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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

JUL 31 2013 APPEAL FROM THE ADMINISTRATIVE LAW COURT

**S.C. SUPREME COURT** Joseph 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, ..... Defendants,

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

**REPLY BRIEF OF PETITIONER**

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## ARGUMENT

### *Summary of Argument*

Respondent MRR Highway 92, LLC (“MRR”) argues that excess capacity is an “intended consequence” of the Demonstration of Need (“DON”) Regulation and that if the Department of Health and Environmental Control (“DHEC”) considers the existence of excess capacity as an “additional factor” under Subsection (D)(3)(d) of the DON Regulation it would lead to “unrestrained discretion.” (Brief of Respondent, p. 15, 15 & 28). MRR asserts that DHEC cannot consider any “additional factors,” such as existing excess capacity because that would be “inconsistent with the established test for determining need,” which MRR limits to Subsections (D)(3)(a), (b) and (c). (Brief, p. 26). MRR attempts to sidestep the fact that consideration of “additional factors” under Subsection (D)(3)(d) is part of the test for determining need.

MRR asserts that it would be arbitrary and capricious for DHEC to consider the one factor that would have the most bearing on the question of whether the public has a need for more landfill capacity: the existence of excess capacity. If DHEC can not consider excess capacity as an additional factor bearing on the question of need, then the Regulation would lead to an absurd result that DHEC **can never** consider excess capacity in determining whether a landfill is needed. Such an interpretation would be in direct conflict with the Act’s requirement for a “demonstration of need.” S.C. Code Ann. 44-96-290(E).

To implement the requirement for a “demonstration of need” through a regulation that encourages excess capacity as an “intended consequence” is to turn the Act’s

requirement on its head. (Brief of Respondent, p. 15). An interpretation that promotes excess capacity without any limitation, and without the ability to even consider existing capacity, can not be the same as showing that a landfill is needed.

**I. The Court of Appeals Erred in Granting Discretion to DHEC in This Case**

MRR misstates EAGLE's argument as follows: "EAGLE argues DHEC is not entitled to deference with respect to its interpretation of the DON Regulation because such interpretation is in 'direct conflict with the plain language of the statutory mandate.'" (Brief of Respondent, p. 11).

EAGLE actually argues that either (1) the DON Regulation itself is in direct conflict with the plain language of the Act or (2) DHEC's failure to ever consider the criteria in Subsection (D)(3)(d) leads to an application of the DON Regulation that is in direct conflict with the Act.

As to the first argument, MRR has asserted all along that the DON Regulation itself is DHEC's interpretation of the Act's requirement for a demonstration of need. If the DON Regulation is DHEC's interpretation of the Act, and it is applied in a manner that **never** actually looks at whether a landfill is "needed," as that word is ordinarily understood, then the Regulation materially alters and adds to the Act's requirement for a "demonstration of need." State v. Sweat, 379 S.C. at 385, 665 S.E.2d at 655 (finding the State was "not entitled to any deference in its interpretation because the plain language of [the statute at issue] refute[d] the State's position" and holding the Court was "free to read the statute based on its plain language without deference to the State's position"). Where the plain language of the statute is contrary to the agency's interpretation, the agency's

interpretation should be rejected. Savannah Riverkeeper v. S. Carolina Dep't of Health & Envtl. Control, 400 S.C. 196, 205, 733 S.E.2d 903, 908 (2012) (citing Brown v. Bi-Lo, 354 S.C. at 440, 581 S.E.2d at 838 (2003)).

As to the second argument, the DON Regulations give DHEC the ability to look at “additional factors” bearing directly on the question of need by way of Subsection (D)(3)(d). DHEC has never utilized that Subsection, including in this case, to look at any additional factors in making its need determination, instead relying solely on Subsection (D)(3)(a)’s “circle test.” If DHEC considered additional factors that indicate whether more new landfill capacity is actually needed, then DHEC’s application would be consonant with the Act’s requirement for a demonstration of need. That is exactly what the ALC did in this case – applied Subsection (D)(3)(d) in a manner that is consonant with the Act.

Similarly, MRR misunderstands EAGLE’s arguments related to how DHEC must apply the DON Regulation. EAGLE never argues that DHEC should “ignore the operation of Subsections (D)(3)(a)-(c) when the application of these provisions results in excess disposal capacity.” (Brief of Respondent, p. 11-12). Rather EAGLE argues that DHEC must apply all the Subsections of Regulation 61-107.17(D), including Subsection (D)(3)(d) and not just Subsections (D)(3)(a)-(c). S.C. Code Ann. Regs. § 61-107.17(D)(3) (“the Department **will use the criteria outlined below**,” listing Subsections (D)(3)(a)-(d)).<sup>1</sup> And EAGLE does not suggest that any time there is excess capacity

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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.”

