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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Hon. Ralph King Anderson, III  
Chief Administrative Law Judge

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Appellate Case No.: 2025-000288

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Walter Buchanan, Appellant

v.

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

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**APPELLANT FINAL REPLY TO INITIAL BRIEF  
OF THE SOUTH CAROLINA DEPARTMENT OF  
ENVIRONMENTAL SERVICES**

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HALFORD LAW FIRM  
J. Cameron Halford-Attorney at Law-LLC  
*/s./ J. Cameron Halford*  
S.C. Bar Id. 17184  
Post Office Box 172  
Barnwell, South Carolina 29812  
(803) 524-8659  
e-mail: [cam@halfordlaw.net](mailto:cam@halfordlaw.net)  
ATTORNEY FOR APPELLANT  
WALTER BUCHANAN

April 21, 2026

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- I. The ALC improperly dismissed Appellant’s contested case as untimely.
- II. The ALC improperly dismissed Appellant’s claims for failure to present a contested case where the ALC Court had proper subject matter jurisdiction under statute.
- III. It was abuse of discretion for the ALC to impute Appellant consent to dismissal.

## STATEMENT OF THE CASE

Silfab Solar, Inc. was granted an air permit by the agency's predecessor (SCDHEC) March 1, 2024. (R.p.20). Prior to this, SCDHEC held a public forum at the Fort Mill School District, where both respondents concede there was both (a) a public meeting and (b) a public hearing. This is the forum presentation that the department deemed proper to only half memorialize by transcription. The existing transcript omits Silfab presentations and data for the draft permit yet records public comments only. Silfab's permit is then granted March 1, 2024. Then comes design changes. The design changes are sought so that Silfab can comply with York County Requirements, that are not specified by either respondent. (R. p. 5, ¶3 at 1-2)

Silfab then engaged in construction of design changes never made apparent to the public, where the department never fully answered the public about the tons of chemicals and exhaust rates under Silfab's very first air models in draft permit. The department staff was unable to answer public questions as to chemical tons being stored and impact to the environment, but this is not transcribed. At the relevant time of public forum through 3/1/2024 permit grant, stack height was a planned 19.7' feet, not 50' feet as now constructed. There was also a proposal for stack height at 70' feet, which the agency (SCDES) denies it received but which may have been received by its predecessor SCDHEC.

Turning to the January 30, 2024, letter, the correspondence was sent electronically by the department to Silfab Solar, through the department's E-permitting system. Appellant nor any others who the department advised there would be no further reviews never receive the same letter by E-permitting, mail, or otherwise. The e-mailing of notice by the agency is unilaterally directed to Silfab *only*. Appellants assert unequal protection of the laws by the regulatory department and collusion designed to avoid public ability to verify or present

rebuttal air modeling given the design changes. Silfab's chemical processes will involve toxic chemicals in every form involving specialty gases, liquids and solids. Such chemicals include hydrofluoric acid (HF) and hydrochloric acid (HCl), not to mention combustible Silane (SiH<sub>4</sub>) being placed into use adjacent to neighboring homes and schools adjacent to the facility.

On March 13, 2024, Walter Buchanon, on his own behalf and on the claimed behalf of others in Fort Mill submitted a "Petition for Final Review" to SCDHEC (RFR #1) which is denied by the agency. The agency is, previous to this, abolished by statute and government restructuring. Before this, however, petitioners sought review in March 2024 which SCDHEC denied. Appellant and others were seeking review of matters in connection with Silfab Solar's pre-existing March 1, 2024 permit and, thereafter, changes under the July 30, 2024, letter where Silfab had engaged in design change to exhaust tower height, diameter, and effects as to exit velocity of treated chemicals that today manifests itself as heavy industrial chemical manufacturing use.

On August 16, 2024, the Department's General Counsel responded to Appellant's counsel, notifying him that the S.C. Department of Health and Environmental Control ("DHEC") had been abolished, and the review process previously available before the DHEC Board under S.C. Code Section 44-1-60 (2018) was no longer applicable. (R. p. 22); (Order of Dismissal p. 6, ¶2 at 3-5); Appellant proceeded by submitting a contested case hearing request to the ALC, including a request form, attachments, and an "Agency Information Sheet and Notice of Appearance." (R. p. 134; see also R. p. 16-19). The form was dated August 29, 2024; however, the submission and filing fee were not documented as received by the ALC until September 9, 2024. (R. p. 6 fn#.4); (R. p. 134).

The contested case request admittedly had a Scrivener's error and lacked an original wet signature of counsel. The ALC's Clerk of Court ("Clerk") sent Appellant a memorandum

noting the deficiency and returned the contested case hearing request form for resubmission with an original signature.<sup>1</sup> (R. p. 134); After no response was received, the Clerk emailed Appellant an additional copy of the memorandum. The ALC judge cites the ALC received Appellant's signed, resubmitted request on October 5, 2025. (R. p. 6 fn#5).

On November 27, 2024, the Department and Silfab Solar jointly moved to dismiss Appellant's contested case hearing request for lack of subject matter and procedural jurisdiction where appellant counsel filed no response to respondents' joint motions to dismiss. (R. p. 55). No hearing was held.

**II. THE ALC IMPROPERLY HELD THE JULY 30, 2024, LETTER WHICH ISSUED UPON MAJOR STACK DESIGN CHANGES BY SILFAB DID NOT PRESENT A CONTESTED CASE AND ERRED IN DETERMINING THE ALC DID NOT HAVE SUBJECT MATTER JURISDICTION.**

SCDES describes the July 30, 2024, E-permitting letter as "routine modeling correspondence", which is respectfully incorrect where Silfab adjusted stack height, diameter, and exit velocity rate of treated exhausts, especially where the public was kept in the dark about the changes. At all relevant times, neighboring or adjacent owners would have the right to know, as quickly as an e-mail, about hazards to their health, safety, welfare and properties – not to mention rights to notice and opportunity to be heard. Thus, the court of appeals is presented with whether the letter approving design changes and chemical use exceeded the agency's statutory authority by permitting continuance of the original permit and presented a "contested case" within the ALC's subject matter jurisdiction. (R. p.55).

