

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2025-002447

Friends of Horse Creek Valley,Appellant,

v.

South Carolina Department of Environmental Services and
Rabbit Hill Class 2 Landfill, Respondents.

Initial Joint Brief of Respondents

Etta R. Williams Linen (S.C. Bar No. 16663)
Christopher Whitehead (S.C. Bar No. 100284)
**SOUTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL SERVICES**
2600 Bull Street
Columbia, SC 29201
(803) 898-7286
etta.rosita.linen@des.sc.gov
christopher.whitehead@des.sc.gov

*Attorneys for Respondent South Carolina
Department of Environmental Services*

Chad N. Johnston (S.C. Bar No. 73752)
Samantha J. Dorward (S.C. Bar No. 106310)
BURR & FORMAN LLP
1221 Main Street, Suite 1800
Columbia, SC 29201
(803) 799-9800
cjohnston@burr.com
sdorward@burr.com

Randolph R. Lowell (S.C. Bar No. 16145)
BURR & FORMAN LLP
115 Fairchild Street, Suite 200
Daniel Island, SC 29492
(843) 976-6177
rlowell@burr.com

Kevin E. Pethick (S.C. Bar No. 100878)
AUSTIN & PETHICK LAW FIRM, PC
PO Box 5900
Aiken, SC 29804
(803) 226-0453
kevin@austinpethick.com

*Attorneys for Respondent Rabbit Hill Class 2
Landfill*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
COUNTER STATEMENT OF ISSUES ON APPEAL.....	4
COUNTER STATEMENT OF CASE.....	4
APPLICABLE LAW AND STATEMENT OF FACTS	5
A. Statutory and Regulatory Framework.....	5
B. Statement of Facts.....	9
STANDARD OF REVIEW	15
ARGUMENT	16
I. THE ACT EXPRESSLY AUTHORIZES THE PROMULGATION OF REGULATIONS ALLOWING FOR EXEMPTIONS OR VARIANCES OF THE ACT’S REQUIREMENTS, INCLUDING A DEMONSTRATION OF NEED.	17
II. THE ALC CORRECTLY UPHELD THE DEPARTMENT’S DETERMINATION THAT RABBIT HILL QUALIFIES FOR A VARIANCE TO THE PHASE 1 DON REQUIREMENT.....	21
III. THE ALC CORRECTLY HELD THE DEPARTMENT’S DETERMINATION IS CONSISTENT WITH ITS OWN REGULATIONS.....	22
A. Phase 1 of the permitting process concerns only siting requirements of a facility.	23
B. The ordinary meaning of the term “replacement” refers only to something that replaces the function of something else, without any inherent size requirement, and the Replacement Landfill fits within that plain meaning.	25
C. In the face of an unambiguous statute, Appellant’s proposal to resort to canons of statutory interpretation is unnecessary and improper, and Appellant’s application of those canons is incorrect in any event.....	30
i. Appellant impermissibly points the Court elsewhere to find its preferred meaning of the term “replacement.”.....	31
ii. The ALC did not need to resort to canons of statutory interpretation.....	34
D. Nothing in the applicable regulatory framework supports importing a size constraint into review of a replacement variance request.....	36
E. Rabbit Hill neither sought nor received both replacement and expansion variances.	40
CONCLUSION.....	43

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Amazon Servs., LLC v. Dep’t of Revenue</i> , 447 S.C. 464, 928 S.E.2d 842 (2026)	30
<i>Barnhart v. Thomas</i> , 540 U.S. 20 (2003).....	41
<i>S.C. Dep’t of Revenue v. Blue Moon of Newberry, Inc.</i> , 397 S.C. 256, 725 S.E.2d 480 (2012)	34, 35
<i>Byerly v. Connor</i> , 307 S.C. 441, 415 S.E.2d 796 (1992)	25
<i>Carjow, LLC v. Simmons</i> , 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002).....	33
<i>CFRE, LLC v. Greenville Cnty. Assessor</i> , 395 S.C. 67, 716 S.E.2d 877 (2011)	19
<i>Chapman v. S.C. Dep’t of Soc. Servs.</i> , 420 S.C. 184, 801 S.E.2d 401 (Ct. App. 2017).....	16
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	5
<i>City of Camden v. Brassell</i> , 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997).....	25
<i>City of Rock Hill v. S.C. Dep’t of Health & Env’t Control</i> , 302 S.C. 161, 394 S.E.2d 327 (1990)	24
<i>Comm’rs of Pub. Works v. S.C. Dep’t of Health & Env’t Control</i> , 372 S.C. 351, 641 S.E.2d 763 (Ct. App. 2007).....	25
<i>Consumer Advoc. for State v. S.C. Dep’t of Ins.</i> , 397 S.C. 599, 725 S.E.2d 708 (Ct. App. 2012).....	38
<i>Doe v. Keel</i> , 440 S.C. 427, 892 S.E.2d 282 (2023)	29
<i>Englert, Inc. v. Netherlands Ins. Co.</i> , 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993).....	39

<i>Facebook, Inc., v. Duguid</i> , 592 U.S. 395 (2021).....	42
<i>Greeneagle, Inc. v. S.C. Dep’t of Health and Env’t Control</i> , Docket No. 08-ALJ-07-0339-CC (S.C. Admin. Law Ct. Oct. 25, 2010)	23
<i>Hodges v. Rainey</i> , 341 S.C. 79, 533 S.E.2d 578 (2000)	34, 39
<i>Hunter & Walden Co. v. S.C. State Licensing Bd. for Contractors</i> , 272 S.C. 211, 251 S.E.2d 186 (1978)	18
<i>Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’t Control</i> , 411 S.C. 16, 766 S.E.2d 707 (2014)	<i>passim</i>
<i>Liberty Mut. Ins. Co. v. S.C. Second Inj. Fund</i> , 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005).....	35
<i>Lockhart v. U.S.</i> , 577 U.S. 352 (2016).....	42
<i>Loper Bright Enterprises v. Raimondo</i> , 603 U.S. 369 (2024).....	5
<i>McClanahan v. Richland Cnty. Council</i> , 350 S.C. 433, 567 S.E.2d 240 (2002)	30
<i>McNickel’s Inc. v. S.C. Dep’t of Revenue</i> , 331 S.C. 629, 503 S.E.2d 723 (1998)	17
<i>Muir v. C.R. Bard, Inc.</i> , 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999).....	39
<i>Mulherin-Howell v. Cobb</i> , 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005).....	39
<i>Murphy v. S.C. Dep’t of Health & Env’t Control</i> , 396 S.C. 633, 723 S.E.2d 191 (2012)	25, 29
<i>Planned Parenthood S. Atl. v. State</i> , 440 S.C. 465, 892 S.E.2d 121 (2023)	2, 4
<i>S.C. Dep’t of Corr. v. Mitchell</i> , 377 S.C. 256, 659 S.E.2d 233 (Ct. App. 2008).....	15
<i>Samson v. Greenville Hosp. Sys.</i> , 295 S.C. 359, 368 S.E.2d 665 (1988)	2

<i>Strother v. Lexington Cnty. Recreation Comm’n</i> , 332 S.C. 54, 504 S.E.2d 117 (1998)	25
--	----

<i>State v. White</i> , 338 S.C.56, 525 S.E.2d 261 (Ct. App. 1999).....	38
--	----

Statutes

S.C. Code Ann. § 1-23-610(B)	15
S.C. Code Ann. § 44-96-240.....	20, 28
S.C. Code Ann. § 44-96-240(A)(1)	2, 28
S.C. Code Ann. § 44-96-240(A)(3)	28
S.C. Code Ann. § 44-96-240(A)(5)	28
S.C. Code Ann. § 44-96-290(A)	7, 24, 36
S.C. Code Ann. § 44-96-290(D)	7, 18
S.C. Code Ann. § 44-96-290(D)(3)	24
S.C. Code Ann. § 44-96-290(E).....	7

Regulations

S.C. Code Ann. Regs. 61-107.17.B.7	10
S.C. Code Ann. Regs. 61-107.17.B.8	27, 38, 39
S.C. Code Ann. Regs 61-107.17.D.3.d	11
S.C. Code Ann. Regs. 61-107.17.D.4	8, 9
S.C. Code Ann. Regs. 61-107.17.D.6	9, 20, 21
S.C. Code Ann. Regs. 61-107.17.D.6.a.	37, 39
S.C. Code Ann. Regs. 61-107.17.D.6.a.2	38
S.C. Code Ann. Regs. 61-107.17.D.6.e	40
S.C. Code Ann. Regs. 61-107.19.B.22	27
S.C. Code Ann. Regs. 61-107.19.B.40	27
S.C. Code Ann. Regs. 61-107.19.B.87	27

S.C. Code Ann. Regs. 61-107.19.D	5
S.C. Code Ann. Regs. 61-107.19.D.1	6
S.C. Code Ann. Regs. 61-107.19.D.2.a.2.d	24

Legislative Materials

24 S.C. Reg. 49 (June 23, 2000)	8
44 S.C. Reg. 123 (June 26, 2009)	9

Other Authorities

The American Heritage Dictionary of the English Language, 5th ed. (2022)	26
Antonin Scalia & Brian A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012)	41, 42
Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/	26
Merriam-Webster, https://www.merriam-webster.com/dictionary/	26

INTRODUCTION

Despite Appellant Friends of Horse Creek Valley's (Appellant) sweeping mischaracterizations, hyperbole, and attempts to impose its preferred policy positions, this appeal presents only a straightforward application of a discrete portion of a regulation to facts that are not in dispute. The approval issued by Respondent South Carolina Department of Environmental Services¹ (the Department) to Respondent Rabbit Hill Class 2 Landfill (Rabbit Hill) represents only the first step (Phase 1) of a two-step process required of all landfills in South Carolina under the applicable regulations. Phase 1 of the process relates only to the location of the facility in question. All other aspects of the landfill, including the design criteria, buffers, the operation plan, and, critically, the size—*i.e.*, the landfill's total capacity—are evaluated and determined by the Department as a part of the second step of the approval process (Phase 2). The only approval issued by the Department to date, and the only issue before this Court, is the Phase 1 approval; the application for Phase 2 approval, while submitted as a draft on behalf of Rabbit Hill, has not been acted upon.

As a creature of statute, the Department is bound to apply the applicable law and regulatory procedures as drafted. The undisputed evidence of this appeal demonstrates the Department faithfully applied the law here. As an executive agency presiding over a *de novo* review of the Department approval, the Administrative Law Court (ALC) was likewise bound by the plain language of the statutes and regulations. It, too, applied the law as written and declined Appellant's

¹ Many of the events involved in this contested case occurred prior to the July 1, 2024, split and restructuring of the former South Carolina Department of Health and Environmental Control, which resulted in the creation of the successor agency for environmental issues, the Department of Environmental Services. For consistency, this brief will refer to all actions of the agency as the Department, notwithstanding that many of the actions were taken by the now-dissolved predecessor agency, an immaterial distinction for the purposes of this case.

invitation to read preferred policy viewpoints into otherwise unambiguous provisions of law. Indeed, it is not within the province of any agency or court to impose its own policy views or apply terms and conditions that do not exist. “[The] Court . . . does not make policy determinations. The legislature makes policy decisions. This is a central feature of separation of powers.” *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 483, 892 S.E.2d 121, 131 (2023).

