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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeals Case No. 2025-000288

Hon. Ralph King Anderson, III
Chief Administrative Law Judge

ALC Case No. 24-ALJ-07-0367-CC

Walter Buchanan,

Appellant

v.

South Carolina Department of Environmental Services, and
Silfab Solar, Inc.

Respondents

APPELLANT INITIAL BRIEF

Walter Buchanan appeals the December 23, 2024, order of dismissal by the Administrative Law Court, Hon. Ralph King Anderson III. Appellants would respectfully show and allege the administrative law judge erroneously imposed its own factual findings and conclusions of law in violation of the applicable standard of review, and erred at law by ruling petitioners had consented to relief sought by joint respondent dismissal motions and held no vested constitutional rights. Appellants would respectfully show the court the following.

INDEX

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Respondent corporation Silfab Solar, Inc. was granted a construction and air quality permit by the South Carolina Department of Health and Environmental Control ("SCDHEC") on March 1, 2024 (R. p.__ at ___). The permit was granted by the now-abolished SCDHEC, which issued the air quality permit to Silfab for the construction of solar cell and solar module manufacturing equipment and processes at 7149 Logistics Lane in Fort Mill, South Carolina (R. p. __ at __). The permit specifically authorized associated chemical storage tanks, emergency generator, and established applicable emission limits, source testing, monitoring, recordkeeping, and reporting requirements. Under the permit, facility equipment and operation include storage and use of chemicals including silane (SiH4), hydrofluoric acid (HF), anhydrous ammonia (NH3), and hydrochloric acid (HC1), which will be air emission of water-treated chemical HF via stacks. Silfab then seeks major changes never disseminated in accurate or sufficient detail to the public. On July 1, 2024, the SCDHEC is abolished. The administrative authority to regulate permits pursuant to the National Pollutant Discharge Elimination System (NPDES) permit program is transferred to the newly created South Carolina Department of Environmental Services (SCDES). The court is reviewing a case involving regulation and compliance verification in the wake of government restructuring. See, Act No. 60, 2003 Acts, 302-27 (implementing government agency restructuring). S.C. Code Ann. § 1-30-140 (Act No. 210).

Stack height is twice changed by the corporation, *after* permit approval and grant. Inaccurate and materially inaccurate information is presented to the public by SCDHEC at public forum October 30, 2023. At the relevant time, the stack height was proposed as 19.7 feet above ground level (AGL). This later changes to 70.0 feet stack height. On June 4, 2024, Silfab informed SCDHEC that it needed to modify its proposed stack height (R. p._at__). Stack height is [a]

parameter used to determine compliance with state and federal ambient air quality standards, per condition I.1 of the permit issued March 1, 2024. The permit provides relevant part "[a]ny changes in the parameters used in [the facility's air dispersion modeling] demonstration may require a review by the *facility* (*sic) to determine continuing compliance with [the state and federal ambient air quality standards.]" As noted by the court, this language implements Section II.C of state standard 8, which also states that "[c]hanges in ... parameters will require a review by the *facility* to determine if they have an adverse impact on the compliance demonstration." Silfab has presented the department two (2) different air models involving release of volatile organic compounds (VOCs), but only one (1) of these was ever presented to the affected public in the wake of government restructuring. Accordingly, SCDHEC informed the facility June 4, 2024, that it needed to submit an updated air dispersion modeling analysis to verify that the post-permit change(s) of stack height and any additional changed modeling parameters would maintain compliance with applicable air quality standards. Silfab on June 4, 2024, changed stack height. Noteworthy is stack diameter was also changed. Changes occur again on July 3, 2024. Silfab submits to the newly created SCDES updated modeling parameters three (3) months after its permit issued March 1, 2024. In the wake of government restructure, SCDES fails to follow through in regulation begun under its predecessor, SCDHEC.

At the relevant time, a second April 17, 2024, permit—whether deemed permit "revision" or permit "renewal," the department is no longer statutorily—abolished SCHDEC. It became the South Carolina Department of Environmental Services (hereafter "SCDES"). As cited by the ALC post change in law on July 1, 2024, the administrative authority to *regulate* (sic) permits pursuant to the NPDES was transferred to newly created SCDES implementing restructuring of the government agencies. S.C. Code Ann. §1-30-140 (Westlaw 2024 Act No. 210). Effective July 3,

2024, the administrative regulatory body that provided respondent Silfab modeling forms is SCDES. Nothing about the restructuring of government agencies would not permit the regulating entity to delegate in unchecked form verification of continued compliance, nor lead the permittee to compliance by assistance. Appellants respectfully assert the public should have a vested constitutional right, as the affected public, to present air modeling evidence, which challenged before the regulatory body the findings submitted by Silfab. This is foreclosed by the ALC court, erroneously finding that appellants have no presently vested constitutional rights (R. p. __ at ___).

Silfab, not SCDES, verifies continued NPDES compliance after its March 1, 2024, permit into April 2024. A letter issued April 17, 2024, from SCDES to Silfab (R. p. __ at ___). The ALC found that final review requested by petitioners/appellants was *declined*, and thus the issued permit became a final agency decision (R. p. __). The court found that July 30, 2024, was not a dispositive decision impacting any private rights or duties nor the *need* (*sic) for a hearing at the administrative department level (R. p. __ at __). SCDES delegates to Silfab the sole authority for verifying its air modeling data. This occurs despite the regulatory department awareness that Silfab desired to twice change stack height to comply with county requirements (R. p. __ at __).