Appellant filed no written response to Respondents' joint motions to dismiss. (R. (Order of Dismissal p. 1)). The ALC did not hold a hearing on the motions. Appellants had filed for a contested case hearing, but the court imputes consent dismissal by appellant despite

the case involving constitutional due process and issues that would implicate public health, safety and welfare. The real issue is both respondents at the relevant time aware of planned stack design changes. Appellant and the general public are not, as no follow up to the public forum ever occurred despite the public requesting DHEC answers involving chemicals, including the tonnage to be stored and processed on site. This oddly is not transcribed and why appellant has sought subpoena to get truthful and accurate information. Appellant and others received no E-permitting email letter of any type is to avoid challenge to the ever changing physical changes which house or disperse air exhaust; It would be not subject to verification if air modeling parameters materially differed from what the department presented to the people of Fort Mill by public forum on October 30, 2023. This is likewise the likely culprit of why no transcribing of Silfab data and presentations via SCDHEC occurred for a forum that began at 6:00 pm. Yet, transcription begins conveniently at the 7:18 pm hour.

The trial judge issued an order on January 17, 2025, granting Respondents' Joint Motion to Dismiss on several grounds, and appellant moved for reconsideration January 2, 2025, under Rule 59(e) SCRCPP prior to filing with the court of appeals. Absolutely no in-person or virtual hearings occurred before the lower court. The ALC denied reconsideration on January 17, 2025 (R.p. 12-14) and Appellant's Notice of Appeal to this Court followed. (R. p. 131).

## STATEMENT OF THE FACTS

### **A. Silfab Solar Permitting Background.**

The department seeks to avoid that the permitting process in this case was botched from the very beginning, starting with public forum irregularities. It is odd that sufficient information pertaining to a chemical process use adjacent to neighboring homes is deemed by the agency to have not been necessary to transcribe. Five (5) months goes by after the public forum. A permit is

then granted March 1, 2024 (R. p. 73) after Silfab used air dispersion modeling given to the department -but never effectively conveyed to the affected public by the department(s), ever. (R.p.87). The facility was the *sole* entity to provide data as to demonstrated compliance with ambient air quality standards.

The agency asserts that “as required”, a draft of the permit underwent public notice and comment, but nonetheless DHEC fails to transcribe anything but public commentary. This is no accident. A slide show of information occurs, but no transcription. Both a public meeting and public hearing were held; the irregularity in procedure here is missing transcription of chemical data and modeling as to accuracy given original stack heights and diameter as originally proposed following the public notice process and Department review, the Department issued a construction permit (Permit No. CP-50000090 v. 1.0) (“Permit”). (R. p. 73). The permit authorized the construction of solar cell and module manufacturing equipment and processes, associated chemical storage tanks, and an emergency generator allegedly in accordance with applicable state and federal requirements. (R. \_ (R. p. 4 at para. 2, lines 3-7). It is a correct statement by the agency which asserts to this court that this was and is the *only* air quality permit that has been issued to Silfab Solar, underscoring the errors by the department(s). After grant of the permit, changes begin to take shape in the form of exhaust stack height, diameter, and exit velocity of treated chemicals. (R. p. 5 at ¶ 3, 4 and 5.)

Silfab began to make design changes after the permit as to physical stacks and chemicals storage and exhaust velocity rates, and Silfab is led by the regulatory department to fill in the blanks as to data where Silfab is the source of data and information in manner that no affected person can challenge timely. (R. p. 74-87). The agency is delegating, it is not regulating; and the agency is the only entity with police power and ability to intervene, but it cannot even

provide notice to the public of a letter it emails to Silfab on July 30, 2024. Note the new procedures post-abolishment of SCDHEC had not taken effect yet, so proper notice or opportunity to be heard is disregarded entirely by SCDHEC in April 2024 or SCDES after July 1, 2025. Noteworthy is the public plea for information to the department at public forum which goes not answered with sufficient information or detail. On April 17, 2024, pursuant to S.C. Code Section 44-1-60(E)(2) (2018), several community members filed a request for review of the issued Permit before DHEC's governing Board, RFR #1. (R. p. 5 at ¶2). On April 17, 2024, the DHEC Board notified the requestors in writing that it would not be conducting a final review conference in the matter. (R.p.6 at ¶2, 1-5). This was denial of RFR #1 by Buchanan and others.

**B. The June 30, 2024, Letter at Issue as Agency Action.**

On June 4, 2024, Silfab Solar informed DHEC that it would need to modify the proposed height of its emission stacks to ensure compliance with county requirements concerning building height. (R. p.5 at ¶2 ). The agency does not specify what county requirements specifically, nor does Silfab. It is fact that mid-construction design changes begin to occur after the permit. (R. p.5 at ¶2) Condition I.1 of the Permit states 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.” (*Id.* At ¶3 at 4-8); This language implements Section II(C) of Standard No. 8, and as long as the corporation demonstrates compliance with the agency’s forms, no new permit or modification is alleged to be required.

Appellant referenced “a second April 17, 2024, permit” issued to Silfab Solar. *See, e.g.*, (App. Br. at 2); (R. p. 9, ¶2 lines 4-5). The April 17, 2024, notification, however, was not a new

permit or revision but simply correspondence confirming that the DHEC Board would not be conducting a final review conference in response to the request for review of the Permit by the public thereby rendering that Permit the final agency decision. (R. p. 5). Provided, the April 17, 2024, final decision evidence that it was not, in fact, final. Changes are incorporated which materially differ from the first permit, (R.p.33 at ¶3 lines 3-8) and due process is denied both in April 2024 and July 2024 by the departments. The pesky citizens review boards have been eradicated by government restructuring and new agency procedures. “[C]hanges ... in [modeling] parameters will require a review by the *facility* to determine if they have an adverse impact on the compliance demonstration.” (R. p. 5 at ¶3). 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 other changed modeling parameters would maintain compliance with applicable air quality standards. (R. p. 5). Two (2) more months go by before this is done and while the public remains hoodwinked.

Silfab Solar submitted updated modeling forms to the Department on July 3, 2024. (R. p. 5 at ¶2). The changes between April 17, 2024, and June 3, 2024, submissions by Silfab are major design changes. Noteworthy is Silfab’s submissions now included updates to stack diameter, not merely stack height. Exit velocity parameters change. Design changes add two more buildings being constructed nearby. Nearby to what? Homes and Schools. The parties here dispute the number of drastic changes as to stack height, the agency asserts there was but one (1), and respondent SCDES incorrectly cites the first proposed stack height was 70 feet above the ground level at the time of permit application. Appellant asserts this is backwards, with original stack height at 19.7 feet in original air dispersion modeling. Using what the agency cites as a more conservative parameter, 19.7 feet height then goes to 70 feet, and now

is 50 feet as constructed. Silfab Solar's, July 3, 2024, modeling update changed the modeled stack height to 50 feet above the ground, reflecting the facility's updated plans to construct its stacks at that height.<sup>5</sup> *Id.* The department leads, if not colludes with Silfab, by providing its "air compliance analysis summary Sheet ("Summary Sheet") (R.p. 87). Its "Air Compliance Analysis Summary Sheet" Silfab returns on July 3, 2024. (R. p.5 at ¶4 lines 1-3). Again, it is here Appellant asserts the agency is delegating and not regulating. Noteworthy, there is more than one stack change yet only one (1) summary sheet for documenting air compliance. And, again, there is zero notice to the public, because one botched public forum is all that is required by the agency that succeeds SCDHEC. Per the Summary Sheet form, not surprisingly Silfab Solar's updated modeling continued to show compliance with ambient air quality standards for HCl and HF, incapable of challenge where untimely notices and unequal protection of the laws come at the hands of the department in denying due process.

