STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rick Still, Donice Still, Christine Orr and Terry Orr,	)	Docket No. 13-ALJ-07-0395-CC
Petitioners,	)	
vs.	)	
South Carolina Department of Health and Environmental Control and Lisa Sumerel and Sumerel Poultry Farm,	)	**FINAL ORDER AND DECISION**
Respondents.	)	

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APPEARANCES:	For Petitioners:	Joseph O. Smith, Esquire
	For Respondent SCDHEC:	Stephen P. Hightower, Esquire
	For Respondents Lisa Sumerel and Sumerel Poultry Farm:	Thomas E. Hite, III, Esquire

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (ALC or Court) pursuant to S.C. Code Ann. § 1-23-310 *et seq.* (Rev. 2005 & Supp. 2013), S.C. Code Ann. § 1-23-600 (Supp. 2013), and S.C. Code Ann. § 44-1-60 (Supp. 2013), for a contested case hearing regarding the South Carolina Department of Health and Environmental Control's (SCDHEC or Department) decision to issue Bureau of Water Agricultural Permit ND0088307, Permit Number 19,647-AG (Permit) to Lisa Sumerel for the operation of Sumerel Farm. The Sumerel Farm, which is listed in the caption as Sumerel Poultry Farm, is a proposed broiler poultry facility located off Poole Town Road in Laurens, South Carolina. Petitioners Rick Still, Donice Still, Christine Orr and Terry Orr, who live on properties located on Poole Town Road in the vicinity of the proposed facility, filed a request for a contested case hearing to challenge the Department issuance of the permit. Pursuant to the Rules of the Administrative Law Court (RALC), and the Notice of Hearing filed on June 20, 2014 and served on all the parties, a hearing on the merits was held on August 25 and 26, 2014, at the ALC in Columbia, South Carolina.

At the hearing, the Court heard testimony from witnesses and admitted into evidence several exhibits. Petitioners called Petitioners Rick Still, Terry Orr, and Christine Orr; David Hargett, Ph.D, who was qualified as an environmental scientist consultant and an expert on water impacts; Carmen Parkhurst, Ph.D, who was qualified as an expert in animal feeding operations, poultry science, and waste management; Respondent Lisa Sumerel and her husband, Michael Sumerel; and three employees of the Department, Chrissy Matthews, who conducted the preliminary site inspections of the site; Stephen Smutz, who conducted the Department's review of potential air impacts; and William P. Chaplin, the Department's permit reviewer. Respondents Lisa Sumerel and Sumerel Farm called two witnesses, Leon Fulmer and Joy Shealy, P.E. Ms. Shealy prepared the Comprehensive Nutrient Management Plan reviewed by the Department and Mr. Fulmer conducted field observations used in the preparation of the plan. The Department did not call any witnesses and presented its case through cross-examination of the Department witnesses called by Petitioners and the witnesses called by Respondents Lisa Sumerel and Sumerel Farm. During its cross-examination of Mr. Smutz, the Department sought and the Court qualified Mr. Smutz as an expert in the field of meteorology and agricultural permitting. Several of the exhibits admitted into evidence were consented to by the parties and were admitted as Joint Exhibits (JE). Two additional exhibits were proffered and admitted into evidence, one by Petitioners and one by Respondents.

During the hearing, Petitioners presented the following issues for review:

1) Whether the Department failed to properly evaluate the environmental impacts of the Sumerel Poultry Farm; and
2) Whether the Department's decision to issue the Permit:
   a. constitutes a violation of constitutional or statutory provisions;
   b. was made upon unlawful procedure;
   c. was affected by error of law;
   d. is clearly erroneous in view of the reliable, probative, and substantial evidence;
   e. and/or was arbitrary and capricious and an abuse of discretion;
   f. and prejudiced Petitioners' substantial rights.

After careful consideration of the issues, the testimony presented and exhibits admitted into evidence during the hearing, the Court concludes that the Department issued the Permit to Lisa Sumerel in accord with all applicable statues and regulations for the reasons set forth below.

