Pre-Hearing Statement, p. 4, attached to the Motion as Exhibit C). Section 44-96-300 of the Solid Waste Act requires an applicant for a solid waste management facility permit to file a disclosure statement with the Department. S.C. CODE ANN. § 44-96-300(H) (2002). Pursuant to Section 44-96-300(A), the contents of the disclosure statement are set forth as follows:

The disclosure statement shall contain the following information with regard to the applicant and his responsible parties:

- (1) the full name, business address, and social security number of all responsible parties;
- (2) a description of the experience and credentials, including any past or present permits or licenses for the collection, transportation, treatment, storage, or disposal of solid waste, issued to or held by the applicant within the past five years;

(3) a listing and explanation of all convictions by final judgment of a responsible party in a state or federal court, whether under appeal or not, of a crime of moral turpitude punishable by a fine of five thousand dollars or more or imprisonment for one year or more, or both, within five years immediately preceding the date of the submission of the permit application;

(4) a listing and explanation of all convictions by final judgment of a responsible party in a state or federal court, whether under appeal or not, of a criminal or civil offense involving a violation of an environmental law punishable by a fine of five thousand dollars or more or imprisonment for one year or more, or both, in a state or federal court within five years of the date of submission of the permit application;

(5) a listing and explanation of the instances in which a disposal facility permit held by the applicant was revoked by final judgment in a state or federal court, whether under appeal or not, within five years of the date of submission of the permit application; and

(6) a listing and explanation of all adjudications of the applicant for having been in contempt of any valid court order enforcing any federal environmental law or any state environmental law relative to the activity for which the permit is being sought, within five years of the date of submission of the permit application.

S.C. CODE ANN. § 44-96-300(A) (2002) (emphasis added). The disclosure statement requires certain information about the "responsible parties" and other information about the "applicant" only. The Solid Waste Act defines "applicant" as "an individual, corporation, partnership, business association, or government entity that applies for the issuance, transfer, or modification of a permit under this article." S.C. CODE ANN. § 44-96-250(B)(1) (2002). The Act defines "responsible party" as follows:

(a) any officer, corporation director, or senior management official of a corporation, partnership, or business association that is an applicant;

(b) a management employee of a corporation, partnership, or business association that is an applicant who has overall responsibility for operations and financial management of the facility under consideration;

(c) an individual, officer, corporation director, senior management official of a corporation, partnership, or business association under contract to the applicant to operate the facility under consideration; or

(d) an individual, corporation, partnership, or business association that

holds, directly or indirectly, at least five percent equity or debt interest in the applicant. If any holder of five percent or more of the equity or debt of the applicant is not a natural person, the term means any officer, corporation director, or senior management official of the equity or debt holder who is empowered to make discretionary decisions with respect to the operation and financial management of the facility under consideration.

S.C. CODE ANN. § 44-96-250(B)(20) (2002). While a "responsible party" includes an entity with at least five percent ownership or debt interest in the applicant, the Act clearly defines a "responsible party" as a separate and distinct entity from the "applicant." Additionally, the South Carolina Court of Appeals has held that only the applicant entity—not a parent corporation—is required to file a disclosure statement in support of an application for a permit. *Ballenger v. South Carolina Dep't of Health and Envtl. Control*, 331 S.C. 247, 260, 500 S.E.2d 183, 189 (Ct. App. 1998).

An application for a proposed facility may be denied based on certain information submitted to the Department in an applicant's disclosure statement. Specifically, Section 44-96-300(B) provides as follows:

The department shall deny a permit if it finds by a preponderance of the evidence that:

- (1) the applicant is not financially and technically qualified to carry out the activity for which the permit is sought;
- (2) the applicant has knowingly misrepresented or concealed any material fact in the permit application or disclosure statement, or in any other report or certification required under this article or under regulations promulgated pursuant to this article;
- (3) the applicant has obtained or attempted to obtain the permit by misrepresentation or fraud; or
- (4) the applicant has a documented and continuing history of criminal convictions or a documented history of violation of state or federal environmental laws such that the applicant's ability to operate within the law is questionable.

S.C. CODE ANN. § 44-96-300(B) (2002) (emphasis added). Accordingly, the Act

authorizes the Department to deny a permit based on a history of violations of environmental laws of the applicant; however, the Act does not authorize the denial of a permit application based on a history of violations of an owner of the applicant. As such, even if EAGLE offered evidence that an owner of MRR has a history of landfill permit violations, which it cannot, such evidence would not support a showing that the Department issued the permit in error. Moreover, EAGLE has not alleged that the applicant has a history of violations which would preclude issuance of the permit pursuant to Section 44-96-300-(B)(4) of the Act. Accordingly, MRR is entitled to judgment as a matter of law on this claim.

F. The Department properly determined that the Proposed Landfill is consistent with the 1997 Laurens County Solid Waste Management Plan.

In its Pre-Hearing Statement, EAGLE contends that the 1997 Laurens County Solid Waste Management Plan ("1997 County Plan") does not include estimates and analysis required under Section 44-96-80(A) of the Solid Waste Act and thus fails to meet the requirements of the Act. Based on its allegations that the 1997 County Plan fails to include these estimates and analysis, EAGLE further contends that the Department staff erred in failure to consider "the inadequacy of the Laurens County plan in this permitting decision." (EAGLE Pre-Hearing Statement, p. 3, attached to the Motion as Exhibit C). However, such allegations do not support a showing that the Department erred in conducting its determination of consistency with the local solid waste management plan. As discussed below, the Solid Waste Act provides for the Department's substantive review of a local solid waste management plan and subsequent comments to the local government, but does not provide for formal approval of the plan by the Department. Accordingly, the Department must make its determination of consistency pursuant to Section 44-96-290(F) of the Act based on the current local solid

waste management plan on file with the Department, regardless of any purported "inadequacies" in the plan.

With respect to the substance of a plan submitted to the Department by a county or region, Section 44-96-80(B) provides for the following review process:

Each county or region shall submit its solid waste management plan to the department for review. The department shall have one hundred eighty days from the date on which a plan is submitted to review the plan and provide comments to the submitting entity. At the end of the one hundred eighty-day review period, the county or region shall begin implementation of its solid waste management plan. Such plan must be implemented not later than one year after the end of the one hundred eighty-day review period.

S.C. CODE ANN. § 44-96-80(B) (2002) (emphasis added). This section of the Act clearly authorizes the Department to review the substance of the plan and to provide comments to the county or region which submitted the plan. However, there is no provision for approval of the plan by the Department itself. Moreover, under rules of statutory construction, such requirement is not implicit in this provision of the Act. "The primary rule of statutory construction is that the Court must ascertain the intention of the legislature." *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005). "In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "Subtle or forced construction of statutory words for the purpose of expanding a statute's operation is prohibited." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). When viewing the statute as a whole, it is clear that the General Assembly intended that the Department have only the authority to review and comment on a local or regional plan—not the authority to approve the substance of a local plan prior to giving it effect.

Throughout the Solid Waste Act, the General Assembly conferred on the Department certain approval authority within the context of the state solid waste management program. For example, Section 44-96-290(E) of the Act provides that "[n]o permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." S.C. CODE ANN. § 44-96-290(E) (2002) (emphasis added). In contrast, the Act defines a local solid waste management plan as a plan "prepared, approved, and submitted" by a county or region. *See* S.C. CODE ANN. § 44-96-40(7) (emphasis added) ("County solid waste management plan' means a solid waste management plan prepared, approved, and submitted by a single county pursuant to Section 44-96-80."); *see also* S.C. CODE ANN. § 44-96-40(39) ("Regional solid waste management plan' means a solid waste management plan prepared, approved, and submitted by a group of counties in South Carolina pursuant to Section 44-96-80."). As such, it is clear that the authority to approve the substance of a local solid waste management plan remains with the county or region submitting a plan to the Department.

While the Department may reject a local plan which has not been properly approved by the county or region submitting such plan, the Department has no statutory authority to reject a plan which has been approved by the county or region, but does not meet the substantive requirements of the Act. The Department may only conduct a substantive review of the plan and provide comments to the county or region submitting the plan. Accordingly, the Department has no statutory authority to consider "the inadequacy of the Laurens County plan in this permitting decision," and MRR is entitled to judgment as a matter of law on this claim.

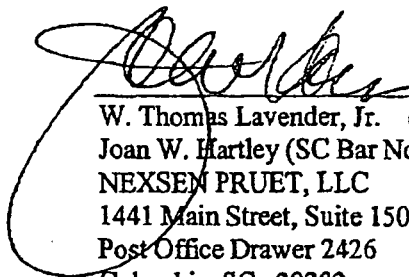
G. Allegations regarding MRR's purported engagement of a former Department employee does not provide a basis for challenging the Department's decision in this matter.

In its Pre-Hearing Statement, EAGLE alleges that "a former official of the South Carolina Department of Health and Environmental Control is presently working as a consultant for MRR, creating at a minimum, the appearance of impropriety." (EAGLE Pre-Hearing Statement, p. 4, attached to the Motion as Exhibit C). Even if this allegation were true, which it is not, such engagement does not violate any statute or regulation. Indeed, there is simply no statutory or regulatory basis for claiming that this alleged engagement of a former Department employee in any manner relates to the Department's decision to issue the permit for the Proposed Landfill. Accordingly, EAGLE's claim that this alleged engagement of a former Department employee violated the statute or regulation fails as a matter of law.

V. CONCLUSION

In challenging the permitting of the Proposed Landfill, EAGLE bears the burden of demonstrating that the Department's issuance of the permit fails to satisfy the regulatory criteria governing the demonstration of need determination and the permitting of a Class Two Landfill. *See Leventis v. South Carolina Dep't of Health and Env'tl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000). As discussed herein, EAGLE has failed to allege that the Department did not conform to the DON Regulation or the Landfill Regulation in issuing the permit for the Proposed Landfill. Accordingly, since EAGLE has not raised a genuine issue of material fact with respect to its allegations that the Department failed to conform to these Regulations in issuing the permit for the Proposed Landfill, MRR is entitled to an order granting judgment as a matter of law and upholding the Department's issuance of the permit.

Respectfully submitted,



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March 17, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioner,

vs.

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

Respondents.

Docket No. 08-ALC-07-0380-CC

**RESPONDENT MRR HIGHWAY 92,
LLC'S MOTION TO MAKE MORE
DEFINITE AND CERTAIN**

Pursuant to Rule 21 of the Rules of Procedures for the Administrative Law Court and Rule 12 of the South Carolina Rules of Civil Procedure, Respondent MRR Highway 92, LLC ("MRR"), hereby moves the Court for a order compelling Petitioner Engaging and Guarding Laurens County's Environment ("Petitioner") to give a more definite statement outlining, in detail, the grounds upon which Petitioner seeks relief in its appeal of the decision of Respondent South Carolina Department of Health and Environmental Control ("Department") to authorize discharge of storm water associated with the construction of a Class Two Landfill to be located 322 Choice Road, Gray Court in Laurens County ("Proposed Landfill") under the State NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 ("General Permit").

On July 18, 2008, the Department issued MRR a permit for construction and operation of the Proposed Landfill. On July 24, 2008, the Department authorized the discharge of storm water associated with construction of the Proposed Landfill under the General Permit. On August 4, 2008, EAGLE requested that the Board of Health and Environmental Control

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("Board") review the Department's decision to issue a permit for the Proposed Landfill and to authorize the storm water discharge under the General Permit. On August 20, 2008, the Board advised EAGLE of its decision not to conduct a review of the staff decision. Thereafter, on September 16, 2008, EAGLE filed a Request for Contested Case Hearing, seeking this Court's review of both Department decisions.

In its Request for Contested Case Hearing and in its Pre-Hearing Statement of Petitioner, filed on November 17, 2008, Petitioner makes no factual allegations with respect to the Department's issuance of the authorization to discharge storm water under the General Permit. The only statement in either filing regarding this authorization is as follows:

Upon information and belief, the stormwater plan for this landfill fails to comply with applicable state and federal requirements, fails to protect the waters of this state from the potential pollution from this landfill, and fails to minimize the potential for floodwaters to come into contact with waste.

(Request for Contested Case Hearing dated September 16, 2008, p. 6, attached hereto as Exhibit A; Pre-Hearing Statement of Petitioner dated November 17, 2008, p. 4, attached hereto as Exhibit B). This assertion is an insufficient statement of grounds for challenging the Department's decision on the authorization of the storm water discharge under the General Permit. Pursuant to S.C. CODE REGS. § 61-72, a request for review of a decision of the Department staff must include "[f]acts, stated with particularity, alleged by the petitioner as grounds entitling it to relief." 25A S.C. CODE REGS. § 61-72.301.C.4 (Supp. 2008). Clearly, the statement by Petitioner does not allege facts detailing the manner in which the Department purportedly issued the NPDES authorization in violation of state and federal law. Instead, Petitioner's statement is merely a legal conclusion. In order to prepare for the hearing on the merits in this matter, MRR is entitled to specific facts supporting EAGLE's claim that the storm water plan for the Proposed Landfill "fails to comply with applicable state and federal

requirements, fails to protect the waters of this state from the potential pollution from this landfill, and fails to minimize the potential for floodwaters to come into contact with waste.”

For all these reasons MRR requests an order compelling Petitioner to provide a more definite and certain statement so as to state specifically the factual allegations outlining the grounds on which Petitioner seeks relief with respect to its claim that the Department erred in authorizing MRR to discharge storm water under the General Permit.

Respectfully submitted,



W. Thomas Lavender, Jr. (SC Bar No. 3143)

Joan W. Hartley (SC Bar No. 72735)

NEXSEN PRUET, LLC

1441 Main Street, Suite 1500 (29201)

Post Office Drawer 2426

Columbia, SC 29202

803.771.8900

Leon C. Harmon (SC Bar No. 2705)

NEXSEN PRUET, LLC

201 W. McBee Avenue, Suite 400 (29601)

Post Office Drawer 10648

Greenville, SC 29603-0648

864.370.2211

March 17, 2009
Columbia, South Carolina

Attorneys for Respondent
MRR Highway 92, LLC

Exhibit A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's
Environment ("EAGLE"), a non-profit
membership organization,

Appellants,

vs.

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

Respondents.

Docket No. 08-ALC-07-0425-CC

REQUEST
FOR
CONTESTED CASE HEARING

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS:

Engaging And Guarding Laurens County's Environment ("EAGLE"), pursuant to Administrative Law Court Rule 11, hereby requests a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control to issue a Class 2 Solid Waste Landfill Permit, and to approve a Stormwater and NPDES general permit to MRR Highway 92, LLC, for the proposed Highway 92 C&D landfill in Laurens County.

In support of this request, the Petitioners submit the following:

THE PETITIONER

1. Engaging And Guarding Laurens County's Environment ("EAGLE") is a non-profit, membership-based organization existing under the laws of the State of South Carolina. EAGLE is devoted to the conservation, protection and preservation of natural resources and to the education of the public to accomplish these ends. EAGLE represents its members, who use and enjoy the waters, wetlands and other natural resources of Laurens County in the vicinity of this project, and whose use and enjoyment are adversely affected by activities that impair or destroy

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these resources.

2. EAGLE and its members have vital interests in the protection of the land, air, waters, wetlands, and other natural resources in Laurens County, through the implementation and enforcement of the Solid Waste Management Act and the regulations promulgated thereunder. Members of EAGLE regularly use and enjoy the land, air, waters, wetlands, and other natural resources that are threatened and would be impacted by the landfilling activities that would be authorized by the permit at issue in this proceeding. These members enjoy bird-watching, observing nature, fishing, and recreating in the creeks, canals, and marshes in the area of the proposed landfill, and many of them live on the banks of the lake adjacent to which the proposed landfill is located. The existence and operation of the proposed landfill in this particular location will decrease the enjoyment of the area and its natural resources by members of EAGLE.

THE PROJECT

3. In 2006, MRR Highway 92, LLC, filed applications for permits to construct and operate a Construction, Demolition, and Land-Clearing Debris Landfill at a site on Choice Road off Highway 92 near Gray Court in Laurens County, South Carolina.

4. On July 18, 2008, the DHEC Bureau of Land and Waste Management gave notice of the proposed issuance of a Class 2 Solid Waste Landfill permit to MRR Highway 92, LLC, pursuant to the new landfill regulations that became effective in May, 2008.

5. On July 24, 2008, the DHEC Stormwater Permitting Section gave notice of the approval of a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES general permit.

6. On August 4, 2008, EAGLE filed a timely request for a final review conference before

the DHEC Board. On August 20, 2008, the Board voted to deny EAGLE's request for a final review conference. Copies of the staff decisions and the notice of the Board decision are attached hereto.

GROUND FOR APPEAL

7. Section 44-96-290(E) of the Solid Waste Management Act states: "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." There is no need for this landfill, and there has been no demonstration of need:

A. The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill.

B. Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste.

C. There is an existing commercial Class Two solid waste landfill, known as the Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton.

D. The needs test provided in DHEC Regulation 61-107.17 fails to comply with the "demonstration of need" requirement of Section 44-96-290 of the Act, in that said regulation does not in fact measure need at all. The permit proposed for the MRR landfill is a perfect

example of the arbitrary and capricious result that is obtained using Regulation 61-107.17 in the manner in which it is presently interpreted and applied by the DHEC staff - resulting in a purported determination of need where clearly there is no objective need.

8. Section 44-96-80 of the South Carolina Solid Waste Policy and Management Act of 1991 authorizes and directs each county to prepare and maintain a solid waste management plan, and allows each county the option of having its own county plan or participating in a regional plan. Section 44-96-80(A) states in part that each solid waste management plan "must provide for public participation and include, at a minimum, the following:

(1) an estimate of the amount of solid waste currently disposed of at solid waste disposal facilities within that county or region and a projection of the amount of solid waste which will be disposed of at solid waste disposal facilities during the twenty-year period following this chapter's effective date;

(2) an estimate of the current capacity within that county or region to manage solid waste, including identification of each solid waste management facility and a projection of its useful life;

(3) an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period;

9. DHEC is charged with the responsibility for reviewing each county or regional solid waste management plan.

10. The Laurens County solid waste management plan fails to meet the requirements of Section 44-96-80, in that it fails to provide the estimates and analysis required by the subsections

quoted above. Notwithstanding this failure, the DHEC staff has not informed the county of the failure, nor has it considered the inadequacy of the Laurens County plan in this permitting decision.

11. The proposed permit violates the South Carolina Solid Waste Policy and Management Act and the DHEC regulations implementing the Act, in the following respects:

A. The permit was issued in violation of Section 44-96-80 of the Act, in that the permit was based in part on a county solid waste management plan that fails to comply with the requirements of Section 44-96-80.

B. The permit is in violation of Section 44-96-180(E) and DHEC Regulations 61-107.17, in that there is no need for this landfill.

C. The DHEC staff erroneously applied Regulation 61-107.17 to imply a need for the landfill solely upon determining that there is one other such landfill within a 10-mile radius. This determination plainly and simply does not meet the demonstration of need requirements of Section 44-96-290(E) of the Act.

D. Because Laurens County generates less than 20,000 tons per year of Class II solid waste, and because the county already contains a commercial Class II solid waste landfill permitted for a capacity of 150,000 tons per year, there is no need for this landfill. The permitting of a second commercial Class II solid waste landfill in Laurens County would result in a capacity for disposal of such waste at least 15 times the actual amount of waste generated within Laurens County. Such a situation plainly would violate Section 44-96-290(E) of the Solid Waste Management Act.

E. The permit is in violation of DHEC Regulation 61-107.19, in that the landfill is incompatible with local land use, and the DHEC staff erroneously and improperly limited its

examination of land use in this area. The landfill is incompatible with the homes, schools, recreation areas and roads within its immediate vicinity.

F. The permit is in violation of DHEC Regulation 61-107.19, in that the proposed landfill is not located on roadways that "are of all-weather construction and capable of withstanding anticipated load limits." The DHEC staff erroneously and improperly disclaimed responsibility for assessing road traffic, despite the express mandate of the regulations.

G. The proposed landfill would be located on a tract of land containing wetlands and adjacent to Lake Martin, an emergency water supply for Laurens County. EAGLE believes that this location is inappropriate and that the applicant has failed to demonstrate that this landfill will not cause significant negative impacts to the wetlands and lake.

H. Upon information and belief, the stormwater plan for this landfill fails to comply with applicable state and federal requirements, fails to protect the waters of this state from the potential pollution from this landfill, and fails to minimize the potential for floodwaters to come into contact with waste.

I. Upon information and belief, the landfill is likely to lead to injurious effects on groundwater in an area where the residents rely primarily upon well water.

J. Upon information and belief, the owners of the applicant limited liability company have a history of landfill permit violations and closures in North Carolina.

K. Upon information and belief, a former official of the South Carolina Department of Health and Environmental Control is presently working as a consultant for MRR, creating at a minimum, the appearance of impropriety.

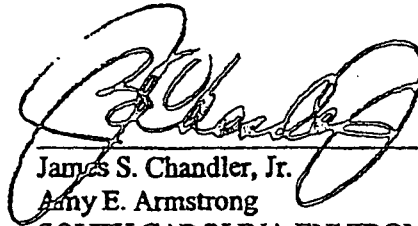
12. The Petitioner believes that there are additional violations that will be revealed through the process of discovery during this contested case proceeding.

13. As a direct and proximate result of these violations and the proposed landfill, EAGLE and its members will suffer harm to their regulatory, recreational, environmental, aesthetic and other interests.

RELIEF REQUESTED

WHEREFORE, Engaging And Guarding Laurens County's Environment ("EAGLE") requests that the Administrative Law Court conduct a contested case hearing and thereafter issue an order reversing the proposed decision to issue the permits and granting such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for Engaging And Guarding Laurens
County's Environment ("EAGLE")

Georgetown, South Carolina

September 16, 2008

Exhibit B

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's	)	Docket No. 08-ALC-07-0425-CC
Environment ("EAGLE"), a non-profit	)	
membership organization,	)	
	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
	)	
MRR Highway 92, LLC, and South Carolina	)	
Department of Health and Environmental Control,	)	
	)	
	)	
Respondents.	)	
	)	

PREHEARING STATEMENT
OF
PETITIONER

Engaging And Guarding Laurens County's Environment ("EAGLE") hereby submits the following as its Prehearing Statement:

1. The nature of this proceeding.

This proceeding is a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control to issue a Class 2 Solid Waste Landfill Permit, and to approve a Stormwater and NPDES general permit to MRR Highway 92, LLC, for the proposed Highway 92 C&D landfill in Laurens County.

2. Statutory provisions conferring subject matter jurisdiction to the agency and other applicable statutes and regulations.

S.C. Code Ann. §§ 1-23-310, *et seq.*, SC Code Ann. § 1-23-600, and S.C. Code § 1-23-650 *et seq.* (1987 & Supp. 2006); S.C. Code Ann. § 48-1-10, *et seq.*; SC Code Ann. § 44-1-60(F); South Carolina Solid Waste Management Act, S.C. Code Ann. § 44-96-10 *et seq.*; DHEC Regulation R.61-107; the Stormwater Management and Sediment Reduction Act of 1991, S.C. Code Ann. §§ 48-14-10, *et seq.*; Stormwater regulations, S.C. Code Ann. Regs. §§ R.72-300 through 316; Water quality standards, S.C. Code Ann. Regs. § R.61-68.

3. The issues presented for determination.

- Section 44-96-290(E) of the Solid Waste Management Act states: "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." There is no need for this landfill, and there has been no demonstration of need:

- The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill.
- Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste.
- There is an existing commercial Class Two solid waste landfill, known as the Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton.
- The needs test provided in DHEC Regulation 61-107.17 fails to comply with the "demonstration of need" requirement of Section 44-96-290 of the Act, in that said regulation does not in fact measure need at all. Even if R.61-107.17 could allow for a true and objective determination of need, the regulation is applied by DHEC in an arbitrary and capricious manner in which no true assessment of need is made. The permit proposed for the MRR landfill is a perfect example of the arbitrary and capricious result that is obtained using Regulation 61-107.17 in the manner in which it is presently interpreted and applied by the DHEC staff - resulting in a purported determination of need where clearly there is no objective need.
- Section 44-96-80 of the South Carolina Solid Waste Policy and Management Act of 1991 authorizes and directs each county to prepare and maintain a solid waste management plan, and allows each county the option of having its own county plan or participating in a regional plan. Section 44-96-80(A) states in part that each solid waste management plan "must provide for public participation and include, at a minimum, the following:
 - (1) an estimate of the amount of solid waste currently disposed of at solid waste disposal facilities within that county or region and a projection of the amount of solid waste which will be disposed of at solid waste disposal facilities during the twenty-year period following this chapter's effective date;
 - (2) an estimate of the current capacity within that county or region to manage solid waste, including identification of each solid waste management facility and a projection of its useful life;
 - (3) an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period;
- DHEC is charged with the responsibility for reviewing each county or regional solid waste management plan.

- The Laurens County solid waste management plan fails to meet the requirements of Section 44-96-80, in that it fails to provide the estimates and analysis required by the subsections quoted above. Notwithstanding this failure, the DHEC staff has not informed the county of the failure, nor has it considered the inadequacy of the Laurens County plan in this permitting decision.
- The proposed permit violates the South Carolina Solid Waste Policy and Management Act and the DHEC regulations implementing the Act, in the following respects:
 - The permit was issued in violation of Section 44-96-80 of the Act, in that the permit was based in part on a county solid waste management plan that fails to comply with the requirements of Section 44-96-80.
 - The permit is in violation of Section 44-96-180(E) and DHEC Regulations 61-107.17, in that there is no need for this landfill.
 - The DHEC staff erroneously applied Regulation 61-107.17 to imply a need for the landfill solely upon determining that there is one other such landfill within a 10-mile radius. This determination plainly and simply does not meet the demonstration of need requirements of Section 44-96-290(E) of the Act.
 - Because Laurens County generates less than 20,000 tons per year of Class II solid waste, and because the county already contains a commercial Class II solid waste landfill permitted for a capacity of 150,000 tons per year, there is no need for this landfill. The permitting of a second commercial Class II solid waste landfill in Laurens County would result in a capacity for disposal of such waste at least 15 times the actual amount of waste generated within Laurens County. Such a situation plainly would violate Section 44-96-290(E) of the Solid Waste Management Act.
 - The permit is in violation of DHEC Regulation 61-107.19, in that the landfill is incompatible with local land use, and the DHEC staff erroneously and improperly limited its examination of land use in this area. The landfill is incompatible with the homes, schools, recreation areas and roads within its immediate vicinity.
 - The permit is in violation of DHEC Regulation 61-107.19, in that the proposed landfill is not located on roadways that "are of all-weather construction and capable of withstanding anticipated load limits." The DHEC staff erroneously and improperly disclaimed responsibility for assessing road traffic, despite the express mandate of the regulations.
 - The proposed landfill would be located on a tract of land containing wetlands and adjacent to Lake Martin, an emergency water supply for Laurens County. EAGLE believes that this location is inappropriate and that the applicant has failed to demonstrate that this landfill will not cause significant negative impacts to the wetlands and lake.

- Upon information and belief, the stormwater plan for this landfill fails to comply with applicable state and federal requirements, fails to protect the waters of this state from the potential pollution from this landfill, and fails to minimize the potential for floodwaters to come into contact with waste.
- Upon information and belief, the landfill is likely to lead to injurious effects on groundwater in an area where the residents rely primarily upon well water.
- Upon information and belief, the owners of the applicant limited liability company have a history of landfill permit violations and closures in North Carolina.
- Upon information and belief, a former official of the South Carolina Department of Health and Environmental Control is presently working as a consultant for MRR, creating at a minimum, the appearance of impropriety.
- The Petitioner believes that there are additional violations that will be revealed through the process of discovery during this contested case proceeding.

5. A brief summary of the facts to be presented at the hearing.

Engaging And Guarding Laurens County's Environment ("EAGLE") is a non-profit, membership-based organization existing under the laws of the State of South Carolina. EAGLE is devoted to the conservation, protection and preservation of natural resources and to the education of the public to accomplish these ends. EAGLE represents its members, who use and enjoy the waters, wetlands and other natural resources of Laurens County in the vicinity of this project, and whose use and enjoyment are adversely affected by activities that impair or destroy these resources.

EAGLE and its members have vital interests in the protection of the land, air, waters, wetlands, and other natural resources in Laurens County, through the implementation and enforcement of the Solid Waste Management Act and the regulations promulgated thereunder. Members of EAGLE regularly use and enjoy the land, air, waters, wetlands, and other natural resources that are threatened and would be impacted by the landfilling activities that would be authorized by the permit at issue in this proceeding. These members enjoy bird-watching, observing nature, fishing, and recreating in the creeks, canals, and marshes in the area of the proposed landfill, and many of them live on the banks of the lake adjacent to which the proposed landfill is located. The existence and operation of the proposed landfill in this particular location will decrease the enjoyment of the area and its natural resources by members of EAGLE.

In 2006, MRR Highway 92, LLC, filed applications for permits to construct and operate a Construction, Demolition, and Land-Clearing Debris Landfill at a site on Choice Road off Highway 92 near Gray Court in Laurens County, South Carolina.

On July 18, 2008, the DHEC Bureau of Land and Waste Management gave notice of the

proposed issuance of a Class 2 Solid Waste Landfill permit to MRR Highway 92, LLC, pursuant to the new landfill regulations that became effective in May, 2008. On July 24, 2008, the DHEC Stormwater Permitting Section gave notice of the approval of a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES general permit.

On August 4, 2008, EAGLE filed a timely request for a final review conference before the DHEC Board. On August 20, 2008, the Board voted to deny EAGLE's request for a final review conference.

The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill. Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste. There is an existing commercial Class Two solid waste landfill, known as the Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton. Accordingly, there is no need for this landfill.

Additional factual statements are set forth above in the statement of issues.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.

None identified to date. If any such motions are identified, this statement will be amended or supplemented.

7. A list of proposed witnesses and exhibits.

Witnesses:

Members of the Petitioner to establish standing: Jeff Nichols, Jimmy Martin, Jacqui Lanier and others

Art Braswell

Kent Coleman

Sarah Daniels

Keith Colingsworth

Marty Lindler

Jeff Herbig

Ronald C. Gilkerson

Jill Stewart

Jana White

Senator Daniel B. Verdin III

Representative Michael A. Pitts

Representative Jeffrey D. Duncan

Representative J. Adam Taylor

Jeff Field

Fred Counts

W. Dennis Ginn

J. Michael Reddeck

Joan Litton

Exhibits

Documents from the DHEC files related to this project

Maps and photographs of the landfill site and surrounding lands

Documents relating to waste generated in Laurens County

Documents relating to existing Class II landfills in and around Laurens County

Additional documents to be listed in an amended or supplemental prehearing statement

8. A statement regarding the necessity for discovery.

The Petitioner is serving a set of standard interrogatories and a first request for production of documents upon the Respondents simultaneously with the filing of this prehearing statement.

The Petitioner anticipates the possibility of additional requests for production of

documents and the need to take at least the three depositions allowed under the rules. The Petitioner may need to take additional depositions, and will make this decision after reviewing the prehearing statements of the Respondents and reviewing their responses to the initial round of discovery.

The Petitioner requests that the Court allow at least 90 days from the date of this prehearing statement for discovery and trial preparation.

9. The estimated length of the hearing.

Two to four days.

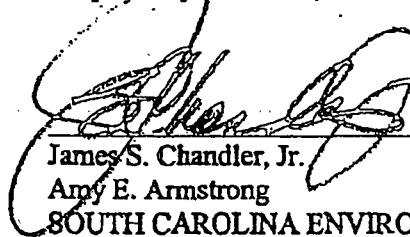
10. Any dates in the next one hundred twenty (120) days when you will not be available for a hearing.

December 2, 9-11, 15-17; January 19-21, February 5

11. An email address where you can be reached.

jchandler@scelp.org
amy@scelp.org

Respectfully submitted,



James S. Chandler, Jr.
Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
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FAX (843) 527-0540

Attorneys for Engaging And Guarding Laurens County's
Environment ("EAGLE")

Georgetown, South Carolina

November 17, 2008

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's
Environment ("EAGLE"), a non-profit
membership organization,

Appellants,

vs.

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

Respondents.

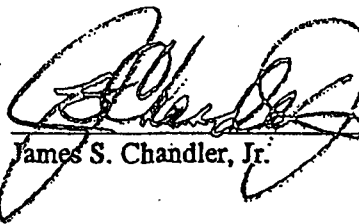
Docket No. 08-ALC-07-0425-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Prehearing Statement of Petitioner upon counsel for the Respondents by placing copies of same in the United State Mail, first-class postage prepaid, addressed to:

Etta R. Williams, Esquire
Stephen P. Hightower, Esquire
DHEC Office of Counsel
2600 Bull Street
Columbia, SC 29201

Joan W. Hartley, Esquire
Nexsen Pruet Adams Kleemeier, LLC
P. O. Drawer 2426
Columbia, SC 29202


James S. Chandler, Jr.

Georgetown, South Carolina

November 17, 2008

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's
Environment ("EAGLE"), a non-profit
membership organization,

Petitioner,

vs.

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

Respondents.

Case No. 08-ALC-07-0425-CC

**PETITIONER'S
MOTION FOR
SUMMARY JUDGMENT
AND RESPONSE TO
MRR HIGHWAY 92'S
MOTION FOR
SUMMARY JUDGMENT**

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON AND THE
RESPONDENTS:

PLEASE TAKE NOTICE that Engaging and Guarding Laurens County's Environment
("EAGLE"), hereby moves the Administrative Law Court for summary judgment in favor of the
Petitioner. In support of this motion, and in response to the motion for summary judgment filed
by MRR Highway 92, LLC, Petitioner submits the following:

INTRODUCTION AND FACTUAL OVERVIEW

MRR Highway 92, LLC ("MRR"), proposes to construct and operate a Construction,
Demolition, and Land-Clearing Debris Landfill at a site on Choice Road off Highway 92 near
Gray Court in Laurens County, South Carolina. In order to obtain a permit from the South
Carolina Department of Health and Environmental Control (DHEC), C & D must meet the
technical, design and operational requirements of the South Carolina Solid Waste Policy and
Management Act of 1991 and the regulations promulgated thereunder.

One of the things MRR must do to obtain a landfill permit is to make a "demonstration of

need" for the facility, pursuant to S.C. Code § 44-96-290(E): "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." S. C. Code § 44-96-290(E).

In attempting to satisfy the "demonstration of need" requirement for its proposed landfill, the only thing MRR submitted to DHEC was a letter designating the latitude and longitude of its proposed landfill. (See Transcript of Deposition of Kent Coleman, attached hereto as Exhibit A, at page 34, line 5 through page 35, line 4; page 39, line 9 through page 42, line 5; and Exhibits 4 and 5 to the Coleman deposition). Using this information, and only this information, DHEC issued a letter stating that MRR had satisfied the statutory demonstration of need requirement. (Coleman Deposition, page 34, line 5 through page 41, line 14; Deposition Exhibits 4 and 5) DHEC later incorporated this letter approval of the "need" requirement into its final decision to issue a permit for the landfill, approving the landfill for the burial of up to 154,000 tons per year of C & D waste. (Id.).

According to DHEC's most recent solid waste annual report, Laurens County generates less than 17,000 tons per year of C & D waste. (Coleman deposition, page 42, line 6 through page 43, line 18; see also, page 75 of the 2007 South Carolina Solid Waste Management Report - Pages 69-72, attached hereto as Exhibit B). In fiscal year 2006, Laurens County generated only 9,479 tons of C & D waste; in 2005, 6,645 tons; in 2004, 8,434 tons; and in 2003, 8,631 tons. (Coleman deposition, page 43, line 13 to page 44, line 1; Exhibit B, page 75).

Laurens County currently has three landfills that handle C & D waste: the City of Clinton landfill, with a permitted annual disposal rate of 1,375 tons; the Laurens County landfill, with a permitted annual disposal rate of 8,900 tons; and the Curry Lake landfill, with a permitted annual disposal rate of 241,591 tons. (Coleman deposition, page 44, line 2 to page 45, line 25; Exhibit

B, page 73). In 2007, the amount of C & D waste actually disposed of in these three landfills was as follows: City of Clinton landfill: 200 tons; Laurens County landfill, 3,212 tons; and Curry Lake landfill, 67,260 tons. (Id.). The City of Clinton landfill has a remaining life of 20 years, and the Curry Lake landfill has a remaining life of 38 years. (Exhibit B, page 73). The Laurens County landfill is closing in May, 2009, and will remain open only for receipt of limbs and other yard waste that can be run through a chipper to create mulch.

These figures show that Laurens County generates less than 17,000 tons of C & D waste, that the county's three landfills accepted 70,672 tons of C & D waste in 2007, and that the total permitted capacity of the county's three landfills is 251,866 tons per year, or 242,966 tons without the Laurens County landfill. (Coleman Deposition, page 46, lines 4 - 11; Exhibit B, pages 73 and 75).

DHEC admits that the existing C & D landfill capacity in Laurens County "was not taken into account" when DHEC made the determination that MRR had made a successful "demonstration of need." (Coleman deposition, page 46, lines 22-25). Accordingly, DHEC ignored the fact that Laurens County already has more than 14 times the landfill capacity it needs.

After DHEC approved MRR's "demonstration of need," DHEC issued the permit to MRR with an annual disposal rate of one hundred fifty-four thousand (154,000) tons per year of C & D waste. (See Exhibit C, Class 2 Landfill Permit No. LF2-002, at page 2). If built, the MRR landfill, together with the existing landfills, would give Laurens County an annual C & D landfill capacity of 396,966 tons for a county generating less than 17,000 tons per year, or about 4% of the permitted capacity.

When approving the "demonstration of need" in 2006, DHEC arrived at the annual

disposal rate of 154,000 tons by adding together the total amount of C & D waste generated in 2004 in the counties of Laurens (8,434 tons), Greenville (87,157 tons), and Spartanburg (58,803 tons). (Coleman deposition, page 41, line 22 to page 42, line 5; Deposition Exhibit 5, page 3).

The 2007 DHEC Solid Waste Management Report shows that Greenville County has existing C & D landfills with an annual allowed disposal rate of approximately 500,000 tons. (Coleman deposition, page 47, lines 10 to 22). The Report also shows that Spartanburg County has existing C & D landfills with an annual allowed disposal rate of 80,000 tons. (Coleman deposition, page 47, line 23 to page 48, line 10).

DHEC admits that the existing permitted capacity of C & D landfills in Greenville and Spartanburg Counties was not taken into account when DHEC approved the MRR "demonstration of need." (Coleman deposition, page 48, lines 11 through 14).

These waste generation and landfill capacity figures are summarized in the following chart:

	Tons of C& D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	16,860	242,966	6.9%
Greenville County	161,738	510,157	31.7%
Spartanburg	72,161	80,000	90.2%
Total - 3 counties	250,759	833,123	30.0%

For the reasons set forth below, the DHEC decision to issue this landfill permit was in error and in violation of the demonstration of need provision of the Solid Waste Management Act, and, accordingly, this decision should be reversed.

ARGUMENT

I.

There is No Need for the Proposed C & D Landfill and MRR Highway 92, LLC, Has Made No Demonstration of Need.

As noted earlier, Section 44-96-290(E) of the South Carolina Solid Waste Management Act states that "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department."

DHEC has promulgated a regulation, R.61-107.17, purportedly pursuant to Section 44-96-290(E), and the regulation is entitled: "Solid Waste Management: Demonstration-of-Need." S.C. Code Ann. Regs. § R.61-107.17. (See Exhibit D attached hereto).

As noted above, the only thing submitted by MRR in support of its request for a determination of need for the landfill was a letter giving the latitude and longitude of the proposed landfill site. Both DHEC and MRR have admitted that no other evidence was submitted or considered in determining that need was demonstrated, except for waste generation tonnage figures from DHEC's annual solid waste reports. The waste generation tonnage amounts for the entire counties of Laurens, Greenville, and Spartanburg Counties were used to set the 154,000 tons per year permitted capacity for the proposed MRR landfill. DHEC did not consider the existing landfill capacity in these counties of 833,123 tons per year.

The approval of the "demonstration of need" was made simply by rote application of the formula set forth in subparts D.3.a. through D.3.c. of Regulation 61-107.17. DHEC plotted the latitude and longitude of the proposed landfill on a map, then drew a circle with a ten (10) mile radius around this plotted point. Then DHEC counted the number of existing commercial

landfills within the circle. After determining that there was only one (1) commercial landfill within the circle, DHEC looked at the map to determine which counties were touched by the circle. DHEC determined that the circle included parts of Laurens, Greenville and Spartanburg Counties. Then DHEC added up the total amount of waste generated within the entire land area of these counties, using figures from the fiscal year 2004 solid waste report, and arrived at a total annual permitted capacity for the proposed landfill: 154,000 tons. The entire three-county production of waste was counted even though the 10-mile radius circle covers only portions of each county.

From this record, it is plain that MRR has made no "demonstration of need" in the plain and ordinary sense of that term. The evidence clearly demonstrates just the opposite: that no more C & D landfills are needed in Laurens County or in any of the areas covered by the three counties of Laurens, Greenville and Spartanburg. These counties presently have landfill capacity far exceeding waste generation - indeed, more than three times the landfill capacity needed to handle the waste generated in these counties. Within Laurens County alone, existing C & D landfill capacity is more than fourteen (14) times the amount of C & D waste being generated.

Plainly, there is no need for this landfill, and no demonstration of need has been made.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 239 (2008); *Lawson v. South Carolina Dept. of Corrections*, 340 S.C. 346, 532 S.E.2d 259 (2000). As will be shown below, there is no genuine issue of material fact on the issue of whether MRR Highway 92, LLC, has made a demonstration of need, and thus an order granting summary judgment in favor of the Petitioner, and reversing the DHEC decision to issue this landfill permit, is appropriate.

A. Regulation 61-107.17 Is Facially Inconsistent With the "Demonstration of Need" Requirement of Section 44-96-290(E) and Is Thus Invalid.

Section 44-96-290(E) of the South Carolina Solid Waste Management Act states in part: "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." S.C. Code Ann. § 44-96-290(E).

Attached hereto as Exhibit E is a portion of the transcript of the deposition of Art Braswell from the case of *York County v. DHEC and C & D Management Company, LLC*, Docket No. 07-ALJ-07-0178-CC. Mr. Braswell was the director of DHEC's Division of Mining and Solid Waste Management at the time the MRR "demonstration of need" was approved, and when Regulation 61-107.17 was promulgated. Mr. Braswell's deposition has been designated a "Rule 30(b)(6)" deposition in the *York County* case as Mr. Braswell is the Department's spokesman in that case, and the testimony is thus binding upon DHEC.

Art Braswell acknowledged that under the formula used by DHEC (10-mile circle, with capacity set at the total of all waste generated in all counties touched by the circle) can result in the permitting of excess capacity, and that using the formula set forth in Regulation 61-107.17, a county could end up with landfill capacity that is several multiples of the amount of waste generated within the county. (Tr. 31, lines 9 to 25). Mr. Braswell admitted: "It's sort of a misnomer because the . . . Demonstration of Need Regulation actually looks at the location of landfills, not actually what is needed in that county. . . . It doesn't take into account the overall waste issue as far as need, saying we have this much capacity in the county, we have more than excess capacity, therefore, we can't site another landfill. That regulation doesn't do that. It only says that you can't have two – more than two within a certain planning area, and then the

tonnages are based on where those planning areas – where they cover – which does allow for a – a large volume of waste or a large capacity of waste to be permitted within every county of the state.” (Tr. 47, line 24 to p. 48, line 18).

As Art Braswell acknowledged, Regulation 61-107.17 fails to truly require a determination of need, and can result in “a large capacity of waste to be permitted within every county of the state.” DHEC’s solid waste report for fiscal year 2007 demonstrates, perhaps as a result of Regulation 61-107.17, that South Carolina has already permitted more than twice the amount of C & D landfill capacity that is needed to handle C & D waste generated within this state. On page 73 of the 2007 DHEC report, DHEC states that the total permitted annual rate of disposal of C & D waste is at least 4,464,333 tons per year. On the same page, DHEC states that the amount of C & D waste generated within South Carolina in fiscal year 2007 was less than half the permitted capacity: 2,054,694 tons. (Exhibit B, page 73).

Even without Art Braswell’s testimony, it is plain that Regulation 61-107.17 fails to require a “demonstration of need” as mandated by Section 44-96-290(E) of the Solid Waste Management Act.

A “demonstration” has been defined to mean: “1. The act of showing or making evident. 2. Conclusive evidence; proof. 3. An illustration or explanation, as of a theory or product, by exemplification or practical application. 4. A manifestation of one’s feelings. 5. A public display of group opinions, as by a rally or march: *peace demonstration*.” The American Heritage Dictionary of the English Language (4th Ed. 2000), p. 484.

“Need” has been defined to mean: “1. A condition or situation in which something is needed or wanted: *crops in need of water; a need for affection*. 2. Something required or wanted; a requisite: *Those of us who led the charge for these women’s issues . . . shared a common*

vision in the needs of women" (Olympia Snowe). 3. Necessity; obligation: *There is no need for you to go*. 4. A condition of poverty or misfortune: *The family is in dire need*." The American Heritage Dictionary of the English Language (4th Ed. 2000), p. 1175.

Applying these plain English definitions to the terms used by the General Assembly, it is obvious that a "demonstration of need" must involve proof of an actual need or requirement for additional landfill capacity.

The Rule 30(b)(6) deposition of DHEC in this case shows that no such demonstration was made in this case. (Deposition of Kent Coleman). Instead of a "demonstration of need," MRR submitted merely the latitude and longitude of its proposed landfill site. These coordinates, of course, demonstrate only the location of the landfill.

In lieu of a "demonstration of need," DHEC applied a rote formula that set the capacity of this landfill at 154,000 tons per year for a county that already has landfills with a permitted capacity of 251,866 tons per year while generating only 17,000 tons per year. Even considering Spartanburg and Greenville County, DHEC's decision would add 154,000 tons of C & D landfill capacity to a tri-county region that already has permitted C & D landfill capacity of 831,866 per year in a region that in 2007 generated a total of 250,759 tons of C & D waste. The permit would thus take a region that currently has more than three times the amount of landfill capacity it needs and end up with nearly four times more landfill capacity than it needs.

Nothing in Regulation 61-107.17 requires anything remotely resembling a true "demonstration of need" in the plain and ordinary use of that phrase. This failure means that the regulation must fall.

It is well-established in South Carolina that where a regulation and a statute are in conflict, the regulation must fall. The general rule is that only the legislature has the authority to

pass laws and any agency interpretation – be it in an administrative order or through agency rule-making – must not alter or add to the statute. In *Lee v. Michigan Millers Mutual Insurance*, 250 S.C. 462, 158 S.E.2d 774 (1968), the Court ruled that an administrative agency invested with rule making power for the purpose of carrying out the legislative will expressed in statutory form has no legal authority to enact regulations that “materially alter or add to” the statute. 250 S.C. 462, 468, 158 S.E.2d 774, 776 (citing *Heyward v. S.C. Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962)). In *Lee*, the Insurance Commissioner issued an Order requiring liability insurance policies issued prior to January 1, 1961, to carry the uninsured motorist endorsement. The Court held that because the order materially altered and added to the statute, it was an invalid agency interpretation.

In *Milliken and Company v. South Carolina Department of Labor*, 275 S.C. 264, 269 S.E.2d 763 (1980), the South Carolina Supreme Court noted:

It is well settled that an administrative order which materially alters or adds to the law is void. *Lee v. Michigan Millers Mut. Ins. Co.*, 250 S.C. 462, 158 S.E.2d 774 (1968). The same principle applies to administrative rule-making. See *Hay v. S.C. Tax Comm’n*, 273 S.C. 269, 255 S.E.2d 837 (1979); *Lee v. Michigan Millers Mut. Ins. Co.*, supra; *Heyward v. S.C. Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962).

275 S.C. at 267-268, 269 S.E.2d at 764.

In *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), the SC Supreme Court held that “Although a regulation has the force of law, it must fall when it alters or adds to a statute.” 283 S.C. at 567, 324 S.E.2d at 31 (citing *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496 (1943)). In that case, the statute provided that “any person” has a right to inspect or copy such public records. Yet DHEC, by regulation, attempted to limit public access to death certificates. The Court ruled that the regulation was invalid because only the legislature can restrict the class of persons to whom DHEC must furnish death certificates.

In *State v. Sweat*, the Court of Appeals ruled that “when a statute’s terms are clear and unambiguous on their face; there is no room for statutory construction and a court must apply the statute according to its literal meaning.” 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008) (citing *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994); *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 231, 612 S.E.2d 719, 723 (Ct. App. 2005)). The Court continued that a “statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention” will be rejected. *Id.* at 350, 677 (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); *Kiriakides v. United Artist Commc’ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). The court will reject the agency’s interpretation where it is contrary to the plain language of the statute. *Id.* (citing *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)).

Numerous other jurisdictions apply the same rule. *See, e.g., Chevron v. NRDC, et al.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782 (1984); *Sharpe v. Arizona Health Care Cost Containment Sys.*, 2009 WL 249706, — P.3d —, (Ariz. App. Div. 1, 2009); *State of Georgia ex rel. Department of Medical Assistance v. Heckler*, 768 F.2d 1293, 1298 (11th Cir. 1985); *Shipkey v. District of Columbia Dept. of Employment Services*, 955 A.2d 718 (D.C. 2008); *Creative Choice XXV, Ltd. v. Florida Housing Finance Corp.*, 991 So.2d 899 (Fla. App. 1. Dist. 2008); *MOAEC, Inc. v. MusicIP Corp.*, 568 F. Supp. 2d 978 (W.D. Wis. 2008).

Here, Section 44-96-290(E) plainly states that “No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department.” S.C. Code Ann. § 44-96-290(E).

Despite this clear mandate for a "demonstration of need," even the DHEC manager who wrote the regulation admits that the title to Regulation 61-107.17 is a "misnomer," and that the regulation looks only at the location of a proposed landfill, and "not actually what is needed."

Regulation 61-107.17 materially alters the requirement plainly set forth in Section 44-96-290(E) of the Solid Waste Management Act. The act plainly requires that the applicant make a "demonstration of need." The regulation, in contrast, relieves the applicant of such a demonstration. Under the regulation, the applicant need only submit the latitude and longitude of the site of the proposed landfill and not a single bit of evidence of need. Under the regulation, neither the applicant nor DHEC makes any effort whatsoever to determine whether a landfill is needed. All they do is put a dot on a map, draw a circle, count the number of existing commercial landfills in the circle, and then assign an annual capacity limit based on the total amount of waste generated in each and every county that even slightly touches the circle. The amount of existing landfill capacity is ignored.

Art Braswell is exactly right: Regulation 61-107.17's title is a "misnomer." The regulation does not measure need at all. The regulation ignores the statutory mandate and leads to the completely absurd result of allowing additional enormous landfills even when the counties surrounding the landfill already have more than three times the amount of landfill capacity that would be needed (in the plain and ordinary sense of that term) to handle the region's waste.

Regulation 61-107.17 materially alters the statutory requirement of a demonstration of need, and thus the regulation is invalid on its face and should be declared invalid.

B. DHEC's Application of Regulation 61-107.17 Is Arbitrary, Capricious, and Characterized By Abuse of Discretion or Clearly Unwarranted Exercise of Discretion.

Subpart D.(3).d. of Regulation 61-107.17 provides: "d. The Department reserves the right

to review additional factors in determining need on a case-by-case basis." S.C. Code Ann. Regs. § R.61-107.17.D.(3).d. This provision gives DHEC a means to consider factors that go beyond the rote formula set forth in Sections 61-107.17.D.3.a. through 61-107.17.D.3.c., a means to determine need "on a case-by-case basis."

In this case, however, DHEC ended its inquiry with the formula set forth in the first three subparts of Regulation 61-107.17.D.3. DHEC did not examine any "additional factors" when it approved MRR's "demonstration of need." (Coleman deposition, page 57, line 12 to page 59, line 6). DHEC admits that the Department received public comments indicating that there is no need for this landfill, and that the comments set forth many of the facts and figures relating to waste generated in Laurens, Greenville and Spartanburg Counties and the existing landfill capacity in these counties. (Coleman deposition, page 59, lines 7 through 17). Despite these comments, and despite the information available to the Department, DHEC did not use any of this information in rendering its "need" decision. (Coleman deposition, page 59, line 18 to page 60, line 21).

The Department looked solely at the number of "commercial" landfills within 10 miles of the site of the proposed MRR landfill, and the total amount of waste generated within Laurens, Greenville and Spartanburg Counties. Despite the clear authority of Section 61-107.17.D.3.d., the Department did not consider any additional factors in issuing approval of MRR's "demonstration of need."

The failure to consider other factors in determining whether the applicant really made a proper demonstration of need is plainly an arbitrary and capricious action. "[I]t is arbitrary or capricious for an administrative agency not to take into account all relevant factors in making its determination." *Hanly v. Mitchell*, 460 F.2d 640, 648 (C.A.2 1972) (citing *Citizens to Preserve*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). The fact that DHEC narrowly looked at the "circle" test while ignoring other relevant factors such as the capacity of other landfills in the region and in the county, shows that DHEC has plainly acted in an arbitrary and capricious manner.

The inclusion of Regulation 61-107.17.D.3.d, shows that DHEC recognized that there would be situations when the rote application of the formulas would not properly determine whether a proposed landfill is needed. This subpart at least provide a mechanism for consideration of additional factors that may bear on the question of need – factors like the amount of existing landfill capacity.

In this case, such additional factors should have included the actual capacity figures for the county and region, the actual generation figures for the county and region, the fact that the county and region already have several times more landfill capacity than either the county or the region needs, the fact that the 10-mile circle included only a portion of the counties used in setting the capacity limit, and probably many other factors. But DHEC admits that it failed to consider any such additional factors – not a single additional factor was taken into account.

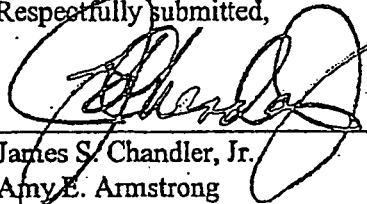
Of course, the provision's vague reference to "additional factors" without specifying what additional factors the agency had in mind, or providing any guidance as to how these additional factors might be used in determining need, the regulation suffers from additional legal flaws, leaving far too much to the agency's discretion to provide appropriate regulatory guidance.

But we can certainly see that in this case, the refusal to consider any additional factors, coupled with the actual capacity and generation figures, demonstrate that DHEC has acted in an arbitrary and capricious manner in approving a so-called "demonstration of need."

CONCLUSIONS

For these reasons, the Administrative Law Court should issue an order granting summary judgment in favor of the Petitioner, denying the motion for summary judgment filed by MRR Highway 92, LLC, and reversing the DHEC decision to grant the permit at issue.

Respectfully submitted,



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May 1, 2009

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's
Environment ("EAGLE"), a non-profit
membership organization,

Petitioner,

vs.

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

Respondents.

Case No. 07-ALJ-07-0178-CC

EXHIBITS

**IN SUPPORT OF PETITIONER'S MOTION
FOR SUMMARY JUDGMENT
AND IN RESPONSE TO MRR HIGHWAY 92, LLC'S
MOTION FOR SUMMARY JUDGMENT**

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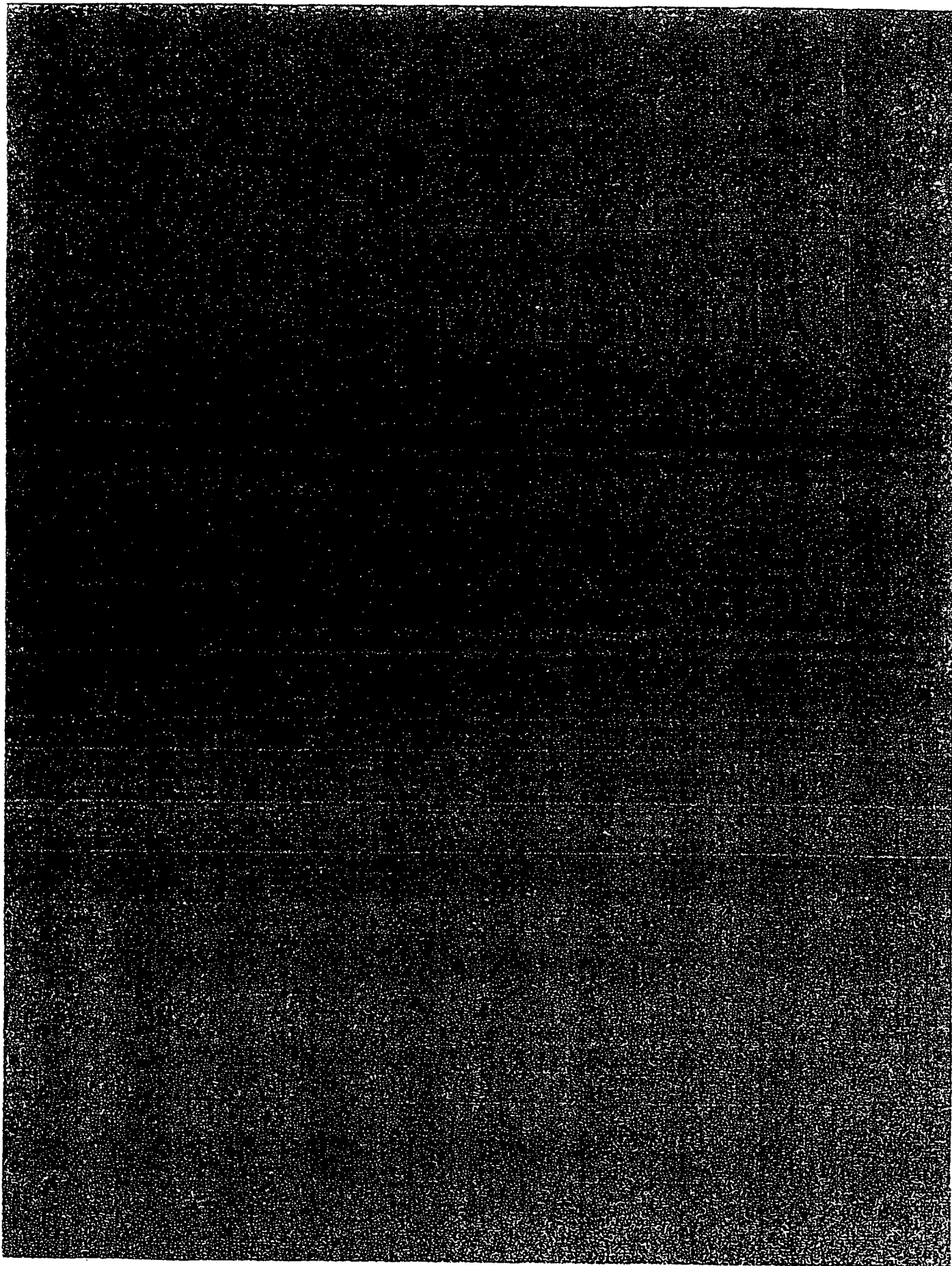
FAX (843) 527-0540

Attorneys for EAGLE

Georgetown, South Carolina
May 1, 2009

INDEX OF EXHIBITS

- A Transcript of Deposition of Kent Coleman (Rule 30(b)(6) deposition of South Carolina Department of Health and Environmental Control, with attached exhibits
1. Notice of 30(b)(6) deposition
 2. Map of Active and Proposed C & D Landfills
 3. Map of Active and Proposed C & D Landfills
 4. Letter dated February 21, 2006, from Rudy M. Curtis of B.P. Barber & Associates, Inc., to Ms. Joan Litton of DHEC
 5. Letter dated March 3, 2006, from Joan F. Litton of DHEC to Mr. Ronald Gilkerson of MRR Southern Company, LLC
 6. Letter dated March 17, 2008 from Laurens County Water and Sewer Commission to Mr. Timothy M. Eleazer of DHEC
- B DHEC 2007 South Carolina Solid Waste Management Report, pp. 1-2 and 69-72
- C Class II Landfill Permit No. LF-2-002, issued to MRR Highway 92, LLC
- D DHEC Regulation 61-107.17
- E Transcript of Deposition of Art Braswell, pages 1-11, 28-32, 46-48, 53-56



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

ENGAGING AND GUARDING	)	DOCKET NO. 08-ALC-07-0425-CC
LAURENS COUNTY'S	)	
ENVIRONMENT ("EAGLE"),	)	
A NON-PROFIT MEMBERSHIP	)	
ORGANIZATION,	)	30(b)(6) DEPOSITION
	)	
PETITIONER,	)	OF
	)	
VS.	)	SOUTH CAROLINA
	)	DEPARTMENT OF HEALTH
MRR HIGHWAY 92, LLC,	)	AND ENVIRONMENTAL CONTROL
AND SOUTH CAROLINA	)	
DEPARTMENT OF HEALTH AND	)	BY
ENVIRONMENTAL CONTROL,	)	
	)	KENT COLEMAN, P.G.
RESPONDENTS.	)	

30(b)(6) Deposition of South Carolina Department of Health and Environmental Control by Kent Coleman, P.G., taken pursuant to the Federal Rules of Civil Procedure, commencing at the hour of 10:04 a.m., Thursday, February 12th, 2009, at South Carolina Department of Health and Environmental Control, 2600 Bull Street, Conference Room 2256, Columbia, South Carolina.

COPY

Reported by
Sandra M. Snead

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Reported By: Sandra M. Snead

Also Present: Jerry Williams
Jeff Nichols
Christopher Roof
Ron Gilkerson

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Exhibits

Marked as Petitioner's Exhibit Number One; 30(b)(6)
Deposition of SCDHEC by Kent Coleman, P.G.; copy of
Notice of Deposition; two pages 9

Marked as Petitioner's Exhibit Number Two; 30(b)(6)
Deposition of SCDHEC by Kent Coleman, P.G.; copy of
Laurens Recycling & Reclamation Center C&D Landfill
map; one page 36

Marked as Petitioner's Exhibit Number Three; 30(b)(6)
Deposition of SCDHEC by Kent Coleman, P.G.; copy of
Active and Proposed Construction and Demolition (C&D)
Debris Landfills in SC map; one page 37

Marked as Petitioner's Exhibit Number Four; 30(b)(6)
Deposition of SCDHEC by Kent Coleman, P.G.; copy of
correspondence dated February 21, 2006 with attached
maps; three pages 39

Marked as Petitioner's Exhibit Number Five; 30(b)(6)
Deposition of SCDHEC by Kent Coleman, P.G.; copy of DHEC
correspondence dated March 3, 2006, U.S. Postal Service
Certified Mail Receipt, Demonstration of Need Worksheet
and B.P. Barber correspondence dated February 21st,
2006; four pages 40

Marked as Petitioner's Exhibit Number Six; 30(b)(6)
Deposition of SCDHEC by Kent Coleman, P.G.; copy of
Laurens County Water and Sewer Commission correspondence
dated March 17th, 2008; two pages 51

Marked as Petitioner's Exhibit Number Seven; 30(b)(6)
Deposition of SCDHEC by Kent Coleman, P.G.; copy of DHEC
documents entitled Agenda for Public Hearing, Fact Sheet
and Feedback Survey; three pages 54

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Stipulations

The reading and signing of this deposition is reserved by the deponent and counsel for the respective parties.

Whereupon,

Kent Coleman, P.G., being duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth, testified and deposed as follows:

The Court Reporter: State your name for the record.

The Deponent: My name is Kent Middleton Coleman.

Examination

By Mr. Chandler:

Q Mr. Coleman, where do you live?

A I live in Northeast Columbia, South Carolina.

Q And how long have you lived in Columbia?

A Oh, let's see. About 15, 16 years, I guess.

Q Okay. And where are you employed?

A I'm employed at the South Carolina Department of Health and Environmental Control.

Q What is your position?

A My position is director of the Division of Mining and Solid Waste Management.

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1 Q And can you give me an overview of what your job
2 entails in that position?

3 A Overseeing the staff, permitting staff, for the
4 Mining and Solid Waste sections, as well as the
5 Office of Solid Waste Reduction and Recycling and
6 the Groundwater Geology Solid Waste Group, the
7 activities of those staff in terms of reviewing and
8 issuing permits, assigning permits, and -- I guess
9 that pretty much -- That pretty well describes it
10 in general terms.

11 Q Okay. And you also are involved in drafting and
12 the process of promulgating regulations?

13 A Yes.

14 Q Okay. What types of permits does your office
15 issue?

16 A Well, a variety of permits for solid waste
17 management facilities, including landfills, solid
18 waste processing facilities, transfer stations, as
19 well as mines, for any type of mining in the state
20 that meets the definition of mining under the
21 Mining Act, and, you know, solid waste facilities
22 in general that are covered under the regs of the
23 Act.

24 Q Okay. Now, what I want to do is back up a little
25 bit and get you to give me your educational

- 1 background.
- 2 A Okay. I have a bachelor's degree in geology and
3 business from the University of South Carolina at
4 Aiken. I have a master of earth resource
5 management from the University of South Carolina in
6 Columbia.
- 7 Q When did you obtain those degrees?
- 8 A I obtained the bachelor's degree in 1988 and the
9 master's degree, '94, '95 -- I think '94.
- 10 Q And have you taken any further courses since
11 getting your master's degree?
- 12 A I've certainly been involved in a number of
13 training opportunities through work, through DHEC,
14 where I've been able to go to different types of
15 workshops and conferences through the years. Also,
16 I am a registered professional geologist in South
17 Carolina, and I take continuing education credits
18 and have maintained that throughout my career as a
19 professional geologist.
- 20 Q And how about walk me through your employment
21 history.
- 22 A Okay. DHEC or all the way from the beginning?
- 23 Q Let's start from the beginning.
- 24 A Okay. I began, after -- after I received my
25 bachelor's degree, working as a geologist. I

1 worked for Kennecott Mineral Exploration Company
2 located in Camden, South Carolina. After -- After
3 leaving there, I went to the University of South
4 Carolina where I worked at the Earth Sciences and
5 Resources Institute as a manager of the Geologic
6 Mapping Area for that institute. And after leaving
7 there, went to DHEC in January of 1992. I began
8 working at DHEC as a project manager and
9 hydrogeologist in the Solid Waste Program. Did
10 that for about three years prior to becoming the
11 section manager of the CERCLA, or Superfund,
12 Groundwater Section where we reviewed cleanup
13 activities under CERCLA for the state. After -- I
14 think I was in that job approximately nine years.
15 Went to a position as the director of the
16 Underground Storage Tank Program with DHEC. Did
17 that job for about four years, and then became
18 director of the Division of Mining and Solid Waste,
19 which is my current position.

20 Q Who was your immediate predecessor in your current
21 job?

22 A Art Braswell.

23 Q Okay. How many people report to you?

24 A I'm currently -- There's 40, 40 people.

25 Q All right. And who is your immediate supervisor?

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- 1 A Claire Prince.
- 2 Q And what is her position?
- 3 A She is the assistant bureau chief of the Bureau of
- 4 Land and Waste Management.
- 5 Q Who is the bureau chief?
- 6 A Daphne Neel is the bureau chief.
- 7 Q Well, you may have said this, but when did you
- 8 become head of this division?
- 9 A December 3rd of 2008. Is that right? No. 2007.
- 10 I'm sorry.
- 11 Q 2007?
- 12 A Yeah.
- 13 Q I was thinking you were in this position last
- 14 August when --
- 15 A Right.
- 16 Q -- I saw you at the DHEC board meeting --
- 17 A That's correct.
- 18 Q -- when the regulations were --
- 19 A That's correct. Yeah, 2007 is right.
- 20 Q Okay. Now, have you seen this Notice of
- 21 Deposition?
- 22 A Yes.
- 23 Q Do you understand that you are the spokesman for
- 24 the Department on at least some of the issues that
- 25 are listed on this notice?

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1 A Yes.

2 Q Okay. Are there any of the issues that are listed
3 on this notice that you are not going to be able to
4 address?

5 A I think I can address most of these issues. The
6 issues that deal directly with the storm water
7 permitting I would not be able to address.

8 Mr. Chandler: Okay. Let's go ahead and
9 mark this as an exhibit so we'll have it with
10 the deposition.

11 Marked as Petitioner's Exhibit
12 Number One; 30(b)(6) Deposition
13 of SCDHEC by Kent Coleman,
14 P.G.; copy of Notice of
15 Deposition; two pages.

16 Q Now, you understand that we're here today to talk
17 about the application that's been made by a company
18 called -- what is it -- MRR Highway 92, LLC?

19 A That's my understanding, yes.

20 Q At the time you became head of this division, what
21 was the status of the permit application? Do you
22 recall?

23 A I know that the application was under review.
24 There had been some activity on that application
25 prior to my coming to the job.

1 Q Okay. And can you give me the names of the people
2 on staff who had been involved up to that point and
3 who have been involved in the review of that permit
4 since then?

5 A Sure. The two sections that were involved with
6 that primarily would have been the Solid Waste
7 Permitting section, which is managed by Joan
8 Litton, and the project manager that she has
9 working on this particular application is Tim
10 Eleazer. The other section that would have been --
11 that would have had primary involvement would be
12 Jana White's Solid Waste Planning Trust Fund
13 Management section, and she -- she has two staff
14 that look at planning issues and some other things,
15 and that would be Celeste Duckett and Ernell
16 Hartwell.

17 Q Ernell?

18 A Ernell. At the time, he was -- He is no longer in
19 her section, but he is still with the division.

20 Q Okay. When you talk about solid waste planning,
21 what kind of role would they have in the permitting
22 process?

23 A They would look at the solid -- the county's solid
24 waste plans and review those plans and look at an
25 application for a particular type of facility as it

1 relates to consistency with the county solid waste
2 management plan.

3 Q Bear with me a minute. I'm trying to remember a
4 name. It can't seem to come into my head. Who is
5 Jana White's predecessor in planning?

6 A Well, it's -- The organization has changed a bit
7 over the years, but Rudy Curtis did some planning
8 work prior to and during -- actually, at the same
9 time Jana was still working on that, as well.

10 Q Okay. Okay. While you were the director of the
11 Underground Storage Tank Division, I assume that
12 during that time and up to December 3rd, 2007, you
13 would not have had any direct involvement with this
14 permit?

15 A That's correct.

16 Q Okay. And do you recall exactly what the status of
17 the permit was other than generally being under
18 review when you -- when it first came onto your
19 radar screen?

