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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Hon. Ralph King Anderson, III,
Chief Administrative Law Judge

Case No. 24-ALJ-07-0367-CC
Appellate Case No.: 2025-000288

Walter Buchanan,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF RESPONDENT SILFAB SOLAR, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

STATEMENT OF ISSUES ON APPEAL

I. Whether the Administrative Law Court correctly determined a July 30, 2024 letter by the Department did not give rise to a contested case under the applicable sections of the South Carolina Code, thereby depriving the Administrative Law Court of subject matter.

II. Whether the Administrative Law Court properly exercised its discretion in dismissing Appellant's Request for a Contested Case under Rule 23.B of the Rules of Procedure for the Administrative Law Court, because Appellant failed to comply with applicable Rules of Procedure.

III. Whether the Administrative Law Court correctly concluded Appellant consented to the relief requested in Respondents' Joint Motion to Dismiss under Rule 19.A of the Rules of Procedure for the Administrative Law Court, because Appellant failed to respond to the motion.

STATEMENT OF THE CASE

This appeal follows an Order of Dismissal entered by the South Carolina Administrative Law Court ("ALC") on December 23, 2024. The ALC dismissed Appellant's request for a contested case hearing by which Appellant sought review of a letter by the South Carolina Department of Environmental Services ("Department"),[1] which acknowledged Respondent Silfab Solar, Inc.'s ("Silfab") update of certain modeling data in accordance with an existing air quality permit.

On March 1, 2024, the Department issued Air Quality Permit Number CP-50000090 v.1.0 to Silfab for construction of a solar cell and panel facility in Fort Mill, South Carolina (the "Permit"). (R. pp. 73–85). To set emission limits for permitted chemicals, the Silfab facility performed air dispersion modeling to demonstrate compliance with ambient air quality levels ("AAL") set forth in "Standard No.8, Toxic Air Pollutants" (hereinafter "Standard 8"), a regulatory provision requiring a permittee demonstrate compliance with AAL by prescribed air dispersion modeling approved by the Department. *See* S.C. Code Ann. Regs. 61-62.5, St. 8; *accord* (R. p. 85). The March 1, 2024 Permit became the final agency decision on April 17, 2024, when the Department Board denied a Request for Final Review ("RFR 1") filed by community members. (R. p. 70, ¶ 4).

On June 4, 2024, Silfab notified the Department it needed to modify proposed stack heights to comply with York County building and equipment height zoning requirements. (R. p. 70, ¶ 5). "Stack height is a parameter used to determine compliance with state and federal ambient air quality standards," including AALs. (R. p. 5). The Permit states, "[a]ny changes in the parameters

[1] "Department" refers to the Department of Health and Environmental Control before July 1, 2024, and the Department of Environmental Services from July 1, 2024 onward. *See* Act No. 60, 2023 S.C. Acts, 302-27 (government agency restructuring).

used in [the facility's air dispersion modeling] demonstration may require a review by the facility to determine continuing compliance with [the state and federal ambient air quality] standards." (R. p. 85). Standard 8 requires "a review by the facility to determine if [changes in listed parameters] have an adverse impact on the [AAL] compliance demonstration." S.C. Code Ann. Regs. 61-62.5, St. 8.II.C. Accordingly, the Department informed Silfab it needed to submit an updated air dispersion modeling analysis to verify that the changed stack height and additional changes, if any, would maintain compliance with applicable air quality standards, including AALs. (R. p. 5; p. 70, ¶ 5).

On July 3, 2024, Silfab submitted the updated modeling forms and modeling parameters to the Department. (R. p. 70, ¶ 6). The Department completed an "Air Compliance Analysis Summary Sheet," dated July 22, 2024, which documented its review of the updated modeling and compliance with the terms of the Permit. (R. p. 70, ¶ 7; pp. 87–92).