The presiding ALC judge found, secondarily, the court did not effectively have subject matter jurisdiction (order p. __). Subsection 48-6-30(A) of the South Carolina Code (supp. 2024) specifically gives the ALC jurisdiction over contested cases generated by department decisions involving the issuance, denial, *renewal*, suspension or revocation of permits. This would likewise include *revisions*. Petitioners on August 14, 2024, filed petition for review and contested case with the ALC. A "contested case" is a proceeding in which the legal rights, duties, or privileges of a party are required (*sic) by law or by Article I, Section 22 of the state constitution to be determined by an agency or the ALC after an opportunity for hearing (emphasis). S.C. Code Ann. 102-505(3)

(supp. 2024). The below court dismissed petitioner's request for contested case finding predicated on Rule 19(A) and Rule 23(B) of the SCALC procedural rules, the court ruling that petitioners were deemed to have consented to dismissal. The ALC found that the department's July 30, 2024, letter merely memorialized that Silfab had on April 17, 2024, certified continued compliance with applicable "standards." Silfab provided SCDES updates to air dispersion modeling. The only information received by the public from the department was conveyed March 30, 2023. Two (2) changes to stack height, changes to stack diameter, and further information pertinent to Volatile Organic Compounds to be released from stacks is never fully and transparently shared with the public at large under guise of "minor" change and "revision." The transcript of the SCDEC public hearing evidences only public commentary, post 7:18 p.m. hour, in a meeting that began at 6 p.m. at Fort Mill *School District*. The necessity of full and accurate transcription of information conveyed to the public on that day is deemed immaterial to SCDES (R. p. __ at __), and thus not required.

Whether the hearing and findings of the agency issue under lawful procedure is dubious, appellants asserted before the ALC violation of constitutional due process rights. Petitioner claimed right to a contested case based on Article I, Section 3 and Section 14 of the South Carolina constitution, where the ALC court determines petitioner waiver and consent under procedural rules 19A and 23(B) of the rules of procedure for the ALC.[1] The ALC found that the lower court did not have subject matter jurisdiction. The court goes further, however, in ruling Silfab's submission of air dispersion modeling analysis after March 1, 2024, in subsequent permit(s) or renewals

[1] Appellant is aware and does not dispute its petitions to the ALC were for reconsideration under SCRCP 59(e), not citing SCALC Rule 19A nor Rule 23(B). Acknowledging this, appellant respectfully asserts it was abuse of discretion by the trial court, particularly finding that "petitioner did not specifically request, in writing, to be notified of the letter sent electronically July 30, 2024."

review did not trigger a legal duty "*because Silfab's submission of the updated air modeling analysis did not trigger a legal duty of the department to review or issue a final decision regarding the facility's (sic) review.*" Silfab has now submitted stack height change two (2) different times (R. p. __ at __). Post-abolition of SCDHEC, the SCDES is in charge of regulation but delegates to the corporation permittee responsibility for continued environmental compliance, whether under state standard 8 of the SC Code of Regulations or the NPDES. The information conveyed to the public by respondents is patently inaccurate and stale, and appellants assert it was a material misrepresentation from the start by the corporation, DHEC, and later SCDES. All this occurs during government restructuring.

STANDARD OF REVIEW

The ALC reviews final agency decisions in its appellate capacity "as prescribed in South Carolina Code Ann. §1-23-380 [Supp. 2013]." S.C. Code Ann. §1-23-600 (E) (Supp. 2013). Subsection 1-23-380(5) provides the reviewing court "*may affirm the decision of the agency,*" "*remand the case for further proceedings,*" or "*reverse or modify the decision if substantial rights of the appellant have been prejudiced because of the administrative findings, inferences, conclusions, or decision are* ...(d) "*affected by error of law*; [or] (e) *are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record...*" The ALC "*may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.* Id. See also, §41-35-750 (stating "the findings of the department regarding facts, if supported by the evidence ... must be conclusive and the jurisdiction of the [ALC] must be confined to questions of law"). Accordingly, the administrative law court sitting in its appellate capacity may not make its own factual findings. See, *Todd's Ice Cream v. S.C. Emp't Comm'n*, 281 S.C. 254, 258, 315 S.E. 2d 373, 375 (Ct. App. 1984) (stating the standard set forth in §1-23-

380 "does not allow judicial fact finding" by the reviewing court). The court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact, unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 466 S.E.2d 357 (1996). The findings of fact by an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings. If the ALC determines that the department's findings are not sufficiently detailed to enable review, it may remand to the department. See, *Able Commc'ns, Inc. v. S.C. Public Service Comm'n*, 290 S.C. 409, 411, 351 S.E. 2d 151, 152, (1986) (vacating and remanding where the agency's findings of fact were insufficient to allow for review of the agency decision). Id. The review of the court must be confined to the record. Enter procedural irregularity begun under DHEC and continued by SCDES. In cases of alleged irregularities in procedure before the agency, not shown of record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers proper. S.C. Code Ann. § 1-23-380(4). Pursuant to S.C. Code Ann. §1-23-380(5)(a)-(c), the court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of the administrative findings, inferences, conclusions, or if the decisions are (a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency, or (c) made upon unlawful procedure.

DISCUSSION

The appellants assert all of the above (a) – (c) exist in the case now before the court of appeals. The most glaring example is DHEC department failure to completely transcribe October

30, 2023, presentations to the public of material facts pertaining to Silfab's plans and use for 7149 Logistics Lane in Fort Mill.

ARGUMENT

Appellants assert material misrepresentation and concealment by respondents, which continued after permit issued March 1, 2024. SCDHEC error is further compounded by SCDES unchecked delegation for environmental compliance to the corporation. It was the administrative department (SCDHEC) that conducted a public forum and hearing at 6 p.m. at Fort Mill School District facilities October 30, 2023. The transcript entirely omits anything respondent Silfab gave to SCDHEC to disseminate to the public prior to 7:18 p.m., inexplicably. The department presented Silfab plans and air modeling data to the public yet fails to preserve the same of record under unlawful procedure. A year passes. Silfab permit is granted March 1, 2024. Then, three months later, the department permits two (2) Silfab changes to stack height under the permit "revisions." The department permits Silfab, solely, verification delegated to the corporation by the administrative department. Silfab is led by hand in getting VOC reporting data under 100 tons per year, easily avoiding the NPDES (R. p. __ at __).