FINDINGS OF FACT

Having observed the witnesses and reviewed the exhibits presented at the hearing, and taking into consideration the burden of persuasion and the credibility of the witnesses, the Court makes the following findings of fact by a preponderance of the evidence:

Background

Respondent Lisa Sumerel and her husband, Michael, are residents of Laurens County, South Carolina and reside at 2044 Poole Town Road. The Sumerel's have two adult sons, aged 27 and 30. They live in a rural farming community, and have applied for a permit to construct and operate poultry broiler farm on property located immediately north of their residence. Mrs. Sumerel is a kindergarten teacher at Ford Elementary School in Laurens County, District 55 and plans to retire in two years. Mrs. Sumerel is the holder of the proposed permit issued by the Department. When she retires she intends to help her husband operate the proposed facility by conducting walk throughs in the houses to keep the chicks moving and by keeping the books. Mr. Sumerel will be the primary operator of the proposed facility. He is currently a hay farmer and has farmed or been involved in farming for much of his lifetime and took classes in agriculture in high school. The property where the proposed facility is to be located was given to them by Mr. Sumerel's mother, who is one of their next-door neighbors.

Permitting Process

On April 23, 2012, the Sumerels filed a request with the Department's regional office located in Greenwood, South Carolina for a Preliminary Site Inspection (PSI) for a proposed poultry facility to be located on Poole Town Road in Laurens County, South Carolina. The request was given to Ms. Chrissy Matthews, an eight year employee of the Department who conducts inspections of agricultural facilities. Ms. Matthews's job includes routine and compliance inspections, preliminary site inspections, and she also performs stormwater compliance and routine inspections. Ms. Matthews conducted the PSI on April 23, 2012. The PSI began with a visit to the location off of Poole Town Road (Site) by Ms. Matthews to determine if the setback distances for poultry facilities could be met and the poultry houses for the proposed facility could fit. During this visit, Ms. Matthews observed that the east and south boundaries of

the Site were covered by a large, mature forest. When Ms. Matthews returned from the field she accessed the Laurens County Geographic Information Systems (GIS) website and used its measuring tool to measure the distances from the property lines of the Site to potential footprints for the facility, to determine if there was sufficient room for the houses. Ms. Matthews recorded her findings on a document known as a Preliminary Site Inspection Checklist, which was admitted into evidence as JE 6. A PSI Checklist is an unofficial form used to assist in the evaluation of a site. Based on her observation of the Site, use of GIS, and experience, Ms. Matthews concluded that the Site was generally suitable for an animal feeding operation governed by S.C. Code Ann. Regs. 61-43 Part 200 (2011). By letter dated April 27, 2012, Ms. Matthews notified the Sumerels that the Site "appears to be suitable" for the operation of a poultry farm. The letter also granted the Sumerels permission to plan and design an animal facility, and submit the plans to the Department before April 23, 2013 for review in accord with the regulations governing *Animal Facilities other than Swine*, which is codified at 4 S.C. Code Ann. Regs. 61-43 Part 200.

The Review Process

On October 10, 2012, the Sumerels signed a Comprehensive Nutrient Management Plan (CNMP), which was received by the Department on October 11, 2012. The CNMP was prepared by Shealy Engineering, LLC. Shealy Engineering, LLC is owned by Joy S. Shealy, P.E.[1] Ms. Shealy graduated from Clemson University with a Bachelor of Science degree in agricultural engineering and holds professional engineer licenses for South Carolina, North Carolina, and Georgia. Prior to establishing Shealy Engineering in 2004, Ms. Shealy had worked for the Department. As a SCDHEC employee, Ms. Shealy worked one year in stormwater permitting and six and a half years in agricultural permitting. Also, during her time with the Department, Ms. Shealy was involved with the promulgation of 4 S.C. Code Ann. Regs. 61-43. Ms. Shealy works with Leon Fulmer, an agricultural engineer, who also is a former Department agricultural permitting reviewer whose duties included those now performed by the current Section Manager of the Agricultural Permitting Section. As an employee of Shealy Engineering, LLC, Mr. Fulmer conducts site inspections to determine if a site is suitable for a poultry facility and to obtain detailed information for the preparation of animal facility management plans. In addition to these

[1] Subsequent to the preparation of the CNMP, on June 2, 2014, Ms. Shealy sold Shealy Engineering, LLC to Shealy Consulting. (Tr. pp. 402, 478).

duties, Mr. Fulmer is the operator of a broiler poultry facility.

The CNMP for the Sumerel facility proposes the construction and operation of a four poultry house broiler facility with a total facility capacity of 109,600 broilers, which "will be brought into the house as chicks and are confined for a period of sixty-three (63) days or until they reach an exit weight of eight and three quarter (8.75) pounds" with a normal production live weight of 493,200 pounds. The proposed facility would be sited so that all applicable set back distance are met or exceeded. Specifically, the proposed facility complies with the following set back distances: 1) potable wells (required 200 feet, actual 1,300 feet); 2) potable wells owned by the applicant (required 50 feet, actual 500 feet); 3) waters of the State located downslope (excluding ephemeral & intermittent streams) (required 100 feet, actual 150 feet); 4) ephemeral or intermittent streams located downslope (required 100 feet, actual 150 feet); 5) ditches or swales located downslope (required 50 feet, actual 50 feet); 6) property line (500,000 lbs or less) (required 200 feet, actual 200 feet); and 7) occupied residence (required 1,000 feet, actual 1,300 feet). The CNMP also provided documentation that the Sumerels had notified all property owners with property located within 1,320 feet from the footprint of the proposed facility, including Petitioners, as required by the regulation's public notice provision.