DHEC must deny a demonstration of need, or contend that the DON Regulations can never allow additional capacity.

Consistent with EAGLE's arguments, the ALC found that the utilization of existing landfills must be considered in assessing need for a new landfill. (ALC Order, p. 3). Applying this finding, the ALC concluded that 32.9% utilization of existing capacity was not a circumstance indicating that additional landfill capacity was needed to meet the public's demands. (App. pp. 20-21, ALC Order, pp. 5-6).

The waste generation and landfill capacity figures for Fiscal Year 2006, the year that MRR sought and received its DON approval, are summarized in the following chart:

	<b>Tons of C &amp; D Waste Generated Annually</b>	<b>Existing Annual C &amp; D Landfill Capacity</b>	<b>Percentage Utilization of Existing Capacity</b>
<b>Laurens County</b>	9479	251866	3.8%
<b>Greenville County</b>	163450	510157	32.0%
<b>Spartanburg</b>	68662	80000	85.8%
<b>Total - 3 counties</b>	241591	842023	28.7%

Within Laurens County alone, C & D landfill capacity in 2006 was more than twenty-six (26) times the amount of C & D waste being generated. Laurens County's Curry Lake Landfill, with enough capacity to accept 241,591 tons of C& D waste annually<sup>2</sup>, is located a mere three miles from the proposed landfill. (App. p. 268).

In sum, in 2006, the tri-County area generated a total of 241,591 tons of C & D

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Curry Lake landfill's capacity was set at the total of all waste generated in the three counties in its planning area, as set forth in Sections (D)(3)(b) and (c).

waste and had 842,023 tons of existing C & D capacity. The landfill utilization rate for the tri-County area was 28.7%.<sup>3</sup> Thus, in the year that DHEC issued this DON, **there was nearly four (4) times more existing capacity in the planning area than was needed to meet the generation rates within that planning area.** Yet amazingly MRR continues to claim that this “excess disposal capacity is an operation of the substantive provisions of Subsection (D)(3).” (Brief of Respondent, p. 12). If grossly excess capacity is an intended purpose, then what meaning, if any, does the Act’s requirement for a demonstration of need have?

MRR acknowledges the reality that DHEC looked only at Subsection (D)(3)(a) in determining whether the landfill was needed: because there was only one commercial landfill in the ten-mile planning radius the “DHEC staff therefore concluded that MRR’s Proposed Landfill was allowed under Subsection (D)(3)(a).” (Brief of Respondent, p. 7). MRR also acknowledges that Subsections (D)(3)(b) and (D)(3)(c) are used solely to determine the maximum annual disposal rate. (*Id.*).

But what is more, Petitioner’s brief sets forth the undisputed fact that DHEC has **never** exercised its right under Subsection (D)(3)(d) to consider additional factors, and indeed, could not even think of what an additional factor would be if it actually did decide to exercise its discretion. (App. pp. 204, 209-210). MRR cites to Young v. Dep’t of

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In 2007, the utilization rate was 29.8%. The ALC found that even with the closing of the Wasp Nest Landfill, which MRR cites as a flaw in the ALC’s Opinion, there will still be 32.9% utilization of existing capacity. (App. p. 24, ALC Order, p. 9). Even given the closing of the Wasp Nest Landfill, the planning area would still have more than three times the capacity needed to meet its generation rates.

Highways and Public Transp., 287 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985), that the directive of a statute must “be applied in a consistent manner.” (Brief of Respondent, p. 24). The consistent manner of application that MRR advocates for is that DHEC can never consider additional factors if doing so would lead to a conclusion that a landfill meeting the “circle test” from Subsection (D)(3)(a) was not “needed” in the plain and ordinary sense of the word. See New York Times Co. v. Spartanburg County School Dist. No. 7, 374 S.C. 307, 649 S.E.2d 28 (2007). MRR’s version of “consistent” means that Subsection (D)(3)(d) will consistently never be applied. Apparently, under MMR’s theory, only additional factors that would support construction of a new landfill could be appropriate for DHEC’s consideration under Subsection (D)(3)(d). MRR proposes that this Court adopt a piecemeal application and interpretation of the DON Regulation that looks only at Subsection (D)(3)(a)-(c), and writes out Subsection (D)(3)(d), which is exactly what DHEC has done.<sup>4</sup>

MRR simply advocates that Subsection (D)(3)(d) never be utilized, and indeed it never has been. DHEC’s application of the DON Regulation in this manner is an abuse of discretion for failure to exercise any discretion whatsoever. Samples v. Mitchell, 329 S.C.