20 A Basically, there was not a draft permit, as I
21 recall, issued until after I came to the job; and,
22 so, it was under review in a lot of different, you
23 know, ways. The specifics of that, I don't -- I
24 don't know that I could say exactly where it was,
25 but the application was under review, and then I

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1 became more aware of it as we got closer to a
2 decision, and I was briefed extensively and then
3 reviewed some of the documentation.

4 Q Okay. Now, as I understand it, -- And you can
5 tell me if I'm wrong. We're going to go over some
6 material that both of us are probably familiar
7 with, but I want to make sure that --

8 A Mm-hmm.

9 Q -- my understanding is correct.

10 A Mm-hmm.

11 Q As I understand it, these -- an application for a
12 C&D landfill, --

13 A Mm-hmm.

14 Q -- like just about any other landfill, goes through
15 certain stages, and there are certain preliminary
16 decisions that are made along the way before you
17 get up to a draft permit. Can you kind of walk me
18 through what those stages are?

19 A Right. I guess one of the first steps in that
20 process would be a request for a demonstration of
21 need review, and that's the process where the
22 Department looks at type of facility location and
23 reviews that application against the requirements
24 of Regulation 61-107.17. And then another
25 preliminary step would be when the application is

1 looked at in relation to the county's solid waste
2 management plan to review whether that application
3 would be consistent, if the facility were
4 permitted, would it be consistent with that county
5 plan. It's also looked at in terms of the state's
6 solid waste plan for consistency. There would also
7 be a review of local zoning and ordinances as part
8 of that process of reviewing the application. And
9 then there would be a technical review of the
10 application to see if it meets the requirements of
11 -- at the time, Regulation 61-107.11, which is when
12 this application came in, at a time when that
13 regulation was effective.

14 Q Okay. And at the end of the technical review
15 process, or at least someways along in that
16 technical process, is that when a draft permit is
17 issued?

18 A Once those steps are completed and we're satisfied
19 that all the technical requirements have been met.

20 Q When is public notice issued?

21 A Well, at that time, under Regulation 61-107.11,
22 there were no specific requirements, but the --
23 under the -- The draft permit would have been the
24 public notice.

25 Q Okay. Now, this particular MRR, -- I'm just going

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1 to shorten this -- the name of the company down to
2 MRR --

3 A Okay.

4 Q -- for the purposes of this deposition. The MRR
5 application sort of straddled two periods of time,
6 really almost like three periods of time, because
7 you had the original set of regulations that might
8 have been in place at the time the initial
9 application, or the initial review, of this
10 landfill came into effect. Then you had an overall
11 set of new regulations that govern the permitting
12 process. And I was going to say a third, but,
13 really, the changes in the need regulation, they've
14 been in the process, but they still are not
15 effective. They're sitting at the legislature?

16 A That's correct.

17 Q Okay. Now, if this were a brand new application
18 today, and we were dealing with somebody that just
19 walked in your door --

20 A Mm-hmm.

21 Q -- to build this same landfill, --

22 A Mm-hmm.

23 Q -- how would the process work?

24 Ms. Williams: Object to form.

25 Speculative.

1 Mr. Chandler: What's the objection?

2 Ms. Williams: Speculative. Object to
3 the form of the question. You're asking him
4 to answer something that if -- You said if
5 you got an application in today, how would you
6 look at.

7 Mr. Chandler: Okay.

8 Q What is your process for a new application that
9 comes in the door now?

10 A Okay. Can I get some clarity on that, too, as to -
11 - You're talking about the process under which
12 regulation?

13 Q Well, you mentioned a little while ago when we were
14 talking about -- you mentioned 61-107.11, and --

15 A Mm-hmm.

16 Q -- you mentioned that it was in effect at the time
17 of this application --

18 A Right.

19 Q -- and implying that it was not anymore --

20 A That's correct.

21 Q -- and that a public notice wasn't required.

22 A Mm-hmm.

23 Q And, so, what I want to make sure that I'm clear on
24 is how those amendments changed things, what were
25 the notice requirements before, --

1 A Okay.

2 Q -- what are the requirements in the future. And we

3 can do it either way. We can start out with how it

4 used to work under the old regulations --

5 A Mm-hmm.

6 Q -- and then go through how it works under the new

7 regulations, but I want to go through both of those

8 things.

9 A Okay. Well, you've asked me the process as it

10 currently is, and that would be, based on what you

11 were saying, under the regulation that has replaced

12 61-107.11, and that would be Regulation 61-107.19.

13 And, so, I'll go through -- I'll go through the

14 process as it exists under 19. I'll call it 19.

15 There is a -- certainly a much more lengthy process

16 in terms of phases that you go through with a new

17 application. One of the most significant changes

18 about the regulation is that the Department's

19 decision-making process is broken into two separate

20 department decisions, the first decision being

21 related to consistency with the county plan,

22 demonstration of need, buffer requirements from

23 residences, and other things like daycares and such

24 -- such as that, and, also, then, the county zoning

25 review. We -- Those are called now -- under the

1 new regulation called determinations that are made
2 in that early process. That -- Those four
3 determinations that are made that are related to
4 demonstration of need, county plan, or planned
5 consistency, zoning and buffers, -- those four
6 decisions are -- Once we've looked at those four
7 determinations, once we've looked at all those
8 things, that decision is made as a separate draft
9 decision by the Department. That is open to public
10 comment and appeal as a separate issue. Once we
11 have completed that portion of the application
12 process and that decision is made and it is not
13 appealed, or if it is appealed, then we get through
14 that process somewhere, and there's a decision
15 that's made that tells us that we should continue,
16 then we would accept a permit application, which
17 would be -- there would be public notice of the
18 application, and we would do a technical review of
19 that application. We would make a draft -- again,
20 a draft decision that it met the technical
21 requirements, which would again be public noticed,
22 and after that notice and responding to any
23 comments, we would do -- make a final staff
24 decision which was -- would be also subject to
25 appeal.

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1 Q Okay. And under the system that was in place prior
2 to the new regulation, 107.19, --

3 A Mm-hmm.

4 Q -- how did the system work? If you could, just
5 briefly run through that.

6 A You mean 11, 61-107.11? Is that what you're
7 asking, because I just went --

8 Q Well, I guess while that was in effect, before the
9 new regulation kicked in.

10 A Okay. So, the old regulation?

11 Q Yeah.

12 A Okay. There would be a request for demonstration
13 of need determination by the department. We would
14 look at that, and we would issue a letter to the
15 applicant stating that they had either met or not
16 met that requirement, along with a maximum
17 available yearly disposal rate which would be also
18 a part of that determination. Then we would also --
19 -- I mean, the timing of it could vary depending on
20 when the applicant sends us different information
21 or a request, but another piece of that process
22 would be where they ask us to review the
23 application for consistency with the county plan.
24 We would do that, and we would issue a preliminary
25 consistency determination, and at the same time as

1 this was happening, we could have already had a
2 technical application in-house. Most likely, we
3 would have, once they met -- At least, once they
4 met the demonstration of need question, they would
5 generally go ahead and apply. And, of course, as
6 we went through all the technical review process,
7 we would still be looking at the same things that
8 we look at now in a lot of cases as far as zoning
9 and buffers and those types of things that I
10 mentioned earlier, as well as the technical
11 requirements. But at that time, those were not
12 separated out into different phases like they are
13 now, so that was -- One of the differences is they
14 were kind of ongoing at the same time. And once we
15 -- we'd get ready to make a draft decision on that,
16 then we would public notice. Although that wasn't
17 a specific requirement, it was a matter of policy
18 for the Department that we always public noticed
19 our draft decisions, allow for a comment period,
20 and we respond to those comments when we make our
21 final decision, and may make some revisions to the
22 permit, you know, accordingly, depending on what
23 the comments are.

24 Q Okay. So, if I understand correctly, sort of
25 summarizing, under the old system, everything sort

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1 of came to a head at the end, and all of the -- any
2 preliminary determinations that had been made were
3 then finalized along with the permit decision that
4 was then subject to an appeal?

5 A That's correct.

6 Q Under the new system, it's more of a two-step
7 process; --

8 A Mm-hmm

9 Q -- you make those four determinations that you
10 named, need and consistency and buffer and zoning,
11 --

12 A Right.

13 Q -- and anybody wanting to challenge that has to
14 challenge it at that time rather than wait til the
15 end?

16 A That's right.

17 Q Okay. Now, with cases that have sort of straddled
18 the two regulations, --

19 A Mm-hmm.

20 Q -- started under the old regulation and go to the
21 new regulation, is there any -- I mean, how are
22 you handling those preliminary determinations --

23 A Mm-hmm.

24 Q -- that were made prior to new regulations?

25 A Right. Well, the regulation itself, the new

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1 regulation, 61-107.19, has language related to
2 that, the handling of those things, and that
3 language is -- To paraphrase it, basically it says
4 that if the Department has made those
5 determinations prior to the effective date of the
6 regulation, then they remain applicable, those
7 decisions that we had made, but they are subject to
8 the continued review of the permit application and
9 the technical requirements, as well as subject to
10 appeal.

11 Q Okay. The new regulation made at least some
12 changes in the -- sort of terminology, how you
13 refer to these types of landfills, --

14 A Mm-hmm. Right.

15 Q -- and, I mean, what we had been calling a C&D
16 landfill, there's a new name for that now, isn't
17 there?

18 A Yes.

19 Q And what is that new name?

20 A It would be a Class Two landfill.

21 Q Okay. Are there differences between what was
22 called a C&D landfill and a Class Two landfill, or
23 is it just nomenclature?

24 A There are some differences in terms of the
25 regulatory requirements that are in place for the

1 Class Two versus what was in place for a -- what
2 was known as a C&D.

3 Q Okay. Can you give me a rundown of the major
4 differences, you know, not in -- I don't care
5 about the minor stuff, but --

6 A Sure. One of the -- One of the major differences
7 is that there is an Appendix One, List of
8 Acceptable Waste, which has not really -- has
9 changed a little, not a lot, but then there is also
10 the prospect of approval of other waste streams
11 that are appropriate for that type of landfill that
12 are similar to C&D waste, or have similar
13 characteristics to C&D waste. Another significant
14 difference is that they -- there is now a
15 requirement for groundwater monitoring around the
16 Class Two facilities, whereas that was not the case
17 with construction and demolition debris landfills.
18 And I think that's -- That's really the --
19 probably the two main changes that have occurred.

20 Q Okay. Now, this possibility of additional waste
21 being approved for the landfill, -

22 A Mm-hmm.

23 Q -- what is the process? I mean, is that something
24 that they have to come in and apply for approval
25 and the department has to issue an approval of a --

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1 something that may not be on the standard list and
2 --
3 A Yes. There's also a list of unacceptable items
4 which would not be available --
5 Q Right.
6 A -- for discussion, but yes, there would be an
7 approval process for any other -- a waste stream
8 that was proposed.
9 Q Would that be an amendment to the permit? Would it
10 be something that the public would be involved in,
11 or how is that handled?
12 A It would be a permit modification, and I don't
13 really recall the specifics of public involvement,
14 but it would depend on whether it was a major
15 permit modification or a minor permit modification.
16 Q Okay. And do you know whether the regs spell out
17 what you're going to consider what's major and
18 what's minor, or is that a judgment call?
19 A They do spell it out, and that's -- I'd have to go
20 back and read those definitions again to remember
21 whether or not this was specifically addressed.
22 Q Okay. Now, I want to start out talking about the
23 technical review of this particular permit for MRR.
24 The names you've given me in terms of being
25 involved in this, Joan Litton and Tim Eleazer, --

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- 1 A Mm-hmm.
- 2 Q -- were they people who did the technical review?
- 3 A Yes.
- 4 Q Okay. And what is their background and training?
- 5 A Mr. Eleazer is an engineer.
- 6 Q Okay.
- 7 A His background and training is as an engineer, as
- 8 well as Ms. Litton. They're both engineers.
- 9 Q All right. They're both registered professional
- 10 engineers?
- 11 A I'm not sure about Mr. Eleazer. Ms. Litton is not
- 12 a registered professional engineer. I don't recall
- 13 on Mr. Eleazer.
- 14 Q Okay. When you say they're an engineer, they have
- 15 had some engineering training?
- 16 A I mean that they've got a -- at least a bachelor's
- 17 degree from an accredited university in an
- 18 engineering program.
- 19 Q Okay. And, so, they would have been the people who
- 20 made the technical review of this application?
- 21 A Mr. -- Mr. Eleazer would have been the primary
- 22 reviewer of the application under the supervision
- 23 of Ms. Litton.
- 24 Q Okay. In terms of zoning and local ordinances, the
- 25 documents I got from the DHEC file indicate that

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1 Laurens County just doesn't have zoning. Is that
2 what the department also concluded?

3 A My recollection on this case was that there was not
4 a zoning concern, but I don't remember the
5 specifics of Laurens County zoning ordinances.

6 Q Okay. Who would be able to answer that question?

7 A Well, I mean, when I did the -- When I reviewed
8 and was briefed on the materials, I recall seeing
9 documentation of the fact that there was -- the
10 zoning was either -- it didn't -- it wasn't an
11 issue, or was appropriate, but I don't recall the
12 specific document at this time without looking at
13 it again.

14 Q Okay. The consistency with the county solid waste
15 plan, who would have made that determination?

16 A We would have -- It would have been looked at by
17 Jana White's section, and an internal memo would
18 have been sent to the permitting group to indicate
19 that it was -- was or was not consistent, and,
20 again, that was documentation that I reviewed
21 during my briefing prior to signing the permit.

22 Q Okay. And are you familiar with the fact that
23 there was an initial determination that the project
24 was not consistent?

25 A Yes.

1 Q And then the county passed another ordinance, and
2 then there was a new determination that it was
3 consistent?

4 A My recollection is there was an initial
5 determination that it was consistent, and then that
6 was changed with the new ordinance that the county
7 issued to a non-consistent determination, and then
8 the county withdrew that ordinance later, where --
9 which then made it again consistent with their
10 solid waste planning ordinances.

11 Q Okay. Do you know when the current county solid
12 waste management plan was prepared?

13 A The plan that was in effect at the time of this
14 application, it's my recollection that that was a
15 1997 plan.

16 Q Okay.

17 A I don't know the exact month.

18 Q In the oversight of the county plans, how often
19 does DHEC review county or regional solid waste
20 plans to determine whether they need to be updated
21 or amended to reflect changed conditions or
22 whatever?

23 A Mm-hmm. Well, we -- we do not, as a matter of
24 course and as a matter of responsibility or
25 authority, review plans with the intention of

1 telling counties that they have to or need to
2 update a plan. We -- We update plans when they
3 come in, when we receive a new plan -- I mean we
4 review plans when they come in, as a matter of
5 course, and if we have comments or questions about
6 that plan, then we will often send a correspondence
7 to the county with those questions or comments.
8 However, we don't really have approval authority
9 over those plans. We can make suggestions and
10 maybe point out things that they would, perhaps,
11 look at further. So, as a matter of normal course,
12 when we get a new plan, we do review it, and it's
13 not uncommon that we might comment or ask a
14 question. And then, also, the other normal course
15 of review for a plan, or at least a part of a plan,
16 would be when we get an update sent to us from the
17 county that's been passed through council as an
18 approval to the plan, or however they had
19 designated that they were going to update their
20 plans. And then the third -- I guess the third
21 most common situation where we would review a plan
22 would be when we get an application for a type --
23 some type of facility, and then we would again look
24 at that plan at that time, relative to that
25 particular proposal.

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1 Q Okay. If a county wants to amend a plan, or if a
2 county sent something to DHEC saying we have
3 amended our plan, what do -- what does DHEC require
4 in order to take that amendment into account in
5 making a consistency determination for anything
6 that might be in that county under application?

7 A What we would do is look at the -- You're asking
8 me -- Let me make sure I understand what you're
9 asking me. You're asking me how we would determine
10 whether it was a valid amendment or update? Is
11 that --

12 Q Yeah. Let's say you just got a letter from the
13 county --

14 A Right.

15 Q -- saying we've amended our plan, --

16 A Mm-hmm.

17 Q -- and this is the amendment.

18 A Right.

19 Q Would you consider that an amendment, or would you
20 require more?

21 A We would typically ask for documentation of the
22 approval process with the county, and that would --
23 and what type of approval process, that may vary.
24 It may depend on how the original plan that they
25 wrote designated that approval process.

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- 1 Q Okay. Has the Department's view of changes in
2 these plans evolved over time, or changed over
3 time, at all?
- 4 A Has our -- Would you repeat that?
- 5 Q Has the Department's view of what is required to
6 change a plan, or to amend a plan, changed over
7 time?
- 8 A I'm sure that we've learned things over time, but I
9 think that the Act has always been fairly clear
10 that the original plan has a certain process, and
11 then that original plan would have -- would lay out
12 a process, or could lay out a process at least, for
13 the approval of future plans.
- 14 Q Okay. What if you had a county plan -- I mean, if
15 a county plan does not lay out a process --
- 16 A Mm-hmm.
- 17 Q -- for amendment of that plan, --
- 18 A Right.
- 19 Q -- or revision of that plan, what's required?
- 20 A Then we would look for a vote -- vote on -- by the
21 county council to approve that plan as --
22 generally.
- 23 Q Okay. Do you know whether the department has ever
24 accepted something as a change without a vote by
25 county council?

1 A Well, again, that process may vary depending on
2 whether it's a resolution or an ordinance and those
3 types of things that counties have to decide, but
4 I'm not -- I don't specifically remember a case
5 where we -- we found out later that a plan was not
6 valid. I think there may be cases like that, but I
7 don't have a specific recollection at this time.

8 Q Okay. In this particular case with MRR, are you
9 familiar with what exactly was in the county plan
10 that allowed the Department to make a determination
11 of consistency?

12 A Which -- Which determination, the original --
13 because, as you mentioned earlier, there were some
14 back-and-forths.

15 Q The one that goes with the permit that's under
16 appeal right now.

17 A Okay. So, the 1997 county plan is what -- I guess
18 that's what you're asking?

19 Q Yeah. Do you remember what was in that plan that
20 the Department relied on in making the
21 determination of consistency?

22 A When I -- Prior to signing the permit, I did see
23 the documentation which included portions of that
24 plan. I couldn't quote those portions to you right
25 now without looking at the plan.

- 1 Q Okay. Do you know whether there is any
2 documentation at DHEC of which portions of the plan
3 the Department relied on in making that call?
4 A I'm not sure.
5 Q Okay. I ask this because I have a -- I've gotten
6 what purports to be the entire file --
7 A Mm-hmm.
8 Q -- from DHEC, and I haven't found such a thing.
9 I've seen them in other landfill cases, --
10 A Mm-hmm.
11 Q -- the lists of particular sections, and I didn't
12 see one --
13 A Right.
14 Q -- in this one.
15 A I'd have to look into that. There may be, --
16 Q Okay.
17 A -- but I'm not aware of it at this point. I think
18 you would have seen an internal memo stating that
19 this was not inconsistent with, or something to
20 that effect, the plan.
21 Q Okay. I've seen that language before. I don't
22 think I saw it on this one.
23 A Okay!
24 Q This one seemed to be a straight-up, saying it was
25 consistent.

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1 A Okay.

2 Q Let me ask you this question. That brings up some
3 of this -- A determination that is not
4 inconsistent and a -- and a determination that
5 something is consistent, --

6 A Mm-hmm.

7 Q -- are those the same thing, or are they different?

8 A Not necessarily. No. They're -- And I'm sure
9 there has been, perhaps, some changes in
10 terminology over time that I'm not going to -- I'm
11 not talking about that because I don't know
12 specifically, you know, if the terminology was, you
13 know, happenstance or not, because it may mean the
14 same thing, but I do know that at times if there is
15 a very specific -- if there is very specific
16 information about a facility type and it says
17 something very specific about it whereas -- In
18 other words, since we're talking about consistency,
19 let's talk about it as if it were consistent.
20 There may be something in a plan that says that
21 they do need this type of facility. And that does
22 happen. In that case, that certainly would be
23 consistent. If the plan is pretty much silent on
24 the issue or does not directly address that type of
25 a facility, then I think you would probably more --

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1 be more likely to see the not-inconsistent-with
2 language.

3 Q Okay. Does the Department consider the language
4 not inconsistent to be sufficient to satisfy the
5 statutory requirement of consistency?

6 A Yes.

7 Q Okay. Let's talk about the demonstration of need.
8 Can you tell me how the determination was made that
9 this landfill is needed?

10 A It was the proposal which indicated a location for
11 this proposed facility. At that time, it was
12 looked at in relation to the requirements of 61-
13 107.17.

14 Q Okay. And what are the requirements of 61-107.17?

15 A Well, for a C&D landfill, that regulation
16 designates a ten-mile planning area, or ten-mile
17 radius around the facility as a planning area, and
18 in the case of the geographic piece of that, there
19 cannot be -- there can be as many as two facilities
20 of that type within that planning area, and at the
21 time of this review, there was one facility, as I
22 recall, and, so, this would have been the second
23 allowable facility. The other part of that, the
24 other, I guess, piece of that review is to
25 determine the annual disposal rate that would be

- 1 allowed, and that -- then the C&D generation, waste
2 generation, is looked at in the county that that
3 facility is located in as well as the counties that
4 touch the planning area.
- 5 Q Okay. Now, in viewing the DHEC file, one of the
6 earliest things that I find in here is a letter
7 from the applicant to DHEC essentially saying we
8 want a determination of need and giving a latitude
9 and a longitude.
- 10 A Right.
- 11 Q And one of the next things I see in the DHEC file
12 is a letter saying we're approving the
13 determination of need, or words to that effect, --
- 14 A Mm-hmm.
- 15 Q -- and giving a tonnage rate of -- In fact, let me
16 back up a little bit. The first letter that I saw
17 was a letter dated February 21st, 2006, written by
18 B.P. Barber, who I understand is the engineer for
19 this applicant, giving you those coordinates, the
20 latitude and longitude. And then there is a letter
21 dated March the 3rd, '06 approving the
22 determination of need for up to 154,000 tons a
23 year.
- 24 A Okay.
- 25 Q Do you know whether the Department received any

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1 other information regarding the issue of need than
2 that letter with the latitude and longitude?

3 A No, I'm not -- not aware of any additional
4 information.

5 Q Okay. Now, as I understand it, you take that
6 latitude and longitude, and you plot that point on
7 a map, and then you draw a circle with a ten-mile
8 radius around that point.

9 A Correct.

10 Q Okay. And then you look and see what counties are
11 touched by any portion of that circle?

12 A Yes.

13 Q And the total amount of waste that is generated in
14 each of the counties that is touched by that circle
15 is then added up to come to the tonnage rate; is
16 that right?

17 A At that -- At that particular point in time,
18 that's -- The most recent data, which would be the
19 previous annual reporting data that the Department
20 had, would be used to determine that, yes.

21 Q Okay. And, so, the total of 154,000 tons would be
22 the total of C&D waste, or -- what's the type we
23 call this now --

24 A Class Two.

25 Q -- Class Two -- Class Two waste, the total that's

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1 generated in all the counties touched by that
2 circle?

3 A Mm-hmm. And at that time, it would have been C&D.

4 Q Okay. All right.

5 Mr. Chandler: Do you want to mark this
6 as an exhibit?

7 Marked as Petitioner's Exhibit
8 Number Two; 30(b)(6) Deposition
9 of SCDHEC by Kent Coleman,
10 P.G.; copy of Laurens Recycling
11 & Reclamation Center C&D
12 Landfill map; one page.

13 Q Okay. I've got a little map that appears to have
14 been generated at DHEC, maybe obtained --

15 A Okay.

16 Q -- off the website. It's marked as Exhibit Two.
17 Do you recognize this map as including the circle
18 that was drawn for this MRR landfill?

19 A Well, it looks like maybe it had a different name
20 at the time that it was referred to. Are you --
21 Are you referring to a specific facility on there,
22 or am I just missing --

23 Q Hmm. I'm not sure it's on there. All right. Let
24 me do this. I should have looked at that closer.

25 Marked as Petitioner's Exhibit

1 Number Three; 30(b)(6)
2 Deposition of SCDHEC by Kent
3 Coleman, P.G.; copy of Active
4 and Proposed Construction and
5 Demolition (C&D) Debris
6 Landfills in SC map; one page.

7 Ms. Williams: Excuse me. Jimmy, do you
8 have copies for the attorneys, of the
9 exhibits?

10 Mr. Chandler: I've got a couple of
11 copies of these. These were made -- The one
12 that I've marked as Exhibit Three, --

13 Ms. Williams: Mm-hmm.

14 Mr. Chandler: -- this is printed
15 straight off of the DHEC website --

16 The Deponent: Okay.

17 Mr. Chandler: -- in the last couple of
18 days.

19 The Deponent: All right. It's listed as
20 the small map for C&D Landfills at the DHEC
21 website.

22 Q Now, this exhibit, Number Three, it shows something
23 on there, Highway 92, --

24 A Highway 92, yes.

25 Q -- and that's the one we're talking about here that

1 I've been calling MRR, isn't it?

2 A Yes.

3 Q Okay. And what counties are touched by the circle

4 that is drawn around that landfill? Can you tell?

5 A That's why we do blowups. A little bit hard on

6 this particular map. Maybe -- Well, it's

7 certainly Spartanburg -- Can I look at both maps,

8 Exhibit One and -- I mean Exhibit Two and Three,

9 and maybe that will help me out because I think

10 this -- This is also, I believe, the same circle.

11 It just had a different name at the time. Now I'm

12 looking at Exhibit Two, trying to look at a blowup

13 of that Exhibit Three map. But it looks like it

14 touches Spartanburg, Laurens, and it looks like

15 maybe Greenville, but I'm trying to see if there's

16 another county line in there somewhere. It looks

17 like Laurens, Spartanburg and Greenville from what

18 I can tell with this particular figure.

19 Q Okay. That's the same conclusion I came to from --

20 A Okay.

21 Q -- looking at it, but I agree it's just difficult

22 at that scale.

23 A Mm-hmm.

24 Mr. Chandler: Let me go ahead and mark

25 this letter. And it came to me with maps

1 attached, so I'm going to leave them attached.
2 Marked as Petitioner's Exhibit
3 Number Four; 30(b)(6)
4 Deposition of SCDHEC by Kent
5 Coleman, P.G.; copy of
6 correspondence dated February
7 21, 2006 with attached maps;
8 three pages.

9 Q Okay. Exhibit Four is what I think is the letter
10 that I mentioned a little while ago about a
11 February 21st, '06 letter from B.P. Barber about
12 this landfill, asking for a determination of need,
13 and, as it was provided to me by the Department of
14 Health and Environmental Control, it's got a couple
15 of maps, one a smaller scale map, one a larger.
16 The copies are not the best in the world, --

17 A Mm-hmm.

18 Q -- and I don't know whether this little dotted-line
19 circle on the second map represents this landfill,
20 but that has been my guess, but it's just a guess.

21 A Okay.

22 Q Does that appear to be the letter that was received
23 as the request for a determination of need?

24 A Yes. Yes, you can -- The road names and
25 everything in the letter are consistent with the

1 location that we're talking about, Choice Road,
2 Highway 92, --

3 Mr. Chandler: Let's get some consistency
4 here. Let me get this marked, as well.

5 Marked as Petitioner's Exhibit

6 Number Five; 30(b)(6)

7 Deposition of SCDHEC by Kent

8 Coleman, P.G.; copy of DHEC

9 correspondence dated March 3,

10 2006, U.S. Postal Service

11 Certified Mail Receipt,

12 Demonstration of Need Worksheet

13 and B.P. Barber correspondence

14 dated February 21st, 2006; four

15 pages.

16 Mr. Chandler: All right. I've got a
17 letter with some attachments that I notice one
18 of the attachments is that same letter dated
19 February 21st, but we'll just leave them as
20 they -- And I don't have extra copies of
21 these. I'm sorry.

22 Ms. Hartley: Well, may we glance at
23 those --

24 Mr. Chandler: Sure.

25 Ms. Hartley: -- at least before you

1 start asking him questions?

2 Ms. Williams: Is that Exhibit Five, or
3 is that still --

4 The Deponent: Yeah, it's called Five
5 here.

6 Mr. Chandler: Yeah.

7 Ms. Williams: Oh. Okay.

8 Mr. Chandler: Yeah.

9 Q The document I've handed you as Exhibit Five, do
10 you know what it is?

11 A It's titled Demonstration of Need Approval for the
12 Proposed Laurens Reclamation & Recycling Center
13 Long-Term Construction, Demolition and Land-
14 Clearing Debris Landfill.

15 Q And is that a letter fro Joan Litton to Ron
16 Gilkerson?

17 A Yes, it is.

18 Q Okay. And attached to that are a couple of sheets
19 of paper. The second page just seems to be a
20 return receipt on the mail?

21 A Mm-hmm.

22 Q The third page seems to be a little listing of what
23 went into the makeup of the 154,000-ton limit
24 that's set forth in that letter. Do agree with
25 that?

- 1 A Yes.
- 2 Q Okay. And it lists the same three counties that
- 3 you just called out, Greenville, Laurens and
- 4 Spartanburg; is that correct?
- 5 A Yes.
- 6 Q Okay. Now, do you know how much solid waste, or
- 7 C&D waste, is generated per year in Laurens County?
- 8 A I could look at our most recent annual report to
- 9 determine the most recent information that we have.
- 10 On this particular sheet, there's another listed,
- 11 that you've given me in Exhibit Five.
- 12 Q Okay. Is your most recent report the one for
- 13 fiscal year 2007?
- 14 A Yes.
- 15 Q Okay. I just happen to have a copy of that with
- 16 me.
- 17 A How about that.
- 18 Mr. Chandler: I don't want to mark this
- 19 as an exhibit. It's just information that we
- 20 can all get.
- 21 Q And I think if you'll turn to page 74 -- and also
- 22 75 seems to be pertinent to the amount of waste
- 23 generated in Laurens County and what might be taken
- 24 into account in a needs determination.
- 25 A Okay.

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- 1 Q All right. And before anything else, does what I
2 handed you appear to be a genuine copy of the 2007
3 Solid Waste Management Report?
- 4 A It does appear to be a copy of that report, yes.
- 5 Q And what does the report indicate, the amount of
6 C&D waste generated in Laurens County?
- 7 A Well, we're looking at Table 7.7 on page 75, which
8 is the C&D landfill numbers used for demonstration
9 of need, --
- 10 Q Mm-hmm.
- 11 A -- and in FY '07, it appears -- Are you asking me
12 about any particular year or just --
- 13 Q Well, let's -- Let's just go through. You've got
14 years 2003 through 2007 on that page, don't you?
- 15 A I do.
- 16 Q Okay. And what's the figure for waste generated in
17 2007?
- 18 A 16,860 tons.
- 19 Q And what's the figure for 2006?
- 20 A 9,479 tons.
- 21 Q And for 2005?
- 22 A 6,635 tons.
- 23 Q And 2004?
- 24 A 8,434 tons.
- 25 Q And in 2003?

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- 1 A 8,631 tons.
- 2 Q Okay. Now, does this report on page 73 also tell
- 3 you what are the current -- or what was current, as
- 4 of the date of that report, C&D landfills operating
- 5 in Laurens County?
- 6 A I'm sorry. Ask that again.
- 7 Q On page 73 of the report, --
- 8 A Okay, 73. All right.
- 9 Q -- does that give you a list of C&D landfills that
- 10 were operating in Laurens County as of the time of
- 11 that report?
- 12 A Yes.
- 13 Q Okay. And can you tell me what those facilities
- 14 were -- or are?
- 15 A City of Clinton, C&D and LCD landfill. Curry Lake,
- 16 C&D landfill. Laurens County, C&D landfill.
- 17 Q Okay. And what is the permitted capacity of the
- 18 City of Clinton landfill?
- 19 A 1,375 tons.
- 20 Q Okay. And how much was actually disposed of in
- 21 that landfill in the fiscal year 2007?
- 22 A It looks like 200 tons.
- 23 Q Okay. And it's got a 20-year remaining life, it
- 24 was estimated at that time?
- 25 A That's -- Yeah, according to this table.

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- 1 Q Okay. Now, for the Laurens County landfill, --
- 2 A Mm-hmm.
- 3 Q -- what's it permitted for?
- 4 A 8,900 tons.
- 5 Q And how much was disposed of in the fiscal year
- 6 2007?
- 7 A 3,212.
- 8 Q Okay. We've just got a -- sort of a blank space
- 9 there where it says --
- 10 A Mm-hmm.
- 11 Q -- remaining life. What does that mean?
- 12 A That means that information was not reported to us.
- 13 Q Okay. Do you have any personal knowledge of
- 14 whether that landfill has or doesn't have
- 15 additional capacity?
- 16 A The Laurens County C&D landfill? Is that --
- 17 Q Right.
- 18 A -- what you're asking?
- 19 Q (Nods head.)
- 20 A No, I don't.
- 21 Q Okay. How much is the Curry Lake landfill
- 22 permitted for?
- 23 A 241,591 tons.
- 24 Q And how much was actually disposed of there?
- 25 A 67,260 tons.

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- 1 Q And what's its remaining life?
- 2 A Thirty-eight years, according to this table which
- 3 is page 73.
- 4 Q Okay. So, to sort of summarize where we are, in
- 5 2007 Laurens generated 16,860 tons of C&D waste;
- 6 Laurens has disposed of a total of 70,672 tons of
- 7 C&D waste if you add all three of those landfills
- 8 together, and has permitted capacity of 251,866
- 9 tons for C&D waste. Is that correct?
- 10 A Well, I didn't do the math, but it appears to be
- 11 close, if you would add those together.
- 12 Q Okay. Were any of these figures taken into account
- 13 in making the Department's determination of need?
- 14 A The tonnage figures in -- on page 73? That's your
- 15 question, are those particular numbers taken into
- 16 account?
- 17 Q Well, I've recited some numbers from both page 73
- 18 and 75.
- 19 A Mm-hmm.
- 20 Q Were those numbers taken into account?
- 21 A Yes.
- 22 Q Okay. And how did the existing permitted capacity
- 23 of roughly 250,000 tons a year -- how was that
- 24 taken into account?
- 25 A That number was not taken into account.

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1 Q Okay. Now, the other counties that were included
2 in coming up with the 154,000 tons, Greenville and
3 Spartanburg, --

4 A Mm-hmm.

5 Q -- how much waste was generated in Greenville
6 County, C&D waste, in 2007?

7 A In 2007 --

8 Q Right.

9 A -- for Greenville County was 161,738 tons.

10 Q Okay. And how much permitted capacity does
11 Greenville County have for C&D waste landfills?

12 A It'll take me a minute to add them up. There's a
13 lot of them in Greenville. Let me -- Give me a
14 minute to --

15 The Deponent: (to Ms. Williams) Can I
16 have a piece of paper to add that for him?

17 Ms. Williams: Sure.

18 A Do you want an exact number of them, or close, I
19 take it?

20 Q Yeah. I mean, it can be an approximation.

21 A Mm-hmm. Like, approximately half a million tons,
22 500,000 -- 502,000.

23 Q Okay. Now, how much C&D waste was generated in
24 Spartanburg County in fiscal year 2007?

25 A 72,161 tons.

1 Q And how much permitted capacity does Spartanburg
2 County have for C&D waste?

3 A They have the Wasp Nest Road C&D landfill with
4 80,000 tons per year permitted capacity.

5 Q Okay. And in fiscal year 2007, that landfill took
6 in less than that permitted capacity, in fact, took
7 in a little under 50,000 --

8 A Yes.

9 Q -- tons; isn't that right?

10 A Mm-hmm. Yes.

11 Q Okay. Was the amount of capacity for C&D landfills
12 in Greenville and Spartanburg County taken into
13 account in making the determination of need?

14 A No.

15 Mr. Chandler: I'd like to take a little
16 break for just a few minutes, if y'all
17 wouldn't mind.

18 [Off the record at 11:14 a.m.;
19 back on the record at 11:29
20 a.m.]

21 Examination Continues

22 By Mr. Chandler:

23 Q Mr. Coleman, the regulation dealing with needs,
24 Regulation 61-107.17, --

25 A Yes.

- 1 Q -- the Department has been, for a while, looking at
2 that regulation, and there's actually a proposed
3 amendment that's sitting over at the state
4 legislature right now; isn't that correct?
- 5 A Yes.
- 6 Q Okay. What would that proposed regulation -- How
7 would it affect the analysis of this permit?
- 8 A You're asking me if this permit came in -- this
9 request came in today, or under the proposed -- I
10 guess if it came in under the proposed reg, which
11 isn't effective, but --
- 12 Q Right.
- 13 A -- we're speculating about what -- what might
14 happen. Well, if -- if that regulation were to
15 pass as it is, without any changes, which is a big
16 if, but -- this particular facility would have a
17 20-mile planning radius, as opposed to a ten, and
18 I'm not sure without looking at a map whether that
19 would allow the facility or not, in terms of there
20 being two facilities within that radius, but then
21 the tonnage -- the amount of tonnage that it could
22 take on a yearly basis would be also based on that
23 20-year planning radius which might touch some
24 additional counties that it does not currently
25 touch. So, what you're talking about, in general

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1 terms, is having fewer in number but larger in
2 annual tonnage rates for future facilities like
3 this.

4 Q Okay. So, the size of the circle that you draw
5 around the site is going to increase, which, if it
6 hit a second commercial C&D landfill within that,
7 it might knock it out?

8 A That's correct.

9 Q If it doesn't hit a second one, then it could
10 expand the amount of permitted capacity that it
11 could have if it --

12 A No.

13 Q -- happens to stretch to another county?

14 A No. It would not change the amount of permitted
15 capacity. It would change the annual disposal
16 rate.

17 Q Well, annual disposal rate. The annual --

18 A Yes.

19 Q -- disposal rate could go up from --

20 A Yes.

21 Q -- 154,000 if, for instance, the broader circle
22 touched another county?

23 A Correct.

24 Q Now, in your file, there's a series of letters from
25 an entity known as the Laurens County Water and

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1 Sewer Commission, --

2 A Okay.

3 Q -- and I'm just sort of summarizing, but the
4 letters that I have seen, the Laurens County Water
5 and Sewer Commission appears to have some concerns
6 about the proximity of this landfill to Lake
7 Martin. Are you familiar with those letters?

8 A I recall seeing those letters, yes.

9 Q Okay. Were those letters taken into account in the
10 permitting decision?

11 A Well, we review and consider all comments that we
12 receive on -- on our permits during the review
13 process.

14 Q Okay. Did those letters affect the decision in any
15 way?

16 A No.

17 Q And why not?

18 A Can we get a little bit closer to the nature of the
19 letters so I can maybe comment on that a little
20 better?

21 Mr. Chandler: Yeah, let's go ahead and
22 maybe -- Let me get this marked.

23 Marked as Petitioner's Exhibit
24 Number Six; 30(b)(6) Deposition
25 of SCDHEC by Kent Coleman,

P.G.; copy of Laurens County
Water and Sewer Commission
correspondence dated March
17th, 2008; two pages.

Q All right. I've handed you a copy of a letter that
we've marked -- What is that, Exhibit Six?

A Yes, Exhibit Six.

Q Okay. And the best I can recall, the other letters
were fairly similar to that one in terms of the
comments made by that organization. And I think my
question was did those letters affect the decision
in any way?

A Well, it certainly took us a little bit of time to
read and consider these issues in the letter, but,
ultimately, they did not prevent the issuance of
the permit.

Q Okay. Does the Department see this landfill as
posing any risks at all to water quality in Lake
Martin?

A We don't expect it to impact Lake Martin.

Q Okay. Not expecting it to impact it is not the
same as saying there's zero risk --

A Well, I don't --

Q -- I don't think. I mean, do you think there's
zero risk that it's going to impact Lake Martin?

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- 1 A I don't -- I don't really think I base any of my
2 decisions on zero risk. I mean, if I did that, I
3 probably wouldn't do anything. I'd be sitting in
4 my chair, maybe twiddling my thumbs. But our
5 charge is to follow the requirements of the
6 regulations in terms of the separation from surface
7 water and storm water controls and those types of
8 things when we permit a facility, and that's what
9 we did in this case, and based on the facility
10 meeting those requirements, we do not expect it to
11 impact surface water.
- 12 Q Okay. And what is your setback from surface water?
- 13 A It's 200 feet.
- 14 Q Okay. And what is your setback from a school?
- 15 A I believe it's 1,000 feet.
- 16 Q Okay. Does the setback vary any if the surface
17 water is a possible source of drinking water?
- 18 A No.
- 19 Q What kind of setbacks do you require from wetlands?
- 20 A Regulation requires that the facility -- We're
21 talking about -- I'm going to assume we're talking
22 about the C&D.
- 23 Q Yeah.
- 24 A There may be different buffers, depending on what
25 type of facilities you're talking about, but in

1 this case, it's required that they do not disturb
2 the wetland.

3 Q Okay. Are there floodplain requirements?

4 A Yes.

5 Q And what is the requirement related to floodplains?

6 A It's required that the facility and the structures
7 related to the facility do not impede the flow of a
8 hundred-year floodplain, or within a hundred-year
9 floodplain.

10 Q Okay. How much separation does this C&D landfill
11 have to have from the bottom of the landfill to the
12 seasonal high water table?

13 A It will be a two-feet -- a two-foot minimum --

14 Q Okay.

15 A -- separation.

16 Q When there was a public hearing held on March -- I
17 believe it was March 13th, 2008, a fact sheet was
18 handed out under what appears to be DHEC
19 letterhead.

20 Mr. Chandler: Let me get this marked and
21 show it around.

22 Marked as Petitioner's Exhibit

23 Number Seven; 30(b)(6)

24 Deposition of SCDHEC by Kent

25 Coleman, P.G.; copy of DHEC

- 1 documents entitled Agenda for
2 Public Hearing, Fact Sheet and
3 Feedback Survey; three pages.
- 4 Q I've handed you a document. It's several pages
5 stapled together, marked as Exhibit -- Is it
6 Seven?
- 7 A Yes, Exhibit Seven.
- 8 Q And if you'll look at the second page in that
9 packet, there's a statement somewhere on that page
10 that says that this landfill is going to maintain a
11 five-foot separation --
- 12 A Mm-hmm. Okay.
- 13 Q -- from the seasonal high water table. Do you know
14 why that was stated at the public hearing?
- 15 A Well, no, I'm not certain why it was stated at the
16 public hearing.
- 17 Q Okay. But as far as you're concerned, the permit
18 requirement is only two feet?
- 19 A That's what I recall. If you'd like me to review
20 that, I could, but I believe it is.
- 21 Q That's what it looked like to me when I looked at
22 it.
- 23 A Okay. That's the minimum, so a five-foot would
24 meet that minimum.
- 25 Q Okay. Do you know who would have prepared this

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- 1 fact sheet and why that five-foot -- Well, let me
2 ask you this. Do you know who prepared this fact
3 sheet, and do you know who would know why that fact
4 sheet said five feet?
- 5 A I'm not -- I'm not a hundred percent sure who
6 prepared it. I believe Mr. Eleazer most likely
7 would have prepared it. It could be a typo, or it
8 could also be that this landfill does -- is five
9 feet. I'd have to look.
- 10 Q But, certainly, the only thing that can be enforced
11 by the Department is going to be whatever is in the
12 permit?
- 13 A What's in the regulation, yes, and the permit.
- 14 Q Now, this fact sheet also indicates that the
15 maximum height of this landfill from the existing
16 grade is going to be around 160 feet; is that
17 correct?
- 18 A Yes.
- 19 Q Okay. And is that part of the permit requirements?
20 Does the permit -- Do the permit requirements
21 address the question of how high this landfill can
22 ultimately reach?
- 23 A Not directly.
- 24 Q Okay.
- 25 A The design would dictate the height that was in the

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1 -- The design in the application has to meet the
2 requirements of the regulation in terms of slopes,
3 the degree of slopes, and that, along with the size
4 of the footprint of the landfill, would dictate the
5 height.

6 Q And in order for you to determine what that height
7 is approved under, though, you'd have to review the
8 plans, --

9 A Yes.

10 Q -- the drawings and things?

11 A Yes. Mm-hmm.

12 Q Mr. Coleman, in Regulation 61-107.17 there is a
13 provision that is numbered as part -- It looks
14 like it is part capital D, subpart Three, and then
15 little D, and I want to read this section to you.
16 "The Department reserves the right to review
17 additional factors in determining need on a case by
18 case basis." Are you familiar with that language
19 in the regulation?

20 A Yes.

21 Q Okay. What does it mean?

22 A Well, it -- It was placed in the regulation to
23 allow flexibility in the case that a situation were
24 to come up that was not contemplated during the
25 process of discussing and promulgating that

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1 regulation.

2 Q Okay. Were you involved in the preparation of this
3 regulation?

4 A No..

5 Q Okay. Do you know when this regulation was
6 promulgated and became effective?

7 A It was in -- around 2000.

8 Q Okay. And what were you doing in 2000?

9 A I believe I was section manager in the CERCLA
10 program at that point, if I remember right.

11 Q Okay. All right. So, in terms of your knowledge
12 of why this was in here, that's at least
13 secondhand?

14 A Mm-hmm. Yes, --

15 Q Okay. All right. Now, --

16 A -- and, also, based on my experience that it's
17 fairly common to build some flexibility into
18 regulatory language for that purpose.

19 Q Okay. Now, was this section utilized at all in the
20 permitting of this MRR landfill?

21 A No.

22 Q Okay. So, I take it that the fact that Laurens
23 County currently generates less than 20,000 tons of
24 waste and already has 250,000 tons of C&D waste
25 capacity was not considered as an additional factor

1 to be reviewed?

2 A We followed the geographic limitations and the
3 yearly annual disposal rate calculations as
4 specified in that -- in that regulation to
5 determine the need for this facility and the amount
6 of annual disposal allowed.

7 Q Okay. Now, during the process, did you receive --
8 the Department receive comments from the public and
9 others indicating their -- their belief that this
10 landfill was not needed?

11 A I do recall some of that, yes.

12 Q Okay. And did they offer you the sort of facts and
13 figures that we went through here this morning in
14 support of that argument?

15 A I think I recall seeing some facts and figures
16 presented in some of the comments that were
17 received, yes.

18 Q Okay. And despite those comments, what you're
19 saying is the Department stuck to the parts -- I
20 mean, section D and items One, Two and Three, A and
21 B and C, but you did not utilize the right to
22 review additional factors that's provided in
23 subsection D of that part?

24 A We did not review additional factors -- Well, I
25 should say we didn't use any additional factors to

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1 make our decision in this case.

2 Q Okay.

3 Mr. Chandler: Let me take just a short
4 break and walk outside, and I think --

5 The Deponent: Okay.

6 Mr. Chandler: -- we may be done.

7 [Off the record at 11:51 a.m.;
8 back on the record at 11:53
9 a.m.]

10 Examination Continues

11 By Mr. Chandler:

12 Q Okay. As I understand it, the public hearing was
13 held after there was a draft permit put on the
14 table.

15 A Yes.

16 Q All right. As a result of the comments that were
17 received, either in the mail or at the public
18 hearing, were there any changes made in the final
19 permit?

20 A I'm thinking. I don't recall any specifically
21 without reviewing the file again.

22 Mr. Chandler: Okay. That's all the
23 questions I've got.

24 The Deponent: Okay. Thank you.

25 Mr. Chandler: Thank you.

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1 Mr. Williams: I don't have any.
2 Ms. Hartley: I don't have any either.
3 (Whereupon the deposition was concluded at
4 11:54 a.m.)
5 (Deponent will read and sign his/her
6 deposition.)

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State of South Carolina)
) Certificate
 County of Lexington)

Be it known that the foregoing 30(b)(6) deposition of South Carolina Department of Health and Environmental Control by Kent Coleman, P.G., was taken before me;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth concerning the matter in controversy aforesaid;

That the deponent reserved his/her right to read and sign the deposition transcript, and Review by Deponent and Errata sheets were provided to the deponent with instructions that they were to be returned within thirty (30) days with any changes/corrections to said deposition transcript.

The foregoing transcript of 61 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Witness my hand and seal this 23rd day of February, 2009.

Sandra M. Snead

Sandra M. Snead

Notary Public for South Carolina
 My commission expires October 17, 2013.

Note: Recordings are retained for twelve (12) months from date of certification.

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FEB 2 2009

ADMINISTRATIVE LAW COURT

Docket No. 08-ALC-07-0425-CC

DHEC
OFFICE OF GENERAL COUNSEL
07-0425-CC

Petitioner.

NOTICE
OF
DEPOSITION

vs.

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

Respondents:

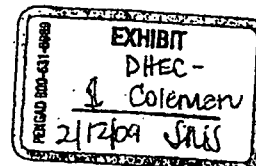
TO: THE RESPONDENTS AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that the Petitioner, pursuant to SCRCP Rule 30 and ALC Rule 21, will take the deposition of the Respondent South Carolina Department of Health and Environmental Control, for all uses permitted by the SCRCP, at the following time and on the following date:

10:00am, Thursday, February 12, 2009, at the offices of DHEC on Farrow Road in Columbia, SC

Pursuant to SCRCF 30(b)(6), the Petitioner gives notice to the South Carolina Department of Health and Environmental Control ("DHEC"), to designate one or more officers, directors or managing agents to testify on its behalf at such deposition in connection with the following matters:

1. Information and evidence considered by DHEC in making the decision to issue the landfill permit at issue in this case.
2. Findings and conclusions made by DHEC in making the decision to issue the landfill permit at issue in this case.
3. The basis of the DHEC determination of need for this landfill.
4. Statutes and regulations applied by DHEC in making the decision to issue the landfill permit at issue in this case.
5. The basis of DHEC's determination that the 1997 Laurens County Solid Waste



Management Plan is valid and complies with Section §44-96-80 of the Solid Waste Management Act.

6. The basis of DHEC's determination that this landfill is consistent with an applicable and valid solid waste management plan.

7. The basis of DHEC's determination that this landfill is in compliance with local zoning, land use, and other applicable ordinances and laws.

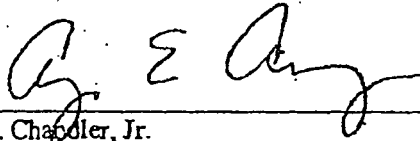
8. The basis of DHEC's determination that the roads to this landfill are of all-weather construction and capable of withstanding anticipated load limits.

9. The basis of DHEC's determination that this landfill will not have adverse impacts, including potential pollution, on adjacent wetlands and Lake Martin.

10. The basis of DHEC's determination that the landfill will not result in pollution of groundwater.

11. The basis of DHEC's determination that the stormwater plan for the landfill complies with applicable state and federal requirements.

12. The nature and extent of Art Braswell's work on seeking approval of the landfill permit on behalf of MRR Highway 92, LLC.



James S. Chappeler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for the Petitioner

Georgetown, South Carolina

January 30, 2009

Laurens Recycling & Reclamation Center C&D Landfill

Cherokee County C&D LF
City of Gaffney C&D LF

WCA Shiloh C&D LF

Wasp Nest Road C&D LF

Pickens Co. C&D LF

Big Valley C&D LF

Enoree C&D LF

Greenville LT C&D LF (Republic)

Greenpointe C&D

Copeland C&D LF

Deeance Co. C&D LF

Clemson U C&D LF

Curry Lake C&D LF

Laurens R&RC C&D LF

Bobby & Danny C&D LF

Twin Chimneys C&D LF

City of Clinton C&D LF

Enterprise C&D LF

Anderson Co. C&D LF

Laurens Co. C&D LF

Active and Proposed Construction & Demolition Landfills in South Carolina

Legend

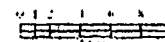
- 1. Active Commercial C&D LF
- 2. Active Non-Commercial C&D LF
- 3. Proposed Commercial C&D LF
- 4. Proposed Non-Commercial C&D LF

Areas Within 1/2 Miles of State
Or Federal Controlled C&D LF
Under Official Ownership

Areas Within 1/2 Miles of City Non-
Commercial C&D LF or More Than
One Under the Same Ownership

City Boundary

Interstates



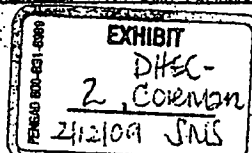
Source: South Carolina Department
of Health and Environmental Control
- Bureau of Solid and Hazardous Waste
Management

Note: This map and its corresponding
data are subject to change. Please
contact the DHEC Solid Waste staff
for the most current data.

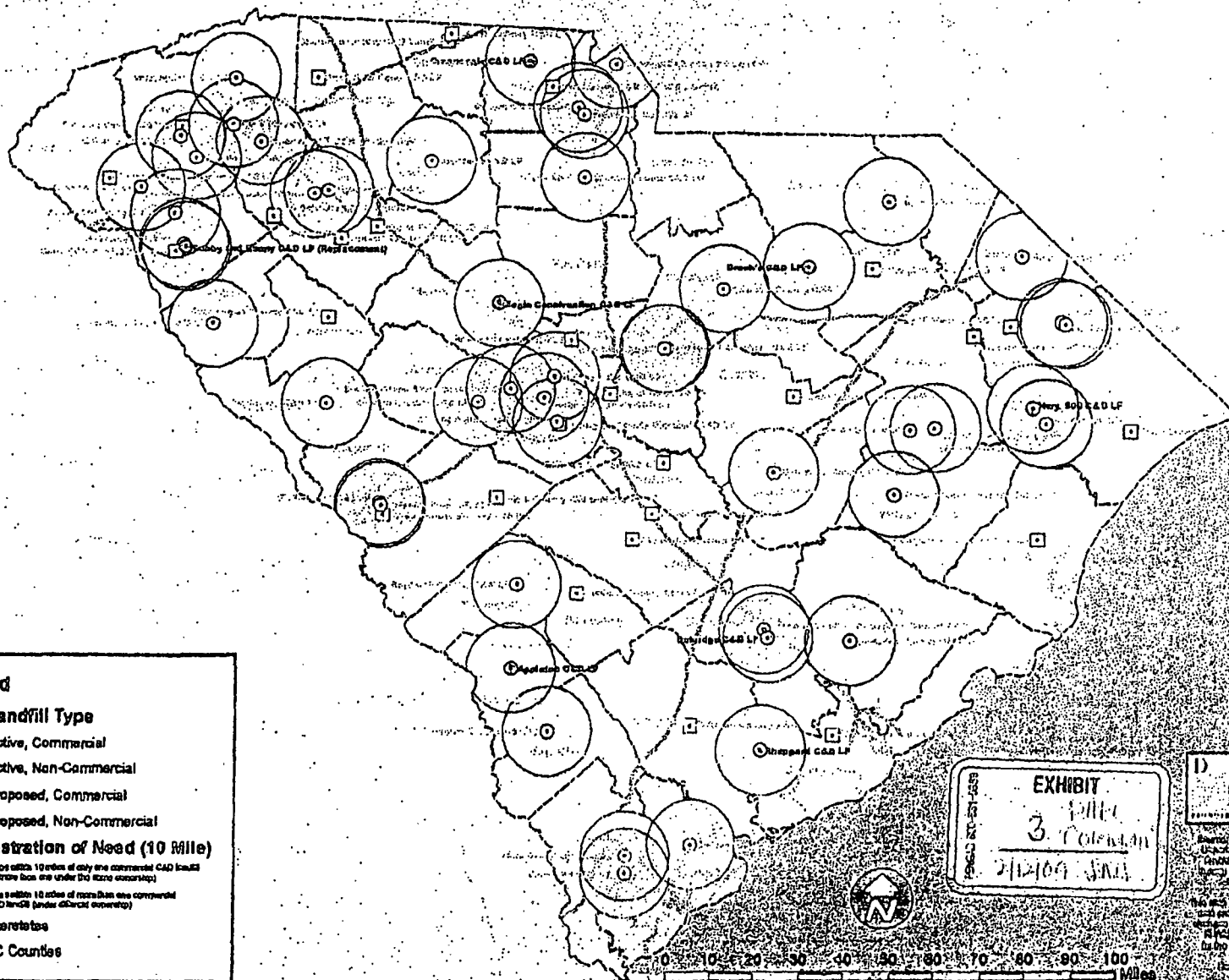
Date: 01/12/2004

D H E C

South Carolina Department of
Health and Environmental Control
Bureau of Solid and Hazardous Waste
Management



Active and Proposed Construction and Demolition (C&D) Debris Landfills in SC



D H E C
DEPARTMENT OF HIGHWAYS
CONSTRUCTION PROJECTS DIVISION

Approved: The South Carolina Department of Transportation (DOT) has reviewed and approved this map for use in the State's annual report to the U.S. Department of Transportation (USDOT) as required by the National Environmental Policy Act (NEPA) and the Federal Highway Administration (FHWA) regulations. This map is not intended to be used for any other purpose without the express written consent of the DOT.



B. P. BARBER & ASSOCIATES, INC.

ENGINEERS - PLANNERS - SURVEYORS

101 RESEARCH DRIVE (29203-9389)

P.O. BOX 1118

COLUMBIA, SOUTH CAROLINA 29202-1118

TELEPHONE 803 254-4400 FACSIMILE 803 771-8676

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FEB 23 2006

DIVISION OF MINING &
SOLID WASTE MANAGEMENT
BLWM

February 21, 2006

Ms. Joan Litton
Manager, Solid Waste Facility Engineering Section
SC Department of Health & Environmental Control
2600 Bull Street
Columbia, SC 29201

RE: Demonstration of Need Request
Laurens Reclamation & Recycling
Center (Project #05749L)
Laurens County

Dear Ms. Litton,

On behalf of MRR Southern Company, LLC, I hereby request, pursuant to Demonstration of Need, R.61-107.17, Department approval to develop a private Part IV construction, demolition and land clearing debris landfill at the referenced location on Choice Road in northern Laurens County along I-385 between Hwy 101 and Hwy 92. Site name and location are:

LAURENS RECLAMATION & RECYCLING CENTER
LATITUDE: 34-DEGREES 37 MINUTES 20.91 SECONDS
LONGITUDE: - 82 DEGREES 05 MINUTES 13.61 SECONDS

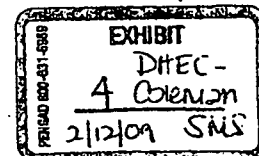
The maximum annual tonnage limit allowed under the regulation based on the latest published disposal data is requested.

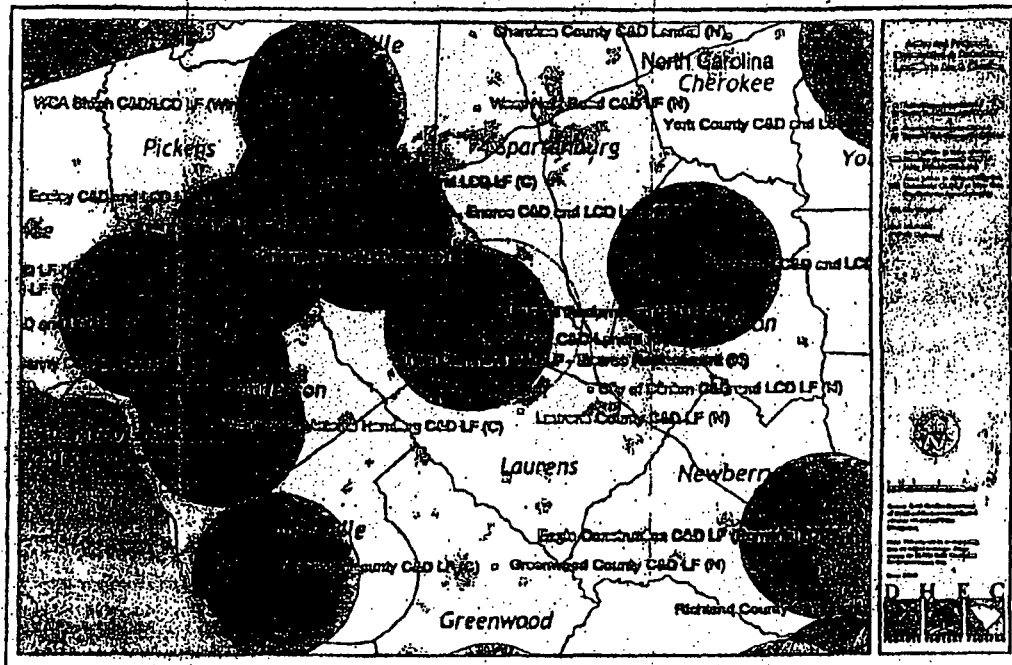
Please contact me if you have questions.

Sincerely yours,
B.P. Barber & Associates, Inc.

Rudy M. Curtis
Senior Solid Waste Coordinator

cc: Ronald Gilkerson, PG, MRR Southern Company L.L.C.,
11925 Sam Roper Dr., Suite C Office 2, Charlotte NC 28269







C. End Hunter, Commissioner
Promoting and protecting the health of the public and the environment.

March 3, 2006

CERTIFIED MAIL
7001 2510 0008 6158 4279

Mr. Ronald C. Gilkerson, P.G.
MMR Southern Company, LLC
11925 Sam Roper Drive, Suite C, Office 2
Charlotte, NC 28269

RE: Demonstration of Need APPROVAL
Proposed Laurens Reclamation and Recycling Center Long-Term Construction, Demolition and
Land-Clearing Debris Landfill
Location: 34°37'20.91" N Latitude, 82°05'13.61" W Longitude
Maximum Annual Disposal Limit of 154,000 tons/year
Laurens County

Dear Mr. Gilkerson:

This office is in receipt of a demonstration of need request, submitted on your behalf by Rudy M. Curtis of B.P. Barber and Associates, for the above-referenced site, dated February 21, 2006. Staff have evaluated the information and determined 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. The Department may consider an annual disposal limit up to 154,000 tons during its consistency determination for this proposed facility.

Securing a site approval under the provisions of the Demonstration of Need regulation in no way supersedes zoning, consistency with local solid waste management plans or other considerations evaluated by the Department during the permitting process.

Also, please be aware that this approval may be terminated by the Department if any one of the following occurs: (A) one hundred twenty (120) days elapse from the date of receipt of this letter of approval without documented evidence of diligent pursuit of the appropriate solid waste permit being presented to the Department or (B) once a permit application has been received by the Department, that permit application is declared inactive or is denied by the Department's solid waste permitting staff or (C) the Department receives official and final notification that the site of the proposed facility does not meet proper zoning for the intended activity or (D) the Department determines that the proposed facility is not consistent with the host county or region solid waste management plan.

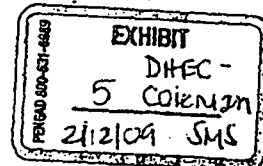
If you have any questions, please contact John McCain of my staff at (803) 896-4067.

Sincerely,

Joan E. Litton, Manager
Solid Waste Permitting Section
Division of Mining and Solid Waste Management
Bureau of Land and Waste Management

JFL/JMM/jmm

cc: Ernest B. Segars - Laurens County Administrator



CONFIDENTIAL

~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

Demonstration of Need Worksheet

Site Name:	Laurens Reclamation and Recycling Center
Permit #:	Proposed
Facility Type:	Long-Term, Commercial C&D LF
Proposed Disposal Amount, tons/yr	Max. Available

Counties included w/ 10 mi. radius	Disposal Amount, tons/yr (FY 2004)
	C&D-IV
Greenville	87,157
Laurens	8,434
Spartanburg	58,803
Total	154,394



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FEB 23 2006

B. P. BARBER & ASSOCIATES, INC.

ENGINEERS - PLANNERS - SURVEYORS

101 RESEARCH DRIVE (29203-6388)

P.O. BOX 1116

COLUMBIA, SOUTH CAROLINA 29202-1116

TELEPHONE 803 234-4400 FACSIMILE 803 771-8676

DIVISION OF MINING &
SOLID WASTE MANAGEMENT
BLM/MC

February 21, 2006

Ms. Joan Litton
Manager, Solid Waste Facility Engineering Section
SC Department of Health & Environmental Control
2600 Bull Street
Columbia, SC 29201

RE: Demonstration of Need Request
Laurens Reclamation & Recycling
Center (Project #05749L)
Laurens County

Dear Ms. Litton,

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LAURENS RECLAMATION & RECYCLING CENTER
LATITUDE: 34 DEGREES 37 MINUTES 20.91 SECONDS
LONGITUDE: - 82 DEGREES 05 MINUTES 13.61 SECONDS

The maximum annual tonnage limit allowed under the regulation based on the latest published disposal data is requested.

Please contact me if you have questions.

Sincerely yours,
B.P. Barber & Associates, Inc.

Rudy M. Curtis
Senior Solid Waste Coordinator

cc: Ronald Gilkerson, PG, MRR Southern Company L.L.C.,
11925 Sam Roper Dr., Suite C Office 2, Charlotte NC 28269



POST OFFICE BOX 1006
LAURENS, SOUTH CAROLINA 29360

(864) 682-3250
FAX (864) 682-3260

WWW.LCWSC.COM

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MAR 24 2008

DIVISION OF MINING &
SOLID WASTE MANAGEMENT
BLWM

March 17, 2008

Mr. Timothy M. Eleazer
SCDHEC BLWM
2600 Bull Street
Columbia SC 29201

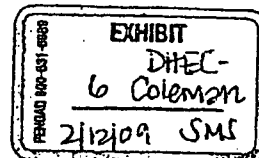
RE: Proposed Hwy. 92 C&D Landfill
Laurens County

Dear Mr. Eleazer:

This letter is written concerning the proposed construction and demolition (C&D) landfill to be located near Hwy. 92 and I-385, at the headwaters of Martin Lake. This letter serves to clarify the Laurens County Water and Sewer Commission (LCWSC) understanding of SCDHEC's regulatory position regarding this proposed landfill and to document LCWSC concerns as allowed under the public comment phase of the permitting process.

Within the next 45 days the LCWSC will hire an Engineering Firm for services related to a County wide water resource study. This study will focus on the natural water resources in Laurens County and how these water resources can meet the County's water and sewer needs for the next 10, 25, 50 years and beyond. We will specifically request that Martin Lake be apart of this study because of its location and purpose as a drinking water reservoir. Martin Lake is within the Beaverdam-Warrior Creek Watershed. When the Watershed Work Plan for Martin Lake was developed in May 1969 it included 255 acre-ft of water storage and a minimum of 2.0 MGD of water capacity for the Upper Laurens County Water District to serve the northern portions of Laurens County and the Town of Gray Court. A supplement to this Watershed Work Plan, dated September of 1972 transferred these water withdrawal rights the Laurens County Water Resource Commission (LCWRC). The LCWRC is now known as the Laurens County Water and Sewer Commission (LCWSC) as a result of the merger with Rabon Creek Rural Water District in 1990.

It is our understanding that it is SCDHEC's position that C&D landfills pose no risk to water bodies, both surface water and ground water and that the proposed landfill will not impair Martin Lake or reduce its reliability as a drinking water source for Laurens County. Current regulations allow such landfills to be within 200 feet of a lake or within 100 feet of a drinking water well, but required to be 1000 feet from a school. Furthermore, if a treatment plant currently existed on Martin Lake it would have no bearing on SCDHEC decision to issue a landfill permit.



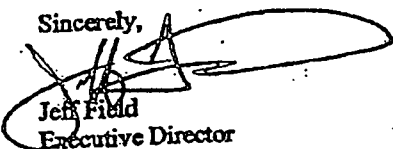
LCWSC Comments
Hwy. 92 C&D Landfill
Page 2 of 2
March 17, 2008

LCWSC would argue that these regulations are woefully inadequate and that this application should be used as an example to develop new regulations for the State of South Carolina. It is our opinion that SCDHEC is ignoring their obligation and over riding purpose as an agency and is about to make a black and white decision when considering MMR's application. If a 1000 foot buffer is technically sound for a school then at the very least this same buffer should apply to a drinking water reservoir. If one of SCDHEC's goals is to protect our children, then what they drink and what their parents cook with should be of top priority. Imagine ten years from now, this landfill is in operation and has committed an operational violation or, God forbid, a contaminate has been found in Lake Martin or in a monitoring well. The LCWSC begins moving forward with plans to construct a package plant on Martin Lake. Public perception would be impossible to overcome and our decision, regardless of the facts, would be in question to a point that it would no longer be feasible. In a time when consumer confidence reports are required to inspire confidence in the water industry, building a water plant within earshot of a landfill would destroy confidence. In effect, SCDHEC will have eliminated a valuable drinking water resource for Laurens County.

SCDHEC can argue that all landfills eventually have a potential to impact drinking water sources or that C&D landfills are technically harmless. Given the proximity of this site to Martin Lake, a known drinking water source for the people of Laurens County and South Carolina, then SCDHEC should NOT be arguing with a public water utility about why it can not protect Lake Martin but rather be building a case to not issue a landfill construction permit to MMR Southern, LLC.

The Board of Commissioners of the LCWSC would strongly argue that it is SCDHEC's right and responsibility to protect Martin Lake and all drinking water sources for the State of South Carolina.

Sincerely,



Jeff Field
Executive Director
LCWSC

CC: Senator Danny Verdin
Representative Adam Taylor
C. Earl Hunter, Commissioner, SCDHEC
Bob Jackson, Regional Director, Upper Savannah Region, SCDHEC
Jimmy Martin



Agenda for Public Hearing
Proposed Hwy. 92 Construction & Demolition (C&D) Landfill
March 13, 2008
6:30 PM

Welcome/Introductions.....Donna Rowe, SCDHEC Meeting Facilitator
Public Officials
DHEC Staff

Public Hearing Opening Remarks.....Hearing Officer-Scott Wilson

Application Overview Presentation.....BLWM Project Manager- Tim Eleazer
BOW Storm Water Manager- Jill Stewart

Formal Public Comment Period Ron Gilkerson, MRR Hwy. 92 LLC

Public Officials

Citizen Group Representative(s)

Individual Citizens

Closing Remarks for Public Hearing.....Hearing Officer

(Short break)

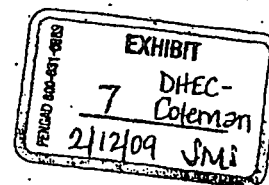
Question/Answer Session

If you have any additional questions, please contact:

Tim Eleazer, Solid Waste Project Engineer.....(803) 896-4217
Sarah Daniels, EQC Region 1, Greenwood Office.....(864) 223-0333

Or mail your written comments to:

SCDHEC- BLWM
Attention Tim Eleazer
2600 Bull St.
Columbia, SC 29201





Fact Sheet

SC Department of Health and Environmental Control • 2600 Bull Street • www.scdhec.gov • Promoting and protecting the health of the public and the environment

Project Name: Proposed Highway 92 Construction, Demolition and Land-Clearing Debris (C&D) Landfill and Reprocessing Center

Project Location: In Laurens County, 322 Choice Road, Gray Court, South Carolina. Approximately 2 miles east of Gray Court, South Carolina off SC Highway 92.