Yet, this appeal asks the Court to ignore those settled principles to obtain Appellant’s preferred outcome, presenting clear policy arguments as legal ones. *But see Samson v. Greenville Hosp. Sys.*, 295 S.C. 359, 367, 368 S.E.2d 665, 669 (1988) (“[T]his Court will not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations.” (cleaned up)). Paying only lip service to the plain language of the Solid Waste Policy and Management Act (the Act), S.C. Code Ann. §§ 44-96-10 to -470, and its implementing regulations,² Appellant implores the Court to overturn the decision of the ALC because “the Solid Waste Act cannot have been intended to facilitate an outcome like the one challenged here.” App. Br. at 6. What Appellant really means is that the Act *should not* have been drafted in a manner that facilitates an outcome like the one reached by the Department and the ALC. But preferred outcomes do not trump clear statutory and regulatory language to the contrary.

Specifically, pursuant to the Act, the Department was directed to create, by regulation, exemptions and variances as to certain requirements of the Act in order to facilitate the proper management of the “increasingly large volumes of solid waste” being generated in the state. S.C. Code Ann. § 44-96-240(A)(1). Pursuant to that statutory authorization, the Department

² In fact, despite asserting that “[t]his appeal presents a purely legal question of statutory and regulatory interpretation,” App. Br. at 3, Appellant does not meaningfully address the applicable regulations’ text or governing analysis until page 15 of its brief, spending the earlier pages on pure policy arguments instead.

promulgated regulations, with the approval of the General Assembly, that authorized the approval of a variance to the Determination of Need (DON) requirement of Phase 1 of the permit application process. Pursuant to the regulation, application of the DON variance is obligatory, meaning that, if the Department determines the applicant meets the conditions specified in the regulation, then the Department is required to approve the variance and no DON is required as a part of the Phase 1 component of the application process.

Here, the Department correctly determined that Rabbit Hill was entitled to a variance to the DON requirement of Phase 1 for the location of its proposed replacement landfill for its existing facility. This appeal arises because, at base, Appellant is unhappy the law provides for such a variance which allows for replacement landfills without undergoing the DON process. But the law controls as written, not Appellant's preference as to what it believes the law should say. And as Appellant concedes, the DON process is not substantive in its application to landfills, meaning that it does not determine any of the attributes of the proposed facility; instead, it merely determines if the proposed location of the landfill facility is appropriate. *See App. Br. at 6* (“[T]he DON requirement is effectuated by drawing a circle around a proposed landfill site and counting the number of existing landfills therein (the ‘circle test’). A proposed landfill cannot satisfy the DON requirement, and thus will not be permitted, if sufficient landfills already exist within the planning area denoted by the circle.” (internal citation omitted)).

Yet, the underlying contested case and this appeal are based solely on Appellant's efforts to graft substantive parts of Phase 2 of the process into the Phase 1 review and determination, moving beyond *the location* of the proposed facility to instead focusing entirely on *the size* of the proposed facility. But the size of the facility has not been determined; it was not before the Department as a part of its Phase 1 review, it was not before the ALC, and it is an inappropriate

consideration by this Court on appeal. Rabbit Hill’s application met the regulatory requirements to receive a variance as to the DON component of the Phase 1 review, and this Court should decline Appellant’s call to legislate additional substantive provisions into the applicable regulations from the bench. *Planned Parenthood*, 440 S.C. at 484, 892 S.E.2d at 132 (“As judges, our solemn duty is to uphold the rule of law; we must maintain judicial discipline, refrain from acting as a super-legislature, and respect the plenary authority of the South Carolina General Assembly.”). The Order of the ALC should be affirmed.

COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Did the Department follow the plain language of the South Carolina Solid Waste Policy and Management Act and implementing regulations in reaching its determination that the proposed Rabbit Hill replacement facility qualified for a variance to the Determination of Need component of Phase 1 of the permit application process?

COUNTER STATEMENT OF CASE

After the Department issued its final determination to Rabbit Hill as to the Phase 1 step of its review, Appellant requested this contested case on August 16, 2024. On February 10, 2025, Appellant filed a motion for summary judgment, claiming the landfill at issue cannot be permitted as a “replacement” facility. On March 17, 2025, Rabbit Hill and the Department filed respective responses in opposition to Appellant’s motion and cross-motions for summary judgment, asserting that the Department correctly determined that the proposed replacement facility qualified for a variance to the DON requirement of the Department’s Phase 1 review.

A hearing on the cross-motions for summary judgment was held on June 26, 2025, before the Honorable S. Phillip Lenski in Columbia, South Carolina. On October 14, 2025, the ALC issued its Order finding that Rabbit Hill qualified for a DON variance and, therefore, granted

Rabbit Hill’s motion for summary judgment, denying Appellant’s motion.³ Specifically, the ALC found that (1) Rabbit Hill qualified for a DON variance, and (2) the Department’s interpretation of the DON variance regulations was reasonable and entitled to deference.⁴

Appellant timely noticed its appeal of the ALC’s order and filed its initial brief on April 22, 2026. This joint initial brief of Rabbit Hill and the Department follows.

APPLICABLE LAW AND STATEMENT OF FACTS

A. Statutory and Regulatory Framework

To resolve this appeal, it is necessary to understand the statutory and regulatory framework surrounding applications for Class 2 and Class 3 landfill permits in South Carolina. Namely, such applications proceed through a two-step process. *See* S.C. Code Ann. Regs. 61-107.19.D;⁵ *see also* **(R. p.)**, Department Public Meeting Presentation (Presentation) (explaining the two-step permit application process, denoted herein as Phase 1 and Phase 2). In Phase 1, an applicant must seek a DON and Consistency determination from the Department, providing the appropriate

³ Where the Department’s motion tracked Rabbitt Hill’s, the ALC granted it; to the extent it differed, the court denied the Department’s motion.

⁴ In *Kiawah Development Partners, II v. S.C. Department of Health and Environmental Control*, our Supreme Court summarized the deference doctrine in this state as follows: “where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency’s interpretation absent compelling reasons. [Courts] defer to an agency interpretation unless it is ‘arbitrary, capricious, or manifestly contrary to the statute.’” 411 S.C. 16, 35, 766 S.E.2d 707, 718 (2014) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). As recognized by the ALC, the United States Supreme Court overruled *Chevron* and the deference framework established therein in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412–13 (2024). However, *Loper* concerned the U.S. Supreme Court’s review of a federal agency’s interpretation of a federal statute under the federal version of the Administrative Procedures Act (APA). *See generally* 603 U.S. at 377–82. Conversely, *Kiawah* concerns our supreme court’s review of a state agency’s interpretation of state statutes and regulations under the APA’s state counterpart. *See generally Kiawah*, 411 S.C. at 28–29, 766 S.E.2d at 717. That precedent has not been overruled, and Appellant does not challenge otherwise. Thus, the *Kiawah* deference framework applies.

⁵ All references to Regulation 61-107.19 are to Part I of the regulation.

documentation and following the procedures set forth in the regulation. *Id.* at 61-107.19.D.1. Upon such a request for a DON and Consistency, the Department evaluates certain criteria set forth in Regulation 61-107.19.D.1, oversees a public notification and participation process consistent with the procedures set forth in 61-107.19.D.2, and issues a DON and Consistency under 61-107.19.D.2.b (Phase 1 Determination). Critically, that determination does not involve any consideration for the size of the proposed landfill; instead, Phase 1 relates to the “siting of the landfill.” (**R. p.**), Presentation at 8. Once, and only after, the Department issues the final Phase 1 Determination as to the submitted DON and Consistency, may an applicant proceed to Phase 2, in which the applicant can file a formal, or technical, application for a Class 2 landfill permit, which involves a wholly separate review process under 61-107.19.D.2.c–g. During Phase 2 the Department will, among other things, review the operational plan, buffer requirements, design criteria, size, groundwater separation, and the engineering report. *Id.*; *see also* (**R. p.**), Order at 6. Just as it did in reviewing a Phase 1 application, the Department will follow a process of issuing public notice for the draft permit, receiving comments, and rendering a final decision for the Phase 2 technical review. *Id.*

As to the DON component of the Phase 1 review, Appellant presents only a partially accurate portrayal of what the Act provides, emphasizing Section 290(E)’s statement that “[n]o permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department.” *See* App. Br. at 6 (quoting S.C. Code Ann. § 44-96-290(E)). However, continuing a theme from below, Appellant purposefully omits the remaining clause of that sentence of Section 290(E), which plainly states “as required by regulation.” *Id.* This clause operates as a clear qualifier to the quoted citation of the Act and confirms the General Assembly’s intent that any regulations

promulgated under the Act could dictate a contrary result. S.C. Code Ann. § 44-96-290(E) (“The department shall promulgate regulations to implement this section.”). Indeed, this point is made expressly in the Act in a preceding subsection of Section 290, wherein the General Assembly states plainly that “[t]he department may, by regulation, exempt certain facilities from all or part of the requirements of this section.” *Id.* § 290(A).

Consistent with subsections (A) and (E) cited above, subsection (D) expressly provides that “[t]he department shall promulgate regulations for the permitting of solid waste management facilities which shall, at a minimum, address the following issues: ... (3) exemptions, *variances*, and emergency approvals.” *Id.* § 290(D) (emphasis added). Accordingly, the Act specifically authorized the promulgation of regulations authorizing variances to the requirements of the Act, including DON, and thereby broadened the scope of the Department’s discretion when establishing its permitting review process through regulations.

Of relevance here, the Department did, in fact, promulgate a regulation allowing for approvals of variance requests from the general Phase 1 DON requirement. Regulation 61-107.17.D.6 provides a procedure by which an applicant may seek a DON variance from the Department, as well as the specific terms and conditions required for the variance to be approved. In pertinent part, Regulation 61-107.17.D.6 provides the following:

6. Variance in regard to demonstration of need. *The Department shall grant a variance to the requirements of D.2 for Class Two and Class Three solid waste landfills according to the following conditions:*

a. An operating Class Two or Class Three landfill ***shall receive a variance*** to construct a replacement Class Two or Class Three landfill at its permitted annual rate of disposal ***provided it meets all of the following conditions:***

...

- (2) The landfill has a permit issuance date on or before the effective date of this Regulation.
- (3) The landfill exhausts its permitted capacity at its current location (see 6.e below for timing).

(4) For the purpose of considering the location of a replacement facility under this section, the location for the replacement facility must be within the facility's existing planning area, provided that, if the planning area includes a portion of a county, the entire county will be considered to be part of the planning area. A Class Two or Class Three landfill, once replaced as provided for in Section D. 6.a., is no longer eligible to receive a variance for replacement under this section.

...

e. An eligible facility shall apply to the Department for a variance to replace or expand the volume of an existing facility prior to exhausting: (1) its permitted capacity, or (2) the operational life of the facility. A facility shall not operate under an expansion variance and a replacement variance simultaneously, with the exception of a reasonable transition period as determined by the Department. A reasonable transition period is considered to be approximately one hundred eighty (180) calendar days.

(Emphasis supplied).

