

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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

Appellate Case No.: 2025-02447

Case No. 24-ALJ-07-0316-CC

Friends of Horse Creek Valley,

Appellant,

v.

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

Respondents.

RECORD ON APPEAL
VOLUME II

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RECORD ON APPEAL

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EXHIBIT 11

MINUTES
AIKEN COUNTY BOARD OF APPEALS
1930 UNIVERSITY PARKWAY, AIKEN, SC – COUNTY COUNCIL CHAMBERS
6:30 P.M., THURSDAY, NOVEMBER 9, 2023
REGULAR MEETING NO. 01-11-23

A. CALL TO ORDER

The regularly scheduled meeting of the Aiken County Board of Appeals was called to order at 6:30 p.m. by Chairman Doug Engebretson, who declared a quorum of the membership was present.

Members Present

Doug Engebretson, Chairman
Tina Bevington
Jennie Marshall
Jason Whingther
John Zentz

Members Absent

Samuel Leverette
JD Cooper
Jerry Waters

Also Present

Sandra Colvin, Planning Staff
Joel Duke, Director
Brad Farrar, County Attorney
Brandon Creel, Code Enforcement Officer
Amy Roberts, Planning Staff

B. RECOGNITION OF VISITORS

Chairman Engebretson welcomed staff, and visitors to the meeting.

C. APPROVAL OF MINUTES: Meeting No. 01-10-23

Chairman Engebretson requested a motion regarding the minutes of the August 10, 2023 Board of Appeals meeting. Ms. Marshall made motion to approve the minutes. Mr. Zentz seconded the motion. The motion was approved by unanimous vote.

D. APPROVAL OF AGENDA:

Chairman Engebretson called for a motion to approve the agenda. Vice-Chairman Whingther made a motion to approve the agenda, which was seconded by Ms. Bevington. The motion was approved by unanimous vote.

E. COMMITTEE REPORTS:

None

F. GENERAL REPORTS:

None

G. OLD BUSINESS:

H. NEW BUSINESS:

- | | | |
|----|-------------------------|---|
| 1. | Variance | Section 24-8.4 |
| | Applicant | Donald and Elyse Burke |
| | Application No. | 125-07-04-006 |
| | Address | Cooper Drive, Aiken, SC |
| | Zoning | RC and RD |
| | County Council District | 2 – Mike Kellems |
| | Nature of Request | Requesting a variance from the requirement that principle structures be constructed prior to any accessory buildings. |

Chairman Engebretson opened the public hearing.

Elyse Burke, 1795 Circle Drive, Fort Campbell, KY, addressed the Board stating her husband is active duty military and she works as a nurse for the Department of the Army. She stated they plan to move to Aiken after the school year ends. She continued stating they plan to build a horse barn to house five horses. The plan is to build the barn in May 2024 and start construction of the home in June 2024. She stated they have a custom house plans by local firm and have selected a builder.

Chairman Engebretson closed the public hearing and asked for a motion. Ms. Marshall made a motion to approve the variance request with contingency to start construction of the home within three months from start of the barn. Ms. Bevington seconded the motion. The motion was unanimously approved.

- | | | |
|----|-------------------------|--|
| 2. | Variance | Section 24-3.6(2)a |
| | Applicant | Hilltop C & D, LLC c/o Kevin E. Pethick, Esq. |
| | Application No. | 037-19-01-001 & 052-14-01-001 |
| | Address | Dixie Clay Road & 424 Huber Clay Road |
| | Zoning | RUD |
| | County Council District | 3 – Danny Feagin |
| | Nature of Request | Requesting a variance allowing for the buffer zone required for a landfill to be reduced from 300 feet to 100 feet from any property line. |

Chairman Engebretson opened the public hearing.

Kevin Pethick, 170 Paddocks Bend, representing the applicant, addressed the Board and presented handouts. (See attached)

Chairman Engebretson asked Mr. Pethick if the requested variance is on the common property between Hilltop C&D, LLC and the Aiken County Landfill. Mr. Pethick stated yes.

Chairman Engebretson stated this is a hearing for the variance requested and will be the only issue the Board will vote on at this time.

Greg Bramlett, 220 Flint Drive, Warrenton, SC, addressed the Board with concerns of the real purpose of needing a variance. He stated concerned with the safety of surrounding neighbors.

Edward Dotson, 262 Flint Drive, Warrenton, SC, addressed the Board with concerns of safety for surrounding area.

Pastor Brendel, 276 Flint Drive, Warrenton, SC, addressed the Board thanking Mr. Pethick clarifying the variance.

Linda Bramlett, 220 Flint Drive, Warrenton, SC, addressed the Board with concerns about stating that it will only be for the section of the common property between Hilltop C&D, LLC and Aiken County.

Gerald Coach, 334 Daley Drive, addressed the Board with concerns of safety for the community and stated he does not want a landfill.

Mr. Duke stated the proposed landfill is not an expansion or continuation of the site operated by Aiken County as before. He stated the proposed landfill will accept construction debris. No household garbage will not be allowed under proposed permit.

Tiffany Holston, 1005 Herndon Dairy Road, addressed the Board with concerns that the Board needs to consider the people in the community do not want a landfill. She stated that she does not want a landfill near her property.

Darnell Holston, 1005 Herndon Dairy Road, addressed the Board asking when will there be a conservation about the proposed landfill, when will residents be able to ask questions concerning the landfill.

Mr. Duke addressed Mr. Holston, this property is zoned RUD, Rural district. He stated under the Aiken county regulations. The landfill is by right allowed in this district. There are conditions that must be met before landfill can be permitted. He continued stating approval doesn't require rezoning or a public hearing, it only requires a submission to the Aiken County Planning Department for review. The Planning Department reviews to make sure the required standards are met.

Celeste Dunbar, 1361 Herndon Dairy Road, addressed the Board with health concerns of the community.

Kevin Pethick, 170 Paddocks Bend, representing the applicant, addressed the Board stating that one of the conditions placed on Hilltop C&D by Dixie Clay as apart the sale of the property was remediation of certain cliffs and steep slopes that were left by Dixie Clay's mining operations. He continued stating that upon investigating, it was determined the cliffs and slopes were located on land owned by Aiken County and represented a hazard to the County, so Hilltop offered to purchase the portion of County property that requires remediation. He stated Hilltop purchased the County property and intends to remediate the steep slopes thereon by filling the existing pits with landfill debris. DHEC agrees this will satisfy their requirements. In order to place landfill debris in the existing pits, Hilltop will need to obtain a buffer reduction from the County's requirement of 300' to the state's requirement of 100', because the proposed landfill activities will take place a little over 100' from the new property line. He continued with this requested buffer reduction only applies to that portion of the property line within the 11.91 acres acquired from Aiken County. It will not affect any other buffers of the Dixie property and surrounding land.

Tim Fox, 212 B Midland Drive, addressed the Board stating the focus of this variance is to remedy the sheer cliff. He stated that SC DHEC requires a 1,000 feet from every resident. He stated this will be a construction debris landfill.

Chairman Engebretson closed the public hearing and asked for a motion.

Mr. Zentz asked if the variance approval depends on the issue with the cliff being resolved. Mr. Pethick stated yes.

Mr. Whinghter asked would the reclamation start after approval of the landfill. Mr. Pethick stated yes.

Mr. Whinghter made a motion to approve the variance application for Hilltop C&D, LLC to reduce the buffer requirement from 300 feet to 100 feet only along the new outer boundary of the 11.91 acre tract, plat by John M. Bailey & Associates, P.E. plat book 65, page 409, contingent on approval of the development plans for an inert landfill. Mr. Zentz seconded the motion. The motion was unanimously approved.

I. NEXT MEETING December 14, 2023

J. EXECUTIVE SESSION:

K. ADJOURNMENT:

Chairman Engebretson requested a motion to adjourn the meeting.

Ms. Marshall made a motion to adjourn. Ms. Bevington seconded the motion. The motion was unanimously approved. Meeting adjourned at 7:44 p.m.

Respectfully Submitted,


Joel T. Duke, Secretary 12/14/2023 Date

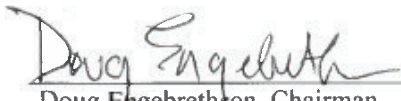

Doug Engebretson, Chairman Date

Exhibit A

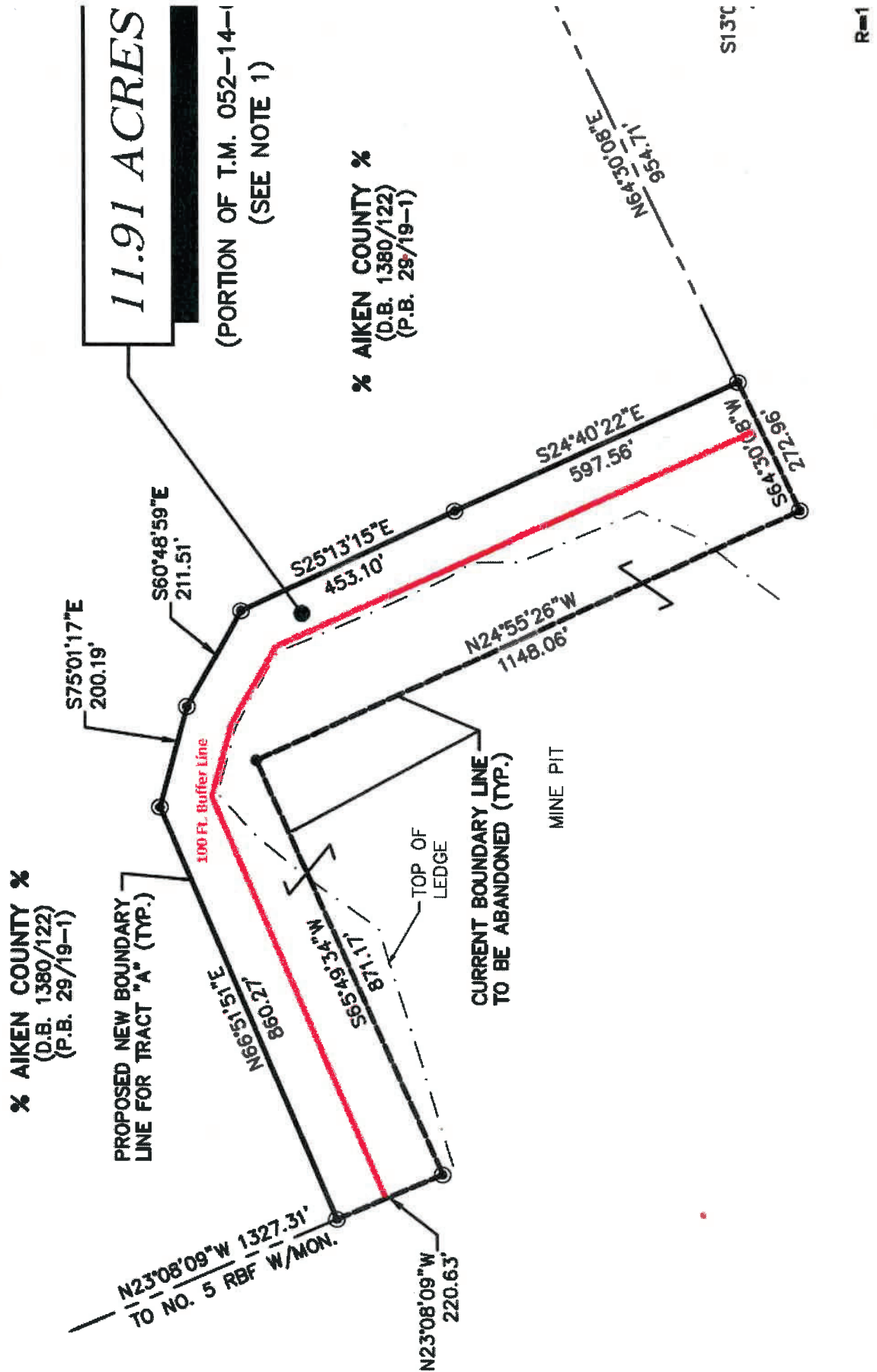


EXHIBIT 12



March 14, 2024

Hilltop C&D, LLC
Attn: Mr. Tim Fox
timf@bkgradingandpaving.com

Draft Determinations

RE: Receipt of Determinations Request received July 13, 2023
ePermitting Submittal Reference: HPW-36S6-1Z9T2
Rabbit Hill Class Two Landfill – Permit No. LF2-00302 (Proposed)
Aiken County

Dear Mr. Fox:

Pursuant to the requirements for Class Two Landfills detailed in Regulations 61-107.17 and 61-107.19, the following draft determinations are ready for publication and review:

1. That the proposed replacement landfill shall receive a variance under Regulation 61-107.17, *Solid Waste Management: Demonstration of Need*, Section D.6.a and that the facility's disposal tonnage will not change from what is permitted at the Hilltop Class 2 Landfill;
2. That the proposed replacement landfill does not require a new or additional determination of consistency under the State or the Three Rivers Regional solid waste management plans;
3. That the proposed replacement landfill maintains a minimum 1,000 feet buffer to residences, schools, day-care centers, churches, hospitals, or parks; and,
4. The applicant provided documentation from Aiken County indicating that the replacement landfill is consistent with local zoning.

The Department's public notice of the draft determinations (enclosed) will be published in *The Aiken Standard* newspaper and sent to the facility mailing list on March 14, 2024. The public will have thirty (30) days, which ends April 13, 2024, to review the draft determinations and submit comments to the Department. Once the comment period closes, the Department will make a final decision regarding the determinations. In addition, the Department will hold a Public Meeting regarding this project on March 28, 2024 at the Midland Valley Fire Department. Please see the enclosed notice for additional information. Should you have any questions please contact me at (803) 898-1339.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Justin Koon', with a long, sweeping horizontal line extending to the right.

Justin Koon, Manager
Solid Waste Permitting and Monitoring Section
Division of Mining & Solid Waste Management
Bureau of Land and Waste Management

enc: Public Notice

ec: Chris Carny, Manager - BLWM Solid Waste & HW Compliance Section
Marty Lindler, Director – Division of Mining & SW Management
Tim Eleazer and John Abernathy – BLWM Solid Waste Permitting & Monitoring Section
Alan Risa, Jr. and Marie McElmurray – Midlands EA Region, Aiken Office
Stacey Smith, PE – stacey@smithgardnerinc.com
Kevin Anderson, PG – kevin@smithgardnerinc.com

South Carolina Department of Health and Environmental Control (DHEC)
Bureau of Land and Waste Management

NOTICE OF DRAFT DETERMINATION AND PUBLIC MEETING

PROPOSED RABBIT HILL CLASS 2 LANDFILL
331 Dixie Clay Road
Beech Island, South Carolina

DHEC will hold a public meeting to discuss the **proposed Rabbit Hill Class 2 Landfill in Aiken County, SC**. This site has been proposed by Hilltop C&D, LLC as a replacement for the existing Hilltop Class 2 Landfill located at 550 Rainbow Falls Road in Graniteville, SC. DHEC's first and current step in the permitting process is Determination of Need and Consistency.

DHEC has determined that 1) The proposed replacement landfill meets the eligibility criteria for an exception under the Demonstration of Need regulations, 2) Does not require a new or additional Determination of Consistency under the solid waste management plans of the state or the Three Rivers Solid Waste Authority, and 3) The replacement landfill is consistent with buffer and county zoning requirements. **DHEC's Determination of Need and Consistency is not final and is open for public comment.**

The public meeting will be held on March 28, 2024, at 6:00 PM, at the Midland Valley Fire Department, 115 School Road in Warrentonville, SC. The public meeting is informal and provides an opportunity to have a discussion with DHEC staff about the proposed replacement landfill and DHEC's environmental permitting process. The meeting will begin with a presentation followed by a time to ask questions of DHEC staff.

South Carolina's applicable solid waste regulations (61-107.17 & 61-107.19), as well as other information on landfill requirements may be viewed on DHEC's website at www.scdhec.gov/environment/land-management/solid-waste. The public notice, permit application, and other relevant documents may be viewed on DHEC's ePermitting Portal at epermweb.dhec.sc.gov or using the QR Code below.

Comments on DHEC's Determination of Need and Consistency will be accepted through April 13, 2024. All comments will be considered before a final determination is made. **Written comments may be submitted via DHEC's ePermitting Portal or QR Code below, email, or U.S. Mail to:**

Justin Koon, Manager
DHEC | Bureau of Land and Waste Management
2600 Bull Street | Columbia, SC 29201
Email: koonjt@dhec.sc.gov



DHEC values all comments made during the public comment period. Public comments could impact DHEC's final determination by giving staff additional information to consider during the permitting process. If you are unable to access DHEC's webpage or ePermitting Portal, or if you have questions about participating in the public meeting, please contact **Justin Koon at (803) 898-1339**. Individuals with disabilities or special needs should contact DHEC at least one week in advance to discuss any special services required to participate.

Please bring this notice to the attention of others you know who may be interested.

EXHIBIT 13

RE: Annual Reports - Class 2 Landfills

From Tim Fox <timf@bkgradingandpaving.com>
Date Wed 8/31/2022 11:23 AM
To Carney, Christopher <carneyce@dhec.sc.gov>
Cc Tim Fox <timf@bkgradingandpaving.com>

 1 attachment (137 KB)
Hilltop FY22 Annual Report.pdf;

Chris,

Please find the attached Hilltop C&D Annual Report.

Thank you.

Tim Fox
Waste and Mining Operations
B&K Grading and Paving
PO Box 729
New Ellenton, S.C. 29809



From: Carney, Christopher [mailto:carneyce@dhec.sc.gov]
Sent: Thursday, June 30, 2022 9:58 AM
To: Carney, Christopher <carneyce@dhec.sc.gov>
Subject: Annual Reports - Class 2 Landfills

All,

As previously mentioned, DHEC is transitioning Solid Waste functions to a new online system called ePermitting. We still aren't quite ready to invite the regulated community into the system but wanted to remind everyone about the upcoming September 1 deadline to submit the annual report for Class 2 Landfills. The attached form will need to be completed by hand, scanned in, and emailed back to me before the deadline. If you have any questions, please let me know.

Chris Carney
Solid Waste Compliance
S.C. Dept. of Health & Environmental Control
Office: (803) 898-0727
Fax: (803) 898-1759
Connect: www.scdhec.gov [Facebook](#) [Twitter](#)

Annual Report - Class 2 Landfill

version 1.2

Form Input

*This form may contain one or more sections or controls that are conditionally displayed based on answers provided in other parts of the form

Site Information

Facility Name Hilltop C+D Landfill

Permittee Hilltop C+D, LLC

Permit Number 022431-1201

Facility Address

Address Line 1

1550 Rainbow Falls Rd.

Address Line 2

City

Graniteville

State/Area

SC

Postal Code

29029

County

Geographical Location

Latitude

33.58936444701749

Longitude

-81.372425497364

Facility Contact

First Name

Tim

Last Name

Fox

Title

Waste + Mining Operations

Phone Type

Only one of the numbers is required

Number

Extension

Home

Other

Mobile

Business

803 652 3232

Email

timf@bkgradingandpaving.com

Mailing Address

Address Line 1

PO BOX 792

Address Line 2

City

New Ellenton

State/Area

SC

Postal Code

29809

Class 2 Landfill Information

Report Year

2022

Transfer Station - If waste was received from a SC transfer station, record those tonnages here. If waste was not received from a transfer station, leave this section blank.

Name of Transfer Station (in S.C.)	Appendix I Wastes	Appendix I Like Waste	Permitted Characterized Wastes Less Than 10 x MCLs	Processed Waste Tires	Natural Disaster Debris	Sub-Total (A)
						Calculated

Processing Facility - If waste was received from a SC SW Processing Facility, record those tonnages here. If waste was not received from a processing facility, leave this section blank.

Name of SW Processing Facility (in S.C.)	Appendix I Wastes	Appendix I Like Waste	Permitted Characterized Wastes Less Than 10 x MCLs	Processed Waste Tires	Natural Disaster Debris	Sub-Total (B)
						Calculated

Out-of-State Waste - If waste was received from outside of SC, list the name of the state where the waste originated. If no waste was accepted from outside SC, leave this section blank.

State	Appendix I Wastes	Appendix I Like Waste	Permitted Characterized Wastes Less Than 10 x MCLs	Processed Waste Tires	Natural Disaster Debris	Sub-Total (C)
						Calculated

In-State Waste - Do not include tonnages already reported in the transfer station or solid waste processing facility sections.

County	Appendix I Wastes	Appendix I Like Wastes	Permitted Characterized Wastes Less Than 10 x MCLs	Processed Waste Tires	Natural Disaster Debris	Sub-Total (D)
Alber	46,364.65					Calculated

Recovered Materials/Tipping Fee

Recovered Materials - If the facility is also a registered construction and demolition debris recycling facility, do not report that activity here. A separate annual report is required to be submitted.

Type of Recovered Materials	Company Receiving Recovered Materials	TONS TRANSFERRED

Tipping Fee Information

Type	Appendix I	Appendix I Like	Characterized Waste
Average tipping fee (\$/ton)	\$ 29.52		
Range of tipping fee (\$/ton)			

Additional Information

Total amount of waste accepted in FY (Tons)

Calculated 46,364.65

Maximum permitted annual tonnage rate (tons/yr)

57,000

Remaining volume of permitted disposal airspace (CY)

89,000

Remaining life of permitted disposal airspace (Months)

14

Attachment(s)

Multiple attachments are not allowed. Please be aware that files exceeding 500 MB in size are not allowed. The following file types are accepted:

.7Z;.7z;*.AVI;*.avi;*.AVI;*.BMP;*.bmp;*.Bmp;*.CSV;*.csv;*.Csv;*.DAT;*.dat;*.Dat;*.DOC;*.doc;*.Doc;*.DOCX;*.docx;*.Docx;*.DWG;*.dwg;*.Dwg;*.EML;*.eml;*.Eml;*.GIF;*.gif;*.Gif;*.GPX;*.gpx;*.Gpx;*.HTM;*.htm;*.html;*.htm;*.HTML;*.html;*.Html;*.JPG;*.jpg;*.Jpg;*.MP3;*.mp3;*.Mp3;*.MP4;*.mp4;*.Mp4;*.MOV;*.mov;*.Mov;*.PDF;*.pdf;*.Pdf;*.PNG;*.png;*.Png;*.RAR;*.rar;*.Rar;*.RTF;*.rtf;*.Rtf;*.TXT;*.txt;*.Txt;*.ZIP;*.zip;*.Zip

Comment

Friends of Horse Creek Valley,	)	Docket No. 24-ALJ-07-0316-CC
	)	
Petitioners,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
South Carolina Department of	)	
Environmental Services and Rabbit Hill Class	)	
2 Landfill,	)	
	)	
Respondents.	)	
	)	

Michael Corley, Esquire
Juan Tolley, Esquire
S.C. Environmental Law Project
P.O. Box 1380
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juan@scelp.org

James Bishop Huey, Esquire
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Columbia, SC 29201
etta.rosita.linen@des.sc.gov
christopher.whitehead@des.sc.gov

A handwritten signature in black ink, reading "Laura Lee Andrews", written over a horizontal line.

Laura Lee Andrews
Paralegal

March 17, 2025
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

COPY

Friends of Horse Creek Valley,	)	Docket No.: 24-ALJ-07-0316-CC
	)	
Petitioner(s),	)	
	)	
vs.	)	
	)	South Carolina Department of
	)	Environmental Services'
South Carolina Department of	)	Response in Opposition to Petitioner's
Environmental Services and Rabbit Hill	)	Motion for Summary Judgment
Class 2 Landfill.	)	and
	)	Respondent Department's Cross-
Respondents.	)	Motion for Summary Judgment
	)	

INTRODUCTION

Pursuant to Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court ("ALC" or "Court") and Rule 56 of the South Carolina Rules of Civil Procedure, Respondent South Carolina Department of Environmental Services ("SCDES" or "Department") hereby submits this Response in Opposition to Petitioner Friends of Horse Creek Valley's ("Petitioner") Motion for Summary Judgment ("Motion") and Respondent Department's Cross-Motion for Summary Judgment. Petitioner filed its Motion with the ALC on February 10, 2025.

Petitioner is challenging the Department's issuance of a final decision for a DON variance, issued on July 17, 2024, Permit #LF2-00302 (assigned a permit # only for tracking purposes because it does not yet have a landfill permit), for the proposed Rabbit Hill Class 2 Landfill ("Rabbit Hill") located at 332 Dixie Clay Road, Beech Island, Aiken County, South Carolina. Rabbit Hill proposes to be a successor landfill and replacement facility for the Hilltop Class 2 Landfill ("Hilltop") in Graniteville, SC, in Aiken County, South Carolina.



The issue for determination is whether the Department properly issued a replacement variance to Hilltop for the siting of Rabbit Hill by applying the applicable law. SCDES agrees with Petitioner that no genuine issue of material fact exists in the above-captioned matter. SCDES properly granted a replacement variance to Hilltop per the applicable law and consistent with the requirements of the Demonstration of Need (DON) Regulation (“DON” or “Regulation”), (S.C. Code Ann. Regs., 61-107.17(D)). “In most cases applying Rule 56(c), this Court and our court of appeals have applied the ‘genuine issue of material fact’ standard set forth in the Rule, requiring the party opposing the motion show a ‘reasonable inference’ to be drawn from the evidence, and we have rejected the ‘*mere scintilla*’ standard[,]” (Kitchen Planners v. Friedman, et al., 440 S.C. 456 (S.C. 2023), 892 S.E.2d 297, citing Baughman v. Am. Tel. & Tel. Co (1991)).

This filing also serves as a Cross-Motion because no genuine issue of material fact exists, and the Department’s issuance of a replacement variance to Hilltop complies with the applicable Regulation as a matter of law. Therefore, a grant of summary judgment in SCDES’ favor is warranted.

The evidence will show that SCDES had an obligation to grant Hilltop’s replacement variance request because it met all conditions for the variance. However, “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.” (County of Lexington, 2016 WL 3648085, quoting S.C. Coastal Conservation League, 363 S.C. at 75, 710 S.E.2d at 486). SCDES’ interpretation is worthy of deference and therefore, should receive deference.

STATEMENT OF FACTS

S.C. Code Ann. Regs., 61-107.19, Part I, Section D, describes the steps necessary to issue a permit to a Class 2 Landfill. The first step is the Determination of Need and Consistency. In this step, the Regulation requires the applicant to provide property ownership documentation and request the four determinations, one of which is the determination of need pursuant to S.C. Code Ann. Regs., 61-107.17. The DON regulation outlines the requirements for evaluating whether there is a need for a landfill in a particular location. Specifically, Section D of the Regulation requires an applicant to submit a demonstration of need request to the Department before submitting its permit application. A replacement variance is an exception to the DON requirement determination found in S.C. Code Ann. Regs., 61-107.17(D). If the applicant meets certain conditions applicable to a specific variance request, the Regulation requires the Department to grant a variance to the requirement for the applicant to receive a DON determination. Here, there was a request from Hilltop for a “replacement” variance, and the provision in the DON regarding a “replacement” variance were met. S.C. Code Ann. Regs., R.61-107.17(D)(6)(a)(2)-(4).

As stated, the Department must grant a variance under certain conditions. A variance was requested from Hilltop on July 13, 2023, per its application to SCDES for a replacement landfill. Here, the conditions at S.C. Code Ann. Regs., R.61-107.17(D)(6)(a)(2)-(4), are met. On July 17, 2024, SCDES issued a decision to grant Hilltop’s request for a replacement variance for the Rabbit Hill replacement facility.

It is important to note that SCDES’ issuance of a replacement variance to Hilltop is just that, a variance to the requirement to receive a DON determination. Petitioner’s Request for a Contested Case Hearing and its Motion refers to the replacement variance issued to Hilltop as a permit. That is incorrect. A replacement variance is not a permit for a replacement landfill; it is a

grant of permission to continue pursuing a replacement facility by submitting a technical application to the Department to obtain a permit. (S.C., Code Ann. Regs., 107.19, Part I, Section D).

The Hilltop facility was initially permitted in 1995 as the G.L. Williams Landfill, with a disposal area of approximately seven (7) acres and a volume of roughly 225,000 cubic yards. The G.L. Williams Landfill was renamed Hilltop in 2012. Hilltop has a permitted annual disposal rate of 107,500 tons per year. In 2019, B&K Grading and Paving ("B&K") purchased Hilltop. Per SCDES' grant of a replacement variance to Hilltop for Rabbit Hill, Hilltop may apply for a permit for a landfill at its existing annual disposal rate at a new location within the same planning area. The Department acknowledged receipt of the application package requesting a replacement variance, and Hilltop published notice of the submittal and notified all adjacent property owners by certified mail. On March 14, 2024, the Department published a notice of its draft DON determination for the proposed replacement landfill and notified all adjacent landowners by first-class mail. The notice provided information for a public meeting on March 28, 2024, at the Midland Valley Fire Department. The public comment period ended on April 13, 2024. All comments received through June 15, 2024, by the Department were given consideration and a response.

Because Hilltop met all the Regulation requirements, the Department granted Hilltop the DON variance requested.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law." *See also Gadson v. Hembree*, 364 S.C. 316, 613 S.E.2d 533 (2005); *Cisson Constr., Inc. v. Reynolds & Assoc., Inc.*, 311 S.C. 499, 429 S.E.2d 847 (Ct. App. 1993). (*See also* Rule 68, RPALC). Moreover, "summary judgment should be granted 'when plain, palpable and undisputed facts exist on which reasonable minds cannot differ.'" *Latzicki-Thomas v S.C. Budget & Control Bd.*, No. 05-ALJ-30-0510-CC (Nov. 13, 2006 (Anderson, J.)).

ARGUMENT

I. THE PLAIN AND ORDINARY MEANING OF "REPLACEMENT."

A. Petitioner fails to apply the plain and ordinary meaning of "replacement."

There is no definition of "replacement" in the Act or Regulation. Therefore, SCDES applied the plain and ordinary meaning of the word. 327 S.C. 507, 489 S.E.2d 663 (Ct.App.1997). In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Adkins v. Comcar Industries, Inc.*, 323 S.C. 409, 475 S.E.2d 762 (1996). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct.App.1997).