On the same day that it was received, the Sumerel application package was sent to the Department's Agricultural Permitting Section for review. William P. Chaplin, the Section Manager of the Agricultural Permitting and Dam Safety Section, reviewed the permit and made all of the decisions regarding its issuance. Mr. Chaplin has worked for the Department since 1992. For twelve years, his duties included septic tank inspections and mosquito control. Mr. Chaplin has been the Section Manager of Agricultural Permitting and Dam Safety Section for the last eight years.

The Department's review began when compliance generated requests to the Bureau of Air Quality and the Division of On-Site Wastewater Management's, Bureau of Environmental Health to evaluate air and groundwater requests. Stephen W. Smutz, of the Bureau of Air Quality's Air Modeling Section, responded to the request in a Memorandum, dated October 16, 2012, on the Air Quality Issue of the proposed facility. In his memorandum, which set forth his evaluative process, Mr. Smutz made the following conclusions: 1) that "[i]n consideration of the relevant standards under state and federal laws, an increase in air pollution is not expected from the proposed operation;" and 2) that "[i]n view of the fact that no State or Federal standards exist

for odors and the foregoing information, the Bureau does not recommend any additional requirements or setbacks for this permit." William H. Burriss of the Bureau of Environmental Health, Division of On-site Wastewater Management responded to the Agricultural Permitting Section's request in a memorandum dated October 22, 2012. The memorandum incorporated field notes that indicated the fieldwork performed to determine if the proposed mortality burial site was suitable. Based on this information, Mr. Chaplin concluded that the proposed burial site was not suitable for mortality disposal.

On October 25, 2012, the Sumerel application was placed on public notice, in accord with 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A). Ms. Matthews posted five signs in the vicinity of the Site notifying the public about the application and informing the public that from October 25, 2012 through November 24, 2012, the Department would be accepting comments on the application.

The Department's technical review of the Sumerel application package began on February 2, 2013. On February 25, 2013, the Department sent out letters to the seventy-seven (77) individuals on the petition and those who wrote letters in opposition to the Sumerel facility, notifying them that the Department had scheduled a public meeting to be held on March 11, 2013 at Laurens Academy Gymnasium at 6:30 PM. The public meeting was held on March 11, 2013 as planned.

In May 2013, the Sumerels submitted amendments to their facility plans. Included in the amendments was a Dead Animal Composting Facility Management Plan (Composting Plan), which changed the mortality disposal method from burial to hay bale composting, incineration, and landfill disposal. On May 28 and 29, 2013, the Department received CNMP pages, which included incorporation of the new mortality disposal methods contained in the CNMP. On June 10, 2013, the Department completed its technical review of the Sumerel application.

On June 12, 2013, the Department issued the Permit to Lisa Sumerel for the operation of a no-discharge broiler poultry feeding operation. The Permit authorizes the construction and operation of four poultry broiler houses, each housing 27,400 birds, for a total of 109,600 birds at any one time. The facility can house up to 4.5 flocks per year and the average animal live weight of each flock is 493,200 lbs. The Permit also authorizes mortality disposal through the use of a hay bale composting system and/or incineration. The Permit also contained a Special Conditions section that enumerates eight requirements, including requirements that: 1) local permits such as

building and stormwater be obtained; 2) any drinking water wells installed on the property for animal or human consumption meet certain regulatory setbacks; and 3) the owner or operator obtain Confined Animal Manure Manager (CAMM) Certification from Clemson University within a year of the Permit's effective date.

Twelve days after receiving the Permit, on June 24, 2013, the Sumerels submitted a request to the Greenwood Regional Office for a PSI to be conducted in order to evaluate the exact locations of the composting and incineration for mortality disposal, including the siting of the composter and incinerator(s) on their facility. That same day, Ms. Matthews conducted a PSI inspection of the Sumerel property to see if the property north of where the proposed poultry houses will be built is suitable for the placement of a hay bale composting system and incinerator. By letter dated June 27, 2013, Ms. Matthews notified the Sumerels that placement of hay bale composting system and incinerator hay bale composting system and incinerator north of the proposed site for the poultry houses was approved. The PSI was not necessary to, nor used by Mr. Chaplin in his decision to authorize composting for poultry mortality at the proposed facility.