Of more critical importance, on March 1, 2024, the administrative department's predecessor, SCDHEC, issued an air quality permit to Silfab for the construction of solar cell and panel production facility in Fort Mill, predicated solely on the misleading and false representations made by both respondents to the public. The representations were either materially false or at best wholly inaccurate and misleading. As noted by the ALC judge, specifically the permit authorizes *construction* of solar cell and module manufacturing equipment and *processes* (*sic), associated chemical storage tanks, an emergency generator, and also establishes applicable emission limits, source testing, monitoring, recordkeeping, and reporting requirements (R. p. __ at ___).

Noteworthy is that the below court omits entirely stack height approval at 19.7 feet, nor subsequent changes by the permittee as to stack height and diameter.

Most alarming is that, under the permit, the department approved that facility equipment and operations include emissions of hydrochloric acid (HC1) and storage of hydrofluoric acid (HF). Hydrogen fluoride is a byproduct of hydrofluoric acid (HF) to be stored on site, treated by a million of gallons of water—daily—prior to exhaust via stacks. These stacks are raised, then lowered. The April 15 permit implements major changes as discussed below. Pursuant to Regulation of 61-62.5 of the South Carolina Code of Regulations (2012), Standard No. 8, *Toxic air pollutants* (standard 8), the facility (Silfab) used air dispersion modeling to demonstrate compliance with applicable ambient standards for HCl and HF under standard 8 (R. p. __ at ___). The department (now SCDES in the wake of abolition of SCDHEC) does zero, delegating to a corporation the ability to usurp the functions of legislative bodies, if not regulatory authority of the newly created SCDES itself.

Appellant respectfully asserts this case presents collusion by the department and corporation, with the department aiding and abetting circumvention from public and court scrutiny of a yet untested heavy industrial chemical manufacturing process. Enter glaring factual misrepresentation ignored by the department and adopted by the ALC judge—based on department determinations after the permit was granted to Silfab. This occurs where the permittee Silfab makes major adjustments and changes to its facility and air modeling—*after* the March 1, 2024, permit is granted. The fine details of a heavy industrial chemical process have thereby evaded transparency, complete and accurate information—presented to the affected public. With the abolishment of SCDHEC, the successor department SCDES then leaves Silfab as the sole certifying party regarding air pollutants pursuant to the National Pollutant Discharge Elimination

System (NPDES) permit program and regulation 61-62.5 of the SC Code of Regulations (2012) Standard No. 8 Toxic air pollutants (R. p. _ at __). The ALC court determined subsequent to petitioner's submission of contested hearing that petitioner had consented to relief sought by a joint motion to dismiss by respondents.

ARGUMENT

I. WAS IT ABUSE OF DISCRECTION AND ERROR OF LAW WHERE THE ALC TRIAL JUDGE RULED APPELLANTS HAD CONSENTED TO DISMISSAL?

Yes. Appellants initial filing with the ALC sought a contested hearing, citing violations of due process by the department (R. p. _ at ___). On November 27, 2024, a joint motion by respondent Silfab and the SCDES was submitted to the court (R. p. _ at __). Appellant counsel acknowledges it did not file a written response to the joint motion. The order cites "[f]ailure of a party to timely file a response may be deemed a consent by that party to the relief sought in the motion or petition." The trial court cites SCALC Rule 19(A) for the ruling yet goes yards further. The ALC finds at law petitioners had no vested constitutional rights to due process or vested right to request a contested case in the first instance—despite the ALC citing it did not have subject matter jurisdiction. Appellants assert the court improperly engages in fact-finding and evaluating the weight of the evidence in error of law and the applicable standard of review. This occurs where—now taking shape and form at the Silfab site—is a major, not minor, pollution emission facility within the densely populated community of Fort Mill. Appellant asserts that the right to present a contested case and to challenge significant changes to stack height and VOC or pollutant release would be a presently vested right protected by the constitution—held by the entire affected public, not just Buchanan. At no time should constitutional right to life, liberty, or property take a backseat to Rule 19 SCALC and Rule 23(B) SCALC. The operative language of Rule 19(A) is

"*may*" and not "*shall*". It denotes discretion of the trial court and is not affirmative language. This is abuse of discretion by the ALC.

It is well settled that the words of a statute will be given their plain and ordinary meaning. *Miller v. Doe*, 441 S.E.2d 319 (1994); see also *State v. Wilson*, 274 S.C. 352; 356, 264 S.E.2d 414, 416 (1980). 'Thus, by using the word "may," rather than "shall," the appellants assert the ruling at law holding petitioners had consented to dismissal would be discretionary (not mandatory) by the ALC. Appellants assert to this court that the ALC judge engaged in abuse of discretion and errs in affirmatively depriving petitioners of contested case, deeming petitioners waived or consent to dismissal in abuse of discretion, then going forward and well beyond the record by exceeding the scope of review and concluding that law appellants held no "vested" constitutional rights.

The ALC court notes that no final agency decision occurred April 17, 2024 (second permit). Further, the timeline in this case is critical for the court to recognize as Silfab engaged in major (not minor) changes *after* the permit was issued March 1, 2024. Another permit issued April 17, 2024, evidences drastic change to stack height (to 70 feet), whereas only 19.7 feet was presented to the affected public. It was error to conclude that the first permit (March 1, 2024) or any second permit (April 17, 2024) was not implicated by change of stack height, diameter, and pollutant discharge data never accurately presented to the public, where the regulating entity delegates fact-finding and verification to the corporation, and the corporation alone. Appellants assert the major changes (post permit) were material, and the department and the corporation permittee are enabled to circumvent constitutional due process where the amended plans and data are never presented to the public under guise of "synthetic minor" permit. To compound the egregious errors, now enter the date July 22, 2024.