Petitioner's conditioned definition of replacement does not have support or verification in the Act or Regulation, Petitioner has not presented any evidence, or law to support its assertions of the plain and ordinary meaning of replacement.

B. The Department properly applies the Plain and Ordinary Meaning of "Replacement."

SCDES and this Court must rely upon the plain and ordinary meaning of replacement because there is no definition of replacement in the Act or the Regulation. Contrary to Petitioner's unsupported interpretation of "replacement," according to the Cambridge Dictionary, Fourth

Edition, replacement means “the action or process of replacing someone or something: a person or thing that takes the place of another.”

SCDES reasonably interpreted “replacement,” consistent with the Cambridge Dictionary’s plain and ordinary meaning of the word. The ALC concluded in a 2012 case that “[B]ecause this 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.” (County of Lexington vs. S.C. Dept of Health & Environmental Control, 2016 WL 3648085 (S.C. Admin. Law Ct.), *quoting* Murphy v. South Carolina Department of Health & Environmental Control, 396 S.C. 633, 723 S.E.2d 191 (2012)). In the Murphy case, which dealt with DHEC regulations, the court properly applied the term “vicinity,” for which the Regulation had no definition. Here, the Department’s interpretation of replacement is also reasonable and consistent with the Regulation’s plain language. There are no grounds to deviate from the Department’s construction and application of the word.

Replacement is specifically referred to in R.61-107.17(D)(6) as follows:

“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:

(1) For a Class Three landfill only, the primary business of the landfill since it began operation has been the disposal of “household waste” and “commercial waste” as defined in S.C. Regulation section 61-107.19.

(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."

A close reading of the regulatory provisions above supports these facts:

- 1) No provision states that a landfill "replacement" is conditional on size.
- 2) No provision states that a DON variance is not available to "replace" an old landfill with a new facility if the replacement facility will have more volumetric capacity than the existing landfill.
- 3) Nothing in the DON Regulation is contrary to the Solid Waste Act. The Act states there must be a DON determination for all new or expanded facilities; however, no such directive exists in the Act or Regulation for a replacement facility.

II. SCDES WAS REQUIRED TO GRANT A REPLACEMENT VARIANCE TO HILLTOP FACILITY.

A. Rabbit Hill is not a replacement and an expansion facility, nor is it a new facility.

Petitioner asserts that Respondent issued a replacement and an expansion variance to Hilltop. Again, this assertion is incorrect and unsupported. Even if Rabbit Hill's landfill volume

may eventually exceed Hilltop's current acreage, this element does not make it both a replacement and an expansion. Also, Petitioner's ever-so-subtle alternative theory that Rabbit Hill is a "new" facility is wrong.

Petitioner's assertions are incorrect because the size of a landfill's footprint or its volumetric capacity is not a reason in the Regulation to deny a replacement variance. There is no legal requirement for a replacement landfill to mirror the existing landfill's size or disposal footprint. SCDES has yet to establish the exact footprint and volume of Rabbit Hill because a review of its technical landfill has not yet occurred. Establishing a footprint and volumetric capacity will occur before a permit issuance for Rabbit Hill's replacement landfill. These considerations will determine whether Rabbit Hill meets all regulatory requirement for a permit. That Rabbit Hill may have a total acreage exceeding Hilltop's current acreage does not negate its replacement designation and has no bearing upon whether the replacement variance is allowed.

Regarding "expansions," the Regulation's definition of an "expansion" states that it is "... any increase in the permitted volumetric capacity of an **existing** solid waste management facility. (*Emphasis added*) R.61-107.17(A)(8)". Also, an existing landfill will already have a designated footprint. However, regarding a replacement, there can be no footprint expansion when no determination regarding a footprint exists. Although R.61-107.17(D)(4)(e) states that a landfill can pursue both an expansion of an existing landfill and a replacement simultaneously, within 180 days, the landfill shall choose which variance it will pursue. Here again, this is not the situation with Rabbit Hill. Hilltop requested a replacement variance, and SCDES granted the DON variance. Rabbit Hill's grant of a replacement variance does not function as an expansion; the DON variance granted only for a replacement of Hilltop.

Also, regarding expansion, there is a definition of “expansion” found in R.61-107.17(A)(8). The definition states that “Expand” or “Expansion” means any increase in the permitted volumetric capacity of an **existing** solid waste management facility. (*Emphasis added*). This definition offers additional support that a replacement is separate and distinct from an “expansion” and that per the Regulation, permitted volumetric capacity is associated with an existing landfill “expansion,” not a “replacement.” Furthermore, Rabbit Hill is not a “new” landfill because the precursor to Rabbit Hill is Hilltop, the current existing facility, and the precursor to Hilltop is G.L. Williams, which received a landfill permit in 1995.

B. SCDES was required to grant Hilltop a replacement variance.

SCDES was required to grant the replacement variance because Rabbit Hill met all the conditions to receive the variance without regard to the size or volumetric capacity of the proposed replacement facility. As stated previously, R. 61-107.17(D)(6)(a)(2)-(4) states the condition that must be met for the Department to grant a replacement variance.

Hilltop met all the above requirements. It met condition two because the Regulation became effective June 23, 2000, and was amended June 26, 2009. The permit was issued to Hilltop (initially entitled G.L. Williams) on April 18, 1995, before the Regulation’s effective date. Hilltop met condition three above because it is in the process of exhausting its permitted capacity at its current location in Graniteville, Aiken County, South Carolina, and it applied for the replacement variance timely, per R. 61-107.17(D)(6)(e), which states the following:

“e. An eligible facility shall apply to the Department for a variance to replace . . . prior to exhausting: (1) its permitted capacity, or (2) the operational life of the facility. . . .”

Rabbit Hill also met condition number 4 because Hilltop requested that Rabbit Hill situate within the same county, Aiken. In reviewing the request package submitted by Hilltop for Rabbit

Hill, the Department evaluated whether, as the DON Regulation allows, Rabbit Hill would situate within a twenty (20) mile radius of any given location within South Carolina. The Regulation enables an existing landfill to replace itself once within a County in its 20-mile planning area. Rabbit Hill proposes to situate within a 20-mile radius and in the same county as Hilltop. Therefore, Rabbit Hill met condition number 4 of the replacement variance provision.

Hilltop, having met all replacement variance conditions, SCDES had an obligation to grant Hilltop's replacement variance request, per R. 61-107.17(D)(6)(a). This provision states:

- “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 . . . conditions:”
(*Emphasis added*).

Since the provision uses the word “shall” rather than “may,” SCDES was required to grant the replacement variance because Rabbit Hill met all the conditions to receive the variance, regardless of the proposed footprint size.

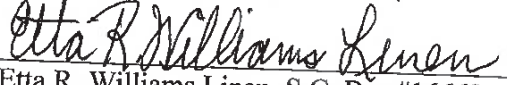
CONCLUSION

The Act does not require the Department to follow specific procedures when making decisions regarding DON. Instead, it requires promulgating regulations to carry out the Department's responsibility of making decisions regarding these requirements. See *Greeneagle Inc v. South Carolina Dep't of Health and Envtl. Control*, 399 S.C. 91, 96-97, 730 S.E.2d 869, 872 (Ct. App.2012). The Department outlines its procedure in R.61-107.17. It is clear that Petitioner's theories and arguments regarding the plain and ordinary meaning of replacement are unsupported and not rooted in the Act or Regulation. The Act requires that the Department promulgate regulations for the DON Regulation and the DON provides explicitly for a variance for a replacement facility. The DON Regulation, specifically R,61-107.17(D)(6)(a), requires the Department to grant a variance under specified conditions which are met in this case.

Pursuant to the foregoing, SCDES respectfully requests the Administrative Law Court issue an order denying Petitioner's Motion for Summary Judgment, finding there is no genuine issue of material fact as to whether Respondent properly granted a replacement variance to Rabbit Hill, and holding that Respondent properly issued the variance as a matter of law per Regulation requirements.

Pursuant to the foregoing, SCDES respectfully requests that the Court issue an order granting Respondents' Cross-Motion for Summary Judgment, finding there is no genuine issue of material fact as to whether Respondent granted only a replacement variance to Rabbit Hill per Regulation requirements and SCDES' decision must be upheld as a matter of law.

Respectfully submitted,



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Attorneys for SCDES

March 17 2025
Columbia, South Carolina

COPY

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,
Environmental Services,

Petitioner,

v.

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

Respondents.

Docket No. 2024-ALJ-07-0316-CC

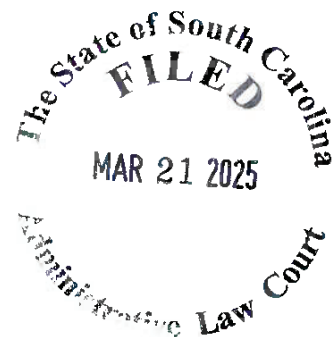
Certificate of Service

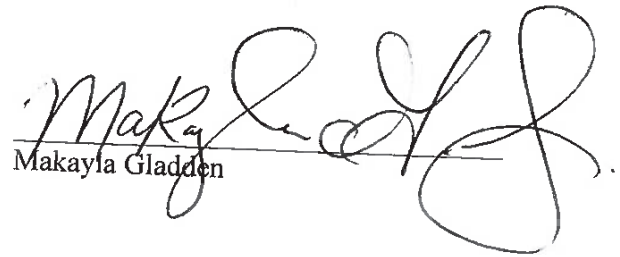
This is to certify that I, Makayla Gladden, Paralegal with the South Carolina Department of Environmental Services, have caused to be served on this day one (1) copy of the *South Carolina Department of Environmental Services' Response in Opposition to Petitioner's Motion for Summary Judgment and Respondent Department's Cross-Motion for Summary Judgment* in the above-captioned matter by depositing same in the United States Mail with sufficient postage prepaid, at the addresses indicated below:

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Makayla Gladden

March 17th, 2025
Columbia, South Carolina



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April 11, 2025

VIA EMAIL & U.S. MAIL

Honorable Jana E. Shealy,
Clerk, SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Friends of Horse Creek Valley v. SCDES & Rabbit Hill Class 2 Landfill
Docket No.: 24-ALC-07-0316-CC

Dear Ms. Shealy,

Please find enclosed Petitioner's Combined Reply to Respondents' Responses to Petitioner's Motion for Summary Judgement and Response to Respondents' Cross-Motions for Summary Judgment, which is being filed on behalf of the Friends of Horse Creek Valley. By copy of this letter I am serving counsel for all parties. Thank you for your kind consideration.

Respectfully,

Michael Corley
Senior Manager of Strategy

cc: Counsel of Record

Our Mission We use our legal expertise to protect land, water and communities across South Carolina.

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,	)	Docket No. 24-ALC-07-0316-CC
	)	
Petitioner,	)	
	)	
vs.	)	PETITIONER’S COMBINED REPLY
	)	TO RESPONDENTS’ RESPONSES TO
Hilltop C&D, LLC, and South Carolina	)	PETITIONER’S MOTION FOR
Department of Environmental Services,	)	SUMMARY JUDGMENT AND
	)	RESPONSE TO RESPONDENTS’ CROSS
	)	MOTIONS FOR SUMMARY JUDGMENT
Respondents.	)	

Pursuant to Rules 19 and 68 of the Rules of Procedure for the South Carolina Administrative Law Court (SCALC), and Rule 56 of the South Carolina Rules of Civil Procedure, Petitioner Friends of Horse Creek Valley hereby submits this combined Reply to Respondents’ Responses to Petitioner’s Motion for Summary Judgment and Response to Respondents’ Cross Motions for Summary Judgment.

I. INTRODUCTION

As detailed below and in Petitioner’s Motion for Summary Judgment, Petitioner’s claim in this case is based entirely upon a question of statutory interpretation—that is, whether the landfill at issue here may receive a DON variance to operate as a ‘replacement facility’ while also expanding the size of its landfill by over 120x the originally permitted facility. That question can and must be answered by this Court as a matter of law.

A “demonstration of need” (DON) is integral to permitting landfills in South Carolina. Respondent Hilltop LLC’s proposed landfill cannot satisfy this fundamental requirement. The landfill at issue in this case is not needed, as a matter of law. Hilltop LLC therefore must obtain a

variance to the DON requirement in order to proceed. The applicable DON variance regulations unequivocally provide for either onsite expansion of volumetric capacity *or* offsite replacement of that capacity. These regulations explicitly prohibit the simultaneous use of both an “expansion” and “replacement” variance. Yet, Respondent Hilltop LLC has been approved to take the permit for a 2.3 acre commercial landfill and to create a 292.5 acre commercial landfill in its place, with no showing of need. In arguing that this massive proposed landfill is not a “new” facility; nor an “expansion” of an existing facility; nor a replacement with expansion; Respondents rely on everything except a straightforward or common sense reading of the statute and regulations. In contrast, the Petitioner’s case rests upon a simple principle: that the maneuver employed here by Hilltop LLC, in buying a small old landfill just to facilitate approval of a massive new facility with maximum annual disposal, is the very antithesis of our robust and well-established DON law.

II. ARGUMENTS

a. DES’s Permitting File Reflects that the Agency has Facilitated Extensive Manipulation of the DON Regulations.

Good defense lawyers are adept at convoluting even the most straightforward inquiries. Amongst all the rhetorical parsing so far, it is easy to lose sight of the fundamental nature of what the Respondents are jointly attempting to pull off here. Petitioners have already explained how B&K Grading and Paving (B&K)³ essentially purchased a liability (the 2.5-acre Hilltop landfill, at the end of its life) for the purpose of avoiding the DON requirement for its intended new landfill. See Petitioner’s SJ Exhibit 4, B&K Email Correspondence (“It was explained to us during the negotiations for the sale of this entity that the current permit could be moved.”). To be clear, this maneuver is not inherently problematic. Indeed, had B&K planned to just build another landfill

³ B&K owns the business entity known as Hilltop C&D, LLC, which operates Hilltop landfill. For clarity, the landfill will be referred to as Hilltop landfill while the business entity will be referred to as Hilltop LLC.

like Hilltop, one may even commend the company on its clever use of the regulations. The problem, of course, comes from the fact that B&K has pushed to take both the size (overall volumetric capacity) and, as it turns out, the annual disposal rate (allowable waste per year) far beyond that of the landfill supposedly being replaced.

Later in this memorandum, Petitioner will further explain how, despite DES's actions here, the DON variance language is actually crafted to prevent exactly this type of regulatory manipulation. For now, though, a closer look at certain aspects of DES's permitting file is warranted, as it sheds further light upon the extensive regulatory manipulation that led to the outcome at issue in this case.

i. Manipulation of annual disposal rate.

Whatever the Respondents' may say about the different stages of landfill approval and the nature of technical review, Respondent Hilltop LLC has undeniably submitted to DES a proposal to build a 293-acre disposal area on a 535-acre site, as a "replacement" for its 2.5-acre landfill. See Respondent Hilltop LLC's SJ Exhibit 9, Public Notice Materials (stating that the proposed replacement area has a "horizontal landfill area of 292.5 acres"). This effort to build a "replacement" landfill with substantially more total capacity has been well covered. What has not yet been discussed, though, is Hilltop LLC's parallel effort to manipulate the *annual* disposal rate at its existing landfill, so that its new "replacement" facility can accept significantly more waste annually than Hilltop landfill ever has. With this parallel regulatory manipulation brought forward, the irrationality (and, if you happen to be a resident of this community, the cruelty) of permitting Rabbit Hill landfill without any DON inquiry becomes even more plain.

Going back to the permitting file, B&K acquired Hilltop landfill in 2019 and shortly thereafter began the process of shuttering that landfill in favor of a new facility. By every

indication, including Hilltop/B&K's own representation, Hilltop landfill was very close to reaching capacity at that time. Indeed, in correspondence dated **April 23, 2023**, Hilltop LLC applied for the DON variance at issue in this case, stating: "**Hilltop landfill will reach its disposal capacity in the near future.**" Petitioner's SJ Exhibit 5, 2023 Application, p. 1 (emphasis added). Such a declaration makes sense, as the DON replacement variance is in fact only available when the landfill being replaced "exhausts its permitted capacity at its current location." S.C. Code Ann. Regs. R.61-107.17(D). In other words, only landfills that are full or nearly full are eligible to be replaced without satisfaction of the DON, and Respondent Hilltop LLC confirmed that Hilltop landfill was one of these facilities.

That being true, what doesn't make sense (at least on the surface), is why Hilltop LLC, only a couple of weeks after representing that their landfill was full, would seek to nearly double the allowable annual disposal rate of that landfill. Yet, that is exactly what Hilltop LLC did on **May 10, 2023**, requesting an annual disposal increase at Hilltop from 57,500 tons/year to 107,500 tons/year, *after* informing DES of Hilltop's closing, and despite the fact that Hilltop landfill had never reached its existing annual disposal rate. See Respondent Hilltop LLC's Exhibit 6, Ltr Requesting Increase in Annual Disposal Rate.

This seemingly strange and contradictory timeline only makes sense when considered in terms of maximizing manipulation of the replacement variance regulations. Those regulations provide that a "replacement" landfill is limited to the same annual disposal rate that is permitted for the landfill being replaced: "An operating ... landfill shall receive a variance to construct a replacement ... **at its permitted annual rate of disposal....**" S.C. Code Ann. Regs. R.61-107.17(D)(6). In other words, the Rabbit Hill landfill was going to be limited to the same maximum annual disposal as was approved for Hilltop Landfill. So, while Hilltop landfill certainly did not

need a disposal rate increase,⁵ Respondent Hilltop LLC nevertheless applied to double the allowable annual disposal rate, while it was in the process of closing Hilltop, so that the massive Rabbit Hill would be allowed to have a correspondingly massive disposal rate. If it even needs to be said at this point, nothing about this course of action suggests that the purpose of Rabbit Hill is to “replace” the function served by Hilltop landfill. Indeed, this course of action stands in stark contrast to what was undoubtedly the intent behind the creation of the “replacement variance,” not to mention any ordinary understanding of what it means for one landfill to replace another.

More remarkable than Hilltop LLC’s pursuit of this strategy is that DES actually approved the disposal rate increase for Hilltop landfill on **January 12, 2024**, four months *after* the Rabbit Hill landfill (supposedly Hilltop’s replacement) had been placed on public notice (Sept. 14, 2023) and a **mere three months before** the Agency issued its determination that Rabbit Hill landfill qualified for a replacement variance with a disposal rate of... you guessed it... 107,500 tons/year. See Respondent Hilltop LLC’s SJ Exhibit 4 and SJ Exhibit 9.

So, in total we have a 2.3-acre landfill that never reached its 57,500-ton yearly limit, being replaced by a 293-acre landfill that can accept 107,500 tons of waste per year. An ordinary person may say this sounds like an expansion. But, the Respondents have said that it is not... at least, they’ve said that when it serves their manipulation of the variance regulations.

ii. *“Expansion” in their own words.*

While it is noted in Respondent Hilltop LLC’s brief, it must be highlighted in the proper context that Hilltop LLC explicitly, unequivocally asked DES for approval to “expand” Hilltop landfill at 331 Dixie Clay Road, **the proposed location of Rabbit Hill**. By correspondence dated

⁵ Note that **25,500** tons of waste were disposed of in Hilltop landfill in 2024, after DES approved increasing its maximum annual disposal from 57,500 to 107,500 tons/year. See S.C. Solid Waste Management Report for Fiscal Year 2024, p. 30.

April 25, 2023, the professional engineering firm hired by Hilltop LLC states as follows: “The purpose of this letter is to officially request the South Carolina Department of Health and Environmental Control (DHEC) to make a determination on the demonstration of need (DON), and consistency with solid waste management plans, zoning, and certain buffers for this **landfill expansion request.**” Respondent Hilltop LLC’s SJ Exhibit 5, p. 1. Note that this is not a casual misstatement by Hilltop LLC’s engineers. Indeed, the literal file name for the letter, which appears in the footer of the document is <H:\Projects\B&K Grading and Paving (SC)\B&K-23-1 (Dixie Clay DON)\Demonstration of Need\Class 2 **Expansion Letter of Request.docx**>. *Id.* at p. 2 (emphasis added). Further, the subject line of the letter is “Class 2 Landfill **Expansion Letter of Request,**” and the writer explains therein that Hilltop intends to expand their Class Two landfill facility on a portion of the property (Subject Property) **located off Dixie Clay Road, Beech Island, Aiken County, South Carolina (Figure 1). The Subject Property to be utilized for the Hilltop expansion is currently owned by two (2) separate entities... .**” *Id.* (emphasis added).

The content of this Expansion Letter of Request—which undoubtedly is an accurate reflection of how this project was discussed internally at Hilltop LLC—is clear and doesn’t require further exposition. Nevertheless, it is worth noting that Respondent has attempted to pass this letter off as a mistaken attempt to expand Hilltop landfill *onsite*—a mistake that was later corrected when Hilltop LLC realized that onsite expansion was infeasible. That sidestep obviously falls flat in light of the numerous references to the location of Rabbit Hill landfill. Far from some mistake or mischaracterization, Respondent Hilltop LLC recognized that the project it was pursuing fit the plain meaning of an “expansion,” and it changed that descriptor only because it wouldn’t allow Hilltop to avoid the DON requirement.

To wit, even after their error in the initial application was “realized” and re-submitted, the public notices issued by Respondent Hilltop LLC continued to reference an “expansion” of the original 2.3 acre landfill to one of 292.5 acres. See Respondent Hilltop LLC’s SJ Exhibit 9.

In concluding this argument, it is worth reminding the Court that all of this regulatory manipulation—of the annual disposal rate, of the total disposal capacity, of the inherent nature of the project—is to avoid satisfying a basic landfill permitting requirement. If Hilltop LLC would just satisfy the DON, this case would not exist, and landfill construction would likely be in progress. Surely all of the regulatory manipulation, which frankly jumps off the page in the case, can’t be rewarded, when all the Petitioner would ask is that Hilltop LLC stop trying to force a variance and build a landfill in a location that can actually satisfy the normal permitting requirements (or build another facility the same size as Hilltop landfill).

- b. The “Expanded Replacement” Loophole Pursued by the Respondent here has Already been Closed.

As previewed at the outset of this memorandum, the DON variance regulations are actually set up to prevent exactly the sort of DON avoidance scheme that has taken place here. As a reminder, those variance regulations read as follows:

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...

- b. A Class Two or Class Three landfill shall receive a variance to **expand the volume** of an existing facility...

- e. An eligible facility shall apply to the Department for a variance to **replace or expand the volume of an existing 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. R.61-107.17(D).

While subsection (e) was discussed in the Petitioner's Motion, it is worth revisiting that provision, in light of all the convolutions introduced since. If the Court is looking to cut to the essence of this case, Petitioner submits that it can most easily do so by reference to subsection (e). That subsection seems very odd on its surface, with its specification that a landfill cannot operate under both variances, but then with the inclusion of a "transition period" where both variances can be held. What could be the point of such a provision? Petitioner submits that, upon detailed consideration, only a single possible purpose emerges. Indeed, there is only one single circumstance where subsection (e) could be implicated, and that is the one at hand: when an applicant attempts to manipulate the DON regulations through strategic acquisition of a sunseting landfill.

To start, note that, as a general rule, all landfills automatically (without satisfying any other conditions) get a DON variance for onsite expansion. See Id. at (D)(6)(a). This expansion variance is broad and straightforward, and it clearly reflects that the legislature very much encourages the onsite expansion of landfills. Indeed, every single landfill gets a pass on DON for onsite expansions except, by virtue of subsection (e), in one narrow circumstance: that being, when the landfill is operating as a "replacement." In short, only a replacement landfill must satisfy the DON for onsite expansion. What could be the reason for this very specific carve out? If onsite expansion of existing landfills is so favored, why would the regulations prevent a landfill from expanding, just because that landfill happened to be built under a replacement variance?

In getting to the bottom of the intent behind subsection (e), the inclusion of the 180-day transition period is particularly telling. Under that provision, a landfill is allowed to operate under both an expansion variance and a replacement variance for 180 days. On its surface, this is another odd provision. And, once again, it can only be implicated in a single circumstance. To wit, consider the following examples:

- 1) An old landfill is “replaced” at a new location (replacement variance). Years pass and the landfill company then seeks to expand. Expansion variance eligible?
 - a. No. A landfill constructed under a replacement variance is always operating under that variance. Allowing that landfill to expand under a variance would mean that the facility would be operating under both variances for its operational life. Subsection (e) says that DON must be satisfied for the expansion.
- 2) An old landfill was previously enlarged under an expansion variance, but that expansion is now also full, and the landfill company seeks to build a replacement facility. Replacement variance eligible?
 - a. Yes! The one and only time the 180-day transition period could be implicated is when a previously expanded landfill pursues a replacement variance. In such case, the old facility can close out operations (over 180 days), while the new facility (the replacement) is up and running.

So, the 180-day transition period facilitates the replacement of a previously expanded landfill, but prevents the expansion of a previously replaced landfill. What could possibly be the logic behind treating these circumstances differently? **Why would DES and the legislature single out expansion of “replacement” landfills as the one and only time when a DON variance is not available?**

The only possible answer is to prevent improper manipulation of the DON variance regulations. That is, if a “replacement” landfill can later be expanded without satisfaction of the DON, this opens the possibility that landfill companies could strategically acquire old, sunseting facilities, “replace” them, and later move to massively expand the replacement facilities. This

loophole would allow the construction of major new landfills without the DON ever being satisfied. As stated in Petitioner's Motion, this loophole would then become a straightforward path for landfill companies to build massive new facilities in areas where they otherwise would not be allowed.

Simply put, the one and only reason for subsection (e) to exist is to close this loophole—there is no other circumstance where the subsection could be implicated—no other reason for favoring expand-then-replace over replace-then-expand. In other words, the possibility of all of the regulatory manipulation discussed above is the very reason why subsection (e) exists. If Rabbit Hill landfill, instead of being 293 acres, were built at the same 2.3 acres as Hilltop landfill, any subsequent expansion of Hilltop landfill would not qualify for a variance, and the DON would have to be satisfied. Yet, somehow, by being more aggressive and going for it all in one fell swoop, Hilltop LLC gets its massive new facility without ever satisfying the DON. It goes without saying that allowing such a course of action to stand would blow an enormous hole in the Solid Waste Management Act and the DON regulations. Stated in another way, interpreting the regulations as the Respondents would suggest effectively negate subsection (e).

- c. The Mention of “Annual Rate of Disposal” in the Regulations does not Dictate that it is the only Metric for evaluating what is a “Replacement.”

Respondent Hilltop LLC has argued that the *only* metric for consideration of the replacement variance is the annual rate of disposal, to the exclusion of total landfill capacity. See Hilltop LLC's Response, p. 16 (stating “[a]nd the only volume-based requirement associated with the consideration of a DON variance...is that the annual rate of disposal from an existing landfill is maintained in the replacement landfill”). As an initial matter, the preceding arguments decisively show how this cannot be the case. If total capacity is not a consideration in relation to replacement

landfills, that once again means that subsection (e) has been rendered irrelevant. Stated more precisely, there is no possible rationale for ignoring total capacity in relation to the replacement variance, while simultaneously preventing a replacement landfill from later getting an expansion variance. Going back to the example just used, the Respondent is arguing that it is perfectly fine for them to jump from 2.3 acres to 293 acres in one go, though they would clearly be prevented from doing the same thing in two steps. Why would the regulations be written to allow for every landfill to expand pursuant to a variance, except replacement landfills, if replacement landfills could expand by 100+ times as part of the replacement variance process? There is no way of reading the variance regulations cohesively under the Respondents' interpretation. Respondents' interpretation falls apart because total volumetric capacity is in fact built into the replacement variance analysis, not just by virtue of subsection (e), but also because of the plain meaning of the word "replacement," and by virtue of the arguments that follow.

Petitioner agrees that the regulation states that the replacement facility is to be "permitted [at its] *annual rate of disposal*." S.C. Code of Ann Regs R.61-107.17.D.6(a). Petitioner also agrees that a facility can receive an expansion variance to "expand...the permitted *volumetric capacity* of an existing solid waste management facility." *Id.* at B.8. However, if increasing the volumetric capacity meets the regulation's definition of "expansion" of an existing facility, then a replacement cannot do that very thing, just at a different location, and effectively evade demonstration of need requirements. Such a narrow reading of the regulation would render other provisions superfluous. See 16 Jade Street, LLC v. R. Design Const. Co., LLC, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012)("[courts] are to construe a statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.'").

The critical dichotomy the Respondents overlook is the division between expansion of volumetric capacity and replacement of volumetric capacity as alternative paths. In its Response, Respondent Hilltop LLC asserts that “the General Assembly consciously chose to define expansion facilities by reference to the volume [of the facility], but... did not define replacement facilities to be similarly constrained, suggest[ing] the omission was intentional.” Respondent Hilltop LLC’s Response, p. 22. What Respondent Hilltop LLC is interpreting as an *omission* is instead a logically obvious *alternative*; it was unnecessary for the General Assembly to explicitly restate what is provided for in other regulatory provisions as mutually exclusive, opposing paths. S.C. R61-107.17.D.6(e).

Further, a reasonable interpretation of the statute as a whole would not confuse absence of a term or phrase in one provision to be persuasive in permitting violations of other explicit regulatory prohibitions. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)(stating that courts are instructed to “read the statute as a whole and in a manner consonant and in harmony with its purpose.”); *See also Books-a-Million*, 2017 WL 2540343, at *4 (stating that “[a] reading of a statute that requires eliminating words within the statute is not reasonable and does not comport with the plain meaning rule.”). In this case, to interpret that a replacement variance also allows for an expanded facility with an increase in volumetric capacity would, in effect, swallow the other regulatory prohibitions and fundamentally thwart the legislative purpose behind the Act.