Applicant: MRR Highway 92, LLC
Represented By: Mr. Ronald C. Gilkerson

Project Details:

- Total property for landfill is 130 acres: 69 acres will be used for waste placement
- Lowest point of the property before land filling is 670 feet; after land filling, the expected highest point of the property will be 830 feet, a net increase of 160 feet.
- Limited to 12 acres open for disposal at any one time
- Maximum rate of disposal: 154,000 tons per year
- Estimated total disposal capacity: 7,800,000 cubic yards
- Estimated landfill life expectancy: 31-73 years
- Operations on Monday through Friday, 7:00 am – 6:00 pm, Saturday, 7:00 am – 12:00 pm
- Proposed landfill site has no applicable zoning

DHEC Requirements for C&D Landfills (not a complete list):

- Landfill must be greater than:
 - 1000 feet from any school, residence, day care, hospital, park
 - 200 feet from any surface water body
 - 100 feet from any property line
 - 100 feet from any drinking water well
- Landfill bottom will be a minimum of 5 feet above seasonal high groundwater table.
- Must make available to DHEC a source of funding to properly close landfill (\$333,200 for 12 acres).
- Wastes that are listed in Appendix I of Regulation 61-107.11 are approved for disposal (copies of Appendix I are available). Examples include: brick, concrete block, plaster/plasterboard, shingles, insulation, structural steel, lumber, tile, glass, hardened concrete/cement
- Groundwater monitoring will be conducted semi-annually at the landfill site.

For more information: The South Carolina Regulation covering C&D Landfills, R.61-107.11, can be found at <http://www.scdhec.gov/environment/lwm/regulatory.htm>

All comments must be submitted by Friday, March 21, 2008. Comments should be sent to the attention of Mr. Timothy M. Eleazer at the mailing address provided on the back.

DHEC Feedback Survey: Public Meeting

Thank you for your answers, which will be kept anonymous.



Meeting name: Hwy. 92 C&D Landfill Location: Gray Court-Owings Middle Sch
DHEC Program Area: BLWM/BOW Date: 03/13/08

1. Please tell us how you heard about this meeting (check all that apply):

☐ radio ☐ television ☐ newspaper ☐ flyer(s) ☐ notice (posted) ☐ notice (mail)
☐ word of mouth ☐ DHEC website ☐ other (please specify) _____

2. What other ways would you like to hear about these type of meetings?

3. Did you receive any background information about what was being discussed tonight? ☐ Yes ☐ No

- If yes, was it understandable? ☐ Yes ☐ No

- If yes, did it give you a way to contact someone for more information? ☐ Yes ☐ No

4. Did you ask for specific information prior to the meeting? ☐ Yes ☐ No

- If yes, did you receive the information you requested? ☐ Yes ☐ No

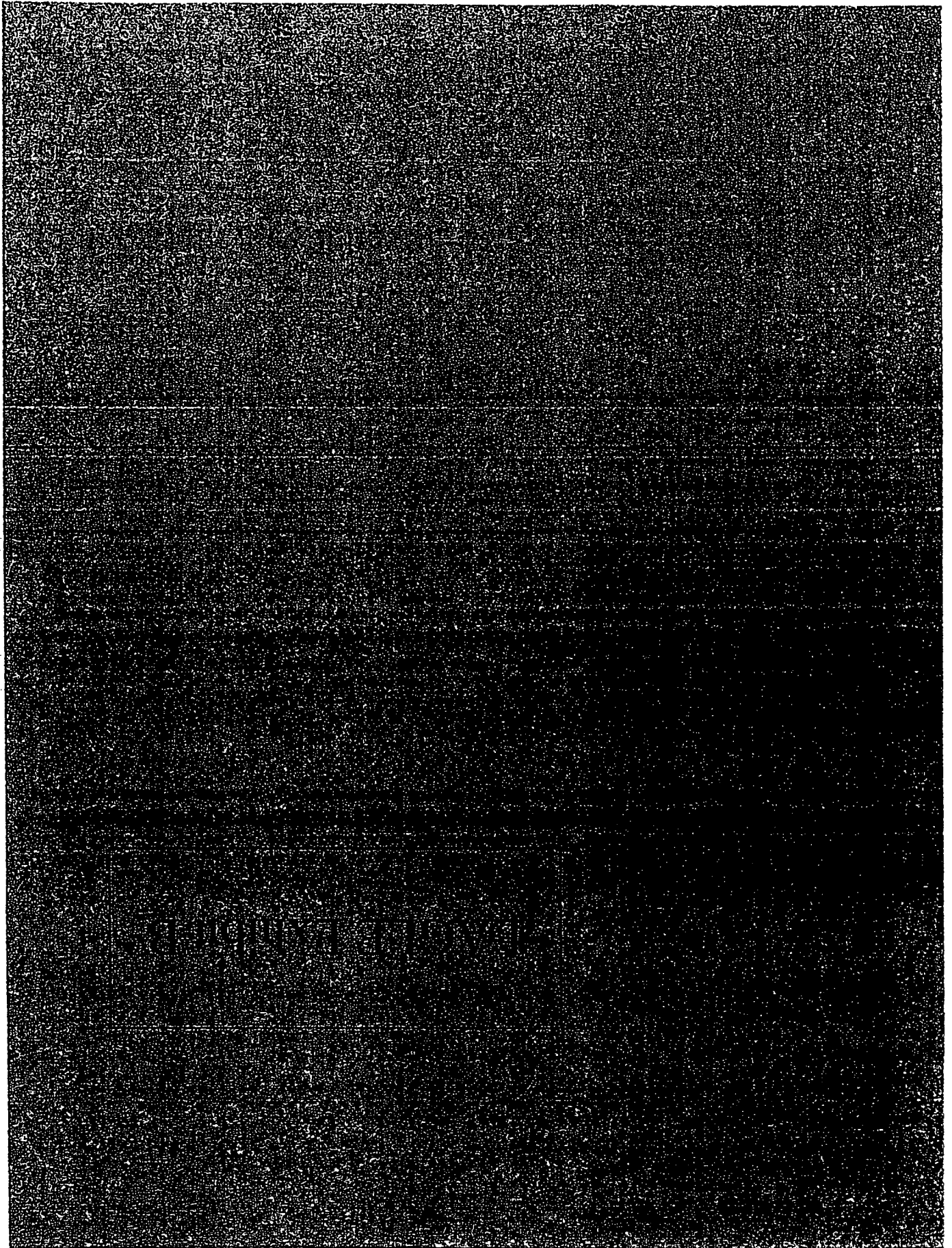
For the following, please indicate how you rate or agree or disagree	Strongly agree	Disagree	Agree	Strongly disagree
5. The notice about the meeting clearly explained the purpose.				
6. The time and place for the meeting was convenient.				
7. The length of the meeting was about right.				
8. The purpose of the meeting was what I expected.				
9. The speakers were knowledgeable.				
10. I understand the role of DHEC in this process.				
11. The speakers at the meeting used language I could understand.				
12. The presentation was well organized.				
13. The speakers at the meeting used language I could understand.				
14. The presentation was well organized.				
15. The written materials received at the meeting were easy to understand.				
16. The meeting met my needs.				
17. Participants should be encouraged to ask questions.				
18. My concerns were heard.				
19. I know how to get follow-up information.				
20. I know what to do to participate in this process.				
21. I understand the "next steps" in the process.				
22. I trust the information from DHEC.				

23. How could this meeting have better met your expectations?

24. Please indicate which group(s) you represent:

☐ neighborhood group ☐ state or tribal or local government ☐ business/industry/trade association
☐ local non-profit organization ☐ federal government ☐ other (please specify)
☐ national environmental organization ☐ resident

25. Additional comments about how to improve this meeting or this survey:



CONSTRUCTION & DEMOLITION DEBRIS

Construction and demolition (C&D) debris is defined in the S.C. Solid Waste Policy and Management Act of 1991, Section 44-96-40, as "discarded solid waste resulting from construction, remodeling, repair and demolition of structures, road building and land clearing." The debris includes, but is not limited to, "bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving materials, and tree and brush stumps, but does not include solid waste from agricultural or silvicultural operations."

As mentioned previously, C&D debris is not included in the state's definition of municipal solid waste (MSW) nor the measured MSW recycling rate. The impact of C&D debris, however, is substantial due to its weight as well as its volume.

C&D debris is a significant part of the total solid waste (TSW) generated in South Carolina. In fact, the 3,645,414 tons of C&D debris generated in fiscal year (FY) 2007 (July 1, 2006 to June 30, 2007) represented more than 21 percent of the TSW stream. In addition, the amount of C&D debris in the state has increased nearly 70 percent since FY03. This increase is roughly twice the 33 percent increase in the amount of TSW generated over the same time.

In FY07, 34 percent of the C&D debris generated in South Carolina was recycled. About 61 percent was disposed of in the 150 permitted C&D debris and land-clearing debris (LCD) landfills in South Carolina, while about 5 percent was incinerated or disposed of in a MSW landfill.

While C&D generation has increased, so has interest in C&D debris recycling – both across the country as well as in South Carolina. Local governments are promoting C&D debris recycling through two approaches – ordinances and voluntary programs.

In order to decrease the amount of C&D debris being disposed of, generators are encouraged to reduce waste and recycle. This results in savings from avoided disposal fees while potentially generating revenue from the sale of recyclables. For example,

homebuilders and contractors can reduce C&D debris by carefully estimating the amount of materials needed for a particular project. Materials that are not needed can be reused on another project or made available to others for reuse.

In all likelihood, interest in C&D debris reduction and recycling will only continue to grow as green building principles and interest in Leadership in Energy and Environmental Design (LEED) certification become more commonplace. Green building – the practice of improving the efficiency of buildings through energy, water and material conservation while reducing impacts on human health and the environment – incorporates C&D debris recycling as well as the use of recycled-content building products. LEED is a nationally recognized rating system that evaluates the design, construction and operation of green buildings.

According to the S.C. Recycling Markets Directory, about two dozen companies are a part of the C&D debris recycling industry in South Carolina. Those that recycle bricks and concrete are plentiful while those that recycle carpet and gypsum wallboard are more limited. C&D debris that is recycled results in valuable products. For example, some C&D debris processors crush concrete, cement blocks and bricks into aggregate that can be sold and used as a substitute for stone. Tree stumps and other wood waste can be ground and sold as boiler fuel or used to produce mulch or compost.



CLASSIFICATIONS FOR C&D DEBRIS/LCD LANDFILLS

There are four types of C&D Debris and LCD landfills: Part I Short-term Landfills; Part II LCD and Yard Trash Landfills; Part III C&D Landfills that serve utilities and manufacturers; and Part IV Long-term Landfills.

Except for Part II Landfills, C&D landfills accept various types of construction and demolition waste that has not come in contact with hazardous constituents such as lead-based paint, friable asbestos, petroleum products, polychlorinated biphenyls (PCBs), solvents and preservatives.

- ☐ **PART I SHORT-TERM LCD LANDFILLS** – These landfills have a proposed life of 12 months or less, occupy one acre in size or less and can only accept land-clearing debris, hardened concrete, hardened/cured asphalt, bricks and block.
- ☐ **PART II LCD AND YARD TRASH LANDFILLS** – These landfills are used solely for the disposal of trees, stumps, wood chips, and yard trash that

is generated by land-clearing activities, storm events and natural disasters (e.g., hurricanes and tornadoes).

- ☐ **PART III INDUSTRIAL C&D LANDFILLS** – These are private landfills with controlled access that serve permanently located utility facilities and manufacturing firms. They may use certain solid waste that is generated on-site for structural fill.
- ☐ **PART IV LONG-TERM C&D LANDFILLS** – These landfills may operate more than a year, are normally larger than one acre and may accept a variety of materials including all materials that can be accepted in Part I, II and III landfills.

Overall, there were 150 C&D debris/LCD landfills in the state in FY07. See the charts and tables on the following pages for details on C&D debris as well as LCD management in FY07.



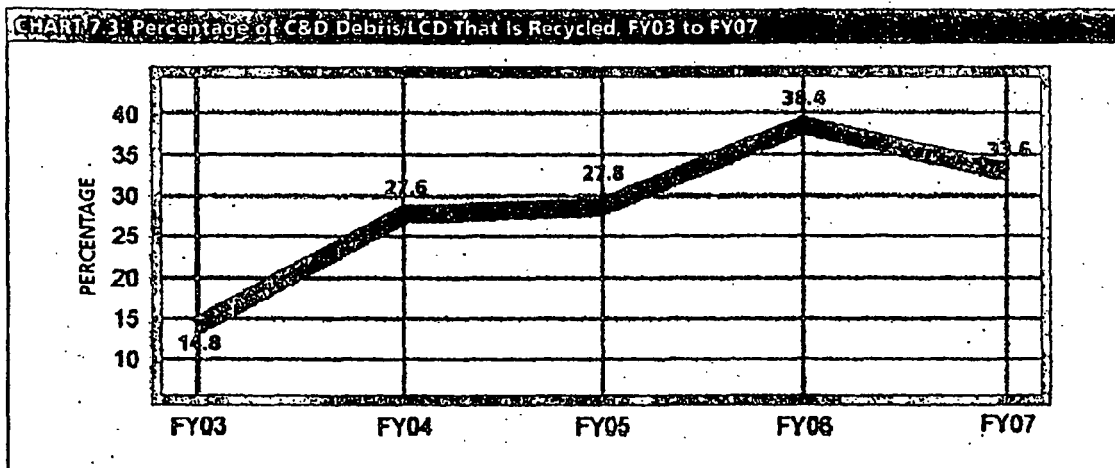
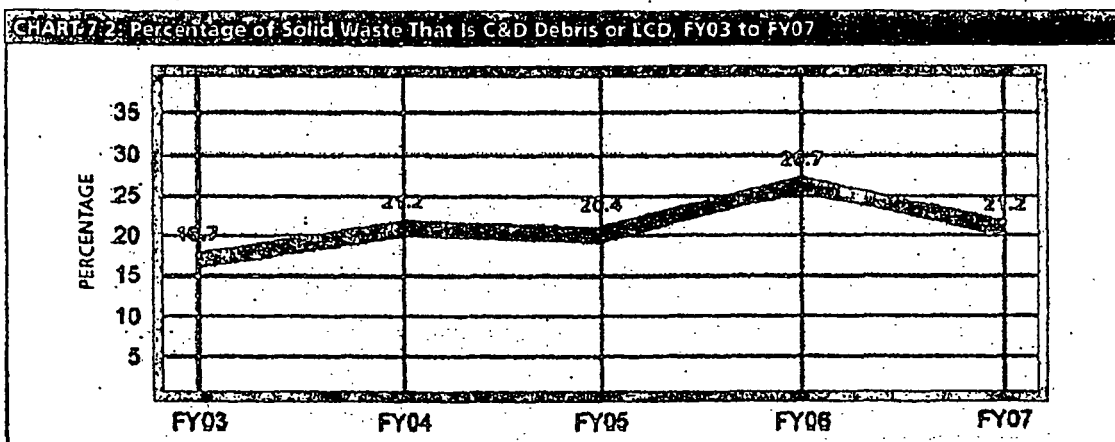
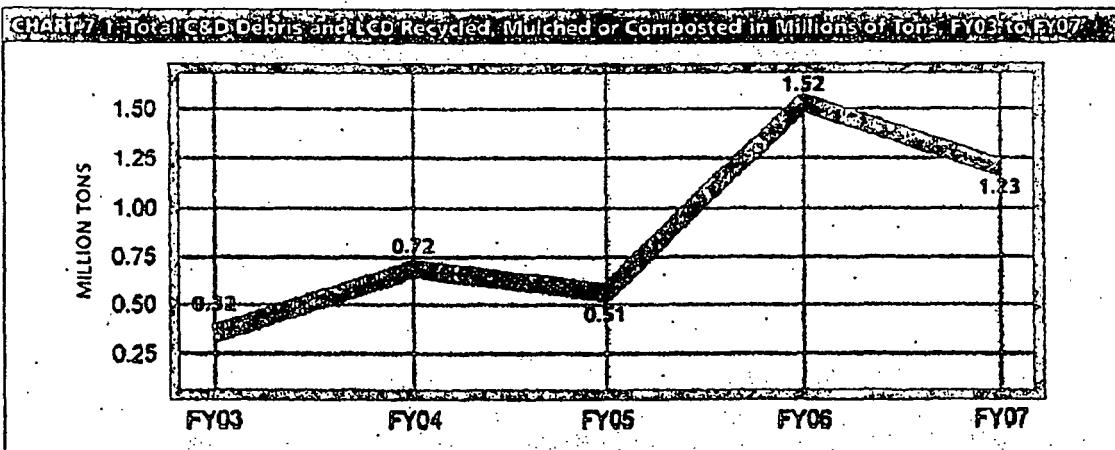


TABLE 7.4: C&D Debris Landfill Disposal and Estimated Remaining Life				
COUNTY	LANDFILL	PERMITTED ANNUAL RATE OF DISPOSAL IN TONS	FY07 DISPOSAL IN TONS	ESTIMATED REMAINING LIFE OF FACILITY IN YEARS
Abbeville	Abbeville County C&DLF	10,000	3,228	59.0
Aiken	Aiken County (Garden) C&D+LCDLF	80,000	65,631	17.3
Aiken	Aiken County Wagener C&DLF	—*	3,144	71.5
Aiken	G.S. Williams C&D+LCDLF	57,500	103,741	40.0
Aiken	Rainbow Falls Road C&DLF	79,100	77,507	30.0
Anderson	Bobbyard Barn C&D+LCDLF	2,250	3,078	17.0
Anderson	Clemson University Long-term C&D+LCDLF	15,000	6,000	6.0
Anderson	Enterprise Material Handling C&DLF	58,000	64,169	20.0
Anderson	Starr C&D+LCDLF	43,300	11,250	10.3
Bamberg	Bamberg County C&D+LCDLF	15,000	16,381	11.5
Barnwell	Barnwell County C&DLF	32,000	12,818	—
Barnwell	Barnwell Resource C&D+LCDLF	20,000	20,006	1.0
Berkeley	Berkeley County C&DLF	214,703	69,320	3.0
Calhoun	Calhoun County C&D+LCDLF	17,500	14,134	32.0
Charleston	Charleston County Bees Ferry C&D+LCDLF	200,000	175,322	1.5
Cherokee	Cherokee County C&DLF	20,000	4,977	50.0
Cherokee	City of Gaffney C&DLF	8,930	4,732	16.0
Cherokee	Cherokee County C&D+LCDLF	4,000	2,039	2.0
Chesterfield	Furr Facility C&DLF	32,700	11,206	65.0
Clarendon	Clarendon County C&D+LCDLF	10,000	10,288	2.0
Colleton	Colleton County C&DLF	20,000	20,858	27.0
Darlington	Darlington County C&D+LCDLF	18,030	8,577	2.0
Darlington	Darlington County C&D+LCDLF (2)	8,030	3,178	115.0
Dillon	Dillon County C&D+LCDLF	34,700	10,543	7.0
Dorchester	Affordable Waste C&DLF	67,000	11,061	46.5
Edgefield	Edgefield County C&D+LCDLF	10,000	10,580	1.0
Florence	Florence County C&DLF	25,000	60	—
Georgetown	Georgetown County C&D+LCDLF	35,000	29,123	—
Greenville	Carter Excavating Company (Big Valley) C&D+LCDLF	75,000	15,417	5.0
Greenville	Enoree C&D+LCDLF	20,000	10,423	0.0
Greenville	Greenville (Republic) C&DLF	200,000	2,479	5.0
Greenville	Hammond C&DLF	87,000	16,131	5.0
Greenville	WCA Shiloh (Wing Quarry) C&D+LCDLF	128,000	92,428	13.1
Greenville	Greenville County C&DLF	10,000	10,570	2.0
Hampton	Hampton County C&D+LCDLF	21,000	8,393	8.9
Horry	Horry County Solid Waste Authority C&D+LCDLF	50,000	12,166	1.0
Jasper	Oakwood C&DLF and RC (Cell 2)	188,000	105,801	17.8
Jasper	State Road C&DLF	10,000	10	1.0
Kershaw	Kershaw County C&D+LCDLF	30,000	24,079	30.0
Kershaw	Lowesville C&D+LCDLF	72,000	36,819	—

COUNTY	LANDFILL	PERMITTED ANNUAL RATE OF DISPOSAL IN TONS	FY07 DISPOSAL IN TONS	ESTIMATED REMAINING LIFE OF FACILITY IN YEARS
Kershaw	Pine Hill C&DLF	120,000	57,339	2.7
Laurens	City of Clinton C&D+LCDLF	1,375	200	20.0
Laurens	City of Laurens C&DLF	24,531	37,260	18.0
Laurens	Laurens County C&DLF	8,900	3,212	—
Lexington	Carroll Materials C&D+LCDLF	240,000	80,861	—
Lexington	Highway 378 (S&T Grading) C&D+LCDLF	250,000	0	—
Lexington	Lexington County (Edmund) C&D+LCDLF	216,000	78,367	14.0
Lexington	Oswald Lumber C&D+LCDLF	2,400	1,560	4.0
Lexington	Sea Recycling C&DLF	312,000	9,536	—
Lexington	Southeastern Associates C&D+LCDLF	120,000	66,010	25.0
Marion	City of Marion C&D+LCDLF	5,000	4,803	3.5
Marion	City of Mullins C&DLF	135,350	28,326	5.0
Marion	South Carolina C&D+LCDLF	206,500	143,727	1.0
Oconee	Seneca C&D+LCDLF	37,615	24,984	1.5
Orangeburg	City of Orangeburg LF	—	30	—
Orangeburg	Orangeburg County C&DLF	31,000	27,232	1.0
Richland	City of Columbia South C&D+LCDLF	—*	30	—
Richland	Richland County C&D+LCDLF	75,000	3,335	—
Richland	Richland County C&D+LCDLF (2)	200,000	0	28.0
Sumter	Westminster C&DLF	80,000	49,876	1.0
Sumter	Sumter County C&DLF (Phase 3)	51,332	41,897	20.0
Union	Union County C&D+LCDLF	15,000	1,100	1.0
Williamsburg	City of Lake City C&DLF	12,900	4,044	0.7
Williamsburg	Williamsburg County C&DLF	12,370	—	0.0
York	Coltharp C&D+LCDLF	60,000	57,156	12.0
York	York County C&DLF	—	1,500	0.0
York	York County C&D+LCDLF	75,000	63,039	1.5
TOTAL		4,464,333	2,054,694	18.0

*Not specified in permit

TABLE 7.5 Legend	
C&DLF	Construction and Demolition Debris Landfill
C&D+LCDLF	Construction and Demolition Debris and Landfill Debris Landfill
LF	Landfill
RCDF	Recycling Center

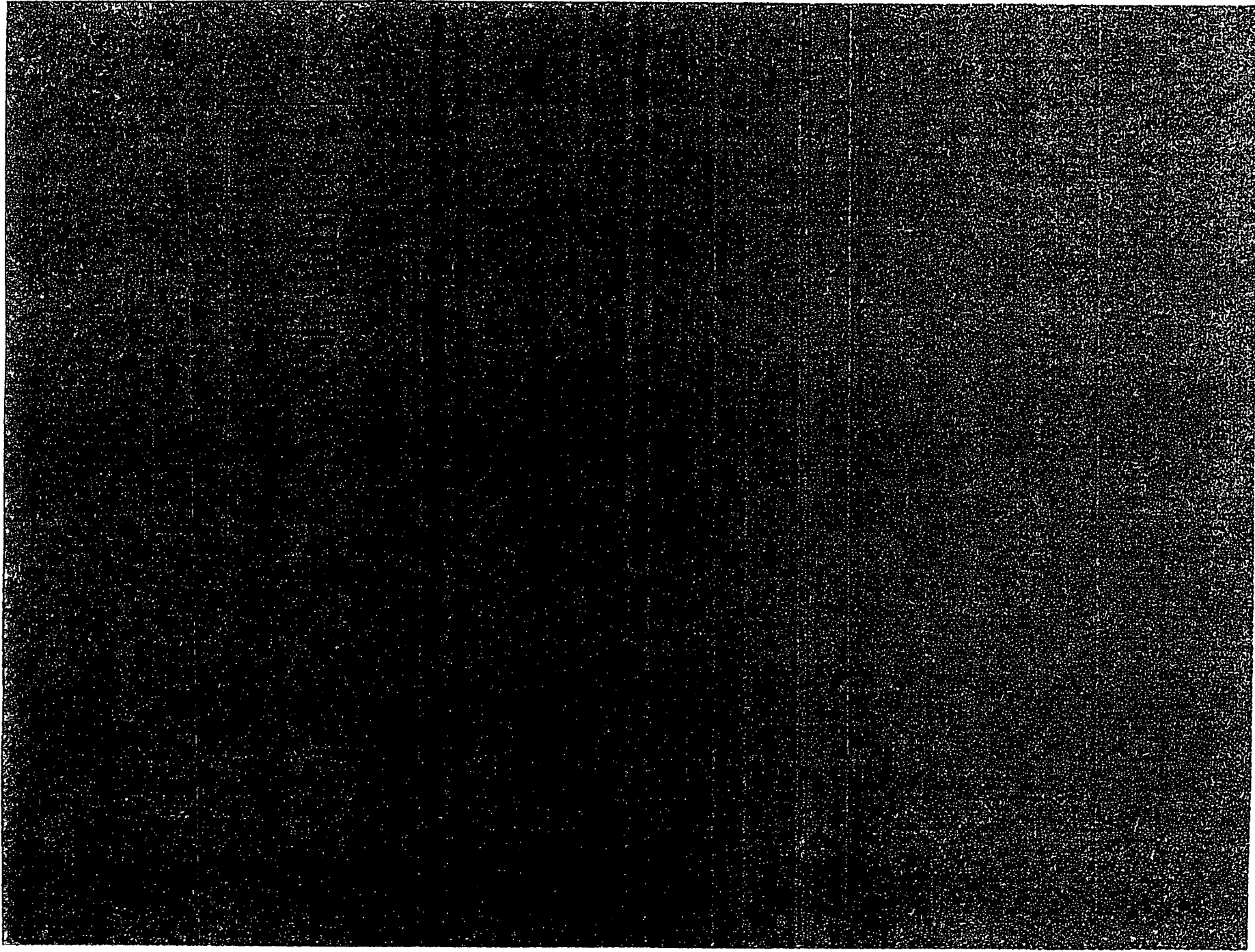
TABLE 7.6: C&D Debris and LCD Landfill Disposal in Tons by Facility Type and County				
COUNTY OR PLACE OF ORIGIN	PART IV LONG-TERM C&D LANDFILLS	PART II LAND-CLEARING DEBRIS LANDFILLS	PART III INDUSTRIAL C&D LANDFILLS	TOTAL FOR EACH COUNTY
Aiken	102,927	29,274	39,509	171,710
Allendale	70,823	15,198	0	86,021
Anderson	70,823	15,198	0	86,021
Barnwell	10,700	0	39,509	50,209
Berkeley	59,472	0	0	59,472
Charleston	183,421	0	0	183,421
Chester	2,057	0	0	2,057
Clarendon	10,288	0	0	10,288
Darlington	11,775	0	20	11,795
Dorchester	12,480	0	375	12,855
Fairfield	284	0	0	284
Georgetown	34,270	0	0	34,270
Greenwood	26,714	0	0	26,714
Harley	262,483	0	0	262,483
Kershaw	42,346	0	0	42,346
Laurens	16,860	396	0	17,256
Lexington	217,465	8,457	0	225,922
Marlboro	1,060	0	0	1,060
Newberry	1,219	100	0	1,319
Orangeburg	27,360	0	0	27,360
Richland	194,955	4,840	0	199,795
Spartanburg	72,161	2,685	0	74,846
Union	2	854	0	856
York	124,695	37,440	0	162,135
Out-of-State (origin not specified)	53,767	1,665	0	55,432
TOTAL AMOUNT OF C&D DEBRIS				

TABLE 7.7: C&D Debris Generated in South Carolina and Disposed of in Part IV Long-term C&D Landfills in Tons for Use in Demonstrating Need

COUNTY	FY07	FY06	FY05	FY04	FY03
Abbeville	3,256	6,597	17,549	3,557	
Aiken	102,927	90,100	79,529	74,412	76,117
Allendale	2,171	2,354	3,128	1,578	3,534
Anderson	70,823	51,300	35,801	35,206	42,857
Bamberg	6,311	16,173	4,861	4,883	15,788
Barnwell	10,700	10,921	10,411	8,329	12,749
Beaufort	13,631	14,152	13,916	12,464	107,287
Berkeley	59,472	61,341	36,175	66,023	58,137
Calhoun	2,076	2,474	3,554	3,139	3,067
Charleston	183,421	168,253	130,755	108,148	189,167
Cherokee	9,818	16,210	10,132	10,658	11,586
Chester	2,057	2,908	4,366	3,220	2,346
Chesnee	10,145	12,177	14,143	12,895	9,192
Clarendon	10,288	8,861	9,296	5,500	4,605
Colleton	10,901	11,233	11,823	13,657	13,295
Darlington	11,755	11,764	12,858	12,614	13,657
Dillon	10,546	8,857	10,935	13,412	10,136
Dorchester	12,480	1,635	2,155	0	10,044
Edgemoor	12,473		1,222	1,671	3,008
Fairfield	284	359	177	126	33
Florence	1,500	1,112	1,264	893	1,141
Georgetown	34,270	51,581	30,087	33,680	22,114
Greenville	16,138	18,453	14,167	17,857	12,923
Greenwood	26,714	20,174	14,675	7,408	12,281
Hanahan	8,418	1,146	1,590	7,744	7,222
Horry	262,483	211,671	155,676	170,856	135,648
Jasper	4,907	3,681	74	244	500
Kershaw	42,346	52,668	41,923	33,277	30,452
Laurens	16,860	9,479	6,635	8,434	8,631
Lexington	217,465	237,178	246,783	231,899	228,223
Marion	11,299	11,155	28,818	16,493	10,987
Marlboro	1,060	1,212	845	1,040	1,034
McCormick	1,663	4,449	1,335	978	1,819
Newberry	1,219	1,273	1,098	797	487
Orangeburg	27,360	26,319	20,915	23,222	21,479
Pickens	20,807	17,581	17,276	18,049	26,834
Richland	194,955	211,729	216,706	199,805	206,794
Saluda	1,165	1,950	4,149	1,176	1,116
Spartanburg	72,161	68,662	71,424	58,803	26,000
Sumter	2,203	3,553	38,923	2,747	31,962
Union	2	3	5	4	1,320
Williamsburg	15,491	17,221	17,806	2,563	15,817
York	124,695	95,632	97,810	82,448	42,550

The data for the year 2007 is preliminary and is subject to change. The data for the years 2003 through 2006 is final.





PUBLIC NOTICE
STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Bureau of Land and Waste Management
2600 Bull Street
Columbia, South Carolina 29223
(803) 896-4000

Public Notice #

Date: June 19, 2008

NOTICE OF DEPARTMENT DECISION

Topic: Highway 92 Construction, Demolition (C&D) Landfill and Reprocessing Center

Location: 322 Choice Road, Gray Court, SC 29645 in Laurens County

After review of the information submitted to SC DHEC for the above referenced facility, the Department of Health and Environmental Control (SC DHEC) has determined that a Class 2 Solid Waste Landfill permit should be issued.

SCDHEC requires that a permit be issued for Class 2 landfills pursuant to SC Code Ann. Sections 44-96-10 et. Seq. and 25A SC Code Reg. 61-107.19, *Solid Waste Management: Solid Waste Landfills and Structural Fills*.

This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the Department decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.

An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393: ATTN: Clerk of the Board, SC DHEC, 2600 Bull Street, Columbia, SC 29201. The request for final review should include the following:

1. The grounds on which the Department's decision is challenged and the specific changes sought in the decision
2. A statement of any significant issues or factors the Board should consider in deciding how to handle the matter
3. A copy of the Department's decision or action under review

In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the Department decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m on the date it is due.

If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.

The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.

If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

Additional information on final review conference and the time frame for filing may be contacting the Legal Office, Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201 or by calling (803) 898-3350.

Bureau of Land and Waste Management
SC Department of Health and Environmental Control
8911 Farrow Road
Columbia, SC 29223

OFFICE OF ENVIRONMENTAL QUALITY CONTROL
BUREAU OF LAND AND WASTE MANAGEMENT
CONSTRUCTION, DEMOLITION, AND LAND-CLEARING DEBRIS LANDFILL
FACILITY ID #####-###

Permit Issued Date: June 19, 2008 Permit Effective Date: _____

Permission is hereby granted to:

Name of Facility: Highway 92 Construction, Demolition and Land Clearing Debris Landfill
and Reprocessing Center
Permittee: MRR Highway 92, LLC
Address: 11743 Trails End Lane
Charlotte, NC 28078
Supervisor: Mr. Ronald C. Gilkerson
Phone: (704) 947-6652

for the operation of a Construction, Demolition, and Land-Clearing Debris Landfill located at 322 Choice Road off SC Highway 92 two (2) miles east of Gray Court, South Carolina.

This permit is issued pursuant to Sections 44-96-10 *et seq.* (Supp. 2007) and 25A S.C. Code Regs. 61-107.19 (Supp. 2007). The authority granted hereunder is subject to the requirements of the aforementioned laws and regulations and the attached conditions.

Kent M. Coleman, P.G., Director

Division of Mining and Solid Waste Management
Bureau of Land & Waste Management

HIGHWAY 92 CONSTRUCTION, DEMOLITION, AND LAND-CLEARING DEBRIS LANDFILL
FACILITY ID 302###-####

A. SPECIAL CONDITIONS

1. The Permittee shall adhere to the Design Drawings and Engineering Report submitted to the Department dated June 27, 2006, and July 30, 2007 with the revisions dated October 26, 2007, unless permit conditions state otherwise.
2. The allowable rate of disposal for this facility is one hundred fifty-four thousand (154,000) tons per fiscal year (July 1 to June 30). Information concerning the facility's previous Fiscal Year's waste receipts is due in the form of an annual report to the Department no later than September 1st of each year, as required by R.61-107.19 Part IV. Subpart C.16, to the attention of:

Manager, Solid and Hazardous Waste Compliance Section
SC DHEC Bureau of Land and Waste Management
2600 Bull Street
Columbia, South Carolina 29201

3. This permit is limited solely to the disposal of items listed in Appendix I of R.61-107.19.
4. The total surface area within the permitted waste disposal footprint that has not been deemed closed by the Department is limited to twelve (12) acres. For an area to be considered closed, the following items shall be completed:
 - a. Official certification from a Professional Engineer registered in the State of South Carolina that the area has been closed in accordance with final cover requirements pursuant to Regulation 61-107.19.
 - b. The area shall be inspected and deemed closed by Department staff.
5. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that the total surface area within the permitted waste disposal footprint that is not deemed officially closed by the Department pursuant to Special Condition No. 4 (above) is equal to or less than 12 acres (at the time of the certification). The certification shall have been completed within the last sixty (60) days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.

6. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that enough soil is currently available to use for final cover (38,720 yd³ of soil for 12 acres with 2' thickness). The certification shall have been completed within the last 60 days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.
7. The financial assurance mechanism must be in place prior to accepting construction, demolition, and land-clearing debris waste.
8. All waste, excluding non-friable asbestos containing material, shall be covered at least every thirty (30) days with a minimum of six (6) inches of clean soil.
9. Non-friable asbestos containing material shall be covered immediately upon receipt with at least six (6) inches of clean soil.

B. GENERAL PERMIT CONDITIONS

1. If the landfill should become inundated with water, all water shall be removed before continuing disposal of waste.
2. The Permittee shall submit a revised cost estimate for closure and post-closure to the Department's Solid and Hazardous Waste Compliance Section for approval prior to acceptance of waste. The cost estimate shall be based upon the closure and post-closure requirements stated in Regulation 61-107.19. Part I. Subpart E.1 and Part IV. Subpart F.

C. ENVIRONMENTAL MONITORING PERMIT CONDITIONS

1. GROUNDWATER DETECTION MONITORING SYSTEM

- a) The Permittee shall maintain a groundwater detection monitoring system consistent with the most recently approved Groundwater Sampling and Analysis Plan, as required by R.61-107.19 Part IV Subpart E. The groundwater detection monitoring system shall consist of monitoring wells as designated in the most recently approved Groundwater Sampling and Analysis Plan and any other monitoring wells specified by the Department. Modifications to the current groundwater detection monitoring system shall be in accordance with the requirements of R.61-107.19 Part IV Subpart E.
- b) The Permittee shall perform all groundwater activities in accordance with the most recently approved Groundwater Sampling and Analysis Plan and in accordance with the requirements of R.61-107.19 Part IV Subpart E, along with any subsequent modifications deemed necessary by the Department to uphold.

- c) The Permittee must evaluate analytical results in accordance with the most recently approved Sampling and Analysis Plan and any subsequent modifications required by the Department.
- d) The Permittee must determine during each sampling event the elevation of the groundwater surface in each well relative to mean sea level (MSL) to the nearest hundredth of a foot. All elevations should be determined on the same day. The Permittee shall determine the total depth of each well on an annual basis.
- e) Groundwater samples shall be analyzed by a laboratory certified by the State of South Carolina.

2. ASSESSMENT OF GROUNDWATER IMPACT

If the Permittee determines that a groundwater protection standard has potentially been exceeded for one or more constituents for routine monitoring at any monitoring well at the relevant point of compliance, then the Permittee shall perform any necessary groundwater assessment actions in accordance with the requirements of R.61-107.19 Part IV Subpart E.3.

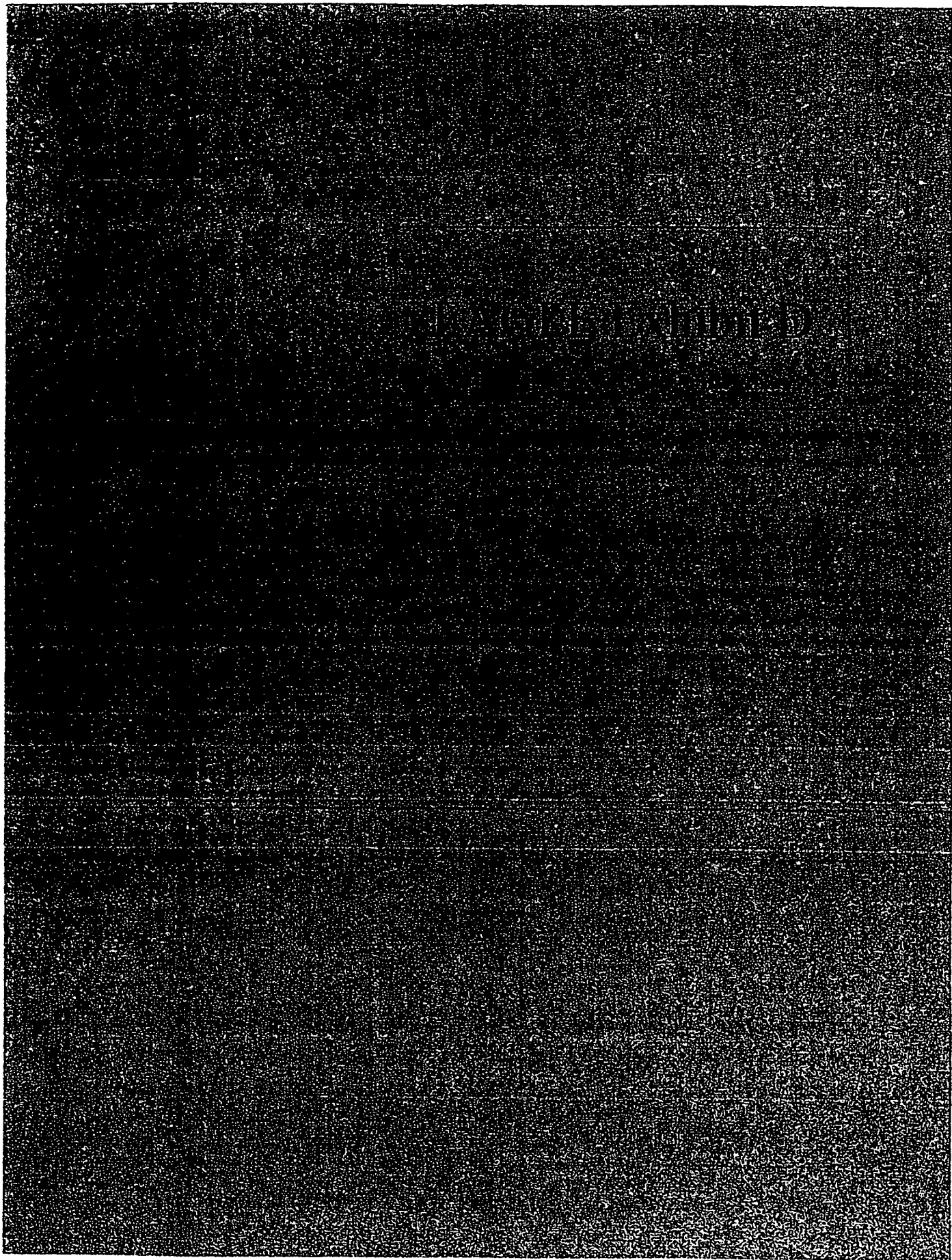
3. REPORTING

- a) The Permittee shall submit to the Department the results of the groundwater monitoring program as specified in the most recently approved Groundwater Sampling and Analysis Plan, in accordance with the following sampling schedule:

Sampling Schedule
 March
 September

Results Due
 May 15
 November 15 (Annual Report)

- b) The Permittee shall submit an annual report signed by a South Carolina certified groundwater scientist summarizing the semi-annual determinations of groundwater flow direction and rate. In addition, the report shall also make a determination as to whether the monitoring well network continues to meet requirements of permit condition C.1.a.
- c) The established groundwater data collected by the implementation of the groundwater monitoring program as specified by this Permit shall be submitted to the SCDHEC Bureau of Land and Waste Management Division of Hydrogeology Solid Waste Groundwater Section, and the Solid Waste Consultant in Region IEQC (Greenwood).



61-107.17. Solid Waste Management: Demonstration-of-Need.

(Statutory Authority: 1976 Code Sections 44-96-260, 44-96-290, and 44-96-450)

Table of Contents:

- A. Applicability
- B. Definitions
- C. Demonstration of Need Requirements
- D. Determining Need
- E. Violations and Penalties
- F. Severability

A. Applicability.

1. This regulation establishes the criteria for the demonstration-of-need for the construction of new and the expansion of existing municipal solid waste landfills, municipal solid waste incinerators, industrial incinerators, Part IV (long-term) construction, demolition, and land-clearing debris landfills, and industrial landfills. Solid waste disposal facilities that have stopped accepting waste prior to the effective date of this regulation shall be considered new facilities and required to demonstrate need pursuant to this regulation.

2. This regulation does not apply to inert or cellulosic solid waste facilities or to industrial facilities managing solid waste generated in the course of normal operations on property under the same ownership or control as the solid waste management facility if the facility is not a commercial solid waste management facility.

3. This regulation does not apply to facilities that handle hazardous waste as defined by the Resource Conservation and Recovery Act (RCRA) and R.61-79, Hazardous Waste Management Regulations, and infectious waste as defined by R.61-105, Infectious Waste Management Regulations.

B. Definitions.

1. "Commercial solid waste disposal facility" means a publicly or privately owned solid waste disposal facility which accepts solid waste from outside the county or region in which the facility is located.

2. "County or regional Solid Waste Management Plan" - means a solid waste management plan prepared, approved, and submitted by either a single county or a region, i.e., a group of counties, pursuant to the Solid Waste Policy and Management Act, S.C. Code Ann. Section 44-96-80 (1976 Code as amended.)

3. "Department" means the South Carolina Department of Health and Environmental Control.

4. "Disposal Rate" means the total volume or rate of disposal at the solid waste disposal facility on a fiscal year basis.

5. "Expand" or "Expansion" means any increase in the permitted capacity of a solid waste disposal facility, or any increase in the total volume or annual permitted rate of disposal at a solid waste disposal facility.

6. "Planning area" means the area around a solid waste disposal facility as defined below which is used for determining the need for new disposal facilities and expansions of existing disposal facilities.

a. The following planning areas shall be used by the Department for determining need for commercial facilities:

Commercial Solid Waste Disposal Facility	Size of Planning Area Around Landfill/Incinerator
Municipal Solid Waste Landfill	75-mile radius
Industrial Landfill	75-mile radius
Municipal Solid Waste Incinerator	75-mile radius
Industrial Incinerator	75-mile radius
Part IV Construction Demolition and Land-clearing debris Landfill	10-mile radius

b. The planning area for an existing county or region owned facility that only accepts waste generated within its boundaries shall be limited to the county or region in which the facility is located. The local solid waste management plan will identify a facility as being a county facility or a regional facility. Any new county or region owned facility that is proposing to accept only waste generated within its boundaries shall be subject to the planning area in Section B.6.a.

7. "Region" means a group of counties which is planning to or has prepared, approved, and submitted a regional solid waste management plan to the Department pursuant to S.C. Code Ann. Section 44-96-80.

8. "Solid Waste" means any garbage, refuse, or sludge from a waste treatment plant, water supply plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities. This term does not include solid or dissolved material in domestic sewage, recovered materials, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to NPDES permits under the Federal Water Pollution Control Act, as amended, or the Pollution Control Act of South Carolina, as amended, or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1964, as amended. Also excluded from this definition are application of fertilizer and animal manure during normal agricultural operations or refuse as defined and regulated pursuant to the South Carolina Mining Act, including processed mineral waste, which will not have a significant adverse impact on the environment.

9. "Solid Waste Disposal Facilities" means municipal solid waste landfills, municipal solid waste incinerators, industrial incinerators, Part IV (long-term) construction, demolition, and land-clearing debris landfills, and/or industrial landfills.

10. "State Solid Waste Management Plan" means the plan which the Department of Health and Environmental Control is required to submit to the General Assembly and to the Governor pursuant to S.C. Code Ann. Section 44-96-60.

C. Demonstration-of-Need Requirements for Solid Waste Disposal Facilities.

1. No permit to construct a new solid waste disposal facility or to expand an existing solid waste disposal facility shall be issued until a demonstration-of-need is approved by the Department, provided, however, that any increase in the disposal rate shall not require a

demonstration-of-need as long as such disposal rate is less than the maximum disposal rate as determined in paragraph D.3.b. below.

2. Construction of new or expansion of existing solid waste disposal facilities may not be commenced until all permits required for construction have been issued.

3. Need shall be demonstrated for the following types of solid waste disposal facilities:

- a. Municipal Solid Waste Landfills;
- b. Part IV (long-term) Construction, Demolition, and Land-Clearing Debris Landfills;
- c. Industrial Landfills;
- d. Municipal Solid Waste Incinerators; and,
- e. Industrial Solid Waste Incinerators.

4. The initial demonstration-of-need for a new or expanded solid waste disposal facilities shall be made by the Department prior to a consistency determination.

5. In determining whether there is a need for new solid waste disposal facilities or expansion of existing solid waste disposal facilities, the Department shall not consider solid waste generated in jurisdictions not subject to the provisions of a county or regional solid waste management plan pursuant to S.C. Code Ann. 44-96-80.

D. Determining Need.

1. For all new proposed solid waste disposal facilities and all proposed expansions of existing solid waste disposal facilities, the applicant shall submit the following information to the Department:

a. The longitude and latitude coordinates for the site of the proposed new facility or proposed expansion; and,

b. The proposed disposal rate for the proposed new facility, or for the proposed expansion of the existing facility.

2. The Department will conduct a review of permitted disposal rates at existing solid waste disposal facilities within the planning area of any new proposed solid waste disposal facilities and any proposed expansions of existing solid waste disposal facilities, based upon information contained in the applicable county or regional solid waste management plan and the State Solid Waste Management Plan for the proposed new solid waste disposal facility/expansion.

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 there of, 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.

4. Variance.

a. In regards to demonstration-of-need, any solid waste disposal facility existing on the effective date of this regulation that exhausts its capacity, shall be allowed to either construct a new solid waste disposal facility at its permitted annual rate of disposal as a replacement, or expand the volume of the existing solid waste disposal facility. The planning area shall be determined based on the location of the expansion or replacement facility. This variance applies to all solid waste disposal facilities, including solid waste disposal facilities that accept only waste generated in the county or region in which the facility is located.

b. A solid waste disposal facility shall apply to the Department for a variance to either replace the solid waste disposal facility or to expand the volume of the existing solid waste disposal facility at least five (5) years before exhausting its permitted capacity or the operational life of the facility.

5. The Department will advise the applicant and the host county or region in writing of its demonstration-of-need determination.

E. Violations and Penalties.

A violation of this regulation or any permit, order, or standard subjects the person to the issuance of a Department order or a civil enforcement action in accordance with S.C. Code Ann. Section 44-96-450. Willful violation of this regulation or any permit, order, or standard subjects the person to the issuance of a Department order or to criminal enforcement action in accordance with S.C. Code Ann. Section 44-96-450. Any person to whom an order is issued may appeal it as a contested case pursuant to any applicable provision of R.61-72, Procedures for Contested Cases, and the S.C. Administrative Procedures Act, S.C. Code Ann. Section 1-23-310 et seq.

F. Severability.

Should any section, paragraph, sentence, word, clause or phrase of this regulation be declared unconstitutional or invalid for any reason, the remainder of this regulation shall not be affected thereby.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

BARBARA POLK,	)	
	)	DOCKET NO. 07-ALJ-0168-CC
PETITIONER,	)	DOCKET NO. 07-ALJ-0178-CC
	)	
VS.	)	
	)	
C&D MANAGEMENT COMPANY,	)	
LLC, AND SOUTH CAROLINA	)	DEPOSITION
DEPARTMENT OF HEALTH AND	)	
ENVIRONMENTAL CONTROL,	)	OF
	)	
RESPONDENTS.	)	
	)	ART BRASWELL
YORK COUNTY, A BODY	)	
POLITIC,	)	
	)	
PETITIONER,	)	
	)	
VS.	)	
	)	
C&D MANAGEMENT COMPANY,	)	
LLC, AND SOUTH CAROLINA	)	
DEPARTMENT OF HEALTH AND	)	
ENVIRONMENTAL CONTROL,	)	
	)	
RESPONDENTS.	)	

Deposition of Art Braswell, taken pursuant to the South Carolina Rules of Civil Procedure, commencing at the hour of 9:41 a.m., Tuesday, March 18th, 2008, at the South Carolina Department of Health and Environmental Control, 101 Business Park Boulevard, Room 2101, Columbia, South Carolina.

COPY

Reported by

Sandra H. Davis

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Appearances

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Sipe, LLC
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P.O. Box 10940
Rock Hill, SC 29731

For DHEC: Susan A. Lake, Esquire
DHEC Office of General Counsel
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Columbia, SC 29201

FOR C&D Management: Leon C. Harmon, Esquire
Nexsen, Pruet, Adams,
Kleemeier, LLC
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Greenville, SC 29603

Reported By: Sandra H. Davis

Also Present: Michael K. Kendree, Esquire
Kent Coleman
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Exhibits

<u>Marked as Exhibit Number One;</u>	
Deposition of Art Braswell; copies of documents; three pages.	12
<u>Marked as Exhibit Number Two;</u>	
Deposition of Art Braswell; copy of letter; one page.	13
<u>Marked as Exhibit Number Three;</u>	
Deposition of Art Braswell; copy of map; one page.	15
<u>Marked as Exhibit Number Four;</u>	
Deposition of Art Braswell; copy of map; one page.	15
<u>Marked as Exhibit Number Five;</u>	
Deposition of Art Braswell; copy of letter; one page.	21
<u>Marked as Exhibit Number Six;</u>	
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Court Reporter's Note: This transcript may contain quoted material. Such material is reproduced as read or quoted by the speaker. Double hyphens (--) denote interruption of speech, incomplete sentence/phrase, or trailing off. [ph] denotes phonetically written. [sic] denotes written as spoken.

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Stipulations

The reading and signing of this deposition is reserved by the deponent and counsel for the respective parties.

Whereupon,

Art Braswell, being duly sworn and cautioned to speak the truth, the whole truth, and nothing but the truth, testified and deposed as follows:

The Court Reporter: Please state your full name for the record.

The Deponent: Arthur Douglas Braswell.

Examination

By Mr. Chandler:

Q Mr. Braswell, where do you live?

A I live at 1627 Ripple Rock Road in Columbia, South Carolina.

Q And how long have you lived in Columbia?

A I moved back here in 1982.

Q And where are you employed?

A Capitol Consultants in South -- South Carolina.

Q What is your position?

A I'm an environmental consultant. I'm a senior vice president of the environmental services division.

Q And what type of work does Capitol Consultants do?

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- 1 A They do lobbying. They do -- handle government
2 affairs, some association management, and
3 environmental services.
- 4 Q Okay. And in your work for Capitol Consulting,
5 what types of things do you do?
- 6 A I assist clients that are trying to get
7 environmental permits, help them through the
8 permitting process.
- 9 Q How long have you been with Capitol Consultants?
- 10 A Since October, the middle of October 2007.
- 11 Q Prior to your current job, where were you employed?
- 12 A I was employed by the Department of Health and
13 Environmental Control.
- 14 Q Okay. Well, let's kind of go back to the other end
15 of your working life. What's your educational
16 background?
- 17 A Bachelor of science degree from the University of
18 South Carolina.
- 19 Q And what was your major?
- 20 A I majored in biology, a minor in chemistry.
- 21 Q Have you got any graduate degrees?
- 22 A No. I attended some -- I did some graduate work,
23 but I don't have a degree.
- 24 Q After you got out of school at Carolina, where did
25 you go to work?

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1 A South Carolina Department of Health and
2 Environmental Control.

3 Q When was that?

4 A October of 1977.

5 Q And -- So, were you with DHEC consistently from
6 October 1977 until this past year?

7 A Yes. I spent one year at the University of Florida
8 doing environmental studies in graduate school, and
9 other than that, I've been with the Department of
10 Health and Environmental Control.

11 Q Okay. Can you just kind of give me a quick
12 overview of the positions that you've held while
13 you were at DHEC?

14 A I started off working in the Greenville County
15 Health Department at the Food Service Program in
16 the first year and a half I was with DHEC. Then I
17 transferred to the Trident ETC District in
18 Charleston. I worked down there til August 1981,
19 and then I started working for the Bureau of Air
20 Quality Control here in Columbia and worked in air
21 quality up until nineteen- -- February of 1989. At
22 that time, I transferred into the Bureau of Land
23 and Waste Management and worked in the Enforcement
24 Section, Solid and Hazardous Waste Enforcement. In
25 1991, when the Solid Waste Act was passed, I became

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1 manager of the Regulation Development Planning and
2 Compliance Section for Solid Waste and worked in
3 that position until September of 1999. Then I
4 became director of the Division of Mining and Solid
5 Waste Management at that time up until I retired.

6 Q Okay. In the last position you held, that was the
7 director of Solid Waste Management?

8 A Mining and Solid Waste Management.

9 Q Mining and Solid Waste Management. Give me an
10 overview of what sort of responsibilities you had
11 in that position.

12 A I supervised the division that was responsible for
13 permitting all of the solid waste management
14 facilities in the state or doing the planning for
15 solid waste management. Also, up until 2004, 2005,
16 I actually headed the Compliance Section, Solid
17 Waste Compliance, in the division. At that time,
18 the division was rearranged and the Recycling --
19 the Solid Waste Recycling Section was merged into
20 the division, and became responsible for recycling
21 issues, too. I also -- The division was
22 responsible for all the permitting and compliance
23 for mining -- mining sites across the state.

24 Q How many people did you have working on your staff?

25 A It was about 35 I believe, full- and part-time.

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1 Q Okay. How much involvement did you have in the
2 actual permit reviews and issuance of permits for
3 solid waste facilities?

4 A The way -- Well, the Solid Waste Permitting
5 Section handled the review. I was involved as --
6 on the final review, go through the application
7 before we made the final decision whether to issue
8 the permit or deny it. Also, any issues that came
9 up during the process were discussed with the Solid
10 Waste Permitting Section manager and his staff.
11 Also, from a planning standpoint, I discussed
12 planning issues with Solid Waste -- the manager of
13 the Solid Waste Planning Section any issue that
14 arose in that. Really, any issues that -- involved
15 in that permit, just anything that was
16 controversial or just had a question, discussed it
17 with the management and the staff of the division.

18 Q Now, are you familiar with the application of a
19 company called C&D Management Company, LLC?

20 A Yes, I am.

21 Q And do you know when they submitted a permit
22 application to the Department?

23 A I'm not sure of the exact date. The process
24 started I guess in 2005, demonstration of need,
25 consistency, and follow-up with an application.

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1 Q Okay. And can you describe what it was that C&D
2 Management was applying for? What was it they
3 wanted to build that they needed a permit?

4 A They were applying for a permit to construct a
5 long-term construction demolition debris landfill.

6 Q And where was it to be located?

7 A Off Rambo Road in York County.

8 Q And it was in the city of Rock Hill?

9 A That's correct.

10 Q Okay. Now, when you -- or when the Department is
11 reviewing an application for a facility like this,
12 can you sort of give me a list of what the key
13 issues generally are in determining whether to
14 issue a permit for this facility?

15 A Yes. Well, to start off, you have to do a
16 Demonstration of Need, determining whether there's
17 -- basically there's two other commercial landfills
18 within the planning radius. Once you get past
19 that, the next step would be determining whether
20 you're consistent with the local solid waste
21 management plan and also with local zoning. Once
22 you go through those steps, you also submit an
23 application to the Department for review with the
24 design of the site showing the buffers around the
25 site, the design field progressions, the

1 operational plan for the site. So, you just go
2 through the full technical review at that point,
3 and then the Department, once they complete the
4 review, would make a decision whether to issue --
5 publish a draft permit, if -- if everything was --
6 we felt like the conditions were met in the
7 regulations.

8 Q Okay. All right. Let's go through these
9 individual parts of this permit review. The first
10 thing you mentioned was Demonstration of Need.
11 Where does the requirement for a determination of
12 need come from in the law?

13 A It's in the Solid Waste Act under -- I think it's
14 4496290, and there's a department for -- a
15 department to determine need for a facility, or
16 write regulations for determining need, which the
17 Department wrote the Regulation 61107.17, which is
18 for the Demonstration of Need.

19 Q Okay. And Section 290E of the Act is what says
20 basically that no permit may be issued until the
21 Demonstration of Need is approved by the
22 Department. Is that --

23 A That's correct.

24 Q -- a rough statement of it? Now, is the term need
25 -- or demonstration of need, is that phrase defined

- 1 in the Act?
- 2 A No, it's not.
- 3 Q Okay. And are you familiar with what evidence or
- 4 documents the C&D Management Company submitted with
- 5 its application for a Demonstration of Need letter?
- 6 A Yes, the letter would have the coordinates for the
- 7 proposed site of the landfill. At that point, we
- 8 -- the staff would take it, we would plot this --
- 9 the location on the map with a -- a
- 10 demonstration of need map, basically, that showed
- 11 the other facilities within the ten-mile planning
- 12 radius, and determine whether this area allowed
- 13 another landfill.
- 14 Q So, the only thing that an applicant has to submit
- 15 is basically a letter with the latitude and
- 16 longitude coordinates?
- 17 A For demonstrating need, that's correct.
- 18 Q Okay. And in this particular case involving C&D
- 19 Management Company, do you know whether the
- 20 Department received anything else in terms of a
- 21 Demonstration of Need besides the letter requesting
- 22 it and giving the latitude and longitude?
- 23 A I'm not aware of anything other than the letter
- 24 requesting the Demonstration of Need.
- 25 Mr. Chandler: (to the court reporter)

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- 1 county was having some problem with open dumping.
2 I take it you mean people just disposing of
3 materials not in a --
4 A Not in a permitted landfill.
5 Q -- permitted landfill?
6 A There were some illegal landfills operating in York
7 County.
8 Q When that starts happening in a county, what does
9 that generally indicate to you?
10 A That there's not adequate capacity in -- Either
11 there's not adequate capacity in the area, or else
12 the distance to the landfill is too great and you
13 may need a new landfill in that county.
14 Q Okay. So, in the overall management of solid
15 waste, too few facilities might mean that people
16 might dump outside of permitted areas?
17 A That's correct.
18 Q Okay. Is there a problem -- Do problems ever come
19 up from having too much capacity?
20 A The Department was -- is concerned about too much
21 capacity from the standpoint of attracting large
22 volumes of waste from other areas of the country.
23 We can't -- As you know, we can't prohibit waste
24 from crossing state lines or prohibit out-of-state
25 waste from coming into the state, but we don't --

1 didn't want to make the state so attractive that we
2 attracted large volumes of waste, and that's how
3 the state -- we wrote the Demonstration of Need
4 Regulation.

5 Q Okay. And would you agree that -- that the
6 requirement of need was to -- when the Act was
7 passed -- was intended to help deal with that
8 problem?

9 A Yes, it was. In fact, the planning radiuses were
10 based on the distance that it was believed that
11 people would travel to deposit waste in those
12 landfills. That ten miles was an adequate distance
13 for C&D-type waste. People wouldn't transport as
14 far as they would like MSW, where you load in the
15 large haulers and transport it 75 miles or even
16 further than that. So, that's why there's
17 different type radiuses for the different type
18 landfills.

19 Q Can you tell me why you used a ten-mile radius and
20 looked at the number of landfills there but you
21 used a much larger area for determining the
22 capacity of this landfill?

23 A Well, we -- No, we used the -- The ten-mile
24 radius was used for the capacity, also, as far as
25 the tonnage, if that's what you're talking about.

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1 The annual tonnage is based on waste generated from
2 that ten-mile -- every county that that touches
3 within that ten-mile zone. I understand, I guess,
4 you're getting at the fact you take that entire
5 county into account, but there was no way to -- We
6 didn't have a way to give a proportion of that
7 waste based on the location of that radius, so we
8 took the entire amount from that county and applied
9 it to that landfill.

10 Q Okay. Has the Department ever attempted to figure
11 out how to apportion the amount of waste being
12 generated by just looking within a ten-mile circle?

13 A Well, under the -- It's currently the -- DHEC's
14 in the process of updating the Demonstration of
15 Need Regulation, and they're looking at -- from a
16 MSW standpoint, of looking at percentages of waste
17 instead of the entire waste, but not based on a
18 portion of how much that county -- that circle
19 touches, just based on the county's waste
20 generation. But from the C&D standpoint, they have
21 -- there's been no effort or indication -- I know
22 it's been mentioned, but there's no -- it has not
23 been done yet, where we've looked at how to
24 proportion that waste based on the area that it
25 touches. Your problem with -- If you do it by

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1 area, then you may be crossing an area where, say,
2 you have a high population and most of the waste
3 may be generated within that ten-mile radius, or
4 you may be in an area where there's a low
5 population and not generate much waste there. So,
6 there was really no way to account for that, so we
7 gave the entire volume to that landfill for
8 whatever counties that circle touched.

9 Q Okay. And -- But don't you have the possibility
10 if you draw these circles, and then, for instance,
11 if York County is generating 54,000 tons, and you
12 could draw, say, two of these circles that covered
13 York County so that the circles didn't overlap, you
14 could end up with four landfills in York County,
15 each of which would be permitted for the full
16 amount of waste that's generated in York County,
17 couldn't you?

18 A You could. That's correct.

19 Q Okay. And, so, within the county, you could
20 conceivably have 216,000 tons of capacity in a
21 county that only generates 54,000, assuming that's
22 --

23 A That's --

24 Q -- a static set of numbers.

25 A That's a possibility.

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- 1 Q It's a possibility.
- 2 A There's some thought, also, that the market will
- 3 drive that. You will not have people siting a
- 4 large number of landfills if there's not a market
- 5 for them, also.
- 6 Q Right, but there's also at least a possibility that
- 7 you're going to have roughly four times the
- 8 capacity that the county --
- 9 A That's a --
- 10 Q -- needs?
- 11 A That's a possibility.
- 12 Q Okay. Now, in the latter part of 2006 and the
- 13 early part of 2007, you were aware, weren't you,
- 14 and wasn't the Department aware, that York County
- 15 was moving to complete a new plan?
- 16 A Yes, I was. In fact, I attended a workshop the
- 17 county council put on in regard to --
- 18 Q Okay.
- 19 A -- discuss the new plan.
- 20 Q And in connection with the development of that
- 21 plan, do you know whether anybody from York County
- 22 asked the Department whether a Solid Waste Advisory
- 23 Council was necessary for such an amendment?
- 24 A Yes. I believe, Anna -- I'm not sure -- Her last
- 25 -- her last name slips me.

1 operation there, where they're mulching the land-
2 clearing debris, it would have to have registration
3 with the Department, but any recycling facility,
4 it's not required to have a permit.

5 Mr. Chandler: Bear with me just a
6 second.

7 Ms. Lake: You want to take a quick
8 break?

9 Mr. Chandler: Yeah, why don't we do
10 that.

11 [Off the record at 10:51 a.m.;
12 back on the record at 11:06
13 a.m.]

14 Examination Continues

15 By Mr. Chandler:

16 Q Okay. Just a couple of quick follow-ups, and then
17 I think I'll turn it over to Ms. Cox. The map that
18 shows the Vernsdale Landfill, other little dots
19 that are labeled on the map include a York County
20 C&D and LCD Landfill and a Rogers C&D Landfill. Is
21 that correct?

22 A That's correct.

23 Q Okay. Now, does the Department take into account
24 the York County C&D Landfill?

25 A Not in determining need, and you can see the N

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- 1 beside it, it means noncommercial.
- 2 Q Mm-hmm.
- 3 A We only consider commercial facilities under the
- 4 current regulation.
- 5 Q Okay. Do you know what capacity, what annual
- 6 tonnage, the York County C&D Landfill can handle?
- 7 A I'm not sure what their permitted tonnage is, but
- 8 it would be eligible up to the maximum the county
- 9 generates.
- 10 Q Okay. And what about the Rogers C&D Landfill? Do
- 11 you know how much it can handle each year?
- 12 A I don't know what their permitted tonnage limit is
- 13 either, but they would be eligible for the --
- 14 basically the same amount as Vernsdale's, where
- 15 they're located. Their radius would cross into
- 16 both counties.
- 17 Q And if between these two facilities they can handle
- 18 the total tonnage of the county, why wouldn't DHEC
- 19 take that into account?
- 20 A Because the way the regulation is currently
- 21 written, the York County Landfill would not be used
- 22 to determine need. We only are looking at
- 23 commercial facilities. And it's really a spatial.
- 24 It's really -- It's sort of a misnomer because the
- 25 landfill regulation -- the CV regulation -- the

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1 Demonstration of Need Regulation actually looks at
2 the location of landfills, not actually what is
3 needed in that county. It's more of a spatial
4 location to determine where the landfills can be
5 located so you can't place more than two in an
6 area, try to spread the landfills out so you
7 wouldn't have a large conglomeration of landfills
8 in one location. It doesn't take into account the
9 overall waste issue as far as need, saying we have
10 this much capacity in the county, we have more than
11 excess capacity, therefore, we can't site another
12 landfill. That regulation doesn't do that. It
13 only says that you can't have two -- more than two
14 within a certain planning area, and then the
15 tonnages are based on where those planning areas --
16 where they cover and -- which does allow for a -- a
17 large volume of waste or a large capacity to be
18 permitted within every county in the state.

19 Mr. Chandler: Okay. Thank you. I think
20 that's all the questions I have for now.

21 Examination

22 By Ms. Cox:

23 Q Mr. Braswell, I appreciate your being here today.
24 Christi Cox, representing Barbara Polk in this
25 action. I want to go back and ask you a few

1 Q How much time does it take to do the DON approval?

2 A It's -- Well, at the time -- It would depend on
3 how quickly we could get our GIS person to handle
4 the -- placing this site on the map and determining
5 whether there's two facilities within that area.
6 When this occurred, we didn't have staff in our
7 division to do that. We were relying on a GIS
8 person within the bureau to help us with that. We
9 now have someone doing that within the Division,
10 but back in 2004, 2005, we didn't have -- that was
11 -- that was done -- Rudy would have handled it
12 with a GIS person.

13 Q How long would it have taken him to perform the DON
14 review and approval?

15 A Very little time. Once you've placed it on the
16 map, you look -- basically you look to see if
17 there's two facilities within that area, where you
18 want to place it, and if it comes back on the map
19 and shows there's not but one other one -- one
20 other commercial facility in that area, then you
21 can go ahead and approve the Demonstration of Need.
22 Basically, to do that and then calculate the
23 tonnage is only the work that is required, and it -
24 - that takes a little more time, I guess, just to
25 go through and look at the county reports to see

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- 1 how much waste is generated in each county.
- 2 Q Mm-hmm. So, all total, he may have spent an hour
- 3 on the DON --
- 4 A Well, --
- 5 Q -- side?
- 6 A -- I -- I can't say. A few hours. I mean, --
- 7 Q No more than a few hours?
- 8 A It doesn't take more than a few hours once you
- 9 actually -- you're able to sit down and do the
- 10 work. It's just getting to that point, you know,
- 11 to do that.
- 12 Q Okay.
- 13 A He's got a lot of other -- As a manager of that
- 14 section, he had a lot of other work to do, too. He
- 15 wasn't just sitting there waiting for these to come
- 16 in.
- 17 Q And you mentioned that what takes place in
- 18 determining need is basically to look at the map
- 19 and determine whether or not there are two
- 20 facilities within a ten-mile radius, and, if there
- 21 are, then there's not a need. Is that true?
- 22 A That's correct. If there's two already in place --
- 23 two commercial facilities in place within a ten-
- 24 mile radius, then there's not a need.
- 25 Q Why is it that you only look at commercial

1 facilities?

2 A When we wrote the regulation, it was really geared
3 more toward MSW-type landfills, and a lot of county
4 facilities would not take waste from outside their
5 county. So, when you're trying to site a large --
6 And this always hadn't encouraged the regional
7 facilities. So, the Department was trying to
8 encourage regional facilities because you had
9 existing facilities that wouldn't take waste from
10 outside their county, then they were -- they would
11 block an area, if they were commercial, and not
12 really provide any service to a regional area. So,
13 when we wrote the regulation, our intent was to
14 ensure there was adequate capacity in a planning
15 area and also that there was at least two
16 facilities to ensure there was some competition to
17 keep prices down at the time. So, there was a
18 competitive market for the -- for the waste at that
19 time.