On July 30, 2024, the Department sent Silfab Solar the letter at issue. (R. p. 5 at ¶4); (Hall affidavit, R. p.70-71, see ¶9 p. 71). Not surprisingly, per the department's affiant states, "Appellant did not request in writing to be notified of the letter prior to it being sent." (R. p. 71 at (9).) Yet, appellant and others had requested two reviews of the permit before this. (R.p.70 at (4); see also (R.p.5 at ¶2). The excuses and justification offered by the agency here are no different than failure to fully transcribe the data presented to the people at public forum. If the department cannot accurately answer the public about environmental impact and tons of chemicals to be stored on Silfab's site, the department is colluding with the Canadian corporation by guidance through the department's own compliance sheet. There is no scrutiny. There is no regulation. There is but, delegation. The truth of environmental release is concealed

truth of Silfab upon the affected public, incapable of verification that would arise from a contested hearing and the adversarial process, if granted.

As noted by respondent Silfab the majority of the Department's letter addressed Silfab Solar's plans to install four boilers that were exempt from construction permitting a matter the respondents both claim *unrelated* to the facility's updated stack height and modeling. (R.p. 5 at ¶4 line 5-8). Fired boilers in vicinity of chemicals like HF are merely ministerial changes, what could possibly go wrong? The matter would be relevant to placement per building design, chemical storage locations, and exit velocities, however, the public would have the right to awareness and notice. Again, the public is hoodwinked about any of the changes. The letter reiterated what was already documented in the Department's Summary Sheet—that the Department had reviewed the *facility's* updated modeling, and the analysis demonstrated continued compliance with air quality standards. This included addition of fired boilers (Id.) Provided, the data and information are provided by none other than the corporation. (R. p. 55 at 2-3); The letter also confirmed that because the modeling was submitted in accordance with Condition I.1 of the Permit, a permit revision was not required and was not being issued. (R. p. 6 ¶1). The question for this court is whether the agency is exceeding its statutory authority by approval of air modeling data but by one (1) person – the corporation – and doing so where major design changes should have at minimum required notice to the affected public. This, however, would have been too burdensome under the changed procedures and processes of the newly created SCDES. (R.p.4 at fn#1; R. p.5 fn#2).

#### STANDARD OF REVIEW

Appellant agrees with the agency's recitation of standard of review under S.C. Code Ann. §1-23-610(a)-(f). This Court may only reverse or modify an ALC decision where a

petitioner's substantive rights have been prejudiced because a finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### ARGUMENT

Appellants assert trial court errors under (a), (b), (c),(d), (e ) and (f) of the statute. Notice, sufficient detailed information to the public, and a right to be heard as to changing stack parameters, boilers, and exit velocities is denied. The department (SCDHEC) denies the first request for review April 17, 2024. (R. p. 5 at ¶2 3-4). SCDES follows up by denying review request as to the July 30, 2024, letter after design changes to exhaust towers by Silfab. However, the newly created SCDES takes over a process begun under the former SCDHEC, renewing a permit (R. p. 9 ¶2 at 4-5) where major design changes occurred. The department exceeded its statutory authority by failing to notice Appellant yet colluding with the corporation through more timely E-permitting or e-mailing the corporation unilaterally but not Appellant or the public whose RFR #1 was denied in April 2024. (R. p.5 lines 7-8). The agency was aware of the names of these persons and that they were neighboring property owners to the plant. (R.p.6 ¶2). Any relevant notices to the public are botched from the time of the very first public forum, and not properly transcribed. From grant of the permit the public becomes hoodwinked where the department ignores constitutional mandates alleging it was not official action which would present a contested case. The argument ignores notice, opportunity to be heard, and that agency decision makes verification by third parties entirely impossible. Moreover, it does so

where these rights are mandatory under the constitution and not subject to change merely by changing regulations of the department's processes and procedures after DHEC is abolished. S.C. Const. art. I section 3; and art. I section 22.

The trial court abused its discretion using ALC Rule 19(A) and 23(B), but yet goes onward to opine outside the scope of the record factually on facts and whether there existed presently vested constitutional rights, [R.p.6 at ¶1 lines 7-11] and worse engages in weighing the evidence cited by the respondents as “*more conservative*”, “*best case*” and “*worst case*” scenarios [R.p.51 at ¶2, lines 4-8] where there is admitted post permit design changes. (R.p.5 at ¶4). The trial court's review “*must be confined to the record.*” S.C.Code Ann. § 1–23–610(B). A chemical manufacturing plant is evolving next to homes and schools in view of reliable, probative, and substantial record evidence as a whole.

Appellant respectfully asserts the trial judge ruling was therefore arbitrary, capricious and abuse of discretion by imputing appellant consent to the dismissal motions where a contested case hearing had been filed and a judge assigned. (R.p.3). At minimum, Article I Section 3 and 22 would take precedence over procedural rules where constitutional rights are implicated. The jurisdictional issues in this case are largely questions of law subject to reversal only if decided “in violation of a statutory provision or ... affected by an error of law.” *Pickens Cnty. v.S.C. Dep't of Health & Env't Control*, 429 S.C. 92, 101, 873 S.E.2d 743, 748 (Ct. App. 2020), *aff 'd in part, vacated in part on other grounds*, 435 S.C. 99, 866 S.E.2d 537 (2021) (quoting *Kiawah Dev. Partners, II v. Dep't of Health & Env't Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014)). The court of appeals review of the ALC's factual findings “must be confined to the record.” S.C.Code Ann. § 1–23–610(B). “The [C]ourt may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on

questions of fact.” *Id.* To the extent facts are in question, the requisite standard is one of substantial evidence, meaning that “the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC.” *Kiawah*, supra 411 S.C. at 28, 766 S.E.2d at 715. Provided, reasonable minds would require the same timely notice to justify the respondents’ assertions that reasonable minds could reach the same conclusion as the ALC if there was but unilateral notice and no equal protection under the laws.