- d. Deferring to the “Technical Phase” of Permitting is Simply an Attempt to Sidestep Review of the Landfill Permitting Requirement that is most Significant to Community Protection.

Respondent further attempts to quell concerns for its massive increase in volumetric capacity by misrepresenting “phases” in the permitting process and attempting to present Petitioner’s complaints as premature. Respondent’s suggestion that consideration of a facility’s total capacity is restricted to what they refer to as “Phase II” is inconsistent with the plain language of the DON regulations.

While it is certainly true that there is a second phase in the landfill permitting process, this fact has no bearing on Petitioner’s Motion for Summary Judgment. The DES approval at issue in this case is the only stage in the landfill permitting process where the DON and variances thereto will considered or reviewable. See Respondent Hilltop LLC’s Exhibit 1, page 8 (stating that Phase 1 encompasses a consistency review, including a DON determination). This contested case is unequivocally the Petitioner’s one opportunity to challenge the DON variance upon which this project hinges.

In justifying its position, much like the Wizard of Oz, Respondent is asking that the Court “pay no attention to the man behind the curtain.” Hilltop LLC has repeatedly represented to DES and the public that its landfill will be 293 acres in size, including in the very public notice of the decision at issue in this case. See Respondent Hilltop LLC’s SJ Exhibit 9, Public Notice Materials (referencing the proposed “horizontal landfill area of 292.5 acres”). Hilltop LLC’s engineers have submitted official documents to DES showing the 293-acre footprint of the landfill. See Petitioner’s SJ Exhibit 5, p. 5. Yet, before this Court, it is as if nothing can be known about the landfill until the next phase of landfill permitting. That would be very convenient for landfill proponents, but it would effectively render unreviewable the most important protection the public has in the landfill approval process.

Respondent's position is entirely inconsistent with the existence of an expansion variance, as embodied in R.61-107.17(D). DES's evaluation of a proposed expansion variance is not possible without consideration of the total volumetric capacity of the landfill involved. It is illogical to argue that the total capacity of a landfill is beyond the scope of this phase of landfill approval, when variances to increase total capacity are a part of this phase of landfill approval. In short, consideration of a landfill's total capacity is necessarily within the scope of the DON variance approval at issue in this case. Indeed, in order to effectively administer R.61-107.17(D), consideration of the total capacity of a proposed "replacement landfill" should be a necessary part of the Agency's consideration of any variance request.

e. The Principles of Statutory Interpretation Support Replacement of Volume and Expansion of Volume as Alternative Paths.

Finally, as an additional, independent basis for relief, Petitioner directs the Court back to R.61-107.17(D)(6)(e) and its instruction that "[a]n eligible facility shall apply to the Department for a variance to **replace or expand the volume of an existing facility.**" (emphasis added). In this case, the more reasonable construction of this "alternative" language is that "replace" and "expand" both modify "the volume of an existing facility." In other words, "replacing the volume of an existing facility" and "expanding the volume of an existing facility" are the two options for obtaining a DON variance. The alternative reading (that there is a "variance to replace" and "a variance to expand the volume of an existing landfill") does not comport with logic or the principles of statutory construction.

While statutory construction may sometimes limit a modifier—in this case "the volume of an existing facility"—to modifying only the nearest referent, this interpretation is "not an absolute and can assuredly be overcome by other indicia of meaning." Barnhart v. Thomas, 540 U.S. 27,

124 S.Ct. 376, 157 L.Ed.2d 333 (2003). Moreover, it 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’” Lockhart v. U.S., 577 U.S. 352, 136 S.Ct. 958, 194 L.Ed. 48 (2016) (quoting Porto Rico Railway, Light & Power Co. v. Mor, 253 U.S. 348, 40 S.Ct. 516, 64 L.Ed.944 (1920)); see also United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (where the Court declined to apply the rule of the last antecedent in instances where “there is no reason consistent with any discernable purpose of the statute to apply” the modifier to the last antecedent alone).

The more reasonable, intuitive interpretation of the language in this case supports the application of the series-qualifier canon. See Nobelman v. American Savings Bank, 508 U.S. 324, 330–331, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). Under the series-qualifier canon, “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,” a modifier at the end of the list “normally applies to the entire series.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). Further, when the modifying clause “is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” Porto Rico Railway, 235 U.S. 345, 348, 40 S.Ct. 516 (1920). In this case, interpreting “the volume of an existing facility” to apply to both “replace” and “expand” is not only the more reasonable interpretation but is further supported by the purpose of the Act and the regulatory context in which this provision is written. “Sometimes context weighs against the application of the rule of the last antecedent.” Barnhart, 540 U.S., at 26, 124 S.Ct. 376. In this case, such context not only outweighs but *necessitates* modifying both “replace” and “expand” so that it may comport with other regulatory prohibitions. Any outcome contrary would render those prohibitions meaningless and lead to absurd results.

Conclusion

Under Respondents' arguments, any interested party that seeks to create a massive commercial landfill without regulatory constraint can purchase a small, already permitted landfill and apply for a "replacement" facility variance to avoid the DON requirement—all while still being allowed to increase the volumetric capacity by over 100x and bearing no regard for the public interests intended to be protected by the Act. Not only is that result contrary to the entire idea of a DON, but it is dangerous to public health and the environment.

With no genuine issue of material fact in dispute, Petitioner is entitled to judgment as a matter of law and Respondents' Cross-Motions for Summary Judgment necessarily fail. For the reasons set forth herein, the Petitioner requests that the court enter an Order granting summary judgment in the Petitioner's favor and against Respondents.

Respectfully submitted,



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Greenville, South Carolina

April 11, 2025

Friends of Horse Creek Valley,)
)
)
Petitioner,)
v.)
)
South Carolina Department of)
Environmental Services and Rabbit)
Hill Class 2 Landfill)
Respondents.)
)



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May 1, 2025

VIA HAND DELIVERY

The Honorable S. Phillip Lenski
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: *Friends of Horse Creek Valley v. SCDES and Rabbit Hill Class 2 Landfill*; Docket No. 24-ALJ-07-0316-CC

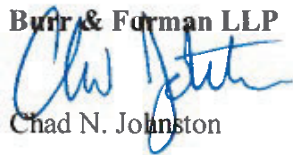
Dear Judge Lenski:

Enclosed for filing please find the original and one copy of Respondent Rabbit Hill Class 2 Landfill's Reply in Support of its Cross Motion for Summary Judgment in the above-referenced matter. I would appreciate it if you would accept the original for filing and return the extra copy bearing your file stamp via our courier.

By copy of this letter, we are serving same on Petitioner Friends of Horse Creek Valley and Respondent South Carolina Department of Environmental Services and enclose a certificate of service to that effect. With best regards, I am

Very truly yours,

Burr & Forman LLP



Chad N. Johnston

CNJ/lla
Enclosures

AL • DE • FL • GA • MS • NC • SC • TN

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ROA 545

The Honorable S. Phillip Lenski

May 1, 2025

Page 2 of 2

cc: Michael G. Corley, Esquire
James Huey, Esquire
Etta R. Williams Linen, Esquire
Juan Tolley, Esquire
Christopher P. Whitehead, Esquire
(all via email and U.S. Mail)

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,	)	Docket No. 24-ALJ-07-0316-CC
	)	
Petitioner,	)	
	)	
v.	)	RABBIT HILL CLASS 2 LANDFILL’S REPLY IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT
	)	
South Carolina Department of	)	
Environmental Services and Rabbit Hill Class	)	
2 Landfill,	)	
	)	
Respondents.	)	
	)	

Pursuant to the Court’s Order on April 17, 2025, and Rules 19(A) and 68 of the Rules of Procedure for the South Carolina Administrative Law Court (SCALC), Respondent Rabbit Hill Class 2 Landfill (Rabbit Hill) submits this Reply (Reply) to Petitioner’s combined reply in support of its Motion for Summary Judgment (Motion) and response (collectively hereinafter, Response) to Rabbit Hill’s and the South Carolina Department of Environmental Services’ (DES) respective Cross Motions for Summary Judgment (RH Cross Motion and DES Cross Motion, respectively, and collectively the Cross Motions).

I. Introduction

“Court[s] ... do[] 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). Despite that inherent truism of any case requiring statutory and regulatory application, the Response lays bare the true nature of Petitioner’s misguided challenge here: a policy argument advocating for what Petitioner believes the Regulations *should say* and attempting to have this Court legislate that policy from the bench rather than adhere to requirements actually adopted by the General Assembly. *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)). Faced with the Cross Motions’ straightforward analysis and application of the plain language of the Regulations to the limited Phase I Determination that is the subject of this challenge, and despite claiming that its “case is based entirely upon a question of statutory interpretation,” Response at 1, the Response quickly devolves into accusations of “regulatory manipulation” and dismay that DES followed the letter of the law, rather than Petitioner’s preferred policy and belief as to what the regulations should require. However, “so long as the [legislature’s] exertion of power bears a reasonable relation to a legitimate purpose sought to be accomplished, the courts may not interfere. With the wisdom and policy of legislative enactments[,] they have no concern. Being forbidden by the Constitution to invade the legislative domain, they cannot substitute their judgment and discretion for that of the lawmakers.” *Brennen v. S. Express Co.*, 106 S.C. 102, 116, 90 S.E. 402, 406 (1916). This Court should decline Petitioner’s invitation to wade into the murky waters of policy-making. *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 sole inquiry before this Court is to determine whether the Phase I requirements of a Class II landfill seeking a replacement variance to the Demonstration of Need (DON) requirements under Regulation 61-107.17.D.6 have been met. In rendering a decision as a matter of law, this Court is confined to the canons of regulatory interpretation. Just as in statutory interpretation, the plain meaning canon is applied when working with an unambiguous regulation. Contrary to the wishes of Petitioner, this Court cannot add or omit words from the regulation, or divine an intent therefrom that is not express, in order to determine the implications for an affected party. Petitioner’s policy preferences, on the other hand, are illegitimate drivers of regulatory

interpretation. In those slim moments where Petitioner addresses the text of the Regulation, Petitioner fails to present a faithful reading which aligns with the canons of regulatory interpretation.

Further, as it did in its Motion, Petitioner fails to remain squarely in a discussion of law, consistently supplanting discussions purportedly based on law with naked policy monologues based on preference. Petitioner believes that, because the Replacement Landfill is larger than the Existing Landfill, it cannot be characterized as a “replacement,” but should rather be construed as a replacement *and* an expansion that is alternatively disallowed or requires a showing of DON. Response at 1-2. While the regulations provide that size, *i.e.*, capacity, is a factor that DES may consider in evaluating an expansion variance, *see* S.C. Code Ann. Regs. § 61-107.17.B.8, the plain text of the replacement variance regulation demonstrates that size is not a factor that the General Assembly-adopted regulation has directed DES to consider, *id.* at –D.6.a. Without an express requirement to consider the volumetric capacity of a replacement landfill in the context of a requested variance from DON, Petitioner argues that this Court should *infer* such a requirement. However, this argument is inherently a policy preference of Petitioner that is wholly inconsistent with the strictures of statutory and regulatory construction.

By correcting the record through an appropriate regulatory analysis and eliminating Petitioner’s erroneous, and oftentimes tangential forays into policy arguments, Rabbit Hill reasserts that granting the Cross Motions as a matter of law is appropriate, permitting it to proceed with the second, technical phase (Phase II) of the landfill permitting process in accordance with the Regulations.

II. Argument

a. **Petitioner's assertions of regulatory manipulation and reliance on a withdrawn and inoperable application, are telling.**

Lest the Court have any question as to whether Petitioner's arguments are rooted in policy preferences, rather than application of the regulations as drafted, Petitioner leaves little doubt by starting its Response with concocted and frivolous assertions that: (1) by availing itself of procedures and allowances afforded by the regulation, Rabbit Hill has somehow "manipulated" the regulation with DES's assistance; and (2) a withdrawn application (which Rabbit Hill forthrightly brought to the Court's attention in the RH Cross Motion) that mistakenly mislabeled the relief that it sought, somehow controls over the resubmitted application that gave rise to the Phase I Determination that is actually before the Court. Not only are these issues, and Petitioner's transparent attempt to ascribe ill-intent thereto, not properly before the Court in this contested case, but they represent little more than pounding the table¹ as a distraction.

i. **The plain language of the regulation permits Rabbit Hill to seek an increase in its annual disposal rate of the Existing Landfill and Petitioner's assertion that DES has "facilitated extensive manipulation" by Rabbit Hill is frivolous.**

As an initial matter, Rabbit Hill's decision to seek an increase in its annual disposal rate at the Existing Landfill, and DES's subsequent decision to grant that request, has not been challenged by any party, is not a part of this contested case, and does not factor into this Court's analysis of the Phase I Determination.² In short, it is a distraction from the relevant issues before the Court

¹ *Magin v. Solitude Homeowner's Inc.*, 2011 WY 102, ¶ 53, 255 P.3d 920, 935 (Wyo. 2011) (recounting the old legal adage that "[w]hen you have compelling facts, pound on those facts. When the law is agreeable to your position, pound on the law. When you have neither favorable facts nor law, pound the table.").

² As discussed in the RH Cross Motion, 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

and nothing more than Petitioner’s attempt to paint Rabbit Hill and DES in a bad—and conspiring—light.

As recounted in the RH Cross Motion, on May 10, 2023, Rabbit Hill applied for an increase in the annual disposal rate when its 2022 volume of accepted waste surpassed eighty (80) percent of the then current-annual disposal rate.³ See RH Cross Motion, **Exhibit 6**. Under Regulation 61-107.17.D.3.d., “[a]n 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....” As referenced in the regulation, such an increase is not left to the discretion of DES, but rather is allowed as a matter of right. *Id.* (stating that it “shall be allowed”). Under Regulation 61-107.17.D.3.d.(1), if a landfill 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, as reported in the most recently published S.C. Solid Waste Management Annual Report when the request is made.” Because, under the rubric established by Regulation 61-107.17.D.3.d.(1), the Existing Landfill qualified for a 50,000-ton increase in its annual disposal rate, that is what Hill Top sought.⁴

qualifying for the replacement variance be permitted at its “annual rate of disposal,” which unquestionably happened here.

³ During fiscal year 2022, the Existing Landfill received 46,865 tons of general construction and demolition debris-type waste, representing 81.5% of the Existing Landfill’s permitted annual disposal rate and qualifying the Existing Landfill for an increase. See **Exhibit 1**, Existing Landfill 2022 Annual Report.

⁴ 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

On January 12, 2024, DES acted upon Rabbit Hill’s request to increase the annual disposal rate at the Existing Landfill, approving same. RH Cross Motion, **Exhibit 4**. Public notice of DES’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 Petitioner. As a result, **the annual disposal rate increase is final and not properly before the Court.**

Notwithstanding, Petitioner attempts to construe Rabbit Hill’s action in this regard—which is specifically authorized by the regulation—as “parallel regulatory manipulation” that is “irrational[.]” *See* Response at 3. To accomplish this disparagement, Petitioner attempts to tie the annual tonnage increase request to Rabbit Hill’s replacement application, asserting that this was part of a “strategy” to game the system. *Id.* at 5; 4 (“This seemingly strange and contradictory timeline only makes sense when considered in terms of maximizing manipulation of the replacement variance regulations.”). To be clear, Petitioner’s assertion in this regard is factually incorrect and entirely unsupported. But it is also patently beside the point and nothing more than

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 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 to 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 seek a 50,000 ton per year increase in its annual disposal rate.

a manufactured distraction in this contested case that again seeks to steer this Court away from the plain language of what the regulation explicitly allows.⁵ Instead, because Petitioner does not like the result of the regulation's application in this instance, it seeks to impose its preferred outcome through a policy argument that ascribes bad faith to Rabbit Hill for availing itself of what the law allows, in favor of a regime that would grant this Court the discretion to override the plain language of the regulation.

Because DES's grant of the annual disposal rate increase for the Existing Landfill is not properly a part of this contested case, and its approval was proper under the regulation in any event, the Court should reject Petitioner's transparent efforts and invitation to wade into the policy arena as a super-legislature.

ii. Petitioner's attempt to rely upon and misconstrue a withdrawn application demonstrates the lengths it is willing to go to in order to avoid a straightforward application of the regulation.

Petitioner next attempts to place great weight on a mistake that Rabbit Hill initially made in seeking approval of the Replacement Landfill. *See* Response at 5-7. As disclosed by *Rabbit Hill* in the RH Cross Motion, Rabbit Hill initially sought a permit for an "expansion" of the Existing Landfill. RH Cross Motion, **Exhibit 5**. While the submission purported to seek an "expansion" of the Existing Landfill, a review of the application actually reveals its true intent was to seek a replacement, as it expressly noted that **"it is not possible to expand landfill operations at the**

⁵ In fact, Petitioner admits that the regulation allows an entity to purchase a landfill that is close to the end of its useful life, *i.e.*, maximal total capacity, and, assuming that it has not been previously replaced and otherwise qualifies under the regulation, replace that facility, thus undercutting its "regulatory manipulation" argument. *See* Response at 2 ("To be clear, this maneuver is not inherently problematic."). It just doesn't think that the replacement landfill should be allowed to have a greater total disposal capacity than the landfill it is replacing, seeking to superimpose a "size" component preference to the solid waste permitting of replacement facilities that is inconsistent with express conditions set by the General Assembly in the South Carolina Solid Waste Policy and Management Act (the Act) and implementing regulations.

[Existing Landfill] location,” and instead sought to “expand [its] Class Two landfill facility on a portion of the property ([the Replacement Landfill site]) located off Dixie Clay Road, Beech Island, Aiken County, South Carolina.” *Id.* (emphasis added). Thus, the permitting action actually sought by Rabbit Hill, albeit through incorrect terminology in the request, was not expansion of the Existing Landfill, but rather replacement of the Existing Landfill at the Replacement Landfill site.⁶

Regardless, that initial application was administratively withdrawn when Rabbit Hill, recognizing its mistake, revised and re-submitted a new application on June 6, 2023 that 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). RH Cross Motion, **Exhibit 3**. Accordingly, and similar to the annual disposal rate increase, the initial April 23, 2023 application is not before the Court in this contested case, as it was never acted upon by DES, was superseded by Rabbit Hill’s subsequent submission, and has no bearing on DES’s Phase I Determination for replacement variance that has been challenged.

Notwithstanding, Petitioner again seeks to impute some greater meaning and “manipulation” on these proceedings “because [the initial application] wouldn’t allow Hilltop to avoid the DON requirement.” Response at 6.⁷ Indeed, had Rabbit Hill actually been seeking to

⁶ Contrary to Petitioner’s assertion, the RH Cross Motion did not try to “pass this letter off as a mistaken attempt to expand [the Existing Landfill] onsite,” and Rabbit Hill did not later “realize[] that onsite expansion was infeasible.” As expressly repeated in the initial mistaken application, and as quoted in the RH Cross Motion, *see* n.4, Rabbit Hill’s intent was always plain that it was seeking approval of the Replacement Landfill site. *See* RH Cross Motion, **Exhibit 5**.

⁷ Petitioner’s even falsely assert that, “even after [Rabbit Hill’s] error in the initial application was ‘realized’ and re-submitted, the public notices issued by Respondent Hilltop LLC continued to reference an ‘expansion’ of the original 2.3 acre landfill to one of 292.5 acres.” Response at 7 (citing RH Cross Motion, **Exhibit 9**). However, the public notices detailed in **Exhibit 9**, transmitted to DES on November 1, 2023, do not reference an “expansion” of the Existing Landfill at all.

expand the Existing Landfill, which it is plainly evident it was not, then such an application for an expansion would have also been allowed under a variance of the DON requirement under Regulation 61-107.17.D.6.b., demonstrating the absurdity of Petitioner's contrived attempts at imputing bad faith to Rabbit Hill's actions. Further, it can hardly be credibly stated—although Petitioner does—that this was all part of some illicit grand design by Rabbit Hill “to avoid satisfying a basic landfill permitting requirement,” *see* Response at 7 (referring to the DON requirement), when a variance to the DON requirement is precisely what the regulation allows for existing landfills seeking to replace themselves.

This fact is further buttressed by reference to the Act, wherein the General Assembly expressed its intent that “[t]he department may, by regulation, exempt certain facilities from all or part of the requirements of this section,” *see* S.C. Code Ann. § 44-96-290(A), and further expressly instructed that DES “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.* at –290(D) (emphasis added).⁸ Again, an entity availing itself of the law is not “regulatory manipulation,” and the only thing that “jumps off the page” in this case is Petitioner's misapprehension of those regulations and its attempt to impose its preferred policy as to what the regulations *should* say, rather than what they actually say.

⁸ Having been presented with the express statutory authority for DES to promulgate regulations allowing for exemptions and variances in the RH Cross Motion, Petitioner understandably appears to have abandoned its misguided alternative argument in support of summary judgment that the Act does not “provide for a potential variance from the DON requirement,” Motion at 2, and that the variance regulation is in conflict with the Act, *id.* at 8-9.

b. Rabbit Hill neither sought nor was granted both an “expansion” variance and a “replacement” variance.

Curiously, Petitioner spends a significant portion of the Response theorizing on the application of Regulation 61-107.17.D.6.e., which provides in pertinent part that “[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.” Response at 7-10. Even more curious is the significant discussion as to what the 180-day transition period specified by Regulation 61-107.17.D.6.e. means, and Petitioner’s hypothesizing as to its potential application. *Id.* (“A reasonable transition period is considered to be approximately one hundred eighty (180) calendar days.”); Response at 9. To be clear, Rabbit Hill neither sought nor was granted both an “expansion” variance and a “replacement” variance, and subsection (e) has no application in this contested case.⁹ Nor is Rabbit Hill seeking to expand a replacement landfill, another straw man argument posited by Petitioner in an effort to manufacture an issue where none exists. *See* Response at 9-10 (“That is, if a ‘replacement’ landfill can later be expanded without satisfaction of the DON, this opens the possibility that landfill companies could strategically acquire old, sunsetting facilities, ‘replace’ them, and later move to massively expand the replacement facilities.”). In short, this entire argument is irrelevant to the issues in this contested case.

⁹ Rabbit Hill does not agree with Petitioner’s hypotheticals and theories as to the application of the transition period, or certainly Petitioner’s inappropriate and conclusory assertion of law that “the 180-day transition period facilitates the replacement of a previously expanded landfill, but prevents the expansion of a previously replaced landfill.” Response at 9; *see J. Annette Oakley v. Beaufort County Assessor*, No. 18-ALJ-17-0233-CC, 2018 WL 5910442, at *3 (Lenski, J., Nov. 7, 2018) (“The question of statutory interpretation is one of law for the court to decide.”) (citing *Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870 (2012)).

The Motion superficially argued that, because Rabbit Hill has sought a variance for a replacement facility, and because the Replacement Landfill is larger in size than the Existing Landfill, Rabbit Hill has, *ipso facto*, sought and received both a replacement variance and an expansion variance. The Response appears to double-down on this misapprehension, but now argues *for the first time in reply* that Rabbit Hill has presumably created, and is now seeking to exploit, a loophole in the regulations for an “expanded replacement.” But as explained extensively in the RH Cross Motion, merely stating, and repeating, such an argument does not make it true. In truth, Petitioner is the author of this straw man loophole, a creation of its own making to again advance a policy argument, rather than engage on the substance of what the regulations actually provide: “[i]t goes without saying that allowing such a course of action to stand would blow an enormous hole in the Solid Waste Management Act and the DON regulations.” Response at 10.

As explained in the RH Cross Motion, reference to the applicable regulations refute Petitioner’s assertion. Of the two types of variances available under Regulation 61-107.17.D.6., only expansion is defined. *See* Regulation 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); –B.40. (defining a “lateral expansion” as “a horizontal expansion of the footprint of an existing landfill”) (emphasis added); –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); Regulation 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). Thus, 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 Petitioner to create the supposed “loophole” it so desperately seeks to exploit. Because Rabbit Hill has not sought to expand the Existing Landfill, Petitioner’s attempt to construe the application as an “expansion,” or as a “replacement and expansion,” runs directly contrary to the plain language of the regulations.

By contrast, “replace” or “replacement” is not defined in the regulations.¹⁰ However, 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,” –(A)(1), and that “[a] number

¹⁰ Petitioner suggests that, in the face of the unambiguous regulation proscribing the appropriate considerations for DES to employ in evaluating a replacement variance, “the ordinary understanding of what it means for one landfill to replace another” should control, *see* Response at 5, which Petitioner posits as a replacement that is larger than the existing cannot constitute a replacement. However, Petitioner fails to provide any authority establishing the “ordinary” definition of the word. In the absence of meaningful justification, Petitioner uses the different descriptors of “like” and “same size as” when describing what it wishes for the regulations to mean, with the clearest example of Petitioner’s desired definition of being the “same size as.” *Id.* at 7. This fits with Petitioner’s repeated policy pleas that the capacity of the Replacement Landfill is inappropriately larger than that of the Existing Landfill. Unfortunately for Petitioner, this policy preference is unsubstantiated and further challenged upon a survey of both the legal and non-legal usages of “replace” or “replacement.” *See, e.g.,* Black’s Law Dictionary, Replacement Cost, also termed “functional replacement cost.” (12th ed. 2024) (discussing an item that replaces another, stating that “the new [replacement] asset has the same utility but may or may not be identical to the one replaced.”); *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 Apr. 24, 2025) (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.”). As is evident in such survey, the through line of a “replacement” is restoring, and usually improving, the function through a new item, and is not understood as an identical substitute. 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, and, commonly, improved.

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, 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.

- c. **The plain language of the regulation neither expressly imposes a volumetric capacity restriction on variances for replacement landfills nor implicitly requires DES to undertake such an analysis.**

Applications for expansions are required to evaluate “the permitted volumetric capacity of an existing solid waste facility,” *see* S.C. Code Ann. Regs. § 61-107.17.B.8, but the regulations do not impose such a requirement on DES as to replacement facilities. The only volume of waste constraint imposed by the regulations on replacement landfills is that they must be authorized for the “permitted annual rate of disposal” of the existing landfill. S.C. Code Ann. Regs. § 61-107.17.D.6.a.

Petitioner now concedes that is what the regulations actually state and provide, abandoning the Motion’s incorrect assertion that “the DON variance regulations, in plain language, present a straightforward choice for the owner of an existing landfill. That owner may: **(1) obtain a DON variance to expand the permitted volumetric capacity at the present landfill location; (2) obtain a DON variance to replace the permitted volumetric capacity of the existing landfill at a new location...**” Motion at 7-8 (bolding in original, italics added). Yet here again, Petitioner poses a policy question to the Court, albeit based its incorrect conclusion of law, *see* n.9 *supra*, that advocates for reading extra requirements into the regulation for DES to apply to replacement

variances: “[w]hy would the regulations be written to allow for every landfill to expand pursuant to a variance, except replacement landfills, if replacement landfills could expand by 100+ times as part of the replacement variance process?” Response at 11. Petitioner’s solution: ignore the fact that the regulations adopted by the General Assembly 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 DES to undertake a volumetric capacity analysis in approving the location of replacement facilities under the DON variance analysis specified for Phase I determinations.

Instead, Petitioner asserts that reading a volumetric capacity requirement into the replacement variance—where it admits that none exists—is appropriate because “it was unnecessary for the General Assembly to explicitly restate what is provided for in other regulatory provisions as mutually exclusive, opposing paths.” Response at 12 (again citing its irrelevant theories based on Regulation 61-107.17.D.6.e.). However, subsection (e) provides no support for Petitioner here either, as it does not mandate volumetric capacity considerations, dictating only that a facility not seek both a replacement variance and an expansion variance at the same time, which again leaves Petitioner to argue that this Court should either super-legislate such a criterion into the replacement variance regulation, or construe the regulation as implicitly recognizing same. *But see Creswick v. Univ. of S.C.*, 434 S.C. 77, 81–82, 862 S.E.2d 706, 708 (2021) (“If a statute’s language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and this Court must apply the statute according to its literal meaning. Under the plain meaning rule, this Court has no right to search for or impose another meaning or resort to subtle or forced construction to change the scope of a clear and unambiguous statute.”) (citations omitted).

d. Petitioner's statutory interpretation argument of subsection (e) is incorrect.

Not yet finished with subsection (e) of Regulation 61-107.17.D.6., Petitioner returns to it yet again to argue that statutory construction of the clause “[a]n eligible facility shall apply to the Department for a variance to replace or expand the volume of an existing facility” suggests two options, with both verbs “replace” and “expand” modified by “the volume of,” *i.e.*, (1) “replace ... the volume of an existing facility,” and “expand the volume of an existing facility.” Statutory construction does not support Petitioner’s argument.

First, it is important that the Court take stock of the context of where subsection (e) fits within the broader variance section of Regulation 61-107.17.D.6. The primary criteria for a replacement variance appears in subsection (a), not subsection (e), while the availability of an expansion variance is set forth in subsection (b), although no specific criteria for expansion variances are delineated. Subsection (e) merely adds an additional criterion for replacement variances, while it provides the only criterion applicable to expansion variances. In sum total, as discussed above, that criterion requires existing facilities to apply to DES 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 (e) provides that an existing facility must choose to either apply for a replacement variance or an expansion variance. 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 (e) suggests that its purpose is not to further limit replacement variances to the volume of the existing facilities.

Statutory construction suggests a similar result. As Petitioner concedes, its preferred reading of subsection (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.” Response at 14; 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 antecedent¹¹ requires the modifier “the volume of” to be applied only to “expand,” rather than it reaching back to also modify “replace.”

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 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. Moreover, here, the use of expand and the direct object that follows suggests that it is a transitive verb that must be directed to its specific object or point of reference—*i.e.*, expand what? expand the volume of—for effect.

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 (e) in the vacuum that Petitioner suggests.¹² In fact, DES and this Court are 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

¹¹ 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* (2012), at 144.

¹² 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.

enumerates the criteria that are applicable to replacement variances and it contains no requirement that DES anchor the size of a replacement landfill to the permitted volumetric capacity of an existing landfill. Instead, DES is authorized—and DES 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.