After SCDHEC is abolished July 1, 2024, the newly created SCDES leads Silfab through the quagmire it has created; SCDES kindly provides Silfab the department's very own updated modeling forms July 30, 2024 for use by the Silfab corporation in its own verification regarding what is now known via FOIA replies as: two (2) changes of stack height, changes to VOC discharge levels, and atop absolute concealment and false representation to the public by the agency's predecessor. SCDES issues a letter back to Silfab advising modeling parameters must be updated.

II. IS THE ALC TRIAL JUDGE DISMISSAL AND RULING AT LAW IN ERROR WHERE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD EVIDENCE MAJOR CHANGES AFTER THE MARCH 1, 2024, PERMIT?

Yes. The record evidences Silfab applied with the administrative agency, citing its stack height would be 19.7 feet AGL (above ground level). This fact was falsely presented by the department to the citizenry, based on Silfab data and air modeling. Appellants respectfully assert that this triggered a duty by the department to accurately advise the citizenry and should have required a new permit application, not be deemed a minor change. But the stage has been set for the department to disregard errors by its abolished predecessor SCDHEC. Noteworthy for this court is initial reports of VOC release data were initially above 100 tons estimated per year. Amended Silfab data reports less than 100 tons per year, conveniently avoiding the NPDES regulations in lieu of review under Standard 8, SC Code of Regulations. This court must consider not only the raising and lowering of stack height. The court must consider the ramifications presented by stack diameter change. Thus, the industry-wide saying:

"THE SOLUTION TO POLLUTION IS *DILUTION.*"
—Author Unknown

Appellants assert respondent SCDES and Silfab collusion in arriving at discharge levels, with Silfab aided by the department head of the administrative regulatory body (R. p. __ at __). The ALC has expressly focused on HC1 (hydrochloric acid), the byproduct of treated HF (hydrofluoric acid) after water treated on site (which means a heavy industrial process upon a light industrial-zoned tract). Appellants allege improper weighing of evidence in violation of the standard of review by the ALC judge. What "county requirements" were Silfab trying to comply with, exactly? Did the department have a duty at law to inquire, given the representations to the public on October 30, 2023? Again, adjusted stack height was never publicly disclosed and was materially misleading after permit changes. Construction of 19.7 ft. stacks never occurs. What does occur is a change to 70 ft. high stacks, then Silfab lowering them to 50 feet. Yes, both would be above the height of 19.7 feet AGL initially represented to the public by respondents. Provided, it would be an assumption of material fact by the regulating department to adopt carte blanche by delegation (not regulation) the corporation's amendment as *minor*, with no need to advise the affected public of what levels (whether under state or federal law) of toxins they may face in their environment. Provided, SCDES as successor to SCHEC deems it not necessary for another public hearing (R.p.__ at ___).

1. **Silfab represents stack height for pollutant exhaust at 19.7 feet in height and adopted by the department (SCDHEC) in permit grant.**

Respondent SCDES confirms to the ALC the first representation to the public had the stacks at 19.7 feet (roof level). The stacks were originally modeled and showed compliance at 19.7 feet (i.e., *a more conservative, and worse case, parameter*) according to SCDES (R. p. __ at __). Then, things change on June 4, 2024. Silfab needed (sic) to modify its proposed stack height to "ensure compliance with county requirements" (R. p. __ at __). Silfab then graciously agrees to raise stack height to 70 feet. Appellants assert the ALC has erred by adopting review of the weight

of unproven evidence and assumption of misleading and inaccurate information by successor agency SCDES.

2. Silfab seeks to raise stack height to 70 feet.

Respondent SCDES asserts to the below court that [a]lthough the actual (sic) stack height would be *decreasing* from 70 feet to 50 feet from the ground, the stacks originally modeled (sic) as part of the October 30, 2023, department presentation of Silfab data to the public meant that the third such amendment to stack *height could not possibly* (sic) *affect the compliance demonstration by Silfab*—second air modeling data occurring after permit grant March 1, 2024—*would adversely affect the compliance model as a practical matter* (R. p. at __). Perhaps this denotes the reason the ALC goes beyond declaration of no subject matter jurisdiction, to weight of the evidence and improperly ruling at law upon vested vs. non-vested constitutional rights of the appellants. Under the ALC ruling, Silfab must necessarily enter operation before a nuisance exists; otherwise, petitioners cannot challenge by contested hearing air models presented by Silfab.

Again, at no time is the public advised of the changes post the March 30, 2024, permit issued by the department. If no legal duty was triggered by regulated approval of the raise of stack height to 70 feet, then appellant asserts certainly a decrease from 70 feet to 50 feet would, and it would be improper for the ALC to engage in judicial fact-finding or review factual data not supported by evidence of record, which would be materially misleading and insufficiently detailed for the below court —adduced for the court by respondent agency where at no time the public is truthfully advised of accurate information of release of VOCs into the environment. The court would be engaging, improperly, in judicial fact-finding predicated on assumption where respondents' failure to accurately and truthfully advise the public had, in fact, now occurred after public forum October 23, 2023 most of which is not preserved by the record, because SCDES

deems it not required (R. p. __ at __). Provided, however, Silfab now seeks a third change to publicly represented stack height decreasing it to 50 feet.

3. Silfab now adjusts stack height to 50 feet.

If the change of stack height from 19.7 feet to 70 feet was a blessing to the surrounding, affected public, how does subsequent update *decrease* to 50 ft. stack height not adversely affect the public right to know via due process, given the information is never disseminated by SCDES or Silfab in sufficient transparent or accurate detail? The public is hoodwinked under procedural irregularities not shown of record, and not accurately transcribed. The information has been gleaned via FOIA requests. At no time is (1) 70 ft. height of stacks, or (2) 50 ft. stack height transparently conveyed to the public in sufficient and accurate detail, nor to the ALC by the administrative regulatory body. Another public hearing would become an annoyance, particularly where higher standards may apply if release data is converted to gallons vs. tons, but this fails to make it into transcript because the only item recorded is post 7:18 p.m. at the public forum presentation.