**I. The ALC improperly dismissed Appellant’s contested case requests as untimely.**

In dismissing Appellant’s contested case hearing request, the ALC ultimately concluded that it lacked subject matter jurisdiction due to the October 5 filing. But this would not be the case based on S.C. Code Ann. 1-23-600(A). The ALC also found that even if the July 30, 2024, letter were considered to present a contested case, Appellant’s request for it to be heard was untimely under SCALC Rules 19(A) and 23(B), and S.C. Code Section 48–6–30(D)(2) because it was filed a second time on October 5, 2024, [R.p. 6 fn#5] and more than 30 days had now run after the July 30, 2024, unilateral *electronic mailing* of the Department’s E-permitting letter to Silfab Solar. (R. p.9 fn#.9). Again, appellant nor any affected person who had petitioned the department received this e-filing letter, which is a substantial factor as to timing and overt attempt to avoid input by citizens. Contrary to the agency’s assertion that the ALC basis for dismissal remains uncontested, this simply is not the case. It does not square firmly with the law and facts of this case is inherent failures to timely notice the public of ever-changing construction changes including design of stacks and updates regarding exit velocities via stack height and diameter changes that differed from that presented at public forum held October 30, 2023. Verification cannot occur, because the agency was not acting lawfully within

its scope of statutory authority. The agency is placing its new regulations and the permit language ahead of constitutionally protected rights of Appellant and the public under constitutional mandate. Thus, a decision affirming the ALC's dismissal on grounds of untimeliness is not warranted here if in fact mandatory constitutional rights to due process are implicated. (R. p. 9 at fn#9); (Id. ¶1 at 4-12).

There is deceit here by the department(s). First, denial of request for review by Buchanan and others August 14, 2024. Then, denial of request for review #2 as to the June 30, 2024, letter. As to the ALC Court specifically, the court had jurisdiction over cases generated by department decisions involving renewals, specifically, and other actions of the department which may give rise to a contested case..." S.C. Code Ann. §1-23-600(A). If the agency failed to exercise its authority or provide notice, this is substantial factor for disputing the ALC's dismissal on grounds of untimeliness. Appellant had not abandoned any arguments. To the contrary, appellant is placed at disadvantage due to timing of unilateral notice issued by the agency to merely one party (the corporation) and the ALC's dismissal on such grounds of untimeliness should not be affirmed by this court. (R.p. 5 at ¶5, 7-11).

S.C. Code Ann. § 48-6-30(A) cited by the agency as to statutory procedures the department alleges appellant to have missed. Provided, however, under these procedures, the Department must send **notice** of a reviewable decision to "the applicant, permittee, licensee, certificate holder, and affected persons who have requested in writing to be notified," and an affected person desiring to contest a reviewable decision must request a contested case hearing before the ALC within "thirty calendar days after the mailing of [the] decision." S.C. Code Ann. §§ 48-6-30(D)(1) and (D)(2); *see also* SCALC Rule 11(C) (stating generally applicable time limit, "[u]nless otherwise provided by statute"). The statute would be the South Carolina constitution. This thirty-day statutory deadline typically controls, but it controls where proper

**notice**, and both respondents conceded that the E-permitting letter was sent only to the corporation. (R. p. 5 at ¶4 at lines 6-10). The agency’s logic asks this court to impute notice on the unwarranted assertion that petitioner *did not ask for such a mailing*, [R. p. 71 at (9)] which is self-serving justification for failure to comply with notice and provide opportunity to be heard. While appellant concedes an un-signed petition did mail, (R.p.17) it clocked in at the ALC August 14, 2024. Appellant then re-filed 2024 with wet signature. (R.p. 28). Appellant asserts substantial compliance with procedural rules, and abuse of discretion by the trial court to utilize imputed consent and time deadlines to over-ride appellant and public constitutional rights and ability to not just trust but verify environmental compliance by contested case hearing. The ALC reached the manifest conclusion that even if, *arguendo*, the Department letter in dispute had been considered reviewable, Appellant did not meet the above thirty-day deadline utilizing the corrected filing in conjunction with imputed consent under ALC Rule 19(A) and 23(B). (R. p. 6 fn#5); (R. p.28); (R.p.17).

By affidavit, the Department established before the ALC that the letter was sent electronically to Silfab Solar [ only] through the Department’s E-Permitting system on July 30, 2024. (R. p. 70 at 8). While this is documented by the Hall affidavit respondent relies so heavily upon, the ALC ruling, evidences the trial court going beyond limiting its scope of review strictly to the record below further evidencing abuse of discretion and error of law. (R. p. 9, ¶1 at 9-11).

**II. The ALC improperly dismissed Appellant’s claims for failure to present a contested case where the ALC had proper subject matter jurisdiction under statute.**

The July 30, 2023, E-permitting letter from SCDES to permitte, Silfab Solar, Inc. (“Silfab”) presented a contested case where the ALC held proper subject matter jurisdiction by virtue of S.C. Code Ann. 1-23-600(A) and the department consistently

failed to provide timely notice to the affected public and the appellant. The agency asserts that Appellant has at no point in the proceedings below or before this Court substantiated any claim to contested case jurisdiction for the Department's July 30, 2024 letter. Appellant asserts substantial rights predicated on the department renewal and "other actions of the department" (R.p.9 ¶ at 2, lines 4-5) that give rise to a contested case. Most prominently, unilateral and reckless agency abandon of timely notice to appellant or other neighboring landowners in renewal of a preexisting second permit [R.p. 9 at ¶2 lines 4-5] upon changed design parameters where there were major changes to stacks and exit velocity data involving air discharges. Despite 1-23-600(A) and the record facts, the ALC in error concluded that the Department's July 30, 2024, letter presented no issue where contested case would be warranted, and that the court lacked subject matter jurisdiction. (R.p.7). Both respondents desperately attempt to steer clear of the specific words of the statute like "modification" to justify their position as there was no "issuance" or no "renewal" to the permit granted of March 1, 2024. It is undisputed however that major stack height changes and diameter changes took place, which affect exit velocity of volatile organic compounds adjacent to homes and schools, thus implicating some form of decision and approval of design changes SCDES had no statutory authority to review. (R. p. 5 at ¶4 at 5-7). The respondents both concede county requirements necessitate changes that Silfab was seeking, which would be independent sources of York County law or regulations. (Id. at ¶3 at 1-2).