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EAGLE asserts that, in addition to excess capacity, “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.

105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

**A. Reading Excess Capacity as an “Intended Result” of the Application of the DON Regulation Leads to an Interpretation that is in Direct Conflict with the Act**

MRR asserts that excess capacity is the “intended result” or “intended consequence” of the application of the DON Regulation. (Brief of Respondent, p. 13 & 15). MRR says that by operation of Regulation (D)(3), excess capacity is a foregone conclusion.<sup>5</sup>

MRR again misstates EAGLE’s argument in saying that “**any** interpretation and application of the DON Regulation to allow excess permitted disposal capacity is in direct conflict with Section 44-96-290(E).” (Brief of Respondent, p. 15). EAGLE has never advocated that position, but rather that “need” means need, and that when an area already has over three times more **existing** excess capacity than needed, that is certainly an “additional factor” that warrants consideration in making a determination of need.

Interestingly, MRR quotes Section 44-96-20 that the “solid waste management program is needed to protect public health and safety, protect and preserve the quality of

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MRR goes as far as saying that if there are two facilities in a County, the disposal rate will always exceed the total generation rate. (Brief of Respondent, p. 14). The record contains no evidence that if there are two facilities in a county capacity will always exceed the total generation rate for that county. The capacity depends on what the generation rates were in the county at the time the DON was issued for each landfill. It is entirely conceivable that a landfill permitted 30 years ago together with a landfill permitted 20 years ago in the same county could collectively have less capacity than the generation rates as they exist today. In other words, since the generation rates change from year to year, the disposal rates authorized under Subsections (D)(3)(b)-(c) will similarly change.

the environment, and conserve and recycle natural resources,” but then entirely fails to explain how authorizing the planning area to accept well over three times as much waste as it generates will protect and preserve the environment, conserve and recycle natural resources or otherwise accomplishes the objectives of this important policy.<sup>6</sup> (Brief of Respondent, p. 15, citing S.C. Code Ann. § 44-96-20(A)(13)). Of course, no explanation is given because no explanation exists – excess landfills destroy and degrade the environment, and dispose of (as opposed to conserve and recycle) natural resources. Additional unneeded and unnecessary landfills only exacerbate these problems that the Act seeks to prevent.

MRR also claims that one of the goals of the Act is to “promote competition.” (Brief of Respondent, p. 16). MRR cites to Section 44-96-240(A)(6) for this assertion, despite the fact that the word “competition” does not arise anywhere in the section quoted by MRR. And MRR refrained from quoting the remainder of that provision, which states that solid waste services should “minimize any threat to human health and safety or to the environment.” S.C. Code § 44-96-240(A)(6).

If MRR is correct that excess capacity is the inevitable and intended outcome, this leads to the obvious question: even if the Act promoted competition, how much is

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Aside from the fact that this section of the Act does not support excess landfill capacity, an “inquiry into the purpose of the Act arises only if the plain language is ambiguous.” Savannah Riverkeeper v. South Carolina Dept. of Health and Environmental Control, 400 S.C. 196, 203, 733 S.E.2d 903 (2012) (citing Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (title of statute “cannot undo or limit what the text makes plain”)). Here the plain language of the Act is not ambiguous, and requires a “demonstration of need.”

enough? How will we know when we have enough landfills? It is not as if we are permitting excess capacity now, for the first time. We are adding a heap of additional capacity to a County and a Region that already has considerably more landfill capacity than needed to meet its existing and future generation rates and disposal needs.