On July 30, 2024, the Department sent a letter to Silfab (the "July 30, 2024 Letter") reiterated its review of updated modeling parameters, noting specifically it reviewed Silfab's submission, and documented a determination Silfab demonstrated continued compliance with applicable standards and the Permit. (R. p. 70–71, ¶ 8; p. 93). The letter concludes a construction permit application and revision is not required because the updated parameters were submitted pursuant to Condition I.1 of the existing Permit. (R. p. 93).

On September 9, 2024, Appellant filed a Request for Contested Case Hearing at the ALC, as well as an Agency Information Sheet and Notice of Appearance.[2] (R. p. 17–26). The Request sought review of an unnamed July 30, 2024 "decision," alleging it resulted in a "violation of

[2] The documents were dated August 29, 2024, but the ALC did not receive them until September 9, 2024. (R. p. 6).

substantive due process and error of law denying proper notice and opportunity to be heard, thus denying contested case status." (R. p. 17). The Clerk of Court for the ALC notified Appellant the next day that the Request for Contested Case Hearing contained an insufficient signature impeding the contested case. (R. p. 134). On October 5, 2024, Appellant submitted a corrected Request for Contested Case Hearing, which perfected the filing. (R. p. 27–30; p. 6, n. 5). The case was assigned to the Honorable Ralph King Anderson, III on October 16, 2024. (R. p. 3).

On November 17, 2024, Silfab and the Department filed a Joint Motion to Dismiss the contested case. The Joint Motion argued the case should be dismissed because (1) the ALC lacked subject matter jurisdiction because the July 30, 2024 Letter does not give rise to a "contested case" under South Carolina law; and (2) Appellant failed to meet requirements of procedural jurisdiction through an untimely challenge to the July 30, 2024 Letter in violation of the ALC Rules of Procedure, which justified dismissal under Rule 23.B, SCALC. (R. pp. 55–68). Appellant did not submit a response to the Joint Motion to Dismiss. (R. p. 4).

On December 23, 2024, the ALC issued the Order of Dismissal, which granted the Joint Motion and dismissed the contested case with prejudice, ruling (1) the July 30, 2024 Letter does not give rise to a contested case; (2) the ALC lacked procedural jurisdiction by Appellant's failure to timely challenge the July 30, 2024 Letter; and (3) Appellant's failure to respond to the Joint Motion is deemed consent to the relief requested. (R. pp. 7–9).

On January 2, 2025, Appellant filed a Motion for Reconsideration with supporting Memorandum in the ALC asking the Court to reconsider the Order of Dismissal.[3] (R. pp. 94–114).

[3] This Brief uses the term "Motion for Reconsideration" to refer to Appellant's motion before the ALC titled, "Petitioner Motion to Reconsider Alter or Amend Judgment Dated December 23, 2024 SCRCP 59(e)."

The ALC denied the Motion for Reconsideration on January 17, 2025. (R. pp. 12–15). This appeal followed.

STANDARD OF REVIEW

"In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (citations omitted). Accordingly,

> [t]he 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 affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (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. § 1-23-380(5)(a)-(f).

"Appellate review of an order by the ALC 'must be confined to the record.'" *S.C. Dep't of Revenue v. Club Rio*, 392 S.C. 636, 640, 709 S.E.2d 690, 692 (Ct. App. 2011) (citing S.C. Code Ann. § 1-23-610(B)). "The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon*, 380 S.C. at 604, 670 S.E.2d at 676 (citation omitted). "[T]his [appellate] court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized

by abuse of discretion or clearly unwarranted exercise of discretion." *Id.* (citing *Olson v. S.C. Dep't of Health and Env't Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008)).

"An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." *Original Blue Ribbon*, 380 S.C. at 605 (citations omitted). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Id.* (citations omitted). "In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." *Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dep't of Health and Env't Control*, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014).

STATEMENT OF FACTS

This appeal arises from correspondence between the Department and Silfab, the holder of the Permit, for construction of a solar cell and panel production facility in Fort Mill, South Carolina.