Thus, the court of appeals should not affirm, as the *on-the-fly* changes made by Silfab after permit grant never enter the public consciousness due to fault of the very agency that purports to protect the environment. Irrespective of the changing procedural rules and

processes of the newly created SCDES, the sending of an e-mail letter is fairly ministerial in nature and would not be burdensome to send to more than one (1) recipient. The right to notice and opportunity to be heard is a constitutional due process right which trumps changes within the SCDES agency after July 1, 2024, abolishment of predecessor agency SCDHEC. While the agency describes the letter as “routine modeling correspondence”, the department exceeded its statutory authority by permit continuation were failing to apply changed physical attributes by Silfab to stack height, diameter, and exit velocities. The end objective is continued approval of the March 1, 2024, permit grant. Appellant asserts the approval of these major changes gives rise to a contested case, which the department(s) twice denied appellant and others. (R. p. 5 at ¶2; Id. at ¶4; and R. p. 6 ¶1; and ¶3 at 1-lines 4-8). The ALC is a creation of statute, and “as a creation of statute, it only has those powers statutorily granted to it.” SCDES exceeds its authority by approving Silfab’s re-submitted air modeling based upon changed designs the department has no place reviewing or considering. (R.p.5 ¶4 at 4-6). Hence, Silfab design changes as a factor not important enough to convey accurately to the affected public. The APA vests the ALC the authority to hear contested cases defined in section 1–23–505 [of the APA] or Article I, Section 22, Constitution of the State of South Carolina, 1895.” S.C. Code Ann. § 1–23–600(A). The ALC jurisdiction extends to review of “decisions of the [Department] involving the issuance, denial, **renewal**, suspension, or revocation of permits, licenses, certificates, or **other actions** of the [D]epartment which may give rise to a contested case[.]” S.C. Code Ann. §§ 48–6–30(A), (D)(2). The relevant other action is department approval of Silfab dispersion models upon changes in stack design, considering the designs approved under the 3/1/2024 grant of permit. (*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); *Responsible Econ. Dev. v. S.C. Dep’t of Health & Env’t Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007))). The APA vests in

the ALC the authority to hear “contested cases as defined in Section Contrary to the assertion of the agency that the ALC review is available only if the letter in question were to constitute a permit or other decision giving rise to a contested case, there is Article I Section 3 of the state constitution, and Article I section 22 (no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on **due notice** and an opportunity to be heard...nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.) (R. p. 9 at ¶2 lines 4-8).

Respondent SCDES would have the courts believe the right to notice and verify right to live free of toxic discharges of a chemical manufacturing use situated upon light industrial site adjacent to homes and schools is not a protected liberty or right where the department mission statement is to ensure environmental compliance through safety and science, yet not observation of constitutional due process in the administrative regulatory context. In the administrative context this is more specifically addressed by Article I, Section 22 as accurately cited by respondent Silfab’s brief (*Silfab* In.Br. at 16, at 1-7). Our state Supreme Court considers due process protections under Article I, Section 22 to be “the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions.” *S.C. Ambulatory Surgery Ctr. Ass’n v. S.C. Worker’s Comp. Comm’n*, 376 S.C. 165, 656 S.E.2d 340 (2010). Thus, the ALC’s consideration of any right to a contested case hearing applies equally whether evaluated under Article I, Section 3 or Section 22 of the constitution.

Appellant asserts the ALC review should have been available as other decision giving rise to a “contested case” under the APA as well as the state constitution, hence the attempt to classify the letter as not a permit, nor a renewal nor a modification, just merely routine correspondence that was not official action of the department. Contrary to the agency assertion

that “ Having not issued or modified any permit, the letter cannot be said to give rise to contested case jurisdiction as a permit “issuance, denial, renewal, suspension, or revocation” under the Department’s enabling statute is incorrect, [see, R.p. 9 ¶2 at 4-5] at as the matter at minimum involves decision of the newly created SCDES implicating constitutional rights, proper notice, and due process of law. Thus, the departments routine modeling correspondence, emailed unilaterally and only to the corporation, would give rise to a contested case under the APA. To give rise to a contested case, the Department’s letter must, at minimum, be in connection with a “proceeding ... in which the legal rights, duties, or privileges of a party are required ... to be determined” by law or by the S.C. Constitution after the opportunity for a hearing. Such would be the comedy of errors beginning with public forum and extending through permit grant March 1, 2024. Further, such would be permit continuation taking into consideration design changes, (R.p.9 ¶2 at 4-5) which exceed statutory authority of the department. (R. p. 5, ¶4, 5-8); (R. p. 93 ¶1).

From the DHEC irregularities and failures of the public forum, to the issuance of the June 30, 2024, letter, the agency at minimum failed in proper notice of accurate information, denied due process, and authorized renewal or continuation of a permit upon major Silfab design changes. Based on these factors alone, the letter is not routine, ministerial correspondence which does reflect a proceeding or decision implicating “legal rights, duties, or privileges” not the least of which are constitutional rights to notice, due process of law, and equal protection of law. Using Permit (Condition I.1) and regulations (Standard No. 8, Section II(C)) which would now involve emissions through stack height changes, stack diameter modification, and changing exist velocities effectively converted the letter into a decision triggering appellant and public legal rights. The information evades the public eye where unilateral communication, and thwarts awareness through unilateral notice whereby citizenry can capably request contested case review. Since not every

heavy industrial chemical manufacturing process decides to set up shop on a light industrial site next to homes and schools, the arguments made by the agency that granting contested case status here would be to render every routine modeling update the legal equivalent of a new permit unavailing. Here, only the permittee is required to conduct a review to verify compliance according to the agency, evidencing delegation and not regulation. The department provides Silfab with the agency's own Air Compliance Analysis Summary Sheet, which the respondent corporation refers to as a standard document prepared by department staff summarizing a facility's modeling analysis and results. (Silfab Br. at 12, ¶5 at 3). The agency colludes if not coaches the facility to reporting its numbers, evidencing a formal decision which affects continuation of a permit granted March 1, 2024. Whether "modification", "renewal" or other action the department's position that it owed no legal duty is incorrect shown by department providing "staff standard documentation, for facility (not DES) to verify air compliance under design changes that would be a trigger event giving rise to a contested case, if proper and timely notice had been provided to Appellant and others. See, *Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control* 403 S.C. at 595-96, 743 S.E.2d at 797 (2013). Applying this case's principle to the letter in question, the ALC improperly concluded that "[b]ecause **Silfab's** submission of the updated air dispersion modeling analysis did not trigger a legal duty for the Department to review or issue a final decision regarding the facility review, the Department's July 30<sup>th</sup> letter cannot be described as a 'contested case' as defined under the [APA]." (R. p. 5). It bears repeating that the stack height presented at public forum was 19.7 feet, changed to 70 feet, then finalized at 50' feet. (R. p. 127 at ¶2) Diameter has changed. Exit velocity has changed. Article I, Section 22 of the South Carolina Constitution provides, in part, that "[n]o person shall be finally bound by a quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard." S.C. Const. Art. I, § 22. The ALC erred in concluding the Appellant had no vested constitutional right to a contested case hearing and

by weighing evidence like improved emissions dispersion of treated volatile organic compounds produced by a chemical manufacturing use or weighing worst case scenarios unsupported factually by the record.