20 Q Where in the regs does it say only to look at
21 commercial facilities?

22 A Well, it's in the Demonstration of Need Regulation.

23 Q It's your position that it says only look at
24 commercial facilities?

25 A That's correct.

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- 1 Q And can you tell me what reg you're referring to?
- 2 A 61107.17, I think. I guess that --
- 3 Q 107 --
- 4 A .17. I think it's Section D, I believe.
- 5 Q Now, in coming up with the tonnage amount, however,
- 6 you do consider the amount that's been deposited in
- 7 the county landfill?
- 8 A That's right.
- 9 Q Okay. So, you consider the county's --
- 10 A We look at general --
- 11 Q -- amounts, but you don't allow them to back that
- 12 out, so you're always going to have a need wherever
- 13 there's a county landfill. Is that true?
- 14 A Oh, that -- that's true.
- 15 Q With respect to the initial DON request and the
- 16 consistency determination, was there any thought or
- 17 any -- was there anything done by DHEC to look at
- 18 the zoning of the property?
- 19 A Well, we always look at zoning. When the
- 20 application came in, we would look at zoning to
- 21 make sure it was consistent with local zoning.
- 22 Q Okay. I'm not talking about the application. I'm
- 23 talking about at the DON stage and the consistency
- 24 stage. Did anybody at DHEC look at zoning?
- 25 A Not at that time. I'm not aware of that.

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioner,

vs.

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

Respondents.

Docket No. 08-ALJ-07-0425-CC

**RESPONDENTS' JOINT REPLY TO
PETITIONER'S MOTION FOR
SUMMARY JUDGMENT AND
RESPONSE TO MRR HIGHWAY 92,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

Respondents MRR Highway 92, LLC ("MRR") and South Carolina Department of Health and Environmental Control ("Department") (hereinafter collectively referred to as "Respondents") submit this memorandum of law in reply to Petitioner's Motion for Summary Judgment and Response to MRR Highway 92, LLC's Motion for Summary Judgment ("Petitioner's Motion and Response"), filed on May 1, 2009.

**I. THE PETITIONER HAS FAILED TO ASSERT A LEGITIMATE
CHALLENGE TO THE VALIDITY OF THE DON REGULATION.**

In Petitioner's Motion and Response, the Petitioner repeatedly asserts that the Department erred in issuing a permit to MRR for construction and operation of a Class Two Landfill to be located 322 Choice Road, Gray Court in Laurens County ("Proposed Landfill") because there is no actual need for the Proposed Landfill. The Petitioner does not assert that the Department failed to approve the demonstration of need for the Proposed Landfill in accordance with S.C. CODE ANN. REGS. § 61-107.17 ("DON Regulation"), which was promulgated by the Department as required by Section 44-96-290(E) of the Solid Waste Act. Indeed, the Petitioner concedes that the demonstration of need was approved in accordance with the criteria set forth in the DON Regulation. (See

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Petitioner's Motion for Summary Judgment and Response to MRR Highway 92's Motion for Summary Judgment, hereinafter "Petitioner's Motion and Response," pp. 3-4). Instead, the Petitioner asserts that the approval of the demonstration was improper because the Department failed to consider the existing permitted capacity in assessing the need for the Proposed Landfill. (See Petitioner's Motion and Response, p. 6). Contrary to this assertion, the DON Regulation does not require a consideration of existing capacity in determining a need for the Proposed Landfill within the planning area defined under the Regulation. Pursuant to the DON Regulation, the number of existing commercial landfills in the planning area is the only criteria necessary for determining need for the Proposed Landfill.

The DON Regulation establishes the criteria for the demonstration of need for the construction of new Part IV (long-term) construction, demolition, and land-clearing debris landfills. 25A S.C. CODE REGS. § 61-107.17.A.1 (Supp. 2007).¹ Pursuant to this provision of the Regulation, need for a new Part IV C&D landfill is demonstrated when there are fewer than two commercial Part IV C&D landfills within a ten-mile radius planning area of the proposed landfill. 25A S.C. CODE REG. § 61-107.17.D.3.a (Supp. 2007). When there are less than two commercial Part IV C&D landfills within this planning area, there are no other criteria to be considered by the Department in making the determination that an additional Part IV C&D landfill is needed within this planning area. In such circumstances, the disposal capacity of the new landfill is not a criterion for

¹ Prior to the Department's decision on MRR's permit application, the Department promulgated new regulations governing the permitting and operation of landfills. See 25A S.C. CODE ANN. REGS. § 61-107.19. Under the new Landfill Regulation, C&D landfills are permitted as Class Two Landfills. However, the new Landfill Regulation expressly provides that a determination of need made prior to the effective date of the new Regulation "shall remain applicable and become the agency's final determination." S.C. CODE ANN. REGS. § 61-107.19 Part I.D.1.b. Accordingly, the Department's demonstration of need approval as a Part IV C&D Landfill conforms to the requirements for a Class Two Landfill.

determining need, as the DON Regulation provides that each disposal facility in the planning area is allowed up to a maximum disposal rate equal to the total amount of solid waste generated in the county or counties that fall within the planning area. 25A S.C. CODE REG. § 61-107.17.D.3.b (Supp. 2007). Capacity is a criterion for determining need only when two commercial Part VI C&D landfills are already permitting in the ten-mile radius planning area. In such case, the DON Regulation provides that an additional commercial landfill is needed if the existing landfills in the planning area do not have capacity to meet the disposal needs for that area. 25A S.C. CODE REG. § 61-107.17.D.3.a (Supp. 2007). Accordingly, until there are two commercial Part IV C&D landfills within a planning area, the Department does not consider capacity in determining need for a proposed landfill.

In Petitioner's Motion and Reply, the Petitioner cites to deposition testimony of Art Braswell to support its claim that the excess permitted landfill capacity demonstrates that there is no need for the Proposed Landfill. While Mr. Braswell testified that the application of the DON Regulation can result in permitting of excess capacity, he did not testify that such result was in conflict with the DON Regulation. Indeed, as discussed more fully in MRR's Motion for Summary Judgment, 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, each is allowed a maximum yearly disposal rate up to the total amount of waste generated in the host county. Moreover, 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 facility touches on more than one

county. Accordingly, Mr. Braswell's testimony regarding the excess capacity does not support a showing that the Department erred in approving the demonstration of need for the Proposed Landfill.

The Petitioner further asserts that the DON Regulation is invalid because it fails to require a demonstration of need "in the plain and ordinary use of that term." (Petitioner's Motion and Response, p. 9). As a preliminary matter, the Solid Waste Act does not define "need" or "demonstration of need." S.C. CODE ANN. § 44-96-250 (2002). Instead, Section 44-96-290(E) of the Solid Waste Act, which requires approval of a demonstration of need by the Department, provides that "[t]he department shall promulgate regulations to implement this section." S.C. CODE ANN. § 44-96-290(E) (2002). Accordingly, in enacting Section 44-96-290 of the Act, the General Assembly clearly intended that the Department further define "demonstration of need" through promulgation of regulations. In accordance with this statutory directive, the Department promulgated the DON Regulation which establishes the criteria for determining need for new or expanded facilities. Clearly, the DON Regulation is the Department's interpretation of the demonstration of need provision of the Solid Waste Act and is thus entitled to deference. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation."). As such, unless the Petitioner identifies some specific conflict between Section 44-96-290(E) of the Act and the DON Regulation, there is no basis for Petitioner's assertion that the DON Regulation improperly alters or adds to the Act.

Additionally, in asserting that the Department erred in following the DON Regulation, the Petitioner makes no claim that the DON Regulation was not validly

promulgated pursuant to the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA"). See S.C. CODE ANN. §§ 1-23-110 and 1-23-120 (Supp. 2008). Indeed, the current DON Regulation was promulgated in 2000 in accordance with the APA which requires public notification of proposed regulations and submittal to the General Assembly. See S.C. CODE ANN. §§ 1-23-110 and 1-23-120 (Supp. 2008). Instead, the Petitioner merely contends that the DON Regulation as promulgated and followed by the Department in this case fails to measure actual need and thus does not conform to the Solid Waste Act. An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation. *Hunter & Walden Co. v. South Carolina State Licensing Bd. for Contractors*, 272 S.C. 211, 251 S.E.2d 186 (1978). Regulations authorized by the legislature have the force of law. *Gaffney Ledger v. South Carolina Ethics Comm'n*, 360 S.C. 107, 600 S.E.2d 540 (2004). "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, the Department staff properly approved the demonstration of need for the Proposed Landfill based on the criteria set forth in the DON Regulation.

Finally, the Petitioner's challenge to the validity of the DON Regulation is not proper in this action. The South Carolina Supreme Court has held that the Administrative Law Court has no authority to rule on the validity of a regulation. *Drummond v. Dep't of Revenue*, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008) (citing *Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000)). Accordingly, the Petitioner's claim that the DON Regulation is invalid cannot be considered by this Court in reviewing the Department's decision to issue a permit for the Proposed Landfill.

II. SECTION 61-107.D.3.D OF THE DON REGULATION DOES NOT REQUIRE THE DEPARTMENT TO CONSIDER OTHER FACTORS IN MAKING A DEMONSTRATION OF NEED DETERMINATION.

In Petitioner's Motion and Response, the Petitioner asserts that the Department staff erred in issuing the demonstration of need approval without considering factors other than those expressly set out in the DON Regulation. (Petitioner's Motion and Response, pp. 12-14). In the section of the DON Regulation outlining the specific criteria for demonstration of need determinations, the DON Regulation includes a provision under which the Department "reserves the right to review additional factors in determining need on a case-by-case basis." 25A S.C. CODE REG. § 61-107.17.D.3.d (Supp. 2007). While this provision would allow the Department staff to consider other factors in making its determination, it certainly does not require the staff to do so. The decision on whether to exercise this right to consider additional factors is clearly within the discretion of the staff and does not provide grounds for challenging the Department's decision to approve a demonstration of need which meets the express criteria set forth in the DON Regulation.

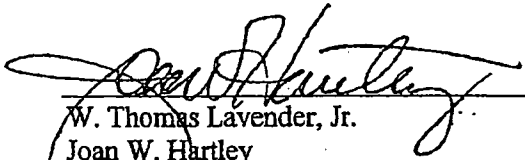
III. CONCLUSION

For the foregoing reasons, Respondents hereby request that the Court deny the Petitioner's Motion for Summary Judgment and issue an order granting judgment as a matter of law in favor of Respondents and upholding the Department's issuance of the permit for the Proposed Landfill.

III. CONCLUSION

For the foregoing reasons, Respondents hereby request that the Court deny the Petitioner's Motion for Summary Judgment and issue an order granting judgment as a matter of law in favor of Respondents and upholding the Department's issuance of the permit for the Proposed Landfill.

Respectfully submitted,



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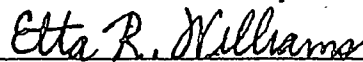
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May 18, 2009

Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioner,

vs.

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

Respondents.

Case No. 07-ALJ-07-0425-CC

**PETITIONER'S RESPONSE
TO
MOTION TO DISMISS**

The Petitioner, Engaging and Guarding Laurens County's Environment ("EAGLE"), submits the following in response to the motion to dismiss made orally by counsel for the Respondents at the beginning of the contested case hearing on July 22, 2009.

Due to the fact that the motion to dismiss was not made in a writing and the transcript of the hearing has not yet been received, counsel for the Petitioner will first state his understanding of the gist of Respondents' motion. Respondents seek dismissal on the grounds that Petitioner did not appeal DHEC's approval of MRR's "demonstration of need" within 15 days of the issuance of the letter of approval and therefore this Court lacks jurisdiction to hear this appeal on the issue of need. The Respondents claim that the issuance of the approval letter triggered an appeal period pursuant to the APA and Administrative Law Court Rule 11 (the approval letter was issued March 3, 2006, prior to the enactment of Section 44-1-60).

Under the South Carolina Administrative Procedures Act, "Contested case" means a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency

after an opportunity for hearing.” S.C. Code § 1-23-310(3). The provisions of Article I, Section 22 of the South Carolina Constitution state: “No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.”

During the contested case hearing on July 22, 2009, DHEC admitted that no public notice was issued and no public comment period was conducted prior to DHEC’s issuance of a letter approving MRR’s “demonstration of need” request.

Accordingly, either the letter “decision” was not an appealable contested case decision or the “decision” is void because made in violation of EAGLE’s constitutional rights.

This Court and the appellate courts of this state have noted on several occasions that DHEC had no written procedures for making “demonstration of need” approvals prior to the enactment of DHEC Regulation 61-107.19, which became effective May 23, 2008. *Oakwood Landfill, Inc. v. South Carolina Dept. of Health and Environmental Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct.App. 2009); *Pressley v. Lancaster County*, 343 S.C. 696, 542 S.E.2d 366 (Ct.App. 2001); *Waste Management of Carolinas, Inc. v. South Carolina Department of Health*, 2008 WL 4659522, 07-ALJ-07-0429-CC (September 24, 2008).

In *Oakwood Landfill*, a request for contested case hearing was filed in 2004 after a landfill permit was issued, where approvals of consistency requests had been issued in 2000 and 2003. In *Waste Management*, a request for review was apparently filed sometime after a permit was denied in June 2007 after consistency determinations had been made in November and December 2006.

Until joining in this motion to dismiss, DHEC has consistently taken the position that

demonstration of need approvals and county consistency determinations are not immediately appealable and cannot be appealed until the agency has issued a final decision on the landfill permit.

Attached hereto as Exhibit A are documents from DHEC Board Docket No. 08-RFR-119, including (1) the letter of November 14, 2008 of the Clerk of the DHEC Board announcing the Board's decision in a case involving the Williamsburg County MSW landfill, (2) the letter of the DHEC Office of General Counsel arguing that a demonstration of need approval issued on November 9, 2007, "was not a decision 'involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the Department which gave rise to a contested case' under S.C. Code Ann. § 44-1-60(A) (Supp. 2007)." The decision of the Board was that "the matter is not yet ripe for review."

Attached hereto as Exhibit B are documents from ALC Case No. 07-ALJ-07-0459-CC, including (1) the Order For Dismissal issued by Judge John D. McLeod, ruling that Marlboro County's appeals of the demonstration of need approval and consistency determination should be dismissed without prejudice to the County's right to appeal once a final agency decision is issued, and (2) DHEC's motions to dismiss in that case. In its initial motion to dismiss, the DHEC legal office took the position that since a demonstration of need approval was not issued after public notice and comments, it was not a stand-alone contested case. Judge McLeod's Order for Dismissal notes that "MRR Sandhills, LLC, concurs with DHEC's position on these matters."¹

¹ The Petitioner does not agree with all of the arguments made by DHEC, nor with all of the conclusions of law stated by Judge McLeod. The Petitioner believes that the letter approving the "demonstration of need" was never appealable prior to the issuance of public notice, receipt

Attached hereto as Exhibit C are documents from DHEC Board Docket No. 09-RFR-52, involving a request for Board review of a DHEC document described by DHEC staff as "Demonstration of Need Approval for Williamsburg County Municipal Landfill Annual Disposal Rate Increases - 400,000 tons, Facility ID # 451001-1101" and a second document issued by DHEC staff stating that "Staff has . . . determined that an increase in this facility's annual disposal rate is allowed pursuant to the provisions of R.61-107.17, *Demonstration of Need*" and listing the facility as Facility ID # 451001-1201. Exhibit C includes documents submitted to the Board by the DHEC Office of Counsel arguing that the decisions are not appealable because they are not staff decisions, department decisions or final agency decisions appealable as a contested case.

MRR Sandhills, LLC, is a subsidiary or closely related and commonly owned company to MRR Highway 92, LLC, part of a company known as MRR Southern. In the case involving MRR Sandhills, LLC, Judge McLeod's Order for Dismissal dated July 20, 2009, states that "MRR Sandhills, LLC, concurs with DHEC's position on these matters." The "matters" being referred to are stated in the same paragraph: "the County will not lose its right to appeal and will have another opportunity at the end of the public notice and application process." (Exhibit B, Order for Dismissal, pp. 2-3).

The core requirements of due process of law are notice, opportunity for hearing in a

of public comments, and the issuance of a final DHEC staff decision. Accordingly, there was no need to rule that somehow new DHEC Regulation 61-107.19 made a formerly "ripe" appeal suddenly "unripe." The Petitioner respectfully submits that the provisions of Regulation 61-107.19, Part I.D.1.b. were included in the new regulations **not** to revive any lost appeal rights, but rather to simply reconcile the new regulation with permit applications for which preliminary determinations were made prior to the effective date of the new regulation, and to make clear that the preliminary determinations were appealable after "the agency's final determination under Part I.D.1, subject to the appeal provision in Part I.D.1.c. and the subsequent public notice and application process."

meaningful way, and judicial review. *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998); S.C. Constitution, Article I, Section 22; ; *Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991).

Notice must be "adequate." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 642 S.E.2d 565 (2007). What exactly constitutes adequate notice may vary from case to case, because "Due process is flexible and calls for such procedural protections as the particular situation demands." *Stono River*, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

In this case, DHEC acknowledged, through the testimony of Kent Coleman, that no notice of the request for demonstration of need approval was issued to the public or to anyone else, and no public comments were solicited. There is no evidence that the letter approving the "demonstration of need" was placed on public notice or sent to anyone else.

There is evidence that members of the public who became members of EAGLE learned of the landfill proposal at least by June 16, 2006. (Pet. Ex. 9). But there is no evidence indicating that DHEC ever provided any notice, or any means of informing any member of the public, that the agency considered approval of a "demonstration of need" request a "contested case" or other Department decision that must be appealed in a timely manner or else rights would be lost.

In fact, as evidenced by the position taken in every case prior to DHEC joining in MRR's motion on July 22, 2009, anyone who asked DHEC whether a demonstration of need approval was appealable would have been told that it was only appealable either as part of a determination made following public notice and comments as provided by DHEC Regulation 61-107.19, which

became effective May 23, 2008, or following public notice and comments as provided by old DHEC Regulation 61-107.258.

In the Rule 30(b)(6) deposition of DHEC, spokesman Kent Coleman testified as follows:

Q. Okay. So if I understand correctly, sort of summarizing, under the old system, everything sort of came to a head at the end, and all of the -- any preliminary determinations that had been made were then finalized along with the permit decision that was then subject to an appeal?

A. That's correct.

(Pet. Ex. 5, page 19, line 24 through page 20, line 5).

Given the Rule 30(b)(6) testimony of DHEC, and the position taken by the DHEC Office of Counsel in every other case involving a solid waste management permit and either a demonstration of need approval or a consistency determination, it is apparent that anyone who asked DHEC, at least prior to July 22, 2009, about whether a letter approving a demonstration of need prior to May 23, 2008, was an appealable Department decision, would have been told by DHEC that the answer was "no."

Likewise, there is nothing in any DHEC regulation nor in any reported case decision indicating that a letter approving a demonstration of need was appealable prior to public notice, receipt of public comments, opportunity for public hearing, and a Department decision on the overall permit. There is not a single thing that can be pointed to as giving the Petitioner, any of its members, nor any other member of the general public, notice that a Department letter approving a demonstration of need prior to any public notice and opportunity to comment must be appealed or else the Administrative Law Court will lack jurisdiction to hear an appeal on the demonstration of need issue as part of an appeal of the overall permit.

Of course, it has been ruled that actual notice for a full appeal period is not an essential part of the appeals process under the current appeals process as set forth in Section 44-1-60. *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 380 S.C. 349, 669 S.E.2d 899 (Ct.App. 2008). Even the Court of Appeals in that case, however, pointed to the prior public notices that were issued by DHEC, and the public comment period available to interested parties, as a factor in the Court's conclusion that it was the League's fault that it was not provided proper notice of the Department decision in a timely manner:

The League received the notice due to it when (1) public notice of SPA's permit application was provided; and (2) the General Assembly enacted the requirement in Section 44-1-60(E) that affected persons must affirmatively request to be notified of the staff decision on the permit application when it is issued. . . .

We agree with the ALC judge. While Coastal has a constitutional right to due process of law, including a right to notice and a meaningful opportunity to be heard, Coastal failed to take the necessary steps outlined in the statutory procedure of Section 44-1-60 to protect these rights. See S.C. Code Ann. § 44-1-60(E). A party "cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it." *Zaman v. S.C. State Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991).

Coastal received public notice of the pending permit applications and participated in public hearings. Additionally, Coastal expressed concern to DHEC in comment letters. However, Coastal failed to comply with the established administrative procedures that would have entitled it to mailed notification from DHEC when the approved permits were mailed to the SPA and the DOT. Through Section 44-1-60(E), the General Assembly provided Coastal with the means to receive notice, but Coastal declined to avail itself of the statutorily-mandated protocol. Coastal's due process rights were not violated by the ALC judge's interpretation of the statute.

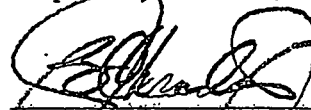
380 S.C. 349, 383, 669 S.E.2d 899, 916-917.

Here, there was no public notice, no public comment period, no final Department

decision until the public notices were issued on March 13, 2008 (Pet. Ex. 17) and July 18, 2008 (Pet. Exs. 21, 22). Quite plainly, the letter approving the "demonstration of need" of March 3, 2006, was not a final appealable Department decision.

WHEREFORE, the Petitioner respectfully submits that the motion to dismiss should be denied.

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for EAGLE

Georgetown, South Carolina

August 4, 2009

BOARD:
Paul C. Aughry, III
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Edwin H. Cooper, III
Vice Chairman
Steven G. Kisner
Secretary



C. Earl Hunter, Commissioner

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BOARD:
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S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

November 14, 2008

U.S. Mail - CERTIFIED - Return Receipt

91 7108 2133 3935 6638 7108

James S. Chandler, Jr., Esquire
South Carolina Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

91 7108 2133 3935 6638 7115

Stanley S. Pasley
Williamsburg County Supervisor
P.O. Box 330
Kingstree, SC 29556

91 7108 2133 3935 6638 7122

William E. Jenkinson, III, Esquire
Williamsburg County
P.O. Box 330
Kingstree, SC 29556

Via Interagency Mail Delivery

Etta R. Williams, Esquire
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 08-RFR-119 - Request review of staff decision dated November 9, 2007,
to approve a Demonstration of Need for an expansion of the Williamsburg County
MSW Landfill.

The S.C. Board of Health and Environmental Control decided on November 13, 2008, not to
conduct a Final Review Conference on the above-referenced matter because the matter is not yet
ripe for review.

EXHIBIT A - 000001

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

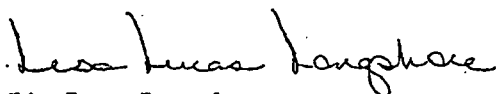
A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,



Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCC # 20788

S:\Share\LEGAL\ALL\MATTERS\20788 RFR BLWM Williamsburg County Landfill Expansion\rcd.doc

EXHIBIT A - 000002

2 of 2

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501(c)3 non-profit
organization

James S. Chandler, Jr.
Amy E. Armstrong

Staff Attorneys

OFFICE ADDRESS

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Georgetown, SC 29440

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*To protect the natural
environment of South
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concerned citizens
and by improving the
state's system of
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November 12, 2008

VIA FAX AND US MAIL

Mr. Paul C. Aughtry, III, Chairman
DHEC Board
c/o Lisa Lucas Longshore, Clerk of the Board
2600 Bull Street
Columbia, SC 29201

Re: Coalition of Concerned Citizens of Williamsburg
vs. Williamsburg County and SC DHEC
Demonstration of Need Approval
Proposed Williamsburg County MSW Landfill Expansion
Docket No. 08-RFR-119

Dear Chairman Aughtry:

This letter is submitted on behalf of Coalition of Concerned Citizens of Williamsburg ("Citizens") in reply to the letter of November 5, 2008 from the DHEC Office of General Counsel.

This case involves a staff decision that Williamsburg County has demonstrated a need for an expansion of its existing landfill in Salters to a capacity of 2,375,000 tons per year. The staff decision was issued without prior public notice, and no notice of the staff decision was issued. The Citizens filed a request for review within 15 days of learning of the needs determination.

In 2008, Williamsburg County gave notice that it has abandoned plans to expand its existing landfill, and the County submitted a new request to DHEC for a determination of need for a landfill at a new site.

The Office of General Counsel argues that the Demonstration of Need Approval of November 9, 2007, is not yet ripe for appeal. The Citizens do not necessarily disagree with this assertion. The Citizens filed this request for board review out of an abundance of caution, in order to make sure that its rights are fully protected. At the time the request was filed, the Citizens did not know what the Department's legal position would be on the ripeness of this appeal. The permitting regulations for landfills in effect at the time

EXHIBIT A - 000003

Mr. Paul C. Aughtry, Chairman, DHEC Board
November 12, 2008
Page 2.

of the November 9, 2007 decision did not require an appeal at that time. The regulations were amended effective May, 2008, and the DHEC staff has given no indication of how old demonstrations of need will be viewed under this new regulation. If the Department's position is that the decision is not ripe for appeal, the Citizens are willing to agree to withdraw this appeal on that basis.

The second argument made by the Office of General Counsel, however, makes withdrawal of this request problematic.

As noted, the Citizens filed this request for review within 15 days of learning that a demonstration of need approval had been issued for the Salters site. As noted by the Office of General Counsel, the approval was issued with no prior public notice.

The Office of General Counsel, as an alternative to the ripeness argument, argues that the request for review was filed too late. The Office of General Counsel also argues that a public notice issued in June and July, 2008, have effectively terminated any right of review that may have existed. These arguments are inconsistent with the argument that the case is not ripe. The arguments also lack merit.

The 2008 public notices merely state that "Williamsburg County intends to submit a permit application to [DHEC] to modify its existing municipal solid waste landfill permit." The notices also state that the new disposal site "will not be implemented at the existing landfill in Salters but is planned for the new replacement landfill which will not be at the Salters site." The notice does not solicit comments, sets no deadline for comments, does not give any indication of the need to request notification of decisions related to the proposed permit modifications.

Counsel for the Citizens submitted a Freedom of Information Act request to Joan Litton of DHEC on September 30, 2008, copy attached, seeking an opportunity to review and copy all documents related to the Williamsburg County landfill, including "all documents related to any proposed replacement sites." DHEC sent a response to this request indicating that "you will be notified by our office when the research process is complete and files are ready for your review." (Copy attached). To date, DHEC has not notified counsel for Citizens that the files are ready for review. Without access to the DHEC files, the Citizens cannot even begin to assess the true legal status of the existing landfill or its proposed replacement.

EXHIBIT A - 000004

BOARD:
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Coleman F. Buckhouse, MD

OFFICE OF GENERAL COUNSEL

Telephone: (803) 898-3349; Facsimile: (803) 898-3367

November 5, 2008

Mr. Paul C. Aughtry, III, Chairman
DHEC Board
c/o Lisa Lucas, Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201-1708

Re: Docket No. 08-RFR-119 – *Request for Review by Coalition of Concerned Citizens of Williamsburg* of staff decision dated November 9, 2007, to approve a Demonstration of Need for an expansion of the Williamsburg County MSW Landfill; DHEC File No.: 20788

Dear Chairman Aughtry:

This letter is to respectfully request that the above-referenced Request for Review be dismissed pursuant to the fact that the Demonstration of Need Approval ("Approval") issued by DHEC to Williamsburg County ("County") on November 9, 2007, is not yet ripe for appeal. The Approval is not appealable as a contested case pursuant to S.C. CODE ANN. § 1-23-310 (Supp. 2007) as the Approval merely provided the County with instruction that it had met a preliminary threshold for attaining eligibility for a permit modification. As a routine matter, no public notice was required. The Approval merely advised the County that pursuant to the Demonstration of Need ("DON") regulation, S.C. ANN. REG. 61-107.17, the Department had reviewed the DON based upon the factors set forth in the aforementioned regulation. The Approval was not a decision "involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the Department which give rise to a contested case" under S.C. CODE ANN. § 44-1-60(A) (Supp. 2007). Williamsburg County has not applied for a permit or license to construct a solid waste facility, thus the DON Approval is only interlocutory in nature. As such, the Request for Review by the *Coalition of Concerned Citizens of Williamsburg* ("CCCW") is not ripe for review. The DON Approval is not appealable as a contested case and the DON regulation, S.C. ANN. REG. 61-107.17, does not require public notice for an Approval.

Alternatively, should the Board surmise that the Approval is appealable as a contested case, then S.C. CODE ANN. § 44-1-60(E) (Supp. 2007) states "notice of the department decision must be sent to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail, return receipt requested. The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person."

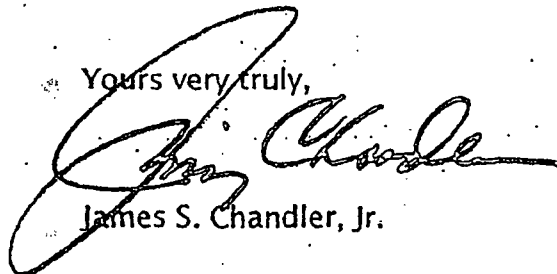
Mr. Paul C. Aughtry, Chairman, DHEC Board
November 12, 2008
Page 3

The one document that DHEC staff has provided to Citizens is the letter of August 27, 2008, from Stanley S. Pasley, Williamsburg County Supervisor, to Ms. Jana White of DHEC, requesting a Determination of Need and Consistency for a proposed new landfill to be built at a site described as "immediately west of Turner Road and Campbell Road, Williamsburg County." (Copy attached). In response to receipt of this letter, the Citizens, through its attorney and through several individual members, have requested that they be given notice of any Department decisions on this application. To date, they have received no notice of any decision, and thus there is no decision on the "new site" to appeal.

If the Board grants review, the Board should rule that the County's request of August 27, 2008, represents the abandonment of the proposal to enlarge the existing Salters landfill, and that therefore the termination of the Determination of Needs Approval for the Salters site is appropriate, because this approval is now moot.

For these reasons, the Coalition of Concerned Citizens of Williamsburg respectfully requests that the DHEC Board grant its request for a review conference in this matter and thereafter issue an order reversing the demonstration of need approval, or, in the alternative, that the DHEC Board issue an order declaring that the request is not ripe, or is moot, and that Citizens may raise all of the issues set forth in this request in any appeal from any decision made by the Department on the still-pending application of Williamsburg County.

Yours very truly,



James S. Chandler, Jr.

cc: Stanley S. Pasley, Williamsburg County Supervisor
William E. Jenkinson, III, Esquire, Williamsburg County Attorney
Etta R. Williams, Esquire, DHEC Staff Attorney
John Adams Hodge, Esquire

EXHIBIT A - 000005

DHEC issued the DON Approval to County on November 9, 2007. However, Requestor CCCW did not file its Request for Review in this matter until October 14, 2008, which was eleven (11) months and 5 days after the Approval was issued. Additionally, even though CCCW only formed as a non-profit organization on October 1, 2008, any one of its members could have individually requested notice of the Approval as an affected person if they so chose, but did not.

Although, pursuant to regulation, the Approval did not require public notice, Requestor, CCCW, was placed on notice regarding the tonnage increase that Williamsburg County sought in 3 public notices that County placed in newspapers of general circulation. After these notices were published CCCW did not become an applicant, permittee, licensee, or affected person who asked to be notified by certified mail, return receipt requested, of any action of DHEC pertaining to the tonnage increase request. (see Attachment A, *Affidavit of Joan Littom*). County, pursuant to S.C. CODE ANN. REGS. 61-107.19, *Solid Waste Landfills and Structural Fill* (Supp. 2008), published a Notice of Filing of a Major Permit Modification in a newspaper of general circulation in the area of the proposed landfill project, when it published the Notice (see Attachment B, *Affidavit of Carrie Lloyd*) on June 27, 2008, in *The Morning News*, a Florence County, South Carolina, newspaper. Two additional notices (see Attachments C & D, *Affidavit of Publication & Notice*) were published on July 2nd & 9th, 2008, in *The News*, a Kingstree, South Carolina, newspaper.

Pursuant to S.C. CODE ANN. § 44-1-60(E), the deadline for filing a Request for Review in this matter would have been "fifteen days after notice of the department decision has been mailed to the applicant," which would have made the deadline date approximately *Monday, November 26, 2007*. Therefore, since Requestor CCCW did not file its Request for Review in this matter until October 14, 2008, the request is untimely.

Even the Administrative Law Court ("ALC"), pursuant to ALC Rule 11.C., disallows a filing for a request for a contested case hearing if the request is "filed more than ninety (90) days after the date of the issuance of the order or determination." Here, Requester has even surpassed

Page 3
DHEC BOARD

the 90-day ALC Rule by 8 months and 5 days. Thus, pursuant to the foregoing, DHEC respectfully requests that this matter be dismissed with prejudice.

Sincerely,

Etta R. Williams
Etta R. Williams
Attorney for SC DHEC

Attachment A: *Affidavit of Joan Litton*
Attachment B: *Affidavit of Carrie Lloyd of publication of Notice in the Morning News,
Florence County, South Carolina on June 27, 2008*
Attachments C: *Affidavit of Publication of the Notice in The News, Kingstree, South
Carolina on July 2nd & 9th, 2008*

cc.: ✓ James S. Chandler, Jr., Attorney for Requestors
Stanley S. Pasley, Williamsburg County Supervisor
William E. Jenkinson, III, Attorney for Williamsburg County
Kent Coleman, BLWM, SC DHEC

EXHIBIT A - 000008

ATTACHMENT A

EXHIBIT A - 000009

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

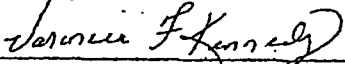
In Re: Request review of staff decision	)	Docket No.: 08-RFR-119
Dated November 9, 2007, to approve a	)	
Demonstration of Need for an expansion of	)	AFFIDAVIT OF
The Williamsburg County MSW Landfill	)	JOAN LITTON
Environmental Control,	)	

PERSONALLY appeared before me, Joan Litton, Manager, Permitting Section in the Bureau of Land and Waste Management ("BLWM") at the South Carolina Department of Health and Environmental Control ("DHEC" or "the Department"), being duly sworn, avers and states that:

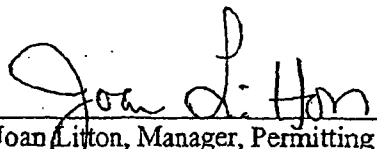
After reviewing my records, I have not received any request from the Coalition of Concerned Citizens of Williamsburg to be notified of decisions related to the Demonstration of Need requested by Williamsburg County, either prior to or after November 9, 2007, which was the date DHEC issued to the County a Demonstration of Need ("DON") Approval, pertaining to its solid waste landfill expansion for Facility ID # 451001-1101.

FURTHER affiant sayeth not.

SWORN to before me
this 4th Day of November, 2008



Notary Public for South Carolina
My Commission Expires: My Commission Expires April 9, 2017



Joan Litton, Manager, Permitting Section,
Bureau of Land and Waste Management
SC DHEC

EXHIBIT A - 000010

ATTACHMENT B

EXHIBIT A - 000011

Morning News

Carolina Publishing Group

AFFIDAVIT OF INSERTION

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Personally appeared before me

Carrie Lloyd

The Legal Clerk for the Morning News, a daily newspaper published in the
City of Florence, County of Florence, and the State of South Carolina said
that the attached advertisement was published on 6/27/08

_____, & _____

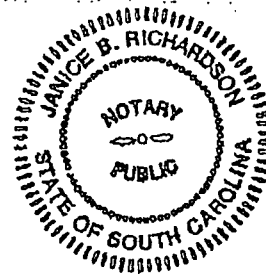
as shown by the files as said company.

Carrie Lloyd

Sworn and subscribed before me this 20th day of Oct., 2008

Jamie B. Richardson NS
Notary Public South Carolina

Commissions expires: My Commission Expires April 18, 2010



310 S. Dargan Street • P.O. Box 100528 • Florence, South Carolina 29501-0528
843-317-6597 • www.morningnewsonline.com

A Media General Newspaper Company

EXHIBIT A - 000012

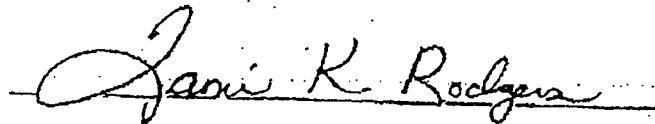
ATTACHMENT C

EXHIBIT A - 000013

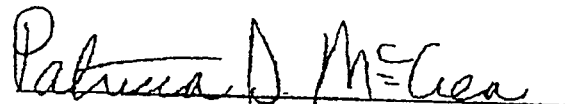
AFFIDAVIT OF PUBLICATION**THE NEWS, Kingstree, S.C.**STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

Personally appeared before me Tami K. Rodgers, who being duly sworn, says that she is Publisher of THE NEWS, a newspaper published in the City and State aforesaid and that the Legal Notice, a copy of which is hereto attached, was published in said newspaper 3 times, to wit:

On	the	2nd	day	of	July	2008
On	the	9th	day	of	July	2008
On	the		day	of		2008
On	the		day	of		2008
On	the		day	of		2008
On	the		day	of		2008
On	the		day	of		2008
On	the		day	of		2008



Sworn to and subscribed before me this 21st
day of October, A.D. 2008.



Notary Public for South Carolina

EXHIBIT A - 000014

ATTACHMENT D

EXHIBIT A - 000015

Notice of Filing of a Major Permit Modification

Topic: Williamsburg County Municipal Solid Waste Landfill
Proposed Annual Disposal Limit Increase

Location: SC State Rd. 197, approximately 6 miles SW of
Kingstree

Mailing Address: PO Box 330, Kingstree, South Carolina
29556

Pursuant to SC Code Ann. Sections 44-96-10 et. Seq. (Supp. 2006) and 25A SC Code Reg. 61-107.19, *Solid Waste Landfills and Structural Fill* (Supp. 2008), notice of all applications submitted to SC DHEC for a major modification of Class Three landfills shall be published by the applicant once in a newspaper of general circulation in the area of the proposed landfill project.

Williamsburg County intends to submit a permit application to South Carolina Department of Health and Environmental Control to modify its existing municipal solid waste landfill permit. Proposed is a major modification of the existing annual disposal rate to be done in phases beginning with 1,950,000 tons and eventually increasing to a maximum of 2,375,000 tons over a 15 year period. This phase disposal rate increase will not be implemented at the existing landfill in Salters but is planned for the new replacement landfill which will not be at the Salters site. The existing landfill accepts municipal, commercial, and industrial solid waste. The projected life of the landfill is approximately 4 years.

Who to contact and submit comments: Copies of the permit application will be available by appointment for public viewing during normal working hours at the following locations:

South Carolina Department of Health
and Environmental Control
Bureau of Land and Waste Management
8911 Farrow Road
Columbia, SC 29203
Contact: Juli Blalock, (803) 888-4213
E-mail: blalockj@dhec.sc.gov

Environmental Quality Control Regional Office
South Carolina Department of Health
and Environmental Control
Region 6
927 Shing Avenue
Myrtle Beach, SC 29577-3580
(843) 238-4378 Fax: (843) 238-4518
Contact: Misty Foster, (843) 238-4378
E-Mail: fostermf@dhec.sc.gov

EXHIBIT A - 000016

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Marlboro County,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control, and MRR Sandhills,
LLC,

Respondents.

Docket No.: 07-ALJ-07-0459-CC

ORDER FOR DISMISSAL**FILED**

JUL 20 2009

APPEARANCES:**SC ADMIN. LAW COURT**

For the Petitioner, Steven Weber, Esquire

For the Respondent, SC DHEC: Etia R. Williams, Esquire

For the Respondent, MRR Sandhills, LLC: Richard Harpootlian, Esquire

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to S.C. CODE ANN. § 1-23-600(A) (as amended by 2008 S.C. Act No. 334) and S.C. CODE ANN. §§ 44-1-60(A)-(E) (Supp. 2007) upon the request of Petitioner Marlboro County ("County") on September 14, 2007, for a contested case hearing regarding a Demonstration of Need ("DON Approval") issued on July 16, 2007, and upon the request of the County on May 16, 2008 for a contested case hearing regarding a "preliminary" consistency determination issued on February 27, 2008, to MRR Sandhills, LLC ("MRR"), for the Proposed Sandhills Regional MSW Landfill ("landfill"). The two contested cases filed by the County were consolidated into this action.

The South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") filed two (2) Motions to Dismiss in the above-captioned matter on September 2, 2008, and on March 13, 2009 respectively. The Motion filed in September 2008 called for a complete dismissal of the appeal relating to the preliminary consistency determination and the Motion filed in March 2009 called for a complete dismissal of the DON Approval. A hearing on both motions occurred on June 19, 2009, with all parties given an opportunity to make a presentation to the Court, upon which all parties did make a presentation.

EXHIBIT B - 000001

Upon review of the issues raised, I find that dismissal without prejudice is appropriate and that the County will have another opportunity to appeal these matters if it so chooses, pursuant to S.C. CODE ANN. REGS. 61-107.19 et seq. (Supp. 2008), Solid Waste Management: Solid Waste Landfills and Structural Fill, specifically, R. 61-107.19, Part I.D.1.b. (Supp. 2008), which states that "where, prior to the effective date of this regulation, the Department has made determinations required under Part I.D.1.a. of this regulation, such determinations shall remain applicable and become the agency's final determination under Part I.D.1, subject to the appeal provision in Part I.D.1.c. and the subsequent public notice and application process."

STANDARD OF REVIEW AND JURISDICTION

Jurisdiction is pursuant to the Administrative Procedures Act, S.C. CODE ANN. § 1-23-310 et seq. (2005 & Supp. 2006), and S.C. CODE ANN. § 44-1-60 (2002 & Supp. 2006). A party who is aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedures Act only after the party has exhausted all administrative remedies available within the agency. See, S.C. CODE ANN. §§ 1-23-380 (A) and 1-23-600 (2005 & Supp. 2006).

UNDISPUTED FACTS

On May 23, 2008, Regulation 61-107.19, Solid Waste Management: Solid Waste Landfills and Structural Fill, went into effect. This regulation replaced and simultaneously repealed Regulation 61-107.258, Solid Waste Management: Municipal Solid Waste Landfills.

DISCUSSION

DHEC contends that although the DON Approval was issued prior to R. 61-107.19, et al becoming effective, the promulgation of the regulation on May 23, 2008, makes the appeal of the DON Approval unripe at this time, pursuant to R. 61-107.19, Part I.D.1.b. (Supp. 2008). DHEC also contends that because the determination that it rendered on consistency was merely a "preliminary" determination, this determination is not final and therefore not a final agency decision rising to the level of a contested case, and as such, an appeal of the Department's determination is not within the jurisdiction of the ALC. DHEC further argues that because pursuant to R. 61-107.19 Part I.D.1.b, the DON Approval "shall remain applicable and become the agency's final determination under Part I.D.1, subject to the appeal provision in Part I.D.1.c and the subsequent public notice and application process", the County will not lose its right to

appeal and will have another opportunity at the end of the public notice and application process. MRR Sandhills, LLC, concurs with DHEC's position on these matters.

However, the County argues that both appeals are indeed ripe to be heard and that they both rise to the level of a contested case. The County's position on the DON Approval is that the plain language of the new regulation grandfathers both the DON Approval and the County's appeal of the DON Approval. The County's position on the Department's "preliminary" consistency determination is: (1) if the determination is final, it is grandfathered under the new regulation as is the County's appeal of the determination; and (2) if the determination is preliminary, then no determination was made under the new regulation and DHEC must conduct a new consistency determination.

The Court finds that the enactment of S.C. CODE ANN. REGS. 61-107.19 et seq. (Supp. 2008), Solid Waste Management: Solid Waste Landfills and Structural Fill, specifically, R. 61-107.19, Part I.D.1.b. (Supp. 2008), changes the appeal status of the DON Approval to unripe for appeal at this time. Under the previously promulgated regulation pertaining to a DON Approval, S.C. Code Ann. 61-107.17, Solid Waste Management: Demonstration-of-Need, there was no requirement for public notice. However, under the newly enacted regulation, R. 61-107.19, et al., the DON Approval is required to be placed on public notice. Further, the public notice comment period will last at least 30 days and a hearing will be held on the matter if the Department receives requests for a hearing from ten (10) persons in writing, (See 61-107.19, D.2.b.(1)&(2)(a)). Therefore, the DON Approval will not become a final agency decision until the determination has gone through the required public notice. Additionally, this interpretation is consistent with the other appeal provision applicable in this matter, S.C. CODE ANN. § 44-1-60(B), which states that "the department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision." (*Emphasis added.*)

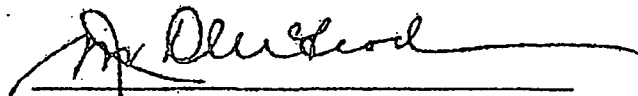
Regarding the "preliminary" consistency determination issued by DHEC on February 27, 2008, this Court finds that this determination is not a final agency determination, thus it is not a final agency decision subject to litigation as a contested case. A "preliminary" determination is not a determination that is required by regulation – not the old one, R. 61-107.11, or the new one, R. 61-107.19 – and as such, it is not a regulation that is subject to appeal as a contested case. However, once DHEC makes a final consistency determination as required by R. 61-107.19, Part

I, D.1.a.(2), and once the public notice requirements are fulfilled pursuant to this regulation and the final consistency determination is issued, then the determination will be subject to appeal as a contested case.

This Court also finds that the County will not lose its right to appeal any of the issues the County has raised heretofore, and will have another opportunity to appeal all of these issues at the end of the public notice and application process, thus the County will not be prejudiced by the dismissal of these consolidated appeals. Accordingly, dismissal pursuant to Respondent DHEC's Motions and on the foregoing grounds is appropriate.

IT IS THEREFORE ORDERED that, Respondent DHEC's Motions for Dismissal of both appeals that are included in the above-captioned matter are hereby GRANTED and this consolidated action is DISMISSED WITHOUT PREJUDICE allowing Petitioner Marlboro County to raise all issues and theories of the case that it wishes to raise once a final agency determination is issued for Demonstration of Need and Consistency, pursuant to R. 61-107.19, Part 1, D.1.a.(1)&(2).

AND IT IS SO ORDERED.


John D. McLeod
Administrative Law Court Judge

July 20, 2009
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that _____ assigned as this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 20 day of July, 2009
By: Austyn R. Haldeman
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Marlboro County,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No.: 08-ALJ-07-0249-CC

Docket No.: 08-ALJ-07-0459-CC

NOTICE AND
MOTION TO DISMISS

TO: STEVEN D. WEBER, ESQ., ATTORNEY FOR PETITIONER,
MARLBORO COUNTY

YOU WILL PLEASE TAKE NOTICE that Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department"), through its undersigned counsel, will move before the Administrative Law Court ("ALC" or "Court") as soon after service hereof as counsel may be heard, for an Order dismissing the constitutional issues raised in the matters of the above-captioned Docket Nos. 08-ALJ-07-0459-CC & 08-AL-07-0249-CC. Respondent will also move before the ALC for the complete dismissal of Docket No. 08-AL-07-0249-CC on additional and separate grounds. This Motion is being filed because the ALC lacks jurisdiction to hear certain constitutional issues raised by Petitioner Marlboro County ("County") in both of the Petitions filed in the above-captioned matters. It is also being filed pursuant to S.C. CODE ANN. §§ 44-1-60(A)-(E) (Supp. 2007), and Administrative Law Court Rule 38. The grounds for dismissal are set forth below.

BACKGROUND

Respondent DHEC received a demonstration of need analysis request letter dated July 10, 2007, from MRR Southern ("MRR") for the Proposed Sandhills Regional MSW Landfill ("landfill"). Pursuant to this request, Respondent issued to MRR a Demonstration of Need ("DON") approval letter (*Attachment A*) dated July 16, 2007. Petitioner Marlboro County ("County" or "Marlboro County") requested a review of this approval from the DHEC Board ("Board") on or about July 17, 2007. The Board declined to conduct a final review conference and on September 14, 2007, County filed a *Petition for Administrative Review and a Request for a Contested Case Hearing* with the ALC. This matter, Docket No.: 07-ALJ-07-0459-CC, is presently pending before the Administrative Law Court.¹

On November 26, 2007, a consistency review was completed by DHEC to determine if the landfill is consistent with the Marlboro County solid waste management plan ("Plan") on file with the Department. Based on the Department's review of the March 2001 Marlboro County Plan and the South Carolina 1999 State Solid Waste Management Plan, DHEC issued, via certified mail, a Preliminary Consistency Determination (*Attachment B*) on February 27, 2008, to Mr. F. Norbert Hector of MRR, the entity that requested the consistency determination. The letter from the Department did not include any appeal information and stated the following: "As a reminder, this is a preliminary determination. A final consistency determination will be made when the permit decision is ready for issuance."

¹ DHEC asserts for the record that any claims made by Petitioner concerning the DON approval in its May 16, 2008, *Petition for Administrative Review and Request for Contested Case Hearing*, referencing DHEC's issuance of the Preliminary Consistency Determination, should not be heard because the argument is untimely and should have been raised in its *Petition* that requested review of the DON approval.

On March 12, 2008, Marlboro County filed a Request for Review of the Preliminary Consistency Determination that was issued by the Department on February 27, 2008. The Board declined to honor County's *Request* and conduct a final review conference on April 17, 2008, and a letter (*Attachment C*), dated April 21, 2008, notifying Marlboro County of the Department's decision was sent via certified mail to Marlboro County, Mr. Hector of MRR, and John Adams Hodge, Esquire, attorney for MRR. The letter was also sent to DHEC via interagency mail delivery. This letter, unlike the Preliminary Consistency Determination letter, did contain appeal information. However, this appeal information is routinely included when the Department denies a hearing for a final review conference. This information also states that "the above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court."

On May 16, 2008, Petitioner County served upon the ALC a *Petition for Administrative Review and Request for Contested Case Hearing* of DHEC's issuance of the referenced Preliminary Consistency Determination. This matter, Docket No.: 08-ALJ-07-0249-CC, is presently pending before the Court. The matter was assigned to the Honorable John D. McLeod, Administrative Law Judge, on May 21, 2008.

GROUNDS FOR DISMISSAL

- 1.) Certain constitutional issues raised in the above-captioned matters should be dismissed because the ALC lacks jurisdiction to hear those issues.

The Administrative Law Court "is an agency and a court of record within the Executive branch of the government of this state." S.C. CODE ANN. § 1-23-500 (2005). An Administrative Law Judge's duty shall be to "preside over all hearings of contested

cases as defined in Section 1-23-310 . . . involving the department of the executive branch of government . . .” S.C. CODE ANN. § 1-23-600 (2005).

Here, Petitioner County has raised constitutional issues in both of the above-captioned *Petitions for Administrative Review and Request for a Contested Case Hearing*. Both *Petitions* allege that the DON requirements are unconstitutional on their face. (Pet., May 16, 2008 at 3, ¶ 9; Pet., Sept. 14, 2007 at 4, ¶ 14). Further, Petitioner requests on Page 5 of the Petition filed on September 14, 2007, that the “Department’s approval of the demonstration of need analysis be invalidated based on the unconstitutionality of the Demonstration of Need Requirements on their face” Petitioner even goes on to assert, “because of the unconstitutionality of the Demonstration of Need Requirements, the consistency determination subsequently issued by the Department is also invalid.” (Pet., May, 16, 2008 at 6, ¶ 21).

The Court should dismiss the aforementioned portions of both Petitions because the South Carolina Supreme Court has ruled that an administrative agency has no authority to pass on the constitutionality of a statute or regulation. Video Gaming Consultants, Inc., v. S.C. Dept. of Revenue, 358 S.C. 647, 652, 595 S.E.2d 890, 892 (Ct. App. 2004). “An agency must follow the law as written until its constitutionality is judicially determined.” Id. This was again relied upon in Drummond v. State, 2008 WL 2229043, at *4 (S.C. 2008) (stating because the ALC is part of the executive branch, as clarified in Video Gaming Consultants, it has no authority to rule on the facial validity of a statute or regulation). Thus, Petitioner County’s request that the ALC invalidate the Department’s approval of the DON analysis should not be considered and must be

dismissed as an issue requiring review because to act on Petitioner's request would be an expansion of the ALC's judicial authority.

- 2.) The entire contested case for Docket No.: 08-ALJ-07-0249-CC should be dismissed pursuant S.C. CODE ANN. §§ 44-1-60(A)-(E) (Supp. 2007) because the Determination issued by DHEC on February 27, 2008, is not a department decision or final agency decision, and is therefore, not appealable as a contested case.

The letter that was issued to Mr. F. Norbert Hector of MMR Southern on February 27, 2008, is clearly titled "Preliminary Consistency Determination" and explicitly states in the second paragraph that "a final consistency determination will be made when the permit decision is ready for issuance." This Preliminary Consistency Determination was merely an informational letter that is not appealable pursuant to S.C. CODE ANN. § 44-1-60(A). This section, which discusses "appeals from department decisions giving rise to contested case; procedures," states the following:

- (A) All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section.

This section is unambiguous and provides that only an appeal of a "department decision" will give rise to a contested case. Also unambiguous is S.C. CODE ANN. § 44-1-60(C) (Supp. 2007), which states, "the initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department shall be a staff decision." DHEC contends that the Preliminary Consistency Determination did not even rise to the level of a "staff decision" because it merely informed the applicant, MRR, of its proposed landfill's consistency status at that particular time in the process. A Final Consistency Determination is made when

the permit is issued or denied. Then, only at this point is the Final Consistency Determination appealable.²

The Determination could only rise to the level of a "staff decision" after the Department has complied with S.C. CODE ANN. § 44-1-60(D) (Supp. 2007) by considering "all material comments received in response to the public notice in determining whether to issue, deny or condition such permit, license, certification or other approval." The Determination that was issued by the Department on February 27, 2008, has not been public noticed. Once a decision is made to issue a landfill permit to MRR and a draft permit is formulated, then it will be public noticed and comments will be received and reviewed by the Department. Subsequent to this process, if no adverse comments are received by the Department that are unable to be resolved, the Department will make a decision to issue a landfill permit to MRR and the Final Consistency Determination will be part of that Department decision.

Pursuant to S.C. CODE ANN. § 44-1-60(E) (Supp. 2007), the Department decision will only become the "final agency decision," once affected persons who have asked to be notified by certified mail, return receipt requested, have also been notified and "fifteen days [pass] after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the

² Since the issuance of the Preliminary Consistency Determination on February 27, 2008, "new" *Solid Waste Management: Solid Waste Landfills and Structural Fill* regulations, S.C. Code Regs. 61-107.19, went into effect on May 23, 2008. Regulation 61-107.19, Part I.D.1.b. states that "where, prior to the effective date of this regulation, the Department has made determinations required under Part I.D.1.a. of this regulation, such determinations shall remain applicable and become the agency's final determination under Part I.D.1, subject to the appeal provision in Part I.D.1.c and the subsequent public notice and application process." Regulation 61-107.19 became effective *after* the Preliminary Consistency Determination was issued and since no other Determination was issued after the regulation became effective, that Determination will remain applicable. However, the Determination will not transform into a "department decision" or a "final agency decision" that will give rise to a contested case until the application and public notice process is complete and the procedure set out for appeals in S.C. CODE ANN. §§ 44-1-60(A)-(E) is followed. Thus, the Determination is still not ripe for appeal at this time.

department by the applicant, permittee, licensee, or affected person." If a request for review of a department decision is submitted to the Department by one of these entities and a final review conference is not conducted within sixty days, the department decision then becomes a final agency decision and may be appealed to the ALC. However, no part of the aforementioned process has occurred – no staff decision has been issued, no issuance of a draft decision for placement on public notice has occurred, and no comments have been received or reviewed by the Department. Thus, there has been no issuance of a staff decision that has transformed into a department decision and then finally into a "final agency decision." Therefore, since there is no final agency decision in relation to Docket Number 08-AIJ-07-0259-CC, the Preliminary Consistency Determination that was issued on February 27, 2008, is a determination that is not yet ripe for appeal.

The "ripeness doctrine" addresses a time question: when in time is it appropriate for court to take up the asserted claim. Action Alliance of Senior Citizens of Great Philadelphia v. Margaret Heckler, 789 F.2d 931, 940 (D.C. Cir. 1986). Additionally, "[t]he appropriateness of an issue for judicial review depends on such factors as: whether agency action is final; . . . and whether further administrative action is needed to clarify the agency's position . . ." *Id.* Here the agency/department action is not final. According to S.C. CODE ANN. 44-1-60(E) (Supp. 2007) "the department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant . . ." Here, no department decision was made. Additionally, further administrative action is needed to clarify the agency's position because the Department's February 27, 2008 issuance of the

Determination, is not a "final" determination. The department does not issue a Final Consistency Determination until the permit decision is ready for issuance and, as stated earlier, this will not occur until the process for issuing a department decision has been followed by the Department, and until the department places a draft permit on public notice, receives comments, and if requested, holds a public hearing.

3.) This contested case should be dismissed pursuant to Administrative Law Court Rule 38.

Rule 38 of the Administrative Law Court Rules states that "upon motion of any party, or on its own motion, an administrative law judge may dismiss an appeal for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section."

Petitioner County has failed to comply with the rules of procedure for appeals that are set forth in S.C. CODE ANN. §§ 44-1-60(A)-(E) (Supp. 2007). These rules of procedure for appeals clearly state that only a "department decision" give rise to a contested case.

Therefore, this contested case should be dismissed pursuant to Administrative Law Court Rule 38.

CONCLUSION

WHEREFORE, pursuant to the above-stated grounds for dismissal of a certain portion of Docket Number 08-ALJ-07-0459-CC and the complete dismissal of Docket Number 08-ALJ-07-0249-CC, Respondent DHEC respectfully requests that this matter be dismissed with prejudice.

Respectfully submitted,

Etta R. Williams

Etta R. Williams
Attorney for SC DHEC
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708
Tel: 803/898-3349
Fax: 803/898-3367

August 28, 2008
Columbia, South Carolina

Attachment A: DON Approval letter dated July 16, 2007
Attachment B: Preliminary consistency determination letter from DHEC to Mr. F. Norbert Hector of MRR, dated February 27, 2008
Attachment C: April 21, 2008 letter from Respondent DHEC to Steven D. Weber, Esq., F. Norbert Hector, John Adams Hodge, Esq., and Etta R. Williams, Esq.

ATTACHMENT A

EXHIBIT B - 000014



EXHIBIT A

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

91 7108 2133 3932 9429 0268

July 16, 2007

CERTIFIED MAIL

91 7108 2133 3932 9429 0268

Mr. John Adams Hodge
Haynesworth Sinkler Boyd, PA
P.O. Box 11889
Columbia, SC 29211-1889

RE: Demonstration of Need APPROVAL
Proposed Sandhills Regional Municipal Solid Waste (MSW) Landfill
Location: 34°47'40.5" N Latitude, 79°45'14.5" W Longitude
Maximum Annual Disposal Limit of 1,480,000 tons/year
Marlboro County

Dear Mr. Hodge:

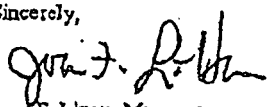
This office is in receipt of your demonstration of need request submitted relative to the above-referenced site dated July 10, 2007. Staff have evaluated the information and determined that pursuant to the provisions of R.61-107.17, *Demonstration of Need*, there is a need for this type of facility in the corresponding planning area. The Department may consider an annual disposal limit up to 1,480,000 tons during its consistency determination for this proposed facility.

Securing a site approval under the provisions of the Demonstration of Need regulation in no way supercedes zoning, consistency with local solid waste management plans or other considerations evaluated by the Department during the permitting process.

Also, please be aware that this approval may be terminated by the Department if any one of the following occurs: (A) one hundred twenty (120) days elapse from the date of receipt of this letter of approval without documented evidence of diligent pursuit of the appropriate solid waste permit being presented to the Department or (B) once a permit application has been received by the Department, that permit application is declared inactive or is denied by the Department's solid waste permitting staff or (C) the Department determines that the site of the proposed facility does not meet proper zoning for the intended activity or (D) the Department determines that the proposed facility is not consistent with the host county or region solid waste management plan or (E) the current landowner of the property in question raises objections with the Department about the activity approved herein.

If you have any questions, please contact John M. McCain of my staff at (803) 896-4067.

Sincerely,


Joan F. Litton, Manager
Solid Waste Permitting Section
Division of Mining and Solid Waste Management
Bureau of Land and Waste Management

JFL/JMM/jmm

cc: R. Cecil Kimrey - Marlboro County Administrator

ATTACHMENT B

EXHIBIT B - 000016

EXHIBIT A



South Carolina Department of Health and Environmental Control

February 27, 2008

CERTIFIED MAIL 91 7108 2133 3937 9271 3882

Mr. F. Norbert Hector
MRR Southern
431 Raleigh View Rd.
Raleigh, NC 27610

RE: Preliminary Consistency Determination

Activity:	Proposed Sandhills Regional MSW Landfill
Site:	Latitude: 34° 47' 40.5" N, Longitude 79° 45' 14.5 W
Annual Tonnage Limit:	1,480,000 tons
County:	Marlboro County
Plan Reviewed:	March 2001 Marlboro County Solid Waste Management Plan

Dear Mr. Hector:

On November 26, 2007, a consistency review was initiated to determine if the above referenced proposed facility is consistent with the county plan on file with the Department. Based on the Department's review of the March 2001 Marlboro County Solid Waste Management Plan and the South Carolina 1999 State Solid Waste Management Plan, our preliminary finding is that the proposed Sandhills MSW Landfill is consistent with both the Marlboro County Plan and the State Solid Waste Management Plan.

As a reminder, this is a preliminary determination. A final consistency determination will be made when the permit decision is ready for issuance. In addition, a site must be consistent with local land-use, zoning, and other county requirements including solid waste ordinances, before a permit is issued. If applicable, these documents should also be submitted to initiate a departmental review.

If you have questions or concerns regarding this matter, or if we can be of assistance in any other way, please feel free to contact me [(803) 896-4221, whitejm@dhec.sc.gov] or Kent Coleman [(803) 896-4202, colemakm@dhec.sc.gov].

With kindest regards,

Jana M. White, Manager
Solid Waste Planning and Grants Section
Division of Mining and Solid Waste Management
Bureau of Land and Waste Management

JMW/jmw

cc: Mr. R. Cecil Kimrey, Marlboro County Administrator
Ms. Joan Litton, DHEC Solid Waste Permitting
Mr. Keith Collingsworth, DHEC Solid Waste Hydrogeology
Mr. Rudy Curtis, BP-Barber
Mr. James Owens, Regional Director, DHEC EQC Region 4

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

2500 Bull Street • Columbia, SC 29204 • Phone: (803) 896-3172 • www.scdhec.gov

EXHIBIT B - 000017

ATTACHMENT C

EXHIBIT B - 000018

BOARD:
Paul C. Aughry, III
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kiser
Secretary



C. Ead Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:
Henry C. Scott
M. David Mitchell, MD
Glenn A. McCall
Coleman E. Buckhouse, MD

S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

April 21, 2008

U.S. Mail - CERTIFIED - Return Receipt

91 7108 2133 3934 4765 7962

Steven D. Weber, Esquire
Parker Poe
Three Wachovia Center
Suite 3000
401 South Tryon Street
Charlotte, North Carolina 28202-1935

91 7108 2133 3934 4765 7979

F. Norbert Hector
MRR Southern
431 Raleigh View Road
Raleigh, North Carolina 27610

91 7108 2133 3934 4765 7986

John Adams Hodge, Esquire
Haynesworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, South Carolina 29211

Via Interagency Mail Delivery

Etta R. Williams, Esquire
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201

RECEIVED

APR 21 2008

DHEC
OFFICE OF GENERAL COUNSEL

RE: Docket No. 08-RFR-34 - Request review of staff decision dated February 27, 2008, of a preliminary finding that the proposed Sandhills MSW Landfill is consistent with both the Marlboro County Plan and the State Solid Waste Management Plan.

The S.C. Board of Health and Environmental Control decided on April 17, 2008, not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "If a final review

conference is not conducted within 90 days of the date of the preliminary decision, the final agency decision becomes the final agency decision." EXHIBIT B - 0000019

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

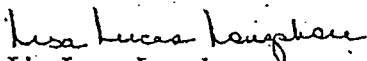
A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,


Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCC # 20656

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EXHIBIT B - 000020

S.C. CODE ANN. § 44-1-60(A) (Supp. 2008), also a statute applicable in this matter, unambiguously provides that only an appeal of a "department decision" will give rise to a contested case. Here, it states:

- (A) All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section.

Moreover, pursuant to § 44-1-60(B), "the department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision." The language in the referenced statute and in R. 61-107.19, Part 1D.1.b. requires DHEC to adhere to the public notice provisions in R. 61-107.19, Part 1D.2.b.(1&2). These provisions state that a public notice will be published when the need, consistency, zoning and buffer determinations are ready for review. After public notice occurs, the public will have 30 days to review and comment on these determinations and request a public hearing. Subsequent to the comment period and the holding of a public hearing (if requested), the Department will issue a final Department Decision and the Decision may be appealed at that time.

Additionally, pursuant to S.C. CODE ANN. § 44-1-60(E) (Supp. 2008), the department decision will only become the "final agency decision" once affected persons who have asked to be notified by certified mail, return receipt requested, have also been notified and "fifteen days [pass] after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person." If a request for review of a department decision is submitted to the Department by one of these entities and a final review conference is not conducted within

management plans; 3) consistency with local zoning, land use, and any other applicable ordinances; and 4) buffer requirements met. S.C. CODE ANN. REGS. 61-107.19, Part I. D.1.a.(1-4) (Supp. 2008). Under R. 61-107.258, the repealed regulation formerly applicable to the permitting of a MSW landfill, no provisions required public notice of a DON determination. Since R. 61-107.258 is no longer applicable, the requirements of R. 61-107.19 now govern the issuance of DON determinations and these requirements must be fulfilled before the DON determination becomes a final agency decision.

1. The above-captioned contested case should be dismissed because applicable regulations and statutes require public notice, comment, and an opportunity for a hearing before a DON determination will become a final agency decision giving rise to a contested case.

New regulations for *Solid Waste Management: Solid Waste Landfills and Structural Fill*, S.C. CODE ANN. REGS. 61-107.19 et seq. (Supp. 2008), went into effect on May 23, 2008. Once this occurred, DHEC's Demonstration of Need ("DON") approval to MRR became a determination that was not a final agency decision that would give rise to a contested case. Regulation 61-107.19, Part I.D.1.b. states that "where, prior to the effective date of this regulation, the Department has made determinations required under Part I.D.1.a. of this regulation, such determinations shall remain applicable and become the agency's final determination under Part I.D.1, subject to the appeal provision in Part I.D.1.c and the subsequent public notice and application process." Regulation 61-107.19 became effective *after* the DON approval letter was issued to MRR, therefore the DON determination remains applicable. Further, the applicable DON approval is subject to " ... the subsequent public notice and application process." R. 61-107.19, Part I.D.1.b. (Supp. 2008). Thus, this contested case hearing must be dismissed.

I. BACKGROUND

Respondent DHEC received a demonstration of need analysis request letter dated July 10, 2007, from MRR Sandhills, LLC ("MRR") for the Proposed Sandhills Regional MSW Landfill ("landfill"). Pursuant to this request, Respondent issued to MRR a Demonstration of Need ("DON") approval letter (Attachment A) dated July 16, 2007. Marlboro County requested a review of this approval from the DHEC Board ("Board") on or about July 17, 2007. The Board declined to conduct a final review conference and on September 14, 2007, County filed a *Petition for Administrative Review and a Request for a Contested Case Hearing* with the ALC. This matter is presently pending before the Administrative Law Court.

II. STANDARD OF REVIEW AND JURISDICTION

Jurisdiction is pursuant to the Administrative Procedures Act, S.C. CODE ANN. § 1-23-310 *et seq.* (2005 & Supp. 2006), and S.C. CODE ANN. § 44-1-60 (2002 & Supp. 2006). A party who is aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedures Act only after the party has exhausted all administrative remedies available within the agency. *See* S.C. CODE ANN. REGS. §§ 1-23-380(A) and 1-23-600 (2005 & Supp. 2006).

III. GROUNDS FOR DISMISSAL

A. ALC LACKS SUBJECT MATTER JURISDICTION TO HEAR A CONTESTED CASE THAT DOES NOT INVOLVE A FINAL AGENCY DECISION, THEREFORE THIS CONTESTED CASE SHOULD BE DISMISSED

Under the current solid waste permitting regulation, "prior to submittal of a permit application to the Department for a new or expanded Class Two or Class Three Landfill, the applicant shall . . . request the following determinations by the Department." Those determinations include 1) need; 2) consistency with State and county/regional solid waste

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Marlboro County,

Petitioner,

vs.

South Carolina Department of Health and
Environmental Control, and MRR Sandhills,
LLC,

Respondents.

Docket No.: 07-ALJ-07-0459-CC

NOTICE AND
MOTION TO DISMISS

TO: STEVEN D. WEBER, ESQ., ATTORNEY FOR PETITIONER, MARLBORO COUNTY

YOU WILL PLEASE TAKE NOTICE that Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department"), through its undersigned counsel, will move before the Administrative Law Court ("ALC" or "Court") as soon after service hereof as counsel may be heard, for an Order completely dismissing all issues raised in the above-captioned matter pursuant to ALC Rule 38, South Carolina Rules of Civil Procedure ("SCRCP"), Rule 12(b)(1), because the ALC lacks jurisdiction over the subject matter since the Demonstration of Need (DON) determination is not a "final agency decision."

Since Respondent DHEC has already addressed, in a separate Motion to Dismiss, that the Administrative Law Court (ALC) lacks jurisdiction to hear Petitioner Marlboro County's ("County" or "Marlboro County") facial constitutional challenge¹ to the Demonstration of Need (DON) regulation, that issue will not be revisited in this Motion. The grounds for dismissal of this contested case are set forth below.

¹ A facial constitutional challenge is an issue that was raised in Petitioner County's *Petition for Administrative Review and a Request for a Contested Case Hearing* that was filed with the ALC on September 14, 2007.

EXHIBIT B - 000021

1

sixty days, the department decision then becomes a final agency decision and may be appealed to the ALC.

However, no part of the aforementioned process has occurred for the DON determination that was issued to MRR by DHEC – there has been no issuance of a draft decision for placement on public notice, and no comments have been received or reviewed by the Department. Thus, DHEC's DON determination that was issued to MRR is not a department decision that has transformed into a final agency decision. Therefore, there is no final agency decision in relation to Docket Number 07-ALJ-07-0459-CC that gives rise to a contested case that can be heard by the ALC.

2. This matter should be dismissed because it does not meet the test for "finality" under applicable case law, rendering the subject matter moot, which is also supported by case law.