Rabbit Hill has unquestionably met the actual requirements of the regulation. The original permit for the Existing Landfill was issued on April 18, 1995, the Existing Landfill has reached its permitted capacity of waste, the location of the Replacement Landfill is within the planning area of the Existing Landfill, the Existing Landfill has not been previously replaced, and Rabbit Hill’s application for replacement was submitted prior to exhausting the permitted capacity at the Existing Landfill. As those are the only requirements of the regulation, and on those undisputed points alone, DES was required to grant a replacement variance to the DON requirements at the same annual rate of disposal of the Existing Landfill.

Further, as set forth above, reference to the definitions of “expand” and “expansion” within the regulation provide further support that “the volume of” in subsection (e) modifies “expand,” rather than “replace.” Regulation 61-107.19.B.22 defines “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). While Regulation 61-107.17.B.8 defines “expand” or “expansion” as “any increase in the *permitted volumetric capacity of an*

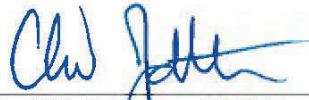
existing solid waste management facility.” (emphasis added). Thus, the regulations specifically tie expansions to the volume of the existing facility, while nothing in the regulations suggest that replacements are tied to volume. Again, this suggests that the rule of the last antecedent should control and dictates that “the volume of” modifies only “expand,” consistent with how expand and expansion are defined in the regulation.

Accordingly, reading subsection (e) in the manner suggested by Petitioner is not consistent with the regulation, canons of statutory construction, or the actual criteria set forth in subsection (a) and would instead impose a new volumetric capacity criterion on replacements that does not exist, solely in furtherance Petitioner’s policy preference. For all of the reasons discussed here, such an exercise is inappropriate and would have this Court super-legislate from the bench in contravention of the rules of statutory construction. *See Samson*, 295 S.C. at 367, 368 S.E.2d at 669 (“[T]his Court will not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations.”). Because DES followed the letter of the regulation, the Motion must fail and instead Rabbit Hill and DES are entitled to summary judgment.

III. Conclusion

As set forth herein and in the RH Cross Motion, DES properly applied the regulations to Rabbit Hill’s application for a replacement variance in this Phase I Determination. This Court is not permitted to entertain or give purchase to Petitioner’s extra-textual policy preferences, as such rationales are contrary to the plain language of the regulation and violate the canons of regulatory interpretation which provide stability and consistency to the rule of law. Accordingly, this Court should first deny Petitioner’s motion for summary judgment and instead grant the Cross Motions of Rabbit Hill and DES, permitting Respondents to continue into the Phase II Technical Review of the Replacement Landfill in accordance with the Regulations.

Respectfully submitted,



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Attorneys for the Respondent

Rabbit Hill Class 2 Landfill

May 1, 2025

Columbia, South Carolina

EXHIBIT 1

Annual Report - Class 2 Landfill

version 1.2

Form Input

*This form may contain one or more sections or controls that are conditionally displayed based on answers provided in other parts of the form

Site Information

Facility Name Hilltop C+D Landfill

Permittee Hilltop C+D, LLC

Permit Number 022431-1201

Facility Address

Address Line 1

1550 Rainbow Falls Rd.

Address Line 2

City

Graniteville

State/Area

SC

Postal Code

29029

County

Geographical Location

Latitude

33.58936444701749

Longitude

-81.372425497364

Facility Contact

First Name

Tim

Last Name

Fox

Title

Waste + Mining Operations

Phone Type

Only one type of numbers accepted

Number

Extension

Home

Other

Mobile

Business

803 652 3232

Email

timf@bkgradingandpaving.com

Mailing Address

Address Line 1

PO BOX 792

Address Line 2

City

New Ellenton

State/Area

SC

Postal Code

29809

Class 2 Landfill Information

Report Year

2022

Transfer Station - If waste was received from a SC transfer station, record those tonnages here. If waste was not received from a transfer station, leave this section blank.

Name of Transfer Station (in S.C.)	Appendix I Wastes	Appendix I Like Waste	Permitted Characterized Wastes Less Than 10 x MCLs	Processed Waste Tires	Natural Disaster Debris	Sub-Total (A)
						Calculated

Processing Facility - If waste was received from a SC SW Processing Facility, record those tonnages here. If waste was not received from a processing facility, leave this section blank.

Name of SW Processing Facility (in S.C.)	Appendix I Wastes	Appendix I Like Waste	Permitted Characterized Wastes Less Than 10 x MCLs	Processed Waste Tires	Natural Disaster Debris	Sub-Total (B)
						Calculated

Out-of-State Waste - If waste was received from outside of SC, list the name of the state where the waste originated. If no waste was accepted from outside SC, leave this section blank.

State	Appendix I Wastes	Appendix I Like Waste	Permitted Characterized Wastes Less Than 10 x MCLs	Processed Waste Tires	Natural Disaster Debris	Sub-Total (C)
						Calculated

In-State Waste - Do not include tonnages already reported in the transfer station or solid waste processing facility sections.

County	Appendix I Wastes	Appendix I Like Wastes	Permitted Characterized Wastes Less Than 10 x MCLs	Processed Waste Tires	Natural Disaster Debris	Sub-Total (D)
Aiken	46,364.65					Calculated

Recovered Materials/Tipping Fee

Recovered Materials - If the facility is also a registered construction and demolition debris recycling facility, do not report that activity here. A separate annual report is required to be submitted.

Type of Recovered Materials	Company Receiving Recovered Materials	TONS TRANSFERRED

Tipping Fee Information

Type	Appendix I	Appendix I Like	Characterized Waste
Average tipping fee (\$/ton)	\$ 29.52		
Range of tipping fee (\$/ton)			

Additional Information

Total amount of waste accepted in FY (Tons)

Calculated 46,364.65

Maximum permitted annual tonnage rate (tons/yr)

57,000

Remaining volume of permitted disposal airspace (CY)

89,000

Remaining life of permitted disposal airspace (Months)

14

Attachment(s)

Multiple attachments are not allowed. Please be aware that files exceeding 500 MB in size are not allowed. The following file types are accepted:

.7Z;.7z;*.AVI;*.avi;*.AVI;*.BMP;*.bmp;*.Bmp;*.CSV;*.csv;*.Csv;*.DAT;*.dat;*.Dat;*.DOC;*.doc;*.Doc;*.DOCX;*.docx;*.Docx;*.DWG;*.dwg;*.Dwg;*.EML;*.eml;*.Eml;*.GIF;*.gif;*.Gif;*.GPX;*.gpx;*.Gpx;*.HTM;*.htm;*.html;*.htm

Comment

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,	)	Docket No. 24-ALJ-07-0316-CC
	)	
Petitioners,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
South Carolina Department of	)	
Environmental Services and Rabbit Hill Class	)	
2 Landfill,	)	
	)	
Respondents.	)	
	)	

This is to certify that I, Laura Lee Andrews, a paralegal with the law firm of Burr & Forman LLP, have caused to be served on this day one (1) copy of **Respondent Rabbit Hill Class 2 Landfill's Reply in Support of its Cross Motion for Summary Judgment** in the above-captioned matter via email and by depositing same in the U.S. Mail with first class postage affixed thereto upon the persons and at the addresses as set forth below:

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Juan Tolley, Esquire
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Laura Lee Andrews
Paralegal

May 1, 2025
Columbia, South Carolina



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ENVIRONMENTAL
LAW PROJECT**

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October 22, 2025

VIA EMAIL & U.S. MAIL

Honorable Jana E. Shealy,
Clerk, SC Administrative Law Court
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Austin & Pethick Law Firm, PC
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Aiken, SC 29804

Re: Friends of Horse Creek Valley v. SCDES & Rabbit Hill Class 2 Landfill
Docket No.: 24-ALC-07-0316-CC

Dear Ms. Shealy,

Please find enclosed Petitioner's Motion for Reconsideration along with the required \$50 filing fee, which is being filed on behalf of the Friends of Horse Creek Valley. By copy of this

Board of Directors: Jerry Schulze, Chairperson, J. Mac Bennett, Keith Bowers, Janelle Ellis,
Terry Grayson-Caprio, Liz Igleheart, Tom Kester, Bess Lochocki, Michelle Mapp, Carla Pinckney,
Cynthia Powell, Greg VanDerwerker, Davis Whitfield-Cargile, Keith Williamson
Board Member Emeriti: Frances Close, Robert Schotfield

ROA 571

letter I am serving counsel for all parties. Please return a clocked-in copy self-addressed, stamped envelope provided. Thank you for your kind consideration.

Respectfully,

A handwritten signature in cursive script, reading "Jaya Wragg". The signature is written in black ink and is positioned to the right of the printed name.

Jaya Wragg
Legal Assistant

cc: Counsel of Record

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,	)	Docket No. 24-ALC-07-0316-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
Hilltop C&D, LLC, and South Carolina	)	PETITIONER'S MOTION
Department of Environmental Services,	)	FOR RECONSIDERATION
	)	
Respondents.	)	
	)	
	)	
	)	

Pursuant to Rule 29(D) of the Rules of Procedure for the Administrative Law Court (SCALC) and Rule 59(e) of the South Carolina Rules of Civil Procedure (SCRPC), Petitioner Friends of Horse Creek Valley (“Petitioner”) respectfully moves this Court to reconsider and amend its Order dated October 14, 2025, which granted Respondent’s Motion for Summary Judgment and denied Petitioner’s Motion for Summary Judgment (the “Order”).

This Motion is timely filed within ten (10) days of service of the Order and seeks correction of material errors of law and fact that, if left unaddressed, would result in manifest injustice. Following Rule 29(D)’s directive to identify with particularity the points the Court has overlooked or misapprehended, Petitioner directs the Court’s attention to the following errors:

A. MISAPPREHENSION OF THE SCOPE OF REGULATION 61-107.17(D)(6)(e)

The Court misapprehended the scope and substantive effect of Regulation 61-107.17(D)(6)(e). The regulation authorizes the Department to grant either a variance to replace a facility or a variance to expand its volume, but it expressly prohibits a facility from operating under both at the same time. *See* S.C. Code Regs. 61-107.17(D)(6)(e).

This structure reflects the Department’s intent to maintain a clear regulatory distinction

between replacement and expansion, consistent with the Solid Waste Policy and Management Act's Demonstration of Need requirement set forth in S.C. Code Ann. § 44-96-290(E). A replacement facility may only replicate existing, necessary capacity and may not increase it.

By accepting the Respondent's characterization of a 292.5-acre, 107,500-ton facility as a replacement for a 2.3-acre, 57,500-ton landfill, the Court effectively permitted an expansion variance to operate under the guise of a replacement variance. That interpretation nullifies the plain text of section (D)(6)(e) and undermines the mandatory Demonstration of Need process required for expanded facilities.

B. MISAPPREHENSION OF THE RULES OF STATUTORY CONSTRUCTION

The Court misapplied the governing principles of statutory and regulatory interpretation by: (a) relying solely on the regulation's plain language despite ambiguity in its intent and scope; (b) failing to give effect to the Legislature's intent as the cardinal rule of construction; (c) adopting an interpretation that produces an absurd and unlawful result; (d) failing to harmonize the regulation with its enabling statute; and (e) disregarding the settled principle that any ambiguity must be resolved to ensure a just, equitable, and reasonable operation of the law. Collectively, these errors produced an overly literal reading that disregards the Solid Waste Policy and Management Act's (SWPMA) substantive purpose and structure.

C. FAILURE TO GIVE EFFECT TO THE SWPMA'S MANDATORY DON REQUIREMENT

The Court failed to recognize that the demonstration of need requirement in S.C. Code Ann. § 44-96-290(E) applies unequivocally to all new or expanded solid-waste management facilities and may not be waived by regulation. By declining to enforce this requirement, the Court effectively subordinated a controlling statutory mandate to an agency regulation.

D. FAILURE TO RECOGNIZE THE STATUTE’S SUPREMACY OVER REGULATION

Even if the Court’s interpretation of Regulation 61-107.17(D)(6) were correct, the Solid Waste Act’s express statutory requirements must prevail where a regulation or agency interpretation conflicts with the statute’s plain terms and intent, and the Order therefore inverted this hierarchy by granting controlling effect to the regulation instead of the governing statute.

E. ERRONEOUS CHARACTERIZATION OF SUBSECTION (D)(6)(e) AS MERELY PROCEDURAL

The Court erred in construing Regulation 61-107.17(D)(6)(e) as a procedural timing provision rather than a substantive restriction on the scope of landfill variances. The regulation provides that an eligible facility may apply for a variance to replace or expand the volume of an existing facility but may not operate under both at the same time. This prohibition reflects the Department’s intent to preserve a clear line between replacement and expansion and to prevent the misuse of the Demonstration of Need process.

Its structure and placement within Regulation 61-107.17(D)(6) demonstrate that subsection (e) was intended to define and limit when a facility may replace or expand capacity, not to prescribe only when such a variance may be sought. Treating it as a procedural provision deprives subsection (e) of independent meaning and purpose and allows an expansion variance to proceed under the guise of replacement, contrary to both the regulation’s text and the legislative intent of the Solid Waste Policy and Management Act.

F. OVERLOOKING SUBSECTION (D)(6)(E)’S PURPOSE AS A SAFEGUARD

The Court failed to recognize that subsection (D)(6)(e) was specifically designed to prevent misuse of the demonstration of need variance, by ensuring that an applicant cannot evade the need requirement through reclassification. Respondent’s simultaneous claim of both “replacement” and “expansion” exemplifies the misuse the regulation was intended to prevent.

G. MISAPPREHENSION OF THE REGULATION'S CAPACITY LIMITATIONS

The Court mistakenly assumed that the annual rate of disposal limit is the only applicable constraint on the replacement facility. The regulation and governing statute impose additional quantitative and qualitative limitations on facility size, volume, and service-area expansion that the Court's analysis did not address.

H. CUMULATIVE IMPACT OF ERRORS

Taken together, these misapprehensions undermine the integrated framework of the SWPMA and Regulation 61-107.17 by allowing an applicant to expand under the guise of replacement without satisfying the mandatory Demonstration of Need and consistency review required by the record and the statute. This outcome contravenes legislative intent and erodes the safeguards established to ensure rational and environmentally sound waste-management planning.

CONCLUSION

Reconsideration is necessary to correct manifest errors of law and fact and to prevent a miscarriage of justice. The Court's Order misapprehended the plain language of Regulation 61-107.17 and overlooked the mandatory statutory preconditions set forth in § 44-96-290(E). Because these errors go to the core jurisdictional and statutory limits on agency permitting authority, reconsideration is essential to ensure faithful application of South Carolina law and to preserve these issues for any subsequent review.

For these reasons, Petitioner respectfully requests that the Court:

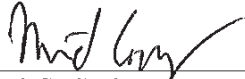
1. Alter or amend its October 14, 2025 Order to vacate the grant of summary judgment to Respondents and to grant Petitioner's Motion for Summary Judgment;
2. Reverse the South Carolina Department of Environmental Services' Phase I Determination approving Hilltop C&D's "replacement facility" application;

3. Find that Hilltop C&D's proposal constitutes an expansion within the meaning of S.C. Code Ann. § 44-96-290(E) and Regulation 61-107.17(D)(6)(c); and

4. Grant such other and further relief as the Court deems just and proper, including remand to the Department for proceedings consistent with this ruling and the Solid Waste Policy and Management Act.

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT



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Attorneys for Petitioner Friends of Horse Creek Valley

October 22, 2025
Georgetown, S.C.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,

Petitioner,

vs.

Hilltop C&D, LLC, and South Carolina
Department of Environmental Services,

Respondents

Docket No. 24-ALC-07-0316-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I have served Petitioner's Motion for Reconsideration by depositing same in the U.S. Mail to the parties addressed to:

Etta R. Williams Linen
SCDES Office of General Counsel
2600 Bull Street
Columbia, SC 29201

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Aiken, SC 29804

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT


Jaya Wragg, Legal Assistant

October 22, 2025
Georgetown, S.C.



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October 31, 2025

VIA HAND DELIVERY

The Honorable S. Phillip Lenski
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: *Friends of Horse Creek Valley v. SCDES and Rabbit Hill Class 2 Landfill*; Docket No. 24-ALJ-07-0316-CC

Dear Judge Lenski:

Enclosed for filing please find the original and one copy of Respondent Rabbit Hill Class 2 Landfill and South Carolina Department of Environmental Services' Joint Response to Petitioner's Motion for Reconsideration. I would appreciate it if you would accept the original for filing and return the extra copy bearing your file stamp via our courier.

By copy of this letter, we are serving same on Petitioner Friends of Horse Creek Valley and enclose a certificate of service to that effect. With best regards, I am

Very truly yours,

Burr & Forman LLP



Chad N. Johnston

CNJ/lla
Enclosures

cc: Michael G. Corley, Esquire
James Huey, Esquire
Etta R. Williams Linen, Esquire
Juan Tolley, Esquire
Christopher P. Whitehead, Esquire
(all via email and U.S. Mail)

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,	)	Docket No. 24-ALJ-07-0316-CC
	)	
Petitioners,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
South Carolina Department of	)	
Environmental Services and Rabbit Hill Class	)	
2 Landfill,	)	
	)	
Respondents.	)	
_____	)	

This is to certify that I, Laura Lee Andrews, a paralegal with the law firm of Burr & Forman LLP, have caused to be served on this day one (1) copy of Respondents Rabbit Hill Class 2 Landfill and South Carolina Department of Environmental Services' Joint Response to Petitioner's Motion for Reconsideration in the above-captioned matter via email and by depositing same in the U.S. Mail with first class postage affixed thereto upon the persons and at the addresses as set forth below:

Michael Corley, Esquire
Juan Tolley, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
michael@scelp.org
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A handwritten signature in cursive script, reading "Laura Lee Andrews", written over a horizontal line.

Laura Lee Andrews
Paralegal

October 31, 2025
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,	)	Docket No. 24-ALJ-07-0316-CC
	)	
Petitioner,	)	
	)	
v.	)	RESPONDENTS JOINT RESPONSE
	)	TO PETITIONER'S MOTION FOR
	)	RECONSIDERATION
South Carolina Department of	)	
Environmental Services and Rabbit Hill Class	)	
2 Landfill,	)	
	)	
Respondents.	)	
_____	)	

Pursuant to Rule 26(D) of the Rules of Procedure for the South Carolina Administrative Law Court (SCALC) and Rule 59(e) of the South Carolina Rules of Civil Procedure (SCRCP), Respondents South Carolina Department of Environmental Services (SCDES) and Rabbit Hill Class 2 Landfill (Rabbit Hill) (together, the Respondents) submit this joint response (Response) to Petitioner Friends of Horse Creek Valley's (Petitioner) motion for reconsideration and/or amendment (Motion) of the Court's Order dated October 14, 2025, granting Respondents' cross motions for summary judgment (Order).

I. Introduction

It is clear from the Order that the Court thoughtfully considered the arguments of the parties within the plain language of the applicable statute and regulations. The Motion fails to articulate any ground or issue with particularity that the Order overlooked, misapprehended, or that otherwise warrants reconsideration or amendment. Instead, the Motion presents as a precursor to an appeal, conveying short summaries of arguments already raised to and rejected by the Court. For the reasons articulated in the Order, as well as those set forth below, denial of the motion is warranted.

II. Standard

Pursuant to Rule 29(D), SCALC, a party may move for reconsideration of a final decision of this Court subject to the grounds for relief set forth in Rule 59, SCRCP. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) (“A motion under Rule 59(e) long has been viewed as ‘motion for reconsideration’ despite the absence of those words from the rule.”). Motion for reconsideration “may not be used to relitigate old matters,” but are instead intended as a vehicle through which a party can demonstrate that a court overlooked, misinterpreted, or failed to apply certain evidence and laws applicable to the case. *Edward K. Woltz & Holly H. Woltz & S & C Props., LLC, Petitioners*, No. 23-ALJ-30-0285-CC, 2025 WL 1240304, at *2 (Apr. 24, 2025) (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995)). Nor may a movant use a motion for reconsideration to advance arguments that were not raised previously in the prior briefing. *Troutman, v. S.C. Dep't of Env't Servs.*, No. 24-ALJ-07-0423-CC, 2025 WL 889690, at *2 (Mar. 14, 2025) (citing *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009)).

III. Argument

- i. The Order does not misapprehend, mischaracterize, or overlook the scope of Regulation 61-107.17(D)(6)(e).

Petitioner makes three overlapping arguments as to Regulation 61-107.17(D)(6)(e) in the Motion. *See* Mot. at 1 (Argument A); at 3 (Arguments E and F). Petitioner advances no new or distinguishing argument as to these issues; it merely disagrees with the well-reasoned analysis of the Order which reaches the opposite result. In that respect, Petitioner’s arguments fail to satisfy the standard for reconsideration or amendment of the Order.

Petitioner contends that the Court misapprehends the scope and substantive effect of the variance exception to the general requirement that an applicant must satisfactorily show a

demonstration of need for a new or expanding Class 2 solid waste landfill. Mot. at 1-2. As a variation of that argument, Petitioner contends that, in failing to give Subsection D.6.e. substantive weight, the Court erred in construing the provision as procedural. Mot. at 3. Finally, Petitioner advances a policy-based argument that Subsection D.6.e. should be construed as a safeguard against misuse of the demonstration of need variance, as evidenced by its allegation that Rabbit Hill has sought and received a variance for both a replacement and expansion simultaneously. *Id.*

Section D of Regulation 61-107.17 sets forth the general procedures for the demonstration of need process, while Subsection D.6 provides that a variance to the general requirement for a demonstration of need for replacement and expansion is available to Class 2 and Class 3 landfills, “provided it meets all of the following conditions,” *id.* Subsection D.6.a. The substantive conditions supplied by the regulation for replacement landfills are expressly defined, including that any eligible landfill must: (1) have been issued a permit prior to the effective date of the regulation (*id.* –D.6.a.(2)); (2) exhaust its permitted capacity at its current location, subject to the timing provisions of Subsection D.6.e. (*id.* –D.6.a.(3)); (3) be within the facility’s existing planning area, to include the entire county in which it is located (*id.* –D.6.a.(4)); and (4) have not been previously replaced (*id.* –D.6.a.(4)). In addition, and as to the timing of the application for a replacement variance, Subsection D.6.e. provides that an applicant must apply for a replacement prior to exhausting its permitted capacity at the existing facility. In fact, Subsection D.6.a.(3) references D.6.e. as a timing provision: e.g. “see 6.e below for timing.” Subsection D.6.e. also prohibits a facility from operating under both an expansion variance and a replacement variance simultaneously, except for a reasonable transition period not to exceed 180 days.

Petitioner’s attempts to turn Subsection D.6.e. into something other than what its unambiguous language provides, continues to suffer from the same gaps in logic as it did in its dispositive motion briefings. 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.

First, Petitioner continues to reiterate a point that is not in dispute: that a landfill may not operate under both an expansion variance and a replacement variance at the same time. Rabbit Hill’s existing landfill is not operating under either an expansion or replacement variance, and it has only sought a variance as to the demonstration of need requirement for the proposed replacement landfill.¹ Further, refuting Petitioner’s assertion that Rabbit Hill sought and received a variance to both replace and expand its existing landfill, the Court expressly found that—and the evidence of record confirms—“[n]othing suggests that the Hilltop Landfill ever received an expansion variance.” Order at 12. Therefore, Subsection D.6.e.’s prohibition against holding both an expansion variance and a replacement variance is inapplicable to the facts of this case.

¹ As recognized by the Court, *see* Order at 5, n.5, Rabbit Hill’s initial variance submission that termed its request as an expansion was obviously mistaken, given that it plainly stated “**it is not possible to expand landfill operations at the [Existing Landfill] location,**” and instead sought to replace its “Class Two landfill facility on a portion of the property ([the Replacement Landfill site]) located off Dixie Clay Road, Beech Island, Aiken County, South Carolina.” Rabbit Hill Cross Motion, Exhibit 5 (emphasis added). Regardless, Rabbit Hill’s initial application was administratively withdrawn when, recognizing its mistake, it revised and re-submitted a new application on June 6, 2023 that appropriately characterized the request as a replacement of its existing landfill at a new location. Rabbit Hill’s initial, mistaken application was not acted upon by SCDES and is not before the Court.

Nevertheless, Petitioner continues to assert that, because the proposed replacement landfill is larger than Rabbit Hill's existing landfill, it cannot be characterized as a "replacement," but should rather be construed as a replacement *and* an expansion that is alternatively disallowed or requires a showing of a demonstration of need. The Motion doubles down on this point, stating definitively that "[a] replacement facility may only replicate existing, necessary capacity and may not increase it." Motion at 2. Petitioner does not cite the regulation for this conclusory assertion of law. *But see 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). And for good reason, as its twin assertions of "replicat[ion]" and "necessary capacity" find zero support in the regulation. The Order recognized these unmoored arguments for what they are: statements of preferred policy, rather than application of the plain language of the regulation. Order at 8.

Further, the regulations define "expand" or "expansion" by reference to two qualifications: first, an expansion only refers to action taken as to an existing landfill facility, not a replacement; and second, expansions are tethered to the capacity or volume of the landfill. By contrast, as noted by the Order at 7, n.12; 8-9, replacement is neither expressly defined in the regulation nor otherwise tied to the capacity of volume or the existing landfill sought to be replaced. Yet, the Act provides the statutory framework for the Court's conclusion that the only reasonable interpretation of the term "replace" or "replacement" is that it applies to a different location than, and is not constrained by the capacity of, 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," –(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,” –(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). Because Subsection D.6.e. does not 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, this Court was correct not to be tempted by Petitioner’s naked policy arguments and demands to super-legislate such a criterion into the replacement variance regulation.

In short, and as correctly analyzed and found by the Court, *see* Order at 8, Subsection D.6.e. does not add a substantive condition or parameter required to be met by an applicant in order to qualify for a replacement variance. Instead, Subsection D.6.e. is a timing provision that addresses *when* a replacement application may be submitted. Reconsideration or amendment of the Order on this point is unwarranted.

ii. The Order does not misapprehend the rules of statutory construction.

Petitioner next contends that the Court misapplied the governing principles of statutory and regulatory interpretation, listing five examples. Mot. at 2 (Argument B). Yet, in criticizing the Order, Petitioner does not cite to any specific rule or case as support for its assertions of error. *See Cobb, supra*.

As to the specific grounds asserted, Petitioner first amazingly argues that the Court erred in relying solely on the plain language of the regulation to reach its decision. *But see Books-a-Million, Inc. v. S.C. Dept. Revenue*, 2017 WL 2540343, at *3 (S.C. Admin Law Ct. 2017) (“When a statute is unambiguous, a court must rely on the plain meaning of the words in the statute when reading said statute.”). To skirt this black letter rule of statutory construction, Petitioner contends

for the first time in the Motion that the regulation is now “ambigu[ous] in its intent and scope.” Beyond the cognizability of an argument raised for the first time in a motion for reconsideration, *see Troutman, supra*, Petitioner’s new argument directly contradicts the representation it made in its motion for summary judgment that “the DON variance regulation is plain and unambiguous and must be interpreted accordingly.” Pet. MSJ at 6. This argument is without merit.

Second, Petitioner asserts that the Court failed to give effect to the General Assembly’s intent. Here again, Petitioner wishes to substitute its interpretation and desired policy goals for the plain language of the regulation. However, “[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature.” *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). “In doing so, we must give the words found in the statute their ‘plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.’” *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *Sloan*, 371 S.C. at 499, 640 S.E.2d at 459). “Thus if the words are unambiguous, we must apply their literal meaning,” *Id.* (citing *Sloan*, 371 S.C. at 498, 640 S.E.2d at 459), and “the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). By adhering to the plain and unambiguous language of the regulation, and refusing to supplant the regulation with the policy desires of the Petitioner, the Order is faithful to binding precedent governing regulatory interpretation.

Third, Petitioner asserts that the Court’s interpretation of the regulation produces an absurd and unlawful result. Once again, Petitioner fails to identify the specific—or any—absurd or unlawful result that follows, failing to comply with a motion for reconsideration’s requirement of particularity. Presumably, this assertion is backstopped by Petitioner’s catch-all assertion that the Court’s reading disregards the South Carolina Solid Waste Policy and Management Act (the Act).

But as discussed below, this argument is categorically refuted by the plain language of the Act directing SCDES to adopt regulations permitting variances or exceptions (*i.e.*, 61-107-17.D.6) to the general requirement that landfill applicants complete the demonstration of need process. This argument is also without merit.

Fourth, Petitioner asserts that the Court failed to harmonize the regulation with its enabling legislation. Contrary to Petitioner's assertion, the Order expressly cites the provisions of the Act wherein the General Assembly gave SCDES permission to exempt certain facilities from all or part of the Act and later directed SCDES to promulgate regulations providing for "exemptions" and "variances." *See* Order at 6 (citing 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."); - 290(D)(3) ("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.")); Order at 8, n.14. This argument is wholly without merit.

Fifth and finally, Petitioner asserts that the Court disregarded the settled principle that any ambiguity must be resolved to ensure a just, equitable, and reasonable operation of law. As an initial matter, the Court found that the regulation is unambiguous, *see* Order at 8; thus, the plain language controls.² Moreover, as discussed above, Petitioner agreed that the regulation is unambiguous; therefore, this belated attempt at arguing an ambiguity based on its discontent with the construed language of the unambiguous regulation does not meet Petitioner's burden in a motion for reconsideration.

² The Court's construction of the definition of replacement, which is undefined in the regulation, does not dictate a different result or suggest the existence of an ambiguity.

- iii. The Order gave effect to the Act's plain language and did not subvert it to the regulation.