Thus, consistent with the foregoing, and as to the DON requirement of the general procedures for Phase 1 Determinations, the Department is required (*i.e.*, “shall grant” and “shall receive”) to issue a variance as to the DON requirement for Rabbit Hill’s proposed replacement landfill if: (1) the existing landfill was issued its permit prior to the effective date of the regulation (which was June 26, 2009);⁶ (2) the existing landfill exhausts its permitted capacity at its current

⁶ As noted in the Order, the effective date of the original Regulation 61-107.17 was June 23, 2000. (**R. p.**), Order at 13 n.19. The regulation as originally drafted provided paths for variances to the Act’s DON requirements, providing that:

4. Variance. a. In regards to demonstration-of-need, any solid waste disposal facility existing on the effective date of this regulation that exhausts its capacity, shall be allowed to either construct a new solid waste disposal facility at its permitted annual rate of disposal as a replacement, or expand the volume of the existing solid waste disposal facility.

...

b. A solid waste disposal facility shall apply to the Department for a variance to either replace the solid waste disposal facility or to expand the volume of the existing solid waste disposal facility at least five (5) years before exhausting its permitted capacity or the operational life of the facility.

S.C. State Register, Vol. 24, Issue No. 6, Published June 23, 2000 at 49 (adopted as S.C. Code Ann. Regs. 61-107.17.D.4, effective June 23, 2000). Of note, this version of the regulation specified that qualifying facilities were permitted to construct a new facility as a replacement to

location; (3) the proposed replacement location is within the existing landfill's current planning area, to include the entire county in which it is located; (4) the existing landfill has not previously been replaced; and (5) the existing landfill applies for replacement prior to exhausting its permitted capacity. *See* S.C. Code Ann. Regs. 61-107.17.D.6 (summarized).

B. Statement of Facts

Rabbit Hill owns and operates a permitted Class 2 landfill for the disposal of construction and demolition debris (Solid Waste Permit Number 022481-1201) located at or about 550 Rainbow Falls Road, Graniteville, South Carolina 29829 (Existing Landfill). **(R. p.)**, Class 2 Landfill Replacement Letter of Request. The Department originally granted a permit to operate the Existing Landfill on April 18, 1995. **(R. p.)**, Department Public Meeting Presentation; **(R. p.)**, Permit Modification (referencing an original issuance date of April 18, 1995). The Existing Landfill has a permitted disposal capacity of approximately 225,186 cubic yards and is approximately six and a half (6.5) acres⁷ in size. *Id.*; **(R. p.)**, Order at 2.

the old facility at its permitted annual rate of disposal, without any reference to the replacement's size or capacity, while clearly demarking the difference between replacements and expansions, with the latter tied to "expanding the volume" of the existing landfill. *Id.*

The regulation was subsequently amended, effective June 26, 2009, with the language reflected above. S.C. State Register, Vol. 44, Issue No. 6, Published June 26, 2009. In explaining the amendment, the text provides the following:

The Variance section was renumbered and revised as appropriate. Also, the requirement that the applicant must apply for a variance at least five years before exhausting permitted capacity was deleted. This is not practical. The variance conditions for Class Two and Class Three solid waste landfills were specified.

Id. at 123. The effective date of the regulation for the purposes of the variance to DON (*i.e.*, 2000 versus 2009) has not been litigated; however, the Department's position is that the effective date of the amended regulation, June 26, 2009, applies as the date of eligibility under subsection D.6.(a)(2). Regardless of which date is used, this is a moot point as to Rabbit Hill's proposed variance, as it received its permit in 1995. **(R. p.)**, Order at 13 n.19.

⁷ Appellant repeatedly refers to the size of the Existing Landfill as being only the 2.3 acres of current disposal area, but the actual acreage of the landfill is approximately 6.5 acres.

Following preparation and submission of the 2022 annual report for the Existing Landfill, Rabbit Hill evaluated operations at the facility under the regulations. As a result, Rabbit Hill took two distinct actions with respect to the Existing Landfill. First, because the Existing Landfill was nearing its permitted disposal capacity (*i.e.*, space for waste), Rabbit Hill initially sought, by way of an April 23, 2023, application to the Department, a permit for an “expansion” of the Existing Landfill.⁸ (**R. p.**), Expansion Request.

Second and separately, Rabbit Hill determined that it was eligible for an increase in its annual disposal rate (*i.e.*, how many tons of waste a landfill can receive annually)⁹ at the Existing Landfill. Consequently, by letter dated May 10, 2023, Rabbit Hill sought an increase in the

⁸ While Rabbit Hill’s submission purported in name to seek an “expansion” of the Existing Landfill, *see* App. Br. at 9 n. 5, in fact, the “expansion” request clearly stated in the application that “it is not possible to expand landfill operations at the Rainbow Falls location,” and instead sought to “expand [its] Class Two landfill facility on a portion of the property (Subject Property) located off Dixie Clay Road, Beech Island, Aiken County, South Carolina,” (**R. p.**), 2023 Expansion Request, which is the location of the Replacement Landfill. Thus, although mistakenly labeled, the permitting action actually sought by Rabbit Hill was not “expansion” of the Existing Landfill, but rather replacement. Below, Appellant attempted to place great weight on this initial application, construing it as an admission that what Rabbit Hill really sought was an expansion variance. The ALC properly rejected Appellant’s game of “gotcha,” (**R. p.**), Order at 3 n.5 (recognizing that the “application mistakenly characterized the request as an ‘expansion’ request instead of a ‘replacement’ request”), particularly where it was Rabbit Hill that brought the issue to the ALC’s attention in an effort to provide a fulsome summary of events leading up to the Phase 1 Determination. Regardless, that initial application was administratively withdrawn when Rabbit Hill, recognizing its mistake, revised and re-submitted a new application on June 6, 2023, which appropriately characterized the request as a replacement of the Existing Landfill at a new location to be located at 331 Dixie Clay Road, Beech Island, South Carolina 29842 (Replacement Landfill). (**R. p.**), Rabbit Hill Cross Motion, Exhibit 3. Accordingly, the initial April 23, 2023, application was not before the ALC in the contested case or this Court on Appeal, as it was never acted upon by the Department, was superseded by Rabbit Hill’s subsequent submission, and has no bearing on the Department’s Phase 1 Determination for replacement variance that has been challenged. The Court should similarly reject Appellant’s attempt to capitalize on this inadvertence.

⁹ S.C. Code Ann. Regs. 61-107.17.B.7 (defining “Disposal Rate” as “the total amount, either by tonnage or volume, of waste received at the solid waste disposal facility on a fiscal year (July 1–June 30) basis.”).

permitted annual disposal rate for the Existing Landfill under Regulation 61-107.17.D.3.d., which provides in pertinent part that:

An existing Class Two solid waste landfill operating within 20 percent of the permitted yearly disposal rate stated in the current permit, as documented in the most recently published S.C. Solid Waste Management Annual Report when the request is made, ***shall be allowed*** to increase the maximum yearly disposal rate

(Emphasis supplied). As referenced in the regulation, such an increase is not left to the discretion of the Department but rather is allowed as a matter of right when a landfill reaches the required threshold specified in the regulation. *Id.* (stating that an increase “shall be allowed”).¹⁰ (R. p.), Ltr Requesting Increase in Annual Disposal Rate.¹¹

¹⁰ Below, Appellant accused Rabbit Hill of “regulatory manipulation” that is “irrational” and part of a “strategy” to game the system, (R. p.), App. SJ Resp. at 3-5. Appellant continues a somewhat softer version of that disparagement on appeal, still accusing Rabbit Hill in its brief of utilizing “a strategy to maximize manipulation of the DON variance regulations.” App. Br. at 10. To be clear, these assertions are not only factually incorrect and entirely unsupported, but they are also entirely beside the point and nothing more than a manufactured distraction in this appeal: doing what the regulation allows you to do is not regulatory manipulation, it is following the plain language of what the regulation allows. Moreover, the Department granted Rabbit Hill’s request to increase the annual disposal rate at the Existing Landfill on January 12, 2024. (R. p.), Rabbit Hill Cross Motion, Exhibit 4. Public notice of the Department’s decision was published on even date in The Aiken Standard newspaper. *Id.* Critically, *no challenge of the disposal rate increase was lodged by any party*, including Appellant. As a result, the annual disposal rate increase is final, not properly before the Court, and is advanced by Appellant for the sole purpose of imputing a contrived “manipulation” charge against Rabbit Hill.

¹¹ Under Regulation 61-107.17.D.3.d.1, if a facility qualifies for an increase in the annual disposal rate, such increase shall be “[t]he lesser of either: (a) 50,000 tons or (b) the increase in waste generated in the planning area for disposal at Class Two landfills, since the last increase in the permitted annual disposal rate for said landfill.” The Existing Landfill last sought and was granted an increase in its annual disposal rate on September 29, 2004, from 15,000 tons per year to 57,500 tons per year. At the time of the 2004 tonnage increase, the Planning Area for Class 2 Landfills was limited to a 10-mile radius, which consisted of Aiken and Edgefield Counties; however, in or about 2009, the regulation was amended to provide that the Planning Area for Class 2 Landfills extends to a 20-mile radius from the facility. *See* Regulation 61-107.17.C.3. (defining the planning area for Class 2 Landfills as 20 miles). Thus, for the purposes of the 2023 tonnage increase request, the Existing Landfill’s Planning Area included Aiken, Edgefield, McCormick and Saluda Counties. According to publicly-available Solid Waste Management Annual Reports, Class 2 waste generated for disposal in Aiken County increased from 90,100 tons per year in FY 2006 to 183,534 tons per year in FY 2022, Class 2 waste generated for disposal in Edgefield

Thereafter, recognizing that its April 23, 2023, Expansion Request had been mistakenly submitted as an “expansion” request, when it was intended to be a “replacement” request, Rabbit Hill revised and re-submitted its application on June 6, 2023, appropriately characterizing the request as a replacement of the Existing Landfill at a new location of 331 Dixie Clay Road, Beech Island, South Carolina 29842 (Replacement Landfill). (**R. p.**), Application. On September 5, 2023, the Department provided notice to Rabbit Hill that the application had proceeded to Phase 1 of the review process and was determined to be administratively complete. (**R. p.**), Department Ltr Determining Application Administratively Complete. The Department’s letter also required Rabbit Hill, consistent with Regulation 61-107.19.D.2, to comply with the applicable public notification and participation procedures. *Id.*

In furtherance of the consistency determination component of the Phase 1 review, on October 1, 2023, Rabbit Hill sought a limited variance from Aiken County of the buffer requirement (from 300 feet to 100 feet) between the Replacement Landfill and property owned by Aiken County. This variance request related to a critical component of Rabbit Hill’s commitment to the County as a part of the project: a portion of the Replacement Landfill was owned by, and