A. Prior Permitting and Correspondence at Issue

On March 1, 2024, the Department issued Silfab the Permit, which authorizes the construction of solar cell and module manufacturing equipment and processes, associated chemical storage tanks, and an emergency generator, and establishes applicable emission limits, source testing, monitoring, recordkeeping, and reporting requirements for those processes and stationary sources authorized under the Permit. (R. pp. 69–70, ¶ 3; p. 73). The facility equipment and

operations authorized by the Permit includes emissions restrictions and limitations for hydrochloric acid ("HCl") and hydrogen fluoride ("HF"). (R. pp. 78–80). Pursuant to S.C. Regulation 61-62.5, Standard No. 8, *Toxic Air Pollutants* ("Standard 8"), the facility used air dispersion modeling to demonstrate compliance with allowable ambient air concentrations for HCl and HF under Standard 8, Section II.A, C-E. (R. p. 69, ¶ 2).

On March 13, 2024, as authorized by S.C. Code Section 44-1-60(E)(2), several community members filed RFR 1 at the DHEC Board challenging Permit issuance and expressing questions and concerns regarding the Permit. (R. p. 70, ¶ 4). On April 17, 2024, the DHEC Board notified the requestors that it would not be conducting a final review conference in the matter, and the issued Permit became the final agency decision. (*Id*.). No further review of the Permit was timely sought before the ALC. (*Id*.).

On June 4, 2024, Silfab informed the Department it would need to modify its proposed stack heights in accordance with the Permit to ensure compliance with county requirements governing building/equipment height. (R. p. 70, ¶ 5). The updates included stack height, stack diameter, exit velocity, and two nearby buildings under construction. (*Id*.).

Condition I.1 of the Permit provides in relevant part that "[a]ny changes in the parameters used in [the facility's air dispersion modeling] demonstration may require a review by the facility to determine continuing compliance with [the state and federal ambient air quality] standards." (R. p. 85). This language implements Section II.C of Standard 8, which 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."

Stack height is a parameter used to determine compliance with state air toxics and federal ambient air quality standards. S.C. Code Ann. Regs. 61-62.5.II.A, C-E. Accordingly, DHEC staff

informed the facility that it would need to submit an updated air dispersion modeling analysis to verify that the changed stack height and any additional changed modeling parameters would maintain compliance with applicable air quality standards. (R. p. 70, ¶ 5).

On July 3, 2024, Silfab filed the necessary updated modeling forms with the Department, including the updated modeling parameters. (R. p. 70, ¶ 6). The updated modeling parameters included updates to stack height, stack diameter, and exit velocity, and accounted for two buildings being constructed nearby. (*Id*.).

The Department documented its review of the updated modeling in an "Air Compliance Analysis Summary Sheet" dated July 22, 2024. (R. p. 70, ¶ 7; pp. 87–92). This is a standard document prepared by Department staff summarizing a facility's modeling analysis and results. (R. p. 70, ¶ 7). The maximum expected pollutant concentrations yielded from the modeling analysis were lower than those generated during the initial modeling analysis (given the extra-conservative parameters originally modeled) and continued to show compliance with applicable air quality standards for toxic air pollutants.[4] (R. pp. 87–92).

On July 30, 2024, the Department sent Silfab the letter. (R. p. 93). The July 30, 2024 Letter acknowledges receipt of Silfab's plans to install four boilers exempt from construction permitting requirements—a matter unrelated to the facility's updated modeling analysis.[5] (*Id*.). Following the exempt boiler discussion, the letter reiterates what was already stated in the Air Compliance Analysis Summary Sheet, namely that the Department reviewed the facility's updated modeling

[4] The originally planned stack height was 70 feet. (R. p. 70, ¶ 6). The updated modeling factored a newly planned 50ft stack height. (*Id.*) This did not adversely affect the original modeling because the original modeling used a more conservative, worse-case parameter of only 19.7 feet. (*Id*.).