Only the "worst case" 19.7 ft. AGL (above ground level) height is originally applied for by respondent Silfab in its permit application, and as originally conveyed to the public by respondent SCDES. Irrespective of whatever height above 19.7 ft., post permit amendments to stack height and diameter would make the 19.7 ft. presented by the department grossly inaccurate, if not complete misrepresentation. Changes are occurring post-permit to stack height and **stack diameter**. Fired boilers are being installed with associated tanks of silane. *What could possibly go wrong*? HCI is overly focused upon by the court, entirely ignoring storage of hydrofluoric acid (HF). The only way HCI would be released by discharge is via stacks, emitted into the air after being treated by water and heating processes. According to the regulatory department SCDHEC

the facility will operate as a "conditional major source". Provided, however, the change in stack height is "minor" and deemed merely "revision" (R. p. __ at __).

Silfab submitted updates to modeling parameters July 3, 2024, including "updates to *stack height*, stack diameter ... exit velocity, and "accounted for two buildings being constructed nearby ... and "*Four (4) boilers* (R. p. __ at ___) are introduced by the Silfab changes requested June 4, 2024. This is three (3) months *after* permit approval by the administrative agency using 19.7 feet for stack height. Appellants assert the ALC erroneously concluded these changes "exempt" for construction permitting requirements—and erroneously ruled at law the matter to be "a matter *un-related* (*sic) to the facility's *updated* (*sic) modeling analysis" (R. p. __ at __). The ALC court has improperly engaged in fact-finding and weighing of evidence before the department, not confining its review solely to the record. The ALC court errs under the standard of review by substituting its own fact-finding here, where the new SCDES regulatory department engaged in absolutely none. Relying, instead, upon its permittee to connect the dots under the analysis sheet provided to Silfab by deference to the department (R. p. __ at __).

This is because only the permitee verifies continued compliance (*sic) with applicable standards, not the regulatory department itself (R. p. __ at __). The finding that a construction permit revision was not required and thus was not being issued was error, ignoring monumental changes the public had every right to know about and contest. This is particularly the case if grossly inaccurate data was presented to the public October 30, 2023 in public forum with no further follow-up. The totality of factual circumstances shows what now is taking form at 7149 Logistics Lane. It is the manifestation of nuisance of an emerging heavy industrial use adjacent to children, an elementary school, and hundreds of residential homes.

As months have passed, the truth and form of the Silfab plant now takes shape, where the permittee is in charge of all factual findings adopted by the administrative department carte blanch, hence adopted by the trial court as reported by the regulatory body. The ALC in error engages in fact- finding as to the weight of evidence where major, not minor, changes defalcate the record, with no transparency (nor even accurate presentation) to the citizenry and affected public. The changes in stack height are deemed minor by the department, where the department should have stepped up to bat and regulated compliance with due process, and should have required a new permit, not permit "revision". Change to *lowered* stack height from 70 feet to 50 feet should have triggered a duty for the department (SCDES) to review and accurately present to the public, this ever-changing data, and not simply adopt carte blanche respondent Silfab representations as a minor change as fact before the ALC. The problem is Freedom of Information documents create the firestorm that now engulfs Silfab in Fort Mill.

It was error for the ALC to engage in its own fact findings instead or limiting its review to the record by expressly adopting *permittee* Silfab's factual findings where the department (now SCDES) presented the public insufficiently detailed information; it then issued a letter July 30, 2024, acknowledging receipt of Silfab desired changes and "county requirements" (R. p. __ at __). Did the department have a duty to inquire as to what "county requirements" Silfab was referring to in its petition for major changes? Absolutely. Noteworthy is that Silfab's second stack height adjustment from 70 feet to a lowered 50 feet would be a major (not minor) change—and the record evidences this occurs *after* permit issue date March 1, 2024. If the adjustment by Silfab was to comply with "county requirements" (R. p. __ at __) as evidenced by the record, the reasonable step the department should have taken is inquire as to what county requirements. Zoning, perhaps? Location, perhaps? The ALC ignores that an administrative agency or corporate entities have

usurped legislative authority of bodies like the county council and specifically the County Board of Zoning Appeals in York County via administrative regulatory processes.

While appellant acknowledges the zoning code (which evidences Light Industrial site) is not a matter the department would have reviewed, the toxic pollutant discharge data, which falling under the National Pollutant Discharge Elimination System (NPDES) and transferred to the newly created SCDES, certainly would be. It would be if a regulator agency of the permit and changes to stack height occur after the permit issues March 1, 2024. Instead, a permittee wolf is delegated authority to certify and verify pollutant discharge levels pursuant to Regulation 61-62.5 of the South Carolina Code of Regulations (2012) (R. p. __ at __). The wolf is left tending the flock, both respondents fully aware of adjacent school facilities that will operate in the wake of Silfab's planned discharge of treated chemical pollutants. The representations made to the public are now grotesquely inaccurate, if not untruthful and misleading data with insufficient detail. At minimum, the changes would entitle appellants to a contested hearing as to air modeling, foreclosed by the ALC turn to Rule 19(a) and Rule 23(B) of the SCALC, then ruling appellants held no vested constitutional rights at present. The court is improperly weighing defalcated factual determinations of the department, coming expressly and solely from department, verified only by its corporation permittee. Silfab is led to connect the dots by the department head of the newly created SCDES (R. p. __ at __) to easily avoid any scrutiny. As the public is never advised of adjusted stack height, no further public hearing is deemed necessary by the regulatory department (R. p __ at __), thus adopted by the trial court in error.

III. DID THE ALC COURT ERR AT LAW BY ADOPTING FACTUAL MISREPRESENTATIONS OF THE DEPARTMENT WHERE THE RECORD SHOWS DEPARTMENT DETERMINATIONS MADE UPON UNLAWFUL PROCEDURE AND IN EXCESS OF THE STATUTORY AUTHORITY OF THE AGENCY?