County decreased from 13,116 tons per year in FY 2006 to 10,527 tons per year in FY 2022, Class 2 waste generated for disposal in McCormick County decreased from 4,409 tons per year in FY 2006 to 3,766 tons per year in FY 2022, and Class 2 waste generated for disposal in Saluda County increased from 1,960 tons per year in FY 2006 to 2,059 tons per year in FY 2022. Together, this represents a net increase of 90,301 tons per year in the Planning Area of the Existing Landfill since its last annual disposal rate increase. *Compare SC Solid Waste Management Annual Report of FY18, with SC Solid Waste Management Annual Report of FY22.* Further, although the annual reports FY 2003 to FY 2005 are not publicly available, Rabbit Hill is informed that the actual net increase in tons per year for Aiken, Edgefield, McCormick and Saluda Counties during the fiscal years of 2003 to 2022 was greater than the 90,301 net increase shown in the FY 2018 and FY 2022 reports. Regardless, and accordingly, under the “lesser of” qualification of Regulation 61-107.17.D.3.d.(1), because the net increase in tonnage within the Planning Area exceeded 50,000 tons, Rabbit Hill was authorized to—and did—seek a 50,000 ton per year increase in its annual disposal rate.

purchased by Rabbit Hill from, the County and had previously been leased by the County to a third party for mining operations. However, appropriate reclamation at the mine, a process of restoring land disturbed by mining to a safe, stable, and environmentally functional condition, was not completed, and the County property sold to Rabbit Hill came with the condition that Rabbit Hill remediate that known safety risk left by the previous mining operations through the Replacement Landfill site activities. **(R. p.)**, Aiken County Variance Request. Critically, the variance request only applied to the limited area acquired from Aiken County (11.91 acres), in order for Rabbit Hill to conduct necessary reclamation work on the mining site; the remainder of the Replacement Landfill's acreage would comply with, and Rabbit Hill has committed to abiding by, the standard 300-foot buffer requirement of the County. *Id.*

On November 1, 2023, Rabbit Hill provided documentation to the Department demonstrating its compliance with the applicable public notification and participation procedures of Regulation 61-107.19.D.2. **(R. p.)**, Public Notice Materials. In addition, and on its own accord, on November 14, 2023, Rabbit Hill hosted a public forum regarding its Phase 1 application at the Faith Baptist Church in Warrenton, South Carolina. **(R. p.)**, Public Forum Sign-in Sheet. Thereafter, on November 9, 2023, the Aiken County Board of Appeals held a public hearing on Rabbit Hill's proposed variance request, ultimately unanimously approving Rabbit Hill's request to reduce the local zoning buffer requirements for the limited area adjacent to property acquired from the County (the 11.91 acres), an approval which made Rabbit Hill compliant with applicable zoning and other ordinances. **(R. p.)**, Aiken BZA Meeting Minutes.

As set forth above, on January 12, 2024, the Department acted upon Rabbit Hill's request to increase the annual disposal rate at the Existing Landfill, approving same. **(R. p.)**, Permit Modification. Public notice of the Department's decision was published on even date in The Aiken

Standard newspaper. *Id.* Again, no challenge of the disposal rate increase was lodged by any party, and no challenge to that increase is before the Court.

On March 14, 2024, the Department issued its Draft Determination (Draft Phase 1 Determination). (**R. p.**), Draft Phase 1 Determination. In addition, the Department published the Draft Phase 1 Determination in The Aiken Standard newspaper on March 14, 2024; the publication of the Draft Phase 1 Determination started a 30-day public comment period. *Id.* Finally, on March 28, 2024, the Department hosted a public meeting regarding the Phase 1 application at the Midland Valley Fire Department, presenting the two-step permit process and project to the public. (**R. p.**), Department Public Meeting Presentation. As set forth above and in the Presentation, the Department explained that the purpose of Phase 1 of the two-step solid waste landfill permitting process relates solely to the Department’s evaluation of “siting the landfill” through a DON and consistency review. *Id.* at 8.

On July 17, 2024, the Department issued notice of its final Phase 1 Determination by and through a Notice of Decision (NOD). (**R. p.**), Phase 1 Determination. As set forth at the outset of the cover letter issuing the NOD, the Department clearly and unmistakably states that “[t]his decision applies to the first phase of the landfill permitting process, which deals with need, consistency, zoning, and certain buffers.” *Id.* (emphasis in original). The NOD further stated that “the proposed Rabbit Hill Class 2 Landfill is consistent with the requirements of the DON regulations, the Aiken County and state solid waste management plans as a commercial landfill, and the buffer requirements as a replacement facility to the Hilltop Class 2 Landfill.” *Id.* Further, the NOD stated that Department staff had reviewed all information submitted prior to June 15, 2024 “to ensure that the requirements of the Act, R.61-107.17, and R.61-107.19 have been met.” *Id.* Moreover, both in the cover letter and the Staff Decision Summary, the Department emphasized

the limited nature of the Phase 1 Determination, stating that “[Rabbit Hill] may proceed with submitting the technical application for a Class 2 Landfill permit,” *id.* at 1 (Cover Letter), and that “the applicant has met the applicable requirements and may submit a technical application for review, which would start the 2nd phase of the permitting process,” *id.* at 5 (p. 3, Staff Decision Summary). Regarding DON, the Department found that “[t]he [Replacement Landfill] is able to meet all requirements [of Regulation 61-107.17.D.6];” therefore, the replacement facility is considered to be consistent with DON. *Id.* at 6 (p. 4, Staff Decision Summary). Rabbit Hill then submitted its Phase 2 application, which is currently pending before the Department but is currently stayed.¹² Appellant’s challenge to the Phase 1 Determination followed.

STANDARD OF REVIEW

“In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review.” *Kiawah*, 411 S.C. at 28, 766 S.E.2d at 715. “Section 1-23-610 of the South Carolina Code [] sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency.” *S.C. Dep’t of Corr. v. Mitchell*, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (Ct. App. 2008). “The review of the [ALC’s] order must be confined to the record.” S.C. Code Ann. § 1-23-610(B). “The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact.” *Id.* “In determining whether the ALC’s decision was supported by substantial evidence, th[is C]ourt need only find, . . . evidence from which reasonable minds could reach the same conclusion as the ALC.” *Kiawah*, 411 S.C. at 28, 766 S.E.2d at 715.

¹² To be clear, Rabbit Hill has only received its Phase 1 Determination for the Replacement Landfill. All issues not covered by the Department’s review and issuance of the Phase 1 Determination are irrelevant to this appeal and are intended by Appellant only as a means of distraction as to what the statute and regulations require of the Department in reviewing a Phase 1 application.

However, when the issue on review raises a question of law, this Court “may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law.” *Id.* “Statutory interpretation is a question of law.” *Chapman v. S.C. Dep’t of Soc. Servs.*, 420 S.C. 184, 188, 801 S.E.2d 401, 403 (Ct. App. 2017) (quoting *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’t Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010)). “Unless there is a compelling reason to the contrary, appellate courts ‘defer to an administrative agency’s interpretations with respect to the statutes entrusted to its administration or its own regulations.’” *Id.* at 188, 801 S.E.2d at 403 (quoting *Kiawah*, 411 S.C. at 34, 766 S.E.2d at 718); *see also Kiawah*, 411 S.C. at 34–35, 766 S.E.2d at 718 (“We defer to an agency interpretation unless it is ‘arbitrary, capricious, or manifestly contrary to the statute.’” (citation omitted))).

ARGUMENT

The discrete issue before the Court is whether the Department’s Phase 1 Determination was issued in contravention of the procedures set forth in the applicable regulation. Necessarily, only the criteria set forth in the regulation as being relevant to the Phase 1 Determination can and should be relevant to the Court’s consideration in this appeal. Notwithstanding, and at base, Appellant conflates the considerations relevant to the independent phases of the permitting process and, in doing so, advances considerations which reach beyond the plain language of the regulation and applicable review scheme for Phase 1 determinations.

The Department fully complied with the regulations in granting Rabbit Hill a variance to the DON requirement of Phase 1. Specifically, and contrary to Appellant’s position, the plain language of the regulations does not require the Department to consider the size, or “*capacity*”, of

the replacement landfill site when making a Phase 1 Determination as to a DON and Consistency,¹³ or in determining the applicability of the available variance to the DON requirement. In short, the size of the proposed replacement landfill is appropriately construed as a red herring at this stage of review that has no relevance to the Phase 1 Determination as to location and consistency, and Appellant's reliance on the respective sizes of the Existing Landfill and the proposed Replacement Landfill to challenge the Phase 1 Determination is nothing short of an attempt to impose additional, non-existent conditions and criteria to the applicable regulations governing the Department's consideration of a Phase 1 application.

In granting Rabbit Hill a variance to the DON requirement, the Department properly constrained its analysis to the specific criteria and process dictated by the General Assembly in the Act and in the promulgated regulations governing solid waste permit approvals. No other issue is before the Court, particularly Appellant's extra-statutory and extra-regulatory conditions to the Phase 1 determination process. Because the Phase 1 Determination was lawfully issued consistent with all applicable regulatory requirements and the Act, the Court should affirm the ALC's decision.

I. THE ACT EXPRESSLY AUTHORIZES THE PROMULGATION OF REGULATIONS ALLOWING FOR EXEMPTIONS OR VARIANCES OF THE ACT'S REQUIREMENTS, INCLUDING A DEMONSTRATION OF NEED.

“While the Legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board ‘to fill up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.” *McNickel's Inc. v. S.C. Dep't of Revenue*, 331 S.C. 629, 634, 503 S.E.2d 723,

¹³ As explained below, Appellant's counsel admitted before the ALC that size or capacity is not a Phase 1 consideration. Nevertheless, Appellant maintains size is a factor in issuing a variance to a requirement of that phase.

725 (1998) (citing *Heyward v. South Carolina Tax Comm’n*, 240 S.C. 347, 126 S.E.2d 15 (1962)).

An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation. *Hunter & Walden Co. v. S.C. State Licensing Bd. for Contractors*, 272 S.C. 211, 251 S.E.2d 186 (1978).

As set forth above, Section 44-96-290(E) directed the Department to promulgate regulations for the implementation of the landfill permitting regime set forth in the Act. (“The department shall promulgate regulations to implement this section.”). The General Assembly also provided the Department with the express authority to promulgate regulations that would exempt certain facilities from the requirements of the Act. *Id.* (“The department may, by regulation, exempt certain facilities from all or part of the requirements of this section.”). Going a step further, the General Assembly specifically directed the Department to promulgate regulations providing for exemptions and variances of facilities from the requirements of the Act. *Id.* § 290(D) (“The department shall promulgate regulations for the permitting of solid waste management facilities which shall, at a minimum, address the following issues: . . . (3) exemptions, *variances*, and emergency approvals.” (emphasis supplied)).

Given the foregoing, Appellant’s attempt to bend the regulation and the Act to Appellant’s prerogative falls flat. To start, the outcome Appellant claims is inconsistent with the Act is that Rabbit Hill sought and received a variance for both a replacement and expansion simultaneously. As that did not happen, Appellant’s outrage is misplaced. Moreover, Appellant argues Regulation 61-107.17.D.6 is invalid because the Act provides that a demonstration of need is required for all new or expanding landfills and, therefore, the variance in that regulation is irreconcilable with the Act. App. Br. at 13 (stating the Act contains an “express requirement that a DON is always necessary”). In a similar vein, Appellant claims that the Act does not provide for variances.

See App. Br. at 7 (“Unlike the Solid Waste Act, DES’s regulations provide for a potential variance from the DON requirement.”). However, as much as Appellant would like it to be, the general requirement for a full demonstration of need is demonstrably not absolute.