The Motion's next two arguments are one in the same: the Act provides that a demonstration of need is required for all new or expanding landfills, and this general requirement must control over the regulation's allowance for variances or exceptions to the general rule. Mot. at 2-3 (Arguments C and D). But Petitioner's argument is easily refuted by reference to the Act and continues to ignore contrary directives given by the General Assembly. By contrast, the Order correctly refused to read the general requirement in isolation and gave appropriate consideration to the express contrary directives to give full effect to the provisions of the Act as a whole.³

In particular, and as noted by the Order at page 6, the General Assembly expressed its intent that "[t]he department may, by regulation, exempt certain facilities from all or part of the requirements of this section," *see* S.C. Code Ann. § 44-96-290(A), and further expressly instructed that SCDES "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.* at -290(D) (emphasis added). Consistent with that statutory directive—not contrary to it—SCDES promulgated the demonstration of need variance procedures at issue in this case.

In making its argument, Petitioner misrepresents S.C. Code Ann. § 44-96-290(E) as stating that the demonstration of need requirement for all new or expanding landfills "may not be waived by regulation." Mot. at 2. In fact, it says the opposite. Section 290(E) reads in full that:

³ *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).

No 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, *as required by regulation*.

(Emphasis added). Thus, the general requirement for demonstration of need is not absolute, and the requirement is expressly qualified by the General Assembly in recognition that promulgated regulations control the process of when it is required, and when it is not. Coupled with the permission extended to SCDES in Section 290(A), as well as the directive given to SCDES in Section 290(D), the variance procedures set forth in Regulation 61-107-17.D.6 are in furtherance of, not contrary to, the plain meaning and statutory intent of the Act. These arguments by Petitioner are wholly without merit.

iv. The Order does not misapprehend the regulation's capacity limitations.

Petitioner next asserts in a conclusory, two-sentence argument, without citation to the Order or the regulation, that the Court has “mistakenly assumed” that the regulation and the Act impose additional quantitative and qualitative limitations on facility size, volume, and service-area expansion. Mot. at 4 (Argument G). Petitioner’s failure to cite to the alleged mistaken assumptions or the alleged contrary limitations in the regulation and Act does not comply with a motion for reconsideration’s requirement of particularity and may be summarily rejected. *See Cobb, supra*; *see also 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).

Beyond that procedural infirmity, Petitioner’s argument is incorrect. As set forth above, and as documented in the Order, *see* Order at 12-13, Phase 1 of a proposed replacement landfill application deals exclusively with the facility’s siting through the demonstration of need and

consistency determinations. As to demonstration of need, the parameters evaluated by SCDES in its application of the Subsection D.6. variance to the general requirement to complete a demonstration of need are discrete and expressly set forth in Subsection D.6.a.-e.: (1) the permit for the existing landfill must have been issued prior to the effective date of the regulation; (2) the existing landfill must exhaust its permitted capacity, subject to the timing provisions of Subsection D.6.e.; (3) the site for the proposed replacement landfill must be within the existing landfill's planning area; (4) the existing landfill must not have been previously replaced; and (5) the applicant must apply for the replacement variance prior to exhausting its permitted capacity at the existing landfill. Subsection D.6.e. also prohibits a facility from operating under both an expansion variance and a replacement variance simultaneously, except for a reasonable transition period not to exceed 180 days.

The only capacity-related parameter for replacement landfills is listed in Subsection D.6.a., which provides that the replacement facility will be permitted at the annual rate of disposal as the existing landfill. Subsections D.6.a.-e. contain no additional parameters, and certainly no parameters related to quantitative and qualitative limitations on facility size, volume, and service-area expansion, as incorrectly argued by Petitioner. Fundamentally, these are Petitioner's extra-textual policy preferences as to what it believes the regulations *should say*, rather than what they actually say, suggesting that this Court should legislate those policy preferences from the bench instead of adhering to the parameters actually adopted by the General Assembly. The Court was correct to avoid Petitioner's invitation. This argument is without merit and serves no basis for reconsideration.

- v. Petitioner's assertion of a cumulative impact of errors is nothing more than a policy argument.

Finally, Petitioner asserts that the cumulative impact of the foregoing alleged inconsistencies and errors undermine the integrated framework of the Act and the regulations. Mot. at 4 (Argument H). Beyond being individually and collectively incorrect, this argument is a summation that requires no further response beyond what is otherwise addressed herein.

IV. Conclusion

For the reasons discussed above, the Motion presents no articulated basis for reconsideration or amendment of the Order. The Court has not overlooked or misapprehended any issue in this case. Each of the issues raised in the Motion were thoroughly—and correctly—analyzed and decided in the Order. Respondents respectfully request that the Court deny the Motion and permit Rabbit Hill to proceed to the Phase 2 technical review of the replacement landfill under the regulations.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

Etta Williams / by CNS with express permission

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*Attorneys for the Respondent
Rabbit Hill Class 2 Landfill*

October 31, 2025
Columbia, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Docket No. 24-ALJ-07-0316-CC

Friends of Horse Creek Valley,

Appellant,

v.

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

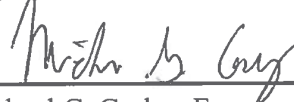
Respondents.

NOTICE OF APPEAL

Friends of Horse Creek Valley hereby appeals the October 14, 2025 Order granting Respondent Rabbit Hill's Motion for Summary Judgment and denying Petitioner's Motion for Summary Judgment, and the November 18, 2025 Order denying Petitioner's Motion for Reconsideration, both issued by the Honorable S. Phillip Lenski in Docket No. 24-ALJ-07-0316-CC, and received by Appellant on the dates filed.

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT



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December 8, 2025
Pawleys Island, South Carolina

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Dec 08 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Docket No. 24-ALJ-07-0316-CC

Friends of Horse Creek Valley,

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on this date I served the foregoing Notice of Appeal upon the Administrative Law Court and the Respondents by U.S. Mail and by electronic notification to the contacts listed in the Attorney Information System (AIS):

The Honorable S. Phillip Lenski
South Carolina Administrative Law Court
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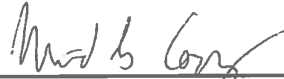
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December 8, 2025
Pawleys Island, South Carolina



Polly Bell <polly@scelp.org>

Friends of Horse Creek Valley v. SC DES; Docket No. 24-ALJ-07-0316-CC

1 message

Polly Bell <polly@scelp.org>

Mon, Dec 8, 2025 at 12:50 PM

To: james@scsj.org, cjohnston@burr.com, rlowell@burr.com, mdecker@burr.com, kevin@austinpethick.com, etta.rosita.linen@des.sc.gov, christopher.whitehead@des.sc.gov

Cc: michael@scelp.org, juan@scelp.org, amy@scelp.org

Enclosed please find a Notice of Appeal and referenced orders for service upon you in the above-referenced matter.

--

Polly Bell

Legal Assistant

South Carolina Environmental Law Project

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December 8, 2025

VIA U.S. MAIL AND ELECTRONIC MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Friends of Horse Creek Valley v. SCDES and Rabbit Hill Class 2 Landfill*;
Docket No. 24-ALJ-07-0316-CC

RECEIVED
Dec 08 2025
SC Court of Appeals

Dear Madame Clerk,

Please find enclosed a Notice of Appeal in the above-referenced matter. I am also enclosing the filing fee of \$250.00, a copy of the orders which are to be challenged on appeal, and the proof of service of the notice of appeal on the Respondents. Thank you for your kind consideration. With deep respect and warm regards, I remain;

Sincerely,


Michael G. Corley

Enclosures

cc: Etta R. Williams Linen, Esq.
Christopher Whitehead, Esq.
Chad N. Johnston, Esq.
Etta R. Williams Linen, Esq.
Kevin E. Pethick, Esq.

Board of Directors - Jerry Schulze, Chairperson, J. Mac Bennett, Keith Bowers, Janielle Ellis,
Terry Grayson-Caprio, Liz Igleheart, Tom Kester, Bess Lochocki, Michelle Mapp, Carla Pinckney,
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Dec 08 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Friends of Horse Creek Valley,

Petitioner,

vs.

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

Respondent.

Docket No. 24-ALJ-07-0316-CC

ORDER GRANTING RESPONDENT RABBIT
HILL'S MOTION FOR SUMMARY
JUDGMENT AND DENYING PETITIONER'S
MOTION FOR SUMMARY JUDGMENT

APPEARANCES: For the Petitioner: Michael G. Corley, Esq.

For the Respondent: Chad N. Johnston, Esq.

For the Department: Etta R. Williams Linen, Esq.

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or court) pursuant to a request for a contested case filed by Friends of Horse Creek Valley (Petitioner). The Petitioner challenges the South Carolina Department of Environmental Services' (Department or DES) decision to grant Rabbit Hill Class 2 Landfill (Respondent or Rabbit Hill) a replacement variance for its solid waste management facility.

On February 12, 2025, the Petitioner filed a motion for summary judgment asserting that the case rests upon a question of statutory and regulatory interpretation regarding whether the landfill at issue may be permitted as a "replacement" facility. Specifically, it argues that: (1) the size of the permitted landfill precludes it from being considered a replacement of the existing landfill; (2) DES regulations only allow for either an expansion variance or a replacement variance, but not both, and any reading of the applicable regulations to allow for both would contravene the plain language of the Solid Waste Management Act (Act); and (3) the permitted landfill is an attempted exploitation of the Demonstration of Need (DON) variance.

On March 17, 2025, Respondent Rabbit Hill filed a response in opposition to the Petitioner's motion and a cross-motion for summary judgment. In its motion, the Respondent argues that: (1) the landfill permit application is a bifurcated process and size considerations are



not part of the first phase of consideration, which only entails a DON and Consistency determination; (2) the plain language of the applicable regulations allow for certain eligible facilities to apply for a variance as to the DON component of the first phase of review; and (3) the Department correctly determined that the proposed landfill qualified for a DON variance and satisfied the consistency component.

Also on March 17, 2023, the Department filed a response in opposition to the Petitioner's motion and a cross-motion for summary judgment. The Department argued in its motion that: (1) the ordinary definition of "replacement" encompasses the proposed landfill, and is reasonable and consistent with the applicable regulation's plain language; (2) the proposed landfill is not both a replacement and an expansion facility, nor is it a new facility; and (3) the Department was required to grant a replacement variance to the original landfill in accordance with the DON regulations.

A hearing on the cross-motions for summary judgment was held on June 26, 2025, at the ALC in Columbia, South Carolina. After careful consideration of the parties' arguments and the applicable law, the court finds that the Respondent qualified for a DON variance. Accordingly, the court grants the Respondent's motion for summary judgment.¹

BACKGROUND

The Respondent owns and operates a permitted Class 2 landfill for the disposal of construction and demolition (C&D) debris located at 550 Rainbow Falls Road, Graniteville, Aiken County, South Carolina 29829 (Existing Landfill or Hilltop Landfill). The Existing Landfill was originally permitted in 1995 (Permit No. 022481-1201) for use as a disposal area only for C&D materials associated with the original permittee's business operations. The landfill has a disposal area of 2.3 acres and a permitted disposal capacity of 225,186 cubic yards. It was initially permitted for a roughly seven-acre disposal area that could accept up to 25,000 cubic yards (or 15,000 tons) of waste per year, though in 2017 it only accepted 3,208 tons. The Hilltop Landfill was sold to B&K Grading and Paving (B&K) in 2019.² In 2022, the Hilltop Landfill accepted 46,865 tons of waste. According to a 2023 report, the Hilltop Landfill had 15,000 cubic yards of remaining space.

¹ To the extent that the Department's motion mirrors that of the Respondent, the Department's motion is granted. To the extent it differs, it is denied.

² B&K owns the business entity known as Hilltop C&D, LLC, which operates Hilltop Landfill and is the applicant in this case.

On May 10, 2023, the Respondent sought an increase in the permitted annual disposal rate for the Existing Landfill, from the then permitted annual disposal rate of 57,500 tons per year, to 107,500 tons per year, which the Department approved on January 12, 2024.³ In 2024, following the increase in its permitted annual disposal rate, the Hilltop Landfill accepted 25,500 tons of waste.

On or about June 6, 2023,⁴ the Respondent applied for a replacement variance⁵ from the DON requirement in order to replace the Existing Landfill with a new landfill to be located at 331 Dixie Clay Road, Beech Island, Aiken County, South Carolina 29842 (Replacement Landfill). The proposed location for the Replacement Landfill, which is intended to be used commercially, is a roughly 535-acre property with a proposed landfill footprint area of roughly 293 acres.⁶ The proposed location is the site of a decommissioned mining operation, which the Respondent has agreed to remediate or mitigate as part of this process.

On September 5, 2023, the Department provided notice to Rabbit Hill that it had reviewed Phase 1 of its replacement request and determined that it was administratively complete. On March 14, 2024, the Department issued its Draft Phase 1 Determination. On March 28, 2024, the Department hosted a public meeting regarding the Phase 1 application, explaining the two-step landfill permitting process and proposed project to the public. The Department's presentation clarified that Phase 1 of the two-step landfill permitting process relates solely to the Department's evaluation of "siting of the landfill" through a DON and consistency review.

On July 17, 2024, the Department issued notice of its Final Phase I Determination by way of a Notice of Decision. The Notice of Decision provides that the decision "applies to the first phase of the landfill permitting process, which deals with need, consistency, zoning, and certain buffers." It further provided that the Department determined that the proposed Replacement Landfill complied with the DON regulations, State and County solid waste management plans, and applicable buffer requirements. The Notice of Decision noted that, having been approved for the

³ The increase in annual disposal rate was not challenged and is not before the court.

⁴ The Department's final determination in this matter lists the date of receipt of the application as July 13, 2023, while the application letter is dated June 6, 2023.

⁵ The Respondent originally applied for a permit for an "expansion" of the Existing Landfill on April 23, 2023. After realizing that its April 23, 2023, application mistakenly characterized the request as an "expansion" request instead of a "replacement" request, the Respondent revised and resubmitted its application as such on June 6, 2023.

⁶ There is no evidence as to what the potential volumetric capacity of the Replacement Landfill may be.

first phase of the permitting process, the Respondent may proceed with submitting the technical application for its proposed landfill, which is Phase 2 of the permitting process.⁷

Thereafter, the Petitioner timely requested this contested case hearing. On June 26, 2025, the court held a hearing on the motions.

STANDARD OF REVIEW

The Rules of Procedure for the ALC provide that “[t]he South Carolina Rules of Civil Procedure [(SCRPC)] . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules.” SCALC Rule 68. Rule 56 of the SCRPC states that summary judgment is appropriate and should be granted when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC.

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (citation omitted). “In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party.” *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992) (citation omitted). Stated differently, “the evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party” *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 90, 588 S.E.2d 87, 92 (2003) (citation omitted).

“[S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.” *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004) (citation omitted). “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008) (citations omitted). “Even when there is no dispute as to evidentiary facts, but only as to the conclusion or inferences to be drawn from them, summary judgment should be denied.” *Singleton* at 197, 659 S.E.2d at 202 (citations omitted).

⁷ As discussed in further detail below, the Phase 2 portion of the permitting process, the technical review, entails reviewing the operational plan, buffer requirements, design criteria, groundwater separation, and the engineering report (stormwater and settlement calculations).

“[H]owever, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Thus, “when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001) (citation omitted).

DISCUSSION

The relevant background facts in this case are not in dispute. The Respondent owns and operates the Hilltop Landfill and applied for a replacement variance to replace it with the Replacement Landfill, a much larger facility. The Department determined that the Respondent satisfied the applicable regulatory requirements and that the Replacement Landfill qualified for a variance from the DON requirements. The central issues in this case are whether the Replacement Landfill qualifies as a “replacement” of the Hilltop Landfill for purposes of the DON variance, and whether the Department’s DON and Consistency determination was otherwise consistent with the regulatory requirements applicable at this juncture. For the reasons set forth below, the court finds that, while the much larger Replacement Landfill is unquestionably not comparable to the modest Hilltop Landfill, it qualifies for a DON replacement variance under the DON regulations and ordinary definition of “replacement,” neither of which include any size considerations. The court further finds that the Respondent’s request for a variance satisfied the remaining requirements applicable at this juncture.

By way of background, in this State, landfills are subject to a bifurcated permitting process. First, an applicant must request a Determination of Need and Consistency from the Department (Phase I). S.C. Code Ann. Regs. 61-107.19(D)(1) (Supp. 2024).⁸ The Phase I DON determination only involves the evaluation of certain siting requirements, including the number of existing landfills of the same type within the planning area. *See* S.C. Code Ann. Regs. 61-107.17(D)(2) (2012); *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”). As a part of this phase, the applicant must

⁸ All references to Regulation 61-107.19 in this order are to Part I of the regulation.

submit certain documentation and information to the Department, which then conducts a public notice and participation process. *See* S.C. Code Ann. Regs. 61-107.19(D)(1)(a) & (D)(2) (Supp. 2024). Thereafter, the Department issues a DON and Consistency. S.C. Code Ann. Regs. 61-107.19(D)(2)(b) (Supp. 2024).

Following the Department's DON and Consistency determination under Phase 1, the applicant may then file an application for a technical review of the proposed landfill—Phase 2 of the permitting process—which is a wholly separate procedure. *See* S.C. Code Ann. Regs. 61-107.19(D)(2)(c)-(g) (Supp. 2024). According to the Department, the Phase 2 portion entails reviewing the operational plan, buffer requirements, design criteria, size, groundwater separation, and the engineering report (stormwater and settlement calculations), among other things.⁹ After a similar public notice and participation process, the Department renders a decision for the Phase 2 technical review. *See id.*

With respect to the DON component of the Phase 1 process, section 44-96-290 of South Carolina Code provides 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 [D]epartment” S.C. Code Ann. § 44-96-290(E) (Supp. 2024). However, that section further provides that “[t]he department may, by regulation, exempt certain facilities from all or part of the requirements of this section.” S.C. Code Ann. § 44-96-290(A) (2018). To that end, it requires the Department to promulgate regulations to address “exemptions” and “variances.” S.C. Code Ann. § 44-96-290(D)(3) (2018).

Pursuant to the DON regulatory requirements, no new facilities will be permitted if sufficient landfills of the same type already exist within a geographic proximity to the proposed landfill site. *See* S.C. Code Ann. Regs. 61-107.19(D)(1)(c) (Supp. 2024). However, Regulation 61-107.17(D)(6) provides a procedure for certain existing permittees to request a variance from the Department as to the DON requirement. That regulation provides that that “[t]he Department shall grant¹⁰ a variance to the requirements of D.2 for Class Two and Class Three solid waste

⁹ At the hearing, counsel for the Department confirmed that the size of the Replacement Landfill would be analyzed during the technical review as part of Phase 2. *See* S.C. Code Ann. Regs. 61-107.19(D)(2)(a)(2)(d) (Supp. 2024) (providing that the notice of intent to file a permit application for the technical review shall contain “[t]he proposed size of the landfill or landfill expansion, i.e., footprint acreage”).

¹⁰ Use of the word “shall” indicates a mandatory requirement to issue the variance if the stated conditions are met. *See Collins v. Doe*, 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002) (citations omitted) (“Under the rules of statutory interpretation, use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a mandatory

landfills” if certain specified conditions are met. *See* S.C. Code Ann. Regs. 61-107.17(D)(1)(c) (2012). Pursuant to the applicable part of the regulation,

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 [existing] landfill has a permit issuance date on or before the effective date of this Regulation.¹¹

(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.

S.C. Code Ann. Regs. 61-107.17(D)(6)(a) (2012). Accordingly, the regulation allows for a one-time variance for certain existing permittees to replace qualifying existing facilities without having to demonstrate a need for the replacement facility, assuming the applicable conditions are otherwise met. The regulation similarly allows for a variance, without conditions, to expand the volume of an existing facility.¹² S.C. Code Ann. Regs. 61-107.17(D)(6)(b) (2012).

As for the timing of the application for a variance, the regulation provides that:

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) (2012).

requirement.”). As such, the Department does not have discretion to deny a variance if the applicable conditions are met.

¹¹ The Regulation became effective on June 23, 2000, and was subsequently amended June 26, 2009. *See* S.C. Code Ann. Regs. 61-107.17 (effective June 23, 2000) (amended June 26, 2009).

¹² While “replacement” is not defined in the regulation, “expansion” is defined as “any increase in the permitted volumetric capacity of an existing solid waste management facility.” S.C. Code Ann. Regs. 61-107.17(B)(8) (2012); *see also* S.C. Code Ann. Regs. 61-107.19(B)(22) (Supp. 2024) (defining “expand” and “expansion” to mean “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”).

The Petitioner argues that the proposed facility is both a replacement and, given the significant increase in size, an expansion of the Hilltop Landfill and, therefore, does not qualify for a DON variance under the DON regulations. It argues that implicit in the regulatory scheme is that a variance is available only for *comparable* replacement facilities and that the sole purpose of subsection 6(e) of Regulation 61-107.17, which the Petitioner's case hinges on, is to prevent exploitation of the DON variance, as it argues is the case here.¹³ The Petitioner asserts that there are clear policy arguments favoring expansion of existing facilities, rather than building new facilities, and limiting replacement variances to comparable replacement facilities only.¹⁴ The Respondent and the Department argue that, irrespective of policy arguments, the unambiguous DON regulations allow for a variance for replacement facilities and do not include any size or capacity limitations or considerations as a part of that analysis. They argue that Phase 1 of the landfill permit process only deals with certain citing requirements, while Phase 2 entails the technical review of the proposed facility, during which its size will be considered. They further argue that subsection 6(e) is nothing more than a timing regulation setting forth the appropriate time to apply for the variance and does not add any substantive conditions. The court agrees with the Respondent and the Department.

Initially, the court must determine if the Replacement Landfill qualifies as a replacement of the Hilltop Landfill for purposes of the DON variance. The DON regulations unambiguously provide that the Department shall grant a variance to construct a replacement landfill if the applicable conditions are met. However, the term replacement is not defined within Regulation 61-107.17, nor does it furnish any guidelines or parameters to determine what qualifies as a replacement landfill for these purposes. "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." *Strother v. Lexington*

¹³ The Petitioner contends that the Respondent only purchased the Hilltop Landfill for purposes of obtaining its existing permit to exploit the DON variance regulations.

¹⁴ At the hearing, counsel for the Petitioner conceded that a replacement isn't required to be the same size and that the Respondent could replace a one-acre landfill with a one-thousand-acre landfill, as long as it demonstrates a need for the larger facility. Thus, it would appear that one of the Petitioner's main objections is to the DON regulation allowing certain facilities to avoid having to demonstrate a need by way of the DON variance, particularly where the replacement facility differs in size from the existing facility. This is consistent with the Petitioner's argument that the enabling statute, section 44-96-290, unambiguously prohibits the expansion or construction of *any* new landfills without a DON. However, that section also explicitly permits the Department to promulgate regulations to exempt certain facilities and to grant variances from the requirements of that section, which the Department did by promulgating Regulation 61-107.17. See S.C. Code Ann. § 44-96-290(A), (D)(3); see also *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995) (citation omitted) ("Regulations authorized by the legislature have the force of law."). Accordingly, this argument fails.

Cnty. Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (citation omitted); *Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992) (“The 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.”); *see also* *Murphy v. S.C. Dep’t of Health and Env’t Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) (“Regulations are interpreted using the same rules of construction as statutes.”). To that end, “[w]here a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.” *Lee v. Thermal Eng’g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002) (citations omitted).

In this context, the term “replacement” has a simple, rather broad meaning signifying something that substitutes or is used in place of something else, especially in function. *See* *Replacement*, MERRIAM-WEBSTER.COM, <https://www.merriamwebster.com/dictionary/replacement> (last visited Aug. 15, 2025) (defining “replacement” as “one that replaces another especially in a job or function”); *Replacement*, DICTIONARY.CAMBRIDGE.ORG, <https://dictionary.cambridge.org/us/dictionary/english/replacement> (last visited Aug. 15, 2025) (defining “replacement” as “something that you use instead of something else”). Thus, in accordance with the ordinary meaning of the word, all that is required to qualify as a “replacement” landfill under the regulation is that the replacement facility will take the place of the existing facility and be used for the same function.

Here, the proposed Replacement Landfill would be a disposal site for C&D materials, like the Hilltop Landfill, located in the same planning area as the Hilltop Landfill—Aiken County. The Replacement Landfill must also adhere to the Hilltop Landfill’s permitted annual rate of disposal. The Replacement Landfill will, therefore, be used for the same purposes, to the same extent allowed, and in the same service area as the Hilltop Landfill. As such, the Replacement Landfill qualifies as a replacement for the Hilltop Landfill in accordance with the usual and customary definition of replacement.

While the court acknowledges that the Replacement Landfill, which would be used for commercial purposes, is substantially larger than the modest Hilltop Landfill, which was used exclusively for the prior permittee’s personal business waste, that does not preclude it from qualifying as a replacement for these purposes. Though the DON variance regulation requires the replacement facility to comport to the permitted *annual rate of disposal* of the existing facility, it does not contain similar requirement with respect to the size or volumetric disposal capacity of the

replacement facility. There are no disposal capacity or size restrictions included within the regulation or in the ordinary definition of replacement, and the court is without authority to impose an additional requirement into the regulation that does not exist.¹⁵ See *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) (citation omitted) (“The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy.”) (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 Dev. Partners, II v. S.C. Dep't of Health and Env't Control*, 411 S.C. 16, 39, 766 S.E.2d 707, 720 (2014) (stating that a court’s role is to “apply and interpret, not rewrite, regulations”). Thus, the mere fact that the Replacement Landfill differs in size from the Hilltop Landfill does not necessarily disqualify it from being considered a replacement under the usual and customary meaning of the word and, therefore, the DON regulations.¹⁶

Furthermore, the Department is charged with administering the DON variance regulations and likewise interpreted the term replacement in accordance with its usual and customary meaning, which does not include size or capacity considerations. Because this interpretation is not patently absurd or inconsistent with the DON variance regulation, and given that the size and capacity of the Replacement Landfill will be analyzed during the technical review phase, the court finds that the Department’s interpretation is reasonable and entitled to deference. *Kiawah Dev. Partners, II*, 411 S.C. at 33, 766 S.E.2d at 717 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) (“If the statute or regulation ‘is silent

¹⁵ Had the Department or the General Assembly intended for a replacement facility to abide by the existing facility’s permitted volumetric capacity or size, that requirement could have been added to the regulation along with the requirement to adhere to the permitted annual disposal rate. It would also have been simple to supply a definition for replacement that places conditions or limitations on the size or capacity of the replacement facility. However, nothing in the regulation suggests that a replacement landfill must be a copy of or similar to the one it replaces. There is similarly nothing in the regulation to indicate that a DON variance is not available if the new facility has more volumetric capacity or that would prohibit the Department from granting a replacement variance when the size or capacity may be larger. If the Department reconsiders this position and desires a more restricted interpretation of a replacement facility for environmental or planning reasons, it is certainly at liberty to revise Regulation 61-107.17 accordingly.

¹⁶ By way of analogy, moving from a 1,000-square-foot home to a 10,000-square-foot home does not make the new home any less a replacement for the original residence.

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.”¹⁷

Similarly, while the Hilltop Landfill was exclusively used by the prior permittee for C&D waste generated from his personal business, there is no restriction on the permit limiting it to private or non-commercial use only. Irrespective of how the prior permittee chose to utilize the Hilltop Landfill, it is, nevertheless, a Class Two C&D commercial landfill, just as the Replacement Landfill would be. Thus, the size disparity and difference in how the Replacement Landfill would be used does not negate the fact that it will be used for the same function as the Hilltop Landfill it proposes to replace. Accordingly, the court finds that the Replacement Landfill qualifies as a replacement of the Hilltop Landfill for purposes of the DON variance regulations.¹⁸

¹⁷ In *Kiawah*, 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.’” *Kiawah Dev. Partners, II*, 411 S.C. at 35, 766 S.E.2d at 718 (citing *Chevron*, 467 U.S. at 844). The court is cognizant of the recent U.S. Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, which overruled *Chevron* and the deference framework established pursuant thereto. See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412-13, 144 S.Ct. 2244, 2273 (2024). More specifically, the court overruled the precedent that “required courts to defer to ‘permissible’ agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently” in cases in which “‘the statute [was] silent or ambiguous with respect to the specific issue’ at hand.” *Id.* at 377, 397 (citing *Chevron*). It characterized this as “demand[ing] that courts mechanically afford *binding* deference to agency interpretations . . .” *Id.* at 399 (emphasis in original). The Court concluded that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority,” leaving in place *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944), which endorsed “exercising independent judgment . . . consistent with the ‘respect’ historically given to Executive Branch interpretations.” See *id.* at 399, 412. This court notes, however, that *Loper* dealt with 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 *Loper*, 603 U.S. at 377-82. Conversely, the *Kiawah* case dealt with the South Carolina Supreme Court’s review of a state agency’s interpretation of state statutes and regulations under the state’s version of the APA. See generally *Kiawah Dev. Partners, II*, at 411 S.C. at 28-29. Additionally, in clarifying our state deference doctrine in *Kiawah*, the South Carolina Supreme Court cited to a long lineage of South Carolina cases that consistently applied those principles, including several cases that predate *Chevron*. See *id.* at 34, 766 S.E.2d at 718 (citing *Faile v. S.C. Emp. Sec. Comm’n*, 267 S.C. 536, 540, 230 S.E.2d 219, 222 (1976) (stating that an agency’s interpretation will not be overruled “without cogent reasons”) and *Hadden v. S.C. Tax Comm’n*, 183 S.C. 38, 48, 190 S.E. 249, 253 (1937) (stating that an agency’s interpretation “will not be overruled without cogent reasons”). Thus, in the absence of any South Carolina appellate court decision overruling our state deference cases, including *Kiawah*, and substituting our state deference doctrine with *Loper* deference, it is unclear what impact, if any, the *Loper* decision has on our state deference doctrine. Notably, while the *Loper* decision was cited and discussed generally by the South Carolina Court of Appeals in *Colonial Pipeline Co. v. S.C. Dep’t of Revenue*, 443 S.C. 448, 458-59, 905 S.E.2d 129 134-35 (Ct. App. 2024), the court did not formally adopt, nor did it apply *Loper* style deference, as the issue of agency deference was not reached in that case.

