THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Case No. 08-ALJ-07-0425-CC
Court of Appeals Unpublished Opinion No. 2011-UP-380 filed August 4, 2011

Engaging and Guarding Laurens County's Environment ("EAGLE"). . . . . Petitioner,

v.

South Carolina Department of Health and Environmental Control and
MRR Highway 92, LLC . . . . . Defendants,

of whom MRR Highway 92, LLC is . . . . . Respondent.

RESPONDENT MRR HIGHWAY 92, LLC'S PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent MRR Highway 92, LLC ("MRR") respectfully petitions this Court for a rehearing of the matter decided by Opinion No. 27366 issued March 12, 2014 ("Opinion"). The basis for this petition is that the Opinion overlooks and misapprehends the following key points of law.

I. THE COURT'S RULING OVERLOOKS THE REQUIREMENT THAT THE ADMINISTRATIVE LAW COURT ("ALC") AS THE FACT FINDER IN A CONTESTED CASE DEFER TO THE SPECIALIZED KNOWLEDGE OF THE AGENCY.

An ALC finding on the application of a discretionary provision of a DHEC regulation requires the ALC to defer to the specialized knowledge of the DHEC staff. Although the ALC acts as the fact finder and is not restricted to the factual findings of the administrative agency, "[c]ourts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005); see also *Savannah Riverkeeper v. South Carolina Dep't of Health and Envtl. Control*, 400 S.C. 196, 206, 733 S.E.2d 903, 908 (2012). Pursuant to Section 44-1-60, the DHEC staff decision in this case became the "final agency decision" when the Board issued its decision not to conduct a final review conference. S.C. CODE ANN. § 44-1-60(F) (Supp. 2012). Accordingly, the staff decision is entitled to deference. Kent Coleman, DHEC's Director of the Division of Mining and Solid Waste Management, testified at the contested case hearing regarding the basis for DHEC's permitting decision and the staff's awareness of the evidence offered by EAGLE at the contested case hearing. To the extent that the ALC found compelling reasons why DHEC's decision on its own regulation is not entitled to such deference, the ALC's

decision should include those compelling reasons. The ALC's Final Decision and Order does not include any findings or conclusions based on the testimony of Mr. Colemen. As such, it is clear that the ALC did not give proper, if any, deference to DHEC's "final agency decision."

Additionally, and significantly, Section 44-1-60 requires the ALC to give consideration to DHEC's specialized knowledge in environmental permitting decisions. S.C. CODE ANN. § 44-1-60(F)(2) (Supp. 2013). This Court has acknowledged that Section 44-1-60 governs appeals from DHEC decisions giving rise to contested case hearings. *See Amisub of South Carolina, Inc. v. South Carolina Dep't of Health and Envtl. Control*, 403 S.C. 576, 590, 743 S.E.2d 786, 794 (2013); *Berry v. South Carolina Dep't of Health and Envtl. Control*, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013). Pursuant to Section 44-1-60, the ALC "**shall** give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge." S.C. CODE ANN. § 44-1-60(F)(2) (Supp. 2012) (emphasis added). Such deference is unquestionably required when the ALC's review of a permitting decision is based on a regulatory provision in which the agency reserves discretion in making such decision.

The only substantive issue adjudicated at the hearing on the merits was whether the Department should have denied the DON request based on "additional factors" under subsection (D)(3)(d) of S.C. Code Ann. Regs. § 61-107.17 ("DON Regulation"). 25A S.C. CODE ANN. REGS. § 61-107.17(D)(3)(d) (Supp. 2008). Subsection (D)(3)(d) provides that DHEC "reserves the right to review additional factors in determining need on a case-by-case basis." *Id.* This general reservation of discretion without any specific criteria can only be reviewed by the ALC within the context of the specialized knowledge

of the DHEC staff. Indeed, such discretion can and should only be exercised by DHEC staff with specialized knowledge, such as a comprehensive understanding of the historical and current disposal trends and long-term availability of permitted disposal capacity, the nature and distinctions between and among differing solid waste streams, as well as the expertise to determine how this specialized knowledge should be considered in the context of permitting for future disposal capacity. The ALC exercised its own discretion and delved extensively into detailed analysis of utilization rates for other disposal facilities, ultimately reaching the conclusion that in its learned opinion, a utilization rate of 32.9% was insufficient to demonstrate the need for MRR's proposed facility.