[5] Because the Request for Contested Case Hearing and accompanying exhibits do not allege any dispute in connection with the exempt boilers, that issue is not the subject of this appeal. To the extent Appellant claims there was a dispute regarding the exempt boilers, that issue would not be preserved for this Court's review.

analysis and the analysis demonstrated continued compliance with the applicable ambient air quality standards. (*Id*.). The July 30, 2024 Letter then states that, because the updated parameters were submitted in accordance with Condition I.1 of the facility's permit, a construction permit revision was not required and was not being issued. (*Id*.). The July 30, 2024 Letter is the subject of this appeal.

B. Appellant's Attempts to Challenge the Department's Letter.

On August 14, 2024, Walter Buchanon, on his own behalf and on the claimed behalf of others in Fort Mill, York County, submitted a "Petitioner for Final Review" ("RFR 2") to the Department. (*See* R. pp. 23–24). RFR 2 requests review of matters in association with Silfab's Permit and the July 30, 2024 Letter (specifically asserting concern about changes to the facility's emission stacks). (R. p. 23). On August 16, 2024, the Department's General Counsel wrote Mr. Buchanon's attorney, notifying him the Department of Health and Environmental Control had been abolished, and that the review process previously available before the Department Board under S.C. Code Ann. § 44-1-60 is no longer applicable. (R. p. 22).

Appellant prepared and submitted a "Request for Contested Case Hearing Form" and "Agency Information Sheet and Notice of Appearance" dated August 29, 2024, as well as the filing fee. The Court documented receipt of those filing on September 9, 2024. (R. p. 6, n. 4; p. 28). The Request for Contested Case Hearing Form did not specifically identify the intended Petitioner(s) and identified only the submitting attorney, Mr. J. Cameron Halford, by name. (R. p. 17).

In the Contested Case Hearing Form, Appellant failed to attach the Department's July 30, 2024 Letter and claimed to be appealing an unnamed July 30, 2024 "decision" as a "violation of substantive due process and error of law denying proper notice and opportunity to be heard, thus

denying contested case status," pursuant to article I, sections 3 and 14 of the S.C. Constitution. (R. p. 17). The signature block for submission of the filing was dated August 29, 2024, but omitted a signature. (*Id*.).

The "Agency Information Sheet and Notice of Appearance" originally submitted specifically referenced the Department's July 30, 2024 Letter and claimed a denial of procedural due process and errors of law based on the "exhaust of [HF], exhaust to emit via modified exhaust tower stacks under v.1.0 of the permit." (R. pp. 18–19). Appellant also included as attachments the first page of the March 1, 2024 permit, the August 14, 2024 "Petition for Final Review" submitted to the Department, and the August 16, 2024 Department letter stating that DHEC Board review is no longer available. (R. pp. 20–24).

On September 10, 2024, the ALC issued to Appellant a memorandum of law regarding compliance with ALC Rules 11 and 71, returned the Request for Contested Case Hearing Form for an original signature, and returned the "Agency Information Sheet" as inapplicable (and to be submitted by the Department once the case is assigned). (R. p. 134). The memorandum asked for the appropriate information to be returned within ten (10) days, or the case would not be processed and sent back to the petitioner. (*Id*.). The memorandum includes the disclaimer: "Nothing in this Memorandum extends or tolls any statutory deadline for filing the request for hearing/appeal with the Court." (*Id*.). On October 5, 2024, Appellant corrected the signature deficiency by placing a wet signature on the original form. (R. p. 6, n. 5). The Clerk of Court of the ALC stamped the resubmission cover letter to indicate the filing was perfected October 5, 2024. (R. p. 27; p. 6, n. 5).

ARGUMENT

This Court should affirm the ALC Order of Dismissal because (1) the ALC properly dismissed the case for lack of subject matter because the challenged letter does not give rise to a contested case; (2) the ALC did not abuse its discretion or make error of law in dismissing Appellant's request for a contested case for failure to comply with applicable Rules of Procedure; and (3) the ALC did not abuse its discretion or make error of law by deeming Appellant's failure to respond to Respondents' Joint Motion to Dismiss as consent to the relief requested.