¹⁸ The court is sympathetic to the Petitioner’s argument. Though this court is not prepared to say—for purposes of the DON variance only—that the size differential is so extreme as to lead to a patently absurd result or to disqualify the Replacement Landfill from being considered a replacement, it is unmistakably pushing the upper limits of logic and reason. See *id.* (citation omitted) (“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.’”). While this case might be

As to the Petitioner's claim that subsection 6(e) of the DON regulation only exists to prohibit a facility from operating under both a replacement and expansion variance at the same time, the court finds that this argument misconstrues that provision, as well as the facts of this case. Here, the Respondent applied for and was granted a replacement variance only. Per the regulatory definitions of "expansion" and the DON regulatory procedures, an expansion variance relates to the expansion of an *existing* landfill. See S.C. Code Ann. Regs. 61-107.17(B)(8); S.C. Code Ann. Regs. 61-107.19(B)(22). Nothing suggests that the Hilltop Landfill ever received an expansion variance. Similarly, the presently unpermitted and non-operational Replacement Landfill has not received an expansion variance. Thus, there is nothing to indicate that the Respondent has or will operate with both an expansion and replacement variance simultaneously. Moreover, it is clear that subsection 6(e) is, as the Department and Respondent suggest, merely a timing provision. The DON variance regulation specifically references subsection 6(e) for "timing" purposes, and the subsection itself sets forth when an existing facility must apply to the Department for an expansion or replacement variance. See S.C. Code Ann. Regs. 61-107.17(D)(6)(a)(3), (D)(6)(e). While the regulation provides that a facility may not operate under both an expansion and a replacement variance simultaneously, except during a reasonable transition period, this can only be reasonably construed as prohibiting an existing facility with an expansion variance from also obtaining a replacement variance and continuing operations at the existing facility beyond the period necessary to transition operations to the replacement facility. Subsection 6(e) does not impose any additional requirements or restrictions on DON variance applicants; it merely establishes the timeline for seeking and implementing a variance.

Having determined that the Replacement Landfill qualifies as a replacement and that subsection 6(e) of the DON regulation does not preclude the Respondent's DON variance, the court must determine whether the Respondent meets the remaining regulatory requirements to obtain a replacement variance. As stated above, pursuant to the applicable DON requirements, the Department is required to issue a DON replacement variance for a Class Two landfill, such as the Hilltop Landfill, if: (1) the landfill permit was issued prior to the effective date of the regulation; (2) the landfill exhausts its permitted capacity at its current location; (3) the location of the

an extreme example, without any statutory or regulatory limitations on the size or capacity of a replacement facility for purposes of a DON variance, the court is, nevertheless, constrained to find that it is permissible under the current DON regulations.

proposed replacement facility is within the facility's existing planning area; (4) the landfill has not previously received a variance for replacement; and (5) the landfill applies for the replacement variance prior to exhausting its permitted capacity. *See* S.C. Code Ann. Regs. 61-107.17(D)(6)(a), (D)(6)(e).

Here, the permit for the Hilltop Landfill was issued in 1995, prior to the effective date of Regulation 61-107.17.¹⁹ The Hilltop Landfill is also nearing exhaustion of its permitted disposal capacity. The Replacement Landfill would be located in Aiken County, which is encompassed within the Hilltop Landfill's planning area. The Hilltop Landfill has not previously received a variance for a replacement or been replaced. Finally, the Respondent applied for the replacement variance prior to exhausting its permitted capacity at the Hilltop Landfill. The Department also found that the Replacement Landfill complied with the State and County solid waste management plans, local zoning, land use and any other applicable ordinances, as well as applicable buffer requirements. Accordingly, the court finds that the Respondent has met the remaining regulatory requirements to receive a replacement variance for the Hilltop Landfill. As such, the Department must grant a replacement variance to the Respondent. *See* S.C. Code Ann. Regs. 61-107.17(D)(1)(c), (D)(6)(a).

CONCLUSION

The DON regulation allows qualifying solid waste facilities, like the Hilltop Landfill, to receive a replacement variance, and the usual and customary meaning of "replacement" encompasses the Replacement Landfill. While the court acknowledges the vast disparity in size between the two facilities, it is not the court's place to impose additional requirements into the DON regulatory framework, and it is premature and speculative for this court to consider any factors or considerations related to Phase 2 of the landfill permitting process—the technical review. Consequently, the court finds that the Department's determination that the Respondent qualified for a replacement variance was both warranted and appropriate.

ORDER

¹⁹ The parties' interpretations of the effective date for purposes of this requirement differ, with the Respondent arguing that the effective date of the regulation is June 26, 2009, while the Department notes that the regulation became effective on June 23, 2000. While the court is inclined to believe that June 23, 2000, is the operable effective date, the court need not decide which date is correct, as the permit in this case was issued in 1995, well before either date.

THEREFORE, IT IS HEREBY ORDERED that the Respondent's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that the Departments' Motion for Summary Judgment is **GRANTED** as to the Respondent's eligibility for a DON variance and **DENIED** to the extent that it differs from the Respondent's motion.

IT IS FURTHER ORDERED that the Petitioner's Motion for Summary Judgment is **DENIED**.

AND IT IS SO ORDERED.



S. Phillip Lenski
S.C. Administrative Law Judge

October 14, 2025
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Erika S. Easler, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Erika S. Easler
Judicial Law Clerk

October 14, 2025
Columbia, South Carolina



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SC Court of Appeals

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Friends of Horse Creek Valley,

Petitioner,

vs.

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

Respondents.

Docket No. 24-ALJ-07-0316-CC

**ORDER DENYING PETITIONER'S MOTION
FOR RECONSIDERATION**

This matter came before the Administrative Law Court (ALC or court) pursuant to a request for a contested case filed by Friends of Horse Creek Valley (Petitioner). The Petitioner challenged the South Carolina Department of Environmental Services' (Department and DES) decision to grant Rabbit Hill Class 2 Landfill (Respondent or Rabbit Hill) a Demonstration of Need (DON) replacement variance for its proposed solid waste management facility.

On October 14, 2025, the court issued an Order Granting Respondent Rabbit Hill's Motion for Summary Judgment and Denying Petitioner's Motion for Summary Judgment. In its order, the court found that the Respondent's proposed landfill qualified for a DON variance and that the Respondent was entitled to judgment as a matter of law.

Thereafter, on October 22, 2025, the Petitioner filed a Motion for Reconsideration (Motion) arguing that the court erred in granting the Respondent's motion for summary judgment and denying its motion for summary judgment. The Motion largely reiterates the Petitioner's arguments from its motion for summary judgment and asserts that the court erred by not adopting its position. On October 31, 2025, Rabbit Hill and DES filed a joint response in opposition to the Motion (Response) arguing that the court ruled on all of the Petitioner's arguments in its order and that the Motion fails to articulate any issue warranting reconsideration.

After careful consideration of the Motion and Response, the court finds the Motion to be without merit. The Petitioner failed to establish any error in the court's decision or identify any point that was overlooked or misapprehended by the court. As such, the Motion must be denied.

ORDER

THEREFORE, for the foregoing reasons, the Petitioner's Motion for Reconsideration is hereby **DENIED**.

AND IT IS SO ORDERED.



S. Phillip Lenski
S.C. Administrative Law Judge

November 18, 2025
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Erika S. Easler, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in black ink, appearing to read "Erika S. Easler", written over a horizontal line.

Erika S. Easler
Judicial Law Clerk

November 18, 2025
Columbia, South Carolina

OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 24-ALJ-07-0316-CC

Friends of Horse Creek Valley,)
)
Petitioner,)
)
v.)
)
South Carolina Department of)
Environmental Services and Rabbit)
Hill Class 2 Landfill,)
)
Respondents.)
-----)

**MOTIONS HEARING
CROSS MOTIONS FOR SUMMARY
JUDGMENT**

Thursday, June 26, 2025
10:07 a.m. - 11:49 a.m.

The hearing before the Honorable S. Phillip Lenski was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Courtroom 1, Columbia, South Carolina, on the 26th day of June, 2025 before Amanda J. Creel Godfrey, Court Reporter and Notary Public in and for the State of South Carolina.



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ROA 619

APPEARANCES

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ROA 620

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EXHIBITS

(No exhibits were marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.



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1 CALL TO ORDER:

2 **THE COURT:** Good morning, everyone.

3 **GROUP:** Good morning.

4 **THE COURT:** I'm Phil Lenski, the Administrative Law
5 Judge assigned to this matter. And this is
6 Friends of Horse Creek Valley, Petitioner,
7 versus the South Carolina Department of
8 Environmental Services and Rabbit Hill Class 2
9 Landfill, Respondents. Docket number 24-ALJ-
10 07-0316-CC. We're here today on cross motions
11 for summary judgment. And I see representing
12 the Petitioner, we have Mr. Corley.

13 **MR. CORLEY:** Yes, Your Honor.

14 **THE COURT:** How are you, sir?

15 **MR. CORLEY:** Doing well.

16 **THE COURT:** Ma'am?

17 **MS. TOLLEY:** How are you, Judge? Juan Tolley.

18 **THE COURT:** Okay.

19 **MS. TOLLEY:** Uh-huh.

20 **THE COURT:** Nice to see you, okay, Ms. Tolley. And
21 then also, let's see here, for the Respondent,
22 for the Department, it's Etta Linen, is that
23 right?

24 **MS. LINEN:** Yes, good morning, Your Honor.

25 **THE COURT:** Oh, yes, hey. How are you?



1 **MS. LINEN:** I'm fine. How are you?

2 **THE COURT:** And then -- and then for Rabbit Hill,
3 Mr. Johnston.

4 **MR. JOHNSTON:** Yes. Good morning, Your Honor.

5 **THE COURT:** Good morning. Have I got all the
6 counsel here? I know there are some folks here
7 for 403 credits. We'll discuss that after the
8 hearing has concluded. So, are the parties
9 ready to proceed?

10 **MR. CORLEY:** Yes, Your Honor.

11 **THE COURT:** Do we have anything we need to take up
12 before we get started?

13 **MR. CORLEY:** Not from us, Your Honor.

14 **THE COURT:** Okay.

15 **MS. LINEN:** No, Your Honor.

16 **THE COURT:** All right. So, let's see, the
17 Petitioner was the first motion for summary
18 judgment. So, if you'd like to go first.

19 **MR. CORLEY:** Great. Thank you.

20 **THE COURT:** Again, there's no lectern any more, so
21 we're ---

22 **MR. CORLEY:** Well, I haven't been in here yet.

23 **THE COURT:** --- part of the renovation process.
24 I'm just kind of surprised too. But anyway,
25 they're gone.



1 **MR. CORLEY:** I have not been in the ALC for a
2 while. This is actually the second time I've
3 been in front of you, and the first time was
4 basically your first week on the job, and --
5 but, amazingly, neither of us have aged since
6 then.

7 **THE COURT:** I know; isn't that amazing?

8 **MR. CORLEY:** That's really wonderful to see.

9 **THE COURT:** I don't know. It happens to other
10 people, but not to us, I guess.

11 **MR. CORLEY:** Can I -- I have some PowerPoints that
12 I'm going to run through as a talk ---

13 **THE COURT:** Of course. Right.

14 **MR. CORLEY:** Great.

15 **MOTIONS FOR SUMMARY JUDGMENT:**

16 **MR. CORLEY:** All right. Thank you, Your Honor.

17 **THE COURT:** Certainly.

18 **MR. CORLEY:** Now, I wanted to start by pointing out
19 that I think this is one of the most straight-
20 forward cases that I personally have ever
21 brought. And I say that because for all the
22 briefing that's been done, all the writing, you
23 know, all the Court really needs to do to
24 resolve this case is read one regulation. It's
25 the regulation that you see here in front of



1 you, 61-107. 17(D)(6), read that regulation and
2 figure out what it means and decide the case.
3 Truly, that's it. Your Honor could go back in
4 chambers, carefully read through it a couple
5 times, and that should be enough to decide
6 things. Now, I'm not saying you should do
7 that. We got all dressed up; there's a big
8 crowd, but I point that out because you know,
9 us lawyers are very good at making simple
10 things complex, right? And it would be easy
11 for us today to fall into a micro analysis of
12 the language in this regulation, picking over
13 every word. We did a little bit of that in the
14 briefing. But I don't think that's going to be
15 particularly useful to you. I don't think you
16 need it. You can read the regulation yourself.
17 So, what I'm going to try to do today is try my
18 best to stay out of that micro analysis,
19 instead focusing on big picture context, giving
20 Your Honor the contextual information, the big
21 picture surrounding this regulation that will
22 be valuable to you in your own reading of the
23 reg. That's my -- that's my goal today.

24 So, in starting with that, the first thing
25 we should talk about is need. To be -- for a



1 landfill to be permitted in South Carolina, it
2 has to be needed. That makes sense, right?
3 It's a requirement. You know, when a landfill
4 is constructed, it has an environmental impact;
5 it has a community impact. There's no reason
6 to cause that disruption for land -- a
7 landfill, unless it's needed, okay. So, the
8 way that that need requirement is embodied in
9 the regulations and statute is through the
10 demonstration of need requirement. You see it
11 here in relation to the Solid Waste Management
12 Act. So, this is from the enabling statute
13 that led to the regulation that's at issue in
14 this case. You see what it says there, no
15 permit to construct a new solid waste
16 management facility or to expand an existing
17 facility may be issued until a demonstration of
18 need is approved by the Department. So, this
19 what's been called -- come to known as DON,
20 demonstration of need. It's a fundamental
21 landfill permitting requirement in South
22 Carolina. If you just read the statute here,
23 you'd come away thinking, well, if I'm building
24 my facility at a new place, I need a DON; if
25 I'm expanding at the existing place, I need a



1 DON. Landfills are only permitted with
2 demonstrations of needs. That's my takeaway
3 from this. But then when you -- when we moved
4 into regulations, when the agency, DHEC at the
5 time, is deciding how to implement that
6 enabling statute, how to implement the
7 demonstration of need, they expanded, modified
8 maybe, the DON requirement as it appeared in
9 the statute. And they did that in a couple of
10 ways. Most notably, by creating a couple of
11 exceptions to that demonstration of need
12 requirement, and those exceptions are embodied
13 in the regulation that is at the core of what
14 we're talking about here, (D)(6). All right.
15 So, how did -- how did the agency craft those
16 exceptions? How did the agency modify or
17 expand the DON requirement as it appears in the
18 statute? Well, first you can see that the
19 agency said to themselves, you know, we really
20 want to encourage landfill expansion, right?
21 Landfill expansion is preferable to the
22 construction of new landfills. Because, think
23 about it, when you've got an existing landfill,
24 there's already been the environmental impact.
25 The infrastructure is in place. We've already



1 got a community that's living with this
2 landfill, versus building a new facility where
3 you've got a new site disrupted, a new
4 community disrupted. So, the agency says we
5 need to favor expansion. That's better; it's
6 preferable for a variety of reasons. So, what
7 does the agency do? They create this
8 exception, a Class 2, Class 3 landfill shall
9 receive a variance to expand the volume of an
10 existing facility. What that means is you
11 don't have to satisfy a demonstration of need
12 to expand your landfill. You got a landfill,
13 you can expand it without satisfying a
14 demonstration of need and that promotes the
15 policy that I've been identified of encouraging
16 on-site expansion. On-site expansion is
17 preferable. We create this provision, this
18 policy, that encourages that behavior in the
19 form of a variance and exception to the
20 demonstration of need requirement. Well, what
21 else does the agency do? How else do they
22 modify, amend, add on to the DON requirement in
23 the statute? Well, you can see that the agency
24 recognizes the potential for an unfairness,
25 okay. So, think about it, the Solid Waste



1 Management Act is created in the early '90s,
2 and along with the Solid Waste Management Act
3 comes this new fundamental requirement, this
4 demonstration of need requirement, that's
5 imposed for the first time at the beginning of
6 the '90s, okay. But, of course, there's
7 already landfills that exist in the early '90s.
8 Some of these landfills are well on their way
9 to being filled up, right? And those people,
10 those owners of those pre-demonstration of need
11 landfills, did not know that the DON
12 requirements were coming. So, when they
13 planned where to build their landfill, when
14 they planned how to build their landfill, they
15 weren't able to account for the nature of the
16 DON requirements. If they had known DON was
17 coming, maybe they would have built at a site
18 where it would have been easier to expand,
19 right? Because we just saw you can expand a
20 landfill without DON. Maybe they would have
21 chosen a location where, geographically, where
22 it was easier to make a demonstration of need.
23 But because they didn't know this was coming,
24 these old landfill owners, these pre DON
25 landfill owners, are put at a disadvantage and



1 pot- -- and potentially put out of business by
2 this new at the time, new in the early '90s,
3 demonstration of need requirement. So, what
4 does the agency do? The agency comes up with
5 Section (6)(a), the second exception or
6 variance, what we've called the replacement
7 variance. If you take a look at it, what it
8 says there is, if you've got a permit that's
9 issued on or before the date of the regulation,
10 right, so, you've got a pre DON landfill, and
11 it fills up, you are allowed to replace that
12 landfill once as a matter of fairness, right?
13 The pre DON landfill owners are essentially
14 grandfathered to a degree to prevent them from
15 being unfairly disadvantaged by this new at the
16 time, this demonstration of need requirement.
17 Okay. So, put that back in the context of the
18 regulation as a whole. We've got two
19 exceptions, two variances, one -- and these are
20 two -- so, think about where we stand here.
21 This is -- the demonstration of need is perhaps
22 our most fundamental policy statement as it
23 relates to landfill permitting. Demonstration
24 of need is a fundamental policy. But the
25 agency has decided, you know what, there's two



1 -- there's these other policy objectives that
2 are so important that they warrant an exception
3 to this fundamental DON requirement. And
4 here's what they are, right? Whatever the text
5 -- whatever you say about the text, the purpose
6 is, we want to encourage on-site expansion, and
7 we want to treat pre DON landfill owners
8 fairly. So, in those two circumstances, you
9 get a DON variance and exception, and don't
10 have to satisfy the DON in order to get your
11 landfill permitted. All right. So, again, big
12 picture, we got DON fundamental policy. We've
13 got two exceptions that are based on all
14 policies that are also these -- these
15 exceptions are designed to accomplish important
16 objectives so important that the agency has
17 determined that they warrant an exception to
18 the DON.

19 All right, so moving from that broad
20 context now to this specific case. We have a
21 landfill here that can't satisfy -- can't make
22 a demonstration of need, period. I want to be
23 clear on that. Un- -- like, not in dispute,
24 this landfill is not needed. As a matter of
25 law, not needed, okay. But the agency, DES,



1 has come in and says, well, you know, that
2 doesn't matter. You can have a DON variance,
3 an exception to the DON, and you can build your
4 landfill even though it's not needed as a
5 matter of law. Well, my question for that is,
6 why? Why are we doing that? Why do we want to
7 -- this fundamental DON requirement, why do we
8 want to forgive that for this landfill? Are we
9 encouraging on-site expansion? No. This is
10 a new landfill at a new site. Are we treating
11 pre-demonstration of need landfill owners
12 fairly, right, basically, grandfathering in
13 these old landfill owners? No. The company
14 that has received the variance that intends to
15 build Rabbit Hill Landfill didn't appear on the
16 scene until 2019. None of the important policy
17 objectives that led to the creation of these
18 DON exceptions are present here. And I would
19 impress upon the Court that there's, in fact --
20 the variance granted here, in fact, doesn't
21 promote any legitimate policy objective, which
22 leads to what I consider to be the fundamental
23 question at the heart of this case, why would
24 our regulations, our DON regulations, be set up
25 to forgive the fundamental DON requirement



1 under these circumstances? Why would it be set
2 up in that way? We know the DON is a vi- --
3 demonstration of need is a vital policy -- a
4 vital expression of policy by our legislature.
5 Why would the regulations be set up to forgive
6 that vital statement of policy by our
7 legislature under these circumstances? Well,
8 what I'll show the Court is there's no good
9 reason why the regulations would be set up that
10 way, and, in fact, the regulations are not set
11 up in that way. Okay. So, to explain what I
12 mean, I'm going to work my way through some --
13 some basic facts. I don't think it's necessary
14 for this Court to resolve any disputed facts as
15 a -- as part of this motion. I'm offering
16 these facts mostly to provide context for --
17 for the discussion for the regulation. But to
18 the extent that the Court's interested in
19 validating these facts, this all comes from
20 exhibits that were attached to our summary
21 judgment motion.

22 **THE COURT:** Uh-huh.

23 **MR. CORLEY:** Okay. So, we -- the landfill at issue
24 here, Rabbit Hill Landfill, has a replacement
25 variance. So, let's take a look at the



1 landfill that is being quote, unquote replaced,
2 and that is the Williams Landfill. In 1995,
3 Mr. G.L. Williams got a permit for the Williams
4 Landfill, also known as the Hilltop Landfill,
5 1995. What was that landfill like? Well, Mr.
6 Williams' consultant submitted a report to DES
7 that identified the footprint of that landfill,
8 the disposal area of that landfill as 2.3
9 acres, and specified that the landfill is used
10 exclusively for Mr. Williams' business
11 operations. So, think about that. Think about
12 what that means, practically. 2.3 acres, I
13 think we all have a general idea of what that
14 size is like, right, in the -- in the suburban,
15 semi rural area where I live, 2.3 acres is a
16 fairly normal mullein size, right? It's a
17 modest sized landfill. And it's a modest sized
18 landfill, like not an industrial sized
19 landfill, because it's not serving a industrial
20 purpose. Mr. Williams has a trucking company;
21 he has other business endeavors, and whatever
22 waste he generates as part of that business, he
23 puts into the Williams Landfill, into that 2.3
24 acre footprint. So, the footprint is one way
25 to measure the size of this land -- this pre-



1 DON landfill, the landfill being replaced.
2 Another way to do that is through the total
3 volume that the landfill can accept. You see
4 that here. So, this is the amount of waste
5 that can be piled onto that 2.3 acres. We have
6 135,000 tons, 225 cubic yards. That is the
7 total -- when this landfill was permitted, that
8 was the total amount of waste that landfill was
9 allowed to accept. That is, you know, I don't
10 have a table of data here for Your Honor, but
11 I can assure you that is a very small amount of
12 total volume for a landfill. Certainly, for a
13 commercial landfill.

14 So, the final way that we measure the size
15 of a landfill is the maximum amount that can be
16 disposed of in a year. For here, for the
17 Williams Landfill, Hilltop Landfill, the permit
18 says 15,000 tons a year. So, all in all, we
19 have Mr. Williams, he's not in the landfill
20 business. He's not making money off -- seeking
21 to make money off disposal of commercial waste
22 in his landfill. He has a modest landfill for
23 his own modest purpose. That is a landfill
24 that has been replaced, okay. So, it's like
25 that, you know, for decades, some small changes



1 here and there. Landfill operates in that way
2 under Mr. Williams' ownership. 24 years
3 passes. So, a quarter century passes from the
4 time this permit is issued. And after 24 years
5 or so, the folks that are involved in the
6 current permitted landfill arrive on the scene
7 and, amazingly, the Williams Landfill, the
8 Hilltop Landfill, is still not full. Right,
9 that 2.3 acres after 24 -- after a quarter
10 century, that 2.3 acres is not full. So, just
11 doing a little math here, we started with the
12 total annual -- total allowable capacity of
13 135,000 tons. It had been operating for 24
14 years at that point, still had room. So, at
15 most 5,625 tons of waste per year had been
16 disposed of in the Williams Hilltop Landfill
17 over its life. That is a paltry figure for
18 landfills, and that is apparent -- we'll get --
19 we'll provide more information on this, of
20 course, but that is apparent when you compare
21 that to what has been approved for the annual
22 disposal at the new Rabbit Hill Landfill,
23 107,500 tons a year. All right. So, this
24 landfill that over its 24 year history had at
25 most an average of 5,600 its replacement is now



1 allowed to accept 107,500 tons a year.

2 All right. So, we gone from 1995 to 2019,
3 and -- B&K, the entity, the folks behind the
4 current landfill proposal, arrive on the scene,
5 and for some reason, they get involved in this
6 old Williams Landfill, this 2.3 acre landfill
7 that's been operating for a quarter century.
8 It's got to be nearly full. They come in and
9 they purchase that landfill. February 2019 B&K
10 purchases Williams Hilltop Landfill. Strange
11 purchase, tiny landfill, barely commercial,
12 certainly nearly almost full. Why would a
13 company come in and buy that 24 years after the
14 landfill is permitted? Well, in March 2019
15 that intent becomes clear. In an e-mail to the
16 Department, representative for B&K says it was
17 explained to us during the negotiations for the
18 sale of this entity that the current permit
19 could be moved. In other words, B&K wants to
20 build a new landfill, but instead of getting
21 that landfill permitted, they want to use the
22 Williams Landfill permit to build the new
23 facility. In other words, they want a DON
24 variance. In other words, they want a
25 replacement DON variance.



1 But let's look back at what we know about
2 the replacement variance. What do you need --
3 if B&K wants that replacement variance, well,
4 what do they need to satisfy? Well, the
5 landfill permit date part two, the landfill
6 permit date has to be on or before the
7 effective -- so has to be a pre-DON landfill.
8 They bought the pre-DON landfill. That was the
9 whole point. So, they bought that old
10 landfill. Two is a check. And then the third
11 is the landfill's got to exhaust its permitting
12 capacity at its current location. Now, keep in
13 mind B&K just bought this thing, right? But
14 that doesn't stop them from in 20 -- in April
15 2023 writing DES and saying Hilltop Landfill
16 will reach its disposal capacity in the near
17 future. Hey, DES, the small, little landfill
18 we just bought is almost full. So, clearly
19 reflecting a plan to check off the elements of
20 the replacement variance for the sake of
21 building a new landfill off the back of the
22 existing Williams Hilltop Landfill.

23 But there's actually one more issue as it
24 relates to that replacement variance. Let's go
25 back -- go back here. So, not only did it have



1 -- not only does it have to be an old landfill,
2 not only does it have to be -- have exhausted
3 its current capacity, but if you look at the
4 underlying section there, the replacement
5 landfill has to be at the permitted annual rate
6 of disposal of the landfill being replaced,
7 right? So, the new landfill would have to be
8 at the same annual rate of disposal as the old
9 one. Well, that's not very good for B&k,
10 right? We -- we've already talked about how --
11 how the Williams Landfill, Hilltop Landfill,
12 was always a very small operation. B&K's
13 thinking big time here and -- and something's
14 got to be done so that they can have the
15 permitted annual rate of disposal that will
16 provide the business model that they're looking
17 for. So what do they do? They go May 2023,
18 applies to double the maximum annual disposal
19 rate at Hilltop up to 107,500 tons per year,
20 which is unbelievable to me, honestly. Look,
21 this is a month after the -- B&K says Hilltop
22 Landfill will reach its disposal in the near
23 future. A month later, hey, we want to double
24 the annual disposal rate that this landfill can
25 accept. And it's especially outrageous when



1 you consider that this landfill was permitted
2 to have a maximum total disposal over its life
3 of 135,000 tons. So, basically, we're boosting
4 up the allowable annual -- artificially
5 boosting up the annual -- allowable annual rate
6 of disposal at this landfill to a figure that
7 almost matches the landfill's total capacity
8 for its lifetime.

9 So, what's the purpose of this?
10 Obviously, plain and simple, this is a scheme
11 to manipulate the replacement variance that
12 (D)(6)(a) replacement variance that we've
13 talked about over and over again. And that is
14 confirmed when in June 2020, B&K apply --
15 formally applies for a DON variance to build
16 Rabbit Hill as a replacement for Mr. Williams'
17 old landfill. And it is a doozy of a
18 replacement. Mr. -- Mr. Williams' landfill was
19 2.3 acres, the size of my neighbor's suburban
20 lawn. This new landfill is to be 292 acres in
21 disposal area. This Mr. Williams' landfill
22 operated for 24 years and still never filled
23 out its 130,000 ton capacity. Well, this one's
24 gonna have 107.5 tons per year. Quite a
25 replacement. And it's worth noting, beyond the



1 -- the information that appears here, DES has
2 not yet determined the total vol- -- like the
3 total volume over the lifetime. So, we've got
4 -- we know it's 130 whatever at Williams. DHEC
5 has not yet made that calculation in relation
6 to Rabbit Hill. But the site is an old clay
7 mine. It is a cavernous site, deep pits,
8 practically incomprehensible potential for
9 accepting (c) and (d) volume. I have a feeling
10 that if this moves forward, the total volume
11 allowed at Rabbit Hill will dwarf the
12 comparison. The footprint's over 100 times
13 more. It would not surprise me if the volume
14 is an order of magnitude more than that. So,
15 they submit this request to DES and DES, from
16 my perspective, unbelievably, says yes. And
17 that -- at that point, like, I have to go back
18 to, you know, what I said was my -- my
19 fundamental question, right? The fundamental
20 thing at the root of this decision, like, what
21 policy, what good idea, what positive conduct
22 are we promoting by allowing a landfill to
23 avoid the DON requirement in this manner?
24 We're not doing these things, that's for sure.
25 We're not encouraging on-site expansion. We're



1 not grandfathering in these old DON owners.
2 What is the -- what could possibly be the
3 reason for allowing -- if -- if we assume that
4 our regulations are drafted in a rational way,
5 which I certainly do, what could possibly be
6 the rationale for allowing the DON to be
7 avoided in this manner? And keep in mind,
8 we're not talking about whether this landfill
9 can be constructed. If -- if Rabbit Hill can
10 satisfy the landfill permitting requirements,
11 great, get a DON, move forward. We're talking
12 about whether this landfill can be built
13 without satisfying what I consider to be the
14 most fundamental policy requirement in our
15 landfill regs. Can it be permitted without
16 doing those things? Why in the world would we
17 want to give a free pass out to do what's
18 reflected here? Why would we want to encourage
19 -- why would our regulations be set up to
20 encourage that manipulation, to strategically
21 buy a 2.3 acre landfill, amp up the allowable
22 annual disposal at that landfill, all to
23 piggyback into a landfill that is going to be
24 at least 100 times bigger, I would say by the
25 end of -- by the time we're done, 1,000 times



1 bigger, as a quote, unquote replacement,
2 without looking at our most fundamental
3 landfill policy? Why would we want to
4 encourage that manipulation? Well, the
5 regulations are clear that we don't. At all.
6 In fact, just the opposite.