The ALC's failure to consider the specialized knowledge and expertise of the DHEC staff was improper in this case. Indeed, the manner in which the ALC arrived at the conclusion that the facts in the case warranted the denial of MRR's permit demonstrates that the specialized knowledge and expertise of the DHEC staff are fundamentally required for such determinations. In its Final Order and Decision, the ALC found that "the 32.9% utilization of existing capacity [in the three-county region] simply does not reflect a need for another landfill in the area." (Final Order and Decision, p. 9, R. p. 24, App. p. 25). However, Kent Coleman testified that during its review of the DON request for the Proposed Landfill, the DHEC staff was aware of the permitted annual disposal rate for C&D landfills in Laurens, Spartanburg, and Greenville Counties and of the amount of C&D waste generated in those counties. (Trial Tr. p. 157, l. 21 – p. 158, l. 21, R. pp. 238-39, App. pp. 239-40; p. 166, l. 19 – p. 167, l. 2, R. p. 247-48, App. p. 248-49; p. 159, ll. 5-20, R. p. 240, App. p. 241). The DHEC staff was also aware that Curry Lake C&D Landfill in Laurens County and other landfills within the

planning area for the Proposed Landfill accepted waste from counties beyond the three-county planning area. (Trial Tr. p. 101, l. 7-11, R. p. 182, App. p. 183). Mr. Coleman testified that such additional information did not warrant the denial of the DON request for the Proposed Landfill. (Trial Tr. p. 159, ll. 5-20, R. p. 240, App. p. 241; p. 161, l. 13 – p. 162, l. 6, R. pp. 242-43, App. pp. 243-44).

Similarly, the ALC failed to give deference to DHEC's specialized knowledge regarding the policies underlying the demonstration of need criteria established in the DON Regulation. Section 44-96-240(A)(6) of the Solid Waste Act provides that a "regional approach to the establishment of solid waste management facilities should be strongly encouraged in order to provide solid waste management services in the most efficient and **cost-effective** manner." S.C. CODE ANN. § 44-96-20(A)(13) (2002) (emphasis added). Mr. Coleman testified that one of the goals of siting more than one commercial landfill within the ten-mile planning area is to address the need for competition and encourage facilities to compete with each other in terms of price. (Trial Tr., p. 177, ll. 5-24, R. p. 258, App. p. 259). In fact, Mr. James Martin, a member of EAGLE and owner of a construction business in Laurens County, acknowledged that availability of multiple permitted facilities within a planning area promotes competitive pricing within the market. Specifically, Mr. Martin testified that if there is more than one landfill within the same distance from a construction site, he would select the landfill for disposal of C&D waste according to price. (Trial Tr. p. 189, ll. 6-8, R. p. 270, App. p. 271).

Mr. Coleman further testified that the planning area established in DHEC's DON Regulation is a regional concept. (Trial Tr. p. 100, ll. 12-14, R. p. 181, App. p. 182). Mr.

Coleman testified that many of the Part IV C&D Landfills in the three-county planning area for the Proposed Landfill accept waste from other counties. (Trial Tr. p. 105, ll. 2-10, R. p. 186, App. p. 187). For the fiscal year 2005, Curry Lake C&D Landfill, the only commercial Part IV C&D Landfill in Laurens County, reported accepting for disposal waste from five other counties outside the three-county planning area for the Proposed Landfill. (Pet. Ex. 26, R. p. 437, App. p. 438). The excess permitted disposal capacity allowed under the DON Regulation affords a facility sufficient capacity to accept waste beyond the counties in its planning area and thus increases competition within the larger region served by the facility.

The ALC's ruling simply ignored DHEC's specialized knowledge with respect to the C&D waste needs within the region to be served by the Proposed Landfill and in the context of the policies and goals of the DON Regulation criteria. Instead, the ALC used raw data presented on C&D waste generation and disposal rates and permitting capacity to generate an abstract statistic which the ALC arbitrarily deemed to be excess regional landfill capacity demonstrating that the Proposed Landfill was not needed. There is no question that DHEC alone is in the unique position to fully evaluate the significance of such statistics within the larger context of the state waste management program over which it has oversight pursuant to the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* ("Solid Waste Act"). The ALC provided no basis for its determination that 32.9% warranted denial of the permit. The ruling does not identify any statutory, regulatory, and technical basis for establishing a percentage of excess capacity as being determinative of "need." Moreover, the ALC failed to provide a threshold percentage by which DHEC staff should have made such

determination. Significantly, EAGLE presented no expert to opine on the optimum utilization of existing capacity under the statutory and regulatory scheme establish under the Solid Waste Act. The ALC merely substituted its judgment for that of the DHEC staff. There can be no doubt that the staff's comprehensive knowledge of the C&D disposal needs within the applicable region and within the large state regulatory framework constitutes specialized knowledge not possessed by the ALC and to which the ALC should have given deference in weighing the evidence.