Additionally, DHEC's determination does not meet the *Bennett Test*, which is a test set forth in the case of *Bennett v. Spear*, 520 U.S. 154 (1997). The United States Supreme Court formulated this two-part test to determine whether an agency action may be considered final. DHEC's determination is not final because the determination 1) does not mark the consummation of the agency's decision-making process in relation to determining Demonstration of Need; and 2) does not establish any rights or obligations from which legal consequences will follow. Nothing has been consummated and no rights or obligations have been established because the DON determination process is incomplete. The process is incomplete and will remain so until all requirements for public notice, comment, and opportunity for hearing are fulfilled pursuant to the applicable statutes and regulations.

Furthermore, the posture of Marlboro County's appeal of the DON determination is analogous to the fact pattern in *Nolas Trading Co., Inc. v. SCDHEC*, 289 S.C. 345, 345 S.E.2d

507 (2006). This case involved a challenge by Nolas to regulations promulgated by the South Carolina Department of Health and Environmental Control. Nolas contended that portions of the regulations were issued in violation of the Administrative Procedures Act and were therefore invalid. However, the Court found the appeal to be moot because the regulations in question had been superseded by new regulations during the pendency of the appeal. Therefore, the Court dismissed the case. In the instant matter a very similar situation has occurred. Because new regulations that include public notice, comment, and hearing provision requirements became effective during the pendency of this contested case review and in effect repealed a regulation that did not include the same or similar requirements, the subject matter at issue here is moot and will remain so until the requirements of the regulation have been fulfilled. "Where the questions presented by an appeal are moot, the appeal will be dismissed." Schein v. Lamar, 284 S.C. 252, 325 S.E.2d 573 at 574 (S.C. Ct. App. 1985).

B. THE CHANGE IN THE DON DETERMINATION PROCESS ULTIMATELY ALLOWS MARLBORO COUNTY INPUT INTO THE PROCESS; THERE IS NO EFFECTIVE REMEDY AT LAW

1. Marlboro will have an opportunity to share its concerns regarding the DON process once this case is dismissed.

The new solid waste permitting regulations, S.C. CODE ANN. REGS. 61-107.19 et seq. (Supp. 2008), which went into effect on May 23, 2008, changed the process of how certain determinations are issued by DHEC. The change in the process ultimately gives Marlboro County a forum by which to air their concerns and have input into the DON determination process. The public notice, comment, and opportunity for hearing period give the public an avenue in which to voice their concerns, to ask questions regarding the agency determination, and to receive answers to their questions. Essentially, this process will also allow Marlboro County the opportunity to relay to DHEC what it believes should have been taken into

and regulation provision requirements for public notice, comment, and hearing, which will occur after all four (4) determinations under R. 61-107.19, Part I.D.1.a. are made. At that time, any interested party with standing can seek review before the DHEC Board and ultimately file an appeal before this Court of the Board's final decision.

D. MARLBORO COUNTY WILL NOT SUFFER ANY PREJUDICE IF THIS CONTESTED CASE IS DISMISSED

There are two reasons Marlboro County will not suffer any prejudice if this contested case is dismissed. First, once DHEC issues a final department decision, Marlboro County will have another opportunity to request a review of the department's decision and none of their rights will be lost. Second, even if MRR is aggrieved by DHEC's final decision on the DON after the public comment period has ended, pursuant to R. 61-107.19, there are three (3) other determinations that DHEC must issue before MRR may apply for a MSW landfill permit. If DHEC does not make favorable determinations² in MRR's favor for two of these determinations, there will be no need for the County to appeal the DON decision. Specifically, DHEC may decide that MRR's proposed facility is not consistent with local zoning, land use, and any other applicable ordinances; or that its proposed facility does not meet buffer requirements. Additionally, either prior to or immediately after any and all department decisions are issued regarding any of the four (4) determinations by DHEC, MRR may decide not to pursue an application permit for a MSW landfill. If MRR ceases its pursuit for a MSW permit application, then Marlboro County's request for a contested case hearing will be null and void. However, since DHEC must fulfill the regulations regarding public notice, comment, and hearing, Marlboro County will receive another "bite at the apple" and will not be prejudiced or suffer any harm if this matter is dismissed.

² The consistency determination that was issued by DHEC issued on February 27, 2008, remains applicable pursuant to R. 61-107.19, Part I.D.1.b. (Supp. 2008).

IV. CONCLUSION

WHEREFORE, pursuant to the above-stated grounds for dismissal of Docket Number 07-ALC-07-0459-CC and the grounds set forth in DHEC's previously filed Motion to Dismiss filed on September 14, 2007, Respondent DHEC respectfully requests that this matter be dismissed with prejudice.

Respectfully submitted,

Etta R. Williams

Etta R. Williams
Attorney for SC DHEC
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708
Tel: 803/898-3349
Fax: 803/898-3367

March 12, 2009
Columbia, South Carolina

BOARD:
Paul C. Aughtry, III
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kisner
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:
Henry C. Scott
M. David Mitchell, MD
Glenn A. McCall
Coleman F. Buckhouse, MD

OFFICE OF GENERAL COUNSEL
Telephone: (803) 898-3349; Facsimile: (803) 898-3367

July 9, 2009

*** This letter replaces the letter submitted to the Clerk of the Board yesterday, July 8, 2009.

Mr. Paul C. Aughtry, III, Chairman
DHEC Board
c/o Lisa Lucas, Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201-1708

Re: Docket No. 09-RFR-52 – *Request for Review* by S.C. Coastal conservation League and S.C. Wildlife Federation of a memo submitted to Mr. Stanley S. Pasley, Williamsburg County Supervisor, dated June 3, 2009, regarding a Permit Modification Request from Williamsburg County; DHEC File No.: 20897

Dear Chairman Aughtry:

This letter is to respectfully request that the above-referenced Request for Review be dismissed pursuant to the fact that the memo regarding a Permit Modification Request from Williamsburg County that was submitted to Mr. Stanley S. Pasley, Williamsburg County Supervisor is not appealable, it is not a department decision or a final agency decision appealable as a contested case pursuant to S.C. CODE ANN. § 44-1-60(A)-(E) or pursuant to S.C. CODE ANN. § 1-23-310 (Supp. 2007).

Consistent with the regulatory process, there will be a final agency decision on the DON in this matter at a future date. Once the final agency decision is issued the Requestors in this matter will have an opportunity to appeal the decision. Therefore, if this matter is dismissed based on the foregoing, Requestors will not have lost any rights that they have and will not be prejudiced by such dismissal.

Thus, pursuant to the foregoing, DHEC respectfully requests that this matter be dismissed.

Sincerely,

Etta R. Williams
Etta R. Williams
Attorney for SC DHEC

cc.: Amy E. Armstrong and James S. Chandler, Jr., Attorney for Requestors
Stanley S. Pasley, Williamsburg County Supervisor/Manager
Kent Coleman, BLWM, SC DHEC

BOARD:
Paul C. Aughtry, III
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kiser
Secretary



C. Earl Hunter, Commissioner

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Telephone: (803) 898-3349; Facsimile: (803) 898-3367

July 8, 2009

Mr. Paul C. Aughtry, III, Chairman
DHEC Board
c/o Lisa Lucas, Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201-1708

RECEIVED
S.C. DEPT OF HEALTH
& ENVIRONMENTAL CONTROL
2009 JUL -8 PM 4:51
OFFICE OF THE COMMISSIONER
CHIEF OF STAFF
CLERK OF SCORC BOARD

Re: Docket No. 09-RFR-52 -- *Request for Review* by S.C. Coastal Conservation League and S.C. Wildlife Federation of memos submitted to Mr. Stanley S. Pasley, Williamsburg County Supervisor, and to Concerned Citizens, both dated June 3, 2009, regarding a Permit Modification Request from Williamsburg County; DHEC File No.: 20897

Dear Chairman Aughtry:

This letter is to respectfully request that the above-referenced Request for Review be dismissed pursuant to the fact that the memo regarding a Permit Modification Request from Williamsburg County that was submitted to Mr. Stanley S. Pasley, Williamsburg County Supervisor is not appealable, as it is neither a staff decision, a department decision, or a final agency decision appealable as a contested case pursuant to S.C. CODE ANN. § 44-1-60(A)-(E) or pursuant to S.C. CODE ANN. § 1-23-310 (Supp. 2007). It is not appealable pursuant to either statute because the memo does not rise to the level of a determination that is subject to public notice or the appeal process as stated in S.C. CODE ANN. REGS. 61-107.19, Part I, D.1.b. (Supp. 2008). The memo that the Department issued to Mr. Pasley on June 3, 2009, was merely informational in that it acknowledged that the Demonstration of Need Approval that was issued to Williamsburg County on November 9, 2007, and the maximum daily disposal rate calculated and approved within that Approval (which was 2,370,000 tons), allows for an annual disposal limit of 400,000 tons and that DHEC would consider this disposal limit, as requested by Williamsburg County per letter to the Department dated May 12, 2009.

Additionally, even if this memo was a determination made pursuant to R. 61-107.19, Part I, D.1.b., the determination would be one, which if made prior to the effective date of the regulation (as this one was -- as it was made on November 9, 2007, and the regulation went into effect on May 23, 2008), "... such determinations shall remain applicable and become the agency's final determination under Part I.D.1, subject to the appeal provision in Part I.D.1.c. and the subsequent public notice and application process." R. 61-109.19, Part I, D.1.c. (Supp. 2008).

SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL

Office of General Counsel

Columbia Office • 2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3350 • Fax: (803) 898-3367 • www.scdhec.gov

Page 2
AUGHTRY

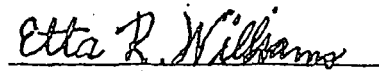
Therefore, if the memo was a determination pursuant to the above-referenced regulation, any appeal of the determination would not be proper until the public notice of the determination was completed as per R. 61-109.19, Part I, D.2.b.(1)&(2) and pursuant to S.C. CODE ANN. § 44-1-60(E) (Supp. 2008).

Further, the memo issued by DHEC to Concerned Citizens dated June 3, 2009, is also not a Demonstration of Need Approval as titled. It is merely a memo notifying the Citizens, as it did Williamsburg County in a similar memo on June 3rd as well, that pursuant to the Demonstration of Need Approval that was issued to Williamsburg County on November 9, 2007, and the maximum daily disposal rate calculated and approved within that Approval (which was 2,370,000 tons), allowed for an annual disposal limit of 400,000 tons and that DHEC would consider this disposal limit, as requested by Williamsburg County per letter to the Department dated May 12, 2009. The titling of the referenced memo as a Demonstration of Need Approval is incorrect, and a complete inadvertence on the part of the Department. As this memo is only informational, here again, the information in the memo is not appealable for the same reasons as stated above.

Even though neither the memo issued by DHEC on June 3rd to Stanley S. Pasley or to Concerned Citizens is a determination pursuant to R. 61-107.19, Part I, D.1.a., eventually there will be a final agency decision on the DON Approval that was issued on November 9, 2007, and once the final agency decision is issued the Requestors in this matter will have an opportunity to appeal the decision. Therefore, if this matter is dismissed based on the foregoing, Requestors will not have lost any rights that they have and will not be prejudiced by such dismissal.

Thus, pursuant to the foregoing, DHEC respectfully requests that this matter be dismissed.

Sincerely,


Etta R. Williams
Attorney for SC DHEC

cc.: Amy E. Armstrong and James S. Chandler, Jr., Attorney for Requestors
Stanley S. Pasley, Williamsburg County Supervisor/Manager
Kent Coleman, BLWM, SC DHEC

EXHIBIT C - 000003

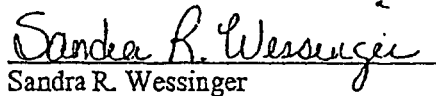
CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, paralegal with the the South Carolina Department of Health and Environmental Control, hereby certify that I have this 8th day of July 2009 served the foregoing *Letter dated July 8, 2009, requesting dismissal of Docket No. 09-RFR-52 - Request for Review by S.C. Coastal conservation League and S.C. Wildlife Federation of a memo submitted to Mr. Stanley S. Pasley, Williamsburg County Supervisor, dated June 3, 2009, regarding a Permit Modification Request from Williamsburg County* upon all parties and counsel of record by placing a copy of same in an envelope and depositing it in the U.S. Mail, as indicated below, with sufficient postage paid, at the address indicated below:

James S. Chandler, Jr., Esquire
Amy E. Armstrong, Esquire
South Carolina Environmental Law Project
PO Box 1380
Pawley's Island, SC 29585

Mr. Stanley S. Pasley
Williamsburg County Supervisor
PO Box 330
Kingstree, SC 29556

William E. Jenkinson, Esquire
Jenkinson Jarrett & Kellahan
Post Office Drawer 669
Kingstree, SC 29556


Sandra R. Wessinger

July 8, 2009
Columbia, South Carolina

EXHIBIT C - 000004

RECEIVED
S.C. DEPT OF HEALTH
& ENVIRONMENTAL CONTROL

2009 JUN 18 PM 2:33

STATE OF SOUTH CAROLINA

OFFICE OF THE COMMISSIONER
CHIEF OF DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
CLERK OF SCDHEC BOARD

South Carolina Coastal Conservation League and South Carolina
Wildlife Federation,

Appellants,

vs.

Williamsburg County and South Carolina Department of Health and
Environmental Control,

Respondents.

- RE: (1) Permit Modification, Williamsburg County MSW Landfill - Tonnage Increase
Facility ID No. 451001-1201
(2) Demonstration of Need Approval for Williamsburg County MSW Landfill -
Annual Disposal Rate Increase to 400,000 tons
Facility ID No. 451001-1101

REQUEST FOR FINAL REVIEW CONFERENCE

TO: THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL:

The South Carolina Coastal Conservation League ("League") and the South Carolina Wildlife Federation hereby request that the Board of Health and Environmental Control conduct a final review conference to review the DHEC staff decisions to approve: (1) a Permit Modification for the Williamsburg County MSW Landfill - Tonnage Increase, Facility ID No. 451001-1201; and (2) Demonstration of Need Approval for Williamsburg County MSW Landfill - Annual Disposal Rate Increase to 400,000 tons.

The basis for this request is as follows:

THE APPELLANT

1. The South Carolina Coastal Conservation League is a non-profit membership

corporation organized and existing under the laws of the State of South Carolina. Members of the League live and own property in Williamsburg County, and these members use and enjoy the waters, wetlands, and other natural resources that would be adversely affected by the proposed increase in the disposal rate at the Williamsburg County landfill.

2. The South Carolina Wildlife Federation is a non-profit membership organization headquartered in Columbia, and serves as the South Carolina affiliate of the National Wildlife Federation. The Federation works to facilitate effective habitat conservation and respect for outdoor traditions for current and future generations through statewide leadership, education, advocacy and partnerships. Members of the Wildlife Federation live and own property in Williamsburg County, and these members use and enjoy the waters, wetlands, and other natural resources that would be adversely affected by the proposed increase in the disposal rate at the Williamsburg County landfill.

3. The League and the Wildlife Federation and their members have vital interests in the protection of the land, air, waters, wetlands, and other natural resources in Williamsburg County, through the implementation and enforcement of the Solid Waste Management Act and the regulations promulgated thereunder. Members of the League and the Wildlife Federation regularly use and enjoy the land, air, waters, wetlands, and other natural resources that are threatened and would be impacted by the landfilling activities that would be authorized by the permits at issue in this proceeding. These members enjoy bird-watching, observing nature, fishing, and recreating in the creeks, canals, and marshes in the area of the proposed landfill. The existence and operation of the proposed landfill and its increased tonnage will decrease the enjoyment of the area and its natural resources by members of the League and the Wildlife Federation.

THE PROJECT

4. Williamsburg County operates an unlined landfill near Salters which DHEC has ordered closed. The closure order was issued several years ago and the closure deadline has been extended several times.

5. Williamsburg County generates less than 50,000 tons per year of solid waste.

6. On June 3, 2009, the DHEC staff gave notice of Demonstration of Need Approval for Williamsburg County Municipal Solid Waste (MSW) Landfill at an Annual Disposal Rate of 400,000 tons.

7. On that same date, the DHEC staff gave notice of approval of a modification of the permit for the Williamsburg County MSW Landfill to increase the annual disposal rate to 400,000 tons.

8. Upon information and belief, neither the Demonstration of Need Approval nor the Permit Modification were preceded by any public notice or opportunity for public comment or

public hearing.

GROUND FOR APPEAL

9. Section 44-96-290(E) of the Solid Waste Management Act states: "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department."

10. There is no need for this landfill, and there has been no demonstration of need:

A. The proposed permit would allow Williamsburg County to dispose of four hundred thousand (400,000) tons per year of municipal solid waste in the landfill, while Williamsburg County generates less than fifty thousand (50,000) tons per year of MSW waste, and thus the staff approval allows 8 times the need.

B. The needs test provided in DHEC Regulation 61-107.17 fails to comply with the "demonstration of need" requirement of Section 44-96-290 of the Act, in that said regulation does not in fact measure need at all. The permit proposed for the MRR landfill is a perfect example of the arbitrary and capricious result that is obtained using Regulation 61-107.17 in the manner in which it is presently interpreted and applied by the DHEC staff - resulting in a purported determination of need where clearly there is no objective need.

C. The staff erroneously used the old version of Regulation 61-107.17, when there is a new version of this regulation that has been approved by the DHEC Board and the South Carolina General Assembly which will become effective by the time the Board considers this request.

D. Regulation 61-107.17 improperly alters Section 44-96-280 of the Solid Waste Management Act by providing exceptions, grandfather clauses, and variances that are not within the Department's authority under said Act or any other provision of law.

11. The Demonstration of Need Approval and permit modification were issued without public notice, public hearing or any opportunity for public comment, in violation of Article I, Section 22 of the South Carolina Constitution and in violation of DHEC regulations.

12. The Demonstration of Need Approval and permit modification were not based on any evidence of true need for a landfill with a capacity of 400,000 tons per year.

13. The Permit Modification is patently inconsistent with and in violation of the Department's orders requiring Williamsburg County to close its unlined landfill, and violates numerous requirements of the DHEC solid waste management regulations which prohibit the expansion and continued operation of unlined landfills.

14. The issuance of the permit modification and approval of the demonstration of need

were not issued based on any objective facts and are not supported by any rule of law and thus are arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

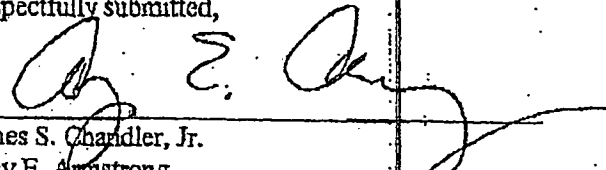
15. As a direct and proximate result of these violations and the proposed landfill, the League and the Wildlife Federation and their members will suffer harm to their regulatory, recreational, environmental, aesthetic and other interests.

16. The League and the Wildlife Federation reserve all rights under Section 44-1-60 and other applicable laws to present evidence and argument during the review proceeding.

RELIEF REQUESTED

WHEREFORE, the South Carolina Coastal Conservation League and the South Carolina Wildlife Federation request that the Board conduct a final review conference in this matter and issue an order reversing the staff's proposed decision to modify the landfill permit and approving a demonstration of need, and rescinding the staff's initial decisions.

Respectfully submitted,


James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for South Carolina Coastal Conservation
League and the South Carolina Wildlife
Federation

Georgetown, South Carolina

June 18, 2009

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF THE
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

South Carolina Coastal Conservation League and South Carolina
Wildlife Federation,

Appellants,

vs.

Williamsburg County and South Carolina Department of Health and
Environmental Control,

Respondents.

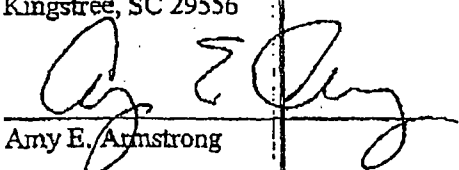
RE: (1) Permit Modification, Williamsburg County MSW Landfill - Tonnage Increase
Facility ID No. 451001-1201
(2) Demonstration of Need Approval for Williamsburg County MSW Landfill -
Annual Disposal Rate Increase to 400,000 tons
Facility ID No. 451001-1101

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the foregoing Request for Final
Review Conference on the Respondents by placing same in U.S. mail addressed to:

Carl Roberts, Esquire
DHEC General Counsel
2600 Bull Street
Columbia, SC 29201

Stanley S. Pasley
Williamsburg County Supervisor
P.O. Box 330
Kingstree, SC 29556


Amy E. Armstrong

June 18, 2009

Georgetown, South Carolina

EXHIBIT C - 000009



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

June 3, 2009

CERTIFIED MAIL

91 7108 2133 3933 7188 4472

Mr. Stanley S. Pasley
Williamsburg County Supervisor
P.O. Box 330
Kingstree, SC 29556

**RE: Permit Modification Request
Williamsburg County MSW Landfill - Tonnage Increase
Facility ID No. 451001-1201
Williamsburg County**

Dear Mr. Pasley:

This office is in receipt of the permit modification request submitted relative to the above-referenced site dated May 12, 2009. Staff has evaluated the information and determined that an increase in this facility's annual disposal rate is allowed pursuant to the provisions of R.61-107.17, *Demonstration of Need*. The Department will consider an annual disposal limit of 400,000 tons, with the appropriate consideration of design capacity, operational capacity, operational life and other applicable regulatory requirements.

If you have any questions, please contact Ernell Hartwell of my staff at (803) 896-4230.

Sincerely,

Joan F. Litton, Manager
Solid Waste Permitting
Bureau of Land and Waste Management

JFL/EHJ/ehj

cc: Misty Foster, EQC Region 6, Williamsburg County



C. Earl Hunter, Commissioner

*Promoting and protecting the health of the public and the environment*Bureau of Land and Waste Management
MEMORANDUM

DATE: June 3, 2009

TO: Concerned Citizens

FROM: Joan F. Litton, Manager *JFL*
Solid Waste Permitting Section

RE: Demonstration of Need Approval for Williamsburg County Municipal Solid Waste
(MSW) Landfill Annual Disposal Rate Increase - 400,000 tons
Facility ID# 451001-1101
Williamsburg County

The Department has received a permit modification request for Williamsburg County to increase the annual disposal rate for the existing Class 3 (MSW) landfill. The Department is providing you a copy of Williamsburg County's letter requesting the modification and a copy of the Department's response for this request. The Department has determined that Williamsburg County is allowed to increase the annual disposal rate to 400,000 tons pursuant to the current Demonstration of Need regulation R.61-107.17. The Department will continue to review the modification request and will notify you of any permit decision regarding this matter.

If you have any questions or comments, you may contact me at (803) 896-4264.

JFL/EHJ/ehj

Enclosures (2)

EXHIBIT C - 000011**SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL**
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

County of Williamsburg



Council Members

Andy D. McKnight, Sr.
Vice Chairman
Samuel E. Drucker
Franklin Fulmore
W. D. Wilson

STANLEY S. PASLEY
County Supervisor

Council Members

Ernie Woods, Jr.
Harry L. Darby
Harry Higgins
Kathleen Chandler
Clerk

RECEIVED

May 12, 2009

MAY 18 2009

Ms. Joan F. Litton, Manager
Solid Waste Permitting Section
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

DIVISION OF MINING &
SOLID WASTE MANAGEMENT
BLWM

RE: Revised Permit Modification Request
Williamsburg County Landfill
Williamsburg County
Facility ID No. 451001-1101

Dear Ms. Litton:

On behalf of Williamsburg County, I hereby submit a revised Solid Waste Permit application to modify the existing solid waste permit for the above referenced facility. The application for which this is the replacement was submitted on July 16, 2008. Understanding that our landfill has been a commercial facility as defined in R.61-107.17.B.1, since June 23, 2000, it is by published disposal data eligible for a disposal rate near 2.5 million tons annually. However, our revised request is to increase the annual disposal rate to 400,000 tons per year from the current rate of 35,000 tons per year. Please note that pursuant to R.61-107.17.C.1, this facility is exempt from need in that "any increase in the disposal rate shall not require a demonstration of need as long as such disposal rate is less than the maximum disposal rate" allowed by the Regulation.

As you are aware, Williamsburg County is under order to close the existing solid waste landfill. The County is working to develop a plan to replace and relocate the existing solid waste landfill to a yet to be determined site. Our plans include the possibility of partnering with other South Carolina counties to establish a regional landfill. Additionally, by letter dated December 30, 2002, the Department was officially notified of the County's intent to replace its existing municipal solid waste landfill.

EXHIBIT C - 000012

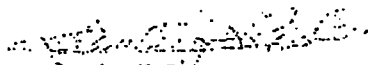
P.O. Box 330 • Kingstree, South Carolina 29556 • Telephone (843) 355-9321 • Fax (843) 355-2106

Pursuant to R.61-107.61.17.D.4.a. Variance, the County shall be allowed to "construct a new solid waste disposal facility at its permitted annual rate of disposal as a replacement" and as such is not required to demonstrate need for the replacement.

A typical tonnage rate increase requires an equipment needs discussion. The existing equipment is considered to be adequate to handle the actual disposal that is likely to occur. There are no expectations of an increase in the actual rate of intake above 15,000 tons per year while operating the existing municipal solid waste landfill. If landfill conditions warrant additional equipment, Williamsburg County will obtain the necessary equipment internally or by rental. As part of the application for our replacement landfill we will provide an in-depth discussion of equipment.

If you have any questions or comments regarding the above information, please do not hesitate to contact me.

Very truly yours,


Stanley S. Pasley
Supervisor/Chairman
Williamsburg County

Enclosures

EXHIBIT C - 000013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Petitioner,

vs.

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

Respondents.

Docket No. 08-ALJ-07-0425-CC

**RESPONDENT MRR HIGHWAY 92,
LLC'S REPLY TO PETITIONER'S
RESPONSE TO MOTION TO DISMISS**

Respondent MRR Highway 92, LLC ("MRR"), submits this memorandum of law in reply to Petitioner's Response to Motion to Dismiss ("Petitioner's Response"), filed on August 4, 2009.

I. BACKGROUND FACTS

On February 21, 2006, MRR requested a demonstration of need ("DON") determination for a construction, demolition, and land-clearing debris ("C&D") landfill to be located 322 Choice Road, Gray Court in Laurens County ("Proposed Landfill"). (See Pet. Ex. 7). By certified letter dated March 3, 2006, Respondent South Carolina Department of Health and Environmental Control ("Department") issued MRR a DON approval for the Proposed Landfill. (See Pet. Ex. 8). Following receipt of the DON approval, MRR submitted an application for a permit for the Proposed Landfill. (Transcript of Administrative Hearing on July 22, 2009, hereinafter "Hrg. Tr.," p. 147, ll. 1-11).

By letter dated June 12, 2006, Jeff Nichols, a member of Petitioner Engaging and Guarding Laurens Petitioner's Environment ("EAGLE"), requested information related to

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SC ADMIN. LAW COURT

the Department's consideration of the permit for the Proposed Landfill. (See Pet. Ex. 9). On August 4, 2008, EAGLE requested that the Board of Health and Environmental Control ("Board") review the Department's decision to issue a permit for the Proposed Landfill. On August 20, 2008, the Board advised EAGLE of its decision not to conduct a review of the staff decision. Thereafter, on September 16, 2008, EAGLE filed a Request for Contest Case Hearing, seeking this Court's review of the Department's decision to issue the permit for the Proposed Landfill and the Department's approval of the demonstration of the need for the Proposed Landfill. On May 1, 2009, EAGLE withdrew all of its grounds for appeal except those grounds related to DON approval for the Proposed Landfill.

At the hearing on the merits in this matter on July 22, 2009, MRR moved for an order dismissing this action for lack of subject matter jurisdiction. The grounds for the motion are that EAGLE failed to file a request for a contested case hearing within thirty (30) days of actual or constructive notice of the Department's decision to approve MRR's DON request for the Proposed Landfill or within ninety (90) days after the date of that decision on March 3, 2006.

II. LEGAL STANDARD

"The question of subject matter jurisdiction is a question of law for the court." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993). "[I]ssues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion." *Bunkum v. Manor Properties*, 321 S.C. 95, 99-100, 467 S.E.2d 758, 761 (Ct. App. 1996) (citations omitted). "Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong."

Bunkum v. Manor Properties, 321 S.C. 95, 99-100, 467 S.E.2d 758, 761 (Ct. App. 1996) (citation omitted). Failure to timely file a request for review of a Department decision deprives the court of jurisdiction to hear an appeal of that decision. *South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Envtl. Control*, 380 S.C. 349, 379, 669 S.E.2d 899, 914 (Ct. App. 2008).

III. ARGUMENT AND CITATION OF AUTHORITY

Pursuant to Rule 11 of the South Carolina Rule of Procedure for the Administrative Law Court, which governed the appeal of a Department decision at the time of the Department's issuance of the DON approval for the Proposed Landfill, EAGLE was required to file a request for a contested case hearing within thirty (30) days after actual or constructive notice of the issuance of the DON approval but no later than ninety (90) days after the date of the DON approval.¹ Rule 11, SCRPA LC. However, as discussed more fully below, EAGLE failed to file such request within this time period and MRR is thus entitled to dismissal of this action.

A. EAGLE's appeal of the DON approval for the Proposed Landfill was not timely filed because the DON approval is an agency decision separate and distinct from the permitting decision.

Section 44-96-290(E) of the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* ("Solid Waste Act"), provides that a demonstration on need must be approved by the Department prior to the permitting of a solid waste management facility. S.C. CODE ANN. § 44-96-290(E) (2002) (underlining added). The Act requires the Department to promulgate regulations for determining need for solid waste management facilities. S.C. CODE ANN. § 44-96-290(E) (2002). The regulation governing demonstration of need for the Proposed Landfill is S.C. CODE REGS.

¹ Effective July 1, 2006, Section 44-1-60 established the procedure and time limits for appeals from decision of the South Carolina Department of Health and Environmental Control.

§ 61-107.17 ("DON Regulation"). 25A S.C. CODE REGS. § 61-107.17 (Supp. 2008) (prior to amendment effective June 29, 2009). On February 21, 2006, MRR requested a demonstration of need approval from DHEC for the Proposed Landfill. (See Pet. Ex. 7). By certified letter dated March 3, 2006, the Department advised MRR of its decision to approve DON for the Proposed Landfill. (See Pet. Ex. 8).² At the time of the Department's decision to approve the DON for the Proposed Landfill, the requirements for permitting of C&D landfills were set forth in S.C. CODE REGS. ANN. § 61-107.11 ("C&D Landfill Regulation"). 25A S.C. CODE REGS. ANN. § 61-107.11 (repealed by S.C. CODE REGS ANN. § 61-107.19 effective May 23, 2008). The C&D Landfill Regulation makes no reference to the DON approval. Indeed, MRR did not submit an application for the permit for the Proposed Landfill pursuant to the C&D Landfill Regulation until after the Department's decision to approve the DON. (Hrg. Tr., p. 147, ll. 1-11). Accordingly, it is unquestionable that the March 3, 2006 DON determination was a final agency decision separate and distinct from the subsequent permitting decision for the Proposed Landfill.

Since the DON approval is a final agency decision, EAGLE was required to appeal that decision as a contested case in accordance with Rule 11, SCR PALC. Clearly, the March 3, 2006 decision to approve the DON was a Department determination subject to a contested case hearing under the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA"). Section 1-23-310 of the APA defines "contested case" as a "proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in

² Prior to the final permitting decision on the Proposed Landfill, DHEC promulgated a new regulation governing permitting of C&D landfills. Pursuant to S.C. CODE REGS. § 61-107.19, Part I.D.1.b ("New Landfill Regulation"), a DON approval issued by the Department prior to the New Landfill Regulation's effective date of May 23, 2008, remained in effect. Accordingly, the Department's decision to issue a DON approval for the Proposed Landfill on March 3, 2006, remained the effective DON approval for the Proposed Landfill, and MRR was not required to seek a new DON approval under the New Landfill Regulation.

which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” S.C. CODE ANN. § 1-23-310(3). Section 1-23-310 defines “license” as “the whole or part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes.” S.C. CODE ANN. § 1-23-310(4) (emphasis added). As noted above, Section 44-96-290(E) of the Solid Waste Act requires the Department to make approve a demonstration of need for a proposed solid waste management facility prior to a decision to issue a permit for such facility. Unquestionably, the decision relating to the demonstration of need is a condition precedent to the issuance of the permit, not an integral part of the permit itself. To conclude otherwise would ignore the plain language of the statute.

In Petitioner’s Response, EAGLE argues that the decision was not a decision subject to a contested case hearing because there was no public notice of the DON approval prior to the Department’s issuance on March 3, 2006. However, there is nothing in the APA which requires such notice. Moreover, neither the Solid Waste Act nor the DON Regulation require public notice of the DON approval. While the APA defines “contested case” as a proceeding “in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing,” the opportunity for hearing referenced in this provision is the hearing before the ALC. S.C. CODE ANN. § 1-23-310(3). As such, the DON approval is a Department decision subject to review in a contested case hearing.

Pursuant to Rule 11(C), SCRPAALC, a request for a contested case hearing to challenge an agency decision “must be filed and served within thirty (30) days after actual or constructive notice of the agency’s determination.” Rule 11(C), SCRPAALC.

S.C. CODE ANN. § 1-23-310(3) (2005). Furthermore, Rule 11 provides that “no request shall be filed more than ninety (90) days after the date of the issuance of the order or determination unless the administrative law judge assigned to the case finds that substantial cause exists for allowing the filing beyond the ninety (90) day period.” Rule 11(C), SCRPALC. Indeed, if the Department staff had made a determination that there was no demonstration of need for the Proposed Landfill or if MRR had believed the maximum annual tonnage rate had been calculated in error, MRR would have been entitled to request a contested case hearing to review the Department decision denying approval of the DON. However, MRR would have been required to do so by April 3, 2006—within thirty (30) days from receipt of the March 3, 2006 letter notifying MRR of the Department’s decision. Moreover, pursuant to Rule 11, any appeal of the DON approval was required to be filed by no later than June 1, 2006, ninety (90) days after the date of the DON approval. Yet, EAGLE did not file its appeal of the DON approval until August 4, 2008—almost two and a half years after the issuance of the DON approval.

Additionally, even if EAGLE did not have notice of the DON approval within ninety (90) days of its issuance, EAGLE clearly failed to timely appeal within thirty (30) days of actual or constructive notice of such decision. There can be no doubt that EAGLE had actual notice of the Department’s issuance of the DON approval no later than June 12, 2006, when Jeff Nichols made specific written inquiries regarding the Department’s determination of need for the Proposed Landfill. (Pet. Ex. 9). Accordingly, EAGLE’s request for a contested case hearing on the DON approval was required to be filed at the very latest by July 12, 2006, thirty (30) days after the date of the June 12, 2006 inquiry. However, EAGLE did not file an appeal of the DON approval until its request for Board review was filed on August 4, 2008—more than two years

later. Accordingly, EAGLE's appeal of the Department's decision to issue the DON approval was untimely, and this Court thus lacks jurisdiction to render a decision in this matter. Any other conclusion would completely disrupt the orderly regulatory process of allowing an applicant to first satisfy a condition precedent to obtaining a permit in order that significant investment in an application is not for naught.

B. Failure to provide public notice to EAGLE of the DON approval does not violate the Due Process Clause of the South Carolina Constitution.

Contrary to EAGLE's assertions, the Due Process Clause of the South Carolina Constitution does not impose on the Department an obligation to provide public notice of its decision to approve the DON for the Proposed Landfill. In Petitioner's Response, EAGLE contends that the Department's failure to place the DON approval on public notice violates EAGLE's due process rights under the South Carolina Constitution. Article I, Section 22 of the South Carolina Constitution provides in relevant part that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . ." S.C. CONST. art. I, § 22. As a preliminary matter, this provision does not require public notice of all decisions of an administrative agency. "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). In this case, the Department provided notice of its decision to MRR. EAGLE has failed to identify any other person with "private rights" entitling that person to notice of such decision. Moreover, EAGLE has failed to identify how the DON approval affects its "private rights." EAGLE has claimed no interest in the property to be developed. Moreover, EAGLE was not a competing business interest which was denied a DON

approval based on the DON approval issued to MRR. The Department provided notice of its decision to the only party with any private rights in the DON decision—MRR. (Pet. Ex. 8). Accordingly, EAGLE cannot claim that the failure to public notice the DON approval for the Proposed Landfill was a violation of its due process rights.

C. EAGLE's claim that the failure to issue public notice of the decision to approve the DON violated the South Carolina Constitution is also untimely.

Even if EAGLE's due process claim were valid, which it is not, EAGLE would have nonetheless been required to bring such claim within the time period set out in Rule 11, SCR PALC. In *Stono River Environmental Protection Association v. South Carolina Department of Health and Environmental Control*, 305 S.C. 90, 406 S.E.2d 340 (1991), the South Carolina Supreme Court considered the appellants claim that its due process rights were violated by the manner in which a hearing before the DHEC Board was conducted. In considering this claim, the Court noted that "the appeal pursuant to regulation 61-72 was timely." *Id.* at 94, 406 S.E.2d at 342. See also *Concerned Citizens for Sandy Flat v. South Carolina Dep't of Health and Env'tl. Control*, 2001 WL 1502396, *2 (S.C.A.L.J. Oct. 12, 2001) ("A citizen whose claim arises under the Constitution rather than under a specific statute or regulation, however, must still act to preserve his claim within a reasonable time after having received actual or constructive notice of the agency action he seeks to challenge."). Similarly, in *South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control*, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008), the Court held that the ALC properly dismissed the claims of the appellant because its appeal was not filed within the time period set forth in S.C. CODE ANN. § 44-1-60. *Id.* at 379, 669 S.E.2d at 914. In denying the appellant claim that such interpretation of the statute resulted in a denial of due process, the Court held that appellant's failure to comply with established procedures

precluded such claim. *Id.* at 383, 669 S.E.2d at 917. The Court stated: "A party 'cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it.'" *Id.* (quoting *Zaman v. S.C. State Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991)). In the instant case, EAGLE failed to take advantage of recourse provided under Rule 11(C) once it learned of the Department issuance of the DON approval.

Pursuant to Rule 11(C), a request for contested case hearing was required to be filed within thirty (30) days of actual or constructive notice. However, even though EAGLE had actual knowledge of the decision no later than June 12, 1006, it failed to seek review of the DON approval or the failure to provide notice of that decision within thirty days as required by Rule 11. Accordingly, EAGLE's claim that the failure to provide public notice of the DON approval for the Proposed Landfill violates its due process rights is untimely.

D. The Department's position in *Marlboro County v. South Carolina Department of Health and Environmental Control and MRR Sandhills, LLC* does not preclude MRR's position in this case.

In Petitioner's Response, EAGLE contends that MRR is not entitled to dismissal in this matter because the Department has taken a contrary position in a hearing before this Court in *Marlboro County v. South Carolina Department of Health and Environmental Control and MRR Sandhills, LLC* (Docket No. 07-ALJ-07-0459-CC). This contention is without merit as the Department's position on the time for appeal of a DON approval can neither confer nor deprive this Court of jurisdiction to hear this matter. EAGLE further suggests that a related company of MRR concurred in that position and thus should be precluded from advancing a contrary position. However, EAGLE fails to state the legal significance of such assertions. The position supporting

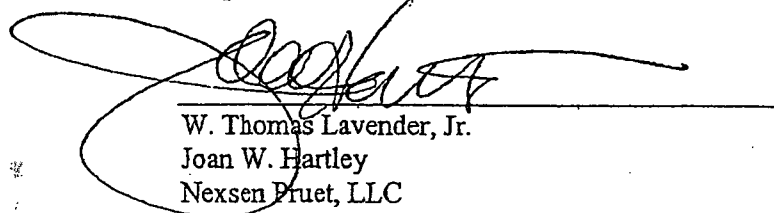
MRR's motion to dismiss in this matter is a legal position – not an inconsistent statement of fact. See *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (holding that a party may be judicially estopped from making a statement of fact which is inconsistent with a statement of such fact in a prior legal proceeding). Moreover, even if MRR Highway 92, LLC and MRR Sandhills, LLC were under the same ownership, which they are not, the position taken by MRR Sandhills, LCC in the *Marlboro County* matter is not inconsistent with the position taken by MRR Highway 92, LLC in this matter. In the *Marlboro County* case, the Department's decision to approve the DON at issue will be placed on public notice under the new regulation governing permitting of landfills, which became effective May 23, 2008, and pursuant to the new landfill regulations, that decision will not be a final agency decision until the close of the public comment period. S.C. CODE REGS. § 61-107.19, Part I.D.2.b.3, the DON approval in that case S.C. CODE REGS. § 61-107.19, Part I.D.2.b.3 ("After close of the public comment period on the draft determination and the public hearing, if held, the Department will issue a Department Decision."). As discussed *supra*, under the DON Regulation in effect when the Department issued the DON approval for the Proposed Landfill, there was no requirement for public notice. Moreover, the C&D Landfill Regulation in effect at that time did not even refer to the DON approval. Accordingly, the position on the time for appeal of the DON approval in the *Marlboro County* case is not inconsistent with MRR's position in this case.

IV. CONCLUSION

The Department's decision to approve the DON for the Proposed Landfill was issued by the Department on March 3, 2006. The decision approving the DON was a final agency decision subject to appeal. The time for filing such appeal was set forth

Rule 11, SCRPA LC. EAGLE failed to file a request for a contested case hearing within thirty (30) days of actual notice of the Department's decision to issue a DON approval for the Proposed Landfill or within ninety (90) days after the date of that decision on March 3, 2006. Accordingly, MRR is entitled to a dismissal of EAGLE's claims.

Respectfully submitted,



W. Thomas Lavender, Jr.
Joan W. Hartley
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

Attorneys for Respondent
MRR Highway 92, LLC

August 12, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's Environment ("EAGLE"),	)	Case No. 07-ALJ-07-0425-CC
	)	
	)	
Petitioner,	)	
	)	PETITIONER'S SUR-REPLY
vs.	)	IN OPPOSITION
	)	TO
South Carolina Department of Health and Environmental Control and MRR Highway 92, LLC,	)	MOTION TO DISMISS
	)	
	)	
Respondents.	)	
	)	

The Petitioner, Engaging and Guarding Laurens County's Environment ("EAGLE"), submits the following in as its sur-reply in opposition to the motion to dismiss made orally by counsel for the Respondents at the beginning of the contested case hearing on July 22, 2009.

1. Prior appeals of DON determinations.

DHEC's letter states that, to Ms. Williams' knowledge, the Marlboro County appeal of the MRR permit "is the first appeal of a DON Approval that DHEC has ever had." While this statement may be an accurate depiction of Ms. Williams' knowledge, in fact the Marlboro County appeal was certainly not the first appeal of a DON approval.

Ballenger v. DHEC, 331 S.C. 247, 500 S.E.2d 183 (1998), involved an appeal of a landfill permit that also involved a demonstration of need approval under S.C. Code § 44-96-280(E). *Democratic Reform at Big Creek v. DHEC*, ALC Docket No. 98-ALJ-07-0556-CC (Final Order and Decision dated March 8, 1999) also involved a landfill permit appeal in which the demonstration of need approval was contested. *Cross Keys Against National Garbage Organization v. DHEC*, ALC Docket No: 00-ALJ-07-0373-CC (Final Order and Decision dated

July 19, 2001) likewise involved a landfill permit appeal in which the demonstration of need approval was contested.

In the case of *York County v. DHEC*, ALC Docket No. 07-ALJ-07-0178-CC, which is presently pending before Judge Matthews, the demonstration of need approval has been appealed as part of the appeal of the overall permit. In that case, which arose before the May 23, 2008, amendments to the DHEC landfill regulations, DHEC has never taken the position that the appeal of the demonstration of need approval was not timely.

DHEC's letter does not provide support for the statement that "DHEC's position is and has always been that under the former regulation, 61-107.17, Demonstration of Need, a DON Approval was immediately appealable." The only documentation of a position taken by the governing Board of the Department is the statement in the notice of the Board's decision to decline to hold a review conference in DHEC Board Docket No. 08-RFR-119. In that case, the DHEC Board specifically declined to hear an appeal of a DON approval on the grounds that "the matter is not yet ripe for review." EAGLE Ex. A, p. 1, attached to Response to Motion to Dismiss. In that case, DHEC's Office of General Counsel argued both sides of the issue: that it was not appealable, but if it was, it was too late. Hardly an indication of a consistent agency position.

2. Due Process.

MRR acknowledges (1) that there is no regulation saying that a DON approval must be appealed at the time it is issued, and (2) that no notice was given to anyone other than MRR either before or after the DON approval.

MRR argues that Section 44-96-290(E) of the SC Solid Waste Policy and Management

Act requires a specific, appealable decision on the issue of need prior to a permit decision. This reading of the Act is a strained attempt to stretch the words of Section 290(E) far beyond its plain language. There is nothing in Section 290(E) that requires an appealable, contested case decision at a preliminary stage in the permitting process.

At the contested case hearing, MRR eagerly stipulated that the Petitioner has standing to appeal this landfill permit. Accordingly, MRR cannot now argue that EAGLE has "failed to identify any other person with 'private' rights entitling that person to notice of the decision," or that EAGLE has "failed to identify how the DON approval affects its 'private rights.'" (MRR Reply, p. 7). MRR has stipulated that MRR has met these requirements.

MRR's arguments that EAGLE somehow should have divined that the DON approval was appealable despite the lack of notice and lack of regulations on the topic, and that EAGLE should have also been savvy enough to raise the due process issues at that time, are certainly creative. During the hearing on July 22, 2009, counsel for MRR said that the reason this motion is being made so late was that "it only came to our attention at five o'clock yesterday afternoon that the ruling in the case involving Marlboro." (Tr.p. 15, lines 17-21). If MRR's attorney, one of the most knowledgeable and experienced environmental lawyers in the state, was not aware of the argument that the DON approval was appealable in 2006, how in the world can he argue that EAGLE should have figured this out three and a half years ago?

As DHEC's attorney acknowledged in the hearing on July 22, 2009, "the DON approval that was made in 2006 actually went on public notice at the time [DHEC] issued the draft permit for the landfill." (Tr.p. 10, lines 15-18). The public notice for the draft permit was issued on February 14, 2008, the public hearing was held on March 13, 2008, and the public comment

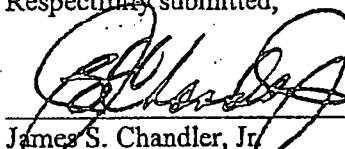
period was open until March 21, 2008. (Pet.Exs. 16, 17). This public notice and public comment period was not held as a result of the May 2008 amendments to the landfill regulations; they preceded the amendments.

Between June 2006 and March 2008, members of EAGLE, the Laurens County Legislative Delegation, Laurens County Council, and others raised the issue of the need for this landfill. (Pet.Exs. 9, 10, 12). In response, DHEC never once told them that it was too late to raise the need issue. DHEC never once said that the time to appeal was past.

Nor can DHEC and MRR point to any statute, regulation, public notice or any other means by which EAGLE was put on notice that it must appeal the March 2006 DON approval or lose its rights.

WHEREFORE, the Petitioner respectfully submits that the motion to dismiss should be denied.

Respectfully submitted,



James S. Chandler, Jr.
Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078
FAX (843) 527-0540
Attorneys for EAGLE

Georgetown, South Carolina

August 18, 2009

BOARD:

Paul C. Aughry, III
Chairman

Edwin H. Cooper, III
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Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:

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M. David Mitchell, MD

Glenn A. McCall

Coleman F. Buckhouse, MD

July 24, 2008

RONALD C GILKERSON PG
MRR HIGHWAY 92 LLC
431 RALEIGH VIEW RD
RALEIGH NC 27610

RE: HWY 92 C&D LANDFILL & REPROCESSING CENTER, Laurens County
File number: 30-07-08-02

Dear Ronald C Gilkerson PG:

The Department of Health and Environmental Control (Department or DHEC) has approved the Stormwater Pollution Prevention Plan (SWPPP) for the referenced project on July 24, 2008. Based on your submission of the Notice of Intent (NOI) and in accordance with the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 (2006 CGP), this project has been granted coverage under the 2006 CGP. This project's general permit coverage number is SCR100953. The total disturbed area for this site is 34.1 acres. This NPDES coverage expires on 07/26/2013, 5 years from the date of issuance.

Monthly reports must be submitted to the Department for the above-referenced site. Please refer to SCR100000, mainly Section 3.10, for information about requirements for inspections and monthly reporting. Your first monthly report is due on or before September 28, 2008.

Because this project disturbs 10 or more acres, a pre-construction meeting must be held onsite with all co-permittees and contractors who are not co-permittees (contractors) prior to that co-permittee or contractor performing construction related work intended to disturb soils at the above-referenced site. Please refer to SCR100000, mainly Section 3.2, for information about requirements for pre-construction meetings and certification of those meetings.

The inspections for this site must be performed by qualified personnel who meets the requirements list in Section 3.10.D of the 2006 CGP. Qualified personnel must be one of the following:

1. SWPPP preparer
2. Person under direct supervision of SWPPP preparer
3. Person who has been certified through a Construction Site Inspector Certification Course that has been approved by DHEC. (see our website for a list of approved courses)
4. Person with registration equivalent of SWPPP preparer
5. Person under direct supervision of person with registration equivalent to SWPPP preparer

An as-built survey, signed and sealed by a S.C. Licensed Land Surveyor, should be submitted for the 1 structure(s) on this site. The survey(s) should show grades, contours, and depths for all structures and should include the elevations and dimensions of all outlet structures, including but not limited to pipes, orifices, risers, weirs, and emergency

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

spillways. A statement signed by the project's S.C. Registered Engineer indicating that the structure(s) was installed and is operating as shown on approved plans and in approved calculations is required. If the elevations or dimensions of the structures listed above do not match those used in the approved plans, provide a certification statement signed by the project's S.C. Registered Engineer indicating that the structure, as built, will function as shown in approved calculations. A new analysis of the structure (routing) may be necessary. The as-built survey and/or analysis must be accepted by the Department before a Notice of Termination (NOT) can be submitted.

The 2006 CGP can be downloaded at the following website:
<http://www.scdhec.gov/environment/water/docs/finalcgp.pdf> or you may request a copy from us via email (stormwatercgp@dhec.sc.gov). You are responsible for ensuring your contractor(s) complies with the approved SWPPP and the minimum requirements of the 2006 CGP. Also, you are responsible for overall compliance with the Storm Water Management and Sediment Reduction Act of 1991 (1991 Act) and the Federal Clean Water Act (CWA).

You must notify this DHEC EQC Regional Office prior to starting any land-disturbing activity. The address and telephone number of the EQC office are as follows:

Greenwood EQC Office
613 S MAIN ST
GREENWOOD SC 29646
864-223-0333

You should be aware that this approval is only applicable for the SWPPP that was submitted for this project. Any additional construction or land disturbing activity beyond the scope of the approved plans is not authorized. Any future work for this project not shown on the stamped, approved plans will require that you submit another site plan for review and approval. All major modifications require review and approval by the Department. Minor modifications to the approved SWPPP may be made by the SWPPP preparer and do not require review and approval by the Department; these changes should be signed and dated by the SWPPP preparer. If you have a question about whether a modification is major or minor, contact the Stormwater Permitting Section at (803) 898-4300.

Three (3) sets of stamped, approved plans are being provided to your engineer. A copy of the stamped, approved SWPPP (including a copy the 2006 CGP and signed co-permittee and contractor certifications), NOI, and CGP coverage letter from DHEC must be retained at the construction site (or accessible within 30 minutes during normal business hours) from the date of commencement of construction activities to the date of final stabilization. A copy of the stamped, approved SWPPP must be available at a central location on-site for the use of all those identified as having responsibilities under the SWPPP whenever they are on the construction site. If an on-site location is unavailable to store the SWPPP when no personnel are present, notice of the plan's location must be posted near the main entrance at the construction site.

All contractors who will conduct land-disturbing activities at the site must sign a certification statement as a co-permittee or as a contractor who is not a co-permittee. You are responsible for any contractor who is not a permittee. You are also responsible for listing all contractors in the SWPPP and for holding a pre-construction conference with each co-permittee and contractor who is not a co-permittee before they can conduct land-disturbing activity at the site.

The Department may conduct periodic inspections of your site. Any violations found during these inspections may result in enforcement action. Failure to comply with the approved SWPPP or the minimum requirements of the 2006 CGP, 1991 Act, or CWA may subject you to applicable penalties.

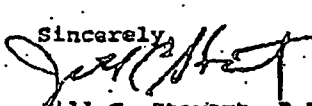
This NPDES coverage should be terminated by the permittee when one of the conditions listed in Section 5.1 of the 2006 CGP has been met. You must submit a Notice of Termination (NOT) to cancel your NPDES coverage under the 2006 CGP. Please see section 5.1 of the 2006 CGP for more information about termination of coverage.

You are responsible for obtaining any other federal, state, or local permit that may be required for this project. Please note we have not sent a copy of this letter to any county or city building official. You must send a copy of this letter to these agencies, if necessary.

Please see the enclosed "Notice of Appeal Procedure" document for information about the procedures for appealing this NPDES coverage. Also, see the enclosed document from the S.C. DHEC Compliance Assurance Division detailing some of the compliance requirements of the 2006 CGP.

If you have any questions or cannot access the referenced websites, please call me at 803-898-0439.

Sincerely,


Bill C. Stewart, P.E.
Stormwater Permitting Section

CC: Jeffrey Herbig-B P BARBER & ASSOCIATES INC
Region 1, Greenwood EQC Office
Permit contact (if not same as app signed by)
ODSA (if not same as Project Owner/Operator or App signed by)
Public comments

New Compliance Requirements:

Facility inspections and monthly reports

Please note that there are several new compliance requirements under the recently issued NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities, SCR100000 (2006 CGP).

- o One of the following inspection schedules has been identified in your approved Storm Water Pollution Prevention Plan (SWPPP): Inspections of the site must be conducted at least once every 7 calendar days or at least once every 14 days and within 24 hours of the end of a storm event of 0.3 inches or greater. You must notify the Department (Bureau of Water, Compliance Assurance Division) in writing to switch your inspection schedule.
- o Inspections conducted under this requirement must be available with the SWPPP and include at a minimum: a) Inspection date, b) Name, title, and qualifications of inspection personnel, c) Weather information since last inspection, including details of storm events d) Weather information and discharge information observed during the inspection, e) Location of discharges of sediment or pollutants from the site, f) Locations of Best Management Practices (BMPs) that need maintenance, g) Locations of BMPs that failed to operate as designed or were inadequate for a particular location, h) Locations where additional BMPs are needed, i) Corrective action required including changes needed in the SWPPP and implementation dates. (An inspection form that may be used for these inspections is available at <http://www.scdhec.gov/stormwater> or from the Compliance Assurance Division)
- o For sites disturbing more than 2 acres, these inspections must be conducted by "qualified personnel" (please see section 3.10D of the 2006 CGP for details on "qualified personnel").
- o For construction sites disturbing 10 acres or more, a monthly report must be submitted to SCDHEC, Bureau of Water, Compliance Assurance Division, 2600 Bull St. Columbia, SC 29201 by the 28th day of the following month and, if applicable, the appropriate Municipal Separate Storm Sewer System (MS4) operator. The monthly report must include at a minimum: a) A summary of the inspections conducted during the month, b) A listing of deficiencies and the date noted, c) For deficiencies requiring corrective action, list the name, address, and telephone number or the responsible party, d) Whether the deficiency was listed in a previous monthly report, e) Corrective actions taken and the date the actions were completed, f) Whether the SWPPP was updated to deal with the noted deficiencies, g) A copy of each inspection conducted during the month. In addition, the first monthly report must include all co-permittee agreements and contractor certifications. As co-permittees and contractors are added during the life of the project, applicable agreements and certifications must be submitted with the next monthly report. These must also be available with the SWPPP. If construction has not begun, the monthly report is still required, but it may simply state that construction has not yet started.

Note: For construction sites disturbing less than ten (10) acres, DHEC may require monthly reports on either a Project-by-Project basis or Operator-by-Operator basis.



Notice of Intent (NOI) for Stormwater Discharges from
Large and Small Construction Activities,
NPDES General Permit SCR100000

For official use only

File number: 30-07-08-02

Permit number: SCR100948

Submission package complete: _____

Public Notice Start Date (OCRM only): _____

For official use only

RECEIVED
SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
STORMWATER PERMITTING SECTION
APPROVED FOR CONSTRUCTION ONLY
PROJECT NO. 30-07-08-02 SCR100948
FILE # 30-07-08-02
DATE 7/2/08
BY [Signature]

Submission of an NOI constitutes notice that the entity identified in Section I intends to be authorized under SCR100000. Instructions on page 4.

Date: 08/07/2007

Project/ Site Name: Highway 92 C&D Landfill & Remediating Center County: Laurin
Do you want this project to be considered for the Expedited Permitting Program (EPP)? ☐ Yes ☒ No (See instructions.)

I. Project Information

Project Owner/ Operator (Company or person): MAR Highway 92, LLC
Permit Contact (if owner is company): Ben Ollman Company EIN: 20-6150683
Mailing Address: 431 Raleigh View Road City: Raleigh State: NC Zip: 27810
Phone: (Day) (919) 835-3575 (Mobile) (880) 721-3088 (Fax) (919) 835-3863
Email address (optional): _____

II. Property Information

A. Site Location (street address, nearest intersection, etc.): 322 Choice Road
City/ Town (if in limits): Gray Court Latitude: 34° 37' 21" N Longitude: -82° 05' 10" W
Tax map # (list all): 259-00-00-004
B. Property Owner (if different from section I above): _____
Mailing Address: _____ City: _____ State: _____ Zip: _____
Phone: (Day) _____

III. Site Information

A. Disturbed area (to the nearest tenth of an acre): 34.1 Total area: 132.1
B. Is this project part of a Larger Common Plan for Development or Sale (LCP)? ☐ Yes ☒ No
If yes, what is the previous state permit number? _____ Previous NPDES number: SCR10
LCP/ Overall Development Name: _____
C. Start Date (MM/DD/YYYY): 08/01/2007 Completion Date: 08/01/2012
D. Is this site located on Indian Lands? ☐ Yes ☒ No If yes, name of reservation: _____
E. Type of Activity (check all that apply):
☐ Commercial ☐ Residential: Single-family ☐ Linear (Roads, utility lines, etc.) ☐ Other:
☐ Institutional ☐ Residential: Multi-family ☒ Site Preparation (No new impervious)
F. Are there any flooding problems downstream or adjacent to this site? ☐ Yes ☒ No
G. Is this NOI being submitted in response to a Notice to Comply issued by S.C. DHEC? ☐ Yes ☒ No
H. Is any part of the property located inside an MS4 or urbanized area? ☐ Yes ☒ No
If yes, list the MS4 operator or urbanized area name: _____

IV. Waterbody Information

A. Nearest receiving waterbody(s): Beaverdam Creek Distance to this waterbody (feet): 300
Next/Nearest named receiving waterbody(s): Lake Martin
B. Wetlands/ Waters of the State

	On the site?	If yes, delineated/identified?	Impacts?	Amount of impacts
1. Waters of the U.S./ State	☒ Yes ☐ No	☒ Yes ☐ No	☐ Yes ☒ No	Ac. Feet
a. Perennial stream(s)	☒ Yes ☐ No	☒ Yes ☐ No	☐ Yes ☒ No	Ac. Feet
b. Intermittent stream(s)	☒ Yes ☐ No	☒ Yes ☐ No	☐ Yes ☒ No	Ac. Feet
c. Ephemeral stream(s)	☐ Yes ☒ No	☐ Yes ☒ No	☐ Yes ☒ No	Ac. Feet
d. Jurisdictional wetlands	☒ Yes ☐ No	☒ Yes ☐ No	☐ Yes ☒ No	Ac. Feet
e. Non-jurisdictional wetlands	☒ Yes ☐ No	☐ Yes ☒ No	☐ Yes ☒ No	Ac. Feet
f. Other (List):	☐ Yes ☒ No	☐ Yes ☒ No	☐ Yes ☒ No	Ac. Feet

2. If yes for impacts in Item B.1, has a USACOE permit been applied for or obtained for those impacts?
☐ Yes ☐ No ☐ N/A If yes, list the permit/ application number: _____

C. Impaired Waterbodies

Do stormwater (SW) discharges from the site drain to a watershed that drains to a DHEC WQ monitoring site (WQMS)...

1. Listed on the most current 303(d) List for Impaired Waters? ☒ Yes ☐ No
- a. If yes for (1), is there an unimpaired WQMS between your site and the impaired WQMS? ☐ Yes ☒ No
- b. If no for (a), list the waterbody: Beaverdam Creek List the impairment(s): CU
- c. Will construction SW discharges from your site contain the pollutant(s) of impairment? ☐ Yes ☒ No
- d. If yes for (c), will use of the selected BMPs ensure that the site's discharges will not contribute to or cause further water quality standard violations? ☐ Yes ☐ No
2. For which a TMDL(s) has been developed? ☐ Yes ☒ No
- a. If yes for (2), list the waterbody: _____ List the impairment(s): _____
- b. Has the standard been attained for the impairment(s)? ☐ Yes ☐ No
- c. If no for (b), will construction SW discharges from your site contain the pollutant of impairment? ☐ Yes ☐ No
- d. If yes for (c), are your discharges consistent with the assumptions and requirements of the TMDL(s)? ☐ Yes ☐ No
- e. If no for (d), will use of the selected BMPs ensure that the site's discharges will not contribute to or cause further water quality standard violations? ☐ Yes ☐ No
- D. Are S.C. Navigable Waters (SCNW) on the site? ☐ Yes ☒ No If yes, list the SCNW: _____
- Will any construction activities cross over or occur in, under, or through the SCNW? ☐ Yes ☐ No
- If yes, then describe activity (e.g., road crossing, sub aqueous utility line): _____
- Has an SCNW permit been issued for this site? ☐ Yes, for all activities ☐ Yes, for some activities ☐ No
- If yes, list permit number and corresponding activities: _____

V. Operator Information

- A. SWPPP Preparer: Jeffrey T. Herbig, P.E. S.C. Registration #: 20933
Company/ Firm: BP Barber S.C. COA #: C00020
Mailing Address: PO Box 1116 City: Columbia State: SC Zip: 29202-1116
Phone: (Day) (803)-254-4400 (Mobile) (803)-429-3464 (Fax) (803)-935-0792
Email address (optional): _____
- B. Operator of Day-to-Day Site Activities [ODSA] (Company or person): MRR Highway 92, LLC
Site Contact (If ODSA is company): Chris Roof
Mailing Address: 431 Raleigh View Road City: Raleigh State: NC Zip: 27610
Phone: (Day) (919)-835-3575 (Mobile) (919)-819-0251 (Fax) (919)-835-3653

VI. Signatures and Certifications

- A. One copy of the SWPPP, all specifications and supporting calculations, forms, and reports are herewith submitted and made a part of this application. I have placed my signature and seal on the design documents submitted signifying that I accept responsibility for the design of the system. Further, I certify to the best of my knowledge and belief that the design is consistent with the requirements of Title 48, Chapter 14 of the Code of Laws of SC, 1976 as amended, pursuant to Regulation 72-300 et seq., and in accordance with the terms and conditions of SCR100000. (This should be person identified in Section V.A.)

Please check one: ☒ Engineer ☐ Tier 2 Land Surveyor ☐ Landscape Architect

Jeffrey T. Herbig, P.E.

Printed name of SWPPP Preparer

Jeffrey T. Herbig

Signature of SWPPP Preparer

20933

S.C. Registration #

- B. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

I hereby certify that all land-disturbing construction and associated activity pertaining to this site shall be accomplished pursuant to and in keeping with the terms and conditions of the approved plans and SCR100000. I also certify that a responsible person will be assigned to the project for day-to-day control. I hereby grant authorization to the Department of Health and Environmental Control and/or the local implementing agency the right of access to the site at all times for the purpose of on site inspections during the course of construction and to perform maintenance inspections following the completion of the land-disturbing activity. (See Section 122.22 of S.C. Reg. 61-9 for signatory authority information.)

Ronald C. Gilkerson

Printed name of Project Owner/Owner's

Ronald C. Gilkerson

Signature of Project Owner/Owner's

SC Regional Manager

21153

AUG-04-2008 02:13PM FROM-S.C. ENVIRONMENTAL LAW PROJECT

+843 827 0540

T-258 P.002/007 F-843

71

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF THE
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Engaging and Guarding Laurens County's Environment, a non-profit membership organization,

Appellants,

vs.

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

Respondents.

RE: Class 2 Solid Waste Landfill Permit, No. LP2-002
Stormwater Permit, No. 30-07-08-02, SCR10G968
MRR Highway 92, LLC
Laurens County

RECEIVED
S.C. DEPT OF HEALTH
& ENVIRONMENTAL CONTROL
2008 AUG -4 PM 3:00
OFFICE OF THE COMMISSIONER
CHIEF OF STAFF
CLERK OF SCDHEC BOARD

REQUEST FOR FINAL REVIEW CONFERENCE

TO: THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL:

Engaging And Guarding Laurens County's Environment ("EAGLE") hereby requests that the Board of Health and Environmental Control conduct a final review conference to review the DHEC staff decisions to issue a Class 2 Solid Waste Landfill Permit, and to approve a Stormwater and NPDES general permit to MRR Highway 92, LLC, for the proposed Highway 92 C&D landfill in Laurens County.

The basis for this request is as follows:

THE APPELLANT

1. Engaging And Guarding Laurens County's Environment ("EAGLE") is a non-profit, membership-based organization existing under the laws of the State of South Carolina. EAGLE is devoted to the conservation, protection and preservation of natural resources and to the education of the public to accomplish these ends. EAGLE represents its members, who use and

enjoy the waters, wetlands and other natural resources of Laurens County in the vicinity of this project, and whose use and enjoyment are adversely affected by activities that impair or destroy these resources.

2. EAGLE and its members have vital interests in the protection of the land, air, waters, wetlands, and other natural resources in Laurens County, through the implementation and enforcement of the Solid Waste Management Act and the regulations promulgated thereunder. Members of EAGLE regularly use and enjoy the land, air, waters, wetlands, and other natural resources that are threatened and would be impacted by the landfilling activities that would be authorized by the permit at issue in this proceeding. These members enjoy bird-watching, observing nature, fishing, and recreating in the creeks, canals, and marshes in the area of the proposed landfill, and many of them live on the banks of the lake adjacent to which the proposed landfill is located. The existence and operation of the proposed landfill in this particular location will decrease the enjoyment of the area and its natural resources by members of EAGLE.

THE PROJECT

3. In 2006, MRR Highway 92, LLC, filed applications for permits to construct and operate a Construction, Demolition, and Land-Clearing Debris Landfill at a site on Choice Road off Highway 92 near Gray Court in Laurens County, South Carolina.

4. On July 18, 2008, the DHEC Bureau of Land and Waste Management gave notice of the proposed issuance of a Class 2 Solid Waste Landfill permit to MRR Highway 92, LLC, pursuant to the new landfill regulations that became effective in May, 2008.

5. On July 24, 2008, the DHEC Stormwater Permitting Section gave notice of the approval of a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES general permit.

GROUND'S FOR APPEAL

6. Section 44-96-290(E) of the Solid Waste Management Act states: "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department."

7. There is no need for this landfill, and there has been no demonstration of need:

A. The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill.

B. Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste.

C. There is an existing commercial Class Two solid waste landfill, known as the

Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton.

D. The needs test provided in DHEC Regulation 61-107.17 fails to comply with the "demonstration of need" requirement of Section 44-96-290 of the Act, in that said regulation does not in fact measure need at all. The permit proposed for the MRR landfill is a perfect example of the arbitrary and capricious result that is obtained using Regulation 61-107.17 in the manner in which it is presently interpreted and applied by the DHEC staff - resulting in a purported determination of need where clearly there is no objective need.

8. Section 44-96-80 of the South Carolina Solid Waste Policy and Management Act of 1991 authorizes and directs each county to prepare and maintain a solid waste management plan, and allows each county the option of having its own county plan or participating in a regional plan. Section 44-96-80(A) states in part that each solid waste management plan "must provide for public participation and include, at a minimum, the following:

(1) an estimate of the amount of solid waste currently disposed of at solid waste disposal facilities within that county or region and a projection of the amount of solid waste which will be disposed of at solid waste disposal facilities during the twenty-year period following this chapter's effective date;

(2) an estimate of the current capacity within that county or region to manage solid waste, including identification of each solid waste management facility and a projection of its useful life;

(3) an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period;

9. DHEC is charged with the responsibility for reviewing each county or regional solid waste management plan.

10. The Laurens County solid waste management plan fails to meet the requirements of Section 44-96-80, in that it fails to provide the estimates and analysis required by the subsections quoted above. Notwithstanding this failure, the DHEC staff has not informed the county of the failure, nor has it considered the inadequacy of the Laurens County plan in this permitting decision.

11. The proposed permit violates the South Carolina Solid Waste Policy and Management Act and the DHEC regulations implementing the Act, in the following respects:

A. The permit was issued in violation of Section 44-96-80 of the Act, in that the permit was based in part on a county solid waste management plan that fails to comply with the requirements of Section 44-96-80.

B. The permit is in violation of Section 44-96-180(B) and DHEC Regulations 61-107.17, in that there is no need for this landfill.

C. The DHEC staff erroneously applied Regulation 61-107.17 to imply a need for the landfill solely upon determining that there is one other such landfill within a 10-mile radius. This determination plainly and simply does not meet the demonstration of need requirements of Section 44-96-290(B) of the Act.

D. Because Laurens County generates less than 20,000 tons per year of Class II solid waste, and because the county already contains a commercial Class II solid waste landfill permitted for a capacity of 150,000 tons per year, there is no need for this landfill. The permitting of a second commercial Class II solid waste landfill in Laurens County would result in a capacity for disposal of such waste at least 15 times the actual amount of waste generated within Laurens County. Such a situation plainly would violate Section 44-96-290(B) of the Solid Waste Management Act.

E. The permit is in violation of DHEC Regulation 61-107.19, in that the landfill is incompatible with local land use, and the DHEC staff erroneously and improperly limited its examination of land use in this area. The landfill is incompatible with the homes, schools, recreation areas and roads within its immediate vicinity.

F. The permit is in violation of DHEC Regulation 61-107.19, in that the proposed landfill is not located on roadways that "are of all-weather construction and capable of withstanding anticipated load limits." The DHEC staff erroneously and improperly disclaimed responsibility for assessing road traffic, despite the express mandate of the regulations.