Consistent with its express statutory directive, the Department promulgated Regulation 61-107.17.D.6, providing a procedure for certain existing permittees to request a variance from the general rule of Section 240(E), which otherwise requires a DON for any new or expanding landfill facility. Appellant’s reliance on a limited part of the overall statutory scheme, and an incomplete statement of that limited part to boot (*i.e.*, omitting the relevant statement of “as required by regulation”), fails to give the required weight to the other relevant provisions of the Act which directly bear on and are controlling over its misguided argument. *But see CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (holding that in construing a statute, “the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. [A court should not concentrate on isolated phrases within the statute. Instead, [a court should] read the statute as a whole and in a manner consonant and in harmony with its purpose.” (citations omitted)).

Thus, the general requirement cited by Appellant that all new or expanding landfill facilities must undergo the full DON process is effectively modified under express authority and direction from the General Assembly by Regulation 61-107.17.D.6. In short, that regulation provides that facilities existing at the time the regulation was adopted may replace themselves once during their lifespan without undergoing the full DON process, instead satisfying the DON component of Phase 1 review if the existing facility and its owners comply with certain expressly enumerated conditions. The terms prescribed by the regulation are the following: (1) the existing landfill was issued its permit prior to the effective date of the regulation (which was June 26, 2009);

(2) the existing landfill exhausts its permitted capacity at its current location; (3) the proposed replacement location is within the existing landfill's current planning area, to include the entire county in which it is located; (4) the existing landfill has not previously been replaced; and (5) the existing landfill applies for replacement prior to exhausting its permitted capacity. *See* S.C. Code Ann. Regs. 61-107.17.D.6 (summarized).

Moreover, not only is the variance regulation expressly authorized by the Act, but the Act also includes express findings of the General Assembly that further buttress the statutory framework and justification on which the variance regulation is based. *See* S.C. Code Ann. § 44-96-240 (setting forth the General Assembly's findings that "South Carolina is generating *increasingly large volumes of solid waste* which may pose a threat to human health and safety and to the environment if not properly managed," -(A)(1); that "[m]any communities are managing solid waste in existing facilities not designed and operated with technology and engineering controls that are adequately protective of the environment," -(A)(2); and that "[a] number of new solid waste management facilities will have to be established in coming years *to replace* older facilities as they reach capacity or as they are required to close," -(A)(3), thus "[l]egislation is needed to establish an adequate regulatory framework for the siting, design, construction, operation, and closure of solid waste management facilities," -(A)(5) (emphasis added)). Construed together, these findings support the General Assembly's direction to the Department to promulgate regulations affording it flexibility in addressing the state's solid waste issues through variances and exemptions.

Finally, the regulation is self-executing, meaning that, if an applicant satisfies the conditions set forth in the regulation, the Department is not afforded the discretion to grant or deny a variance request but instead is required to grant the variance to the DON component of the Phase

1 process. S.C. Code Ann. Regs. 61-107.17.D.6 (“The Department shall grant a variance to the [DON] requirements,” and the “landfill shall receive a variance to construct a replacement Class Two or Class Three landfill at its permitted annual rate of disposal provided it meets all of the following conditions . . .”).

In sum, the replacement variance regulation is expressly authorized by the Act; therefore, it is entirely consistent with—not contrary to—the Act.

II. THE ALC CORRECTLY UPHELD THE DEPARTMENT’S DETERMINATION THAT RABBIT HILL QUALIFIES FOR A VARIANCE TO THE PHASE 1 DON REQUIREMENT.

Having demonstrated that the Act expressly authorizes the Department’s promulgation of regulations affording it the ability to grant an exemption or variance to the general requirements of the Act, the application of the promulgated regulations to the undisputed facts of this case is straightforward and uncontroversial.

Critically, there is no dispute in this case—meaning Appellant does not contest the indisputable facts—that Rabbit Hill meets the conditions for a replacement of the Existing Landfill. As found by the ALC in its Order, (**R. p.**), Order at 13, and not challenged in this appeal: (1) the Existing Landfill was issued its permit on April 18, 1995, (**R. p.**), Department Public Meeting Presentation, prior to the effective date of Regulation 61-107.17; (2) the Existing Landfill is nearing exhaustion of its permitted disposal capacity, (**R. p.**), Application; (3) the proposed Replacement Landfill is located within the Existing Landfill’s planning area and situated entirely within Aiken County, *id.*; (4) the Existing Landfill has not previously been replaced; and (5) Rabbit Hill applied to replace the Existing Landfill prior to exhausting its permitted capacity, *id.*

As such, the regulation is unequivocal and clear, dictating that the Department is required to grant Rabbit Hill a variance as to the Phase 1 DON requirement. Moreover, and as a further component of its remaining Phase 1 Determination obligation, the Department found that the

Replacement Landfill is consistent with the State and county/region solid waste management plans, local zoning, land use and any other applicable ordinances. (**R. p.**), Phase 1 Determination at 2, 5, 7, 23. For these straightforward and undisputed reasons, the ALC correctly concluded the Department properly granted Rabbit Hill a variance as to the Phase 1 DON requirement for the proposed Replacement Landfill. Moreover, as this issue represents the only true issue in this appeal, it is controlling and Appellant’s remaining arguments—consisting of naked policy contentions and misguided attempts at parsing unambiguous statutes and regulations—are unavailing.

III. THE ALC CORRECTLY HELD THE DEPARTMENT’S DETERMINATION IS CONSISTENT WITH ITS OWN REGULATIONS.

Notwithstanding the dispositive resolution of the single true issue of this appeal above, analysis of Appellant’s remaining arguments reveals them to be without merit. To get around the straightforward application of the criteria set forth above, Appellant asserts that, because the Replacement Landfill is physically larger than the Existing Landfill, and potentially may have a larger disposal capacity than the Existing Landfill—despite the Replacement Landfill’s capacity having not yet been reviewed or determined by the Department—it cannot qualify as a replacement facility that is eligible for a variance to the Phase 1 DON requirement. A plain reading of the regulation does not support Appellant’s contention, as the size—or capacity—of a Replacement Landfill is not among the criteria identified as relevant to the Department’s evaluation of whether an applicant satisfies the express requirements to receive a variance from doing a DON or otherwise satisfies the Phase 1 determination review.

Appellant makes this argument by first asking the Court to read restrictive features into the term “replacement” which do not appear in the regulation. As recognized by the Order, (**R. pp.**), Order at 7 n.12; at 8, “replacement” is not defined in the regulation. However, as set forth in the

preceding sections of the brief, the criteria required by the regulation to evaluate whether an applicant is entitled to a variance in conducting a DON for a proposed replacement landfill are expressly prescribed, and the size—or capacity—of the proposed replacement site is not among them. Moreover, and more fundamentally, because a DON review is focused exclusively on the location of a proposed landfill, at base, size considerations are irrelevant to such a review even if a full DON were required; therefore, it logically follows that the criteria set forth in the regulation as to whether an applicant is entitled to a variance from the DON process would likewise not include an evaluation of the proposed replacement landfill’s size. Further, because the plain meaning of the term “replacement” does not carry with it an inherent size consideration, instead reflecting a substitute in function, *see (R. p.)*, Order at 9 and discussion, *infra*, the Replacement Landfill fits the term’s ordinary meaning, and the other provisions of the applicable regulation do not undermine either of those points. Consequently, the Department’s determination was consistent with its regulations, and the ALC’s similar holding is supported by the evidence and should be affirmed. Appellant’s strained attempt at converting its own policy considerations into an alternative construction of the regulations cannot justify a different result.

A. Phase 1 of the permitting process concerns only siting requirements of a facility.

As is evident from its plain language, the Phase 1 Determination regulations do not contemplate size in determining need. Phase 1 determinations, including the DON component of the permit application process, deals solely with select *siting* requirements of any proposed (new, expanded, or replacement) facility. **(R. p.)**, Order at 5; *Cf. Greeneagle, Inc. v. S.C. Dep’t of Health and Env’t Control*, Docket No. 08-ALJ-07-0339-CC (S.C. Admin. Law Ct. Oct. 25, 2010) (finding that “DON might be better understood as an ‘Approval of Location’” and that “[t]he DON regulation does not look at ‘need’ in terms of capacity, but looks at ‘need’ in terms of location”). In other words, even if Rabbit Hill had not sought a variance, and instead underwent the traditional

DON process in Phase 1, size would not have been considered. Rather, such a consideration is one of many relevant to the Department's consideration of an applicant's technical application for Phase 2 of the permit process. *See* S.C. Code Ann. Regs. 61-107.19.D.2.a.2.d (providing that the notice of intent to file a permit application *for the technical review* (*i.e.*, Phase 2) shall contain "[t]he proposed size of the landfill or landfill expansion, *i.e.*, footprint acreage"). It logically follows, therefore, that an exception to that requirement would have similar indifference to a replacement facility's size.

In fact, at the hearing before the ALC, Appellant conceded that a replacement isn't required to be the same size as an existing facility and that Rabbit Hill could replace a one-acre landfill with a one-thousand-acre landfill, as long as it demonstrates a need for the larger facility. (**R. p.**), Tr. at 71:18-23. Therefore, Appellant's actual complaint is that the plain language of the DON regulation allows certain facilities to be exempt from having to conduct a full DON by way of the variance. But again, the authority for the variance regulations is express in the Act, *see* S.C. Code Ann. § 44-96-290(A), (D)(3), despite Appellant's misguided argument that the Act unequivocally prohibits the expansion or construction of *any* new (*i.e.*, brand new or replacement) landfills without a DON; therefore, Appellant's argument meets itself coming and going.

Because the DON component of Phase 1 contains no size requirement, it strains credulity to suggest a variance to that same requirement would possess such a criterion. Instead, whether an applicant receives a DON or a variance to that requirement (all in Phase 1), the plain language of the regulation does not authorize the Department to approve or reject a landfill based on its size or capacity, and the Department is not permitted to superimpose extra-statutory or extra-regulatory terms or conditions to its analysis. *See City of Rock Hill v. S.C. Dep't of Health & Env't Control*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (noting that DHEC , as a creature of statute,

possesses only those powers specifically delineated); *Comm'rs of Pub. Works v. S.C. Dep't of Health & Env't Control*, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007) (“[W]here the terms of the statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute’s operation.”).

- B. The ordinary meaning of the term “replacement” refers only to something that replaces the function of something else, without any inherent size requirement, and the Replacement Landfill fits within that plain meaning.

“Regulations are interpreted using the same rules of construction as statutes.” *Murphy v. S.C. Dep't of Health & Env't Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). “When interpreting a regulation, [the Court] look[s] for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit *or expand* the regulation’s operation.” *Id.* at 639–40, 723 S.E.2d at 195 (quoting *Converse Power Corp.*, 350 S.C. at 47, 564 S.E.2d at 346 (emphasis added))); *Strother v. Lexington Cnty. Recreation Comm’n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (“When faced with an undefined statutory term, the [C]ourt must interpret the term in accord with its usual and customary meaning.” (citation omitted)). “Whe[n] the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper.” *Kiawah*, 411 S.C. at 39, 766 S.E.2d at 720–21.