MRR makes much of the fact that C & D landfills in the three-county planning area accept waste outside of the planning area. (Brief of Respondent, p. 16-17). MRR asserts that “sufficient capacity to accept waste beyond the counties in its planning area . . . increases competition” within the larger region. (Brief of Respondent, p. 17). MRR’s assertion overlooks the big picture of what exactly is happening in South Carolina. This State currently has more than 4.4 million tons of annual C & D landfill capacity yet generates only 2.0 million tons of C & D waste annually. (App. p. 419 (EAGLE Ex. 24, p. 73, Totals)). Even looking outside the planning area, and considering that landfills will accept waste from counties outside their planning areas, we still have **more than two times more disposal capacity than what we generate in the entire State.** (*Id.*) It is safe to say that we have “more than adequate capacity to meet the State’s disposal needs,” as stated in the preamble to the DON Regulation. (Brief of Respondent, p. 17, citing 24 S.C. Reg. 46 (June 23, 2000)). Even this Court in Sandlands C& D, LLC v. County of Horry, stated that the “DON Regulation creates geographic planning areas that DHEC must contemplate when deciding **whether the projection of solid waste in the area warrants the construction of a new landfill** at a proposed landfill site or the proposed expansion of an existing landfill. 394 S.C. 451, 457, 716 S.E.2d 280, 283 (2011) (emphasis added).

**B. DHEC is Not Entitled to Deference Where Its Decision is in Conflict With the Plain Language of the Act**

An agency is normally entitled to deference, unless there is a compelling reason to differ. S.C. Coastal Conservation League v. DHEC, 363 S.C. 67, 610 S.E.2d 482 (2005). But in this case, where DHEC's interpretation of the Act's "demonstration of need" requirement is a Regulation that fails to look at "whether the projection of solid waste in the area warrants the construction of a new landfill" (citing Sandlands) or whether "circumstances within the region of the landfill indicate additional landfill capacity is needed to meet the public's demands" (App. p. 21, ALC Order, p. 6), that "interpretation" must fall as materially altering and adding to the Act. See Milliken and Company v. South Carolina Department of Labor, 275 S.C. 264, 269 S.E.2d 763 (1980); Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984); Media Gen. Commc'ns, Inc. v. S. Carolina Dep't of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010) (when a statute's "terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense.").

MRR sounds alarms about the potential for DHEC's "unrestrained" discretion in assessing additional factors and evaluating excess capacity. (Brief of Respondent, p. 18). Though it is difficult to fathom DHEC exercising such unrestrained discretion in denying a landfill permit based on its history of rote application of the "circle test," MRR recommends that the way to avoid that possibility is to take away any discretion for DHEC to consider excess capacity, or any other additional factor that might weigh against a new landfill that is not "needed" in the plain and ordinary sense of that word. On the

contrary, DHEC can exercise discretion without disregarding the provisions of (D)(3)(a)-(c), as feared by MRR, by simply following the directives of the DON Regulation and considering **all four of the criteria listed under Subsection (D)(3), not just the first three.** (Brief of Respondent, p. 18). Indeed, since the first three criteria do not actually look at whether the circumstances exist requiring additional capacity, i.e., whether a landfill is in fact “needed,” only by application of Subsection (D)(3)(d) can DHEC truly make that determination of need.

**C. The Term “Need” Is Not Defined in the Statute or the DON Regulation, Thus There is No DHEC Interpretation of “Need” Warranting Deference**

The problem with MRR’s argument (p. 20-21) that the DON Regulation is DHEC’s interpretation of the Act’s requirement for a demonstration of need is that nowhere in the DON Regulations is the term “need” defined. MRR recognizes that the DON Regulation sets forth a “formula for determining need,” but it never actually defines what “need” means, if it has a meaning beyond the plain and ordinary meaning of that word. (Brief of Respondent, p. 20). Instead the DON Regulation states that “in determining if there is a need for a new . . . solid waste disposal facility, the Department **will use the criteria outlined below,**” and then it lists those four criteria in Subsection (D)(3)(a) – (d). S.C. Code Ann. Regs. § 61-107.17(D)(3). In this case, the DHEC staff 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 argues that a single one of these first three criteria should be taken 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 contradictory under the plain meaning of those words. MRR’s argument is not supported by anything in the regulation or its underlying statutory mandate and should be rejected. State v. Peake, 375 S.C. at 599, 654 S.E.2d at 289; Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994))

While rote application of the first three DON criteria may lead to excess permitted disposal capacity, there is no legal support for MRR’s contention that the “express provisions of the DON Regulation” necessarily provide such excess capacity. (Brief of Respondent, p. 26). There is nothing in the “express provisions” of the DON Regulation providing for excess capacity. The “express provisions” say nothing about promoting, encouraging, allowing or mandating excess capacity. The express provisions direct DHEC to consider “additional factors,” and the Act requires a demonstration that a landfill is needed. 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.”