G. The proposed landfill would be located on a tract of land containing wetlands and adjacent to Lake Martin, an emergency water supply for Laurens County. EAGLE believes that this location is inappropriate and that the applicant has failed to demonstrate that this landfill will not cause significant negative impacts to the wetlands and lake.

H. Upon information and belief, the stormwater plan for this landfill fails to comply with applicable state and federal requirements, and fails to minimize the potential for floodwaters to come into contact with waste.

I. Upon information and belief, the landfill is likely to lead to injurious effects on groundwater in an area where the residents rely primarily upon well water.

J. Upon information and belief, the owners of the applicant limited liability

company have a history of landfill permit violations and closures in North Carolina.

K. Upon information and belief, a former official of the South Carolina Department of Health and Environmental Control is presently working as a consultant for MRR, creating at a minimum, the appearance of impropriety.

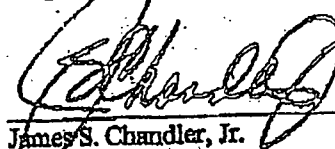
12. As a direct and proximate result of these violations and the proposed landfill, EAGLE and its members will suffer harm to their regulatory, recreational, environmental, aesthetic and other interests.

13. EAGLE reserves all rights under Section 44-1-60 and other applicable laws to present evidence and argument during the review proceeding.

RELIEF REQUESTED

WHEREFORE, Engaging And Guarding Laurens County's Environment ("EAGLE") requests that the Board conduct a final review conference in this matter and issue an order reversing the staff's proposed decision to issue this landfill permit, and rescinding the staff's initial permit decision.

Respectfully Submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 380
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Attorneys for Engaging And Guarding Laurens
County's Environment ("EAGLE")

Georgetown, South Carolina

August 4, 2008

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF THE
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Engaging and Guarding Laurens County's Environment, a non-profit
membership organization,

Appellants,

vs.

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

Respondents.

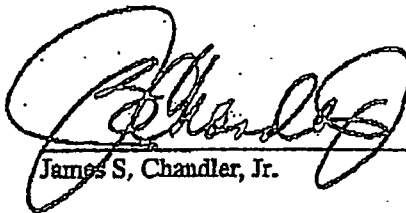
RE: Class 2 Solid Waste Landfill Permit, No. LF2-002
Stormwater Permit, No. 30-07-08-02, SCR10G968
MRR Highway 92, LLC, Laurens County

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the foregoing Request for Final
Review Conference upon the Respondents, by placing same in the United States mail, first-class
postage prepaid, addressed to:

Carl Roberts, Esquire
DHEC General Counsel
2600 Bull Street
Columbia, SC 29201

Mr. Ronald C. Gilkerson
MRR Highway 92 LLC
431 Raleigh View Road
Raleigh, NC 27610



James S. Chandler, Jr.

August 4, 2008

Georgetown, South Carolina

BOARD:

Paul C. Aughry, III
Chairman

Edwin H. Cooper, III
Vice Chairman

Steven G. Kiser
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:

Henry C. Scott

M. David Mitchell, MD

Glenn A. McCall

Coleman F. Buckhouse, MD

S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

August 21, 2008

U.S. Mail - CERTIFIED - Return Receipt

91 7108 2133 3935 6746 1838

James S. Chandler, Jr., Esquire
SC Environmental Law Project
Post Office Box 1380
Pawley's Island, South Carolina 29585

91 7108 2133 3935 6746 1821

Ronald C. Gilkerson, P.G.
MRR Highway 92, LLC
11743 Trails End Lane
Charlotte, North Carolina 28078

Via Interagency Mail Delivery

Etta R. Williams, Esquire
Stephen P. Hightower, Esquire
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201

RE: **Docket No. 08-RFR-94- Request review of staff decision dated July 18, 2008, to issue Permit No. LF2-002, Class 2 Solid Waste Landfill Permit, for Highway 92 C&D Landfill and Reprocessing Center and to approve a Stormwater and NPDES general permit (SCR100000).**

The S.C. Board of Health and Environmental Control decided on August 20, 2008, not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224

Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,


Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 20758

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's
Environment ("EAGLE"), a non-profit
membership organization,

Appellants,

vs.

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

Respondents.

Docket No. 08-ALC-07-0425-CC

REQUEST
FOR
CONTESTED CASE HEARING

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS:

Engaging And Guarding Laurens County's Environment ("EAGLE"), pursuant to Administrative Law Court Rule 11, hereby requests a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control to issue a Class 2 Solid Waste Landfill Permit, and to approve a Stormwater and NPDES general permit to MRR Highway 92, LLC, for the proposed Highway 92 C&D landfill in Laurens County.

In support of this request, the Petitioners submit the following:

THE PETITIONER

1. Engaging And Guarding Laurens County's Environment ("EAGLE") is a non-profit, membership-based organization existing under the laws of the State of South Carolina. EAGLE is devoted to the conservation, protection and preservation of natural resources and to the education of the public to accomplish these ends. EAGLE represents its members, who use and enjoy the waters, wetlands and other natural resources of Laurens County in the vicinity of this project, and whose use and enjoyment are adversely affected by activities that impair or destroy

SEP 16 2008

SC ADMIN. LAW COURT

these resources.

2. EAGLE and its members have vital interests in the protection of the land, air, waters, wetlands, and other natural resources in Laurens County, through the implementation and enforcement of the Solid Waste Management Act and the regulations promulgated thereunder. Members of EAGLE regularly use and enjoy the land, air, waters, wetlands, and other natural resources that are threatened and would be impacted by the landfilling activities that would be authorized by the permit at issue in this proceeding. These members enjoy bird-watching, observing nature, fishing, and recreating in the creeks, canals, and marshes in the area of the proposed landfill, and many of them live on the banks of the lake adjacent to which the proposed landfill is located. The existence and operation of the proposed landfill in this particular location will decrease the enjoyment of the area and its natural resources by members of EAGLE.

THE PROJECT

3. In 2006, MRR Highway 92, LLC, filed applications for permits to construct and operate a Construction, Demolition, and Land-Clearing Debris Landfill at a site on Choice Road off Highway 92 near Gray Court in Laurens County, South Carolina.

4. On July 18, 2008, the DHEC Bureau of Land and Waste Management gave notice of the proposed issuance of a Class 2 Solid Waste Landfill permit to MRR Highway 92, LLC, pursuant to the new landfill regulations that became effective in May, 2008.

5. On July 24, 2008, the DHEC Stormwater Permitting Section gave notice of the approval of a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES general permit.

6. On August 4, 2008, EAGLE filed a timely request for a final review conference before

the DHEC Board. On August 20, 2008, the Board voted to deny EAGLE's request for a final review conference. Copies of the staff decisions and the notice of the Board decision are attached hereto.

GROUND FOR APPEAL

7. Section 44-96-290(E) of the Solid Waste Management Act states: "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department."

There is no need for this landfill, and there has been no demonstration of need:

A. The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill.

B. Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste.

C. There is an existing commercial Class Two solid waste landfill, known as the Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton.

D. The needs test provided in DHEC Regulation 61-107.17 fails to comply with the "demonstration of need" requirement of Section 44-96-290 of the Act, in that said regulation does not in fact measure need at all. The permit proposed for the MRR landfill is a perfect

example of the arbitrary and capricious result that is obtained using Regulation 61-107.17 in the manner in which it is presently interpreted and applied by the DHEC staff - resulting in a purported determination of need where clearly there is no objective need.

8. Section 44-96-80 of the South Carolina Solid Waste Policy and Management Act of 1991 authorizes and directs each county to prepare and maintain a solid waste management plan, and allows each county the option of having its own county plan or participating in a regional plan. Section 44-96-80(A) states in part that each solid waste management plan "must provide for public participation and include, at a minimum, the following:

(1) an estimate of the amount of solid waste currently disposed of at solid waste disposal facilities within that county or region and a projection of the amount of solid waste which will be disposed of at solid waste disposal facilities during the twenty-year period following this chapter's effective date;

(2) an estimate of the current capacity within that county or region to manage solid waste, including identification of each solid waste management facility and a projection of its useful life;

(3) an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period;

9. DHEC is charged with the responsibility for reviewing each county or regional solid waste management plan.

10. The Laurens County solid waste management plan fails to meet the requirements of Section 44-96-80, in that it fails to provide the estimates and analysis required by the subsections

quoted above. Notwithstanding this failure, the DHEC staff has not informed the county of the failure, nor has it considered the inadequacy of the Laurens County plan in this permitting decision.

11. The proposed permit violates the South Carolina Solid Waste Policy and Management Act and the DHEC regulations implementing the Act, in the following respects:

A. The permit was issued in violation of Section 44-96-80 of the Act, in that the permit was based in part on a county solid waste management plan that fails to comply with the requirements of Section 44-96-80.

B. The permit is in violation of Section 44-96-180(E) and DHEC Regulations 61-107.17, in that there is no need for this landfill.

C. The DHEC staff erroneously applied Regulation 61-107.17 to imply a need for the landfill solely upon determining that there is one other such landfill within a 10-mile radius. This determination plainly and simply does not meet the demonstration of need requirements of Section 44-96-290(E) of the Act.

D. Because Laurens County generates less than 20,000 tons per year of Class II solid waste, and because the county already contains a commercial Class II solid waste landfill permitted for a capacity of 150,000 tons per year, there is no need for this landfill. The permitting of a second commercial Class II solid waste landfill in Laurens County would result in a capacity for disposal of such waste at least 15 times the actual amount of waste generated within Laurens County. Such a situation plainly would violate Section 44-96-290(E) of the Solid Waste Management Act.

E. The permit is in violation of DHEC Regulation 61-107.19, in that the landfill is incompatible with local land use, and the DHEC staff erroneously and improperly limited its

examination of land use in this area. The landfill is incompatible with the homes, schools, recreation areas and roads within its immediate vicinity.

F. The permit is in violation of DHEC Regulation 61-107.19, in that the proposed landfill is not located on roadways that "are of all-weather construction and capable of withstanding anticipated load limits." The DHEC staff erroneously and improperly disclaimed responsibility for assessing road traffic, despite the express mandate of the regulations.

G. The proposed landfill would be located on a tract of land containing wetlands and adjacent to Lake Martin, an emergency water supply for Laurens County. EAGLE believes that this location is inappropriate and that the applicant has failed to demonstrate that this landfill will not cause significant negative impacts to the wetlands and lake.

H. Upon information and belief, the stormwater plan for this landfill fails to comply with applicable state and federal requirements, fails to protect the waters of this state from the potential pollution from this landfill, and fails to minimize the potential for floodwaters to come into contact with waste.

I. Upon information and belief, the landfill is likely to lead to injurious effects on groundwater in an area where the residents rely primarily upon well water.

J. Upon information and belief, the owners of the applicant limited liability company have a history of landfill permit violations and closures in North Carolina.

K. Upon information and belief, a former official of the South Carolina Department of Health and Environmental Control is presently working as a consultant for MRR, creating at a minimum, the appearance of impropriety.

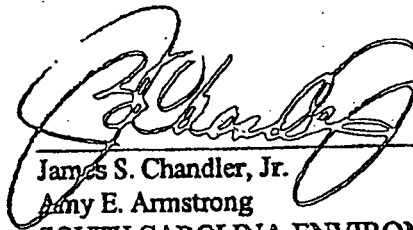
12. The Petitioner believes that there are additional violations that will be revealed through the process of discovery during this contested case proceeding.

13. As a direct and proximate result of these violations and the proposed landfill, EAGLE and its members will suffer harm to their regulatory, recreational, environmental, aesthetic and other interests.

RELIEF REQUESTED

WHEREFORE, Engaging And Guarding Laurens County's Environment ("EAGLE") requests that the Administrative Law Court conduct a contested case hearing and thereafter issue an order reversing the proposed decision to issue the permits and granting such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

**SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT**

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Pawleys Island, SC 29585

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FAX (843) 527-0540

**Attorneys for Engaging And Guarding Laurens
County's Environment ("EAGLE")**

Georgetown, South Carolina

September 16, 2008

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's
Environment ("EAGLE"), a non-profit
membership organization,

Appellants,

vs.

MRR Highway 92, LLC, and South Carolina
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Respondents.

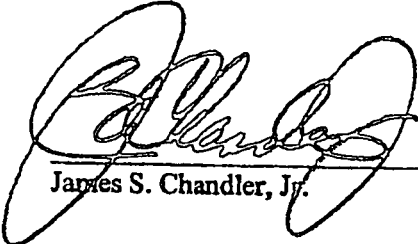
Docket No. 08-ALC-07-____-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Request for Contested Case
Hearing by placing copies of same in the United State Mail, addressed to:

Carl Roberts, Esquire
DHEC General Counsel
2600 Bull Street
Columbia, SC 29201

Mr. Ronald C. Gilkerson
MRR Highway 92 LLC
431 Raleigh View Road
Raleigh, NC 27610


James S. Chandler, Jr.

Georgetown, South Carolina

September 16, 2008

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Engaging and Guarding Laurens County's
Environment ("EAGLE"), a non-profit
membership organization,

Petitioner,

vs.

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

Respondents.

Docket No. 08-ALC-07-0425-CC

**PREHEARING STATEMENT
OF
PETITIONER**

Engaging And Guarding Laurens County's Environment ("EAGLE") hereby submits the following as its Prehearing Statement:

1. The nature of this proceeding.

This proceeding is a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control to issue a Class 2 Solid Waste Landfill Permit, and to approve a Stormwater and NPDES general permit to MRR Highway 92, LLC, for the proposed Highway 92 C&D landfill in Laurens County.

2. Statutory provisions conferring subject matter jurisdiction to the agency and other applicable statutes and regulations.

S.C. Code Ann. §§ 1-23-310, *et seq.*, SC Code Ann. § 1-23-600, and S.C. Code § 1-23-650 *et seq.* (1987 & Supp. 2006); S.C. Code Ann. § 48-1-10, *et seq.*; SC Code Ann. § 44-1-60(F); South Carolina Solid Waste Management Act, S.C. Code Ann. § 44-96-10 *et seq.*; DHEC Regulation R.61-107; the Stormwater Management and Sediment Reduction Act of 1991, S.C. Code Ann. §§ 48-14-10, *et seq.*; Stormwater regulations, S.C. Code Ann. Regs. §§ R.72-300 through 316; Water quality standards, S.C. Code Ann. Regs. § R.61-68.

3. The issues presented for determination.

- Section 44-96-290(E) of the Solid Waste Management Act states: "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." There is no need for this landfill, and there has been no demonstration of need;

- The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill.
- Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste.
- There is an existing commercial Class Two solid waste landfill, known as the Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton.
- The needs test provided in DHEC Regulation 61-107.17 fails to comply with the "demonstration of need" requirement of Section 44-96-290 of the Act, in that said regulation does not in fact measure need at all. Even if R.61-107.17 could allow for a true and objective determination of need, the regulation is applied by DHEC in an arbitrary and capricious manner in which no true assessment of need is made. The permit proposed for the MRR landfill is a perfect example of the arbitrary and capricious result that is obtained using Regulation 61-107.17 in the manner in which it is presently interpreted and applied by the DHEC staff - resulting in a purported determination of need where clearly there is no objective need.
- Section 44-96-80 of the South Carolina Solid Waste Policy and Management Act of 1991 authorizes and directs each county to prepare and maintain a solid waste management plan, and allows each county the option of having its own county plan or participating in a regional plan. Section 44-96-80(A) states in part that each solid waste management plan "must provide for public participation and include, at a minimum, the following:
 - (1) an estimate of the amount of solid waste currently disposed of at solid waste disposal facilities within that county or region and a projection of the amount of solid waste which will be disposed of at solid waste disposal facilities during the twenty-year period following this chapter's effective date;
 - (2) an estimate of the current capacity within that county or region to manage solid waste, including identification of each solid waste management facility and a projection of its useful life;
 - (3) an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period;
- DHEC is charged with the responsibility for reviewing each county or regional solid waste management plan.

- The Laurens County solid waste management plan fails to meet the requirements of Section 44-96-80, in that it fails to provide the estimates and analysis required by the subsections quoted above. Notwithstanding this failure, the DHEC staff has not informed the county of the failure, nor has it considered the inadequacy of the Laurens County plan in this permitting decision.
- The proposed permit violates the South Carolina Solid Waste Policy and Management Act and the DHEC regulations implementing the Act, in the following respects:
 - The permit was issued in violation of Section 44-96-80 of the Act, in that the permit was based in part on a county solid waste management plan that fails to comply with the requirements of Section 44-96-80.
 - The permit is in violation of Section 44-96-180(E) and DHEC Regulations 61-107.17, in that there is no need for this landfill.
 - The DHEC staff erroneously applied Regulation 61-107.17 to imply a need for the landfill solely upon determining that there is one other such landfill within a 10-mile radius. This determination plainly and simply does not meet the demonstration of need requirements of Section 44-96-290(E) of the Act.
 - Because Laurens County generates less than 20,000 tons per year of Class II solid waste, and because the county already contains a commercial Class II solid waste landfill permitted for a capacity of 150,000 tons per year, there is no need for this landfill. The permitting of a second commercial Class II solid waste landfill in Laurens County would result in a capacity for disposal of such waste at least 15 times the actual amount of waste generated within Laurens County. Such a situation plainly would violate Section 44-96-290(E) of the Solid Waste Management Act.
 - The permit is in violation of DHEC Regulation 61-107.19, in that the landfill is incompatible with local land use, and the DHEC staff erroneously and improperly limited its examination of land use in this area. The landfill is incompatible with the homes, schools, recreation areas and roads within its immediate vicinity.
 - The permit is in violation of DHEC Regulation 61-107.19, in that the proposed landfill is not located on roadways that "are of all-weather construction and capable of withstanding anticipated load limits." The DHEC staff erroneously and improperly disclaimed responsibility for assessing road traffic, despite the express mandate of the regulations.
 - The proposed landfill would be located on a tract of land containing wetlands and adjacent to Lake Martin, an emergency water supply for Laurens County. EAGLE believes that this location is inappropriate and that the applicant has failed to demonstrate that this landfill will not cause significant negative impacts to the wetlands and lake.

- Upon information and belief, the stormwater plan for this landfill fails to comply with applicable state and federal requirements, fails to protect the waters of this state from the potential pollution from this landfill, and fails to minimize the potential for floodwaters to come into contact with waste.
- Upon information and belief, the landfill is likely to lead to injurious effects on groundwater in an area where the residents rely primarily upon well water.
- Upon information and belief, the owners of the applicant limited liability company have a history of landfill permit violations and closures in North Carolina.
- Upon information and belief, a former official of the South Carolina Department of Health and Environmental Control is presently working as a consultant for MRR, creating at a minimum, the appearance of impropriety.
- The Petitioner believes that there are additional violations that will be revealed through the process of discovery during this contested case proceeding.

5. A brief summary of the facts to be presented at the hearing.

Engaging And Guarding Laurens County's Environment ("EAGLE") is a non-profit, membership-based organization existing under the laws of the State of South Carolina. EAGLE is devoted to the conservation, protection and preservation of natural resources and to the education of the public to accomplish these ends. EAGLE represents its members, who use and enjoy the waters, wetlands and other natural resources of Laurens County in the vicinity of this project, and whose use and enjoyment are adversely affected by activities that impair or destroy these resources.

EAGLE and its members have vital interests in the protection of the land, air, waters, wetlands, and other natural resources in Laurens County, through the implementation and enforcement of the Solid Waste Management Act and the regulations promulgated thereunder. Members of EAGLE regularly use and enjoy the land, air, waters, wetlands, and other natural resources that are threatened and would be impacted by the landfilling activities that would be authorized by the permit at issue in this proceeding. These members enjoy bird-watching, observing nature, fishing, and recreating in the creeks, canals, and marshes in the area of the proposed landfill, and many of them live on the banks of the lake adjacent to which the proposed landfill is located. The existence and operation of the proposed landfill in this particular location will decrease the enjoyment of the area and its natural resources by members of EAGLE.

In 2006, MRR Highway 92, LLC, filed applications for permits to construct and operate a Construction, Demolition, and Land-Clearing Debris Landfill at a site on Choice Road off Highway 92 near Gray Court in Laurens County, South Carolina.

On July 18, 2008, the DHEC Bureau of Land and Waste Management gave notice of the

proposed issuance of a Class 2 Solid Waste Landfill permit to MRR Highway 92, LLC, pursuant to the new landfill regulations that became effective in May, 2008. On July 24, 2008, the DHEC Stormwater Permitting Section gave notice of the approval of a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES general permit.

On August 4, 2008, EAGLE filed a timely request for a final review conference before the DHEC Board. On August 20, 2008, the Board voted to deny EAGLE's request for a final review conference.

The proposed permit would allow MRR to dispose of one hundred fifty-four thousand (154,000) tons per year of Class Two solid waste in the proposed landfill. Upon information and belief, Laurens County generates less than twenty thousand (20,000) tons per year of Class Two solid waste. There is an existing commercial Class Two solid waste landfill, known as the Curry Lake Road landfill, within 10 miles of the proposed MRR landfill, permitted for the disposal of approximately one hundred fifty thousand (150,000) tons per year of Class Two solid waste. According to the 2007 DHEC Solid Waste Management Annual Report, in 2007 the Curry Lake Road Landfill disposed of approximately sixty seven thousand two hundred sixty (67,260) tons of Class Two waste. In addition to the Curry Lake Road landfill, there are similar but smaller landfills operated by Laurens County and the City of Clinton. Accordingly, there is no need for this landfill.

Additional factual statements are set forth above in the statement of issues.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.

None identified to date. If any such motions are identified, this statement will be amended or supplemented.

7. A list of proposed witnesses and exhibits.

Witnesses:

Members of the Petitioner to establish standing: Jeff Nichols, Jimmy Martin, Jacqui Lanier and others

Art Braswell

Kent Coleman

Sarah Daniels

Keith Colingsworth

Marty Lindler

Jeff Herbig

Ronald C. Gilkerson

Jill Stewart

Jana White

Senator Daniel B. Verdin III

Representative Michael A. Pitts

Representative Jeffrey D. Duncan

Representative J. Adam Taylor

Jeff Field

Fred Counts

W. Dennis Ginn

J. Michael Reddeck

Joan Litton

Exhibits

Documents from the DHEC files related to this project

Maps and photographs of the landfill site and surrounding lands

Documents relating to waste generated in Laurens County

Documents relating to existing Class II landfills in and around Laurens County

Additional documents to be listed in an amended or supplemental prehearing statement

8. A statement regarding the necessity for discovery.

The Petitioner is serving a set of standard interrogatories and a first request for production of documents upon the Respondents simultaneously with the filing of this prehearing statement.

The Petitioner anticipates the possibility of additional requests for production of

documents and the need to take at least the three depositions allowed under the rules. The Petitioner may need to take additional depositions, and will make this decision after reviewing the prehearing statements of the Respondents and reviewing their responses to the initial round of discovery.

The Petitioner requests that the Court allow at least 90 days from the date of this prehearing statement for discovery and trial preparation.

9. The estimated length of the hearing.

Two to four days.

10. Any dates in the next one hundred twenty (120) days when you will not be available for a hearing.

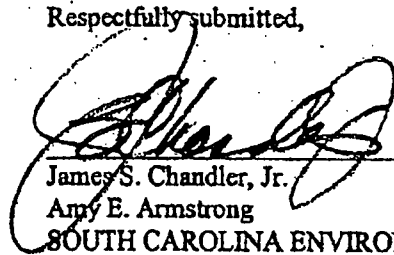
December 2, 9-11, 15-17; January 19-21, February 5

11. An email address where you can be reached.

jchandler@scelp.org

amy@scelp.org

Respectfully submitted,



James S. Chandler, Jr.
Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for Engaging And Guarding Laurens County's
Environment ("EAGLE")

Georgetown, South Carolina

November 17, 2008

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

Petitioner,

vs.

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

Respondents.

Docket No. 08-ALJ-07-0425-CC

**PREHEARING STATEMENT
OF RESPONDENT MRR
HIGHWAY 92, LLC**

Respondent MRR Highway 92, LLC ("MRR"), submits this Prehearing Statement pursuant to the Order for Prehearing Statements dated October 30, 2008.

1. **The nature of this proceeding:** On September 16, 2008, Petitioner Engaging and Guarding Laurens County's Environment ("EAGLE" or "Petitioner") filed an appeal of the decision of the South Carolina Department of Health and Environmental Control (the "Department") to issue a permit to MRR for construction and operation of Class Two landfill to be located on Choice Road off Highway 92 near Gray Court in Laurens County ("Proposed Landfill") and to authorize coverage for land-disturbing activities associated with construction of the Proposed Landfill under the State's NPDES General Permit for Storm Water Discharges for Large and Small Construction Activities SCR100000 ("State General Permit").

2. **Statutory provision(s) conferring subject matter jurisdiction to the Court and other applicable statutes and regulations:** Jurisdiction is conferred pursuant to S.C. CODE ANN. §§ 1-23-310, *et seq.*, and S.C. CODE ANN. § 44-1-60. Other applicable statutes and

regulations include S.C. CODE ANN. §§ 44-96-80 and 44-96-290 and S.C. CODE REGS. 61-9.122, 61-107.17, and 61-107.19.

3. The issues to be presented for determination: This appeal raises the following issues for determination:

- (a) Whether the Department properly approved a demonstration of need for the Proposed Landfill pursuant to S.C. CODE ANN. § 44-96-290(E) and S.C. CODE REGS. 61-107.17;
- (b) Whether the Department properly determined that the Proposed Landfill conforms to the requirements of S.C. CODE REGS. 61-107.19;
- (c) Whether the Department properly determined that the Proposed Landfill is consistent with local zoning ordinances and the local solid waste management plan pursuant to S.C. CODE ANN. § 44-96-290(F); and
- (d) Whether MRR met the requirements for eligibility for coverage under the State General Permit for land-disturbing activities associated with construction of the Proposed Landfill.

4. The action requested of the Court: MRR requests that the Court find that the Department's issuance of the Permit for the Proposed Landfill was proper under the South Carolina Solid Waste Policy and Management Act, S.C. CODE ANN. § 44-96-10 *et seq.* ("the Act") and S.C. CODE REGS. § 61-107.19 and that the authorization for coverage under the State General Permit was proper under CODE REGS. § 61-9.122.

5. A brief summary of the facts to be presented at the hearing:

On February 21, 2006, MRR requested a demonstration of need determination and a consistency determination for the Proposed Landfill. On March 3, 2006, the Department issued a demonstration of need approval to MRR with a maximum annual disposal limit 154,000 tons. By letter dated March 1, 2006, the Department advised the Laurens County administrator of its preliminary determination that the Proposed Landfill was consistent with the 1997 County Plan, the current solid waste management plan on file with the Department at that time, and requested

comments within 14 days. By letter dated March 9, 2006, Laurens County concurred in the Department's determination of consistency with the County Plan. On March 14, 2006, the Department issued a preliminary consistency determination for the Proposed Landfill. On June 27, 2006, MRR submitted an application for a permit for the Proposed Landfill to the Department. On July 14, 2006, the Department advised MRR that its permit application was administratively complete and that the technical review of the application would begin.

On or about July 17, 2006, the Laurens County Council ("County Council") passed Ordinance No. 622, which purported to reduce the number of allowable privately owned long-term construction, demolition, and land-clearing debris landfills from three to one. By memorandum dated July 18, 2006, Scott Holland of the Laurens County Department of Public Works advised the Department that Ordinance No. 622 had passed and requested that the Department amend the 1997 County Plan to include this ordinance. By letter dated July 26, 2006, the Department notified MRR of its final consistency determination based on this purported amendment to the 1997 County Plan and denied the permit for the Proposed Landfill. On February 13, 2007, Laurens County repealed Ordinance No. 622 and its purported amendment of the 1997 County Plan. Thereafter, the Department continued its technical review of MRR's permit application.

The Department properly determined that MRR's permit application for the Proposed Landfill complied with the technical permitting requirements of the Act and S.C. CODE REGS. 61-107.17 and placed the proposed permit on public notice. On March 13, 2008, the Department held a public hearing on the Proposed Landfill in Gray Court. On July 18, 2008, the Department issued MRR a Class Two landfill permit for the Proposed Landfill.

In 2007, MRR filed with the Department a notice of intent to conduct land-disturbing

activities associated with the construction of Proposed Landfill under the State General Permit. By letter dated July 24, 2008, the Department notified MRR of the approval of its Stormwater Pollution Prevention Plan ("SWPPP") for these construction activities associated and granted MRR coverage under the State General Permit. The SWPPP and the coverage under the State General Permit address stormwater management for construction of the Proposed Landfill only—not for the operation of the Proposed Landfill following construction.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion: MRR intends to file a motion to strike or other appropriate motion pursuant to Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court and Rule 12 of the South Carolina Rules of Civil Procedure to address those allegations raised by Petitioner that are immaterial and impertinent to the issues properly before the Court in this matter. MRR reserves the right to raise other motions as may be appropriate as discovery progresses in this matter.

7. A list of proposed witnesses and exhibits: At this time, MRR would anticipate calling the following witnesses:

- (a) Ron Gilkerson – MRR Highway 92, LLC;
- (b) Rudy Curtis – B.P. Barber and Associates, Inc.;
- (c) Jeff Herbig – B.P. Barber and Associates, Inc.;
- (d) Charles Wilson - Schnabel Engineering ; and
- (e) Kent M. Coleman – South Carolina Department of Health and Environmental Control;
- (f) Joan F. Litton – South Carolina Department of Health and Environmental Control;
- (g) Keith Collinsworth – South Carolina Department of Health and Environmental Control; and
- (h) Jill C. Stewart – South Carolina Department of Health and Environmental Control;

MRR reserves the right to name additional witnesses.

At this time, MRR would anticipate introducing the following exhibits:

- (a) The Department's permit application file for the Proposed Landfill;
- (b) 1997 Laurens County Solid Waste Management Plan;
- (c) The Department's file on MRR's notice of intent to conduct land-disturbing activities under the State General Permit.

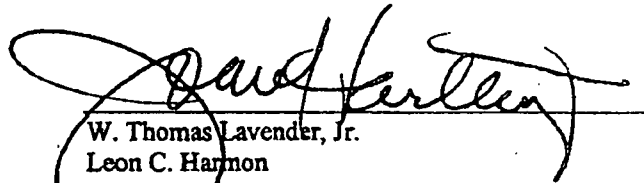
MRR reserves the right to introduce additional exhibits.

8. A statement regarding the necessity for discovery, if any: MRR anticipates discovery in the form of interrogatories, requests to produce, requests to admit, and depositions.

9. The estimated length for the hearing: Two (2) days.

10. Any dates in the next three months when the parties, counsel or key witnesses will not be available for a hearing: January 19-23, 2008.

11. Email addresses: wlavender@nexsenpruet.com; lharmon@nexsenpruet.com; and jhartley@nexsenpruet.com.



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Attorneys for Respondent
MRR Highway 92, LLC

November 14, 2008
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Engaging & Guarding Laurens County's
Environment ("EAGLE"), a non-profit
Membership organization,

Petitioner,

vs.

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

Respondents.

Docket No. 08-ALJ-07-0425-CC

**PREHEARING STATEMENT OF
RESPONDENT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL**

Responding to the *Order for Prehearing Statements* issued by the Honorable Ralph King Anderson, III, Administrative Law Court Judge, on October 30, 2008, Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") hereby submits the following:

1. The nature of this Proceeding:

Petitioner Engaging & Guarding Laurens County's Environment ("EAGLE"), a non-profit Membership organization, appeals to the Administrative Law Court ("ALC") for a Request of Contested Case hearing in the above-captioned matter, based upon EAGLE's assertion that S.C. Code Ann. § 44-96-290(E) has been violated because there has been no demonstration of need for Respondent MRR Highway 92, LLC's ("MRR") proposed landfill, prior to DHEC's issuance of a permit for the landfill, and Petitioner EAGLE opposes DHEC's issuance of coverage to MRR under National Pollutant Discharge Elimination System ("NPDES") Construction General Permit SCR10G968.

2. Statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations:

The statutory provisions conferring subject matter jurisdiction on this tribunal are pursuant to Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-310 *et seq.* (Supp. Revised 2005). Additional applicable statutes and regulations are as follows:

Prehearing Statement on 11-13-08
EAGLE vs. DHEC & MRR; DHEC File No.: 20752.1

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SC ADMIN. LAW COURT

- Sections 44-96-10 *et seq.* (Supp. 2006), South Carolina Solid Waste Policy and Management Act;
- Sections 48-1-10 *et seq.* (2008 & Supp. 2007), Pollution Control Act;
- Sections 48-14-10 *et seq.* (2008), Stormwater Management and Sediment reduction Act;
- 24 S.C. Code Regs. 61-9 (Supp. 2007), Water Pollution Control Permits;
- 25A S.C. Code Regs. 61-107.17 (Supp. 2006), Solid Waste Management: Demonstration-of-Need;
- 25A S.C. Code Regs. 61-107.19 (Supp. 2008), Solid Waste Management: Solid Waste Landfills and Structural Fill; and
- 26 S.C. Code Ann. Regs. 72-300 *et seq.* (Supp. 2007), Standards for Stormwater Management and Sediment Reduction.

3. The issues presented for determination;

The issues presented for determination are whether the Department issued, in compliance with the applicable statutes and regulations, a landfill permit and coverage under NPDES Construction General Permit Coverage SCR10G968, to MRR.

4. The action requested of the Court, if any;

The Department respectfully requests that this Court issue an Order upholding the Department staff's issuance of the landfill permit to MRR and that it sustains the Department's decision to issue coverage under NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities to MRR for initial land disturbance for the construction of the Hwy. 92 C & D Landfill and Reprocessing Center.

5. A brief summary of the facts to be presented at the hearing;

On July 18, 2008, the Department approved the application of MRR Landfill, LLC, for a new Class 2 landfill that is to be located on Choice Road off Highway 92 in Gray Court, Laurens County, South Carolina. Also, on July 30, 2008, the Department issued coverage under the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities to MRR for initial land disturbance for the construction of the Hwy. 92 C & D Landfill and Reprocessing Center, to be located at the same address location stated above. Due to DHEC's above-stated actions, EAGLE requested a review conference of DHEC's decisions of the DHEC Board ("Board") on August 4, 2008. The Board decided on August 20, 2008, not to conduct a Final Review Conference and EAGLE was mailed notification of

the Board's decision on August 21, 2008. Subsequently, on September 16, 2008, EAGLE mailed for filing with the ALC a Request for a Contested Case hearing in this matter.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;

Presently, the Department anticipates raising several motions in this case, such as a Motion for a More Definite Statement, a Motion to Exclude Certain Issues, and a Motion to Dismiss. The authority underlying each Motion is pursuant to the South Carolina Rules of Civil Procedure ("SCRCF").

7. A list of proposed witnesses and exhibits:

Witnesses:

Kent M. Coleman, P.G., Director
Division of Mining and Solid Waste Management
Bureau of Land and Waste Management, DHEC

Joan P. Litton, Manager
Solid Waste Permitting Section
Bureau of Land and Waste Management, DHEC

Keith Collinsworth, P. G., Manager
Solid Waste Groundwater Section
Bureau of Land and Waste Management, DHEC

Jill C. Stewart, P. E., Manager
Stormwater Permitting Section
Bureau of Water, DHEC

At

SC DHEC
Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201-1708

Exhibits:

The DHEC file in this matter.

8. A statement regarding the necessity for discovery, if any;

The Department does not anticipate conducting discovery at this time, however, it reserves the right to conduct discovery as may prove necessary, in accordance with the Rules of Court for the Administrative Law Court.

9. The estimated length of the hearing;

The Department anticipates the hearing will take approximately 2 days.

10. Any dates in the next one hundred twenty (120) days when you will not be available for a hearing; and

November 17-20, & 24-28; December 2-5, 8, 11-12, 18-19, & 22; January 2, 5, 12-14, 20, & 27-30; and February 3-4.

11. An email address where you can be reached.

Counsel can be reached by email at williaer@dhec.sc.gov and hightosp@dhec.sc.gov.

Respectfully submitted,

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SC Bar Number 16663

Stephen P. Hightower
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November 13, 2008
Columbia, South Carolina

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

May 1, 2009

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OUR MISSION

*To protect the natural
environment of South
Carolina by providing
legal services and advice
to environmental
organizations and
concerned citizens
and by improving the
state's system of
environmental
regulation.*

Honorable Ralph King Anderson, III
Judge, S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29211

Re: Engaging And Guarding Laurens County's
Environment ("EAGLE") vs. MRR Highway 92, LLC
and SC DHEC
Case Number 08-ALC-07-0425-CC

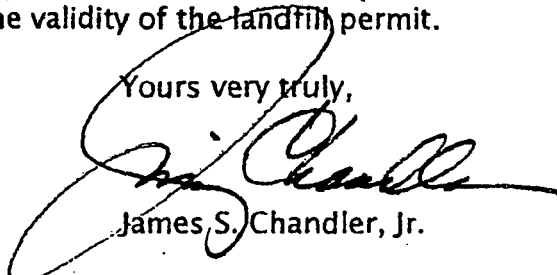
Dear Judge Anderson:

Enclosed for filing please find the Petitioner's Motion for Summary Judgment and Response to MRR Highway 92's Motion for Summary Judgements, along with Exhibits, my certificate of service and a check for the motion filing fee.

Please have your staff return a clocked in copy of the Motion in the envelope provided.

The Petitioner has decided to limit its appeal to the question of the need for this landfill. Accordingly, the Petitioner hereby withdraws all of its grounds for appeal as set forth in the Petitioner's Request for Contested Case Hearing and Prehearing Statement, except as to the issues and grounds set forth relating to the need for this landfill, the validity of Regulation 61-107.17, the requirements of Section 44-96-290(E) of the Solid Waste Management Act, and the manner in which the Act and regulations have been applied in determining the issue of need in this case. Our challenge to the stormwater permit is withdrawn except insofar as that permit depends upon the validity of the landfill permit.

Yours very truly,


James S. Chandler, Jr.

cc: Etta R. Williams, Esquire
Stephen P. Hightower, Esquire
Joan W. Hartley, Esquire
W. Thomas Lavender, Esquire

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 08-ALJ-07-0425-CC

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

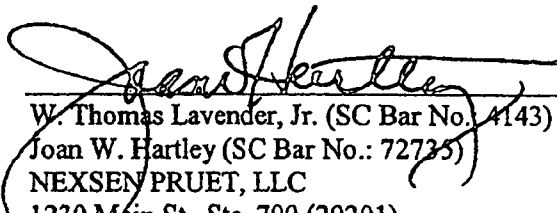
v.

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

of whom MRR Highway 92, LLC is Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.


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April 7, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 08-ALJ-07-0425-CC

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

v.

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

of whom MRR Highway 92, LLC is Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ("ALC") HAVE JURISDICTION TO CONDUCT A CONTESTED CASE HEARING CONCERNING THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S ISSUANCE OF A DEMONSTRATION OF NEED TO MRR ON MARCH 3, 2006?
- II. DID THE ALC ERR IN HOLDING THAT EXCESS PERMITTED DISPOSAL CAPACITY OF C&D LANDFILLS WITHIN THE PROPOSED FACILITY'S PLANNING AREA COULD BE AN "ADDITIONAL FACTOR" UNDER SUBSECTION (D)(3)(d) OF S.C. CODE ANN. REGS. § 61-107.17 ("DON REGULATION")?
- III. DID THE ALC ERR IN FAILING TO GIVE DEFERENCE TO THE DEPARTMENT'S INTERPRETATION OF SECTION 44-96-290(E) OF THE SOLID WASTE ACT?
- IV. DID THE ALC ERR IN FINDING THAT THE DEPARTMENT FAILED TO EXERCISE ITS DISCRETION TO DENY MRR'S DON REQUEST BASED ON EXCESS PERMITTED DISPOSAL CAPACITY WITHIN THE PLANNING AREA FOR THE PROPOSED FACILITY?
- V. DID THE ALC IMPROPERLY RULE ON THE FACIAL VALIDITY OF THE DON REGULATION?
- VI. DID THE ALC ERR IN ADMITTING INTO EVIDENCE REPORTS WHICH DID NOT EXIST AT THE TIME OF THE DEPARTMENT'S DECISION?
- VII. IS THE ALC'S FINDING THAT THE PROPOSED FACILITY IS NOT NEEDED ARBITRARY?
- VIII. IS THE ALC'S FINDING THAT THE PROPOSED FACILITY IS NOT NEEDED SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD?

STATEMENT OF THE CASE

On March 3, 2006, the South Carolina Department of Health and Environmental Control ("Department") issued a demonstration of need ("DON") determination to Appellant 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 Facility"). (See March 3, 2006 letter from Joan Litton to Ronald C. Gilkerson, Pet. Ex. 8, R. p. 367). On July 18, 2008, the Department issued a permit for construction and operation of the Proposed Facility ("Landfill Permit"). (Pet. Ex. 22, R. pp. 406-13). On July 24, 2008, the Department authorized discharge of storm water associated with the construction of the Proposed Facility 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). On August 4, 2008, EAGLE requested that the Board of Health and Environmental Control ("Board") review the Department'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 Facility. (See Request for Final Review Conference dated August 4, 2008, R. pp. 805-10). 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 from Lisa Lucas Longshore, R. pp. 811-12). Thereafter, on September 16, 2008, EAGLE filed a Request for Contested Case Hearing, seeking review of the Department's decision by the ALC. (See Request for Contested Case Hearing dated September 16, 2008, R. pp. 813-20).

On March 17, 2009, MRR filed a motion for partial summary judgment with respect to all issues raised in EAGLE's Request for Contested Case Hearing regarding the Department's issuance of the permit for the Proposed Facility. (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). 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). 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). In the letter accompanying EAGLE's motion and response, EAGLE advised the ALC that it was withdrawing all grounds for appeal of the Department's decisions except for those related to the Department's issuance of the DON on March 3, 2006. (See May 1, 2009 letter from James S. Chandler, Jr. to The Honorable Ralph King Anderson, III, R. p. 837). On May 18, 2009, MRR and the Department 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).

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., hereinafter "Summary Judgment Hearing," R. pp. 25-81). On June 5, 2009, MRR and the Department filed a supplemental reply to EAGLE's motion for summary judgment to address additional arguments raised by EAGLE at the hearing on the motions for summary judgment. (See Respondents' Joint Supplemental Reply to Petitioner's Motion for Summary Judgment and Response to Respondent's Motion for Summary Judgment). The ALC denied both motions for summary judgment, ruling that there was a genuine

issue of material fact as to whether the Department should have denied the permit for the Proposed Facility based on the Department'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).

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). At the hearing on the merits, MRR moved for dismissal of EAGLE's appeal of the Department's issuance of the DON based on lack of subject matter jurisdiction. (Trial Tr., pp. 4-6, R. pp. 85-87). On August 4, 2009, EAGLE filed a response to MRR's motion to dismiss. (See Petitioner's Response to Motion to Dismiss, R. pp. 719-83). On August 12, 2009, MRR filed a reply to EAGLE's response. (See Respondent MRR Highway 92, LLC's Reply to Petitioner's Response to Motion to Dismiss, R. pp. 784-94). On August 13, 2009, the Department filed a reply to EAGLE's response. (See August 13, 2009 letter from Etta R. Williams to The Honorable Ralph King Anderson, III). On August 18, 2009, EAGLE filed a sur-reply in opposition in response to the motion to dismiss. (See Petitioner's Sur-Reply in opposition to Motion to Dismiss, R. pp. 795-98). On October 29, 2009, the ALC issued its Final Order and Decision, finding that the Proposed Facility is not needed and thus reversing the Department's issuance of the permit to MRR.

STATEMENT OF THE FACTS

On February 21, 2006, a request for a demonstration of need determination was submitted to DHEC for construction and operation of the Proposed Facility. (See February 21, 2006 letter from Rudy M. Curtis to Joan Litton, Pet. Ex. 7, R. pp. 366). At the time, there were fewer than two commercial Part IV C&D landfills within a ten-mile planning radius of the Proposed Facility. (Transcript of Administrative Hearing on July 22, 2009, hereinafter "Trial Tr.," p. 90, ll. 3-25, R. p. 171). By certified letter dated March 3, 2006, the Department issued MRR a DON approval for the Proposed Facility. (See Pet. Ex. 8, R. p. 367). Following receipt of the DON approval, MRR submitted an application for the Landfill Permit. (Trial Tr., p. 147, ll. 1-11, R. p. 228). By letter dated June 12, 2006, Jeff Nichols, a member of EAGLE, requested information related to the Department's consideration of the Landfill Permit, including information on the determination of need for the Proposed Facility. (See Pet. Ex. 9, R. pp. 368-75).

A. Calculation of the Annual Disposal Rate for the Proposed Facility

In calculating the annual disposal rate for a proposed facility, 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 county or counties 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). Pursuant to 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 facility. S.C. CODE ANN. REGS. § 61-107.17(B)(6) (Supp. 2008). The ten-mile planning radius for the Proposed Facility includes portions of Laurens, Spartanburg, and Greenville Counties. (Trial Tr., p. 95, ll. 2-4, R. p. 176).

According to the 2007 South Carolina Solid Waste Management Annual Report, the amount of construction, demolition, and yard-clearing debris ("C&D") waste generated in Laurens, Spartanburg, and Greenville Counties was reported to the Department as follows:

Laurens County:	8,434 tons in 2004
	6,635 tons in 2005
	9,479 tons in 2006
	16,860 tons in 2007
Spartanburg County:	58,803 tons in 2004
	71,424 tons in 2005
	68,662 tons in 2006
	72,161 tons in 2007
Greenville County:	87,157 tons in 2004
	142,767 tons in 2005
	163,450 tons in 2006
	161,738 tons in 2007

(Pet. Ex. 24, p. 75, R. p. 420). The DON approval for the Proposed Facility established a maximum annual disposal limit of 154,000 tons per year based on 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). 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). Accordingly, the total C&D waste generated in these counties in 2004 was 154,394.

According to the South Carolina Solid Waste Management Annual Report for Fiscal Year 2007, the permitted annual rate of disposal for the Part IV C&D Landfills in Greenville, Laurens, and Spartanburg Counties is as follows: 510,157 tons per year in

Greenville County, 251,866 tons per year in Laurens County, and 80,000 tons per year in Spartanburg County—for a total of 842,023 tons per year. (Pet. Ex. 24, p. 72-73, R. p. 417-18).

B. Permitted Disposal Capacity in Laurens County

At the time of the DON approval, there were three permitted Part IV C&D Landfills in Laurens County—the City of Clinton C&D Landfill, the Laurens County C&D Landfill, and Curry Lake C&D Landfill. According to the 2007 State Solid Waste Management Annual Report, the City of Clinton C&D Landfill had a permitted annual rate of disposal of 1,375 tons per year. (Pet. Ex. 24, p. 73, R. p. 418). The Laurens County C&D Landfill had an annual rate of disposal 8,900 tons per year. *Id.* The Laurens County C&D Landfill ceased accepting waste in May of 2009 and is currently in the process of closure. (Trial Tr. p. 28, ll. 5-11, R. p. 109). Curry Lake C&D Landfill is the only commercial C&D Landfill in Laurens County. According to the 2007 State Solid Waste Management Annual Report, Curry Lake C&D Landfill has an annual rate of disposal of 241,591 tons per year. (Trial Tr. p. 82, ll. 1-22, R. p. 163; Pet. Ex. 24, p. 73, R. p. 418). The site of the Proposed Facility is approximately three miles from the Curry Lake C&D Landfill. (Trial Tr. p. 186, ll. 18-21, R. p. 267). 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). 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 Facility. (Pet. Ex. 26, R. p. 437).

C. Permitted Disposal Capacity in Spartanburg County

According to the 2007 South Carolina Solid Waste Management Annual Report,

Wasp Nest Road C&D Landfill ("Wasp Nest Landfill") is the only permitted C&D landfill in Spartanburg County. (Pet. Ex. 24, p. 73, R. p. 418). Wasp Nest Landfill has an annual disposal rate of 80,000 tons per year. (Pet. Ex. 24, p. 73, R. p. 418). However, only 49,876 tons of the 72,161 tons of waste generated in Spartanburg County in fiscal year 2007 was disposed of in Spartanburg County. (Pet. Ex. 24, pp. 73-74, R. pp. 418-19). Significantly, the estimated remaining life of Wasp Nest Landfill was only 1.6 years in 2007. (Pet. Ex. 24, p. 73, R. p. 418).

D. Permitted Disposal Capacity in Greenville County

In 2007 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). Scott Holland, Public Works Director for Laurens County, testified that Greenville County's Twin Chimneys C&D Landfill is located approximately five miles from the Laurens County boundary line and that a commercial Part IV C&D Landfill owned by Republic Industries is located approximately ten to twelve miles from the county line. (Trial Tr. p. 54, l. 22 – p. 55, l. 7, R. pp. 135-36).

E. The Department's decision on the DON Request

During the review of the DON request for the Proposed Facility, the Department 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; p. 166, l. 19 – p. 167, l. 2, R. pp. 247-48; p. 159, ll. 5-20, R. p. 240). The Department staff was also 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). Kent Coleman, Director of the Division of Mining and Solid Waste Management,

testified that the planning area established in the Department's DON Regulation is a regional concept. (Trial Tr. p. 100, ll. 12-14, R. p. 181). Mr. Coleman testified that many of the Part IV C&D Landfills in the three-county planning area for the Proposed Facility accept waste from other counties. (Trial Tr. p. 105, ll. 2-10, R. p. 186). 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). 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).

At the time of the DON determination for the Proposed Facility, no other information was submitted to the Department for consideration in making that determination. (Trial Tr. p. 158, l. 23 – p. 159, l. 6, R. pp. 239-40). Kent Coleman testified that even though the Department 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 Facility, such considerations did not warrant denial of the DON request. (Trial Tr. p. 159, ll. 5-20, R. p. 240; p. 161, l. 13 – p. 162, l. 6, R. pp. 242-43).

The Department received comments regarding the Proposed Facility throughout the permitting process, including comments regarding the need for the Proposed Facility. (Trial Tr. p. 147, l. 12 – p. 149, l. 25, R. pp. 228-30; p. 160, ll. 3-25, R. p. 241). The Department reviewed all of the comments submitted to the Department, but none of the

comments caused the Department to reconsider is 2006 determination on the DON approval. (Trial Tr. p. 149, l. 21 – p. 150, l. 6, R. pp. 230-31). On July 18, 2008, the Department issued a permit for construction and operation of the Proposed Facility. (Pet. Ex. 22, R. pp. 406-13).

STANDARD OF REVIEW

Appellate review of an ALC decision is governed by S.C. CODE ANN. § 1-23-610

which states:

(B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. CODE ANN. § 1-23-610(B) (Supp. 2008). In a contested case hearing before the ALC, the party challenging the Department's decision has the burden of proof. *Young v. South Carolina Dep't of Health and Envtl. Control*, 383 S.C. 452, 459, 680 S.E.2d 784, 788 (Ct. App. 2009) (citing *Hoffman v. Greenville County*, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963)).

ARGUMENTS

I. THE ALC DID NOT HAVE SUBJECT MATTER JURISDICTION TO HEAR EAGLE'S REQUEST FOR CONTESTED CASE HEARING ON THE DEPARTMENT'S ISSUANCE ON THE DON APPROVAL ON MARCH 3, 2006.

The ALC did not have jurisdiction to hear EAGLE's contested case because EAGLE did not timely file its Request for Contested Case Hearing for review of the Department's decision on the DON approval issued to MRR on March 3, 2006. Pursuant to Rule 11 of the South Carolina Rules of Procedure for the Administrative Law Court, which governed the appeal of a Department decision at that time, EAGLE was required to file a request for a contested case hearing within thirty (30) days after actual or constructive notice of the issuance of the DON approval but no later than ninety (90) days after the date of the DON approval.¹ Rule 11, SCRPAALC. "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 120, 678 S.E.2d 430, 433 (2009). Issues related to subject matter jurisdiction may be raised at any time. *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998). The lack of subject matter jurisdiction may not be waived, even by consent of the parties. *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). EAGLE did not file an appeal of the DON approval until its request for Board review was filed on August 4, 2008—more than two years later. Accordingly, the ALC lacked subject matter jurisdiction to hear EAGLE's appeal of the Department's decision to the issue the DON approval.

¹ Effective July 1, 2006, Section 44-1-60 established the procedure and time limits for appeals from decision of the South Carolina Department of Health and Environmental Control. At the time of the Department's decision on MRR's DON request, Rule 11 of the South Carolina Rules of Procedure for the Administrative Law Court governed the time for filing an appeal of decisions of the South Carolina Department of Health and Environmental Control.

A. The Department's decision on MRR's DON request is a final agency decision.

The Department's decision on MRR's DON request is separate and distinct from the Department's decision to issue a permit for the Proposed Facility. Section 44-96-290(E) of the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* ("Solid Waste Act"), provides that a demonstration of need must be approved by the Department prior to the permitting of a solid waste management facility. S.C. CODE ANN. § 44-96-290(E) (2002) (emphasis added). The Act requires the Department to promulgate regulations for determining need for solid waste management facilities. S.C. CODE ANN. § 44-96-290(E) (2002). The regulation governing demonstration of need for the Proposed Facility is S.C. CODE ANN. REGS. § 61-107.17 ("DON Regulation"). 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008) (prior to amendment effective June 29, 2009). On February 21, 2006, MRR requested a DON determination from DHEC for the Proposed Facility. (*See* Pet. Ex. 7, R. p. 366). By certified letter dated March 3, 2006, the Department advised MRR of its decision to approve the DON for the Proposed Facility. (*See* Pet. Ex. 8, R. p. 367). At the time of the Department's decision to approve the DON for the Proposed Facility, the requirements for permitting of Part IV C&D Landfills were set forth in S.C. CODE ANN. REGS. § 61-107.11 ("C&D Landfill Regulation"). 25A S.C. CODE ANN. REGS. § 61-107.11 (repealed by S.C. CODE REGS ANN. § 61-107.19 effective May 23, 2008).² The Part IV C&D Landfill Regulation makes no reference to the DON approval. MRR did

² Prior to the final permitting decision on the Proposed Facility, DHEC promulgated a new regulation governing permitting of C&D landfills. Pursuant to S.C. CODE ANN. REGS. § 61-107.19, Part I.D.1.b ("New Landfill Regulation"), a DON approval issued by the Department prior to the New Landfill Regulation's effective date of May 23, 2008, remained in effect. Accordingly, the Department's decision to issue a DON approval for the Proposed Facility on March 3, 2006, remained the effective DON approval for the Proposed Facility, and MRR was not required to seek a new DON approval under the New Landfill Regulation.

not submit an application for the permit for the Proposed Facility pursuant to the Part IV C&D Landfill Regulation until after receiving the Department's decision to approve the DON. (Trial Tr., p. 147, ll. 1-11, R. p. 228). Accordingly, the March 3, 2006 DON determination was a final agency decision separate and distinct from the subsequent permitting decision for the Proposed Facility.

In its response to MRR's motion to dismiss, EAGLE argued that the decision was not a final agency decision subject to a contested case hearing because there was no public notice of the DON approval prior to the Department's issuance on March 3, 2006. (See Petitioner's Response to Motion to Dismiss, p. 5, R. p. 723). However, there is nothing in the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA"), which requires such notice. Additionally, neither the Solid Waste Act nor the DON Regulation requires public notice of a DON approval. While the APA defines "contested case" as a proceeding "in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing," the opportunity for hearing referenced in this provision is the hearing before the ALC. S.C. CODE ANN. § 1-23-310(3) (Supp. 2008). As such, the DON approval is a Department decision subject to review in a contested case hearing.

B. EAGLE failed to timely file for review of the Department's issuance of a DON approval for the Proposed Facility.

Pursuant to Rule 11(C), SCRPA, a request for a contested case hearing to challenge an agency decision "must be filed and served within thirty (30) days after actual or constructive notice of the agency's determination." Rule 11(C), SCRPA. Rule 11 further provides that "no request shall be filed more than ninety (90) days after the date of the issuance of the order or determination unless the administrative law judge

assigned to the case finds that substantial cause exists for allowing the filing beyond the ninety (90) day period." Rule 11(C), SCRPAALC. There is no doubt that these deadlines for filing apply to the DON determination issued on March 3, 2006. Indeed, if the Department staff had denied MRR's DON request or if MRR had believed the maximum annual tonnage rate had been calculated in error, MRR would have been entitled to request a contested case hearing to review the Department decision denying approval of the DON. However, MRR would have been required to do so within thirty (30) days from its receipt of the March 3, 2006 letter notifying MRR of the Department's decision. Moreover, pursuant to Rule 11, any appeal of the DON approval was required to be filed by no later than June 1, 2006, ninety (90) days after the date of the DON approval. Yet, EAGLE did not file its appeal of the DON approval until August 4, 2008—almost two and a half years after the issuance of the DON approval.

Additionally, even if EAGLE did not have notice of the DON approval within ninety (90) days of its issuance, EAGLE clearly failed to timely appeal within thirty (30) days of actual or constructive notice of such decision. At the latest, EAGLE had actual notice of the Department's issuance of the DON approval no later than June 12, 2006, when Mr. Jeff Nichols made specific written inquiries regarding the Department's determination of need for the Proposed Facility. (Pet. Ex. 9, R. pp. 368-75). Accordingly, EAGLE's request for a contested case hearing on the DON approval was required to be filed by July 12, 2006, thirty (30) days after the date of the June 12, 2006 inquiry. Again, EAGLE did not file an appeal of the DON approval until its request for Board review was filed on August 4, 2008—more than two years later. As such, EAGLE's request for contested case hearing was not timely filed and therefore the ALC

lacked subject matter jurisdiction to hear EAGLE's appeal of the March 3, 2006 DON approval.

C. Failure to place the DON on public notice did not violate EAGLE's due process rights.

In its response to MRR's motion to dismiss, EAGLE contended that the Department's failure to place the DON approval on public notice violates EAGLE's due process rights under the South Carolina Constitution. Article I, Section 22 of the South Carolina Constitution provides in relevant part that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . ." S.C. CONST. art. I, § 22. The Due Process Clause of the South Carolina Constitution does not require public notice of all decisions of an administrative agency. "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). In this case, the Department provided notice of its decision to MRR. EAGLE has failed to identify any other person with "private rights" entitling that person to notice of such decision. Additionally, EAGLE has failed to identify how the DON approval affects its "private rights." EAGLE has claimed no interest in the property to be developed. EAGLE does not have interest in a competing business which was denied a DON approval based on the DON approval issued to MRR. The Department provided notice of its decision to the only party with any private rights in the DON decision—MRR. Accordingly, EAGLE cannot claim that the failure to public notice the DON approval for the Proposed Facility was a violation of its due process rights.

Additionally, even if EAGLE had a valid due process claim, which it does not, EAGLE would have nonetheless been required to bring such claim within the time period set out in Rule 11, SCRPALC. In *South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control*, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008), this Court held that the ALC properly dismissed the claims of the appellant because its appeal was not filed within the time period set forth in S.C. CODE ANN. § 44-1-60. *Id.* at 379, 669 S.E.2d at 914. In rejecting the appellant's argument that such interpretation of the statute resulted in a denial of due process, this Court held that appellant's failure to comply with established procedures precluded such claim. *Id.* at 383, 669 S.E.2d at 917. This Court further explained: "A party 'cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it.'" *Id.* (quoting *Zaman v. S.C. State Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991)). In the instant case, EAGLE unquestionably failed to take advantage of recourse provided under Rule 11(C) once it learned of the Department issuance of the DON approval and thus has no claim that dismissal of its untimely request for review by the ALC violates its due process rights.

The Department's decision to approve the DON for the Proposed Facility was issued by the Department on March 3, 2006. The decision approving the DON was a final agency decision subject to appeal. The time for filing such appeal was set forth Rule 11, SCRPALC. EAGLE failed to file a request for a contested case hearing within thirty (30) days of actual notice of the Department's decision to issue a DON approval for the Proposed Facility or within ninety (90) days after the date of that decision on March

3, 2006. Therefore, the ALC clearly lacked subject matter jurisdiction to hear EAGLE's appeal of the DON approval for the Proposed Facility and should have granted MRR's motion to dismiss.

II. THE ALC ERRED IN HOLDING THAT EXISTING PERMITTED DISPOSAL CAPACITY OF C&D LANDFILLS WITHIN THE PROPOSED FACILITY'S PLANNING AREA COULD BE AN "ADDITIONAL FACTOR" UNDER SUBSECTION (D)(3)(d) OF THE DON REGULATION.

In reversing the Department's issuance of the DON approval, the ALC found that existing disposal capacity within the three-county planning area for the Proposed Facility was an additional factor which should have been considered by the Department to deny MRR's DON request. As discussed more fully below, the ALC erred in this finding because the excess permitted capacity cannot be an additional factor under Subsection (D)(3) since the maximum annual rate of disposal is determined under an express provision of this subsection of the DON Regulation.

A. The DON Regulation expressly contemplates excess permitted disposal capacity within the host county and other counties encompassed in a proposed facility's planning area.

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 Act does not specify procedures for the Department 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). Section 44-96-290(E) expressly requires the Department to “promulgate regulations to implement this section.” 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 the Department to define need in the regulations promulgated under that section. The Department did so in promulgating the DON Regulation. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008).

The DON Regulation in effect at the time of the decision on MRR’s DON request was promulgated in 2000 in accordance with the APA, which requires public notification of proposed regulations and submittal to the General Assembly. *See* S.C. CODE ANN. §§ 1-23-110 and 1-23-120 (Supp. 2008). 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 facility “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). The planning area for Part IV C&D Landfills is a ten-mile planning radius around the proposed facility. 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). "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 Env'tl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). As such, the Department staff was required to render a decision on MRR's DON request based on the criteria set forth in the DON Regulation.

The Department's approval of MRR's DON request met the requirements of Subsections (D)(3)(a)-(c) of the DON Regulation. Subsection (D)(3)(a) provides that there may be two Part IV C&D Landfills within the ten-mile radius planning area. Curry Lake C&D Landfill was the only commercial C&D Landfill located in Laurens County. (Pet Ex. 24, p. 73, R. p. 418). Accordingly, the Department properly concluded that

Subsection (D)(3)(a) established a need for the Proposed Facility. Pursuant to Subsection (D)(3)(b), the Department issued the DON approval with an maximum annual disposal limit of 154,000 tons per year. This maximum annual disposal limit of 154,000 tons per year was based on 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). Pursuant to Subsection (D)(3)(c), the Department 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 the Department's decision on MRR's DON request. As such, the Department unquestionably made the DON determination in accordance with Subsections (D)(3)(a) – (c) of the DON Regulation.

B. Excess permitted disposal capacity is function of the express formula for determining need under Subsection (D)(3)(b) and therefore cannot be an additional factor for consideration under Subsection (D)(3)(d).

In appealing the DON approval for the Proposed Facility, EAGLE did not dispute that the Department properly determined that the Proposed Facility 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 Facility'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 Facility'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). In denying summary judgment, ALC found that there was a genuine issue of material fact as to whether this excess permitted disposal capacity should have been considered by the Department as an "additional factor" under Subsection (D)(3)(d). (See Order Denying Petitioner's Motion for Summary Judgment, pp. 4-5, R. pp. 9-10; Order Denying Respondent MRR Highway 92, LLC's Motion for Partial Summary Judgment, p. 4, R. p. 14). As discussed more fully below, such holding was clearly in error as this excess permitted disposal capacity is a function of the operation of Subsection (D)(3)(b) of the DON Regulation. Accordingly, excess permitted disposal capacity is an intended result of the application of the DON Regulation as promulgated by the Department and therefore cannot be an **additional** factor to be considered by the Department staff in determining need for new facilities.

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 facility. 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 Facility, 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 facility touches on more than one county. Similarly, this excess permitted disposal capacity may also exist in the other counties in a proposed facility'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 implementation of Subsection (D)(3)(b).

C. The maximum annual disposal rate formula in Subsection (D)(3)(b) conforms to the purposes and goals of the Solid Waste Act.

Subsection (D)(3)(b) of the DON Regulation unequivocally provides for capacity in excess of amount of waste generated in the host county of a proposed Part IV C&D landfill. This provision of the DON Regulation conforms to the express legislative goals and directives of the Solid Waste Act. Section 44-96-290(E) does not require the Department 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 facility is determined based on the total yearly waste generated in all counties 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 facility.

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). Indeed, Mr. James Martin, a member of EAGLE and owner of a construction business in Laurens County, acknowledged that 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).

Similarly, excess permitted disposal capacity throughout the region to be served by a proposed facility 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 the Department's DON Regulation is a regional concept. (Trial Tr. p. 100, ll. 12-14, R. p. 181). Mr. Coleman testified that many of the Part IV C&D Landfills in the three-county planning area for the Proposed Facility accept waste from other counties. (Trial Tr. p. 105, ll. 2-10, R. p. 186). 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 Facility. (Pet. Ex. 26, R. p. 437). 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.

D. Excess permitted disposal capacity is an intended function of the application of the an express provision of the DON Regulation and therefore cannot be an "additional" factor under Subsection (D)(3)(d).

Subsection (D)(3)(d) of the DON Regulation provides that 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)(d) (Supp. 2008). While this subsection of the Regulation gives the Department discretion to consider factors beyond

those set forth in Subsection (D)(3)(a)-(c), it does not allow the Department 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 the Department'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 Facility 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 the Department in its decision on MRR's DON request.

III. THE ALC ERRED IN FAILING TO GIVE DEFERENCE TO THE DEPARTMENT'S INTERPRETATION OF THE DON REGULATION.

As discussed *supra*, the General Assembly did not define "need" in Section 44-96-290(E) of the Solid Waste Act, but instead authorized the Department to promulgate regulations for determining need for new facilities. S.C. CODE ANN. § 44-96-290(E) (2002). The General Assembly thus expressly authorized the Department "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 promulgated the DON Regulation, the Department set forth a clear formula for determining need and annual rate of disposal for new Part IV C&D landfills.

The ALC erred in failing to give deference to the Department's interpretation of Section 44-96-290(E) of the Solid Waste Act. "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 the Department'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 Regulation unquestionably provides for excess permitted disposal capacity in the host county and the counties encompassed by a proposed facility's planning area. There can be no doubt that the Department 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 facility's planning. Moreover, if the Department had intended to limit this excess capacity to a specific percentage relative to the waste generated within the counties encompassed by a proposed facility's planning area, the Department certainly could have drafted the DON Regulation to do so. However, the Department 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, in holding that the Department staff should have considered excess permitted disposal

capacity as an "additional factor" under Subsection (D)(3)(d) of the DON Regulation, the ALC failed to give deference to the Department's interpretation of "need" as set forth in the DON Regulation and thus erred in so holding.

IV. THE ALC IMPROPERLY RULED ON THE FACIAL VALIDITY OF THE DON REGULATION IN ITS FINAL ORDER AND DECISION.

In its Final Order and Decision, the ALC improperly substituted its definition of need for the test for need as set forth in the DON Regulation. Specifically, the ALC held as follows:

Other than the criteria set forth in Regulation 61-107.17(D)(D), no other definitions of the term "need" are provided in either the Act or the DHEC regulation. Accordingly, the Court should look to the "plain and ordinary" meaning of these terms. *New York Times Co. v. Spartanburg Cty. School Dist. No. 7*, 374 S.C. 207, 649 S.E.2d 28 (2007). "Need" has been defined to mean: "a condition requiring supply or relief." MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary>. Applying that definition to this case, it is obvious that the General Assembly intended that a demonstration of "need" must involve proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public's demand.

(Final Order and Decision, pp. 6-7, R. pp. 21-22). In so holding, the ALC clearly substituted its own method for approving a "demonstration of need" for that promulgated by the Department under the DON Regulation. The ALC's ruling that a demonstration of need must include "proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public's demand" is in direct conflict with the express provisions of the DON Regulation. Accordingly, such holding is directed specifically at the validity of the DON Regulation to determine need and is thus improper. The South Carolina Supreme Court has held that this Court, as part of the executive branch, has no authority to rule on the facial validity of a regulation. *Drummond v. Dep't of Revenue*, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008) (citing

Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000)). As discussed *supra*, excess permitted disposal capacity is a function of the application of Subsection (D)(3)(b) of the DON Regulation. In holding that the Department staff should have determined whether "additional landfill capacity is needed," the ALC effectively held that Subsection (D)(3)(b) is invalid. Such holding is beyond the authority of the ALC and was therefore in error.

V. THE ALC ERRED IN FINDING THAT THE DEPARTMENT FAILED TO EXERCISE ITS DISCRETION TO DENY MRR'S DON REQUEST BASED ON EXISTING PERMITTED CAPACITY WITHIN THE PLANNING AREA FOR THE PROPOSED FACILITY.

In denying MRR's motion for summary judgment, the ALC held that Subsection (D)(3)(b) is discretionary and therefore EAGLE was entitled to present evidence to show that the Department failed to exercise that discretion in considering excess permitted disposal capacity in the region to be served by the Proposed Facility. (See Order Denying Respondent MRR Highway 92, LLC's Motion for Partial Summary Judgment p. 4, R. p. 14). As discussed *supra*, that holding is clearly contrary to plain language of the DON Regulation itself. Moreover, such holding is in error because the Department'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 the Department.

The Department 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 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 the Department 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, the Department is required to made 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 the Department promulgating regulations defining the term. Significant to the holding in *Young* is this Court's determination that the definition set forth in the Department'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 the Department. Specifically, it would allow the Department 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 the Department.

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) ("Small Island Regulation"). *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. ----- 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 the Department 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 the Department staff had such discretion.

VI. THE ALC'S 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 the Department'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). 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). The DON approval was issued to MRR by the Department on March 3, 2006. While preserving its argument that the DON approval was a final agency decision and that EAGLE had failed to timely its appeal of that decision, MRR objected to the admission of any evidence which did not exist at the time of the Department'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; pp. 74-78, R. pp. 155-59). 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 the Department decision and could not have been considered by the Department. 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 & Env'tl. 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 the Department's decision, such holding does not allow the ALC to consider evidence which could not impact the Department's decision because it did not exist at the time of such decision. Accordingly, the ALC improperly admitted evidence which did not exist at the time of the Department's decision on the Landfill Permit on July 18, 2008.

VII. THE ALC'S FINDING THAT THE PROPOSED FACILITY IS NOT NEEDED IS ARBITRARY AND CAPRICIOUS.

In its Final Order and Decision, the ALC held that the Proposed Facility was not needed because the three-county region of the planning area for the Proposed Facility "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). 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 facility. 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 facility.