I. The ALC properly dismissed this case for lack of subject matter jurisdiction because the challenged letter does not give rise to a contested case.

The ALC is a creation of statute, limited to those powers statutorily granted. *S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 186, 700 S.E.2d 468, 470 (Ct. App. 2010) ("The statutes do not grant the Department or the ALC authority to exceed their statutorily granted powers."). Subject to inapplicable exceptions, the ALC retains subject matter jurisdiction "over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895." S.C. Code Ann. § 1-23-600(A).

> Specifically, the ALC has jurisdiction over cases generated by Department decisions
>
> involving the **issuance, denial, renewal, suspension, or revocation of permits**, licenses, certificates, **or other actions of the department which may give rise to a contested case**, except a decision to establish a baseline or setback line, must be made using the procedures set forth in this section.

S.C. Code Ann. § 48-6-30(A) (emphasis added). In turn, a "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 or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.

S.C. Code Ann. § 1-23-505(3). In this context, the ALC has subject matter jurisdiction if either a permitting matter is involved (a Permitting Contested Case) or an appropriate legal right subject to the ALC's jurisdiction is at issue (a Legal Contested Case).[6]

A. Lack of Permitting Contested Case.

As the ALC correctly observed, this case does not involve the "issuance, denial, renewal, or revocation" of the Permit, and therefore cannot be a Permitting Contested Case. (*See* R. p. 8) ("Notably, the letter did not issue or modify Silfab's permit. . . . it merely memorialized that Silfab's April 17, 2024 permit remained in compliance with applicable standards."). The challenged letter has no bearing on the Permit; rather, it documented actions explicitly contemplated by the Permit and Standard 8. Documenting action taken pursuant to a permit condition and regulatory standard is not "issuance, denial, renewal, or revocation" of that permit.[7]

B. Lack of Legal Contested Case.

The ALC properly evaluated the presence of a Legal Contested Case by turning to statutes, regulations, and the South Carolina Constitution. (*See* R. p. 8–9). Pursuant to this review, the ALC correctly concluded neither applicable statutes and regulations, nor the State Constitution, gave rise to a Legal Contested Case challenging the July 30, 2024 Letter. (*Id*.).

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[6] This Brief refers to contested cases "involving the issuance, denial, renewal, suspension or revocation of permits" as "Permitting Contested Cases." Accordingly, "other actions of the Department which may give rise to a contested case," either by law or the State Constitution, are referred to as "Legal Contested Cases." This distinction serves solely to distinguish separate analyses in the Order of Dismissal.

[7] Appellant's related, unsupported argument that Permitting Contested Cases includes cases relating to permit revisions was not raised to or ruled upon by the ALC. Therefore, the argument is not preserved for appeal. (*See* App.'s Br., p. 3); *Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995). Moreover, the July 30, 2024 Letter is not a permit revision. (*See* R. p. 93) ("Since the modeling parameters were submitted in accordance with Condition I.1 of [the Permit], a construction permit revision was not required, and none is being issued.")).

First, "the regulations which implement the licensing and review of Silfab's permit do not provide for a contested case hearing for review of updated modeling parameters." (R. p. 8). In fact, no air quality statute or regulation requires a contested case hearing for review of updated modeling parameters, updates which are authorized by the underlying Permit. *See* S.C. Code Ann. § 48-1-10, *et seq.* (Pollution Control Act); S.C. Code Ann. Regs. 61-62 (Air Pollution Control Regulations and Standards). Both "Standard 8 within the regulations and Condition I.1 of the permit itself expressly address modeling parameter changes by requiring the facility to conduct a review to verify continued compliance." (*Id*.). To find a contested case here would strip Standard 8 and Condition I.1 of the Permit of all meaning and effect. Appellant could have challenged the Permit, including Condition I.1, but chose not to do so. (*See* R. p. 9, n.8).