Was the October 23, 2023 public forum hearing conducted upon unlawful procedure, and did major permit changes get approved, exceeding the statutory authority of the department? *Absolutely*. While not fully or completely transcribed, inexplicably (R. p. __ at __), discussion of misrepresentations are warranted here as to volatile organic compound (VOCs) quantities recklessly disregarded by the agency and later the trial court. Appellants assert, if not reckless disregard of due process rights of the public to be fully transparent as to VOC discharge, a change in stack height from 19.7 feet to 70.0 feet, now lowered to 50.0 feet, would be. This is especially true if pertinent to processes involving chemicals like hydrofluoric acid (HF) and air discharge of HCl from stacks. Why is this? Silfab inaccurately represented to the public 22,000-plus pounds (not gallons) of data through the department at public hearing. The record evidences collusion, whether inadvertent or not, by the regulatory department in assisting the permittee to get VOCs down below 100.3 to 99.7. More strict standards and not state regulation would apply (Title V of the NPDES), but not so if Silfab data changed under the suggestion of the agency to *under* 100.3 tons discharge per year. The record evidences this occurred, and is how Silfab "fudges" via the SCDES aiding and abetting the corporate entity. SCDES is guiding the permittee (after permit was granted March 1, 2024) to aide and abet the corporation to fall within state scrutiny under Regulation 61-62.5 Standard No. 8 Toxic Air Pollutants, yet denies community requests March 13, 2024, for final review. Thus, the agency decision was final (R. p. _ at __).

IV. WAS IT ERROR FOR THE TRIAL COURT TO CONCLUDE AT LAW THAT POST PERMIT CHANGE(S) PROPOSED BY SILFAB TO SCDES DID NOT TRIGGER A LEGAL DUTY IMPLICATING DUE PROCESS RIGHTS OF AFFECTED PERSONS?

Yes. The below court cites the department documented its review of "updated" air modeling parameters—plural—including post March 1, 2023, update(s) to (1) stack height; (2) stack diameter; (3) exit velocities; and (4) accounting of new buildings being constructed "nearby."

(R. p. __ at __). *Nearby to what exactly*? **Children.** The department (at this relevant time, SCDES) *leads* permittee Silfab via updated modeling using the agency's "air compliance analysis summary sheet" dated July 22, 2024 (R. p. __ at __). A mere eight (8) days later on July 30 the agency acknowledges receipt of Silfab plans to implement (post permit) four (4) fired boilers (R. p. __ at __). Why is this significant? The boilers are within proximity to storage of silane (H4Si). The stack height is changing dramatically, along with stack diameter. Velocity of VOC exit at stack height is changed conveniently to avoid Title V of the NPDES—with the department aiding and abetting its permittee by leading it to correct report analysis under the department's own "Air Compliance Analysis Summary Sheet" (R. p. __ at ___). None of this gets transparently presented to the affected citizenry, *Ever*. The sole verifying entity for VOC exhaust is none other than respondent Silfab; the agency department head leading and guiding its permittee. As cited by the court stack height is **[a]** "parameter" (singular) used to determine compliance with state and federal ambient air quality standards per condition I.1 of the permit issued March 1, 2023 (over a year prior to permit grant). Were changes in stack height requested a major change, which triggered a legal duty? *Absolutely.* The wolf itself has been left sole authority verifying compliance with applicable standards, tending the flock at the adjacent property. It is classic usurping the authority of regulatory bodies with expertise deferred to by the ALC judge, aided by the defalcated Silfab reporting to the agency, which findings transmit to the court below in defalcated form. The below court certainly complies with deference as to the regulatory department's specialized knowledge, pursuant to S.C. Code Ann. §1-23-350. The court pays no attention to the fact that SCDES has in the wake of SCDHEC being abolished delegated - not regulated - to the corporation.

The ALC concludes that a new permit referred to by the trial court as merely "a construction permit *revision (*sic)*" was not required and thus was not being issued (R. p. __).

After citing the ALC court did not have subject matter jurisdiction, (R.p.___ at __), why then did the court go on to rule at law the petitioner/appellant failed to show a deprivation of its legal rights or privileges, particularly in light of the court's ruling that [I]mportantly, "*the interests protected by the due process clause are defined not by the constitution, but by independent sources, such as state law*" (R. p. __ Order p. 6 at Para. (1) – (5)). "State law" could include county requirements, which prohibit a heavy industrial use upon a site zoned Light Industrial by ordinance, an act of the county legislative body. It is not an act that should be delegated toa corporation by deference of the regulatory department. There is a patent conflict as to state regulatory law and county regulatory law, particularly no deference to the county council or the quasi-judicial body board of zoning appeals. Silfab is aware by May 9, 2024 that the Board of Zoning Appeals has reversed the corporation's zoning interpretation. Silfab took part in presentation to the county BZA board.

Appellants respectfully assert that the court errs in focusing upon the April 17, 2024, permit, which was not merely "modified." Stack height was a major change, not minor. The permit of March 1, 2024 is made antiquated, outdated and inaccurate by June 4, 2024. This is when Silfab requested changes to stack height. The information submitted to the public October 30, **2023**, is now stale and defalcated—and insufficient in detail, particularly in light that as of July 3, 2024 Silfab-submitted updated modeling "parameters" involving (a) stack height (b) stack diameter and (c) exit velocity. Exit velocity of what? Volatile organic compounds (VOCs). These have changed conveniently from a "worst case" scenario (R. p. __ at __) cited by the respondent agency to the court. The agency determinations are without foundation of lawful procedure, deliberately not transcribed upon unlawful procedure, and adopted by the trial court while reviewing the weight of the evidence and whether petitioners held no vested constitutional rights. Appellants respectfully assert the determination of the agency exceeds the statutory authority of the department, by

delegating (not regulating) to Silfab being in charge of verification of VOC release data never presented accurately, truthfully, or transparently to affected public by public forum held October 23, 2023. Hoodwinked by the major post-permit changes, the public would never have an opportunity for notice or a hearing much less ability for contested hearing. As cited by the court, the new SCDES advised petitioner counsel procedures formerly utilized for contested hearing are "no longer applicable" (R. p. __ at __) after abolishment of SCDHEC by government restructuring.