(Final Order and Decision, p. 7, R. p. 22). However, despite this conclusion of law, the ALC found that the Proposed Facility 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). 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 facility. Indeed, as previously discussed, had the Department 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 facility, the Department 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 the Department to deny MRR's DON request because there is no need for the Proposed Facility. 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 Facility, the ALC failed to provide a threshold percentage by which the Department should have made such determination. Would greater utilization of the existing capacity—perhaps 40 percent or 50 percent—indicated the need for the Proposed Facility? 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 Department staff could not deny the DON request based of such considerations. As discussed in Section IV above, the Department's consideration of existing capacity to assess the need for a proposed facility 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 Facility based on excess disposal capacity would constitute "unrestrained discretion" by the Department 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 the Department would have been arbitrary. Likewise, such determination by the ALC is also arbitrary and should be reversed.

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

Despite the ALC's ruling that the Proposed Facility is not needed in the three-county region to be served by the Proposed Facility, the evidence on the record clearly supports a finding that the Proposed Facility is needed. For example, the three-county planning area for the Proposed Facility 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). In 2007, the estimated remaining life of Wasp Nest was only 1.6 years in 2007. (Pet. Ex. 24, p. 73, R. p. 418). 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). 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 Facility 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 Facility. (Final Order and Decision, pp. 7-8, R. pp. 22-23). As such, the disposal capacity in Greenville

County facilities would be the only consideration supporting the ALC's holding that the Proposed Facility 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). 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). 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 within the three-county planning area for the Proposed Facility 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 facility's planning area. Kent Coleman, Director of the Division of Mining and Solid Waste Management, testified that the planning area established in the Department's DON Regulation is a regional concept. (Trial Tr. p. 100, ll. 12-14, R. p. 181). Mr. Coleman testified that many of the C&D landfills in the three-county planning area for the Proposed Facility accept waste from other counties. (Trial Tr. p. 105, ll. 2-10, R. p. 186). 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 Facility. (Pet. Ex. 26, R. p. 437). As such, the evidence on the record clearly supports the need for the Proposed Facility despite the raw statistics cited by the ALC in making its ruling.

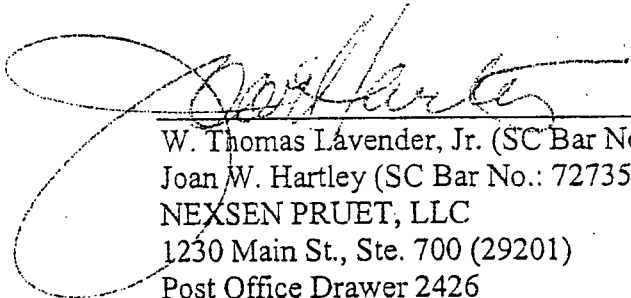
Finally, the ALC failed give the required consideration to the Department's specialized knowledge in weighing the evidence in this case. Pursuant to S.C. CODE ANN. § 44-1-60, the ALC is required to "give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge." S.C. CODE ANN. § 44-1-60(F)(2) (Supp. 2008). During the review of the DON request for the Proposed Facility, the Department 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; p. 166, l. 19 – p. 167, l. 2, R. p. 247-48; p. 159, ll. 5-20, R. p. 240). 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 Facility accepted waste from counties beyond the three-county planning area. (Trial Tr. p. 101, l. 7-11, R. p. 182). Kent Coleman testified that such information did not warrant the denial of the DON request for the Proposed Facility. (Trial Tr. p. 159, ll. 5-20, R. p. 240; p. 161, l. 13 – p. 162, l. 6, R. pp. 242-43). The ALC's ruling ignored the Department's specialized knowledge with respect to the C&D waste needs within the region to be served by the Proposed Facility and instead focused on one raw statistic in reversing the Department's decision. There is no question that the Department 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 Facility is not needed while ignoring the substantial evidence to the contrary and disregarding the Department's specialized knowledge (as well as the plain language of the DON Regulation) in assessing the totality of the statistics in the possession of the Department at the time that it made the decision on MRR's DON request.

CONCLUSION

The ALC clearly lacked subject matter jurisdiction to conduct a contested case hearing on EAGLE's appeal of the DON approval for the Proposed Facility. Even if the ALC had jurisdiction to hear this case, the ALC erred in holding that excess permitted disposal capacity in the three-county planning area for the Proposed Facility could be an "additional factor" under Subsection (D)(3)(d) of the DON Regulation. Additionally, the ALC erred in failing to give the required deference to the Department's interpretation of Section 44-96-290(E) of the Solid Waste Act as set forth in the express provisions of the DON Regulation. Moreover, the ALC improperly ruled on the facial validity of the DON Regulation. The ALC also erred in holding that the Department staff failed to exercise its discretion in denying the DON request for the Proposed Facility as such discretion is clearly beyond the discretion of the Department staff in making such determinations under the DON Regulation. Finally, the ALC's holding in this matter is arbitrary and is not supported by the substantial evidence on the record as a whole. Accordingly, the Appellant respectfully requests that this Court reverse the decision of the ALC and affirm the Department's issuance of the DON approval for the Proposed Facility.

April 27, 2010



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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

Case No. 08-ALC-07-0425-CC

Engaging and Guarding Laurens County's Environment ("EAGLE"),
a non-profit membership organization, ... Respondent,

vs.

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

of whom MRR Highway 92, LLC, is Appellant.

BRIEF OF RESPONDENT, EAGLE

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STATEMENT OF ISSUES ON APPEAL

- I. Where a Landfill Permit Is Appealed in a Timely Manner, Does The Administrative Law Court Have Subject Matter Jurisdiction to Consider a Preliminary Approval of a "Demonstration of Need" Made Without Notice and Opportunity for Hearing?
- II. Was The Administrative Law Judge Correct in Ruling That Existing Excess Permitted Capacity of C&D Landfills Within the Vicinity of the Proposed Landfill Showed That There Is No Need for the Proposed MRR Landfill, Where The Decision of the ALJ Is Fully Supported by the Plain Language of the Applicable Statute and Regulation, and Nothing in Regulation 61-107.17 Shows an Intent to License Excess Capacity, and Such Intent Would Be in Direct Conflict with the Statutory Mandate of Section 44-96-290(e)?
- III. Where The Department's Interpretation of Regulation 61-107.17 Is Contrary to the Plain Language of the Regulation and Section 44-96-290(e) of the Solid Waste Policy & Management Act, Is It Entitled to Deference?
- IV. Did The Administrative Law Court Rule on the Facial Validity of a Regulation Or Merely Apply the Regulation According to its Plain Language in Light of the Statutory Mandate?
- V. Did The Administrative Law Court Err in Applying All of the Terms of the Applicable Statutes and Regulations in Determining That There Is No Need for MRR's Proposed Landfill?
- VI. Did The Administrative Law Court Err in the Admission of Evidence, Where The Appellant Cannot Show an Abuse of Discretion, Error of Law, or Prejudice?
- VII. Is The Administrative Law Court's Finding That the Proposed Landfill Is Not Needed Fully Supported by the Reliable, Probative and Substantial Evidence on the Whole Record and by the Applicable Statutes and Regulations, and Thus Not Arbitrary or Capricious?
- VIII. Is The Administrative Law Court's Holding That the Proposed Landfill Is Not Needed Fully Supported by the Reliable, Probative, Substantial and Uncontroverted Evidence?
- IX. Is The Administrative Law Court's Decision Supported by Additional Sustaining Grounds, Including More "Additional Factors" Showing That the Proposed Landfill Is Not Needed; the 2009 version of Regulation 61-107.17; and Regulation 61-107.17, as Interpreted by DHEC and MRR, Is Contrary to the Clear Statutory Mandate of Section 44-96-290(e)?

STATEMENT OF THE CASE

This case began as an application made by MRR Highway 92, LLC ("MRR"), for a solid waste management permit from the South Carolina Department of Health and Environmental Control (DHEC). MRR requested permission to construct and operate a commercial landfill in Laurens County for the disposal of construction, demolition and land-clearing debris.

The DHEC staff announced its decision to issue the requested permit on July 18, 2008. (R. pp. 406-413 (Pet. Ex. 22)). On July 24, 2008, the DHEC staff gave notice of its decision to approve a storm water plan for the proposed landfill.

On August 4, 2008, EAGLE filed its Request for Final Review Conference with the DHEC Board, seeking review of the staff decisions. (R. pp. 805-809 (Request for Final Review Conference)). By letter dated August 21, 2008, the Clerk of the DHEC Board informed EAGLE that the Board had voted on August 20, 2008, to decline the request for Board review. (R. pp. 811-812 (Letter from Clerk, August 21, 2008)).

On September 16, 2008, EAGLE filed its Request for Contested Case Hearing in the Administrative Law Court. (R. pp. 813-820 (Request for Contested Case Hearing, September 16, 2008)). The case was assigned to Administrative Law Judge Ralph King Anderson, III.

On March 17, 2009, MRR filed a motion for partial summary judgment on all issues relating to the solid waste facility permit. (R. pp. 439-449 (MRR Highway 92, LLC's Motion for Partial Summary Judgment)). On March 17, 2009, MRR also filed a motion to make more definite and certain with respect to EAGLE's allegations relating to the storm

water permit. (R. p. 551-571 (MRR Motion to Make More Definite and Certain)). On May 1, 2009, EAGLE filed a motion for summary judgment and response to MRR's motions, and at the same time withdrew all of its grounds for appeal except for issues "relating to the need for this landfill, the validity of Regulation 61-107.17, the requirements of Section 44-96-290(E) of the Solid Waste Management Act, and the manner in which the Act and regulations have been applied in determining the issue of need in this case." (R. pp. 572-711 (Petitioner's Motion for Summary Judgment and Response to MRR Highway 92, LLC's Motion for Summary Judgment; Letter of counsel to ALJ, May 1, 2009)).

On May 27, 2009, the ALC heard the cross motions for summary judgment. (R. pp. 25-81 (Transcript of the Summary Judgment Hearing)).

On July 22, 2009, a hearing on the merits was held before the ALC. (R. pp. 82-287 (Transcript of Administrative Hearing, July 22, 2009)). At the beginning of the hearing, MRR moved to dismiss the case for lack of jurisdiction, arguing that EAGLE should have filed an appeal in 2006, when DHEC issued a letter to MRR approving a "demonstration of need" request. (R. pp. 85-86 (Tr. 4-5)).

On August 7, 2009, the ALJ issued two orders denying both motions for summary judgment. (R. pp. 6-15 (Order Denying Petitioner's Motion for Summary Judgment, August 7, 2009; Order Denying Respondent MRR Highway 92, LLC's Motion for Partial Summary Judgment, August 7, 2009)).

On October 29, 2009, the ALC issued its Final Order and Decision, finding that the proposed landfill is not needed and thus reversing the Department's decision to issue the permit to MRR. (R. p. 16-24 (Final Order and Decision)).

ARGUMENT

In order to obtain a solid waste management permit from DHEC, MRR must meet the technical, design and operational requirements of the South Carolina Solid Waste Policy and Management Act of 1991 and the regulations promulgated thereunder. MRR must also make a "demonstration of need" for the facility. S.C. Code § 44-96-290(E). EAGLE limited its appeal to the issue of whether a proper "demonstration of need" has been made by MRR. The Administrative Law Judge found and concluded that MRR has not made a "demonstration of need," and thus ordered that the permit to construct the proposed landfill be denied. (R. pp. 16-24 (Final Order and Decision)).

As this brief will demonstrate, the decision of the Administrative Law Judge is fully supported by the reliable, probative and substantial evidence and the applicable law.

The Facts and Evidence.

At the contested case hearing, EAGLE presented the testimony of Scott Holland, Kent Coleman and Jimmy Martin. The Respondents called no witnesses.

Scott Holland has been the director of public works for Laurens County for nearly 20 years. (R. p. 108 (Tr. p. 27)). He is in charge of the county's solid waste disposal program. Mr. Holland testified that the county operated a C & D¹ landfill for 12 years until May, 2009, and that landfill is now being closed out. (R. p. 109 (Tr. 28)). The county continues to receive yard waste at the site, which is also used for recycling. (R. pp. 110-111 (Tr. 29-30)).

Mr. Holland testified that there are two other C & D landfills in Laurens County: a

¹ "C & D" landfills handle construction, demolition waste and land-clearing debris. Under current DHEC Regulations they are known as Class 2 landfills. S.C. Code Regs. §§ R.61-107.17, R.61-107.19, Part IV & Appendix 1.

small landfill owned by the City of Clinton, and a privately-owned landfill known as the Curry Lake Landfill. (R. p. 111 (Tr. 30)). The Curry Lake Landfill pays a "host fee" to Laurens County based on the number of tons of waste received, and the county receives regular reports from the landfill regarding tonnages received. (R. p. 112 (Tr. 31)). According to the County's records, the Curry Lake Landfill received 57,188.09 tons of waste in 2006, 65,577.03 tons in 2007, and 58,531.81 tons in 2008. (R. p. 430 (Pet. Ex. 26)).

Petitioner's Exhibit 12 is a resolution approved by Laurens County Council on June 27, 2006, stating that "Laurens County does not have an immediate need for the additional landfill space to be provided by the propose [sic] facility." (R. pp. 378-380 (Pet. Ex. 12)).

Mr. Holland testified that he has never heard anyone in Laurens County say that they could not find a place to dispose of C & D waste. (R. p. 132 (Tr. 51)). He said that Laurens County has never experienced any problems that could be attributed to a lack of C & D landfill capacity. (R. p. 132 (Tr. 51)). He said that Laurens County has never discussed whether there is a need for more C & D landfill capacity, other than the June 27, 2006, resolution. (R. p. 133 (Tr. 52)).

Mr. Holland testified that since closing its landfill, the county uses the Curry Lake Landfill for disposal of its C & D waste. (R. p. 135 (Tr. 54)). He said that there are competitive alternatives nearby, including Greenville County's Twin Chimneys landfill and a landfill operated by Republic Industries. (R. pp. 135-136 (Tr. 54-55)). When asked about illegal dumping in the county, he said that he does not think that the number of or the distance to landfill facilities is the issue in illegal dumping. (R. p. 137 (Tr. 56)). He said that his opinion is that there are two factors behind illegal dumping: avoidance of the cost of

disposal, and "just pure laziness." (R. p. 143 (Tr. 62)).

Kent Coleman is in charge of DHEC's division of mining and solid waste management. He has held this position for approximately a year and a half. (R. p. 144 (Tr. 63)).

Mr. Coleman identified documents from the DHEC administrative record. By letter dated February 21, 2006, Rudy M. Curtis, a consultant to MRR Southern Company, LLC, requested approval of a "Demonstration of Need" for a "private Part IV construction, demolition and land clearing debris landfill" in Laurens County, for the "maximum annual tonnage limit allowed." (R. p. 366 (Pet. Ex. 7)). On March 3, 2006, Joan Litton of DHEC wrote a letter to Mr. Ronald C. Gilkerson of MRR Southern Company, LLC, stating that DHEC has received the letter from Rudy Curtis, evaluated the information, and "determined 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. The Department may consider an annual disposal limit up to 154,000 tons during its consistency determination for this proposed facility." (R. p. 367 (Pet. Ex. 8 (Emphasis in original))). The DHEC approval was conditioned upon the company moving forward with the permitting process. (R. pp. 149-150 (Tr. 68-69)).

In a letter dated June 12, 2006, DHEC was asked by Jeff Nichols: "What data do we have that shows Laurens County has a need for a C & D landfill." DHEC's response was: "'Need' as defined by DHEC is determined by the Demonstration of Need (DON) regulation and the county plan. Neither prohibits the proposed landfill. DON addresses regional needs and the local plan should address local needs." (R. p. 368-371 (Pet. Ex. 9)).

On June 26, 2006, a letter signed by Rep. Michael A. Pitts, Rep. Jeffrey D. Duncan, Rep. J. Adam Taylor and Sen. Daniel B. Verdin III was submitted to DHEC, stating in part: "We express the following concerns and ask that you address them during the permitting process: First, the proximity to a current C & D landfill on Curry's Lake Road in the Gray Court area of Laurens County. We question the need for a second landfill in this relatively short distance." (R. pp. 376-377 (Pet. Ex. 10)).

Mr. Coleman testified that his office prepares an annual report on solid waste in South Carolina. Portions of the annual reports for fiscal years 2007 and 2008 were admitted as Petitioner's Exhibits 24 and 25. (R. pp. 414-421, 422-429). On page 77 of the 2008 report there is a table showing the amount of C & D waste generated in each county "for Use in Demonstrating Need." (R. p. 428). According to DHEC's report, in fiscal year 2004 Laurens County generated 8,434 tons of C & D waste; the corresponding figure for 2005 was 6,635 tons; for 2006 it was 9,479 tons; for 2007 it was 16,860 tons; and for 2008 it was 12,811 tons. (R. pp. 161-162 (Tr. 80-81); R. p. 428 (Pet. Ex. 25, p. 77); see also, R. p. 420 (Pet. Ex. 24, p. 75)). On pages 74 and 75 of the 2008 report, and on pages 72 and 73 of the 2007 report, existing landfills are listed by county. (R. pp. 417-418, 425-426). For Laurens County, the reports list the City of Clinton landfill, with a permitted annual disposal rate of 1,375 tons, the Curry Lake Landfill, with a permitted annual disposal rate of 241,591 tons, and the Laurens County landfill, with a permitted annual disposal rate of 8,900 tons. (R. pp. 417-418, 425-426). In fiscal year 2008, the Curry Lake Landfill received a total of 67,331 tons of C & D waste. (R. p. 426 (Pet. Ex. 25, p. 75)). In fiscal year 2007, the Curry Lake landfill received 67,260 tons of C & D waste. (R. p. 418 (Pet. Ex. 24, p. 73)).

Petitioner's Exhibits 24 and 25 include waste generation data for fiscal years 2003, 2004, 2005 and 2006. (R. pp. 419-420 (Petitioner's Ex. 24, p. 75 of excerpts from 2007 DHEC Annual Report); R. pp. 427-428 (Petitioner's Ex. 25, p. 77 of excerpts from 2008 DHEC Annual Report)). The waste generation and landfill capacity² figures for Fiscal Year 2004 are summarized in the following chart:

	Tons of C& D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	8,434	251,866	3.3%
Greenville County	87,157	510,157	17.1%
Spartanburg	58,803	80,000	73.5%
Total - 3 counties	154,394	842,023	18.3%

The waste generation and landfill capacity figures for Fiscal Year 2005 are summarized in the following chart:

	Tons of C& D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	6,635	251,866	2.6%
Greenville County	142,767	510,157	28.0%
Spartanburg	71,424	80,000	89.3%
Total - 3 counties	220,826	842,023	26.2%

Thee waste generation and landfill capacity figures for Fiscal Year 2006 are summarized in the following chart:

² Includes the Laurens County C & D landfill, which was operating prior to May 2009.

	Tons of C & D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	9,479	251,866	3.8%
Greenville County	163,450	510,157	32.0%
Spartanburg	68,662	80,000	85.8%
Total - 3 counties	241,591	842,023	28.7%

Mr. Coleman said that MRR's request for demonstration of need approval provided only the latitude and longitude of the proposed landfill, and no other information. (R. pp. 165-168 (Tr. 84-87)). In deciding to issue an approval letter, DHEC first plotted the latitude and longitude on a map, and then drew a circle with a ten-mile radius around that plotted point. (R. p. 171 (Tr. 90)). Then DHEC counted the number of commercial C & D landfills within the circle and found only one such landfill, the Curry Lake Landfill. (R. p. 171 (Tr. 90)). Since the number of existing commercial C & D landfills within the circle was less than two, DHEC determined that it would approve the demonstration of need. (R. p. 172 (Tr. 91)). To calculate the maximum allowable yearly disposal rate, DHEC added together the total amount of waste generated in all of the counties touched by the circle. (R. pp. 172-173 (Tr. 91-92)). Using this method, the Department set the annual disposal rate at 154,000 tons per year. (R. pp. 173-174 (Tr. 92-93)).

Mr. Coleman said that in setting the annual disposal rate, the C & D waste generated in Spartanburg and Greenville counties was added to the amount generated in Laurens County. (R. p. 176 (Tr. 95)). All of the waste generated throughout the entirety of these counties was included in setting the annual capacity limit for the proposed MRR landfill,

even though the 10-mile planning circle included only a portion of these counties. (R. pp. 176-177 (Tr. 95-96)).

When DHEC issued the letter approving MRR's demonstration of need in 2006, DHEC had only considered the location of the landfill, the number of existing commercial landfills within the 10-mile radius circle, and the total amount of waste generated within each county touched by the circle. (R. pp. 179-180 (Tr. 98-99)).

Mr. Coleman acknowledged that at the time the Department issued its demonstration of need approval, no public notice had been issued. (R. 180 (Tr. 99)).

Mr. Coleman said that DHEC views the 10-mile radius circle as a "planning area, which is a regional concept." (R. p. 181 (Tr. 100)). He said that there is not an actual "regional plan" for dealing with C & D waste in Laurens, Greenville and Spartanburg Counties. (R. pp. 181-182 (Tr. 100-101)).

The DHEC solid waste reports show that Spartanburg County has a landfill known as the Wasp Road landfill, which has a permitted capacity of 80,000 tons per year. (R. p. 183 (Tr. 102), R. pp. 418, 426 (Pet. Exs. 24, 25)). The reports also show that in fiscal year 2008, the amount of C & D waste generated in Spartanburg County was 26,364 tons, (R. p. 183 (Tr. 102), R. p. 428 (Pet. Ex. 25)), and in 2007, Spartanburg County generated about 72,000 tons of C & D waste. (R. p. 185 (Tr. 104), R. p. 420 (Pet. Ex. 24, p. 75)).

The 2008 DHEC solid waste report shows that in 2008, Greenville County generated 210,924 tons of C & D waste. (R. pp. 183-184 (Tr. 102-103), R. p. 428 (Pet. Ex. 25, p. 77)). Greenville County has four C & D landfills: Carter Excavation Company, Big Valley, with an annual capacity of 75,000 tons; Greenville Republic, with an annual capacity of 200,000

tons; Twin Chimneys, with an annual capacity of 87,000 tons, and W.C.A. Shiloh, with an annual capacity of 128,000 tons. (R. p. 425 (Pet. Ex. 25, p. 74)).

In total, the three counties generate a combined total of a little over 300,000 tons of C & D waste per year, and they have a combined annual landfill capacity of more than 810,000 tons. (R. p. 185 (Tr. 104); R. pp. 414-428 (Pet. Ex. 25)).

Mr. Coleman acknowledged that the annual landfill capacity is more than the actual disposal rate for the Greenville landfills. (R. p. 187). The Greenville Republic landfill, with a permitted capacity of 200,000 tons, actually received 48,057 tons in fiscal year 2008. (R. pp. 186-187 (Tr. 105-106); R. p. 425 (Pet. Ex. 25)). The Twin Chimneys landfill, with a permitted capacity of more than 87,000 tons, took in 51,000 tons in 2008. (R. p. 425). And W.C.A. Shiloh, with a permitted capacity of 128,000 tons, took in a little more than 80,000 tons in 2008. (R. pp. 186-187 (Tr. 105-106); R. p. 425 (Pet. Ex. 25)).

Mr. Coleman acknowledged that the Curry Lake Landfill's permitted capacity of 240,000 tons was not taken into account in making the demonstration of need determination for the MRR landfill. (R. 187-188 (Tr. 106-107)). He also said that DHEC did not take into account the existing landfill capacity in Spartanburg and Greenville counties, nor the fact that these counties have landfill capacities that exceed the rate of waste generation. (R. p. 188 (Tr. 107)).

In February 2008, public notice was issued for the draft permit for the proposed MRR landfill. (R. pp. 188-189 (Tr. 107-108)). A public hearing was held on March 13, 2008. (R. p. 190 (Tr. 109), R. pp. 381-390 (Pet. Exs. 16, 17)). During the public hearing and the public comment period, DHEC received comments questioning the need for this landfill.

(R. pp. 190-191 (Tr. 109-110); R. pp. 391-398 (Pet. Ex. 20)). On July 18, 2008, DHEC issued the staff decision to issue the permit to MRR. (R. pp. 192-193 (Tr. 111-112), R. pp. 399-413 (Pet. Ex. 21)). DHEC gave public notice of this decision and issued a "staff decision summary report." (R. p. 193 (Tr. 112), R. pp. 406-413 (Pet. Ex. 22)). In responding to questions about the need for the landfill, the Department's summary report said:

The Department addresses the need for landfills in South Carolina under Regulation 61-107.17, *Demonstration of Need* (DON). The DON regulation allows for up to two (2) long-term, commercial C&D landfills within a ten (10) mile radius of any given location within South Carolina. At the time of the February 21, 2006 DON request, there was only one long-term, commercial C&D landfill located within the ten-mile radius of the proposed site, (Curry Lake C&D Landfill). Therefore, per Regulation 61-107.17, the permit applicant was able to demonstrate need for a new C&D landfill at the proposed landfill site.

(R. p. 411-A (Pet. Ex. 22)).

In addition to the presentation of Mr. Coleman's testimony, the Petitioner placed into evidence the deposition testimony given by Mr. Coleman as DHEC's designated spokesman under SCRCF 30(b)(6). (R. pp. 288-365 (Pet. Ex. 5)). In that deposition, Mr. Coleman was asked about Regulation 61-107.17.D.(3)(d), which authorizes DHEC to consider "additional factors" in reviewing an application for "demonstration of need" approval:

Q. Okay. Now, was this section utilized at all in the permitting of this MRR landfill?

A. No.

(R. pp. 345, lines 19-21 (Pet. Ex. 5, page 58, lines 19-21); see also R. p. 344, line 12 through p. 345, line 18 (Pet. Ex. 5, page 57, line 12, through page 58, line 18)). Mr. Coleman was then asked about the public comments received during the permit review:

Q. Okay. And despite these comments, what you're saying is that the Department stuck to the parts -- I mean, Section D and items One, Two and Three, A and B and C, but you did not utilize the right to review additional factors that's provided in subsection D of that part?

A. We did not review additional factors -- Well, I should say that we didn't use any additional factors to make our decision in this case.

(R. p. 346, line 18 through p. 347, line 2 (Pet. Ex. 5, page 59, line 18 through page 60, line 2; see also R. p. 345, line 19 through p. 346, line 17 (Pet. Ex. 5, page 58, line 19 through page 59, line 17)).

In his hearing testimony, Mr. Coleman, with regard to the "additional factors" portion of the regulation, said:

Q. But you didn't use it in your analysis in this case?

A. We were aware of a lot of other issues that were brought to our attention during the process. We considered all of the public comments and responded to the comments, but none of them rose to the level of something that, based on our review of the regulation, would change our decision in terms of issuing a permit.

Q. Okay. Now, other than the little paragraph that was in the July 18th, 2008 memorandum to concerned citizens, Petitioner's Exhibit Two, other than the little paragraph about "need" there, and other answers to Jeff Nichols' questions submitted in June of 2006, is there any document that the Department ever generated that responds to the comments that you received?

A. There were a number of face-to-face meetings with concerned citizens, I think three, in addition to the public hearing, which was a fourth. But there are, you know, notes in the record that were taken at that.

meetings where these issues were also discussed and answered in those meetings with the citizens. But other than that, I'm not aware of anything else.

(R. pp. 199-200 (Tr. 118-119)).

Mr. Coleman said that DHEC has nothing defining "additional factors" or when they will be considered in determining need, nor does DHEC have a definition of "need" other than the overall "demonstration of need" regulation. (R. pp. 201-202 (Tr. 120-121)). He said that DHEC has never used the "additional factors" provision in making a decision on a landfill permit. (R. p. 203, lines 14-18 (Tr. 122)). He said that the Department did not consider the fact that Laurens County already has a landfill with an annual capacity more than ten times the amount of waste generated annually in the county. (R. pp. 203-204 (Tr. 122-123)). He said that he felt that considering this factor would be "arbitrary." (R. pp. 204-205 (Tr. 123-124)). He also said that the Department did not consider the excess capacity in Greenville County, nor the fact that the formula used the amount of waste generated in all of Greenville County when the 10-mile circle took in only a small portion of the county. (R. pp. 207-208 (Tr. 126-127)). He also said that DHEC did not consider the fact that several existing commercial landfills lie just outside the 10-mile planning circle. (R. pp. 208-209 (Tr. 127-128)). He also said that he could not think of anything that he would ever consider an "additional factor." (R. pp. 208-209 (Tr. 127-128)).

Under a proffer by the Petitioner, Mr. Coleman said that a new version of Regulation 61-107.17 that came into effect on June 26, 2009, the 10-mile planning circle has been expanded to a 20-mile planning circle. (R. pp. 213-215 (Tr. 132-133)). Under the new regulation, there are four or five existing landfills within the planning area, and if DHEC

were making the decision on the demonstration of need today, the decision under the regulation would be to deny. (R. pp. 215-217 (Tr. 134-136); R. pp. 438 (Pet. Ex. 28 (Proffered))).

On cross-examination by MRR, Mr. Coleman noted that the last page of Petitioner's Exhibit 26 shows that for fiscal year 2005, the Curry Lake Landfill received 3,098.24 tons of C & D waste from Laurens County, and also received a total of 51,511.38 tons from other counties. (R. pp. 218-219 (Tr. 137-138); R. p. 437 (Pet. Ex. 26)). The 2007 DHEC solid waste report shows that the Curry Lake Landfill has a "remaining life" of 38 years, while the 2008 report shows a remaining life of 23 years. (R. pp. 221-222 (Tr. 140-141); R. pp. 414-428 (Pet. Exs. 24, 25)). Mr. Coleman did not know why this figure changed. (R. pp. 222-223 (Tr. 141-142)).

Mr. Coleman said that DHEC had the county waste generation and landfill capacity information in the 2007 solid waste report at the time it made its decision to issue the MRR permit. (R. p. 224 (Tr. 143)). He said that between February 21, 2006, when MRR sent its request for demonstration of need approval, and March 3, 2006, when DHEC issued its approval letter, no one asked DHEC to consider additional factors. (R. pp. 227-228 (Tr. 146-147)). He said that the comments made by the public were not sufficient to change the Department's position on the needs approval. (R. pp. 230-231 (Tr. 149-150)). He also said that "there's a number of factors we're aware of and a number of factors that we review and respond to during the process" related to need, but they didn't change his mind. (R. p. 233 (Tr. 152)).

Mr. Coleman said that DHEC was aware of all of the existing landfills in the three

county area and the amounts of waste being disposed of at these landfills, but none of that information changed the final outcome on the DON approval. (R. pp. 238-240 (Tr. 157-159)).

Mr. Coleman said that he could not think of any type of "additional factor" that could cause DHEC to change the DON decision made using the formula of Regulation 61-107.17. (R. p. 245 (Tr. 164)).

Mr. Coleman said that each of the counties (Laurens, Greenville, and Spartanburg) has its own solid waste management plan specifying how the solid waste in the county will be disposed of. (R. p. 249 (Tr. 168)). He acknowledged that the Curry Lake Landfill has a licensed annual capacity that would handle 241,000 tons of the 300,000 tons generated within the three counties. (R. pp. 250-251 (Tr. 169-170)). And there are additional commercial C & D landfills within Spartanburg and Greenville Counties that can take in 570,000 tons of waste per year. (R. pp. 251-252 (Tr. 170-171)).

Mr. Coleman said that the 10-mile circle is the "planning area" but that DHEC does not know how much waste is generated within the 10-mile circle. (R. p. 252 (Tr. 171)). Only landfills within the 10-mile circle are counted under the formula of Regulation 61-107.17, but waste generated outside the circle is counted in determining the allowable new permitted capacity. (R. pp. 252-255 (Tr. 171-174)).

Mr. Coleman said that DHEC feels that the distance to a landfill should be "reasonable," and that there should be a certain amount of competition among landfills. (R. p. 258 (Tr. 177)). He said that the Curry Lake Landfill is about 4 miles from the site of the proposed MRR landfill. (R. p. 259 (Tr. 178)). He doesn't know the distance from the most

distant part of Spartanburg County to the MRR site. (R. p. 259 (Tr. 178)). He could not address how this new landfill would promote competition or efficiency; he could only say that these factors were "discussed" while the regulation was being promulgated. (R. pp. 260-261 (Tr. 179-180)).

James Travis Martin is a member of EAGLE, lives in the Gray Court area of Laurens County, and has been a contractor for 35 years. (R. pp. 263-266 (Tr. 182-185)). His company does highway and "heavy civil work." (R. p. 266 (Tr. 185)). From 1979 to 1984, his company ran the Laurens County landfill as a contractor for the County of Laurens. (R. p. 266 (Tr. 185)). In his work, he regularly disposes of C & D waste. (R. pp. 266-267 (Tr. 185-186)). Most of his waste is hauled to the Curry Lake Landfill, but he also sends waste to the Republic landfill, a landfill in Oconee County, and the Twin Chimneys landfill. (R. p. 267 (Tr. 186)). He said that the Curry Lake Landfill is a little over three miles from the MRR site. (R. p. 267 (Tr. 186)). He said that he has never had any problems finding a site to dispose of his waste, and he knows of no problems experienced by other contractors in the area. (R. pp. 267-268 (Tr. 186-187)). He said that he sees no need for another landfill, because Laurens County already has the Curry Lake Landfill and there are several other landfills in the area. (R. p. 268 (Tr. 187)).

Neither DHEC nor MRR presented any witnesses.

All parties stipulated that the Petitioner has standing pursuant to the requirements set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). (R. pp. 209-212 (Tr. 128-131)).

Sections I through VIII of this brief respond to the same numbered sections of the Brief of Appellant. Section IX presents additional sustaining grounds.

I.

This Contested Case Proceeding Was Initiated In A Timely Manner and the Administrative Law Court Had Subject Matter Jurisdiction to Hear EAGLE's Appeal of All Issues Relating to the Landfill Permit.

At the beginning of the contested case hearing on July 22, 2009, counsel for MRR made an oral motion to dismiss for lack of jurisdiction. (R. p. 85 (Tr. 4)). MRR argued that any appeal on the question of "need" for the landfill had to be filed within 30 days of the letter issued by the DHEC staff on March 3, 2006. (R. pp. 86, 367 (Pet. Ex. 8)). The Administrative Law Judge took the motion under advisement. (R. pp. 102-103 (Tr. 21-22)). In his Final Order and Decision, the ALJ concluded that the "Administrative Law Court has jurisdiction over this contested case matter pursuant to S.C. Code Ann. § 1-23-600(A) (Supp. 2008) and S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2008)." (R. p. 19 (Final Order, p. 4)).

The ALC's ruling in this point is solidly based on the applicable law.

Under the South Carolina Administrative Procedures Act, "'Contested case' means a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." S.C. Code § 1-23-310(3) (Emphasis added). The provisions of Article I, Section 22 of the South Carolina Constitution state: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency

affecting private rights except on **due notice and an opportunity to be heard.**" (Emphasis added).

During the contested case hearing on July 22, 2009, DHEC admitted that no public notice was issued prior to DHEC's issuance of a letter approving MRR's "demonstration of need" request. (R. p. 180 (Tr. 99)).

Accordingly, either the letter "decision" was not an appealable contested case decision or the "decision" is void because made without notice or opportunity for hearing, in violation of EAGLE's constitutional rights.

The core requirements of due process of law are notice, opportunity for hearing in a meaningful way, and judicial review. *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998); S.C. Constitution, Article I, Section 22; *Stono River Env'tl. Protection Ass'n v. South Carolina Dep't of Health and Env'tl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991).

Notice must be "adequate." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 642 S.E.2d 565 (2007). What exactly constitutes adequate notice may vary from case to case, because "Due process is flexible and calls for such procedural protections as the particular situation demands." *Stono River*, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

In this case, DHEC acknowledged, through the testimony of Kent Coleman, that no notice of the request for demonstration of need approval was issued to the public or to anyone else, and no public comments were solicited. (R. p. 180 (Tr. 99)). There is no evidence that the letter approving the "demonstration of need" was placed on public notice

or sent to anyone else.

There is evidence that members of the public who became members of EAGLE learned of the landfill proposal at least by June 16, 2006. (R. p. 368 (Pet. Ex. 9)). But there is no evidence indicating that DHEC ever provided any notice, or any means of informing any member of the public, that the agency considered approval of a "demonstration of need" request a "contested case" or other Department decision that must be appealed in a timely manner or else rights would be lost. And there is no statute or regulation stating that this decision was a final decision appealable as a contested case.

In the Rule 30(b)(6) deposition of DHEC, spokesman Kent Coleman testified as follows:

Q. Okay. So if I understand correctly, sort of summarizing, under the old system, everything sort of came to a head at the end, and all of the -- any preliminary determinations that had been made were then finalized along with the permit decision that was then subject to an appeal?

A. That's correct.

(R. p. 310, line 24 through p. 311, line 5 (Pet. Ex. 5, page 19, line 24 through page 20, line 5)).

There is nothing in any statute, DHEC regulation nor in any reported case decision indicating that a letter approving a demonstration of need was appealable prior to public notice, receipt of public comments, opportunity for public hearing, and a Department decision on the overall permit. There is not a single thing that can be pointed to as giving EAGLE, any of its members, nor any other member of the general public, notice that a Department letter approving a demonstration of need prior to any public notice and

opportunity to comment must be appealed or else the Administrative Law Court will lack jurisdiction to hear an appeal on the demonstration of need issue as part of an appeal of the overall permit.

Of course, it has been ruled that actual notice for a full appeal period is not an essential part of the appeals process under the current appeals process as set forth in S.C. Code Section 44-1-60. *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008), *Certiorari Granted* (Sept. 3, 2009). Even the Court of Appeals in that case, however, pointed to the prior public notices that were issued by DHEC, and the public comment period available to interested parties, as a factor in the Court's conclusion that it was the League's fault that it was not provided proper notice of the Department decision in a timely manner:

The League received the notice due to it when (1) public notice of SPA's permit application was provided; and (2) the General Assembly enacted the requirement in Section 44-1-60(E) that affected persons must affirmatively request to be notified of the staff decision on the permit application when it is issued. . . .

We agree with the ALC judge. While Coastal has a constitutional right to due process of law, including a right to notice and a meaningful opportunity to be heard, Coastal failed to take the necessary steps outlined in the statutory procedure of Section 44-1-60 to protect these rights. See S.C. Code Ann. § 44-1-60(E). A party "cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it." *Zaman v. S.C. State Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991).

Coastal received public notice of the pending permit applications and participated in public hearings. Additionally, Coastal expressed concern to DHEC in comment letters. However, Coastal failed to comply with the established administrative procedures that would have entitled it to mailed

notification from DHEC when the approved permits were mailed to the SPA and the DOT. Through Section 44-1-60(E), the General Assembly provided Coastal with the means to receive notice, but Coastal declined to avail itself of the statutorily-mandated protocol. Coastal's due process rights were not violated by the ALC judge's interpretation of the statute.

380 S.C. 349, 383, 669 S.E.2d 899, 916-917.

MRR argues that under Section 44-96-290(E) of the Solid Waste Policy & Management Act and DHEC Regulation 61-107.17, the demonstration of need approval was a "final agency decision." Yet MRR cites no specific provision of either the statute or regulation that deems this decision final and appealable. All MRR can say is that "neither the Solid Waste Act nor the DON Regulation requires public notice of a DON approval." (Initial brief, p. 13).

MRR also argues that the "opportunity for hearing" required by Section 1-23-310(3) of the Administrative Procedures Act, "is the hearing before the ALC." But, again, MRR cites no authority for this proposition. Moreover, MRR ignores the fundamental fact that "opportunity for hearing" presumes that something -- perhaps notice (?) -- triggers this "opportunity." How can anyone have an opportunity for hearing if there is no notice informing them of the "opportunity"? MRR also ignores Section 1-23-370(a), which reinforces the "notice" requirement: "When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this article and Article 1 concerning contested cases apply." S.C. Code § 1-23-370(a).

Here, there was no public notice, no public comment period, no final Department decision, no meaningful opportunity for hearing, until the public notices were issued on March 13, 2008 (R. p. 388 (Pet. Ex. 17)) and July 18, 2008 (R. pp. 399-413 (Pet. Exs. 21,

22)).

Of course, MRR also argues that there was notice in 2006: "the Department provided notice of its decision to MRR." (Initial Brief, p. 15). MRR goes on to argue that EAGLE has no "private rights" entitling it to notice. (Id.). Essentially, this argument amounts to a claim that EAGLE lacks standing to complain of lack of notice, and lacks standing to pursue this case on appeal from the DHEC decision. Yet, at the contested case hearing, MRR stipulated that EAGLE has "standing for purposes of the proceedings here today." (R. p. 209, line 2 through p. 212, line 7 (Tr. p. 128, line 2 through p. 131, line 7)). In any event, MRR is simply wrong on this issue. The South Carolina Supreme Court and the Court of Appeals have recognized that citizens groups who have standing in environmental cases possess the due process rights of notice and opportunity for hearing guaranteed by Article I, Section 22, of the South Carolina Constitution. *League of Women Voters of Georgetown County v. Litchfield-by-the-Sea*, 305 S.C. 424, 409 S.E.2d 378 (1991); *Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991); *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

Finally on this point, MRR argues that EAGLE, even if it has a right to due process, lost its rights because it did not file an appeal in 2006, within 30 days of learning of the DHEC letter approving the demonstration of need. MRR fails to explain how EAGLE should have known that an appeal was required in 2006. Interestingly, neither MRR nor DHEC raised any issue about the timeliness of EAGLE's appeal on any issue until the day of the hearing. MRR's attorney apologized for the late motion: "First of all, I apologize the

Court for the timing of this motion; however, it only came to our attention at five o'clock yesterday afternoon that the ruling in the case involving Marlboro. We consulted briefly with counsel for the Department only to learn that they would not join in this motion, so we spent the evening determining the propriety of making the motion and concluded late in the evening last night that we had no alternative but to make this motion, in spite of the timing of it." (R. pp. 96-97 (Tr. 15-16)). MRR is represented by experienced environmental attorneys. If even eminent counsel were not aware of the argument that an appeal must be filed from the letter approving the "demonstration of need" request, how in the world could anyone else have figured that out, with no notice and no regulation or statute describing the letter as a final, appealable decision?

The final, appealable Department decision was made on July 18, 2008. (R. pp. 399-413 (Pet. Exs. 21, 22)). EAGLE filed a timely request for DHEC Board Review, pursuant to Section 44-1-60, and thereafter a timely request for contested case hearing, pursuant to Sections 1-23-600 and 44-1-60. (R. pp. 805-810 (Request for Board Review); R. pp. 813-820 (Request for contested case hearing)). It has been stipulated that EAGLE has standing. Accordingly, the Administrative Law Court had jurisdiction over this contested case proceeding.

II.

The Administrative Law Judge Was Correct In Ruling That Existing Excess Permitted Capacity of C&D Landfills Within the Vicinity of the Proposed Landfill Showed That There Is No Need for the Proposed MRR Landfill.

A. The Decision of the Administrative Law Judge Is Fully Supported By the Plain Language of the Applicable Statute and Regulation.

C & D landfills, also known as Type II landfills, are regulated pursuant to the South Carolina Solid Waste Policy and Management Act (the "Act"), S.C. Code Ann. §§ 44-96-10, *et seq.*, which requires permits for all solid waste management facilities. Section 44-96-290(E) of the South Carolina Solid Waste Management Act states that "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." S.C. Code § 44-96-290(E).

DHEC has promulgated a regulation, R.61-107.17, entitled: "Solid Waste Management: Demonstration-of-Need." S.C. Code Ann. Regs. § R.61-107.17. The original DHEC Regulation 61-107.17 became effective in 2000. On June 26, 2009, a new version of DHEC Regulation became effective when it was published in the State Register. 33 S.C. State Register (No. 6, June 26, 2009).

The 2000 version of Regulation 61-107.17 specifies a 10-mile "planning area" for construction, demolition, and land-clearing debris landfills. Part D of Regulation 61-107.17 specifies the drawing of a circle with a 10-mile radius, the counting of "commercial" solid waste landfills within the planning area, and the method of establishing an annual disposal

rate.

The current version of Regulation 61-107.17 specifies the use of a 20-mile planning area for C & D landfills. S.C. Code Regs. § R.61-107.17(C)(3); 33 S.C. State Register (No. 6, June 26, 2009), pp. 119-135. Under both regulations, a circle is drawn around the location of the proposed landfill: a 10-mile radius circle under the old regulations, and a 20-mile radius circle under the current regulations. If two or more existing landfills are within the circle, the demonstration of need will not be approved.

Section 61-107.17(D)(3)(d) of the 2000 regulation, and Section 61-107.17(D)(2)(b) of the current regulation, both allow DHEC to “review additional factors in determining need on a case-by-case basis.”

No definitions of the terms “demonstration,” “need,” or “additional factors” are provided in either the Act or the DHEC regulation. Accordingly, the Court should look to the “plain and ordinary” meaning of these terms. *New York Times Co. v. Spartanburg County School Dist. No. 7*, 374 S.C. 307, 649 S.E.2d 28 (2007).

A “demonstration” has been defined to mean: “1. The act of showing or making evident. 2. Conclusive evidence; proof. 3. An illustration or explanation, as of a theory or product, by exemplification or practical application. 4. A manifestation of one’s feelings. 5. A public display of group opinions, as by a rally or march: *peace demonstration*.” The American Heritage Dictionary of the English Language (4th Ed. 2000), p. 484.

“Need” has been defined to mean: “1. A condition or situation in which something is needed or wanted: *crops in need of water; a need for affection*. 2. Something required or wanted; a requisite: “*Those of us who led the charge for these women’s issues . . . shared a*

common vision in the needs of women" (Olympia Snowe). 3. Necessity; obligation: *There is no need for you to go*. 4. A condition of poverty or misfortune: *The family is in dire need*."

The American Heritage Dictionary of the English Language (4th Ed. 2000), p. 1175.

"Need" has been defined in Black's Law Dictionary as follows: "A relative term, the conception of which must, within reasonable limits, vary with the personal situation of the individual employing it. Term means to have an urgent or essential use for (something lacking); to want, require." Black's Law Dictionary, Abridged Sixth Edition, 1991, p. 715.

Applying these plain English and legal definitions to the terms used by the General Assembly, it is obvious that to fulfil the statutory requirement, a "demonstration of need" must involve proof of an actual need or requirement for additional landfill capacity.

In lieu of a true "demonstration of need," DHEC applied only the formula portions of Regulation 61-107.17 to arrive at a decision that this landfill is needed and that its annual capacity should be 154,000 tons per year -- for a county that already has landfills with a permitted capacity of 251,866 tons per year while generating only 17,000 tons per year. Even considering Spartanburg and Greenville County, DHEC's decision would add 154,000 tons of C & D landfill capacity to a tri-county region that already has permitted C & D landfill capacity of 831,866 per year in a region that in 2007 generated a total of 250,759 tons of C & D waste. And it would add this capacity to a state that has over 4.4 million tons of C & D landfill capacity while generating only 2.0 million tons of C & D waste. (R. p. 418 (EAGLE Ex. 24, p. 73, Totals)).

Subpart D.(3).d. of Regulation 61-107.17 provides: "d. The Department reserves the right to review additional factors in determining need on a case-by-case basis." S.C. Code

Ann. Regs. § R.61-107.17.D.(3).d. This provision gives DHEC a means to consider factors that go beyond the rote formula set forth in Sections 61-107.17.D.3.a. through 61-107.17.D.3.c., a means to determine whether there is an actual "need" for more landfill capacity.

In this case, however, DHEC ended its inquiry with the formula set forth in the first three subparts of Regulation 61-107.17.D.3. DHEC did not examine any "additional factors" when it approved MRR's "demonstration of need." DHEC admits that the Department received public comments indicating that there is no need for this landfill, and that the comments set forth many of the facts and figures relating to waste generated in Laurens, Greenville and Spartanburg Counties and the existing landfill capacity in these counties. (R. p. 346 (Pet. Ex. 5, Coleman deposition, page 59, lines 7 through 17)). Despite these comments, and despite the information available to the Department, DHEC did not use any of this information in rendering its "need" decision. (R. p. 346, line 18 to p. 347, line 21 (Pet. Ex. 5, Coleman deposition, page 59, line 18 to page 60, line 21)).

The Department looked solely at the number of "commercial" landfills within 10 miles of the site of the proposed MRR landfill, and the total amount of waste generated within Laurens, Greenville and Spartanburg Counties. Despite the clear authority of Section 61-107.17.D.3.d., the Department did not consider any additional factors in issuing approval of MRR's "demonstration of need."

The failure to consider other factors in determining whether the applicant really made a proper demonstration of need is plainly an arbitrary and capricious action. "[I]t is arbitrary or capricious for an administrative agency not to take into account all relevant

factors in making its determination." *Hanly v. Mitchell*, 460 F.2d 640, 648 (C.A.2 1972) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). The fact that DHEC narrowly looked at the "circle" test while ignoring other relevant factors such as the capacity of other landfills in the region and in the county, shows that DHEC acted in an arbitrary and capricious manner.

The inclusion of Regulation 61-107.17.D.3.d. shows that DHEC recognized that there would be situations when the rote application of the formulas would not properly determine whether a proposed landfill is needed. This subpart at least provides a mechanism for consideration of additional factors that may bear on the question of need – factors like the amount of existing landfill capacity compared to the amount of waste going to landfills.

In this case, such additional factors should have included the actual capacity figures for the county and region, the actual generation figures for the county and region, the fact that the county and region already have several times more landfill capacity than either the county or the region needs to handle the amounts of waste being generated, the fact that the 10-mile circle included only a portion of the counties used in setting the capacity limit, the fact that the state overall has more than 4.4 million tons of annual landfill capacity for a state that generates only 2.0 million tons of waste, and probably many other factors. But DHEC admits that it failed to consider any such additional factors – not a single additional factor was taken into account.

From this record, it is plain that MRR has made no "demonstration of need" in the plain and ordinary sense of that term. The evidence clearly demonstrates just the opposite: that no more C & D landfills are needed in Laurens County or in any of the areas covered by

the three counties of Laurens, Greenville and Spartanburg. These counties presently have landfill capacity far exceeding waste generation rates – indeed, more than three times the landfill capacity needed to handle the waste generated in these counties. Within Laurens County alone, existing C & D landfill capacity is more than fourteen (14) times the amount of C & D waste being generated.

Accordingly, the ALJ's decision to reverse the DHEC staff decision and deny the permit is fully supported by substantial evidence and the applicable law. The ALJ properly applied the "additional factors" test that the DHEC staff had ignored. Moreover, the uncontroverted evidence showed that there were even more circumstances that could have been considered "additional factors" than were considered by the ALJ. The ALJ based his decision on the excess capacity in the three-county area. His decision is also supported by several more "additional factors": (1) the extraordinary excess capacity in Laurens County (annual capacity of 240,000 tons with only 17,000 tons of waste generated); (2) the excess capacity in Greenville County (annual capacity of 510,000 tons with only 163,450 tons of waste generated); (3) the excess capacity in Spartanburg County (annual capacity of 80,000 tons with only 71,424 tons of waste generated); (4) the fact that the 10-mile circle included only a small portion of the larger counties (Greenville and Spartanburg) used by DHEC in setting the capacity limit; (5) the fact that the state overall has more than 4.4 million tons of annual landfill capacity for a state that generates only 2.0 million tons of waste; and (6) the fact that application of the current version of Regulation 61-107.17 would expand the circle to a radius of 20 miles and thus even the rote formula would cause denial of the permit for lack of need.

The ALJ simply applied all of the requirements of Regulation 61-107.17, using the plain and ordinary meanings of the terms used, and keeping in mind the statutory mandate of a "demonstration of need." The ALJ properly rejected the interpretation of Regulation 61-107.17 urged by DHEC and MRR, which would have rendered the regulation inconsistent with the statutory mandate and rendered a key portion of the regulation meaningless.

B. Nothing in Regulation 61-107.17 Expressly Shows an Intent to License Excess Capacity, and Such Intent Would Be In Direct Conflict With the Statutory Mandate of Section 44-96-290(E).

MRR argues that "excess capacity" is built into Regulation 61-107.17, and therefore excess capacity can never be considered an "additional factor" under R.61-107.17.(D)(3)(d). This argument has no merit.

DHEC regulation 61-107.17 allows the agency to "to review additional factors in determining need on a case-by-case basis," but the regulation does not define "factors." S.C. Code Ann. Regs. § R.61-107.17.(D)(3)(d).

The term "factor" has been defined as "one that actively contributes to an accomplishment, result or process." The American Heritage Dictionary of the English Language (4th Ed. 2000), p. 634.

As noted earlier, Section 44-96-290(E) expressly prohibits the issuance of a permit for a new or expanded solid waste management facility until and unless there has been a "demonstration of need" for the facility. MRR now argues that DHEC is authorized to license "excess capacity" despite this clear statutory limitation. MRR's argument is in direct conflict with the plain mandate of Section 44-96-290(E). Moreover, there is nothing in

Regulation 61-107.17 that establishes either a need for excess capacity or a state policy favoring excess capacity.

It is certainly true that rote application of subsections (a) through (c) of Regulation 61-107.17(D)(3) can lead to the licensing of excess capacity. But there is no basis for concluding that it was the intent of either DHEC or the General Assembly to allow a regulation to convert a "need" requirement to a built-in requirement of "excess capacity." In fact, the plain language of the regulation shows the opposite intent. Regulation 61-107.17(D)(3) begins by saying: "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." S.C. Code Regs. § R.61-107.17(D)(3) (Emphasis added). Thereafter, the regulation has four (4) subparts describing the "criteria." The items listed in Regulation 61-107.17(D)(3)(a) through (c) are not called "factors," but "criteria." In this case, the DHEC staff decision used only the first three criteria listed in Regulation 61-107.17(D)(3). DHEC did **not** apply the fourth criteria, the only one that uses the term "additional factors." MRR now argues that a single one of these first three criteria should be deemed to establish "excess capacity" as "an intended consequence" of the "demonstration of need" process, and that therefore "excess capacity" is an essential "factor" of the "need" requirement.

Of course, equating "need" with "excess capacity" is patently absurd. MRR's argument is not supported by anything in the regulation or its underlying statutory mandate. Moreover, even where the plain language of a statute leads to an absurd result, courts should reject that meaning:

However clear the language of a statute may be, the court will reject that

meaning when it leads to an absurd result not possibly intended by the legislature.

Hamm v. SC Public Service Commission, 287 S.C. 180, 336 S.E.2d 470 (1985), citing *State, ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778 (1964).

Here, the plain language of Regulation 61-107.17 does not call for excess capacity. Only by rote application of the first three criteria of Regulation 61-107.17(D)(3) while ignoring both the fourth criteria and the underlying statutory mandate of a "demonstration of need," can excess capacity be justified. Furthermore, a close analysis of Regulation 61-107.17(D)(3) also undermines MRR's arguments. Subpart (a) determines when no new facilities are allowed (subject, of course to "additional factors" per subpart (d)). It says nothing about what happens if there are not at least two existing facilities within the "planning area." Subparts (b) and (c) go beyond the real issue of need, and jump to the issue what capacity limits should be placed on a "needed" landfill, and show how the capacity limit should be determined. Accordingly, subparts (b) and (c) come into play only after "need" is determined through the other criteria. MRR's arguments urge the Court to infer "need" from silence in subpart (a), to set permitted capacity using subparts (b) and (c) based on this inferred need, and then to ignore subpart (d).

The inclusion of Regulation 61-107.17.D.3.d. shows that DHEC recognized that there would be situations when the rote application of the circle test would not properly determine whether a proposed landfill is needed. This subpart provides a mechanism for consideration of additional factors that may bear on the question of need -- factors like the amount of existing landfill capacity compared to the amount of waste going to landfills.

As noted earlier, the regulation does not define "factors" or "additional factors," and there is nothing in the regulation that disqualifies a condition of excess capacity from being considered an "additional factor" that can be utilized in determining whether a landfill is needed. MRR's arguments are unsupported by either the statute, regulation or any other legal authority, and should be rejected.

III.

The Department's Interpretation of Regulation 61-107.17 Is Contrary To the Plain Language of the Regulation and Section 44-96-290(E) of the Solid Waste Policy & Management Act and Thus Is Not Entitled to Deference.

MRR cites *Young v. SC Dep't of Highways and Public Transp.*, 287 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985), in support of its argument that Regulation 61-107.17, and the DHEC staff's interpretation of that regulation, is entitled to deference. In *Young*, the Court of Appeals recognized that an agency's authority to promulgate regulations, and deference to the agency's interpretation of the statute, are limited to circumstances where the agency regulation and interpretation are "reasonably related to the purpose of the enabling legislation." 287 S.C. at 112, 336 S.E.2d at 882.

Here, the enabling legislation is Section 44-96-290(E) of the Solid Waste Policy & Management Act, which requires a "demonstration of need." S.C. Code § 44-96-290(E). If MRR is correct and DHEC has promulgated a regulation that turns the mandate of "need" into a mandate for "excess capacity," then the regulation is in direct conflict with the statute and must fall.

The South Carolina Supreme Court has consistently overruled regulations which are in conflict with statutes. In *Milliken and Company v. South Carolina Department of Labor*, 275 S.C. 264, 269 S.E.2d 763 (1980), the South Carolina Supreme Court noted:

It is well settled that an administrative order which materially alters or adds to the law is void. *Lee v. Michigan Millers Mut. Ins. Co.*, 250 S.C. 462, 158 S.E.2d 774 (1968). The same principle applies to administrative rule-making. See *Hay v. S.C. Tax Comm'n*, 273 S.C. 269, 255 S.E.2d 837 (1979); *Lee v. Michigan Millers Mut. Ins. Co.*, supra; *Heyward v. S.C. Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962).

275 S.C. at 267-268, 269 S.E.2d at 764. In *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), the Court said: "Although a regulation has the force of law, it must fall when it alters or adds to a statute." 283 S.C. at 567, 324 S.E.2d at 315, citing *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496 (1943). Therefore, DHEC regulations are valid only when they are consistent with the underlying statutory provisions.

Here, DHEC's regulation includes a provision that allows the "need" determination to be made on a case by case basis so as to avoid excess capacity. Yet under the agency's standard operating procedure, the "additional factors" test is never applied by the agency staff. Indeed, the DHEC official in charge of solid waste management permits testified that the agency has never looked at "additional factors" and does not even know what an "additional factor" is. (R. pp. 208-209, 245 (Tr. 127-128, 164)). By consistently ignoring the "additional factors" provision, the DHEC interpretation has effectively negated this provision, resulting in the permitting of excess capacity that is in direct conflict with the statutory mandate of permitting only those facilities that have made a "demonstration of

need.”

Where an agency’s interpretation of the statute leads to a situation that is in direct conflict with the plain language of the statutory mandate, there is certainly a “compelling reason” to overrule the agency’s interpretation.

MRR urges this Court to defer to DHEC and allow Regulation 61-107.17 to override the statutory “demonstration of need” requirement. MRR’s argument is contrary to the plain language of the statute and regulation, contrary to settled case law, and contrary to the public interest, and thus should be rejected.

IV.

The Administrative Law Court Did Not Rule on the Facial Validity of the Regulation But Instead Merely Applied the Regulation According To Its Plain Language In Light of the Statutory Mandate.

The Administrative Law Judge recognized that the Administrative Law Court, “as a segment of the executive branch, has no authority to rule on the ‘facial validity’ of a regulation under state law.” (R. pp. 6-10 (Order Denying Petitioner’s Motion for Summary Judgment, August 7, 2009)).

MRR argues, however, that in interpreting the regulation in light of the plain and ordinary meaning of its terms, and of the terms of the regulation’s underlying statute, the ALC “substituted its own method for approving a ‘demonstration of need’ for that promulgated by the Department under the DON Regulation.” (Initial brief, p. 27). This argument has no merit. All the ALJ did was to apply the plain and ordinary meaning of the

regulation and its underlying statute, a task that is fully within the authority of the Administrative Law Court.

V.

The Administrative Law Court Did Not Err In Applying All of the Terms of the Applicable Statutes and Regulations in Determining That There Is No Need for MRR's Proposed Landfill.

MRR's arguments in Section V of its brief are merely a re-statement of grounds covered in Sections I through IV of its brief. EAGLE incorporates by reference the arguments in Sections I through IV herein in response.

VI.

The Administrative Law Court Did Not Err in the Admission of Evidence.

MRR claims error in the admission of EAGLE Exhibits 25 and 26, DHEC's 2008 Solid Waste Management Report and a Laurens County document summarizing the amount of waste at the Curry Lake C&D landfill from 2006, respectively, arguing that the ALC cannot admit "evidence which did not exist at the time of the Department decision and could not have been considered by the Department." (Initial Brief, pp. 31-32). This argument is patently without merit.

As MRR acknowledges, the hearing before the Administrative Law Court is a *de novo* proceeding. (Initial Brief, p. 32). The only authority offered by MRR in support of its argument against admission of evidence "which did not exist at the time of the Department

decision” is that this Court’s ruling in *Marlboro Park Hospital v. SC Department of Health & Environmental Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004), did not expressly authorize such evidence. But *Marlboro Park* involved only the broad issue of whether evidence not presented during a DHEC “Staff Review Hearing” could be admitted by the Administrative Law Court, and the issue of a distinction between evidence existing at the time of the staff hearing, and evidence that did not exist at that time, was neither presented nor addressed. There is nothing in the *Marlboro Park* opinion that remotely suggests that any such distinction makes any difference. Indeed, this Court in *Marlboro Park* noted that a “A trial *de novo* is one in which ‘the whole case is tried as if no trial whatsoever had been had in the first instance.’” 358 S.C. at 579, 595 S.E.2d at 854, quoting *Blizzard v. Miller*, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991).

In any event, MRR makes no attempt to show prejudice from the admission of this evidence.

The admission of evidence is left to the sound discretion of the trial court, and the trial court’s decision will not be reversed absent an abuse of discretion amounting to error of law. The appealing party must show both the error of the ruling and prejudice. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008).

MRR, notably, does not complain about the admission of EAGLE Exhibit 24, the 2007 DHEC Solid Waste Management Report. Exhibit 24 contains much of the same information contained in EAGLE Exhibit 25. (R. pp. 414-429). The only new landfill statistics provided in Exhibit 25 are the landfill capacity and waste production figures for fiscal year 2008. The 2008 numbers were not used by the ALJ in his decision. Nor does the

ALJ's order refer to or rely upon EAGLE Exhibit 26.

Quite simply, MRR has shown neither error, prejudice or abuse of discretion.

VII.

The Administrative Law Court's Finding That The Proposed Landfill Is Not Needed Is Fully Supported By The Reliable, Probative and Substantial Evidence On The Whole Record And By The Applicable Statutes and Regulations, And Thus Is Not Arbitrary Or Capricious.

MRR does not contest any of the specific individual factual findings of the Final Order and Decision, and MRR fully acknowledges that there is excess landfill capacity in the Laurens, Greenville and Spartanburg County area. The findings on the amount of waste produced in these counties and the capacity of the existing landfills are taken directly from official reports issued by the South Carolina Department of Health and Environmental Control.

MRR simply argues that there is an inconsistency between the ALJ's refusal to consider singly the Laurens County figures for waste production and landfill capacity as a "additional factor," and the ALJ's conclusion that an area-wide condition of excess capacity would be considered an "additional factor."

EAGLE respectfully submits that the ALJ should have looked at **both** the excess capacity within Laurens County and within the three-county area, and should have considered **both** of these things as "additional factors" under Regulation 61-107.17(D)(3)(d). While utilization of the three-county landfill capacity is only 32.9%, there

is only a 29.5% utilization of the existing Laurens County landfill capacity. (R. p. 418 (Pet. Ex. 24, p. 73)). And Laurens County already has over 240,000 tons of annual C & D landfill capacity, while generating only 17,000 tons per year.

Section 44-96-290(E) requires a demonstration of need before a landfill permit may be issued. Here, the plain and ordinary meaning of the statutory requirement justify denial of a permit for lack of need where there are hundreds of thousands of tons of excess landfill capacity. There is nothing arbitrary or capricious about the ALJ's conclusions regarding a lack of need.

VIII.

The Administrative Law Court's Holding That The Proposed Landfill Is Not Needed Is Fully Supported by the Reliable, Probative, Substantial and Uncontroverted Evidence.

MRR points to isolated bits of evidence in an attempt to argue that the ALC's finding of a lack of need is not supported by the substantial evidence. Essentially, however, MRR is arguing the weight of the evidence and that the evidence should have led to different findings. These arguments are insufficient to overturn the ALC's ruling.

The rules governing the review of administrative decisions under the substantial evidence test are well established:

"Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *Southeast Res. Recover, Inc. v. Dep't of Health and Env'tl. Control*, 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)). "[T]he

possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

South Carolina Coastal Conservation League vs. South Carolina Department of Health and Environmental Control, 363 S.C. 67, 610 S.E.2d 482 (2005). "[I]n environmental permitting cases, the ALJ presides as the finder of fact. § 1-23-600(B)." *Id.*

MRR's arguments go to the weight of the evidence and how it should be interpreted. MRR has not demonstrated that the finding that this proposed landfill is not needed lacks evidentiary support. The finding is fully supported by reliable, probative, substantial and largely uncontroverted evidence.

IX.

There Are Additional Sustaining Grounds Supporting The Administrative Law Court's Denial of the Landfill Permit.

A. There Are More "Additional Factors" That Justify The Determination That The Proposed MRR Landfill Is Not Needed.

In part II.A. of this brief, EAGLE has set forth several circumstances, supported by the uncontroverted evidence, that could and should have been considered by DHEC and the Administrative Law Judge as "additional factors" under DHEC Regulation 61-107.17(D)(3)(d) (2000). These "additional factors" also constitute additional sustaining grounds supporting a decision to affirm the ALJ's order.

B. The Administrative Law Judge Should Have Applied the 2009 Version of DHEC Regulation 61-107.17, And the 2009 Version Provides Additional Support For The Decision to Deny The Landfill Permit.

As noted earlier, both MRR and EAGLE filed motions for summary judgment in this case. The motions were heard by the Administrative Law Judge on May 27, 2009. By the time the case came to trial, on July 22, 2009, no orders had been issued ruling on these motions.

Following the trial on the merits, on August 7, 2009, the Administrative Law Judge issued two orders denying both motions for summary judgment.

In his Order Denying Petitioner's Motion for Summary Judgment, the ALJ rejected EAGLE's argument that the version of DHEC Regulation 61-107.17 that should be applied to MRR's application was the current version, which became effective upon publication in the State Register on June 26, 2009.

The ALJ rejected EAGLE's arguments, ruling that application of the 2009 version of Regulation 61-107.17 would be a "retroactive" application of this rule, and refused to consider the 2009 version. (R. pp. 6-10 (Order Denying Petitioner's Motion for Summary Judgment)).

The ALJ's ruling on this point, however, was misguided. As will be shown below, applying a current regulation to a proposed future activity – the proposed landfill – would not be a retroactive application of the regulation. And the new regulation provides additional support for denial of the landfill permit.

In *Ziffrin v. United States*, 318 U.S. 73, 63 S.Ct. 465 (1943), the United States

Supreme Court ruled that where there is a change in the law prior to a final decision on a permit, the new law must be applied: "A fortiori, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation." 318 U.S. at 78, 63 S.Ct. at 469.

The rule of the *Ziffrin* case was recently followed in a New York case, *In re Solomon*, 46 A.D.3d 370, 847 N.Y.S.2d 568 (N.Y.A.D. 1 Dept.,2007). The New York court said:

We further reject petitioner's argument that he is entitled to have his license application considered under the standards existing before certain modifications to the statutes in 2003. Just as a reviewing court rules on the basis of the law in effect at the time of the decision (see *Matter of Demisay, Inc. v. Petito*, 31 N.Y.2d 896, 897, 340 N.Y.S.2d 406, 292 N.E.2d 674 [1972]), "a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation" (*Ziffrin, Inc. v. United States*, 318 U.S. 73, 78, 63 S.Ct. 465, 87 L.Ed. 621 [1943]). Applications are generally determined based on the law as it exists at the time of the decision, and petitioner's stated reasons for relying on the outdated standards do not warrant a different conclusion.

46 A.D.3d at 372, 847 N.Y.S.2d at 570.

Where a permit has not yet been issued, and where the administrative appeals process has not concluded a decision on a contested case hearing, a permit applicant has no basis for claiming a vested right based on out-dated regulation that has been replaced with a new regulation. In August of 2008, the DHEC Board gave approval to new standards for making determinations of need for solid waste facilities. The new standards are now fully in effect and are the law of the State of South Carolina. (SC State Register, Vol. 33, Issue No. 6, pp. 119-133).

The ALJ cited *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001), for the proposition that a new law may not be applied retroactively absent a clear indication from the legislature that it intended such a result. (R. p. 10 (Order Denying Petitioner's Motion for Summary Judgment, p. 5)). While EAGLE does not disagree with this basic proposition, EAGLE respectfully submits that the rule of "retroactive" application of a new law does not apply to the present situation.

The retroactive application of a new or amended rule involves the application of the new rule to **past** conduct. As the U.S. Supreme Court said in *St. Cyr*:

"The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " *Martin*, 527 U.S., at 357-358, 119 S.Ct. 1998 (quoting *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483). A statute has retroactive effect when it " 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past....' " *Id.*, at 269, 114 S.Ct. 1522 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767, No. 13,156 (C.C.D.N.H. 1814) (Story, J.)). As we have repeatedly counseled, the judgment whether a particular statute acts retroactively "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.' " *Martin*, 527 U.S., at 358, 119 S.Ct. 1998 (quoting *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483).

I.N.S. v. St. Cyr, 533 U.S. 289, 320 (2001)(footnote omitted).

Here, we are faced with a decision about the **future** construction of a landfill. Here, the failure to apply the 2007 plan and the 2009 regulations would result in the permitting of a **new** landfill that is facially in violation of the current county solid waste management plan and in violation of the current demonstration of need regulation. Here, MRR possesses no vested rights in any aspect of its requested landfill permit; even after the DHEC staff made a

final staff decision and the DHEC Board refused to grant review, the permit decision remained subject to *de novo* review by the Administrative Law Court and judicial review by this Court and the Supreme Court.

Application of the new version of Regulation 61-107.17 and the 2007 Plan do not represent a “retroactive” application of these rules. The basis for the general rule against retroactive application of a new statute or regulation is the *ex post facto* clause of the United States Constitution. It is inappropriate to apply a new rule retroactively to apply to past conduct. Here, however, the new plan and regulation are not being applied to past conduct. Instead, the rules that are now in effect are being applied in determining whether a future activity should take place – the construction of a new landfill. As noted in *Ziffrin* and *In re Solomon*, using the old regulations – under the flawed interpretation urged by MRR – would authorize a long-term future land-filling activity that would be in clear violation of the current 2009 demonstration of need regulations.