Second, the ALC correctly concluded the South Carolina Constitution implicates no Legal Contested Case. (R. pp. 8–9). Appellant asserted Article I, Sections 3 and 14 of the State Constitution justify a contested case.[8] (*See* R. p. 17). However, the ALC properly rejected this argument, finding "[Appellant] failed to explain to this Court what legally protected right was denied in deprivation of its constitutional due process rights." (R. p. 9). "The fact that the Department reviewed Silfab's updated modeling and verified its continued compliance does not create a legal protected right and thus, [Appellant] has failed to show a deprivation of its legal rights and privileges." (*Id*.).

Appellant argues on appeal "constitutional right[s] to life, liberty, or property [should not] take a backseat to Rule 19 SCALC and Rule 23(B) SCALC." (App.'s Br., p. 9). However, Appellant asserts no basis for a vested constitutional right, instead asserting that "the right to

[8] The ALC properly rejected Appellant's claim based on Article I, Section 14 as that provision guarantees a right to a trial by jury and the ALC does not hear jury trials. (R. p. 8, n. 7).

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 [Appellant]." (App's Br. p. 9).[9] Appellant provides no authority for a constitutional right to challenge a ministerial letter documenting a previously authorized Permit provision, because no such right exists.

Appellant further contends it was inappropriate for the ALC to rule Appellant had no vested constitutional right to a contested case hearing to challenge the July 30, 2024 Letter because the Court also ruled it did not have subject matter jurisdiction. (*See, e.g.*, App's Br. pp. 9, 10, 13, 17, 20, 22, and 25). By definition, review of whether the ALC has subject matter jurisdiction over a supposed contested case necessarily requires the ALC review whether the final agency action implicates the Appellant's constitutional rights. S.C. Code Ann. § 1-23-505(3) (definition of "contested case").

It stands to reason that the ALC cannot answer the question of whether there exists a contested case unless it first considers whether or not constitutional rights are at play. The ALC did that here by evaluating the procedural and legal case for a challenge to the Permit where the Permit otherwise authorizes the agency decisions that were made.

II. The ALC did not abuse discretion or make error of law in dismissing Appellant's request for a contested case under Rule 23.B, SCALC, for failure to comply with Rules of Procedure.

Rule 23.B, SCALC, authorizes the ALC to dismiss a contested case "adversely to the offending party for failure to comply with any of the rules of procedure for contested cases, including the failure to comply with any of the time limits provided in these rules or by order of

[9] Appellant similarly asserts in its Conclusion, "Petitioners [*sic*] at all stages of this dispute have an absolute, complete, and fully vested right to protect their [*sic*] children and have notice and opportunity to be heard regarding environmental impact." (App.'s Br., p. 23).

the Court." The ALC dismissed this case in part due to Appellant's failure to comply with the statutory deadline for filing a request for a contested case hearing. (R. p. 9, n. 9).[10]

Rule 11, SCALC, provides, "[u]nless otherwise provided by statute, a request [for a contested case hearing] must be filed within thirty (30) days after actual or constructive notice of the agency's determination." Here, the statute provides that an "affected person" may challenge a Department decision which gives rise to a contested case by filing a Request for Contested Case Hearing "[w]ithin thirty calendar days after the mailing of a decision . . .". S.C. Code Ann. § 48-6-30(D)(2).

The ALC properly determined the Appellant failed to effectuate the jurisdiction of the ALC for two reasons. First, Appellant filed an ineffective, unperfected, and untimely Request. (*See* R. p. 6, n. 5). The Department's letter was issued on July 30, 2024. Therefore, Appellant's Request was due August 29, 2024. Appellant submitted its challenge on September 9, 2024, eleven (11) days after the deadline. (R. p. 28).

Second, Appellant attempted to perfect its Request on October 5, 2024, nearly six weeks after the original deadline. (R. p. 6, n. 5). Appellant did not comply with the statutory deadline for filing a Request for a Contested Case Hearing. Rule 23.B, SCALC, expressly permits the ALC to exercise its discretion and dismiss a case in such circumstances, as it did here.