MRR takes the leap in its brief from first claiming excess capacity is an “intended consequence” to later asserting that the “express provisions” authorize it. EAGLE does not dispute that the DON Regulation may be applied in a way that results in excess permitted capacity, but it certainly does not require the permitting of excess capacity, particularly in a tri-county planning area that has nearly four times the capacity it needs to meet its generation rates.

MRR cites S.C. Coastal Conservation League v. SCDHEC, 363 S.C. 67, 610 S.E.2d 482 (2005), that DHEC cannot exercise “unrestrained discretion” in evaluating permit applications. As MRR points out, in that case “neither the Small Island Regulation nor the statute under which the Small Island Regulation was promulgated defined the term ‘small.’” (Brief of Respondent, p. 25). Similarly in this case neither the DON Regulation nor the statute define the term “need.” But in SCCCL there was no “test” for determining whether an island was “small,” so DHEC had “nothing to interpret or apply.” Id. at 74. In this case there is “test” for making a determination of need, which requires consideration of four criteria. However that “test” as applied by DHEC is inconsistent with the Act and the plain meaning of the word “need.” The “test” as applied by the ALC, however, applies **all** of the criteria under Section (D)(3) of the Regulation and arrives at a result that is consistent with, and gives meaning to, the Act’s requirement for a “demonstration of need.”

MRR also cites to 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 DHEC defined need in promulgating the DON Regulation. (Brief of Respondent, p. 19, 23-24). 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.”<sup>7</sup> 287 S.C. at 112, 336 S.E.2d at 882.

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Moreover, Young involved the following Department regulation: “Transient or Temporary Activities, shall consist of those activities that are not open for business at

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.

MRR misstates the ALJ’s conclusion as to what “additional factors” should be considered. While the ALJ stated that “excess permitted disposal capacity within Laurens County does not constitute an additional factor requiring denial . . . [because s]uch disposal capacity is a result of an express provision of the DON Regulation . . .” (Brief of Respondent, p. 26, App. p. 23), he found that the “additional factor” warranting denial was the excess capacity **in the three-county planning area**, which “simply does not reflect a need for another landfill in the area.” (App. p. 25). The ALJ’s conclusion was based on his reading of the Act, which directs regional management in meeting landfill needs.

Reading the Act and the Regulations as a whole there are but two conclusions. Either MRR is correct that the DON Regulation itself is the agency’s interpretation of the Act’s requirement for a “demonstration of need,” in which case it alters and adds to the Act and must fall. Or the Regulation can be applied in a manner that gives meaning to and is consistent with the Act’s requirement and takes into consideration factors bearing

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least six months of the year or does (sic) not maintain normal hours of business ....” Young v. S. Carolina Dep’t of Highways & Pub. Transp., 287 S.C. 108, 112, 336 S.E.2d 879, 881 (Ct. App. 1985). In that case the term “transient or temporary activities” was defined, whereas the DON Regulations merely provide criteria for DHEC to consider in making a determination of need.

on whether the region has a need for more landfill capacity, as the ALC did in this case.

## **II. The Substantial Evidence Supports the ALC's Holding and the Court of Appeals Erred in Disregarding the ALC's Findings**

Fundamentally contradicting itself, MRR first complains that the ALJ should not have relied on generation and disposal statistics for the three-county planning area, and then complain that he “ignores evidence of the regional aspect of the C & D waste market.” (Brief of Respondent, p. 29). MRR dissects each of the three counties, stating that Spartanburg has no capacity, Laurens County’s excess capacity does not warrant denial; and Greenville’s generation rates exceed its disposal capacity. Then MRR faults the ALJ for not taking a regional approach. (*Id.*) As MRR points out “the planning area established in DHEC’s DON Regulation is a regional concept.” (Brief of Respondent, p. 30). Indeed, that is exactly how the ALC treated it – as a regional concept, looking at the generation rates and disposal capacity in that planning area to deduce that there is a 32.9% utilization rate of existing landfills.

The argument that such unbridled excess capacity should be permitted overlooks the facts that the annual landfill capacity is more than the actual disposal rate for all of the Greenville landfills,<sup>8</sup> (App. p. 186) and that DHEC failed to take into account Curry Lake Landfill’s permitted capacity of 240,000 tons in making its DON determination. (App.