C. Regulation 61-107.17, As Interpreted by DHEC and MRR, Is Contrary To The Clear Statutory Mandate of Section 44-96-290(E), And Thus If The Regulation Cannot Be Interpreted In A Way As To Avoid This Conflict, The Regulation Should Be Declared Invalid.

MRR urges this court to rule that Regulation 61-107.17 requires DHEC to issue permits for “excess capacity” solid waste landfills, arguing that this Regulation defines “need” as mandated by Section 44-96-290(E) of the Solid Waste Policy & Management Act. This argument, if sustained, would negate the statutory mandate that prohibits the issuance of a permit without a “demonstration of need.” Accordingly, if the Court concludes that the

Regulation cannot be reconciled with the plain meaning of the requirement of a "demonstration of need," the Regulation should be struck down.

EAGLE's motion for summary judgment argued that Regulation 61-107.17, as applied by DHEC, violates the "demonstration of need" requirement of Section 44-96-290(E) of the Act. The ALJ refused to address this issue, ruling that "the ALC, as a segment of the executive branch, has no authority to rule on the 'facial validity' of a regulation under state law. See Drummond v. State, 378 S.C. 362, 370, 662 S.E.2d 587, 591 (2008)." (R. p. 9 (Order Denying Petitioner's Motion for Summary Judgment, p. 4)).

On appeal, MRR urges this court to adopt a facial interpretation of Regulation 61-107.17 that places the regulation in blatant conflict with the underlying statutory mandate.

It is well-established in South Carolina that where a regulation and a statute are in conflict, the regulation must fall. The general rule is that only the legislature has the authority to pass laws and any agency interpretation – be it in an administrative order or through agency rule-making – must not alter or add to the statute. In *Lee v. Michigan Millers Mutual Insurance*, 250 S.C. 462, 158 S.E.2d 774 (1968), the Court ruled that an administrative agency invested with rule making power for the purpose of carrying out the legislative will expressed in statutory form has no legal authority to enact regulations that "materially alter or add to" the statute. 250 S.C. 462, 468, 158 S.E.2d 774, 776 (citing *Heyward v. S.C. Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962)). In *Lee*, the Insurance Commissioner issued an Order requiring liability insurance policies issued prior to January 1, 1961, to carry the uninsured motorist endorsement. The Court held that because the order materially altered and added to the statute, it was an invalid agency interpretation.

In *Milliken and Company v. South Carolina Department of Labor*, 275 S.C. 264, 269 S.E.2d 763 (1980), the South Carolina Supreme Court noted:

It is well settled that an administrative order which materially alters or adds to the law is void. *Lee v. Michigan Millers Mut. Ins. Co.*, 250 S.C. 462, 158 S.E.2d 774 (1968). The same principle applies to administrative rule-making. See *Hay v. S.C. Tax Comm'n*, 273 S.C. 269, 255 S.E.2d 837 (1979); *Lee v. Michigan Millers Mut. Ins. Co.*, supra; *Heyward v. S.C. Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962).

275 S.C. at 267-268, 269 S.E.2d at 764.

In *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), the SC Supreme Court held that "Although a regulation has the force of law, it must fall when it alters or adds to a statute." 283 S.C. at 567, 324 S.E.2d at 31 (citing *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496 (1943)). In that case, the statute provided that "any person" has a right to inspect or copy such public records. Yet DHEC, by regulation, attempted to limit public access to death certificates. The Court ruled that the regulation was invalid because only the legislature can restrict the class of persons to whom DHEC must furnish death certificates.

In *State v. Sweat*, the Court of Appeals ruled that "when a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008) (citing *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994); *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 231, 612 S.E.2d 719, 723 (Ct. App. 2005). The Court continued that a "statutory interpretation which would lead

to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention" will be rejected. *Id.* at 350, 677 (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); *Kiriakides v. United Artist Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). The court will reject the agency's interpretation where it is contrary to the plain language of the statute. *Id.* (citing *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)).

Numerous other jurisdictions apply the same rule. *See, e.g., Chevron v. NRDC, et al.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782 (1984); *Sharpe v. Arizona Health Care Cost Containment Sys.*, 220 Ariz. 488, 207 P.3d 741, 2009 WL 249706 (Ariz. App. Div. 1, 2009); *State of Georgia ex rel. Department of Medical Assistance v. Heckler*, 768 F.2d 1293, 1298 (11th Cir.1985); *Shipkey v. District of Columbia Dept. of Employment Services*, 955 A.2d 718 (D.C. 2008); *Creative Choice XXV, Ltd. v. Florida Housing Finance Corp.*, 991 So.2d 899 (Fla. App.1. Dist. 2008); *MOAEC, Inc. v. MusicIP Corp.*, 568 F. Supp. 2d 978 (W.D.Wis. 2008).

Here, Section 44-96-290(E) plainly states that "No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department." S.C. Code Ann. § 44-96-290(E).

The ALC properly interpreted and applied Regulation 61-107.17 in a manner that is consistent with the plain language of its underlying statutory mandate, and which gives effect to all provisions of the regulation. In contrast, the interpretation argued by MRR, and used by DHEC, presents a clear conflict with the statutory mandate and fails to give any

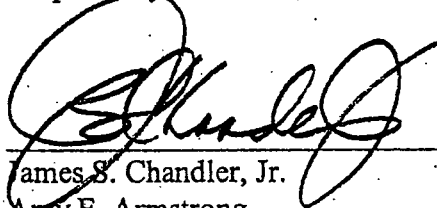
meaning to Regulation 61-107.17(D)(3)(d). If this Court should conclude that DHEC's interpretation of Regulation 61-107.17 is correct, then the Court should declare the regulation to be in direct conflict with Section 44-96-290(E) of the Act and therefore invalid.

CONCLUSION

Section 44-96-290(E) of the Solid Waste Policy & Management Act prohibits issuance of a permit for a new or expanded solid waste management facility without a "demonstration of need." S.C. Code Ann. § 44-96-290(E). Ruling upon uncontroverted evidence, and giving effect to the plain language of this statute and its implementing regulations, the Administrative Law Judge properly concluded that MRR failed to make a demonstration of need for its proposed landfill.

For these and the other foregoing reasons, the Final Order and Decision of the Administrative Law Judge should be affirmed.

Respectfully submitted,



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April 27, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Case No. 08-ALC-07-0425-CC

Engaging and Guarding Laurens County's Environment ("EAGLE"),
a non-profit membership organization, ... Respondent,

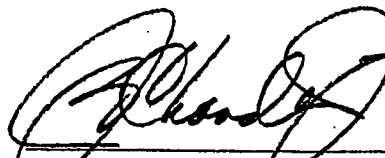
vs.

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

of whom MRR Highway 92, LLC, is Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent EAGLE complies
with Rule 211, SCACR.


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April 27, 2010

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THE STATE OF SOUTH CAROLINA
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v.

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

of whom MRR Highway 92, LLC is Appellant.

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ARGUMENTS

I. THE ALC DID NOT HAVE SUBJECT MATTER JURISDICTION TO HEAR EAGLE'S REQUEST FOR CONTESTED CASE HEARING ON THE DEPARTMENT'S ISSUANCE ON THE DON APPROVAL ON MARCH 3, 2006.

In its initial brief, EAGLE contends that the request for review of the demonstration of need ("DON") approval 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 Facility") was not a final agency decision subject to a contested case hearing. EAGLE further argues that if the March 3, 2006 DON approval were a final agency decision, such decision is void because the Department did not give public notice of the decision. However, as discussed more fully below, the March 3, 2006 DON approval was a final and appealable decision, and the Department gave notice of that decision to all parties entitled to notice. Moreover, failure to give EAGLE notice of the DON approval did not violate EAGLE's due process rights. Finally, a stipulation as to standing does not preclude a determination that the ALC lacked subject matter jurisdiction to review the Department's decision to issue a DON approval for the Proposed Facility.

A. The March 3, 2006 DON approval was a final and appealable agency decision.

In its brief, EAGLE contends that the March 3, 2006 DON approval was not a final and appealable decision subject to a contested case hearing. Contrary to EAGLE's contention, the March 3, 2006 DON approval was a final decision subject to a contested case hearing. Indeed, MRR would have been required to bring a contested case regarding the Department's decision on its DON request within 30 days of receipt of such decision pursuant to Rule 11, SCR PALC. For example, if the Department had denied the DON

approval or if MRR had disputed the maximum annual disposal rate allowed under the DON approval, the time for appeal of such decision would have run from the receipt of the Department's decision by MRR. If the DON approval was a final agency decision as to MRR, then such decision was also a final agency decision as to all other parties. As such, the Department's decision on MRR's DON request was unquestionably a final and appealable decision.

B. The Department provided notice of the March 3, 2006 DON approval to all parties entitled to notice.

Additionally, EAGLE argues that "either the letter 'decision' was not an appealable contested case decision or the 'decision' is void because made without notice or opportunity for hearing, in violation of EAGLE's constitutional rights." (Respondent's Initial Brief, p. 17). This argument fails because the Department gave notice of the March 3, 2006 DON approval to all parties entitled to notice under the applicable statute and regulations. Contrary to EAGLE's assertions, there is no requirement of public notice of the DON approval for the Proposed Facility. EAGLE fails to direct the Court to any statutory provision requiring the Department to give public notice of its decision on MRR's DON request. Indeed, while certain statutory and regulatory provisions require the Department to issue public notice of a decision or of its intent to issue a decision, there is no requirement that every decision of the Department be placed on public notice. *See, e.g.*, S.C. CODE ANN. § 48-1-115 (2008) (requiring the Department to give public notice prior to issuing a construction permit for a sludge storage facility); S.C. CODE ANN. § 48-39-140(C) (2008) (requiring the Department to give public notice of an of an application for a permit to utilize the critical area of the coastal zone); S.C. CODE ANN. § 48-20-70 (2008) (required the Department to publish

notice an application for an operating permit or a substantial modification of an operating authorizing mining activity).

In its brief, EAGLE contends that MRR ignores Section 1-23-370(a) of the APA, which EAGLE asserts "reinforces the 'notice' requirements." (Respondent's Initial Brief, p. 20). On the contrary, this provision of the APA supports MRR's position that public notice is not required for every Department decision. Specifically, Section 1-23-270(a) provides as follows: "When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this article and Article 1 concerning contested cases apply." S.C. CODE ANN. § 1-23-270(a) (2005). There is no question that the "required to be preceded by notice" is conditional and does not apply in every Department decision to grant, deny or renew a license. Indeed, the South Carolina Supreme Court has acknowledged that notice and opportunity to be heard as a "contested case" under the APA may not be applicable to every decision of the Department, but held that a party may nonetheless be entitled to notice and an opportunity to be heard under the Article I, Section 22, of the South Carolina Constitution. *Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envt. Control*, 305 S.C. 90, 93, 406 S.E.2d 340, 342 (1991).

In *Stono River*, the South Carolina Supreme Court held that "constitutional due process provisions, apart from the APA, are sufficient to confer the rights to notice and for an opportunity to be heard." *Id.* at 93-94, 406 S.E.2d at 342. Article I, Section 22, of the South Carolina Constitution provides as follows:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty

or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. CONST. art. I, § 22. The *Stono River* Court held that intervenors had been denied their constitution rights of notice and opportunity to be heard when they were not informed of issues to be considered at DHEC board meeting and were not allowed to present evidence and cross-examine witnesses regarding merits of case. *Stono River*, 305 S.C. at 94, 406 S.E.2d at 342. However, such holding does not support EAGLE's claim that it was entitled to notice of the DON approval for the Proposed Facility.

More recently, this Court considered a claim to denial of procedural due process in *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*. 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008). In *South Carolina Coastal Conservation League*, this Court cited *Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008), for the following holding: "The procedural component of the state and federal due process clauses requires the individual **whose property or liberty interests are affected** to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." *Id.* at 382, 669 S.E.2d at 916 (emphasis added); *see also Brown v. South Carolina State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (holding that the right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause). As discussed more fully in Appellant's initial brief, EAGLE has no interest in the property to be developed. EAGLE does not

have interest in a competing business which was denied a DON approval based on the DON approval issued to MRR. Moreover, in its initial brief, EAGLE failed to identify any property or liberty interest which would entitle it to notice of the Department's DON approval for the Proposed Facility. Accordingly, the Department provided notice of its decision to the only party with any liberty or property rights in the DON decision—MRR.

Additionally, in *South Carolina Coastal Conservation League*, this Court held that even though the appellant had a constitutional right to due process of law, such claim failed because Appellant failed to take the statutorily required steps outlined to protect these rights. 380 S.C. at 383, 669 S.E.2d at 916-17. Such is the case in this matter. Even if EAGLE had a claim to denial of its due process rights, which it does not, EAGLE unquestionably failed to take advantage of the recourse provided under Rule 11(C), SCR PALC, once it learned of the Department issuance of the DON approval and thus has no claim that dismissal of its untimely request for review by the ALC violates its due process rights.

C. A stipulation to standing has no bearing on a determination regarding the ALC's jurisdiction to hear Respondent's request for review of the Department's DON approval.

In its brief, EAGLE contends that MRR's stipulation that EAGLE has standing to challenge the Department's decision amounts to a requirement that such party is entitled to notice and an opportunity for hearing under Article I, Section 22, of the South Carolina Constitution. As a preliminary matter, standing and due process rights are two distinct concepts for which the South Carolina appellate courts have recognized two distinct tests. Standing is a threshold determination of a party's right to be heard in a judicial proceeding. "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." *Powell ex rel. Kelley v. Bank*

of America, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting 1A C.J.S. Actions § 101 (2005)). In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, the South Carolina Supreme Court adopted the standing test set established by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which “set forth the ‘irreducible constitutional minimum of standing.’” 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

The *Lujan* test consists of the following 3-prong test for establishing standing:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not “conjectural” or “hypothetical.”

Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”

Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Id. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 559-61). The *Sea Pines* court acknowledged that “an injury to one’s aesthetic and recreational interests in enjoying and observing wildlife is a judicially cognizable injury in fact.” *Id.* at 602, 550 S.E.2d at 291-92. In contrast, as discussed *supra*, the interests entitled to protection under the due process clause of the South Carolina Constitution are expressly limited to liberty and property interests. Indeed, in *Sea Pines*, the Court identified standing to challenge the issuance of permits and the parties’ right to notice and opportunity to be heard prior to the issuance of permits as separate and distinct issues. *Id.* at 599, 550 S.E.2d at 290. Accordingly, a stipulation as to EAGLE’s standing to challenge the Department’s DON approval has no bearing on EAGLE’s claim that it was entitled to notice of the DON

approval pursuant to Article I, Section 22, of the South Carolina Constitution.

More importantly, a stipulation as to standing has no bearing on the ALC's jurisdiction to hear the party's claims. As discussed above, standing is a determination of a party's right to bring claims before a court. Subject matter jurisdiction is the court's power to hear and determine particular classes. *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 120, 678 S.E.2d 430, 433 (2009). Compliance with statutory time periods for filing an action is a prerequisite for the court's jurisdiction to hear the case. *South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Env'tl. Control*, 380 S.C. 349, 376, 669 S.E.2d 899, 913 (Ct. App. 2008) (citation omitted). As discussed at length in Appellant's initial brief, the ALC did not have jurisdiction to hear EAGLE's contested case because EAGLE did not timely file its Request for Contested Case Hearing for review of DON approval pursuant to Rule 11 of the South Carolina Rules of Procedure for the Administrative Law Court. EAGLE argues that MRR's failure to raise the issue of timeliness of EAGLE's appeal prior to the hearing on the merits in some manner diminishes the validity of MRR's claim that the ALC lacked jurisdiction to hear EAGLE's appeal. The South Carolina law on this issue is well settled. "The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006) (citation omitted). The lack of subject matter jurisdiction may not be waived, even by consent of the parties. *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989).

The Department's decision to approve the DON for the Proposed Facility was

issued by the Department on March 3, 2006. The decision approving the DON was a final agency decision subject to appeal. The time for filing such appeal was set forth Rule 11, SCR PALC. EAGLE failed to file a request for a contested case hearing within thirty (30) days of actual notice of the Department's decision to issue a DON approval for the Proposed Facility or within ninety (90) days after the date of that decision on March 3, 2006. EAGLE did not file an appeal of the DON approval until its request for Board review was filed on August 4, 2008—more than two years later. Therefore, the ALC clearly lacked subject matter jurisdiction to hear EAGLE's appeal of the DON approval for the Proposed Facility and should have granted MRR's motion to dismiss.

II. THE ALC IMPROPERLY SUBSTITUTED ITS OWN DEFINITION OF DEMONSTRATION OF NEED FOR THAT SET FORTH IN THE DON REGULATION.

Section 44-96-290(E) of the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* ("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 Act does not specify procedures for the Department 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). Instead, the General Assembly expressed required the Department to promulgate regulations implementing procedures for approving demonstrations of need for new and expanded facilities. S.C. CODE ANN. § 44-96-290(E) (2002) ("The department shall promulgate regulations to implement this section."). In its Final Order and Decision, the ALC improperly substituted its definition of need for the test for need as set forth in the DON Regulation. Specifically, the ALC held as follows:

Other than the criteria set forth in Regulation 61-107.17(D)(3), no other

definitions of the term "need" are provided in either the Act or the DHEC regulation. Accordingly, the Court should look to the "plain and ordinary" meaning of these terms. *New York Times Co. v. Spartanburg Cty. School Dist. No. 7*, 374 S.C. 207, 649 S.E.2d 28 (2007). "Need" has been defined to mean: "a condition requiring supply or relief." MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary>. Applying that definition to this case, it is obvious that the General Assembly intended that a demonstration of "need" must involve proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public's demands.

(Final Order and Decision, pp. 6-7, R. pp. 21-22). In so holding, the ALC clearly substituted its own method for approving a "demonstration of need" for that promulgated by the Department under the DON Regulation. The ALC's ruling that a demonstration of need must include "proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public's demand" is in direct conflict with the express provisions of the DON Regulation. Moreover, the ALC's interpretation of "demonstration of need" presumes that an additional landfill is needed only when there is some indication that the disposal needs of the planning area and surrounding region cannot be met without the additional permitted capacity of the proposed facility. In other words, the ALC interprets "demonstration of need" to require a showing that the additional disposal capacity is a necessity. This interpretation is unduly narrow. There is nothing in the Solid Waste Act which prohibits the permitting of disposal capacity beyond that generated within a county or region, or even within the State. Indeed, as discussed more fully below, the excess permitted capacity which results from the application of the express provisions of the DON Regulation promotes the express goals and policies of the Solid Waste Act.

As acknowledged by EAGLE in its initial brief, the application of the express criteria set forth in the DON Regulation may lead to permitted annual disposal capacity in

excess of the amount of waste generated in the host county and the other counties within a facility's planning area as defined by the DON Regulation. Indeed, as discussed at length in Appellant's initial brief, the operation of Subsection (D)(3)(b) of the DON Regulation will always result in excess disposal capacity when there is another facility within the ten-mile radius planning area of a proposed facility. In such case, Subsection (D)(3)(b) allows each facility a maximum yearly disposal rate up to the total amount of waste generated in the host county. Moreover, depending on the size of the county, there could be any number of facilities located within the county—each with a permitted maximum annual disposal rate equal to the total annual waste generated in the host county. Finally, as is the case with the Proposed Facility, 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 facility touches on more than one county. Unquestionably, the application of the DON Regulation may, and often does, result in disposal capacity in excess of that necessary only to meet the needs of the host county and the surrounding region. In fact, the only time when the application of Subsection (D)(3)(b) would not result in the excess disposal capacity beyond that amount of waste generated in the host county is when there is only one permitted facility in the county. Yet, the ALC concluded that this excess capacity, which is simply the result of the operation of the express criteria on the DON Regulation, is an additional factor which required the Department to deny MRR's DON request.

ALC's narrow interpretation of Section 44-96-290(E) of the Solid Waste Act is completely at odds with the express directives of the Solid Waste Act. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges*

v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000) (emphasis added). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005). As a preliminary matter, the General Assembly could have set parameters for the demonstration of need determination, but did not do so. Instead, the General Assembly directed the Department to promulgate regulations for making such determination. Additionally, the General Assembly imposed only one limitation on the Department's procedure for approving a demonstration of need, providing as follows: "In determining if there is a need for new or expanded solid waste disposal sites, the department shall not consider solid waste generated in jurisdictions not subject to the provisions of a county or regional solid waste management plan pursuant to this chapter." S.C. CODE ANN. § 44-96-290(E) (2002). Since all counties must adopt a county or regional solid waste management plan pursuant to Section 44-96-80 of the Act, such provision must be interpreted to prohibit the consideration of waste generated outside of the state as a component of the procedures governing a demonstration of need determination. S.C. CODE ANN. § 44-96-80(A) (2002). However, this provision also suggests a legislative intent that the demonstration of need determination would incorporate a factor based on the amount of solid waste generated. The Department did so in promulgating the DON

Regulation. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008).

The criteria for demonstrating need as set forth in the Regulation is directly related to the goals and purposes of the Solid Waste Act. In enacting the Solid Waste Act, the General Assembly made a specific finding regarding the need for a "coordinated statewide solid waste management program." S.C. CODE ANN. § 44-96-20(A)(13) (2002). The DON Regulation's use of planning areas to determine need for new and expanded facilities is consistent with the legislative directive to develop a statewide program for managing solid waste. With respect to the location of facilities, the planning areas established by the DON Regulation assure that C&D landfills are spread throughout the state geographically without regard to county boundaries and the needs of a particular county. Moreover, the siting of two commercial facilities within each planning area and allowing each facility a maximum disposal rate **at least** equal to amount of waste generated in the host county promotes competition within the C&D waste disposal market. Such objective is consistent with the express goals and policies of the Solid Waste Act. Specifically, a stated purpose of the Solid Waste Act is to provide solid waste management services in "the most environmentally, safe, economically feasible and cost-effective manner." S.C. CODE ANN. § 44-96-20(B)(1) (2002) (emphasis added). Similarly, the General Assembly made a specific finding 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. § 44-96-240(A)(6) (2002) (emphasis added). The excess permitted capacity resulting from the application of the express provisions of the DON Regulation promotes competition and thus facilitates the disposal of waste in a "cost-

effective manner.” Indeed, Mr. James Martin, a member of EAGLE and owner of a construction business in Laurens County, acknowledged that 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). Similarly, excess permitted disposal capacity throughout the region to be served by a proposed facility promotes competition. 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 the Department’s DON Regulation is a regional concept. (Trial Tr. p. 100, ll. 12-14, R. p. 181). Mr. Coleman testified that many of the Part IV C&D Landfills in the three-county planning area for the Proposed Facility accept waste from other counties. (Trial Tr. p. 105, ll. 2-10, R. p. 186). 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 Facility. (Pet. Ex. 26, R. p. 437). 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. The narrow interpretation of the “demonstration of need” as adopted by the ALC and advocated by EAGLE clearly undermines this goal.

In its brief, EAGLE argues that MRR’s interpretation of the DON Regulation to allow for excess permitted disposal capacity is in direct conflict with the statute and thus

invalid. Citing to *Milliken and Company v. South Carolina Department of Labor*, 275 S.C. 264, 269 S.E.2d 763 (1980), and *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), EAGLE argues that the DON Regulation is void under this interpretation because a regulation "must fall when it alters or adds to a statute." (Respondent's Initial Brief, p. 32). Again, as discussed *supra*, the DON Regulation does not alter or add to Section 44-96-290(E), which clearly authorizes the Department to promulgate the regulation on the demonstration of need determine. Moreover, as EAGLE concedes, the Solid Waste Act does not define "need" or "demonstration of need." 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). The Department has done so with the promulgation of the DON Regulation. Additionally, it is clear that the DON Regulation does not alter or add to the provisions of the Solid Waste Act because the DON Regulation determines demonstration of need in a manner which promotes the goals and policies of the Act. Accordingly, the DON Regulation, as promulgated by the Department and submitted to the General Assembly pursuant to the APA, is valid.

Moreover, as discussed in Appellant's initial brief, the DON Regulation is the Department's interpretation of "demonstration of need" in Section 44-96-290(E) of the Solid Waste Act. In Section 44-96-290(E), the General Assembly expressly required the Department to promulgate regulation implementing a procedure for the demonstration of

need determination. S.C. CODE ANN. § 44-96-290(E) (2002). The DON Regulation was promulgated in 2000 in accordance with the APA, which requires public notification of proposed regulations and submittal to the General Assembly. See S.C. CODE ANN. §§ 1-23-110 and 1-23-120 (Supp. 2008). “[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” *Brown v. S.C. Dep’t of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting *Dunton v. S.C. Bd. of Exam’rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). As discussed *supra*, the General Assembly did not define “need” in Section 44-96-290(E) of the Solid Waste Act, but instead authorized the Department to promulgate regulations for determining need for new facilities. S.C. CODE ANN. § 44-96-290(E) (2002). In promulgated the DON Regulation, the Department set forth a clear formula for determining need and annual rate of disposal for new Part IV C&D landfills.

The ALC erred in failing to give deference to the Department’s interpretation of Section 44-96-290(E) of the Solid Waste Act. The DON Regulation is the Department’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 Regulation unquestionably provides for excess permitted disposal capacity in the host county and the counties encompassed by a proposed facility’s planning area. There can be no doubt that the Department 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 facility’s planning. Moreover, if the Department had intended to limit this excess capacity to a specific percentage relative to the waste generated within the counties encompassed by a

proposed facility's planning area, the Department certainly could have drafted the DON Regulation to do so. However, the Department 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, in holding that the Department staff should have considered excess permitted disposal capacity as an "additional factor" under Subsection (D)(3)(d) of the DON Regulation, the ALC failed to give deference to the Department's interpretation of "need" as set forth in the DON Regulation and thus erred in so holding.

III. THE CONSIDERATION OF EXCESS CAPACITY AS AN "ADDITIONAL FACTOR" WOULD ALLOW THE DEPARTMENT STAFF TO COMPLETELY DISREGARD THE EXPRESS CRITERIA OF THE PROPERLY ADOPTED TEST FOR DEMONSTRATION OF NEED.

In its brief, EAGLE contends that Subsection (D)(3)(d) "gives DHEC a means to consider factors that go beyond the rote formula set forth in Section 61-107.D.3.a through 61-107.17.D.3.c, a means to determine whether there is an actual 'need' for more landfill capacity." (Respondent's Initial Brief, p. 25). However, the consideration of excess permitted disposal capacity as an additional factor under Subsection (D)(3)(d) does not "go beyond the rote formula" of Subsections (D)(3)(a)-(c), it directly contradicts those express provisions of the DON Regulation. In effect, the ALC interpreted the Subsection (D)(3)(d) of the DON Regulation which is in direct conflict with the express provisions of Subsections (D)(3)(a)-(c). In particular, the ALC's interpretation of Subsection (D)(3)(d) to allow the consideration of excess permitting disposal capacity as an additional factor effectively invalidates Subsection (D)(3)(b) of the Regulation.

Subsection (D)(3)(d) of the DON Regulation provides that 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)(d) (Supp. 2008). While this subsection of the Regulation gives the Department discretion to consider factors beyond those set forth in Subsection (D)(3)(a)-(c), it does not allow the Department 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 the Department’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 Facility 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 the Department in its decision on MRR’s DON request.

IV. ALL OF THE “ADDITIONAL FACTORS” WHICH EAGLE IDENTIFIES AS ADDITIONAL SUSTAINING GROUNDS ARE RELATED TO EXCESS CAPACITY AND THUS ALSO FAIL TO SUPPORT THE ALC’S FINDING THAT THE PROPOSED FACILITY IS NOT NEEDED.

In its brief, EAGLE identifies the following “additional factors” which it contends also support the ALC’s finding that the Proposed Facility is not needed:

the actual capacity figures for the county and region, the actual generation figures for the county and region, the fact that the county and region already have several times more landfill capacity than either the county or the region needs to handle the amounts of waste being

generated, the fact that the 10-mile circle included on a portion of the counties used in setting the capacity limit, the fact that the state overall has more than 4.4 million tons of annual landfill capacity for a state that generates only 2.0 million tons of waste, and probably many other factors.

(Respondent's Initial Brief, pp. 26-27). All of these alleged "additional factors" relate to the excess capacity resulting from the operation of the express provisions of the DON Regulation. Accordingly, for the reasons stated herein above, such factors cannot be an "additional factor" for consideration under Subsection (D)(3)(d) of the DON Regulation.

V. THE ALC PROPERLY RULED THAT THE 2009 DON REGULATION WAS NOT APPLICABLE TO ITS REVIEW OF THE DEPARTMENT'S DON APPROVAL FOR THE PROPOSED FACILITY.

In its brief, EAGLE contends that the 2009 amendment of the DON Regulation, effective June 26, 2009, should have been applied by the ALC in its decision. The South Carolina law on this issue is clear, and the ALC properly ruled that the 2009 DON Regulation was not applicable to its review of the DON approval for the Proposed facility. EAGLE cites to the 1943 U.S. Supreme Court in *Ziffrin v. United States*, 318 U.S. 73 (1943), as authority for this contention. Since the EAGLE has cited to no authority that the South Carolina courts have adopted this holding, and Respondents find no such authority, the *Ziffrin* holding is not binding authority in this matter. Indeed, in *Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000), this Court squarely addressed this argument, stating as follows:

Our analysis focuses on whether DHEC followed the regulatory procedures in effect during the permit review process. We therefore apply the regulations effective during the actual permit review and need not consider whether subsequent amendments apply prospectively or retroactively. See *Rehkopf v. Kuhland*, 30 S.C. 234, 238, 9 S.E. 99, 101 (1889) (holding a statutory amendment inapplicable to a cause of action that accrued prior to the amendment and applying the statute in effect

when the action accrued); *Compare* David E. Shipley, SOUTH CAROLINA ADMINISTRATIVE LAW 4-50 (1983) (noting regulations normally apply prospectively), with *Carolina Power & Light Co. v. Town of Pageland*, 321 S.C. 538, 543, 471 S.E.2d 137, 140 (1996) ("The cardinal rule in determining whether a statute will have prospective or retroactive application is that the intent of the legislature controls."), and *American Nat'l Fire Ins. Co. v. Smith Grading and Paving, Inc.*, 317 S.C. 445, 448, 454 S.E.2d 897, 899 (1995) ("A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. The statute must contain express words evincing an intent that it be retroactive or words necessarily implying such an intent. The only exception to this rule is a statutory enactment that effects a change in remedy or procedure." (internal citations omitted)), and *Snively v. Perpetual Fed. Sav. Bank*, 306 S.C. 348, 350, 412 S.E.2d 382, 384 (1991) (noting the presumption that statutory enactments apply prospectively rather than retroactively in their operation unless there is a specific provision of clear legislative intent to the contrary).

Id. at 133, 530 S.E.2d at 651, fn. 8. Not only is there no language in the new regulation expressing an intent that it should be applied retroactively, the express language of the new regulation provides that a DON approval made prior to the effective date of the new regulation remains effective:

Where, prior to the effective date of this regulation, the Department made determinations required under Part I.D.1.a. of South Carolina Regulation 61-107.19, such determinations shall remain applicable and become the agency's final determination subject to the appeal provision in Section F of this regulation and any applicable public notice and application requirements. All demonstration of need determinations are subject to termination criteria outlined in Sections C.4 and C.5 of this regulation regardless of when the determination was made.

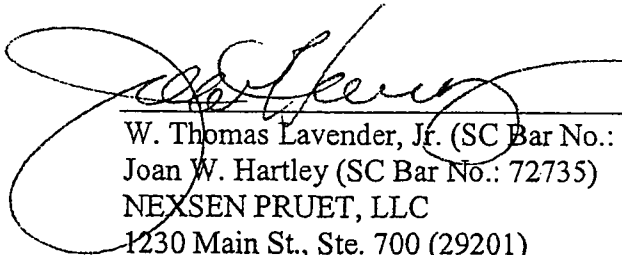
(Pet. Ex. 28 (Proffered), Section C.6). Accordingly, the ALC correctly held that the amendment of the DON Regulation effective June 26, 2009, was not applicable in the ALC's review of the DON approval for the Proposed Landfill.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court find that the ALC lacked subject matter jurisdiction to conduct a contested case hearing on

EAGLE's appeal of the DON approval for the Proposed Facility. Appellant further requests that this Court reverse the decision of the ALC and affirm the Department's issuance of the DON approval for the Proposed Facility.

April 27, 2010



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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

Docket No. 08-ALJ-07-0425-CC

Petitioner.)

v.)

FINAL ORDER AND DECISION

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

Respondents.)

APPEARANCES: For the Petitioner: James S. Chandler, Jr., Esquire and Amy E. Armstrong, Esquire.

For the Respondent SC DHEC: Etta R. Williams, Esquire

For the Respondent MRR Highway 92, LLC: W. Thomas Lavender, Jr., Esquire and Joan W. Hartley, Esquire

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to S.C. Code Ann. § 1-23-600(A) and S.C. Code Ann. § 44-1-60 upon the request for a contested case hearing filed by Engaging and Guarding Laurens County's Environment (EAGLE). EAGLE contests the issuance of a permit by the South Carolina Department of Health and Environmental Control (Department) for the construction and operation of a Class Two Landfill to be located 322 Choice Road, Gray Court in Laurens County (Proposed Landfill).¹ After the Court's determination on motions for summary judgment filed by EAGLE and MRR, the sole issue for determination at the hearing was whether additional factors beyond those specifically set forth in Regulation 61-107.17.D.3(a)-(c) require denial of the demonstration of need request pursuant Subsection (D)(3)(d) of the Regulation. A hearing on the merits was held before this Court on July 22, 2009.

¹ In its Request for Contested Case Hearing and Prehearing Statement, EAGLE has alleged that Regulation 61-107.17 should be declared invalid as inconsistent with the statutory demonstration of need requirement, in that the regulation fails to require a true demonstration of need and instead relieves the permit applicant from making such a showing. These arguments are beyond the jurisdiction of the Administrative Law Court and will not be addressed further. Drummond v. State of S.C. and S.C. Dept. of Revenue, 378 S.C. 362, 662 S.E.2d 587 (2008).

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FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

By letter dated February 21, 2006, a request for a demonstration of need (DON) was submitted to DHEC for the Proposed Landfill. At the time, there were fewer than two commercial Part IV C&D landfills within a ten-mile planning radius of the Proposed Landfill. The ten-mile planning radius for the Proposed Landfill includes portions of Laurens, Spartanburg, and Greenville Counties

On March 3, 2006, DHEC issued its initial DON approval for the Proposed Landfill with a maximum annual tonnage limit of 154,000 tons per year. This annual disposal rate was based on the reported amount of C&D waste generated in Laurens, Spartanburg, and Greenville Counties for fiscal year 2004. The Department continued to review comments received on the Proposed Landfill throughout the permitting process, including comments regarding the need for the Proposed Landfill. It subsequently issued a permit for construction and operation of the Proposed Landfill on July 18, 2008.

At the time of the DON approval, there were three permitted C&D landfills in Laurens County—the City of Clinton C&D Landfill, the Laurens County C&D Landfill, and Curry Lake C&D Landfill (Curry Lake). The site of the Proposed Landfill is approximately three miles from Curry Lake. It was the only privately owned C&D Landfill in Laurens County and had an annual rate of disposal of 241,591 tons per year. The other Laurens County landfills were appreciably less of a factor in evaluating need. The City of Clinton C&D Landfill had a permitted annual rate of disposal of only 1.375 tons per year. The Laurens County C&D Landfill had an annual rate of disposal of 8,900 tons per year. However, the Laurens County Landfill ceased accepting waste in May of 2009 and is currently in the process of closure.

The most significant factor according to the Regulations in evaluating need is the number of C&D landfills in a ten-mile radius around the proposed location. As noted above, the ten-mile planning radius for the Proposed Landfill includes portions of Laurens, Spartanburg, and Greenville Counties. According to the South Carolina Solid Waste Management Annual Report for Fiscal Year 2007, the **permitted annual rate of disposal** for the C&D landfills in Greenville, Laurens, and Spartanburg Counties is as follows:

- 510,157 tons per year in Greenville County.

- 251,866 tons per year in Laurens County, and
- 80,000 tons per year in Spartanburg County

— for a total of 842,023 tons per year. Therefore, the proposed landfill meets the requisites of 25A S.C. Code Regs. § 61-107.17(D)(3)(a), (b) and (c) (Supp. 2008).

EAGLE nevertheless contends that there are additional factors that reflect that the proposed location is not needed. See 25A S.C. Code Regs. § 61-107.17(D)(3)(d) (Supp. 2008). Specifically, EAGLE argues that this Court should consider the excess capacity in Greenville County; the fact that the ten-mile radius encompasses only a small portion of Greenville County; and the proximity of existing commercial landfills.

The Greenville County C&D landfills in proximity to the proposed location are Twin Chimneys C&D Landfill (Twin Chimneys) and Republic Industries. Twin Chimneys is located approximately five miles from the Laurens County boundary line and Republic Industries is located approximately ten to twelve miles from the county line. The only permitted C&D landfill in Spartanburg County is Wasp Nest Road C&D Landfill (Wasp Nest). However, the estimated remaining life of Wasp Nest is only about 1.6 years.

An important consideration in addressing the need for a landfill is that the planning area established in the DON Regulation is a regional concept. Many of the C&D landfills in the three-county planning area for the Proposed Landfill accept waste from other counties. That factor however must also be considered in conjunction with the utilization of those landfills. The waste generation and landfill capacity figures for Fiscal Year 2005, 2006 and 2007 are summarized in the following charts:

Fiscal Year 2005	Tons of C & D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	6,635	251,866	2.6%
Greenville County	142,767	510,157	28.0%
Spartanburg	71,424	80,000	89.3%
Total - 3 counties	220,826	842,023	26.2%

Fiscal Year 2006	Tons of C& D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	9,479	251,866	3.8%
Greenville County	163,450	510,157	32.0%
Spartanburg	68,662	80,000	85.8%
Total - 3 counties	241,591	842,023	28.7%

Fiscal Year 2007	Tons of C& D Waste Generated Annually	Existing Annual C & D Landfill Capacity	Percentage Utilization of Existing Capacity
Laurens County	16,860	251,866	7.8%
Greenville County	161,738	510,157	31.7%
Spartanburg	72,161	80,000	90.2%
Total - 3 counties	250,759	842,023	29.8%

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

Jurisdiction and Standard of Proof

The Administrative Law Court has jurisdiction over this contested case matter pursuant to S.C. Code Ann. § 1-23-600(A) (Supp. 2008) and S.C. Code Ann. §44-1-60(F)(2) (Supp. 2008). Petitioner, as the party challenging the Department's approval for the Proposed Landfill, bears the burden of proof in this case. See Leventis v. S.C. Dept. of Health & Env'tl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue). The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Nat'l Health Corp. v. S.C. Dept. of Health & Env'tl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). This Court reviews the evidence presented *de novo*. Marlboro Park Hosp. v. S.C. Dept. of Health & Env'tl. Control, 358 S.C. 573, 595 S.E.2d 851 (2004).

Demonstration of Need

Permitting of solid waste management facilities, including C&D landfills, is governed by the South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. §§ 44-96-10 et seq. (2002) (Solid Waste Act), and the regulations promulgated pursuant to the Act. 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., 358 S.C. 402, 408, 595 S.E.2d 468, 471 (2004). The Solid Waste Act however does require that the Department promulgate regulations for demonstrating need for solid waste management facilities. S.C. Code Ann. § 44-96-290(E) (2002). The regulation governing demonstration of need for a new facility is found at S.C. Code Regs. § 61-107.17 (DON Regulation). 25A S.C. Code Regs. § 61-107.17 (Supp. 2008).²

The DON Regulation establishes the criteria for the demonstration of need for the construction of new Part IV (long-term) construction, demolition, and land-clearing debris landfills. 25A S.C. Code Regs. § 61-107.17 (A)(1) (Supp. 2008).³ Regulation 107.17 specifies a ten-mile "planning area" for construction, demolition, and land clearing debris landfills. Part D of Regulation 61-107.17 specifies the drawing of a circle with a ten-mile radius, the counting of "commercial" solid waste landfills within the planning area, and the method of establishing an annual disposal rate. Specifically, Regulation 61-107.17(D)(3) provides that: "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.

² The DON Regulation was amended effective June 26, 2009. This decision is thus based on the DON Regulation in effect at the time of the permitting decision published in the State Register 33 S.C. State Register (No. 6, June 26, 2009).

³ Prior to the Department's decision on MRR's permit application, the Department promulgated new regulations governing the permitting and operation of landfills. See 25A S.C. Code Ann. Regs. § 61-107.19. Under the new Landfill Regulation, C&D landfills are permitted as Class Two Landfills. However, the new Landfill Regulation expressly provides that a determination of need made prior to the effective date of the new Regulation "shall remain applicable and become the agency's final determination." S.C. Code Ann. Regs. § 61-107.19 Part I.D.1.b. Accordingly, the Department's demonstration of need approval as a Part IV C&D Landfill conforms to the requirements for a Class Two Landfill.

- 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.

(emphasis added).

This Regulation thus excludes the permitting of more than two facilities under separate ownership within the planning area. However, it does not mandate that a permit be granted if there are less than two facilities in the planning area and the applicant meets the remaining criteria of Regulation 61-101.17 (D)(3)(a) through (c). Rather, pursuant to Regulation 61-107-17 (D)(3)(d) it is appropriate to consider any additional factors that reflect whether or not the facility is needed on a case-by-case basis.⁴

Petitioner conceded that MRR's application conformed to the requirements of Subsections (D)(3)(a) through (c) of the Regulation. However, EAGLE contends the Department's approval for the Proposed Landfill was improper because additional factors should be considered pursuant to Subsection (D)(3)(d) of the DON Regulation. Other than the criteria set forth in Regulation 61-107-17 (D)(3), no other definitions of the term "need" are provided in either the Act or the DHEC regulation. Accordingly, the Court should look to the "plain and ordinary" meaning of these terms. New York Times Co. v. Spartanburg Cty. School Dist. No. 7, 374 S.C. 307, 649 S.E.2d 28 (2007). "Need" has been defined to mean: "a condition requiring supply or relief." Merriam-Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary>. Applying that definition to this case, it is obvious that the General Assembly intended that a demonstration of "need" must involve proof that the circumstances

⁴ Respondents' desire to have a bright line test regarding these permits is understandable and, in fact, reasonable. However, I simply do not find that the language of the Regulation establishes that result. Nonetheless, I do recognize that determining need in these cases involves many variables for which future legislative guidance would be helpful.

within the region of the landfill indicate additional landfill capacity is needed to meet the public's demands.

Laurens County Consideration

According to the 2007 Solid Waste Management Annual Report, the amount of C&D waste generated in Laurens County for the fiscal years 2004 through 2007 is as follows: 6.635 tons in 2005; 9,479 tons in 2006; and 16.860 tons in 2007. At the time of the Department's approval, the three permitted C&D landfills in Laurens County had a total annual disposal rate of 251.866. EAGLE contends that this excess permitted capacity within Laurens County is an "additional factor" which required denial of the demonstration of need for the Proposed Landfill. This Court finds this argument unpersuasive and contrary to express provisions of the Solid Waste Act.

Section 44-96-290(E) does not require the Department 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 the need for a commercial facility within defined planning areas, which, as in this case, may encompass multiple counties. In fact, according to fiscal year 2004/2005 reporting to the Department, Curry Lake Landfill in Laurens County accepted C&D waste from seven other counties in South Carolina. Such evidence demonstrates that C&D landfills serve the disposal needs beyond the host county and even the planning area defined by the DON Regulation.

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 facility. Subsection (D)(3)(b) 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 **county or counties** that fall, either all inclusive or a portion thereof, within the planning area." S.C. Code Ann. Regs. § 61-

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107.17(D)(3)(b) (Supp. 2008) (emphasis added). This provision of the DON Regulation provides that the combined maximum yearly disposal rate for all facilities within a county may exceed the waste disposal needs of the host county. When there is more than one facility in a 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. Depending on the size of the county, there could be any number of facilities located within the county—each with a permitted maximum annual disposal rate equal to the total annual waste generated in the host county. Moreover, 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 facility touches on more than one county. Accordingly, the fact that the host county for a proposed facility already has sufficient or excess permitted disposal capacity to meet the needs of the host county is not an “additional factor,” in and of itself, which warrants denial of a demonstration of need for permitting of additional facilities.

Regional Consideration

Petitioner argues further that the fact that the region already has more landfill capacity than either the county or the region needs is an additional factor warranting the denial of the permit. In fact, the Respondents agree that this matter should be reviewed taking into consideration the multi county area or a regional view. In this case, the regional need for C&D disposal is increasing. Moreover, the remaining life of the Wasp Nest Landfill which has an annual disposal rate of 80,000 tons per year is basically finished. Recognizing that fact, after the annual capacity of Spartanburg is eliminated, the percentage utilization of existing capacity would be 32.9%. The regional capacity is thus declining. In that regard, 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.

Nevertheless, the number of existing landfills in proximity to the site of the proposed MRR landfill, and the utilization of those landfills, offsets the implications of the Wasp Nest closing. The proposed MRR Highway 92 landfill is only about 4 miles from the existing 241,000 tons-per-year Curry Lake landfill. The 87,187 tons-per year Twin Chimneys landfill in Greenville County is about 5 miles outside Laurens County, or about 11 miles from the site of the proposed MRR landfill. Finally, Greenville County landfill also has the Republic Landfill which has an annual disposal capacity of 200,000 tons-per-year and is about 10-12 miles outside Laurens County or 14-16 miles from the site of the proposed MRR landfill.

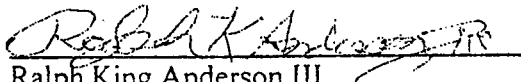
More importantly, even considering the loss of the Wasp Nest landfill, the 32.9% utilization of existing capacity simply does not reflect a need for another landfill in the area. In other words, the three county area is generating less than 300,000 tons of C & D waste per year, and even excluding the Wasp Nest landfill it has over 750,000 tons of existing annual C & D landfill capacity. Furthermore, once the annual tonnage of the proposed landfill is factored into the existing C & D landfill capacity, even considering the loss of the Wasp Nest landfill the use of existing capacity would only be 27.38%. Looking further into the future, after the remaining life of the Republic landfill is finished, the use of existing capacity would still only be 35.02%.⁵

I therefore find that the proposed facility is not needed.

ORDER

IT IS THEREFORE ORDERED that the permit to construct the Proposed Landfill is DENIED.

AND IT IS SO ORDERED.


Ralph King Anderson III
Chief Administrative Law Judge

October 23, 2009
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 23rd day of October, 2009

By: Annale M. Scott
Judicial Law Clerk

⁵ The remaining life of the Greenville County 200,000 tons-per-year Republic landfill is less than seven years.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 08-ALC-07-0425-CC

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

vs.

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

of whom MRR Highway 92, LLC, is Appellant.

PETITION FOR REHEARING

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August 18, 2011

RECEIVED

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SC Court of Appeals 000974

Pursuant to SCACR Rule 221(a), the Respondent Engaging and Guarding Laurens' Environment ("EAGLE") respectfully petitions this Court for a rehearing in the case of *EAGLE v. SCDHEC and MRR Highway 92, LLC*, Unpub. Op. No. 2011-UP-380 (August 4, 2011). The basis for this petition is that the Opinion overlooks and misapprehends keys points of law. The Opinion points to no error of law made by the Administrative Law Court ("ALC") as required under § 1-23-610(B) of the Administrative Procedures Act ("APA"), instead concluding that the ALC failed to defer to a staff decision that is contrary to the statute. In its one-page, Per Curiam Opinion, the Court overlooks the ALC's conclusion that under S.C. Code Ann. § 44-96-290(E), "need" in the plain and ordinary meaning of the word requires some proof that additional landfill capacity is needed; fails to give deference to the ALC's interpretation of § 44-96-290(E) and instead improperly defers to a staff decision; and misapprehends the standard of review applied to an ALC decision.

The ALC Opinion is Entitled to Deference, Not the Staff Decision

The standard of review set forth in the Administrative Procedures Act requires the reviewing court to give deference to the Administrative Law Judge's decision.¹ This Court misapprehended the ALC's role in the context of that standard of review. Judicial review of an administrative decision requires deference to the "agency," but the Administrative Law Court is a body of the executive

¹The appellate court can only reverse the ALC if its findings, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-610(B).

branch, i.e., the "agency." Indeed, this Court has recognized that the Administrative Law Court "functions as an arm of the agency for purposes of according the agency deference in interpretation." *Dorman v. DHEC*, 350 S.C. 159, 167, 565 S.E.2d 119, 123 (Ct. App. 2002). Yet the Court erroneously found that it was the ALC who owed deference to the staff.² The staff is not entitled to deference – it is the final order or decision of the agency, i.e., the Administrative Law Court's Order that is entitled to deference.

The Court must look to the Administrative Procedures Act, which prescribes the procedures for the agency to follow in exercising its authority. The APA is clear that it is the Administrative Law Court that is the agency and is the final decision-maker in interpreting the agency's statutes and regulations. § 1-23-310(2) & (3); § 1-23-350. The APA defines "agency" as "each state board, commission, department, or officer, other than the legislature, the courts, **or the Administrative Law Court, authorized by law to determine contested cases.**" S.C. Code Ann. § 1-23-310(2) (emphasis added). The APA further defines a "contested case" as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be **determined by an agency after an opportunity for hearing.**"³ S.C. Code Ann. § 1-23-310(3) (emphasis added). The ALC is the "agency" that provides the party with "an opportunity for hearing." It is clear that the Administrative Law Court is the "agency" under the APA and is thus the "agency" that is entitled to deference. Indeed, Professor Richard Seamon and the Honorable Paige Gossett recognize that the APA "defines the term 'agency' broadly." S.C.

²As discussed below, the staff decision was affected by error of law in that staff failed to exercise any discretion in arbitrarily deciding not to consider additional factors.

³ § 1-23-350 of the Administrative Procedures Act sets forth the requirements for a final agency decision.

Administrative Practice and Procedure, 2nd Ed., p. 52 (Lowell, 2008). They explain that the “Court of Appeals and Supreme Court review of administrative decisions [is] in an appellate capacity directly from the Administrative Law Court,” thus it is the ALC decision – an administrative decision – that is entitled to deference from this Court. *Id.* at 56. The Court’s Opinion misapprehends its judicial review role by failing to give deference to the administrative agency decision of the ALC.

The Court’s opinion makes a passing reference to § 44-1-60(G)(3) from which the Court appears to assume that the staff decision, which the DHEC Board declined to review, is entitled to great deference. The Court erred in so concluding. In this case, there was no review of the staff decision or interpretation by the Board. We are left with an interpretation of staff, which received no review from the Board. The only administrative agency decision on the matter is that of the ALC. A staff decision simply cannot rise to the level of an “agency interpretation” of a statute or regulation for the purposes of deference. A staff decision, which was passed upon by the DHEC Board for review, is not entitled to the deference of the “agency” (the ALC) that is charged with determining the legal rights, duties and privileges of a party after a hearing.

Even if Staff Were Entitled to Deference, No Deference is Warranted if the Interpretation Contradicts the Plain Language of the Statute

An agency’s long-standing interpretation of a statute is usually entitled to deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute’s plain language. *Etiwan Fertilizer Co.*, 217 S.C. at 359, 60 S.E.2d at 684. See *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (“We recognize the Court generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the

statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citation omitted)). Even though it is the ALC that is accorded deference, the staff interpretation contradicts the plain language of the statute, and was arbitrary and capricious.

The agency staff admitted that it did not consider "additional factors" in this case, nor had it ever considered "additional factors," and that staff did not even know what "additional factors" it might consider, even if it decided to so. (R.pp. 208-09; 245). The Department's complete failure to consider "additional factors" is not an exercise of discretion entitled to deference. It is not within an agency's discretion to ignore relevant evidence and factors. On the contrary, "it is arbitrary or capricious for an administrative agency not to take into account all relevant factors in making its determination." *Hanly v. Mitchell*, 460 F.2d 640, 648 (2nd. Cir. 1972) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971)). An agency has discretion in the weight to give relevant factors but not discretion to utterly fail to consider those factors. An agency's decision to exclude relevant evidence is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with the law, and is grounds for a remand to the agency for reconsideration. See *Blinder, Robinson & Co. v. Securities & Exchange Comm'n*, 837 F.2d 1099, 1112 (D.C. Cir. 1988) (finding that agency's decision to exclude relevant evidence was arbitrary and capricious); *N.L.R.B. v. Process & Pollution Control Co.*, 588 F.2d 786, 790-91 (10th Cir. 1978) (reversible error to reject relevant evidence offered in an administrative hearing). . While the agency does have some discretion in determining whether and when to apply the "additional factors" test, it must actually exercise that discre. 1. The Department's failure to consider additional factors in determining whether the applicant really made a proper demonstration of need is an arbitrary and capricious action and not an exercise of discretion.

Subpart D.(3).d. of Regulation 61-107.17 provides: "The Department reserves the right to review additional factors in determining need on a case-by-case basis." In this case there were clearly relevant additional factors that weighed on the need for the proposed landfill. Instead of considering the factors under this subpart, or even determining that the factors did not warrant consideration, DHEC's representative testified in Rule 30(b)(6) deposition that he did not even know what an "additional factor" would be. R. pp. 208-209 (tr. 127-128)). The Department looked solely at the number of "commercial" landfills within 10 miles of the site of the proposed MRR landfill, and the total amount of waste generated within Laurens, Greenville and Spartanburg Counties. The agency completely failed to consider relevant evidence under the clear authority of Section 61-107.17.D.3.d. This is not a case of the agency exercising discretion one way or the other, but rather of entirely failing to exercise any discretion. It was therefore in error for this Court to award such a decision considerable deference.

The Court cited language in its Opinion requiring "a compelling reason to differ" from the agency's regulatory interpretation. Even if the Staff's, and not the ALC's, determination was the final agency decision, the Staff's interpretation of Regulation 61-107.17 is contrary to the plain language of § 44-96-290(E) of the Solid Waste Policy and Management Act and thus is not entitled to this deference. In *Commissioners of Public Works v. DHEC*, 372 S.C. 351, 359 (Ct. App. 2007), this Court noted that "[g]enerally, the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration." (quotations omitted). "[H]owever, the primary rule of statutory construction is that the Court must ascertain the intention of the legislature . . . [, and] [t]hus, the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation." *Id.* (quotations omitted). The ALC rightfully

concluded that the agency's interpretation of the Demonstration of Need regulation conflicted with Section 290(E)'s DON requirement and that he was therefore required to reject the contrary interpretation. This Court erred in showing deference to the Staff's contrary interpretation.

Here, the Solid Waste Management Act, § 44-96-290(E), requires a "demonstration of need." As the ALC concluded, the Staff has interpreted and applied R.61-107.17 in a manner that does not fulfill this statutory requirement. Under the holdings of this Court and the South Carolina Supreme Court, the staff's interpretation must fall. *See Milliken and Co. v. S.C. Dep't of Labor*, 275 S.C. 264, 267-68 ("It is well settled that an administrative order which materially alters or adds to the law is void. The same principle applies to administrative rule-making." (citations omitted); *Society Of Professional Journalists v. Sexton*, 283 S.C. 563, 567 ("Although a regulation has the force of law, it must fall when it alters or adds to a statute."). Where an agency's interpretation of the regulation leads to a situation that is in direct conflict with the plain language of the statutory mandate, it is an error to show the utmost deference to that interpretation by requiring a "compelling reason to differ." Even so, direct conflict with the enabling statute is a compelling reason, if one could ever exist in this context.

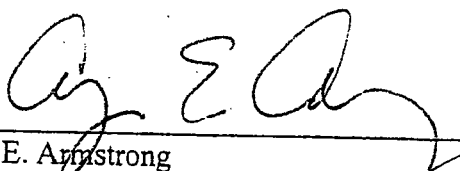
The Court overlooked the ALC's conclusion that "need" as required by § 44-96-290(E) of the Solid Waste Management Act, was not defined in the Act or in the Regulations, and thus the ALC must look to the "plain and ordinary" meaning of the word "need" in determining whether the required "need" had been demonstrated. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Ray Bell Constr. Co. v. Sch. Dist. of Greenville County*, 331 S.C. 19, 26, 501 S.E.2d 725, 729

(1998)(emphasis in original). "However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature...." *Id.* "If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." *Id.* The Court overlooked the ALC's conclusion that "it is obvious that the General Assembly intended that a demonstration of 'need' must involve some proof that the circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public's demands." (Order, pp. 6-7).

Where a case involves judicial review of an administrative decision that required the agency to construe the statute it was administering and to apply that construction to the facts as the agency found them, the appellate court will defer to reasonable conclusions of law. The courts will not engage in a case-by-case evaluation of the expertise and experience of an administrative law judge and reviewing officer to determine what deference will be given to their interpretation of the governing law. 1373A C.J.S. Public Administrative Law and Procedure. Yet rather than deferring the ALC's reasonable conclusion of law that the statutory requirement to demonstrate "need" in the ordinary sense of the word requires proof that excess landfill capacity is needed, this Court's opinion erroneously rejected that interpretation.

CONCLUSION

For the foregoing reasons, Respondent Engaging and Guarding Laurens' Environment respectfully requests that this Court grant its Petition for Rehearing and affirm the ALC's conclusion that the applicant failed to demonstrate a need for the proposed landfill.



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August 18, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 08-ALC-07-0425-CC

Engaging and Guarding Laurens County's Environment ("EAGLE"),
a non-profit membership organization Respondent,

vs.

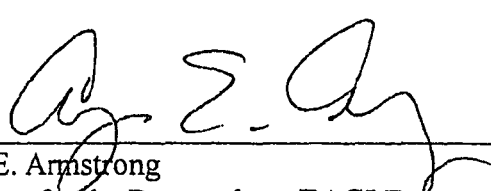
South Carolina Department of Health and Environmental Control
and MRR Highway 92, LLC Defendant, Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the foregoing Petition for Rehearing of Respondent EAGLE upon counsel for the Appellant MRR Highway 92, LLC, and DHEC, by placing same in the United States mail, first-class postage prepaid, addressed to:

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Amy E. Armstrong
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August 18, 2011

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 08-ALJ-07-0425-CC

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

v.

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

of whom MRR Highway 92, LLC is Appellant.

**APPELLANT MRR HIGHWAY 92, LCC'S
RETURN TO PETITION FOR HEARING**

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Attorneys for Appellant
MRR Highway 92, LLC

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, the Appellant MRR Highway 92, LLC ("MRR"), submits this Return in opposition to the Respondent's Petition for Rehearing ("Petition") and respectfully requests this Court deny the Petition on the grounds set forth below.

In its Petition, Respondent contends that this Court overlooked or misapprehended the following points of law: (1) the Court's opinion identified no error of law made by the Administrative Law Court ("ALC"); (2) the Court overlooked the ALC's conclusion regarding "need" for the proposed landfill; and (3) the Court failed to give deference to the ALC's interpretation of Section 44-96-290(E) of the of the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* ("Solid Waste Act"). Respondent's Petition is clearly based on a mischaracterization of the Court's opinion. Contrary to Respondent's contention, the Court's reversal of the ALC's decision was clearly based on an error of law—i.e., the ALC's incorrect interpretation of the Section 44-96-290(E) of the Solid Waste Act and the requirements of S.C. CODE ANN. REGS. § 61-107.17 ("DON Regulation"). 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008) (prior to amendment effective June 29, 2009) Additionally, and significantly, the ALC's interpretation of Section 44-96-290(e) is not entitled to deference in this Court's review of the decision below. A fundamental purpose of this Court's review of the ALC's decision is to determine whether the decision is based on an incorrect interpretation of the relevant law and to correct such error. Accordingly, as discussed more fully below, Respondent has failed to identify any valid basis for its Petition.

I. THE COURT'S REVERSAL OF THE ALC'S DECISION WAS BASED ON ERROR OF LAW.

Respondent contends that this Court has identified no error of law in its reversal of the ALC decision. The Court 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." (Unpublished Opinion No. 2011-UP-380, hereinafter "Opinion," p. 2). Clearly, the reversal is based on this Court's interpretation of the requirements of Section (D)(3) of the DON Regulation. In contested permitting cases, the ALC serves as the finder of fact. *Oakwood Landfill, Inc. v. South Carolina Dep't of Health and Env'tl. Control*, 381 S.C. 120, 127, 671 S.E.2d 646, 650 (Ct. App. 2009). A court reviewing a decision of the ALC "shall not substitute its judgment for that of the ALC as to findings of fact, [but] may reverse or modify decisions that are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole." *ESA Services, LLC v. South Carolina Dep't of Rev.*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011). With respect to the Court's reversal of the ALC's decision, the relevant fact is that the Department declined to consider additional factors in issuing the DON determination for the MRR landfill. This Court did not substitute its judgment for this finding of fact. Instead, the Court reversed the ALC's decision based on the ALC's conclusion of law regarding the legal effect of this fact. More specifically, the relevant question of law is whether "the Department acted within its discretion" in accordance with the relevant provisions of the DON Regulation. As such, the Court's reversal of the ALC decision is based on error of law.

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 Act does not specify procedures for the Department 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). Section 44-96-290(E) expressly requires the Department to “promulgate regulations to implement this section.” 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 the Department to define need in the regulations promulgated under that section. The Department did so in promulgating the DON Regulation. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008).

The DON Regulation in effect at the time of the decision on MRR’s DON request set forth the following criteria for determining need for a Part IV C&D Landfill:

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 there of, 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) (emphasis added). The ALC held that Subsection (D)(3)(d) is discretionary and therefore allowed EAGLE to present evidence to show that the Department failed to exercise that discretion in issuing the DON approval for the MRR landfill. (See Order Denying Respondent MRR Highway 92, LLC's Motion for Partial Summary Judgment p. 4, R. p. 14). In reversing the ALC's decision, this Court agreed with the ALC's interpretation that Subsection (D)(3)(d) is discretionary, but reversed the ALC's interpretation of the legal effect of the discretionary nature of Subsection (D)(3)(b). Specifically, this Court held that in exercising its discretion "to review additional factors in determining need on a case-by-case basis," the Department may decline to review additional factors. (Order, p. 2). "Decisions of the ALC judge should not be overturned by the reviewing court unless they are unsupported by substantial evidence or controlled by some error of law." *South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Env'tl. Control*, 380 S.C. 349, 361, 669 S.E.2d 899, 905 (Ct. App. 2008) (citation omitted). Contrary to Appellant's assertion, this Court's reversal of the ALC's decision is unquestionably a determination that the decision is "controlled by some error of law."

II. THE ALC'S FINDING WITH RESPECT TO "NEED" WAS BASED ON ERROR OF LAW.

Respondent contends that the Court's reversal of the ALC's decision overlooks the "ALC's conclusion that under S.C. Code Ann. § 44-96-290(E), 'need' in the plain and ordinary

meaning of the word requires some proof that additional landfill capacity is needed.” (Petition, p. 1). In reaching this conclusion on “need,” the ALC cited to case law regarding statutory interpretation and a dictionary definition of “need.” (See Final Order and Decision, p. 6, R. p. 21) (citing *New York Times Co. v. Spartanburg Cty. School Dist. No. 7*, 374 S.C. 307, 649 S.E.2d 28 (2007)). As discussed *supra*, Section 44-96-290(E) requires a “demonstration of need” to be approved by the Department and expressly directs the Department to “promulgate regulations to implement this section.” S.C. CODE ANN. § 44-96-290(E) (2002). The Department did so in promulgating the DON Regulation which sets forth the specific criteria for making a demonstration of need determination. In reversing the ALC’s decision, this Court obviously disagreed with the ALC’s interpretation of the term “need” as used in Section 44-96-290(E) and given effect through the DON Regulation. This Court correctly found that the Department’s determination of “demonstration of need” for the MRR landfill was conducted in accordance with the DON Regulation promulgated pursuant to the legislative directive of Section 44-96-290(E). The ALC’s consideration of “additional factors” was based on an erroneous interpretation of Section 44-96-290(E) and the DON Regulation. This Court correctly reversed the ALC’s decision, including its erroneous interpretation of “need” and consideration of “additional factors” pursuant to Subsection (D)(3)(d) of the DON Regulation. Such ruling was thus based on an error of law.

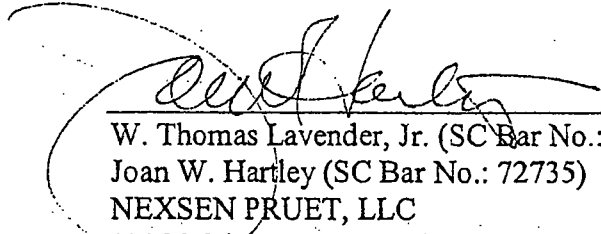
III. THE ALC’S INTERPRETATION OF SECTION 44-96-290(E) OF THE SOLID WASTE ACT AND THE DON REGULATION IS NOT ENTITLED TO DEFERENCE IN THIS COURT’S REVIEW OF ALC’S DECISION.

Respondent argues that Section 1-23-610 of the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* (“APA”), requires this Court to give deference to the ALC’s interpretation of a statute. While Respondent correctly states that the ALC is part of the executive branch of state government, the ALC acts as the trial court in a contested case

hearing, making findings of fact and conclusions of law. S.C. CODE ANN. § 1-23-350. Section 1-23-610 of the APA establishes the standard for review of an ALC decision by this Court. Subsection 1-23-610(d) expressly authorizes this Court to reverse a decision of the ALC which is "affected by other error of law." S.C. CODE ANN. § 1-23-610(d). As noted above, the reversal of the ALC decision is based on this Court's interpretation of Subsection (D)(3)(d) of the DON Regulation. The law is clear that this Court owes no deference to a lower court's interpretation of law. *See, e.g., Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court. We are free to decide a question of law with no particular deference to the circuit court." (internal citation omitted)). This rule has been applied to appeals from decision of an administrative agency. *See, e.g., Barton v. Higgs*, 381 S.C. 367, 370, 674 S.E.2d 145, 146 (2009) ("When reviewing an appeal from the workers' compensation commission, the appellate court may not weigh the evidence or substitute its judgment for that of the full commission as to the weight of evidence on questions of fact. . . . However, the appellate court may reverse the full commission's decision if it is based on an error of law" (internal citations omitted)). The ALC's interpretation of a regulation is also a question of law which may be reversed by this Court if "affected by error of law." *See, e.g., South Carolina Dep't of Rev. v. Blue Moon of Newberry, Inc.*, 387 S.C. 467, 470, 693 S.E.2d 21, 22 (Ct. App. 2010) (holding that the ALC erred in interpreting a Department of Revenue regulation). Accordingly, the ALC's interpretation of the DON Regulation is entitled to no deference in this Court's review of the decision and conversely, such interpretation may be found to be an error of law as in the instant case.

IV. CONCLUSION

For the foregoing reasons, MRR respectfully requests that Respondent's Petition for Rehearing be denied.



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Attorneys for Appellant

MRR Highway 92, LLC

September 1, 2011
Columbia, South Carolina

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appeal from the Administrative Law Court
Ralph K. Anderson, III, Administrative Law Court Judge

Unpublished Opinion No. 2011-UP-380
Heard May 3, 2011 – Filed August 4, 2011

REVERSED

W. Thomas Lavender, Jr., and Joan W. Hartley, both
of Columbia, for Appellant.

Amy E. Armstrong, of Pawleys Island, for
Respondent.

PER CURIAM: This appeal from the Administrative Law Court (ALC) arises out of the issuance of a solid waste management permit from the South Carolina Department of Health and Environmental Control (the Department) to Appellant MRR Highway 92, LLC (MRR). Respondent Engaging and Guarding Laurens County's Environment (EAGLE) requested a contested case hearing after the Department decided not to conduct a final review conference regarding the issuance of the permit. The ALC reversed the Department's decision and denied the permit, finding the proposed facility was not needed. MRR appealed from the decision of the ALC, arguing the ALC did not have jurisdiction and the ALC erred in reversing the decision of the Department issuing a demonstration of need. We find the request for a contested case hearing was timely filed. We reverse the decision of the ALC and reinstate the decision of the Department because the Department acted within its discretion by declining to consider additional factors in issuing a demonstration of need to MRR. See S.C. Code Ann. § 44-1-60(G)(3) (Supp. 2010) ("An . . . affected person may file a request with the [ALC] for a contested case hearing within thirty calendar days after . . . the final agency decision resulting from the final review conference is received by the parties."); S.C. Code Ann. § 44-96-260(1) (2002) ("To carry out the purposes and provisions of [the South Carolina Solid Waste Policy and Management Act], the department is authorized to . . . promulgate such regulations, procedures, or standards as are necessary to protect human health and safety or the environment from the adverse effects of improper, inadequate, or unsound management of solid waste . . ."); 25A S.C. Code Ann. Regs. 61-107.17(D)(3)(d) (Supp. 2008) ("The Department reserves the right to review additional factors in determining need on a case-by-case basis.") (emphasis added); S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."); S.C. Code Ann. § 1-23-610 (Supp. 2010) (stating this court may reverse the decision of the ALC if it is affected by an error of law).

REVERSED.

FEW, C.J, PIEPER, and LOCKEMY, JJ., concur.

The South Carolina Court of Appeals

Engaging and Guarding Laurens
County's Environment ("EAGLE"), a
non-profit membership organization, Respondent,

v.

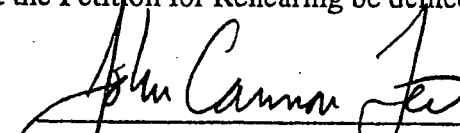
South Carolina Department of Health
and Environmental Control and MRR
Highway 92, LLC, Defendants,
of whom MRR Highway 92, LLC, is Appellant.

The Honorable Ralph K. Anderson, III
Richland County
Trial Court Case No. 2008-AL-07-00425

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded.

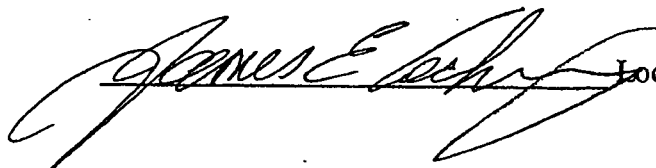
It is, therefore, ordered that the Petition for Rehearing be denied.



Few, C.J.



Pieper, J.



Lockemy, J.

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Columbia, South Carolina

cc: W. Thomas Lavender, Jr., Esquire
Joan W. Hartley, Esquire
Amy E. Armstrong, Esquire

FILED

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