Additionally, the ALC's lack of expertise required to evaluate the C&D disposal needs in the planning region for the Proposed Landfill is demonstrated by the conflicting conclusions in its Final Order and Decision. Significantly, in its Final Order and Decision, the ALC acknowledged that the operation of Subsection (D)(3)(b) results in excess permitted disposal capacity in Laurens County and that such excess capacity is not an "additional factor" under Subsection (D)(3)(d). Specifically, the ALC held as follows:

> Additionally, the excess permitted disposal capacity within Laurens County does not constitute an additional factor requiring denial of the demonstration of need request for the Proposed Landfill. Such disposal capacity is a result of an express provision of the DON Regulation which sets forth the mechanism for determining the annual disposal rate for a Proposed Landfill.

(Final Order and Decision, p. 7, R. p. 22, App. p. 23). However, despite this conclusion that excess permitted disposal capacity in Laurens County was not an "additional factor" warranting denial of MRR's permit, the ALC thereafter found that the Proposed Landfill was not needed because "the 32.9% utilization of existing capacity [in the three-county region] simply does not reflect a need for another landfill in the area." (Final Order and Decision, p. 9, R. p. 24, App. p. 25). The ALC provides no explanation for this glaring conflict in its evaluation of excess existing landfill capacity. Moreover, the ALC failed

to cite to any statutory or regulatory basis for these obviously conflicting conclusions. Neither Section 44-96-290(E) of the Solid Waste Act nor the DON Regulation promulgated thereunder establishes any criteria for determining need based on the utilization of current permitted capacity within a broader region to be served by a Proposed Landfill. The ALC's conclusions were based on a narrow manipulation of the raw data presented at the contested case hearing and demonstrate that such data can only be assessed by DHEC staff personnel with the experience and knowledge to evaluate such information in the larger context of the staff's expertise and broad understanding of the comprehensive statewide solid waste program.

II. SINCE THE ALC FAILED TO DEFER TO THE SPECIALIZED KNOWLEDGE OF THE AGENCY STAFF IN FINDING THAT REGIONAL EXCESS LANDFILL CAPACITY IS AN ADDITIONAL FACTOR WARRANTING DENIAL OF MRR'S PERMIT, THIS FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

By failing to give deference to the agency's specialized knowledge, the ALC's finding that EAGLE met its burden of proof in this case is not supported by the substantial evidence. The standard of proof in weighing the evidence and making a decision on the merits in a contested case proceeding is the preponderance of the evidence. S.C. CODE ANN. § 1-23-600(A)(5) (Supp. 2012); *Anonymous (M-156-90) v. State Bd. of Med. Exa'rs*, 329 S.C. 371, 496 S.E.2d 17 (1998). EAGLE, as the party challenging DHEC's permitting decision, bears the burden of proving by a preponderance of the evidence its assertions that the demonstration of need for the Proposed Landfill does not conform to the regulatory requirements. *See Leventis v. S.C. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132, 530 S.E.2d 643, 651 (Ct. App. 2000). As this Court acknowledged in its Opinion, the excess regional landfill capacity was discussed during the public comment period. Kent Coleman testified at length about the DHEC

staff's awareness of the C&D waste needs and capacity within the region to be served by the Proposed Landfill, the policies and goals of the DON Regulation criteria, and the basis for DHEC's permitting decision. As discussed in detail above, DHEC's evaluation of the disposal needs and capacity was based on specialized knowledge and therefore was entitled to the ALC's deference in weighing the evidence offered at the contested case hearing. Indeed, if the ALC had deferred to the specialized knowledge of the DHEC staff as required by Section 44-1-60(F)(2), the ALC could not have found that EAGLE met its burden of proof in this case.