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<sup>8</sup>

The Greenville Republic landfill, with a permitted capacity of 200,000 tons, actually received 48,057 tons in fiscal year 2008. (App. pp. 187-88 & 426 (Pet. Ex. 25)). The Twin Chimneys landfill, with a permitted capacity of more than 87,000 tons, took in 51,000 tons in 2008. (App. p. 426). And W.C.A. Shiloh, with a permitted capacity of 128,000 tons, took in a little more than 80,000 tons in 2008. (App. pp. 187-188 & 426 (Pet. Ex. 25)).

pp. 188-189).

MRR's argument that DHEC utilized some "specialized knowledge in weighing the evidence in this case" is laughable. (Brief of Respondent, p. 30). EAGLE would strongly support DHEC utilizing its knowledge of the generation rates and disposal capacities in the planning area, and in the State, in making its need determination. But it did not. DHEC even admits that it did not use any of that knowledge and did not consider the volumes of information before it related to the question of need in making its determination. It simply plotted the latitude and longitude of the proposed landfill on a map, drew a circle with a 10-mile radius around it, counted the landfills in that circle, counted the generation rates in all of the counties touched by that circle and, **twelve days later issued its determination that the proposed landfill was needed.**<sup>9</sup> (App. pp. 180-81; 367-68). DHEC did not have time to weigh the evidence, and in fact DHEC's determination letter specifically stated that it determined there was a need for the landfill in "the corresponding planning area," not in other counties outside the planning area that may utilize landfills in one of the three counties. (App. p. 368). The fact that landfills in the three-county planning area may accept waste from counties outside that planning area was not anything that factored into DHEC's decision.

MRR further asserts that "DHEC is in the unique position to fully evaluate the significance of such statistics within the context of the state waste management program."

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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. (App. pp. 173-174). Using this method, the Department set the annual disposal rate at 154,000 tons per year. (App. pp. 174-175).

(Brief of Respondent, p. 31). EAGLE could not agree more. But instead of fully evaluating the significance of the excess disposal capacity, and the fact that there is a 32.9% utilization rate of the existing landfills in the planning area, DHEC simply ignored it.

### **III. The ALJ's Admission of Evidence is Not Reversible Error**

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. Marlboro Park Hospital v. SC Department of Health & Environmental Control, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004) 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 is of any consequence. 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).

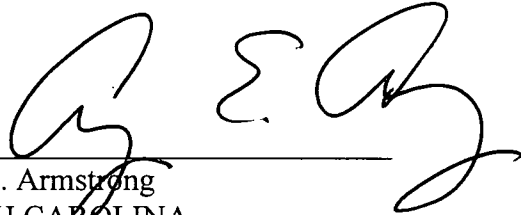
In any event, MRR makes no attempt to show prejudice from the admission of this evidence.

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). The ALJ did not rely solely on the evidence from the 2007 and 2008 solid waste reports or reports

summarizing Curry Lake's disposal rates from 2006-2009 as the basis of his conclusion that the landfill was not needed. That evidence admittedly bolsters the ALJ's conclusions, but did not form the sole or primary basis for his conclusions. His conclusions are supported by the data from 2004 – 2006, which is included in his Final Order and Decision. If there is no prejudice or harm from the admission of evidence, its admission is not reversible error.

### CONCLUSION

For the foregoing reasons, Respondent Engaging and Guarding Laurens' Environment respectfully requests that this Court reverse the Court of Appeal's Opinion and reinstate the ALC's Opinion which found and concluded that the applicant failed to demonstrate a need for the proposed landfill.



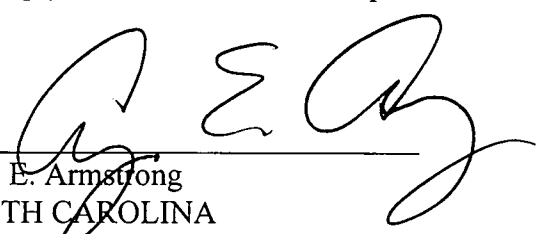
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The undersigned hereby certifies that the Reply Brief of Petitioner complies with Rule 211(b), SCACR.



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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

**S.C. SUPREME COURT**

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, ..... Respondents,

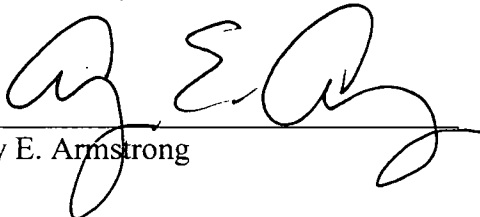
of whom MRR Highway 92, LLC, is ..... Appellant.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I served copies of the Reply Brief of Petitioner Engaging and Guarding Laurens Environment upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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July 29, 2013