While the agency argues the letter in question was not a permit or other quasi-judicial “decision” but rather mere routine correspondence documenting review of Silfab Solar’s updated modeling performed pursuant to express regulatory and permit terms and having no effect on the facility’s preexisting Permit, noteworthy is the process here began under proposed draft permit presented at public forum where the department could not even provide accurate answers then (October 30, 2024) to the public, which will be evidenced if this court permits subpoena to obtain the full recording of both segments of the public forum. The department simply never answers the public yet grants a permit to Silfab March 1, 2024. Once granted, major changes began to occur by Silfab’s desire to make design changes which the public is never conscious of, receiving no notice or even less the right to be heard. Thus, appellant asserts the ALC ruling that such a review “does not create a legal protected right” under the state Constitution is error. (R. p. 8 at ¶2 and ¶3)). After finding the court did not have subject matter jurisdiction, the court went further to weigh the evidence in reasoning that (“[A]n interest in property which is protected by due process arises only when there is a legitimate claim of entitlement, as created and defined by independent sources, and a person clearly must have more than an abstract need or desire for it, and the person must have more than a unilateral expectation of it.”

The agency asserts incorrectly that the APA and governing air quality statutes and regulations did not constitute presently vested constitutional right. Provided, liberty and due process of law properly do so. The right to notice evidence entitlement under claim where the agency first inaccurately conveys information not transcribed at public forum, making

appellant's requests for reviews not unilateral in nature, but affecting an entire community and the liberty to know or have notice of environmental changes that can impact health, safety, welfare and the environment. These are precise and are not abstract as argued by the respondent agency.

Appellant respectfully asserts the trial court got this wrong after weighing facts not substantiated by the record immediately after the court first declares the court did not have subject matter jurisdiction. Article I, Section 3 of the constitution addresses constitutional due process of law. Section 23 of the constitution mandates compliance with due process constitutional rights in Section 3, Article I. Our supreme court in *Ambulatory Surgery Center Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 390-91, 699 S.E.2d 146, 152 (2010) is illustrative, holding "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." (citation omitted). *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) (citing Amendments V and XIV of the United States Constitution and Article I, section 22 of the South Carolina constitution and stating "[t]he fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review"). Id.

Appellant asserts the fundamental requirements of due process are mandatory privilege in this scenario, conferring upon appellant not just constitutional right, but the right to be heard in a meaningful way, which was denied by the departments. "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art. I section 3 (1895). Appellant and the public are denied equal protection where the department provides less than

adequate notice from public forum October 30, 2023, forward. While neither respondent precisely identifies what *county requirement* the corporation seeks to change stack height to comply with, presumably the right to rely upon zoning (or any other local ordinance or regulation) would be an independent source that would meaningfully support providing necessity of awareness to the appellant and public if stack heights and stack diameter designs were post-permit being implemented by the Canadian corporation's construction. (R.p.5 at (1), lines 4-13).

As noted by the agency, the permit is issued months before [R.p. 73]; [R.p. 9 §3 at 4-5] to the department's letter of July 30, 2024 [R.p.93] sent *only* to Silfab. Appellant and the affected public would, if the zoning of Silfab's site is Light Industrial, have an established right to rely upon local zoning and a right to contested hearing involving design changes and exit velocities of pollutant discharge. (R. p. 9 at ¶1, lines 4-13). Appellant and other residential zoned citizenry neighboring the facility would have an absolute right to be aware of, have notice, and opportunity to be heard regarding release of volatile chemical compounds from a chemical manufacturing use now adjacent to their homes and schools. The private right is privilege guaranteed by article I section 3 to due process and equal protection of law, including any county "requirement" Silfab sought design changes under. While both respondents desperately try to steer clear of zoning as a matter inapplicable to the department review, it is not inapplicable to its permittee Silfab where design changes and changes to exit velocity affects the community environment people live in.

Finally, the agency assertion, that Appellant has no constitutional right to review of the Department's letter because he cannot claim any *private* right in relation to it is misguided, the private right would be liberty, health, the right to know accurate information involving environmental compliance. It would include private right to challenge the same by contested

hearing were the department to have fully complied with notice and due process in the first place. The Department's letter to Silfab Solar confirming updated air modeling by use of changed stack height and diameter does, in fact, bind the Appellant and does affect his *private* rights as he is a neighboring and adjacent homeowner. Appellant thus can claim constitutional right to meaningful review where agency denies privileges and immunities (the right to rely upon county zoning or any county regulation in place before Silfab design changes), notice, due process of law, and equal protection under the laws. Appellant is a statutory affected person per statutory law S.C. Code Ann. 6-29-825(A) ("A person who is not the owner of the property may petition to intervene as a party, and this must be granted if the person has a substantial interest...") Environmental impact and the right to due process of law are substantial interests. Thus, appellant respectfully asserts department irregularities in procedure are of record, not unfounded, and presented a proper basis for ALC exercise of jurisdiction.

While the agency argues records related to the facility's stack height change were not *hidden* (\*sic), (SCDES final br.p.19 at ¶2 at 1) they were certainly unilaterally approved by the agency. Substantial record of design changes that differ from information presented by the department at public forum certainly was not updated in a manner that would enter the consciousness of the public, and this was by design. Respondents concede an E-permit email of the letter went strictly to Silfab and Silfab only, never Appellant. Never to others who had requested review and whom the department was aware of effective March of 2024. (R. p. 5 at ¶2 at 1-5). While the agency argues not every Department communication equates to a permit or other decision, and likewise, not every communication or matter before the Department necessitates formal public notice or public participation before the agency, as a regulatory body the department must provide due process of law if any factor under Article I, Section 3 of the Constitution is to be properly observed.