Moreover, the evidence on the record does not support the ALC's ruling that the Proposed Landfill is not needed in the three-county region to be served by the Proposed Landfill. To the contrary, the evidence on the record clearly supports a finding that the Proposed Landfill is needed. For example, the three-county planning area for the Proposed Landfill includes Spartanburg County. According to the 2007 South Carolina Solid Waste Management Annual Report, Wasp Nest Landfill is the only permitted C&D landfill in Spartanburg County. (Pet. Ex. 24, p. 73, R. p. 418, App. p., 419). In 2007, the estimated remaining life of Wasp Nest was only 1.6 years in 2007. (Pet. Ex. 24, p. 73, R. p. 418, App. p. 419). In its Final Order and Decision, the ALC held that "the remaining life of the Wasp Nest Landfill which has an annual disposal rate of 80,000 tons per year is basically finished." (Final Order and Decision, p. 8, R. p. 23, App. p. 24). Accordingly, with the loss of Wasp Nest Landfill, Spartanburg County has **no** C&D disposal capacity within the county. Such evidence is clearly contrary to the ALC's finding that the Proposed Landfill is not needed within the three-county planning area and an error overlooked by this Court.

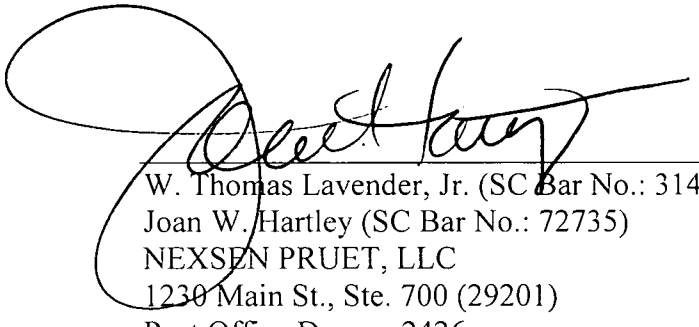
Additionally, as discussed above, the ALC held that the excess permitted disposal capacity in Laurens County did not warrant a denial of the DON request for the Proposed Landfill. (Final Order and Decision, pp. 7-8, R. pp. 22-23, App. pp. 23-24). As such, the disposal capacity in Greenville County facilities would be the only consideration supporting the ALC's holding that the Proposed Landfill is not needed. However, the evidence on the record demonstrates that the Greenville County facilities accept for disposal less waste than that generated within Greenville County itself. Specifically, in 2007 the C&D landfills in Greenville County accepted for disposal only 137,084 tons of the 161,738 tons of waste generated in Greenville County. (Pet. Ex. 24, pp. 72, 74, R. pp. 417, 419, App. pp. 418, 420). Indeed, in 2005 Curry Lake C&D Landfill in Laurens County accepted approximately 23,780 tons of C&D waste from Greenville County. (Trial Ex. 26, R. p. 437, App. p. 438). Thus, both Greenville County and Spartanburg County evidence an actual need for additional disposal capacity outside those counties.

Simply stated, the data on C&D waste generated and the permitted disposal capacity can be evaluated from numerous perspectives in the context of making a permitting decision. However, the evaluation of that data requires the specialized knowledge or expertise of the DHEC staff. The ALC's manipulation of the raw data to generate a statistic to support a finding of regional excess permitting capacity which purportedly warrants denial of the permit completely ignores Mr. Coleman's testimony on DHEC's evaluation of that data in the context of the statewide solid waste program. Pursuant to Section 44-1-60, the ALC is required to defer to the specialized knowledge of the DHEC staff in evaluating the evidence presented in a contested case. Moreover, this is unquestionably the case on matters within DHEC's discretion under a provision which

provides no specific criteria for exercising such discretion. As discussed above, the record is replete with Mr. Coleman's testimony on matters within the specialized knowledge and expertise of the DHEC staff. Had the ALC given appropriate consideration to this testimony, EAGLE could not have met its burden in this case. Accordingly, the ALC's application of regional excess landfill capacity as an "additional factor" is not supported by the substantial evidence on the record.

CONCLUSION

For the reasons stated herein, MRR respectfully requests that this Court withdraw or amend Opinion No. 27366 issued March 12, 2014, and re-issue an Opinion consistent with the recommendations set forth above.



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PROOF OF SERVICE

I certify that I have served Respondent MRR Highway 92, LLC's Petition for Rehearing on counsel of record for Engaging and Guarding Laurens County's Environment ("EAGLE") by depositing a copy of it in the United States Mail, postage prepaid, on April 11, 2014, addressed to:

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