Appellant's failure to timely file a Request for Contested Case is the precise conduct subject to the ALC's discretion under Rule 23.B, SCALC. Accordingly, the ALC did not abuse its

[10] *See also, Knight Pub. Co. v. Univ. of S.C.*, 295 S.C. 31, 33, 367 S.E.2d 20, 22 (1988) (overruled on other grounds by *Simpson v. Sanders*, 314 S.C. 413, 415 n.1, 445 S.E.2d 93, 94 n.1 (1994)) ("A statute that creates a new liability and affixes the time within which an action may be commenced is not a statute of limitation but a statute of creation; commencement within the time affixed is then an indispensable condition of the action.").

discretion or make error of law by applying the Rule 23 as written and dismissing Appellant's request.

III. The ALC did not abuse discretion or make error of law by deeming Appellant's failure to respond to the Joint Motion to Dismiss a consent to the relief requested under Rule 19.A, SCALC.[11]

Rule 19.A, SCALC, states in part, "[f]ailure of a party to timely file a response [to a motion] may be deemed a consent by that party to the relief sought in the motion or petition." Thus, whether to deem a party's failure to respond as consent to the requested relief is a matter left to the sound discretion of the ALC. Again, Appellant challenges the ALC's exercise of discretion plainly contemplated under the ALC Rules.

Respondents filed the Joint Motion to Dismiss on November 27, 2024. Appellant did not file a response. (R. p. 4). On December 23, 2024, the ALC issued an Order of Dismissal granting Respondents' Motion and dismissing the case with prejudice, in part relying on Rule 19.A. (R. pp. 4–10). The ALC affirmed its dismissal after Appellant filed his Motion for Reconsideration, noting "[e]nforcement of court rules is ordinary practice." (R. pp. 12–14).

The ALC's decision to dismiss this case on procedural grounds is supported by the record. The record contains no response by Appellant to the Joint Motion to Dismiss. That alone is sufficient to dismiss the case per Rule 19.A, SCALC.

Appellant has presented no evidence which could show the ALC abused its discretion.[12] The ALC has exercised its discretion under Rule 19.A twice in this case (dismissal and reconsideration), and both times determined dismissal appropriate. Dismissing this case under

[11] The language allowing dismissal for failure to respond to a motion has been moved to Rule 7.B, SCALC subsequent to the underlying case as a result of amendments to the SCALC effective April 14, 2025.

[12] In response, Appellant merely suggests the exercise of discretion inherently is abusive: "The operative language of Rule 19(A) is "may" not "shall." It denotes discretion of the trial court and is not affirmative language. This is abuse of discretion by the ALC." (App.'s Br., pp. 9–10).

Rule 19.A is uniquely appropriate given the ALC's decision is coincident to two additional, independent bases for dismissal—Rule 23.B, SCALC, and lack of subject matter jurisdiction. (R. pp. 8–9, n.9).

Finally, the ALC's exercise of discretion on procedural issues is not affected by the status of the matter as a "contested case," as the Appellant suggests. (App.'s Br., p. 9) (discussion of subject matter jurisdiction within argument on Rule 19.A). Therefore, even if this Court finds the ALC erred in ruling the matter is not a contested case, dismissal still is appropriate and should be affirmed.

IV. Appellant's remaining arguments are not preserved for appeal and lack merit.

The majority of Appellant's Brief focuses on issues not preserved for appeal or germane to this case. Accordingly, this Court of Appeals should not reverse the ALC decision on these grounds.

Appellant vaguely, yet repeatedly, conjures legal issues not considered by the ALC; including nuisance,[13] Department duties,[14] collusion,[15] and obligations under the National Pollutant Discharge Elimination System (NPDES) water discharge system.[16,17] These issues are not preserved for appeal. *See Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) ("It is well settled that, but for a very few exceptions not present here, an appellate court cannot address an issue unless it was raised to, and ruled upon, by the trial court.") (citations omitted).