Appellant's argument for proper notice after the public forum for notice of the events in question directly implicates constitutional right to due process, particularly liberty, health, safety, welfare and liberty involving the right to verify or confirm environmental impact. Article I section 22 of the state constitution be implicated also. This is because the air quality standard modeling post permit design changes would, were the information timely to enter the public consciousness by proper notice, be an administrative decision fully and finally binding upon neighboring owners like the appellant. (R. p. 5 at ¶2); *but see* (R. p. 9 at ¶2 lines 4-5) Equal protection of the law is directly implicated, but the department changes to review process previously available via the predecessor agency is no longer applicable. (Res. DES Br. at 2). The abolishment of DHEC did not alter rights guaranteed by the constitution, nor equal protection under the law. Nothing about Act No. 60, 2023 S.C. Acts, 302-27 (government agency restructuring) changes this. A public forum process begun by the predecessor to SCDES (DHEC) by fumble and inability to answer chemical concentration questions, continues after July 1, 2024, under the newly created SCDES agency who, likewise, denies accurate or detailed information to the public and meaningful opportunity to be heard. Due process is directly implicated where major design changes by Silfab receive department rubber stamped approval. The agency restructuring in no way changed the governing regulations or Permit terms. However, Silfab Solar's design changes evidence how a synthetic minor permit leads to a "conditional major" (R. p. 73-84) emissions source. The agency would not have statutory authority to investigate, not just rubber stamp the changed facility designs where design changes unilaterally implemented by Silfab under its existing permit and regulatory responsibilities by SCDES reflected delegation of Department authority and unequal protection of the laws.

It likewise evidences the agency exceeding its statutory authority in consideration of design changes which are not within the statutory province of the agency whatsoever - where no notice and where denial of due process by the agency as early as March 13, 2024 first review request filed by appellant Buchanan and others. (R.p.5 at ¶2). Then, second review request when appellant and others had become aware of the design changes by Silfab, the department having feigned a meaningful opportunity to be heard from the time of public forum. (R..p. 5 at 2); (R.p.9 at ¶2 line 4-5). The agency attempts to support the errors under S.C. Code Ann. Regs. 61-62.1, Section II(N) (requiring public notice of permitting activity “[w]hen determined to be appropriate by the department (or specified by regulation)”, the argument is unmeritorious in view of vested constitutional rights that are mandatory and should take priority. Article I, Section 3; S.C. Const. Article I, Section 22; S.C. Const.; Article I Section 23 S.C. Const. Thus, arguments and concerns regarding Silfab Solar underlying permitting are substantiated, timely, and were within the lower court’s jurisdiction to review.

Appellant’s grievances pertaining to various “misrepresentations” and wrongdoing by the department during the public participation process begin from public forum forward. They begin prior to Permit grant, based on inaccurate and un-answered information from the department, not merely the content of the issued Permit itself. Again, how does a minor synthetic permittee become a conditional major source of emissions? Such claims concerning the underlying permitting of Silfab Solar in the first place—the core issues the department claims to drive Appellant—present grounds for reversal as the provisions of the state constitution are mandatory and take priority over S.C. Code Ann. Regs. 61-62.1, Section II(N) cited by appellant. (Res DES Br. at 23 fn# 13). Again, nothing about government restructuring or now-changed review processes by the department after abolishment of SCDHEC changed mandatory constitutional provisions, but the department places regulation ahead of

constitutional framework and equal protection of the law. Appellant asserts at no time have a meaningful right to be heard occurred, from public forum forward. Moreover, the department held investigative and police power, where facility design changes never make it to the public consciousness.

Appellant asserts major design changes coupled with the July 30, 2024, letter entitled appellant to notice and due process denied by the departments. Jurisdiction involving the letter evidence modified construction and design changes. If changes to volatile pollutant discharge by stacks into the air, it was a decision to permit the corporation to go forward and deliberate choice to evade any further involvement by the public after grant of the purported singular permit Silfab holds. (but see, R. p. 9 ¶2 at 4-5). The permit grant differed from that which is now nearing full construction at 7149 Logistics Lane in Fort Mill, and the summary sheet confirming Silfab's air modeling (not received until July 3, 2024) results in an "action" by July 30 whether defined as modification, renewal, or other action of the department generally ignoring *mandatory* constitutional due process. See, Article I, section 3 and section 23 of the S.C. constitution.

In the case before the court of appeals it is not merely Appellant's concerns about the pre-Permit public participation process, VOC emission levels, and other aspects of pre-existing Permit. It is about action modifying, renewing, or otherwise constituting agency action by acquiescence under S.C. Code Ann. 1-23-380(5)(a)-(f), specifically violation of mandatory constitutional or statutory provisions. Specifically, action made upon unlawful procedure and irregularities thus not outside the scope of the record below and thus establishing solid grounds for contested case review of the Department's distinct July 30, 2024, "*routine*" letter concerning updated modeling applying major design changes. Under this scenario there is forced trust and no method of verification, as the appellant and public generally are

hoodwinked by informational changes never reaching the public consciousness or awareness, timely. It is agency conduct denying equal protection of law mandated by the constitution and in violation of its very own mission statement.

It is worth mention that the process cited by the agency for public review under S.C. Code Ann. §44-1-60(E)(2) prior to government restructuring is now but a mere fifteen (15) days. However, at date of permit grant March 1, 2024, the public would have no awareness of the major design changes that were forthcoming. This is not true of the department, however. The simple reason public awareness is not continued after Silfab's design changes is plain. There are differences in the stack dimensions which warrant contested review if demanded, which appellants did upon becoming aware of change to stack height, diameter, and exit velocities. This was never communicated by department(s) timely to the public at public forum, or any time after public forum. SCDES violates its own mission statement and commitment to efficient and better delivery of services ensuring that all South Carolinians have a healthy environment, where it seemingly cannot e-mail appellant and affected public members but can provide the letter to the corporation straight away by E-permitting email. This action alone evidence collusion as it creates an informational awareness *gap* under now-shortened statutory time frames to request review or contested hearing. By design, it severely restricts or eliminates public input.

The department cites S.C. Code Ann. § 1-23-380 (affording judicial review to a “party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case”) and *Hyde v. S.C. Dep’t of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994) (a party who has failed to exhaust an adequate administrative remedy provided by statute is precluded from seeking relief before the courts). As noted above, the DHEC board declined in writing to hold a final review conference

regarding the Permit, (R.p. 5 at ¶2 lines 1-4) and neither Appellant nor any other party sought review of the Permit believing they would be bound merely by what was presented at public forum. Design changes made information provided at public forum stale, which turned out drastically different as constructed. This court should note the time frame, the first request for review occurring March 13, 2024. (R. p. at ¶2).