A "contested case" is a proceeding in which the legal rights, duties, or privileges of a party are required by Article I, Section 22, of the constitution "to be determined by an agency or the administrative law court *after opportunity for a hearing.*" S.C. Code Ann. §1-23-505(3) (supp. 2024). The below court identifies yet disregards the statutory provision granting (*emphasis) affected persons the right (*sic) to challenge the issuance of a permit pursuant to section 48-6-30, conveniently avoided by resort to Rule 19(A) SCALC and Rule 23(B) of the rules of procedure for the Administrative Law Court. Again, appellant does not contest it filed for reconsideration before the ALC utilizing Rule 59(e) of the SCRCP (R. p. _ at __). That said, the ALC rules of procedure should be, no different than statutes, read according to their plain and ordinary meaning. *Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E. 2nd 381, 383 (1995) (citing *Miller v. Doe*, 441 S.E.2d 319 (1994). Appellants assert it was abuse of discretion for the ALC judge to deem consent to a dismissal, where the very first filing evidences request for contested hearing over ever-changing "parameters"—stack height, as well as stack width and exit velocities of potentially hazardous VOC exhaust adjacent to schools and homes. The ruling is unjust and harsh. The use of the word "may" signifies permission and generally means the action spoken of is optional or discretionary. *State v. Wilson*, 274 S.C. 352, 356, 264 S.E. 2d 414, 416 (1980). Thus, by using

"may" rather than "shall" the legislate intent evidences the action is discretionary with the judge. The court first finds it does not have subject matter jurisdiction but goes one step further to effectively foreclose any opportunity for contested hearing by improperly engaging in review of the weight of the evidence submitted by the department as to petitioner's constitutional rights, in error ruling them factually and at-law to be not vested. The ruling was unduly harsh, and abuse of discretion; a step the court should not have taken if it had no subject matter jurisdiction. The court errs by concluding at law that petitioners had no vested presently existing constitutional rights, as Silfab has not engaged in operations yet. The court resorts to procedural rule over constitutional mandate where the public's right to transparent, truthful and accurate information was compromised by predecessor admin agency SCDHEC, without correction by SCDES in the awake of government agency restructuring (R. p. __ at __). The information regarded chemical process release of VOCs within the proximity of children, school playgrounds, ballfields, and hundreds of residential homes. This is entirely disregarded by the court ruling at law under Rule 19(A) SCALC that petitioners have "consented" to dismissal vs. ability to have contested hearing. If court deference as to the administrative agency goes too far, given major change to stack height is occurring.The plain language of a statute should likewise apply to rules of procedure, whether the SCALC rules or the SCRCP. (*cf.*, *Rice v. Multimedia*, 318 S.C. 95, 456 S.E.2d 381 (1995) citing *Miller v. Doe,* S.E. 2d 319 (1994).

CONCLUSION

Appellant respectfully asserts the Court of Appeals should vacate and reverse the ALC order. Appellants wish to shine light upon what is getting lost in the shuffle—consideration of the *children*. At minimum, the matter should be Remanded where the department should do its job properly by complying with constitutional substantive and procedural due process with the public

and forcing Silfab transparency, no matter that government restricting has occurred July 1, 2024. Appellants should be granted a contested hearing, which they have at no time waived. The department should have regulated by ensuring complete, accurate, and full transparency to affected citizens for the very reason that substantial rights are implicated. It is important to note that a heavy industrial pollution process(es) involving toxic chemicals like silane, HF, HCl, and anhydrous ammonia combustible cocktails *is taking form* at 7149 Logistics Lane in Fort Mill. These processes will be deployed and operated adjacent to children, elementary schools, playgrounds, ballfields, and dense populations of homes. The sole entity to verify compliance (whether state or federal) is the corporation. The totality of circumstances shows a yet untested process not permitted by "county requirements" e.g., *the zoning code*. The site is zoned Light Industrial. Solar panels and module manufacturing by a heavy industrial process respectfully cannot take priority over the most cherished of God's gifts: *children*. The permit and the ALC court ruling squarely and recklessly places children and residents in harm's way. This court should vacate and reverse on this basis alone.

Remand is proper where the record evidences what is patent, a contested case need involving the most cherished of legal rights, duties, or privileges of the appellants. This would include the right to know and the right not to be exposed to pollutants at lowered stack heights. If major changes (not minor) occurred, a legal duty was triggered and the regulating agency and permittee should have been transparent with the public. This was not the case because the public is hoodwinked under the guise of "minor permit revisions". Petitioners at all stages of this dispute have an absolute, complete, and fully vested right to protect their children and have notice and opportunity to be heard regarding environmental impact. It is not contingent upon Silfab lighting a toxic candle in the future days. The court erred in weighing the evidence and declaring the

planned operations of the plant a contingency, or future act—thus, squarely foreclosing appellants right to a contested hearing atop the administrative department's delegating to the permittee "findings" verified by Silfab alone. Safety and environmental compliance should not solely and strictly be certified by only the permittee and adopted by the department and ALC carte blanche upon defalcated representations. This is inherently reckless. The wolf is left in supervision of the flock next door. Both respondents had constructive (if not actual) knowledge of the nature and character of surroundings adjacent to the Silfab 7149 Logistics Lane site in Fort Mill, yet recklessly have disregarded legal duty owed to the public prior to authorizing construction upon a light industrial site of a heavy industrial chemical processes. This court should reverse, as the wolf is seeking foregiveness after the corporation never complied with zoning. At no time did Silfab petiton the county legislative body for change in use, or variance. It is too easy, instead, to hoodwink the public where the administrative department fails.