As referenced above, and as recognized by the ALC, [t]he terms “replace” or “replacement” are not expressly defined in the regulations. Therefore, the Department and the ALC properly turned to the plain and ordinary meaning of the word, **(R. p.)**, Order at 9, and the Court should do the same. *See City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997) (stating when the General Assembly elects not to define a term in a statute, courts will interpret term in accord with its usual and customary meaning); *Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992) (“[T]he words of a regulation must be given their plain and ordinary

meaning without resort to subtle or forced construction to limit or expand the regulation’s operation.”).

The term “replacement” signifies something that substitutes or is used in place of something else, especially in function. *See Replacement*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/replacement> (last visited June 8, 2026) (defining “replacement” as “one that replaces another especially in a job or *function*”) (emphasis supplied); *Replacement*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/replacement> (last visited June 8, 2026) (defining “replacement” as “something that you use instead of something else”).¹⁴ Thus, to be a “replacement” landfill under the regulation encompasses one that will take the place of the existing facility and be used for the same function.

Initially, Appellant does not contest this fact. *See* App. Br. at 16 (“To start, the ALC correctly noted the typical dictionary definition of ‘replacement’ as ‘one that replaces another especially in a job or function.’”). However, Appellant parts company with the established rules of statutory and regulatory construction when it argues that, because the total acreage of the proposed Replacement Landfill is larger than the Existing Landfill, the Replacement Landfill can no longer be viewed as a replacement and instead enters a hybrid category (created by Appellant) of an “expanded replacement” facility. App. Br. at 27–28. Appellant contends that, because “nowhere in the regulations is ‘replacement’ tied to an increase in landfill size,” a proposed replacement that is larger than the existing facility must necessarily run contrary to the regulation.

¹⁴ *See also Replace*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/replace> (last visited June 8, 2026) (defining “replace” as “to take the place of especially as a substitute or successor” and “to put something new in the place of”); *see also* The American Heritage Dictionary of the English Language, “Replace”, Def. 2, 5th ed. 2022, <https://www.ahdictionary.com/word/search.html?q=replace> (last visited June 8, 2026) (defining “replace” as meaning “to take the place of,” with the example that “jets have largely replaced propeller planes” and “nurse practitioners are replacing doctors in some clinics.”).

The problem with that argument is that the regulation also does not provide any support for Appellant’s position that a replacement facility *cannot* be larger than the existing facility. Indeed, as discussed, the regulation is wholly silent as to the “size” of replacement facilities, and the DON procedures—and the challenged variance to the DON procedures—expressly define the criteria relevant to the inquiry. Size—or capacity—is not one of the expressly enumerated criteria.

But the regulation does define “expand” and “expansion,” and those definitions do not support Appellant’s argument that the proposed Replacement Landfill should be viewed as an expansion under the regulations either. *See* S.C. Code Ann. Regs. 61-107.19.B.22 (defining “expand” or “expansion” as “any increase in the permitted capacity *of a solid waste disposal facility*, or any increase in the total volume *at a solid waste disposal facility*.” (emphasis added)); *id.* § -B.40. (defining a “lateral expansion” as “a horizontal expansion of the footprint of *an existing landfill*” (emphasis added)); *id.* § -B.87 (defining a “vertical expansion” as “an expansion of *an existing solid waste landfill* above previously permitted elevations for the purposes of gaining additional capacity” (emphasis added)); *id.* § 61-107.17.B.8 (defining “expand” or “expansion” as “any increase in the *permitted volumetric capacity of an existing solid waste management facility*.” (emphasis added)).

Two things are immediately apparent from the regulation’s definitions of expand and expansion: first, under both Regulation 61-107.19 & -107.17, an expansion only refers to action taken to increase the capacity or volume *of an existing landfill* and, axiomatically, cannot refer to an “expansion” by way of a new or replacement facility at a different location (in other words, it precludes the broad construction utilized by Appellant); and second, the regulations define expansion facilities by reference to the volume, *i.e.*, size/capacity of the facility, but—in the same subsection—do *not* define replacement facilities to be similarly constrained or require the

Department to undertake a volumetric capacity analysis in approving the location of replacement facilities under the DON variance analysis specified for Phase 1 determinations.

Thus, because the Replacement Landfill is necessarily proposed to be located at a different site than the Existing Landfill, the regulations preclude a determination that the Replacement Landfill is an expansion, as such term is limited to expanding capacity or volume of an existing landfill facility. Moreover, because the regulation defines an expansion by reference to increases to capacity but chose not to define replacement at all, and certainly not in a manner that would similarly constrain a replacement facility to the same capacity as the landfill that it is replacing, Appellant is advocating that the Court read a preferred policy constraint into the regulation that does not exist. Therefore, an ordinary “replacement” may utilize different capacity, size, material, capabilities, and qualifications, as long as the original function of the replaced item is covered.

Further, the Act provides the statutory framework for the conclusion that the only reasonable interpretation of the term “replace” or “replacement” is that it applies to a different location than an existing facility. *See* S.C. Code Ann. § 44-96-240 (setting forth the General Assembly’s findings that “South Carolina is generating *increasingly large volumes of solid waste* which may pose a threat to human health and safety and to the environment if not properly managed,” *id.* § 240(A)(1), and that “[a] number of *new* solid waste management facilities will have to be established in coming years *to replace* older facilities as they reach capacity or as they are required to close,” *id.* § 240(A)(3), thus “[l]egislation is needed to establish an adequate regulatory framework for the siting, design, construction, operation, and closure of solid waste management facilities,” *id.* § 240(A)(5) (emphasis added)). Construed together, the only reasonable interpretation of Rabbit Hill’s application is that it sought a replacement of the Existing

Landfill at a new site, which eliminates it from being considered an expansion of the Existing Landfill as those terms are defined in the regulations.

Additionally, the Department’s interpretation here of its own regulation is reasonable and entitled to deference.¹⁵ *Doe v. Keel*, 440 S.C. 427, 431, 892 S.E.2d 282, 284 (2023) (“If the statute or regulation ‘is silent or ambiguous with respect to the specific issue,’ the court then *must* give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference.” (emphasis added) (quoting *Kiawah*, 411 S.C. at 33, 766 S.E.2d at 717)). Specifically, the Department reasonably interpreted “replacement” according to Cambridge Dictionary’s definition, which contains no inherent size restriction. And no provision of the applicable regulations states that a “replacement” is conditioned upon size or that a DON variance is unavailable to “replace” an existing landfill with a substitute if that replacement will be larger. Therefore, because the Department’s interpretation is reasonable and consistent with the plain language of the regulation and the Act, there is no reason to depart from its interpretation and application. *See Murphy*, 396 S.C. at 640–41, 723 S.E.2d at 195 (“Because [the] interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC’s construction and application.”).

Applying that definition, the proposed Replacement Landfill would be a disposal site for construction and demolition materials, like the Existing Landfill, located in Aiken County—the same planning area as the Existing Landfill. The Replacement Landfill must also adhere to the

¹⁵ Appellant asserts deference to agency interpretations of regulations is warranted “only where the statute or regulation is ambiguous” App. Br. at 3. However, deference is afforded if a regulation “is silent *or* ambiguous with respect to the specific issue.” *Kiawah*, 411 S.C. at 33, 766 S.E.2d at 717. Therefore, ambiguity is not a prerequisite to affording deference to agency interpretation; deference is also afforded where, as here, a regulation is silent as to a specific issue. *See also Murphy*, 396 S.C. at 640–41, 723 S.E.2d at 195 (affording deference to agency interpretation when interpreting an unambiguous regulation).

Existing Landfill's permitted annual rate of disposal. The Replacement Landfill will, therefore, be used for the same purposes, to the same extent currently allowed, and in the same planning area as the Existing Landfill. As such, the Replacement Landfill qualifies as a replacement for the Existing Landfill in accordance with the usual and customary definition of replacement.

- C. In the face of an unambiguous statute, Appellant's proposal to resort to canons of statutory interpretation is unnecessary and improper, and Appellant's application of those canons is incorrect in any event.

The Court need not resort to statutory interpretation where, as here, the language of a regulation is plain and unambiguous. *See Kiawah*, 411 S.C. at 39, 766 S.E.2d at 720–21 (“Whe[n] the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is *unnecessary and improper*.” (emphasis added)); *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) (“All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used”). And Appellant does not assert the regulation or the term is ambiguous; rather, it concedes the ordinary meaning of “replacement” as set forth by the ALC. *See* App. Br. at 16;¹⁶ *see Amazon Servs., LLC v. Dep’t of Revenue*, 447 S.C. 464, 472, 928 S.E.2d 842, 846 (2026) (holding that when a statute is “unambiguous, we simply apply the text as written, and we do not need the rules of statutory construction.” (citing *Centex Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (“When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d

¹⁶ Confusingly though, despite its agreement with the plain meaning of “replacement,” Appellant also asserts the “ALC failed to grasp how this definition and others like it emphasize continuity of role rather than enlargement,” in an apparent attempt to expand the plain meaning to include a size component. App. Br. at 16.

457, 459 (2007)))). Still, Appellant grasps at interpretive straws to avoid the regulation’s plain text.

- i. Appellant impermissibly points the Court elsewhere to find its preferred meaning of the term “replacement.”*

To advance its preferred policy, Appellant asks the Court to ignore the regulation’s plain language and instead rely on how “replacement” is used in other areas of the law. *See id.* at 16–18. In doing so, Appellant hopes the Court will graft into the plain meaning a size consideration: “Phrases like ‘take the place of’ describe occupying the same position or role as the original, not enlarging or augmenting it, and thus naturally convey substitution rather than expansion.” App. Br. at 16, 18 (“[A]bsent clear language to the contrary, ‘replacement’ denotes a substantially equivalent or comparable substitute. That is, one preserving existing function and capacity.”). This approach “unnecessary and improper” in the face of an unambiguous regulation. *See Kiawah*, 411 S.C. at 39, 766 S.E.2d at 720–21. In any event, much of the authority Appellant offers does not even support its preferred contortion of the word.

First, much of its proffered authority supports the plain meaning as found by the ALC and the Department, centering around *function* not *size*. *See* App. Br. at 16–18 (citing *Conway v. Farmers Home Mut. Ins. Co.*, 26 Cal. App. 4th 1185, 1191–92 (1994) (explaining “the term [replace] also includes the notion of substituting for an original item another item which serves *the same function as the original*” (emphasis added)); *Fitzhugh 25 Partners, L.P. v. KILN Syndicate KLN 501*, 261 S.W.3d 861 (Tex. App. 2008) (rejecting insured’s contention that purchasing an office park was a “replacement” for a multifamily apartment complex destroyed by fire because the word “replacement” in an insurance policy inherently contains the element of *functional similarity*); *Seeber v. Gen. Fire and Cas. Co.*, 19 N.E.3d 402, 411–12 (Ind. App. 2014) (“replacement” coverage did not permit insured to replace destroyed commercial property with

residential condominiums *because properties were not used for same purpose*)). Those cases, and Appellant’s own parentheticals summarizing them, do not contemplate size—only functional—comparability. For that reason, even if “replacement” were ambiguous, this authority does not advance Appellant’s expansive reading.