7 And for that, we move to the final section
8 of the regulation that we've been working on
9 here, the regulation I told you is at the
10 center of this case, (D)(6)(e), okay. So, I'm
11 going to keep my promise about not micro
12 analyzing the language of this regulation, but
13 I submit to you that if you look at the
14 regulation as a whole, you look at (6) as a
15 whole, the only possible purpose that emerges
16 for (e) -- read (e), figure out why it's there,
17 what it's supposed to be doing. The only
18 possible purpose that emerges for (e), the only
19 reason it's included, is to prevent the type of
20 manipulation that's occurred here. Stated --
21 stating that in another way, (6)(e) exists only
22 to prevent the replacement variance from being
23 exploited. That's why that provision is there.
24 And to explain that, how that works, I've
25 broken down (6)(e) into two parts here. We've



1 got the first set -- part of (6)(e), we've got
2 the bottom -- bottom part of (6)(e) there.
3 Let's -- let's talk about the first part first.
4 Let me show you what I mean. Again, my thesis
5 is (6)(e) is there to prevent exploitation of
6 the replacement variance. Here's what I mean.
7 So, let's imagine that I'm a landfill company
8 and I want to buy -- I want to build a big new
9 facility in an area where I cannot satisfy a
10 DON. So, I know I want to build a big new
11 facility. I think it'll be profitable, but I
12 can't satisfy the DON. What do I do? Well,
13 landfills that are full, landfills that are at
14 capacity, that can't accept any more waste,
15 have very little value, right? What's --
16 what's the value of a full landfill? Very
17 little. So, let's say that landfill company,
18 if I identify one of these old full landfills,
19 I can purchase that landfill for next to
20 nothing. Then I've got my pre-DON landfill,
21 it's at capacity, I should be able to get a
22 replacement variance and build a new facility
23 based on purchasing that old landfill. I've
24 avoided DON; I've spent very little securing
25 this old landfill; and I've managed to get my



1 variance. Well, (6)(e) says, no, you can't do
2 that. If you read (6)(c), you have to apply
3 for a variance prior to exhausting the
4 permitted capacity, which means you have to own
5 the landfill; you have to operate the landfill
6 before it runs out of capacity. So, this trick
7 about coming in and buying an old landfill
8 that's already full and flipping that into a
9 new landfill, can't do that trick since the
10 beginning of (6)(e). All right, so that's one.

11 Let's move down to the second part of
12 (6)(e), which is the one that's relevant here.
13 So, again, imagine I'm that -- that landfill
14 company, (6)(e) says, you know, a facility can
15 operate under an expansion var- -- a facility
16 cannot operate under an expansion variance and
17 a replacement variance simultaneously, except
18 for the small period. So, you can't have both
19 variances. You can get an expansion variance
20 and a replacement variance. You can't hold
21 them at the same -- you can't indefinitely hold
22 those at the same time. Well, what would --
23 when would that come up? What's, what's the
24 point of that? Why would -- why would that
25 strange sounding provision be inserted into



1 (6)(e)? Well, I would submit to the Court that
 2 there's only one single circumstance where that
 3 second part of (6)(e) come up. And, again,
 4 I'll take you back to my theoretical. I'm that
 5 landfill company; I want to build a big new
 6 landfill in an area where DON is off the table.
 7 I can't prove that my landfill's needed, but I
 8 still want to build that facility. So, what do
 9 I do? Well, this time I see that little old
 10 landfill and I -- but I manage to scoop it up
 11 before it runs out of capacity, right. So, I
 12 get it before -- there's still a little bit of
 13 disposal capacity left. So, the beginning part
 14 -- the beginning of (6)(e) doesn't catch me,
 15 right, I'm good there. I bought it before
 16 capacity was exhausted. And I use that and --
 17 that -- I buy this new land -- this new ten-
 18 acre landfill, it's almost full, but not quite.
 19 It's an old landfill pre-DON. I get a
 20 replacement variance, right. Great. That's --
 21 so, I do get that replacement variance in that
 22 situation. So, now I've got my -- the middle
 23 -- like, the middle trash can here. I've got
 24 my new landfill. It's a -- it's ten acres.
 25 It's just like the one that it replaced. It's



1 -- you know, it's a new facility, and because
2 I've got the replacement variance, it's
3 operating under that replacement variance. All
4 right. But, of course, my real -- my real
5 desire is to build a massive facility, right?
6 A ten-acre landfill's not very profitable.
7 200-acre landfill's a lot more profitable. So,
8 I say, well, I've got this ten-acre landfill
9 now. Every landfill gets -- every landfill
10 gets a variance to expand, right? Part (b).
11 We -- the agency, wants to encourage on-site
12 expansion. It's preferable to building new
13 landfills. It says, straight away, a Class 2
14 or Class 3 landfill shall receive a variance to
15 expand. It's -- it's automatic. So, I'm going
16 to take my ten-acre land -- my ten-acre
17 replacement landfill, and I'm going to expand
18 that under an expansion variance. Can I do
19 that? I cannot do that because of the end of
20 (6)(e). I can't have a facility that is
21 operating under both an expansion and a
22 replacement landfill. So, why -- why is that?
23 Why would the agency in drafting these
24 regulations care if this ten-acre landfill that
25 I want to expand is a replacement landfill?



1 When I -- when I go to ask them to expand, why
 2 would it matter that it's a replacement
 3 landfill and not just a brand new landfill?
 4 Well, the reason for that is because the point
 5 of (D)(6)(a), the point of the replacement
 6 variance is to be fair to legitimate owners of
 7 landfills predating the demonstration of need.
 8 The point of (D)(6)(a) is not to provide an
 9 escape hatch that crafty landfill companies can
 10 use to build unneeded landfills, because
 11 allowing a variance under the circumstances
 12 that we've talked about, whether it's my
 13 example, or as the case at hand, allowing a
 14 variance under circumstances like that promotes
 15 no valid policy -- policy objective. So, that
 16 declaration in (6)(e), that second part of
 17 (6)(e), you can't hold both variances at the
 18 same time, that is the only thing preventing
 19 the type of DON avoidance scheme that we've
 20 seen that's taken place here. And, in fact,
 21 that's the reason why that second part of
 22 (6)(e) exists. It exists to prevent exactly
 23 what we've seen in this case.

24 **THE COURT:** What if it was only 20 acres? 10 to
 25 20, same thing? The individual purchasing the



1 expansion just wanted to double it from 10 to
2 20 acres.

3 **MR. CORLEY:** So, you're trying to get a replacement
4 variance to double the size of your landfill?

5 **THE COURT:** Uh-huh.

6 **MR. CORLEY:** I don't -- I think that built into the
7 whole system here is that you're not -- that
8 the replacement variance is comparable to the
9 landfill being replaced. I think the whole
10 regulatory -- the whole regulation itself is
11 built to facilitate that requirement, which is
12 why (6)(e) is -- like (6)(e) doesn't make any
13 sense there, unless it's to stop abuse of the
14 -- the replacement variance. And this is --
15 like, you know, would we bring this case if it
16 was jumping from 10 to 20? Maybe not, because
17 this is, like, the most egregious example that
18 I could imagine of exploiting what is a
19 replacement. It's the worst. I mean, 2.3
20 acres to 293 acres, a flat area in someone's,
21 you know, work yard to a cavernous industrial
22 landfill. I mean, it is -- there -- we're at
23 orders of magnitude beyond -- many orders of
24 magnitude beyond the landfill that was
25 strategically purchased just to facilitate that



1 outcome. And (6)(e) is -- like, tell me a
2 purpose for (6)(e). It exists to prevent the
3 exploitation of (a) that's -- that's occurred
4 in this case, right? Like, why -- again, going
5 back to my question, like, why would the
6 regulations be set up to forgive the
7 fundamental DON requirement in these
8 circumstances? What are we -- how's the State,
9 how's the public, how's anybody benefitting
10 from this situation? Well, they're not, of
11 course. And what policy are we promoting by
12 allowing this landfill to avoid the DON? Like,
13 what's the policy -- what's the policy basis?
14 We've got a clear policy basis for the
15 exceptions. What's the policy basis for
16 allowing this avoidance? There's certainly
17 nothing positive, right. So, as it stands now,
18 any old landfill that's out there, any old
19 landfill, is a valuable commodity because it
20 essentially represents an entitlement for a
21 company to come in, purchase it and flip that
22 into a quote, unquote replacement of untold
23 size. It blows a hole in the D- -- in the
24 fundamental DON requirement. And unlike the
25 other exceptions to -- that are built into the



1 DON reg, there's no reason. It doesn't -- it
2 doesn't do anything positive or valuable for
3 anybody. It's -- it's -- the only thing it
4 does is provide a useful loophole for landfill
5 companies. That's not the purpose -- purpose
6 of the regulation. So, the agency is dead
7 wrong on its interpretation. It drafted
8 (6)(e), but its interpretation of (6)(e), its
9 purpose, is dead wrong, and that interpretation
10 must be corrected for the sake of this
11 community.

12 **THE COURT:** Thank you.

13 **MR. CORLEY:** Thanks.

14 **THE COURT:** I will lose this thought if I don't
15 write it down. Thank you.

16 **MR. JOHNSTON:** Thank you, Judge Lenski. Good
17 morning and may it please the Court.

18 **THE COURT:** Good morning.

19 **MR. JOHNSTON:** Again, I'm Chad Johnston. With me
20 today is Matthew Decker. We're both with Burr
21 Forman. I represent the respondent, Rabbit
22 Hill Class 2 Landfill. My colleague, Etta
23 Linen is with the South Carolina Department of
24 Environmental Services. She'll offer arguments
25 on behalf of the Department today.



1 **THE COURT:** Okay.

2 **MR. JOHNSTON:** Rabbit Hill is owned by Hilltop C&D,
3 LLC. For the purposes of this hearing, like we
4 did in our briefing, I'll refer to my client as
5 Rabbit Hill. At issue, obviously, is the
6 proposed -- proposed replacement of their
7 existing landfill with another landfill in a
8 separate location. I'll refer to the current
9 landfill located at Rainbow Falls Road in
10 Graniteville as the existing landfill. I'll
11 refer to the proposed replacement landfill,
12 which is on Dixie Clay Road and Beach Island as
13 the replacement landfill. As this court knows,
14 we're here on cross motions for summary
15 judgment. There's a -- there's a lot of ground
16 to cover here. Much of it is technical, so, I
17 apologize in advance. But I want to give this
18 Court a full view of the issues here. So, as
19 to the motions of Rabbit Hill and DES, they
20 present pure questions of statutory and
21 regulatory interpretation based on the plain
22 language of those texts. Summary judgment is,
23 therefore, proper in our favor as to
24 petitioner's motion. Although couched as a
25 question of statutory and regulatory



1 interpretation, as you've now heard,
2 petitioner's motion reveals itself to be
3 something much different. In fact, the premise
4 of petitioner's motion is that a replacement
5 landfill cannot qualify as a replacement for an
6 existing landfill because the size, meaning the
7 capacity of the replacement landfill, is
8 greater in size than the existing landfill,
9 which is a factual determination. Those
10 factual inquiries are really rendered
11 irrelevant when you look at the plain language
12 of the regulation. Both DES and this Court are
13 required to apply the plain language of the
14 statutes and the regulations. It is
15 inappropriate for DES to impose additional
16 conditions to an application that do not appear
17 in the plain language of the regulation, but
18 that is precisely what petitioner is advocating
19 for this Court to do now, graft additional
20 conditions to the approval of a replacement
21 landfill that do not appear in the regulation.
22 It is, at bottom, a naked policy argument as to
23 what petitioner thinks the regulation should
24 say rather than what it actually says. Now,
25 that policy question might have some merit.



1 Mr. Corley's presentation would be a perfect
2 testimony for the Senate Ag Subcommittee or the
3 House Ag Subcommittee. But as I'll discuss,
4 and as we point out in our motion, in fact,
5 petitioner's policy argument runs contrary to
6 the findings of the General Assembly in the
7 Solid Waste Act. But we're not here to argue
8 about the relevant pros and cons of the
9 legislative policy choices. This Court is not
10 a legislative body, nor is DES. As
11 administrative agencies, both are constrained
12 by the plain language of what the General
13 Assembly has enacted, and a review of that
14 plain language of the regulation reveals the
15 replacement landfill meets each of the
16 conditions specified To qualify for replacement
17 under those circumstances. DES and now this
18 Court have no discretion under the regulation.
19 A permit for a replacement landfill shall,
20 using the language of the regulation, be issued
21 under those circumstances. Summary judgment is
22 therefore appropriate in our favor.

23 So that the Court has some context for the
24 arguments, I'd like to set out the regulatory
25 framework and give this Court some brief facts



1 as to really how we got here. On the
2 regulatory side, applications for Class 2 and
3 Class 3 landfills follow a two-step approach.
4 The process is spelled out in 61.107.19(D), and
5 as was explained by DES during the public
6 hearing, March 28, 2024, public meeting, that
7 presentation is included as Exhibit 1 in our
8 cross motion. The first step requires an
9 application or an applicant to seek a
10 demonstration of need and consistency. Upon
11 such a request as -- as it did here, DES has
12 certain procedures that it has to follow. It
13 evaluates the criteria under 19(D)(1). It
14 oversees the public information and
15 participation process consistent with the
16 procedures in (D)(2). It issues a DON or
17 consistency under (D)(2)(b). This is called
18 the phase one determination. Once and only
19 after DES makes that phase one determination,
20 may an applicant file a formal technical
21 application for a Class 2 landfill. The phase
22 2 process follows a wholly separate procedure
23 under (D)(2)(c) through (g). DES looks at the
24 operational plan, the buffer requirements, the
25 design criteria, groundwater separation,



1 engineering reports. And just as it does for
2 a phase one process, it has the same public
3 notice procedures. Of particular relevance
4 here is regulation 17(D)(6) provides a
5 procedure for an applicant to request a
6 variance from DES as to the DON component of
7 the phase one review. And in pertinent part,
8 as you've seen, (D)(6) says the Department
9 shall grant a variance as to the requirements
10 of (D)(2) for Class 2 and Class 3 solid waste
11 landfills, if certain conditions of the
12 subsection are satisfied. Here, Rabbit Hill
13 has sought -- has only sought and received a
14 phase one determination. A copy of that is
15 included as Exhibit 2 to our cross motion. And
16 in issuing that phase one determination, DES
17 determined that Rabbit Hill did qualify for a
18 variance under the DON requirement. Rabbit Hill
19 has submitted the more intensively reviewed
20 phase two application, but that has not been
21 acted upon and is currently stayed by virtue of
22 the automatic stay in this case. So, the
23 discrete issue before this Court is whether
24 DES' phase one determination only was issued in
25 contravention of the procedures set forth in



1 Regulation 19(D)(1) and (2). Nothing more.
2 The only cri- -- only the criteria set forth in
3 the regulation are relevant to a phase one
4 determination and to this Court's consideration
5 for this contested case. As to the facts,
6 Hilltop C&D owns and operates the existing
7 landfill. It is a Class 2 landfill approved
8 for C and D debris. DES originally issued that
9 permit on April 18th of 1995. It has a
10 permitted disposal capacity, not of 135 as
11 mentioned by Mr. Corley, but 225,000 cubic
12 yards. It is not 2.5 acres. As we set out in
13 our -- in our briefing, it's 6.5 acres.
14 Following the submission of the existing
15 landfills report -- annual report in 2022,
16 Rabbit Hill took two independent and unrelated
17 actions. Under regulation 17(D)(3)(d), an
18 existing landfill which is operating within 20
19 percent of its permitted yearly disposal rate,
20 as documented by that most recent -- recently
21 submitted annual report, shall be entitled to
22 an increase in the maximum yearly disposal.
23 Based on its 2022 report, the existing landfill
24 qualified for an increase. So, on May 10th,
25 2023, Rabbit Hill submitted that request.



1 Before the increase, they had an annual
2 disposal rate of 57,500 tons per year under
3 (D)(3)(d)(1), an increase is required to be the
4 lesser of 50,000 tons, or the increase in the
5 waste generated in the planning area for
6 disposal for Class 2 landfills since the last
7 increase that was requested by that landfill.
8 DES conducted the appropriate inquiry and
9 granted the request. As we detail in our
10 reply, in 2022 the existing landfill accepted
11 81.5 percent of the permitted annual disposal
12 rate. That qualified under (D)(3)(d) for the
13 increase. As to the amount of the increase,
14 the existing landfill last sought and received
15 its increase in the annual disposal in 2004.
16 At that time, the planning area for Class 2
17 landfills was ten miles. That regulation was
18 amended in 2009 and it's now 20 miles. So,
19 looking at the four counties that make up the
20 landfill's planning area, which include Aiken,
21 Edgefield, Saluda, and McCormick, and applying
22 that lesser than qualification, the existing
23 landfill was authorized to see a 50,000 per ton
24 increase. It was granted from 57,500 to
25 107,500. That was issued on January 12th of



1 2024. It was publicly noticed, and no party
2 challenged that decision. It is final, and it
3 is not before the Court in this contested case
4 in any way, shape or form. Of course, that
5 hasn't stopped the petitioner here from
6 resorting, frankly, to conspiracy theories
7 about its application. They allege that this
8 amounted to quote, parallel regulatory
9 manipulation. Mr. Corley repeated it this
10 morning. They call it irrational. They
11 contend that it was part of some grand scheme
12 by Rabbit Hill to gain the system, and they
13 disparage DES as being complicit. They say
14 that DES assisted Rabbit Hill in manipulating
15 the regulations. Let's just call it what it
16 is. It's complete and utter nonsense. It's
17 defamatory. And more to the point, it's
18 completely irrelevant to this case. It is a
19 distraction manufactured by petitioner to muddy
20 the waters and to avoid the application of the
21 plain language of the regulation.

22 Second action taken by Rabbit Hill was
23 seeking to replace the existing landfill. Now,
24 much has been made about -- by petitioner about
25 Rabbit Hill's initial submission to DES. But



1 a review of that document reveals that
2 petitioner's arguments and their misguided
3 attempts to play gotcha there has much to do
4 about nothing. April 23, 2023 application
5 mistakenly identified the application as one
6 for expansion rather than replacement. We've
7 not attempted to hide from that mistake. In
8 fact, we attached it to our cross motion as
9 Exhibit 5. But a review of the application
10 revealed its -- its true intent. Despite
11 mislabeling the relief that it sought, the
12 application clearly and unequivocally stated,
13 it is not possible to expand landfill
14 operations at the Rainbow Hills -- Rainbow
15 Falls location, which is the existing landfill
16 site. It goes on to say, instead, it sought to
17 expand the Class 2 landfill facility on a
18 portion of property located on Dixie Clay Road
19 in Beach Island, which is the replacement
20 landfill site. Of course, again, here, none of
21 that matters. That initial application was
22 never acted upon by DES. It's not before this
23 Court. We realized our mistake and submitted
24 a revised application, doing so
25 administratively withdrew that application.



1 The revised application, which was submitted on
2 June 6 of 2023, it's attached to our cross
3 motion as Exhibit 3, accurately characterized
4 the request as replacement. That is the
5 application that DES deemed administratively
6 complete on September 5th of 2023. That notice
7 is attached to our cross motion as Exhibit 7,
8 and that's the application that was acted upon,
9 has been challenged in this case. The original
10 application is irrelevant to this case.

11 Back to the issue of actual relevance, the
12 replacement landfill is located on a site and
13 it was referred to earlier where mining
14 operations were conducted under an easement
15 with Aiken County. That area has not been
16 properly reclaimed, and it represents a
17 significant safety risk. As a part of the
18 development of the replacement facility, my
19 client has agreed to undertake that work and to
20 mitigate that hazard. Aiken County is in
21 support of this procedure. To that end on
22 October 1st of 2023, we saw the limited
23 variance as to the buffer requirement for Aiken
24 County. That's Exhibit 8 of our cross motion.
25 It related to a small portion of the



1 replacement site, bringing that buffer
2 requirement down from 300 feet to 100 feet.
3 And it's specifically related to the property
4 that Rabbit Hill purchased from Aiken County to
5 remediate that mining operation. The remainder
6 of the site would abide by the standard 300
7 foot buffer. And on November 9th of 2023,
8 Aiken held a public hearing on the buffer
9 request. Board of Zoning Appeals approved it.
10 That's Exhibit 11 to our cross motion.

11 Regarding the replacement application.
12 Rabbit Hill complied with the public
13 notification and participation procedures of
14 the regulation, that's detailed in Exhibit 9.
15 It also, of its own accord, held a public forum
16 that's detailed in Exhibit 10. On March 14th
17 of 2024, DES issued its draft phase one
18 determination, that's Exhibit 12. It published
19 notice of the decision. Had a 30-day public
20 comment period. It hosted a public meeting.
21 And on July 17th of 2024, it issued its final
22 phase one determination. It approved the
23 variance as to demonstration of need, and it
24 found that the replacement landfill was
25 consistent with Aiken County and the solid --



1 State Solid Waste Management Plans. The effect
2 of that decision was to unlock Rabbit Hill to
3 proceed with the phase two technical
4 application.

5 Just quickly on the -- on the standard.
6 The standard here is parties are entitled to
7 summary judgment when there are no facts at
8 issue. We submit that that is -- is absolutely
9 true for respondents Rabbit Hill and DES. And
10 this case presents three basic questions for
11 the Court. Number one, does the existing
12 landfill qualify for replacement under the
13 plain language of the regulation and the
14 conditions expressly enumerated? The answer is
15 yes. Because the existing landfill met each of
16 the express conditions, DES had no authority or
17 discretion to deny the application. Number
18 two, does the regulation governing replacement
19 landfills have a size or capacity requirement?
20 The answer, based on a review of the plain
21 language of the regulation, is no. And number
22 three, may DES or this Court infer or graft
23 additional terms or conditions to the
24 regulation as to the size or capacity of
25 replacement landfills that do not appear in the



1 regulation? The answer is no. All three of
2 those questions are regulatory interpretation
3 questions, and they are appropriate for
4 resolution as a matter of law at this summary
5 judgment stage.

6 So, moving to the -- to the arguments
7 advanced by petitioner here, their argument
8 really boils down to this, because the
9 replacement landfill is larger than the
10 existing landfill, it cannot qualify as a
11 replacement. Your Honor asked, if you go from
12 10 to 20, they said no.

13 **THE COURT:** And there seems -- the argument of the
14 petitioner hinges on 107.17(D)(6)(e).

15 **MR. JOHNSTON:** It does.

16 **THE COURT:** And how would you -- so how -- how
17 would you interpret that? Or how would you ask
18 that this Court interpret that?

19 **MR. JOHNSTON:** You know, it's interesting, Mr.
20 Corley -- and I wrote it down -- said that --
21 he said -- asked the Court a question. Tell me
22 a purpose for (6)(e), except to prevent
23 exploitation. Well, if you look at (6)(a)(3),
24 it says the landfill exhausts its permitted
25 capacity at its current location. That's one



1 of the conditions for replacement. And then in
2 a parenthetical, it says, see (6)(e) for
3 timing. (6)(e) is a timing provision. So, you
4 turn to (6)(e), it says an eligible facility
5 shall apply to the Department for a variance to
6 replace or expand the volume of an existing
7 facility prior to exhausting its permitted
8 capacity or the operational life of the
9 facility. So, it is -- the regulation itself
10 says that it is a timing provision, Your Honor.
11 It's not a substantive provision that adds to
12 the otherwise substantive conditions of a
13 replacement landfill, which are spelled out in
14 (6)(a).

15 Your Honor, the issue of what is
16 determined in a phase one determination is just
17 the siting of the proposed facility. DES
18 confirmed that, that's in Exhibit 1. And,
19 again, this Court must follow the plain
20 language. Both sides contend that the statutes
21 and the text are unambiguous, so regula- --
22 statutory or regulatory interpretation are not
23 permitted here. It would be improper for this
24 Court to resort to statutory construction or to
25 look to impose a different meaning that does



1 not appear in the text. That includes either
2 reading language out of the text or reading
3 additional language in it based on the policy
4 arguments of petitioner. So, again, generally
5 19(D)(1) it talks about two things,
6 demonstration of need and consistency. The
7 Solid Waste Act provides the background for
8 that regulation. And there's a couple of
9 findings in that that I think are appropriate
10 for consideration here. Section 44-96-290(a)
11 says that the Department may, by regulation,
12 exempt certain facilities from all or part of
13 the requirements of this section. So, one of
14 the alternative arguments that petitioner
15 advanced in their motion was that the variance
16 regulation itself was not authorized by the
17 Solid Waste Act. 290(a) specifically says
18 that, by regulation, DES can exempt certain of
19 those facilities. And then in 290(d) it says
20 the Department shall promulgate regulations for
21 permitting of solid waste facilities, which
22 shall, at a minimum, address the following
23 issues, exemptions, variances and emergency
24 approvals. So, their argument -- their --
25 their separate argument that it's not



1 consistent with the Act is wholly without
2 merit. Section 290(a) and (d) specifically
3 authorized the promulgation of those
4 regulations which provide for exemptions and
5 variances to the demonstration of need
6 requirement. So, (D)(6)(a), again, says that
7 when you meet those conditions, a variance for
8 demonstration of need is authorized. The
9 conditions for a replacement that must be met
10 for a (D)(6)(a), the landfill -- number one, a
11 landfill was issued its permit prior to the
12 effective date of the regulation. Two, the
13 landfill exhausts its permitted capacity at its
14 current location. Three, the proposed
15 replacement location is within the facility's
16 planning area. Four, that the landfill has not
17 been previously replaced. And, five, that it
18 applies for that replacement variance prior to
19 the exhaustion of the permitted capacity.
20 That's it. Those are the conditions. If these
21 qualifications are met, then the replacement
22 landfill is to be approved at the permitted
23 annual disposal rate. So, under the undisputed
24 facts of this case, the existing landfill
25 qualifies for replacement. Existing landfill



1 got its permit April 18th of 1995, prior to the
2 effective date of the regulation, which was
3 June 26, 2009. That's shown in Exhibit 1. The
4 existing landfill is nearing exhaustion of its
5 permitted disposal capacity. That's shown in
6 Exhibit 3. The replacement landfill was
7 located in the planning area. That's also
8 shown in Exhibit 3. It has not been previously
9 replaced. That's an undisputed fact. And
10 five, Rabbit Hill did apply for the replacement
11 prior to exhausting its permitted capacity.
12 Again, that's in Exhibit 3. The final
13 determination also found that it was consistent
14 with the state, county and regional solid waste
15 plans, local zoning and use and other local
16 ordinances, that's in Exhibit 2, at pages 257
17 and 23. So, with all of those conditions met,
18 DES was required to approve the variance. They
19 did so at the current permitted annual disposal
20 rate. And this Court is similarly constrained
21 to apply the plain language of the regulation.
22 So, approval of the variance is both warranted
23 and appropriate.