Of all places the administrative agency could have chosen for a public hearing, it chose a Fort Mill *School District* building facilities to disseminate Silfab proposals (effective March 30, 2023). Once there, the former administrative department fails the public. The newly created SCDHES fails to follow up. At no time did either department deliver full, accurate, and complete data in sufficient detail after major changes were sought by Silfab to stack height. There is zero transcription prior to 7:18 p.m. (R. p. __ at ___). SCDES, as predecessor to SCDHEC, compounds error atop inaccurate Silfab reports and permits to its predecessor SCDHEC findings to the court, findings that the court adopted without sufficient detail, deferring to "specialized expertise" of the department. With the abolishing of SCDHEC came the abolishment of citizens review board body. SCDES then further compounds error by failing to disclose to the public, under guise of "minor" change, lowered stack heights adopted by the ALC carte blanche because the regulatory body has

done so. Hook, line and sinker. The ALC court has by abuse of discretion deemed appellants' consent to relight sought (dismissal) under joint motions to dismiss where the operative language is *may*, not the affirmative language *shall*. Rule 19(A) SCACR. Appellants submitted a request for contested case hearing to the ALC and respectfully assert that procedural rule 19(A) SCALC rules does not trump Article I, Section 22 of the state constitution. There are inherent vested constitutional rights involving liberty, the right to live free from potential environmental hazards, and to challenge the data the public now is misleading. A "contested case" is a proceeding that appellants are lawfully entitled to, pursuant to Article I, Section 22 of the constitution of the State of South Carolina—to be determined by an agency or the ALC *after an opportunity for hearing.* S.C. Code Ann. §1-23-505(3) (Supp. 2024). Appellants were provided no opportunity for contested hearing where major changes were implemented by Silfab July 3, 2024. Under the applicable standard of review, the ALC cites it does not have subject matter jurisdiction. Yet, the judge goes onward to conclude at law Silfab's updated parameters did not trigger a legal duty by the department to independently review post March 1, 2024 major changes. Two changes of stack height are never made known to the affected public. They are otherwise misrepresented to the public by SCHEC without correction by SCDES. The public had an absolute right to know if major changes would be occurring adjacent to schools and homes. Now taking form at 7149 Logistics Lane in Fort Mill is a manifestation of a heavy industrial chemical processes adjacent to children, schools and homes. Appellant respectfully asserts the court of appeals should vacate and reverse.

Respectfully submitted,

J. Cameron Halford, LLC
/s. / J. Cameron Halford
S.C. Bar Id. # 17184
Post Office Box 172
Barnwell, South Carolina 29812
(803) 524-8659

April 21, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal Case No. 2025-000288

Hon. Ralph King Anderson, III
Chief Administrative Law Judge

ALC Case No. 24-ALJ-07-0367-CC

Walter Buchanan,

Appellant

v.

South Carolina Department of Environmental Services, and
Silfab Solar, Inc.

Respondents

PROOF OF SERVICE
APPELLANT INITIAL BRIEF

I hereby Certify that I am the attorney for Appellants in the above referenced appeal, and that I did on April 21, 2025, serve a copy of the foregoing Appellant Initial Brief on counsel for Respondents as listed below by e-mail and U.S. mail, postage prepaid, addressed as follows:

South Carolina Environmental Services
Office of General Counsel
Attorney Dawn K. Miller, Esq.
Attorney Bennett W. Smith, Esq.
2600 Bull Street,
Columbia, South Carolina 29201
e-mail: bennet.smith@des.sc.gov
ATTORNEYS FOR RESPONDENT
SOUTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL SERVICES

Williams Mullen Law Firm
Ethan R. Ware, Esq.
Ryan W. Trail
1230 Main Street, Suite 330
Columbia, South Carolina 29211
eware@williamsmullen.com
rtrail@williamsmullen.com
rwillis@williamsmullen.com
jtamasitis@williamsmullen.com
ATTORNEYS FOR RESPONDENT
SILFAB SOLAR, INC.

Respectfully submitted,

HALFORD LAW FIRM
/s./ J. Cameron Halford
J. Cameron Halford-Attorney at Law-LLC
S.C. Bar Id. 17184
95 Allen Street
Post Office Box 172
Barnwell, South Carolina 29812
(803) 529-8659
e-mail: cam@halfordlaw. net

HALFORD LAW FIRM
J. CAMERON HALFORD – ATTORNEY AT LAW – LLC
95 ALLEN STREET – P.O. BOX 172
BARNWELL, SOUTH CAROLINA 29812

TELEPHONE: 803-524-8659
Email: cam@halfordlaw.net
joanni@halfordlaw.net

April 21, 2025

VIA E-MAIL AND U.S. MAIL
South Carolina Court of Appeals
Catherine Harrison, Deputy Clark
Post Office Box 11629
Columbia, South Carolina 29201

Re: Appeal No. 2025-000288
Administrative Law Court Case No. 24-ALJ-07-0367-CC
Walter Buchanan vs South Carolina Department of Environmental Services; and Silfab Solar, Inc.

Dear Mrs. Harrison:

Please find enclosed for electronic filing the following documents in the above captioned appeal. Kindly file and return a stamped copy for our records. The originals will be sent U.S. mail this same date. Should there be any questions or concerns, please contact me at 803-619-4177. Thank you for your assistance.

The documents attached for filing:

1. Initial Brief of Appellant
2. Proof of Service Appellant Initial Brief
3. Appellant Designation of Matters
4. Proof of service Appellant designation of matters
5. Signed counsel certification pursuant to SCACR 209(C)

With regards, I remain

Respectfully,

J. Cameron Halford
/s. J. Cameron Halford
Attorney for Appellant Walter Buchanan

JCH:jal
Enclosure/attachments

cc: Bennet Smith, Esq. / Dawn K. Miller, Esq. – attorneys for respondent SCDES
cc: Richard H. Willis, Esq. / John G. Tamasitis, Esq. – attorneys for respondent Silfab Solar Inc.