Thus the agency arguments that appellant failed to exhaust administrative remedies is without merit where appellant and others were denied a meaningful right to be heard, equal protection of the law, due process, and is generally hoodwinked from knowing about changing corporation stack designs not part of the draft permit parameters presented by the department predecessor via public forum October 23, 2023. It is likely why half of the public forum was not transcribed, and it evidences the department(s) proceeding under irregular and unlawful procedures and in gross violation of the department's own mission statement. There is collusion. As cited by respondent, the agency's role in air permitting is to implement the relevant federal and state air quality standards and requirements, *designed to protect the public health and environment*. The regulatory department(s) miserably failed in this regard, which is substantiated of record, beginning with public forum March 20, 2023. It continues through June 30, 2024, letter that as an agency action continued the existing March 1, 2024, permit. The department has no statutory authority to permit construction design changes, whatsoever. (R. p. 5, ¶4 5-7). To the extent it implicitly did so, the agency exceeded not only its statutory authority but is very own mission statement. The respondents allegedly want the public trust, but not verification or troublesome input of affected citizens. Appellant asserts that the ALC abused its discretion and committed an error of law in deeming Appellant to have consented to dismissal. (SCDES Br. at 9). As set forth below, the court engages in abuse of discretion compounded further by error of law.

**III.) It was abuse of discretion for the ALC to Impute Appellant’s Consent to Dismissal.**

A. The ALC inappropriately applied SCALC Rule 19(A) (2004).

SCALC Rule 19(A)’s operative language, as in effect during the pendency of Respondents’ motion, is straightforward: “Failure 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.” SCALC Rule 19(A) (2024). Appellant filed no response to the joint motions. (R. p. 4 at ¶1 at 4). Appellant had filed for contested hearing, however. There is no virtual or in person hearing held on the dismissal. The operative language in Rule 19(A) is “may” vs. the affirmative language “shall”. By using 'may,' rather than 'shall,' the legislature has provided that the action is discretionary with the judge." *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995). In contesting this aspect of the ALC’s decision applying Rule 19(A) of the ALC rules (2024 version), Appellant claims to have had a “vested right protected by the constitution” to present a contested case and asserts that this right was a priority over the ALC application of SCALC Rules 19(A) and 23(B). (App. DES Br. at 9). The argument in fact presents grounds for finding error and abuse of discretion by the trial court. Appellant filed in year 2024. Respondent concedes the new 2024 edition of the rules were in effect at the time, and the 2025 revisions which do not quote the same “may” operative language.

Appellant asserts the ALC’s decision deeming Appellant to have consented to Respondents’ motion to dismiss prejudiced Appellant and was arbitrary and capricious, (R. p. 4 at ¶1, at 4-10) designed to implicate any procedural method that would thwart necessity of ALC review. Appellant respectfully asserts changing regulations and rules do not best mandate mandatory constitutional right to due process. Here, the ALC improperly concluded that Appellant had no right to contested case review of the July 30, 2024, letter either under the

South Carolina Constitution or under the APA. (R. p. 5); (R.p.6) The permissive nature of SCALC Rule 19(A) in regard to consent does render the ALC's exercise of its authority abuse of discretion and erroneous when viewed against the backdrop of rights guaranteed by the constitution.

Moreover, the ALC in fact exercised discretion in imputing Appellant's consent to Respondents' motion to dismiss, then finding it held no subject matter jurisdiction; yet then going onward to weigh the evidence and facts of "more conservative" and "worst case" parameters not substantiated by record evidence. "[T]his [appellate] court can reverse the ALC if the findings are affected by error of law, or are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion." *S.C. Dep't of Revenue v. Club Rio*, 392 S.C. 636, 640, 709 S.E.2d 690, 692 (Ct. App. 2011). "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, which can only occur where reasonable minds would have proper notice and awareness under due process of law. Appellant's interests in Silfab design changes to stack height and diameter coupled with the right to be aware of exit velocity changes impacting the environment where appellant lives, adjacent to the facility, flow more to constitutional mandate and due process vs. trial judge exercise of authority to dismiss under procedural rules or time bar where scrivener error (unsigned filing) [R.p.6 at fn#5]; [R. p. 16-28] where a contested hearing request was filed with the court. Constitutional rights of appellant, here, are presently vested with the constitutional mandated due process to be observed. The latter would respectfully take precedence over the ALC's authority in applying its procedural rules and the changing procedure of the agency that replaced SCDHEC. Every possible procedural rule has been brought to bear in attempt to bar appellant, [R.p. 17 vs. R. p. 28] where no meaningful right to be heard has occurred. If the agency exceeded its statutory authority, or if appellant constitutional rights were infringed, then reversal is proper by this court. The action complained of is a decision, in fact. It was an agency decision to permit an existing permit to *continue* (R. p. 9 ¶2 at 4-10) where major design changes to stack height,

stack diameter, that SCDES would have no authority to consider but yet continued an existing permit implicitly exceeding its statutory authority in considering and acquiescence to design changes as applied to allowing Silfab's updates of air modeling. This occurs where the major changes are not reaching the public awareness or consciousness timely by department and Silfab avoiding timely or accurate notice, disliking citizenry input after government restructuring eliminated citizen review boards. Appellant was still entitled and vested with right to be aware, to have proper notice, and due process of law including meaningful right to be heard made mandatory by the constitution and which takes precedence over department changing of procedures formerly followed by its predecessor SCDHEC.

### CONCLUSION

For the foregoing reasons, Appellant Walter Buchanan respectfully prays that the Court of Appeals reverse the decision of the trial court imputing consent to procedural dismissal of Appellant contested case hearing request where the trial court had subject matter jurisdiction under S.C. Code Ann. §1-23-600(A) and mandates of the state constitution.

Respectfully submitted,

HALFORD LAW FIRM  
J. Cameron Halford-Attorney at Law-LLC  
*/s./ J. Cameron Halford*  
S.C. Bar Id. 17184  
Post Office Box 172  
Barnwell, South Carolina 29812  
(803) 524-8659  
e-mail: [cam@halfordlaw.net](mailto:cam@halfordlaw.net)  
ATTORNEY FOR APPELLANT  
WALTER BUCHANAN