Appellant's Brief raises additional issues scattered across his Argument sections. Although Silfab has attempted to address each argument through this Brief, to the extent Appellant raises a

[13] App.'s Br., pp. 13, 15.
[14] App.'s Br., pp. 11, 12, 13, 16, 18 (Question Presented No. IV.), 23.
[15] App.'s Br., pp. 8, 12, 18.
[16] App.'s Br., pp. 1, 2, 3, 5, 7, 9, 11, 18.
[17] The NPDES is a Clean Water Act permitting scheme and is not relevant to this case involving a permit issued pursuant to the Clean Air Act.

legal argument not addressed in this Brief, Silfab explicitly asserts such arguments were not before the ALC and are not preserved for appeal. This reservation applies equally to legal arguments raised in Appellant's Motion for Reconsideration before the ALC. *See Poch v. Bayshore Concrete Products/S.C., Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009), *aff'd as modified*, 405 S.C. 359, 747 S.E.2d 757 (2013) ("A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.").

Even if the issues raised in Appellant's Brief were preserved for appeal, they lack merit because they cannot correct Appellant's procedural failures or transform the July 30, 2024 Letter to a contested case. For example, the inapposite allegation that Silfab's "amended" data achieves emissions results that do not trigger certain "NPDES regulations" does not fix the issues plaguing Appellant's Request for Contested Case, since NPDES regulations apply exclusively to wastewater discharges and not air emissions governed by the Permit. (*See* App.'s Br., p. 11; S.C. Code Ann. Regs. 61-9.122.1).

Taking as true Appellant's unsupported allegation that "Silfab inaccurately represented to the public 22,000-plus pounds (not gallons) of data through the Department at public hearing," Appellant does not explain how that undermines the Order of Dismissal or applies to the July 30, 2024 Letter. (*See* App.'s Br., p.18). The Permit under review and comment at the public hearing was not a final Permit, and as a result, the Department could have revised that draft Permit to correct any inaccurate data prior to becoming the Permit subject to the underlying contested case.

Finally, Appellant's references to "new evidence" obtained by Freedom of Information requests are unavailing and irrelevant to the contested case decision. (App.'s Br., p. 16; R. pp. 101–03). The "new" information cited by Appellant is routine correspondence between the permittee, Silfab, and the Department from September 12, 2023 to February 28, 2024, well before

the challenged July 30, 2024 Letter. Appellant first presented this information in his Motion for Reconsideration, but failed to include any information sufficient for the Court to conclude the information could not have been raised prior to judgment. *See Poch*, 386 S.C. at 31, 686 S.E.2d at 699. As such, this information is not preserved on appeal.

CONCLUSION

The decision by the ALC should be affirmed. Based on the foregoing and any other grounds appearing in the Record on Appeal (as provided for in Rule 220, SCACR), the ALC's dismissal of this case was proper.

The ALC correctly based its dismissal on three independent grounds: (1) the challenged letter does not give rise to a contested case; (2) Appellant's failure to comply with applicable Rules of Procedure justifies dismissal under Rule 23.B, SCALC; and (3) Appellant's failure to respond to the Joint Motion to Dismiss is deemed consent to dismissal under Rule 19.A, SCALC. Appellant's arguments on appeal do not demonstrate that the ALC abused its discretion or committed an error of law. Plain application of South Carolina law and the ALC's Rules of Procedure substantiate the ALC's dismissal. Therefore, Silfab respectfully requests the decisions of the ALC be affirmed in its entirety.

[signature on following page]

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October 16, 2025
Columbia, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Hon. Ralph King Anderson, III,
Chief Administrative Law Judge

Case No. 24-ALJ-07-0367-CC
Appellate Case No.: 2025-000288

Walter Buchanan,

Appellant,

v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCAR.

Signature Page to Follow

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