Additionally, Appellant points to distinguishable, irrelevant insurance law principles, stating “replacement value” is “universally understood as the amount necessary ‘to replace a specific item with *one of similar kind and quality*.’” App. Br. at 16; *see also id.* at 17 (citing South Carolina cases discussing “replacement cost” in the insurance context). The concept of replacement cost or value in the insurance context is fundamentally different from the general and plain meaning of replacement. Insurance compensates for the loss actually sustained by the insured. In other words, when an individual purchases insurance, he or she is protecting a specific object so that in the event it is damaged, the individual can recover the value they have lost. That concept is not transferable here to the landfill context, as the owners of landfills qualifying for replacements have not “lost” their existing landfills, either in form or in value; instead, as aptly noted by Appellant during the hearing before the ALC, “[t]he pre DON landfill owners are essentially grandfathered to a degree to prevent them from being unfairly disadvantaged by ... this demonstration of need requirement.” (**R. p.**), Tr. at 12:13-16.¹⁷ Therefore, the insurance cases upon

¹⁷ *See also* (**R. pp.**), Tr. at 11:10-25, 12:1-2 (wherein Appellant’s counsel argues that “those owners of those pre-demonstration of need landfills, did not know that the DON requirements were coming. So, when they planned where to build their landfill, when they planned how to build their landfill, they weren’t able to account for the nature of the DON requirements. If they had known DON was coming, maybe they would have built at a site where it would have been easier to expand, right? Because we just saw you can expand a landfill without DON. Maybe they would have chosen a location where, geographically, where it was easier to make a demonstration of need. But because they didn’t know this was coming, these old landfill owners, these pre DON landfill owners, are put at a disadvantage and pot- -- and potentially put out of business by this new at the time. . . .”).

which Appellant relies are of no value here and cannot support attaching a size condition to the plain meaning of “replacement.”

Outside of the insurance context, Appellant offers *Carjow, LLC v. Simmons*, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002), to shore up its size-based argument, stating that this Court explained “‘replacement cost’ for the purpose of recovering property damage is the expense ‘of comparable ceiling fans/lights.’” App. Br. at 18 (emphasis in original). To be clear, the Court, in the facts section of the opinion, merely mentioned that the plaintiff “presented evidence that the replacement cost of the pews was \$27,438.45 and the replacement cost of comparable ceiling fans/lights was \$154.71 each, excluding \$50 per fixture for installation.” *Carjow*, 349 S.C. at 518, 563 S.E.2d at 361. Given that context, the proposition upon which Appellant lies is questionable. And even so, analogous to the insurance cases, that case involved compensating for actual loss sustained. The Replacement Landfill does nothing to compensate or contemplate any “loss” to the Existing Landfill.

Appellant next relies upon Regulation 61-67.100.C.2, pertaining to wastewater facility permitting, which states, “Replacement of a component (same or similar), as long as there is no change in capacity.” There, because “replacement” contains no inherent size parameter, it was necessary to place an express size condition on the replacement component contemplated in that context. Moreover, this reference in Regulation 61-67.100 is articulated in the context of an exclusion to the standards generally employed by the Department in reviewing engineering reports for wastewater treatment facilities; stated differently, although engineering reports are generally required to be submitted and reviewed by the Department for the design and construction of these types of facilities, replacement of components of an existing facility, just like routine maintenance (which is also articulated as excluded), does not require submission and review of an independent

engineering report. Thus, Appellant’s strained attempt at comparing these fundamentally inapposite provisions does not hold up. Had the intent behind Regulation 61-107.17 been to include such a constraint on size of replacement facilities, similar express language could have—and would have—been included. *Cf. Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (“The canon of construction ‘*expressio unius est exclusio alterius*’ or ‘*inclusio unius est exclusio alterius*’ holds that ‘to express or include one thing implies the exclusion of another, or of the alternative.’” (citation omitted)).

ii. The ALC did not need to resort to canons of statutory interpretation.

This time to fault the ALC, Appellant again reaches for interpretive doctrines. However, confronted with the unambiguous regulation, the ALC properly employed the plain meaning rule. Its reliance on anything other than the regulation’s text simply reveals Appellant’s real grievance: the ALC refused to discard the plain meaning in favor of Appellant’s preferred policy outcome.¹⁸

For example, Appellant clings to the canon of construction against absurd results, asserting the ALC’s plain reading ran contrary to that doctrine *See. S.C. Dep’t of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012) (“[I]f applying the regulation’s plain language would lead to an absurd result, we will interpret the regulation in a manner which avoids the absurdity.”). That “absurd” result is this: providing long-term infrastructure, such as a landfill, through recognition of an expressly authorized regulatory avenue for adapting to evolving

¹⁸ In fact, Appellant condemns the ALC for “arriving at an outcome that is seemingly contrary to even the Judge’s own feelings on the case.” App. Br. at 6. Apparently, Appellant hoped the ALC would ignore legislative and the Department’s intent, as evidenced in the plain text of the statute and implementing regulations, to reach whatever it perceived the court’s own preferences to be. However, the ALC properly exercised its duty to apply the law whatever its “own feelings” may have been.

needs without requiring a full restart of the DON process.¹⁹ Appellant cannot resort to hyperbole and mischaracterizations to paint an absurd result; its subjective view of the result will not do. *Cf. id.* (“A merely conjectural absurdity is not enough; the result must be ‘so patently absurd that it is clear that the [General Assembly] could not have intended such a result.’”).

Relying on no South Carolina authority, Appellant also brings its policy preference front and center by invoking the so-called mischief rule. *See* App. Br. at 24. Without any meaningful support, including any South Carolina case adopting this canon of statutory interpretation, Appellant asserts the result the ALC reached is the “mischief” the Act was designed to prevent, “particularly the siting and expansion of facilities without any demonstrated public need.” App. Br. at 24. However, canons of statutory construction are tools, not weapons, and they cannot be used to engineer a preferred result. *Cf. Liberty Mut. Ins. Co. v. S.C. Second Inj. Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005) (“Once the legislature has made [a] choice, there

¹⁹ In an apparent attempt to lure the Court into reaching its policy-driven result, Appellant claims Rabbit Hill could not, “as a matter of law,” satisfy the DON requirement. App. Br. at 11 (“[I]t is apparent that [Rabbit Hill] could not make the requisite showing if not for its pretextual use of the DON variance. While [Rabbit Hill] has not conceded this fact, it has also not introduced any evidence to the contrary, and its labored course of action here makes the truth readily apparent.”). There is no evidence in this record to support this assertion, which Appellant also cavalierly made—and was firmly refuted by Rabbit Hill—during the hearing before the ALC. *Compare (R. p.)*, Tr. at 13:20-25, *with (R. p.)*, Tr. at 57:1-5. That issue is not before the Court, nor is it relevant, as Rabbit Hill did seek a full DON but instead lawfully sought a *variance* to that requirement. (For the same reason, of course, Rabbit Hill did not introduce any evidence to obtain a DON.) In any event, Appellant argues Rabbit Hill could not have obtained a DON given its size, which again demonstrates its misapprehension of the application process given that size is not considered as a part of a Phase 1 determination.

Similarly, Appellant has resorted to maligning Rabbit Hill. *See, e.g.*, App. Br. at 11 (“Yet, through strategic acquisition of Hilltop landfill, a small facility at the end of its life, Hilltop LLC has (thus far) been successful in virtually nullifying the vital DON requirement.”). However, a variance to the DON requirement is precisely what the regulation allows for existing landfills, such as this one in this case, seeking to replace themselves. Rabbit Hill simply pursued an avenue provided by the regulations, and nothing in the regulations stipulate that only the original owner of a pre-DON landfill is entitled to avail itself of the variances articulated in the regulations. *See also supra* n.17.

is no room for the courts to impose a different judgment based upon their own notions of public policy.” (citation omitted)). And as discussed above, the Act unequivocally authorizes exemptions and variances to the Act’s general requirements, including DON’s. S.C. Code Ann. § 44-96-290(A) (“The department may, by regulation, exempt certain facilities from all or part of the requirements of this section.”).

In sum, the plain meaning of the term “replacement” unambiguously signifies something that substitutes or is used in place of something else, especially in function. Neither its plain and ordinary meaning nor the regulations themselves contain a size consideration. Consistent with that plain meaning, the Department’s interpretation of “replacement” is reasonable and, therefore, must be afforded deference, and the ALC’s similar finding is not affected by an error of law. In the absence of any (asserted or otherwise) ambiguity, Appellant’s invocation of canons of statutory interpretation should be ignored.

D. Nothing in the applicable regulatory framework supports importing a size constraint into review of a replacement variance request.

Finally, and coming from yet another angle, Appellant claims the applicable regulatory scheme is all about capacity. To get there, Appellant once again turns to the meaning of an expansion variance: because an increase in an existing landfill’s total permitted capacity constitutes an “expansion”, the Replacement Landfill cannot be a replacement. However, the regulation’s omission of any volumetric-capacity limitation in the provisions governing replacement variances—contrasted with its explicit inclusion of such a requirement for expansion variances—demonstrates that omission was intentional. *Cf.* App. Br. at 13 (“That asymmetry is significant because it confirms that nowhere in the regulations is ‘replacement’ tied to an increase [or decrease] in landfill size.”).

The primary criteria for a replacement variance appear in subsection (a) of Regulation 61-107.17.D.6. As set forth above, the plain language of the regulation specifies that the determination of whether a replacement landfill is consistent, and whether a variance to the DON requirement is proper, is based solely on whether the landfill (1) received its permit before June 26, 2009, (2) has or will exhaust its “permitted capacity” at its current location, (3) is located in the existing landfill’s planning area, and (4) has not been previously replaced. S.C. Code Ann. Regs. 61-107.17.D.6.a. Subsection D.6.e merely addresses the timing for replacement variances, while it provides the only criterion applicable to expansion variances. In sum total, Subsection D.6.e requires existing facilities to apply to the Department for either a replacement or expansion variance prior to exhausting (1) its permitted capacity, or (2) operational life of the facility. Stated differently, an existing facility may not be replaced or expanded if it is already full. In addition, Subsection D.6.e provides that an existing facility must choose to either apply for a replacement variance (for a new facility at a different site) or an expansion variance (of the existing facility at the current location). This choice is confirmed in the next sentence of subsection (e), which provides that “[a] facility shall not operate under an expansion and a replacement variance simultaneously.” Thus, the context alone of Subsection D.6.e suggests that its purpose is not to add a substantive additional criterion for replacement variances, but as expressed in Subsection D.6.a.3, it merely relates to “timing.” If these qualifications are met, then the Department “shall” grant an operating Class 2 landfill a variance to construct a replacement landfill at its “permitted annual rate of disposal.”²⁰ *Id.* at 61-107.17.D.6.a (emphasis added).