24 As to the size and capacity issues that
25 have been raised, the petitioner really wants



1 this Court to legislate additional conditions
2 from the bench, which impose size and capacity
3 conditions that do not appear in the
4 regulation. Again, the relative merits of that
5 policy choice are not before the Court. Both
6 DES and this Court are not permitted to do
7 that. And petitioners appear to confuse the
8 concepts of volumetric capacity with the
9 volumetric rate of disposal. Again, capacity
10 is the total amount of the waste in the
11 landfill. Volumetric -- or the rate of
12 disposal, is the volume of waste. The measures
13 of waste are different. Their capacity is
14 measured in cubic yards. Rate of disposal is
15 measured in tons per year. And, again, the
16 capacity of an existing landfill only factors
17 into the equation as to when a replacement is
18 allowed. Again, (D)(a)(3) says that you have
19 to exhaust your capacity at the existing
20 landfill and (D)(6)(e) relied upon extensively
21 here is you have to submit that application
22 before you exhaust your capacity. But the only
23 volume-based condition placed on replacement
24 facilities is that annual disposal rate. There
25 is nothing in the regulation that says the



1 replacement landfill must be permitted at the
2 same overall capacity of the existing landfill.
3 And that is consistent, again, with the
4 legislative findings of the General Assembly.
5 So, if you look at Section 44-96-20 of the
6 Solid Waste Act, it includes certain
7 legislative findings of the General Assembly.
8 Those include (A)(6), quote, most of the
9 permitted landfill capacity will be used in the
10 next ten years. (A)(8), the cost of solid
11 waste management will increase significantly
12 due to decreased landfill capacity and more
13 stringent federal requirements for solid waste
14 management. Section 44-96-240 includes those
15 additional legislative findings. South
16 Carolina is generating increasingly large
17 volumes of solid waste which may pose a threat
18 to human health. That's (A)(1) of 240.
19 (A)(3), a number of new solid waste management
20 facilities will have to be established in the
21 coming years to replace older facilities as
22 they reach capacity. So, the General Assembly
23 has found most landfills are at or near
24 capacity. Costs will increase due to that
25 increased capacity. There is more and more



1 waste being generated. Replacement landfills
2 are needed to effectively manage that waste.
3 So, limiting the size of replacement landfills
4 is incongruous with those legislative findings
5 of the General Assembly, but that is precisely
6 what petitioner is arguing. And that -- that
7 regulation came on the heels of those
8 legislative findings and directives. That
9 demonstrates the General Assembly's approval of
10 those procedures. It's also consistent with
11 how expansions and replacements are defined in
12 the regulation. So, as mentioned, you have two
13 options, expansion or replacement. Only
14 expansion is defined in the regulation. Both
15 -- 107.17 and 107.19 define -- or provide
16 definitions for expansion, and they only refer
17 to existing landfills. So, each refers to --
18 to volumetric capacity. 107.17 defines expand
19 or expansion as any increase in the permitted
20 volumetric capacity of an existing solid waste
21 landfill. That's 17(B)(8). Likewise, in 19,
22 it defines expand or expansion as any increase
23 in the permitted capacity of a solid waste
24 management facility, or the total volume of
25 that solid waste disposal facility. That's



1 19(B)(22), references permitted capacity and
2 volume, and it references existing facilities,
3 not new or replacement facilities. Lateral
4 expansion and vertical expansion are also
5 defined in 19(B), (B)(40) and (87), both refer
6 to existing landfills and capacity. So, an
7 expansion variance only refers to an action
8 taken to increase the capacity of that existing
9 landfill. Necessarily, it cannot refer to an
10 expansion by way of a new or replacement
11 landfill. But that, again, is what petitioner
12 is arguing. It's saying that we're doing a
13 replacement and an expansion. Those are two
14 different paths. Conversely, replace or
15 replacement is not defined in the regulation.
16 And, you know, while this Court may construe
17 undefined terms always in accordance with their
18 usual and customary meaning, they are
19 constrained by the rule that the text must be
20 construed in context in their meaning
21 determined by looking at the other terms used
22 in the statute or regulation. Here, expansions
23 refer only to existing landfills. Replacements
24 must be at a different location. Expansions
25 refer -- refer to volumetric capacity. The



1 conditions on replacement landfills do not.
2 The only reasonable interpretation, Your Honor,
3 based on the plain language of the regulation,
4 is that Rabbit Hill is seeking a replacement to
5 the existing landfill, not a replacement and
6 expansion, as those terms are defined. And,
7 again, replacements are not constrained by size
8 or capacity. The only anchor of an existing
9 landfill is the annual tonnage rate that must
10 remain the same. If the General Assembly had
11 desired to maintain the same capacity, do a
12 one-for-one on a replacement, it would have
13 done so, or it could have done so. But the
14 fact that it chose to do so for expansions,
15 referring to capacity, but did not do so for
16 replacement, suggests that that omission was
17 intentional. Petitioner suggests that it was
18 not required, again, because of subsection (e),
19 that that forecloses that option. But, again,
20 subsection (e) really doesn't say what
21 petitioner wants it to say. It refers to
22 timing. It is -- Rabbit Hill has neither
23 sought nor received an expansion variance so
24 that -- that subsection, you know, they spent
25 a considerable amount of time theorizing when



1 that provision of subsection (e) would apply,
2 if you could hold both, and when that 180 days.
3 We haven't applied for an expansion variance.
4 So, that part of subsection (e) has no
5 relevance to this case whatsoever. Petitioner
6 also relies on that first section of subsection
7 (e). They didn't really get into the statutory
8 construction, I'm happy to if Your Honor wants,
9 but their preferred method of statutory
10 construction, it doesn't support the reading
11 that they want. And, again, if the language is
12 plain, you don't resort to statutory
13 construction.

14 Just want to address a couple of other
15 points that they raise and -- raised, and then
16 will certainly sit down and let Ms. Linen tell
17 me when I was wrong. There are slides and Mr.
18 Corley referenced the variances. That
19 variance ---

20 **THE COURT:** Uh-huh.

21 **MR. JOHNSTON:** --- exception only applies to pre-
22 DON landfills. Only pre-DON landfills owners
23 are allowed to replace. He says -- or he said
24 that that's to treat them fairly. The
25 regulation doesn't say that. It does not limit



1 replacements to pre-DON landfills. We also
2 dispute that we can't satisfy the DON
3 requirements. They said, as a matter of law,
4 we can't get a DON. We -- we strongly dispute
5 that. But it's not before this Court. We have
6 a variance here. Again, the facts about the
7 pre-DON landfill are incorrect. They speculate
8 as to the amount of annual disposal at the
9 landfill. The actual figures were available to
10 Mr. Corley, but he didn't use them to come up
11 with his speculation and figures. And, again,
12 on subsection (e), he says the only possible
13 purpose for subject -- subsection (e) is to
14 prevent exploitation of the replacement
15 variance. He called it his thesis, and there's
16 a good reason for that, because it does not
17 appear in the regulation. He's left to
18 theorize, which is fine, but DES can't theorize
19 as to what the regulation says or the policy
20 arguments behind it. Anything that's not
21 expressed in the regulation, DES can't rely
22 upon, and nor can this Court.

23 Your Honor, just real briefly to close, I
24 know this has dragged on for a while. DES and
25 this Court must follow the plain language of



1 the regulation. Policy arguments as to what
2 petitioner thinks the regulation should say
3 cannot control over what the regulation
4 actually says. Courts do not sit as super
5 legislative bodies here to judge the wisdom or
6 the profile of those determinations. Having
7 undisputed facts in this case, judgment is
8 warranted here in favor of Rabbit Hill and DES.
9 We would respectfully request that this Court
10 deny petitioner's motion for summary judgment,
11 grant our cross motion for summary judgment,
12 and really consistent with those legislative
13 findings of the General Assembly that these
14 types of replacement facilities are needed,
15 this Court should allow respondent Rabbit Hill
16 to proceed with that phase two technical
17 portion of the DON -- or of the regulation
18 process for this facility. Thank you.

19 **THE COURT:** Thank you, Mr. Johnston. Ms. Linen?

20 **MS. LINEN:** Yes. May it please the Court. Thank
21 you, Your Honor.

22 **THE COURT:** Uh-huh.

23 **MS. LINEN:** I'm Etta Linen and I represent the
24 Department of Environmental Services in this
25 matter that is before you today. I'd like to



1 say that there is one thing that the Department
2 agrees with the petitioners on, and that is
3 that this is a straightforward case, and that
4 once you read the regulation
5 61.107.17(D)(6)(a), you will be able to render
6 a proper and appropriate decision.

7 Your Honor, the matter before you today,
8 or the only issue before this Court is whether
9 the Department properly followed and applied
10 the appropriate law to grant Hilltop a
11 replacement variance. And I'd like to say that
12 the Department doesn't question the law, it
13 implements it and applies it. And also, the
14 Department does not second guess or speculate
15 on the reasons behind a request. When a
16 request comes in, the Department applies the
17 appropriate law to the given situation.

18 Your Honor, I'd like to say that I concur
19 and join in with everything that Mr. Chad
20 Johnston has said today. He didn't cite
21 anything incorrectly. Everything he said was
22 correct. But I'd like to reiterate several of
23 the points that he made so you -- you probably
24 will have already heard this, so, I'm just
25 going to reiterate it. And I want to reiterate



1 to the Court some material facts that are
2 undisputed.

3 First of all, Hilltop was granted a
4 replacement variance by the Department because
5 it met all of the criteria set forth in
6 Regulation 61.107.17(D)(6)(a). It met all the
7 criteria to get a replacement variance.

8 The second thing I'd like to reiterate is
9 that there is nothing in the regulation that
10 prohibits the Department from granting a
11 replacement variance because the replacement
12 landfill will be larger, or may be larger than
13 the existing landfill. There's nothing that
14 addresses that in the regulation.

15 And the third thing I'd like to reiterate
16 is that the annual tonnage increase that
17 Hilltop requested from the Department and that
18 the Department granted to Hilltop that both the
19 Department and Hilltop followed the applicable
20 regulations for seeking and for them being
21 granted that annual tonnage increase.

22 I'd also like to address your question
23 about (6)(E) and Mr. Johnston did answer, and
24 it is a correct answer. I'd just like to add
25 that in my purview, (6)(E) is just a -- is



1 just, again, a reiteration of (3) -- I'm sorry,
2 (A) (3) -- (6) (A) (3).

3 **THE COURT:** Okay.

4 **MS. LINEN:** Yes. Because that provision says that
5 to get a replacement you have to exhaust, you
6 know, you have to exhaust all of your
7 capability -- your capacity, I'm sorry. And
8 (6) (E) is just telling you when you have to
9 request a replacement in order to be granted
10 one. And what it's saying is you can't -- you
11 have to do it prior to exhausting your
12 capacity. If you do it, you can't do it after
13 you exhaust your capacity. So, if you exhaust
14 all your capacity and then you try to submit a
15 request to the Department for a replacement
16 landfill, chances are you're not going to get
17 it because you didn't follow the regulation.
18 So, there's nothing -- the regulation is -- the
19 Department isn't trying to exploit the
20 regulation, or it's not an exploitation of the
21 replacement variance, as petitioner says. It's
22 just a simple regulation telling you when you
23 need to apply for a replacement variance so
24 that you can get it. You know, it's just
25 giving you that information.



1 So, the Department made a correct
2 determination in granting Hilltop a replacement
3 variance, because, as I said earlier, it met
4 all the criteria. And I know that Mr. Johnson
5 -- Johnston went through the criteria. I'm
6 just going to go through it briefly for you.
7 And in (6)(A) it says, the Department shall --
8 Department shall grant a variance to the
9 requirements of (D)(2) for Class 2 and Class 3
10 solid waste landfills according to the
11 following conditions. Okay. So, and then it
12 says in (A), in operating Class 2 or Class 3
13 landfill shall receive, again, shall receive a
14 variance to construct a replacement Class 2 or
15 Class 3 landfill at its permitted annual rate
16 of disposal, provided it meets all of the
17 following conditions. Now, the conditions set
18 forth in (6)(A) start at -- it's (2), (3), and
19 (4). Those are three conditions. And then the
20 last condition is (E), which has been discussed
21 here already. So, (2) says that the landfill
22 has two -- has -- has a permit issuance date on
23 or before the effective date of this
24 regulation. Well, as you've already heard,
25 Hilltop, which used to be called -- I think it



1 was initially called G.L. Williams. It was
2 initially called G.L. Williams. It was
3 permitted in 1995, so it meets that prong. I
4 mean, it was permitted on or before the
5 effective date of this regulation. Then it
6 says, the landfill has to exhaust its permitted
7 capacity at its current location. That's --
8 that's (3). And at the time Hilltop applied
9 for replacement variance in July 2024, it was
10 operating with less than two years of capacity
11 remaining. So, they applied before they
12 exhausted their capacity. So, they met (E),
13 which we've talked about. And then (4) says,
14 for the purpose of considering the location of
15 replacement facility under this section, the
16 location for the replacement facility must be
17 within the facility's existing planning area,
18 provided that if the planning area includes a
19 portion of a county, the entire county will be
20 considered to be part of the planning area.
21 Well, they met that prong because they are
22 siting the replacement facility in
23 Graniteville, South Carolina, which is in
24 Aiken, and Aiken is the same county that
25 Hilltop is in currently. And -- and it's all



1 in the same planning area. So, that's it.
2 (2), (3), (4) and (E), they met every prong of
3 the regulation. And, you know, the Department
4 had to grant them. We had no choice but to
5 grant them a replacement variance, because the
6 regulation says the Department shall grant a
7 variance, it doesn't say may grant a variance.

8 Your Honor, also, a close reading of the
9 regulatory provisions support the following
10 facts. There's no regulatory provision that
11 states that a landfill replacement is
12 conditional on the size of the existing
13 landfill. There's nothing in the regulation
14 that states that. There's no provision in the
15 regulation that states that a DON variance is
16 unavailable to replace an existing landfill
17 with a new facility if the replacement facility
18 will have more volumetric capacity than the
19 existing landfill, nothing in the regulation
20 that that addresses that. So, the Department
21 -- our position is that size is not relevant.
22 It's not relevant to -- to this issue here.
23 Petitioner argues that the variance that the
24 Department granted, well, he -- petitioner
25 didn't go into this in his presentation, but in



1 his brief, he talks about that what the
2 Department granted was an expansion and a
3 replacement. Well, even though he didn't
4 address it here, it was in his motion or in his
5 reply, and, of course, we only granted a
6 replacement because that's what Hilltop
7 requested. A replacement, as you already know,
8 is a facility that is sited in a new location
9 from an existing facility. The existing
10 facility is Hilltop. The replacement facility
11 is Rabbit Hill. An expansion is when you
12 expand the landfill at the current existing
13 location. So, that's not what Hilltop applied
14 for. They applied for replacement, and
15 replacement is what they received. The whole
16 -- this whole thing about expansion and a
17 replacement, no.

18 **THE COURT:** 'Cause there was some confusion with
19 the initial application, right, and that was
20 corrected?

21 **MS. LINEN:** Well, yes, but they pulled that back.

22 **THE COURT:** Right. I understand.

23 **MS. LINEN:** Yeah. They did initially apply for an
24 expansion.

25 **THE COURT:** I understand.



1 **MS. LINEN:** So, Your Honor, petitioner also argues,
 2 you know, that size matters because of the
 3 volumetric capacity. But, actually, the
 4 volumetric capacity for this landfill will not
 5 be determined. It has hasn't been determined
 6 yet. We don't know what it is. But it will be
 7 determined during the technical review. And
 8 that's the next phase. This phase was just
 9 they asked for a replacement variance, they got
 10 it. No technical review has been done as of
 11 yet.

12 So, the petitioners have argued basically
 13 that if you're going to replace your landfill,
 14 that it has to be a mirror image of the
 15 existing landfill. Well, none of that is based
 16 in regulation. I don't know why they're saying
 17 that. But as you already know, the word
 18 replacement is not defined in the regulation.
 19 So, therefore we have to go on the plain and
 20 ordinary meaning of the words. So, according
 21 to Cambridge Dictionary, the fourth edition,
 22 replacement means the action or process of
 23 replacing someone or something. A person or
 24 thing that takes the place of another. Doesn't
 25 say anything about size, color, weight, any of



1 that. It just says it's something that takes
2 the place of another. So, I'm going to give a
3 very simple analogy, because Petitioner gave an
4 analogy when they wrote their brief. But mine
5 is very simple. Let's say you have a 1968
6 Ford, a car that you've had a long time, and
7 when you bought it, it was working fine. But
8 now, when you get up in the morning and you go
9 to crank the car, it doesn't want to crank up
10 like it used to. It's slower than it used to
11 be. You know, it has a lot of problems. So,
12 you decide, you -- I'm gonna replace this car
13 and get me a new car. And you decide to get a
14 2025 Chevy Camaro. Well, the Camaro is going
15 to be a lot newer; it's a 2025; it may be a
16 different color; it may not be the same size.
17 It's gonna have newer gadgets, 'cause we living
18 in a world with gadgets now. So -- but just
19 because it's a different color, different size,
20 newer gadgets, does that mean that it didn't
21 replace your 1968 Ford? No, it doesn't mean
22 that, because it's going to serve the same
23 purpose that your Ford served, which was to get
24 you from point A to point B when you needed it
25 to. That's the purpose, that's the function of



1 a car. So, it did replace it. It's not a
2 mirror image, it's not a replica, but it did
3 replace -- the Camaro did replace your 1968
4 Ford. So, it is a replacement. So, as far as
5 Department is concerned, size doesn't matter.
6 And the volumetric capacity, as I've already
7 said, has not even been determined yet, to be
8 determined later.

9 So, Your Honor, the last thing I want to
10 address is this argument by petitioners that
11 the Department and Rabbit Hill manipulated the
12 regulation to, I don't know, give -- show favor
13 to Rabbit Hill or Hilltop. That is not the
14 case. Everything that was done was done
15 according to the regulation.

16 So, I want to go through just briefly this
17 timeline for when -- I'm focusing on the annual
18 tonnage increase that Hilltop got. On May 10,
19 2023, Hilltop requested a modification to
20 increase its annual tonnage rate. And they did
21 that. Excuse me, per the regulation, it's
22 61.107.17(D)(3)(d), that lays out the -- it
23 says forth the criteria for how you request an
24 annual tonnage increase and how you are granted
25 one. So, Hilltop -- follow -- followed the



1 regulation. Okay, in June 2023, Hilltop
2 misapplied for an expansion variance, but when
3 it was pointed out to them, oh, is this what
4 you really want? You might not -- you might
5 want to pull it back, or they realized they had
6 applied for the wrong variance. They pulled it
7 back. And on July 13th, 2023, after correcting
8 their mistake, they applied for replacement
9 variance. So, then in January, on January 12,
10 2024, Hilltop was granted the modification that
11 it requested, and they increased the annual
12 tonnage rate to 107,500 tons. But it was
13 almost six months later -- it was six months
14 later when they were granted the replacement
15 grant variance, and that was granted in July of
16 2024. There was no manipulation by the
17 Department, or, as far as I can see, Hilltop in
18 requesting that variance and in the Department
19 granting the variance or granting the annual
20 tonnage increase. I mean, it was all done by
21 the book, by the regulation. It's laid out for
22 anyone who wants to see it or read it.

23 So, Your Honor, you know, doing what the
24 regulation allows one to do is not a
25 manipulation. I mean, if it's there in the



1 regulation, and the Department is following the
2 regulation, we're not manipulating anything.
3 We're not trying to manipulate anything. We --
4 we try to be fair and across the board with
5 everybody, you know, we take in the
6 applications, we review them and we give our
7 decision. That's just how it goes. The
8 Department is constrained to follow what the
9 statute and regulations state, and the criteria
10 mandates that a replacement variance shall be
11 granted if an applicant meets all criteria for
12 replacement.

13 So, therefore, Your Honor, the Department
14 respectfully requests pursuant to the
15 foregoing, that you grant both Rabbit Hill and
16 the Department's cross motions for summary
17 judgment, and that you deny petitioner's motion
18 for summary judgment. Thank you very much.

19 **THE COURT:** Thank you. Mr. Corley?

20 **MR. CORLEY:** One second. I'm trying to reactivate
21 this.

22 **THE COURT:** That's fine.

23 **MR. CORLEY:** All right. And I can be -- I can be
24 relatively brief.

25 **THE COURT:** Take your time, Mr. Corley. I want to



1 make sure everybody has a full opportunity.

2 **MR. CORLEY:** I've heard a lot of debate over my
3 lifetime about whether size matters and Ms.
4 Linen comes down in the camp that it does not.
5 I just took note of that during her
6 conversation. I couldn't help it; I'm sorry.

7 **THE COURT:** I wondered if anyone was going to go
8 there, but you did, so.

9 (Laughter)

10 **MR. CORLEY:** So, another example that Ms. Linen --
11 see, I wonder if she would consider, she said,
12 a fancy car as a good -- as a replacement for
13 her old car. I wonder if she would consider a
14 Boeing 787, a replacement for her old car. And
15 -- and -- we -- it's easy to get skewed in the
16 way that we're talking about this thing, right?
17 A replacement landfill, let's just use that
18 word in its normal parlance. A replacement
19 landfill doesn't have to be the same size. You
20 could replace your one-acre landfill with 1000-
21 acre landfill, if DES would approve it, just
22 make the demonstration of need, which
23 apparently they can do. So, Your Honor, the
24 stakes are much lower than -- than I thought
25 and that you -- because they contest very



1 ferverently that they could establish a DON. So,
2 consider that when you're rendering your
3 decision.

4 So, I want to start, a couple of things
5 that I heard kind of raised my hackles a little
6 bit. One of them was related to this
7 community, and I heard that -- from -- from
8 what I heard, it seems as if this landfill
9 community is doing this community a favor.
10 They almost -- you'd almost think they were a
11 public benefit corporation. They're, gonna go
12 in and fix this hazardous condition to make it
13 safer for the community. Let me tell you about
14 this community. I was shocked to learn about
15 this section of the state. This little section
16 of Aiken County that has had one -- that for
17 decades had one cotton mill after another
18 dotting it. It's the site of the Graniteville
19 spill that you may know of, the chlorine gas
20 spill that killed so many people. If you look
21 back, you can trace through newspaper articles,
22 through -- through media this community
23 repeatedly being the dumping ground for Aiken
24 and Aiken County. So, when I hear that Aiken
25 County is fervently in favor of this, well,



1 that does not surprise me, because that's
2 exactly how this community has gotten treated
3 by Aiken County for 100 years. And it's proof
4 of that, we heard that with -- the site has not
5 been rehabilitated or what -- you know, this
6 was a -- this community dealt with a clay sand
7 mine, okay. And when that clay sand mine was
8 done, what did they do? Did Aiken County, did
9 DES, did anyone come in and require that to be
10 remediated? No, but they did put a landfill
11 in, a municipal landfill. They filled some of
12 the hole with municipal trash. They did that
13 for this community. And then, you know, that
14 happened, and the site still wasn't remediated.
15 And now, here we come, we're going to -- let's
16 dump more -- let's dump more trash into this
17 hole in this community, and let's tell them
18 we're doing them a favor because we're
19 remedying a safety violation. This property is
20 adjacent to an elementary school. It's in the
21 center of a community that has been more
22 beleaguered by pollution and contamination than
23 one that any that I've encountered personally
24 in my environmental law practice, and the last
25 thing they need is an agency bending over



1 backward to allow a replacement landfill that's
2 100, 500, 1,000 whatever it turns out to be,
3 size is larger than the landfill that it's
4 replacing.

5 The other thing that -- that kind of
6 bothered me a little bit is, you know, the idea
7 that, you know, I've said that -- that the plan
8 here for all along was to buy this -- this old
9 landfill, to flip it, you know, it's a
10 strategic thing, a scheme if you want to call
11 it for negative, or a smart move if you want to
12 call it on positive. But, you know, what I
13 heard is basically that I'm over here in my tin
14 hat coming up with conspiracy theories and even
15 maybe defaming by saying that. But yet, what
16 I did not hear was any reason for that
17 purchase, other than to flip it into a massive
18 new landfill by exploiting what is a perceived
19 weakness in the DON regulations. Never heard
20 any from either side why that purchase was
21 undertaken, if not for that reason.

22 So, what -- another point that -- that was
23 hit on repeatedly is that I'm just talking
24 about policy, and I want you to legislate and
25 make policy. Well, I'm a -- you know, I'm a



1 path of least resistance kind of guy, right.
2 That's -- I think we look for the simplest
3 solution. And in talking about policy and
4 asking questions about why would it possibly be
5 like this, my point is not that the language
6 does not support my position. My point is that
7 I am illustrating how there's just -- I pointed
8 that out. I'm not asking you to legislate.
9 I'm like, there is no -- rather than delving
10 into the details of the regulations, I present
11 to you the outcome of those regulations as has
12 happened here. There's no way the terms are
13 written that way. Now, you can go in -- we
14 could micro analyze and get to the same point,
15 but my -- for me, the way my brain works, the
16 easiest path to resistance is to show you how
17 their interpretation of the regs is played out,
18 and to say micro get all in the weeds, all you
19 want, but there's zero chance that the
20 regulations are written to allow this. That's
21 not policy. That's not asking for legislation.
22 That is just skipping to the practical finish
23 line. Rather than spending my hour speaking to
24 Your Honor talking about dictionaries and --
25 and cross references to 25 different



1 regulations and statutes. That doesn't mean
2 that the -- it's not supported by the language.
3 It just means that, you know, like, could they
4 po- -- could it -- could those regulations
5 possibly be drafted to produce this outcome?
6 I say no, there's just no way. Now, why can
7 they not possibly be drafted? You're right
8 that our -- our case seizes on (6)(E) and
9 passing that off as a timing regulation I found
10 to be one of the -- I did not find that to have
11 any merit whatsoever. And think about -- let's
12 look at (6)(E) for a second. Here's that
13 regulation. Okay. Look at the second part
14 there, a facility shall not operate under an
15 expansion variance and a replacement variance
16 simultaneously, with the exception of a
17 reasonable transition period. That is a timing
18 thing. If that was timing, it sure produces
19 some strange outcomes, right? So, you have
20 that reasonable transition period. What that
21 means is, if you look at my example here, my
22 trash can example, let's say that I own a
23 landfill and I expand that landfill, so I have
24 an expansion variance. Can I replace that
25 expanded landfill? Yeah, because I have 180-



1 day transition period, I can -- I can expand a
2 landfill and then I got an expansion variance
3 and then a replacement variance.

4 **THE COURT:** Uh-huh.

5 **MR. CORLEY:** Check, works. Can I have a
6 replacement variance and then an expansion
7 variance? No, because that involves
8 indefinitely holding both variances. So, why
9 would that be different? Why can you expand
10 then replace but not replace then expand?
11 That's a really weird way to establish timing,
12 because it has nothing to do with timing. The
13 point of that is the situation that you see
14 here, bit like -- like the -- what I -- what I
15 feel like we've gotten into with these
16 regulations is we're staring at a painting at
17 the end of our nose, and can't see the painting
18 as a whole because we're so close to it. The
19 entire regulatory scheme, especially in (6)(E)
20 is designed to prevent the situation that you
21 see here, which is, I build a replacement
22 variance -- build a replacement landfill, and
23 then I can't -- I can -- then I cannot get an
24 expansion variance. Can't do it. So, I can't
25 go from 10 to 200. I can't go from a ten-acre



1 landfill to a ten-acre landfill -- to a 200-
2 acre landfill. But under the way they
3 interpret the regulations, I could easily go
4 from 10 to 200. That is plain language of the
5 regulations right there. What -- I mean, why
6 would it be -- what is -- what is that if not
7 a plain language argument, that I can replace
8 my landfill with a ten-acre landfill, but I
9 can't expand -- then expand under a variance to
10 200, but, hey, I'll go from 10 to 200 or 10 to
11 1,000 or 10 to a million, you know. As long as
12 I do it in one step. That doesn't seem like a
13 timing regulation to me.

14 On the matter of plain language, I still
15 am not going to get into a micro analysis, and
16 I encourage Your Honor to look at the micro
17 analysis that we have provided in the brief.
18 But I will say, and I apologize for this,
19 here's some plain language for you, from the
20 enabling statute, which, of course, is superior
21 to any of the things we've talked about in the
22 regulations. No permit to construct a new
23 solid waste management facility or expand an
24 existing solid waste management facility may be
25 issued until a demonstration of need is



1 approved by the Department. Is this situation
2 consistent with that plain language? I
3 certainly can't see so. There are no variances
4 in the statute. That language does not exist.
5 The word replacement doesn't exist in the
6 statute. That statute is saying every
7 landfill, whether you expand it on site, you
8 build it on a new site, requires a DON. So,
9 you know, if you -- if Your Honor finds this
10 situation as an egregious -- as egregious of a
11 misuse of these regulations as I do, here's
12 your -- here's your -- if you're a path of
13 least resistance guy, here it is. Clearly as
14 applied, what's happened here violates the
15 statute. There's your plain language.

16 Maybe -- and the landfill shortage, I
17 mean, again, we're not -- the conversation
18 always gets so skewed. We're not talking about
19 don't build a landfill. There's a shortage,
20 build more landfills. Just get a DON. Don't
21 use an exception. I mean, it's it's the
22 easiest -- it's the easiest answer. So, this
23 community -- this community deserves better
24 than they've received. They don't deserve a
25 third polluting industry on this site, next to



1 the school. There are plenty of reasons why
2 what's happened here, it flies in the face of
3 logic, rationale, policy, sure, but it also is
4 contrary to the whole way that the regulations
5 are set up. If you look at my -- my color
6 chart, my very amateur skills, the color -- the
7 purpose of each section, if you put -- if you
8 put that regulation right up in your face, you
9 might can convince yourself that, well, it says
10 yearly capacity here, and it doesn't specify
11 volume. But if you look at the regulation as
12 it functions as a group, there's clearly an
13 intent there to curb the sort of rampant misuse
14 of the regulation that has occurred here.
15 Thanks.

16 **THE COURT:** Thank you. I just want to give
17 everyone a full opportunity to present their
18 positions. Mr. Johnston, anything further?

19 **MR. JOHNSTON:** Your Honor, just briefly. We cited
20 the statutory provisions that allow
21 forbearances and this prohibition, he seems to
22 have resurrected his alternative argument here.
23 Clearly, that is provided in the regulation.
24 And this argument that the whole regulatory
25 scheme is designed to prevent what is occurring



1 here, again, if there were legislative findings
2 the supported, Mr. Corley would have pointed
3 them out to Your Honor. The reason he's
4 pulling back in big picture is because focus on
5 the actual words and text in the regulation and
6 statute do not support his -- his argument.
7 This is a summary judgment motion based on the
8 plain language, Your Honor. Thank you.

9 **THE COURT:** Thank you. Ms. Linen, anything?

10 **MS. LINEN:** Just one thing, Your Honor. The
11 petitioner, you know, said towards the end of
12 his presentations just now, just -- just do a
13 DON, just do DON. Well, in the regulation, it
14 says you can get a variance from that
15 regulation, so, they don't have -- Hilltop
16 doesn't have to do a DON. They requested a
17 replacement variance, and that's what they
18 received. So, there's no support, statutory or
19 regulatory, for what he's asking. Thank you.

20 **THE COURT:** Thank you. Mr. Corley, I'll give you
21 the last word. Anything else?

22 **MR. CORLEY:** A DON is drawing a circle and counting
23 how many landfills are inside of it. It's a
24 lot less burdensome than what we've been doing
25 here today. That's all I'll say.



1 **THE COURT:** Okay. Thank you. And thank you to all
2 the parties. Your brief -- your motions and
3 arguments made in your motions were really very
4 helpful, very well -- well drafted. And so
5 that was helpful. But then the arguments today
6 have been very helpful, as well. I think I
7 have a very clear picture of both sides'
8 positions, and I'm going to review everything
9 and take a really hard look at those statutes
10 and regulations again and come to a decision
11 very -- very shortly on both of your motions.

12 **MR. CORLEY:** Thank you.

13 **MR. JOHNSTON:** Thank you.

14 **MS. LINEN:** Thank you.

15 **THE COURT:** Thank you very much. All right. We're
16 adjourned.

17 **(There being nothing further, the hearing concluded**
18 **at 11:49 a.m.)**



CERTIFICATE

This is to certify that the within hearing consisting of eighty-two (82) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on January 15, 2026.



Amanda J. Creel Godfrey
Court Reporter

Notary Public for South Carolina
My Commission Expires: May 27, 2031



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CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

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