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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM THE CIRCUIT COURT
FRANK R. ADDY, Presiding Judge

Appellate Case No. 2025-001315
Civil Action No. 2022-CP-10-05192

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South Carolina Coastal Conservation League and Charleston Waterkeeper, ..……. Appellant,

v.

South Carolina Department of Health and Environmental Control, ……..…. Respondents.

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# INITIAL REPLY BRIEF OF APPELLANTS

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The question before this Court is whether the Department's exemption of individual wastewater system permits from Coastal Zone Consistency review by way of the CMP itself violates the Act's statutory mandate.

Respondent repeatedly complains of the burden associated with coastal zone consistency review for small individual septic tanks. In its Initial Brief, DES states, "[t]he exemption from review … has long been in place has previously been upheld as properly accounting for factors including the Department's lack of direct control or authority over sewage treatment and disposal, the sheer number of septic tank permits issued within the coastal zone…" Initial Brief at 3. Instead of, however, specifying the number of permits processed in the eight coastal counties, DES inflates these numbers by citing to the vast number of septic applications and permits the agency processes annually. Resp. Initial Brief at fn 2.

Further, in advocating for its discretion to "fill up the details" in its regulations, DES cites to *McNickel's Inc. v. S.C. Dept. of Revenue*, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998). However, DES does not recognize that *McNickel's* also stands for the proposition that "[a]n administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation." *Id.*, citing *Hunter & Walden Co. v. South Carolina State Licensing Bd. For Contractors*, 272 S.C. 211, 251 S.E.2d 186 (1978).

The South Carolina General Assembly declared the basic state policy "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State" and "[t]o encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise

use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation." S.C. Code Ann.§48-39-30(1) and (5). In furtherance of the Act's purpose and explicit regulatory mandates, the CMP and accompanying CZC certification process were created. S.C. Code Ann.§48-39-80(B). The state policy of environmental protection for our coastal zone in specific relation to septic tanks is captured throughout the document, as the CMP is replete with observations, findings and conclusions about the deleterious impacts associated with septic systems.[1]

In construing a statute, "[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to an absurd result so plainly absurd that it could not have been intended by the General Assembly." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). If this construction stands, the Department could create exemptions whenever it desired, including for every single state permit and certification. Not only does the ALC's ruling lead to an absurd result, it also leads to arbitrary and capricious decision-making on behalf of the agency as to which permits are not worthy of CZC review. DES relies on Table I at CMP V-5 to support its argument CZ review is unnecessary; however, DES cannot identify any basis for determining when permit review is to be exempted. "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Converse Power Corp. v. S.C. Dep't of Health & Env't Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 345 (Ct. App. 2002), quoting *Deese v. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct.App.1985).

[1] *See* dozens of mentions of adverse impacts from septic throughout the CMP at III-6, III-48, and V-2.

Lastly, DES does not acknowledge or address the possibilities of complying through means other than individual staff members conducting individual reviews. The agency can and has employed tools to streamline permitting, such as General Permits and General Coastal Zone Consistency Certifications, without completely rejecting its permitting responsibilities. *See* S.C. Code Ann. § 48-39-130(E) ("The department, in its discretion, may issue a general permit when the issuance of the general permit would advance the implementation of the goals, policies, and purposes contained in Sections 48-39-20, 48-39-30, and 48-39-280.").

The focus on the practical constraints of the agency with no explanation or justification for why these alternative methods of streamlined permitting are impossible is an attempt to distract the Court from the underlying duty imposed by the legislative scheme of the Coastal Tidelands and Wetlands Act. The omission of all individual septic tank permits exceeds the Department's statutory authority. A motivation to simplify does not authorize abandonment of agency obligations.

Respectfully submitted,

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