²⁰ As discussed, Rabbit Hill sought an increase in its annual disposal rate at the Existing Landfill independent of, not as a part of, seeking the replacement variance. As to the variance in question, subsection “a” of Regulation 61-107.17.D.6 only requires that a landfill qualifying for the replacement variance be permitted at its “annual rate of disposal,” which unquestionably happened here. And Rabbit Hill’s decision to seek an increase in its annual disposal rate at the

While the regulations expressly provide that size, *i.e.*, capacity, is a factor that the Department may consider in evaluating an expansion variance,²¹ the plain text of the replacement variance regulation demonstrates that size is not a factor that the promulgated regulation has directed the Department to consider. Though the capacity of the Existing Landfill is the measurement at issue when determining *when* a replacement is allowed, *see* S.C. Code Ann. Regs. 61-107.17.D.6.a.2 & e, the regulations do not specify that the capacity of the Existing Landfill attaches to the Replacement Landfill. Without an express requirement to consider the volumetric capacity of a replacement landfill in the context of a requested variance from the DON, Appellant essentially argues that this Court should *infer* such a requirement. However, reading into the regulations a requirement that the capacity of the landfills must remain the same would run contrary to the Department's interpretation of its own regulations and would violate the "plain meaning rule" obligation of this Court. *Cf. Consumer Advoc. for State v. S.C. Dep't of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) ("The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." (citation omitted) (alteration in original)); *State v. White*, 338 S.C.56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) (citation omitted) ("[Courts] cannot under our power of construction supply an omission in the statute."); *Kiawah*, 411 S.C. at 39, 766 S.E.2d at 720 (stating that a court's role is to "apply and interpret, not rewrite, regulations"). Yet, that is precisely what Appellant urges this Court to do in arguing, without citation or support, that the regulations forbid a variance for replacement

Existing Landfill, and the Department's subsequent decision to grant that request, was publicly noticed, has not been challenged by any party (including Appellant), was not a part of the contested case, and should not factor into this Court's analysis of the Phase 1 Determination.

²¹ *See* S.C. Code Ann. Regs. 61-107.17.B.8 ("'Expand' or 'Expansion' means any increase in the permitted volumetric capacity of an existing solid waste management facility." (emphasis added)).

with volumetric expansion.²² App. Br. at 20. No such prohibition exists, and while Appellant may prefer that the regulation limit the “volumetric expansion” of replacement facilities, Appellant’s preference may not supersede the plain language of the regulation itself.

Even further, had the Department or the General Assembly intended for a replacement facility to adhere to the existing facility’s permitted volumetric capacity or size—or to set up a “capacity-based framework”—it could have, and would have, added such a requirement or supplied a definition for replacement that places conditions on the size or capacity of a replacement landfill. Indeed, as explained above, the regulations demonstrate the Department knew the way, as it readily defined expansion. *Cf. Hodges*, 341 S.C. at 86, 533 S.E.2d at 582. But the only volume-related requirement associated with the consideration of a DON variance in the context of a Phase 1 Determination is that the annual rate of disposal from an existing landfill is maintained in the replacement landfill.²³ See S.C. Code Ann. Regs. 61-107.17.D.6.a. The fact that the General

²² Courts have time and again rejected such unsupported conclusory legal arguments as insufficient to meet a burden of good faith persuasion. See, e.g., *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (stating a one sentence argument is too conclusory to present to the Court).

²³ To be sure, “capacity” and “annual rate of disposal” are different measurements. See *supra* note 9 (explaining “disposal rate” is defined as the total amount of waste received annually). While not expressly defined, is relied upon in the definition of “Expand” or “Expansion” to mean “any increase in the permitted volumetric *capacity* of an existing solid waste management facility.” S.C. Code Ann. Regs. 61-107.17.B.8 (emphasis added). As demonstrated, *disposal rate* refers to the how much waste can enter the landfill each year, while the *capacity* is the overall volume of waste a landfill can receive over its lifetime. Further, *capacity* is measured in cubic yards while *rate of disposal* is measured in tons per year. See also (R. p.), Permit Modification at 3 (“The [Exhausted Landfill] has a disposal capacity of approximately 225,186 cu. yd. per the original design drawings.”); (R. p.), Department Public Meeting Presentation at 4 (“15,000 cubic yards of remaining airspace according to the FY2023 Annual Report.”); (R. p.), 2022 Existing Landfill Annual Report at 3 (Contrasting “[m]aximum permitted annual tonnage rate” in “(tons/yr)” and “[r]emaining volume of permitted disposal airspace” in (CY), i.e., cubic yards.).

Assembly consciously chose to define expansion facilities by reference to the volume, *i.e.*, size/capacity of the facility, but—in the same subsection—did not define replacement facilities to be similarly constrained or require the Department to undertake a volumetric capacity analysis in approving the location of replacement facilities under the DON variance analysis specified for Phase 1 determinations, persuasively suggests that the omission was intentional.

E. Rabbit Hill neither sought nor received both replacement and expansion variances.

In full, Subsection D.6.e provides that:

e. An eligible facility shall apply to the Department for a variance to replace or expand the volume of an existing facility prior to exhausting: (1) its permitted capacity, or (2) the operational life of the facility. A facility shall not operate under an expansion variance and a replacement variance simultaneously, with the exception of a reasonable transition period as determined by the Department. A reasonable transition period is considered to be approximately one hundred eighty (180) calendar days.

S.C. Code Ann. Regs. 61-107.17.D.6.e. Put differently, first, as to the timing of the application for a replacement variance, Subsection D.6.e dictates that an applicant must apply for a replacement prior to exhausting its permitted capacity at the existing facility. *See also id.* 61-107.17.D.6.a.3 (referencing D.6.e as a timing provision: e.g. “see 6.e below for timing.”). And second, there are two separate paths for variances: one for replacements of existing facilities, and one for expansion of existing facilities. *Id.* 61-107.17.D.6.a (replacement); *id.* 61-107.17.D.6.b (expansion). Appellant continues to make a mountain out of this procedural molehill, reiterating the undisputed proposition that a landfill may not operate under both an expansion variance and a replacement variance at the same time. App. Br. at 21. However, the Existing Landfill is not operating under either an expansion or replacement variance, and Rabbit Hill has only sought a variance as to the demonstration of need requirement for the proposed *replacement* landfill. Indeed, the ALC expressly found that—and the evidence of record confirms—“[n]othing suggests that the Hilltop Landfill ever received an expansion variance.” (**R. p.**), Order at 12.

Nevertheless, Appellant argues that, because Rabbit Hill has sought a variance for a replacement facility, and because the Replacement Landfill is larger in size/capacity than the Existing Landfill, Rabbit Hill has, *ipso facto*, sought and received both a replacement variance and an expansion variance, as prohibited by Subsection D.6.e. But because Subsection D.6.e does not constitute a substantive condition to the right to a replacement variance, or mandate or suggest volumetric capacity considerations for replacement facilities—dictating only that a facility not seek both a replacement variance and an expansion variance at the same time—Appellant’s argument is misplaced.

Finally, while employing the rules of statutory construction to the unambiguous regulation is inappropriate for the reasons already discussed, even if this Court felt compelled to engage in such construction here, Appellant’s proposed statutory construction of Subsection D.6.e is unavailing and suggests a similar result. Appellant’s preferred reading of Subsection D.6.e actually goes *against* accepted norms of statutory construction that limit a modifier—in this case “the volume of an existing facility”—to modifying only the nearest referent. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (“[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.”). Applying the rule of the last antecedent²⁴ requires the modifier “the volume of” to be applied only to “expand,” rather than it reaching back to also modify “replace.” *See also supra* n.6 (discussing the findings and original version of the regulation set forth in the S.C. State Register).

Alternatively, even if the rule of the last antecedent did not govern here, the result would still be the same. When a limiting clause “hangs together as a unified whole,” referring to a single

²⁴ The Last Antecedent Canon states that “a pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent.” Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 144 (2012).

thing, the limiting clause is a part of the integrated clause. *Facebook, Inc., v. Duguid*, 592 U.S. 395, 403 (2021) (quoting *Cyan, Inc., v. Beaver County Employees Retirement Fund*, 583 U.S. 416, 440 (2018)). “Expand the volume of” is precisely that type of clause. Further, while it is true that the rule of the last antecedent can be refuted “where ‘no reason appears why’ a modifying clause is not ‘applicable as much to the first and other words as to the last,’” see *Lockhart v. U.S.*, 577 U.S. 352, 355 (2016), here, the regulation expressly provides the basis for the “why” and the Court need not construe Subsection D.6.e in the vacuum that Appellant suggests.²⁵

In fact, this Court is not left to theorize as to the criteria that are to be evaluated with respect to a replacement variance. Regulation 61-107.17.D.6.a. expressly enumerates the criteria that are applicable to replacement variances, and it contains no requirement that the Department anchor the size of a replacement landfill to the permitted volumetric capacity of an existing landfill. Instead, the Department is authorized—and the Department is required (*i.e.*, “shall grant”)—to issue a variance as to the DON requirement for Class Two landfills like Rabbit Hill if: (1) the landfill was issued its permit prior to the effective date of the regulation (which was June 26, 2009); (2) the landfill exhausts its permitted capacity at its current location; (3) the proposed replacement location is within the facility’s existing planning area, to include the entire county in which it is located; (4) the landfill has not previously been replaced; and (5) the landfill applies for replacement prior to exhausting its permitted capacity. The undisputed evidence demonstrates that

²⁵ The Series Qualifier Canon does not compel a different result. That canon states that, “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,” a prepositive or postpositive modifier “normally applies to the entire series.” Reading Law at 147. However, “[p]erhaps more than most of the other canons, [the series-qualifier canon] is highly sensitive to context.” *Id.* at 150. Here, there is no straightforward, parallel, nor descriptive for an applicant to “replace the volume,” and the context of the regulation confirms as much.

Rabbit Hill satisfied these conditions, and the Department's approval of the DON variance, and issuance of the Phase 1 Determination, was warranted and appropriate.

CONCLUSION

The Department followed the plain language of the Act and the applicable regulations in reaching its determination that Rabbit Hill's application satisfied the requirements for a Phase 1 Determination, and the capacity or size of the Replacement Landfill is not a factor that can or should be considered in the Phase 1 siting process under the regulation. No matter how sincerely held, policy preferences cannot overcome that fact. Therefore, the Court should affirm the decision of the ALC.

[Signature Page Follows]

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL SERVICES**

Etta R. Williams Linen (S.C. Bar No. 16663)
Christopher Whitehead (S.C. Bar No. 100284)
2600 Bull Street
Columbia, SC 29201
(803) 898-7286
etta.rosita.linen@des.sc.gov
christopher.whitehead@des.sc.gov

*Attorneys for Respondent South Carolina
Department of Environmental Services*

-AND-

BURR & FORMAN LLP

s/Chad N. Johnston

Chad N. Johnston (S.C. Bar No. 73752)
Samantha J. Dorward (S.C. Bar No. 106310)
1221 Main Street, Suite 1800
Columbia, SC 29201
(803) 799-9800
cjohnston@burr.com
sdorward@burr.com

Randolph R. Lowell (S.C. Bar No. 16145)
115 Fairchild Street, Suite 200
Daniel Island, SC 29492
(843) 976-6177
rlowell@burr.com

AUSTIN & PETHICK LAW FIRM, PC

Kevin E. Pethick (S.C. Bar No. 100878)
PO Box 5900
Aiken, SC 29804
(803) 226-0453
kevin@austinpethick.com

*Attorneys for Respondent Rabbit Hill Class 2
Landfill*

June 22, 2026
Columbia, South Carolina