Petitioners' Objections to the Issuance of the Permit

Petitioners take issue with the Department issuance of the Permit to Mrs. Sumerel, claiming that the Department's review was inadequate. They cite general quality of life claims and the following specific claims: the Odor and Vector Abatement Plans do not conform to regulatory requirements; the Department inadequately considered water impacts because potential impacts from grading activities and stormwater runoff were not considered; the proposed facility was a large facility because the information on the average live weight in the CNMP was inaccurate; and the Department's review of the Composting Plan was inadequate. The parties presented testimony and exhibits regarding each of these claims and based on this evidence, the Court makes the following additional findings of fact:

Petitioner Rick Still testified that he and his wife moved to the area for the quiet enjoyment of nature and the outdoors. The Stills live at 1734 Poole Town Road and their residence is located 1,650 feet from the footprint of the proposed facility. The Stills claim that they utilize their land surrounding their home and outdoor space on a frequent basis, including using the large outdoor kitchen on the property. Mr. Still is concerned that the Sumerel operation will have numerous negative impacts upon his right to the quiet and peaceful enjoyment of his property. Namely, Mr. Still expressed deep concerns about the environmental impacts and

possible nuisance in the form of foul and offensive odors, dust, feathers, and other airborne emissions intruding into his property and interfering or prohibiting him and his wife from enjoying it as they currently do. Mr. Still was also concerned about the inadequacy of the CNMP, the Composting Plan and the Department's evaluation of those documents and approval of the Sumerel Permit. He also voiced a concern that should the Sumerel facility go into operation it would immediately cause a drastic devaluation of his property.

Petitioner Terry Orr testified that he and his wife Christine also live on Poole Town Road. The Orrs live at 1174 Poole Town Road and their residence is located 3,600 feet from the footprint of the proposed facility. The Orrs also own a pond located approximately 2,000 feet northeast of the proposed facility. Mr. Orr testified that he uses the pond property nearly every day for hiking, fishing and other recreation. He expressed serious concern that nuisance odors would interfere with the use and enjoyment of his property. Mr. Orr was also very concerned that the airborne emissions and water runoff would have detrimental environmental impacts on his pond, which is interconnected with upslope water bodies that are in close proximity to and downslope from the proposed Sumerel site.

Finally, Petitioner Christine Orr testified about her concerns over the proposed Sumerel operation. Mrs. Orr testified that she likes to go out in her yard with the family dogs on a regular basis. She went on to say that she regularly enjoys sitting on her front porch, reading a book, and enjoying the quiet. She said "that's my weekend thing." As with Mr. Still and her husband, Mrs. Orr expressed serious concerns about the proposed Sumerel operation. She believes it will prohibit her from enjoying her property as she currently does by generating nuisance odors, vectors, and various emissions harmful to the surrounding environment. Mrs. Orr said the proposed operation was not traditional farming in any sense and more akin to an industrial factory.

A. Odor and Vector Abatement Plans

The Sumerel CNMP contains three sections addressing odor and vector abatement. Section 7.2, labeled "Vector Control and Abatement," provides a list of actions for the Sumerels to take in order to address vector issues generally and specifically. Section 7.3, labeled "Air Quality," provides information regarding odor. Finally, Section 7.6 of the CNMP, which is labeled "Site Specific Vector and Odor Abatement Plan," contains additional odor and vector

abatement procedures. Section 7.2 contains the following detailed set of general and specific actions that the Sumerels are to take to address vectors:

Removing all excess building materials.
Removal of any excess feed from the houses or around bins.
Keeping grass and weeds mowed.
Keeping all buildings free of trash and debris.
The proper use and servicing of bait stations.
Proper and timely disposal of dead animals.
Keeping all manure cleaned up caused by spillage from around the houses. Keep all temporary stored manure covered and dry.
Any spillage or feed should be cleaned as soon as possible and all feed will be kept dry.
Covers on feed storage bins should be used. Drainage away from all feed storage containers should be provided to reduce moisture accumulation.

Actions to be taken for the abatement of an ***insect*** problem:
Mow vegetation around the facility.
Clean up any spilled feed.
Repair or replace equipment that is spilling feed.
Use covers to prevent feed from getting wet.
Dispose of any wet or contaminated feed.
Check for leaks from waterers, etc. and repair as needed.
Remove any garbage or trash from the facility.
Remove and dispose of all dead animals immediately and appropriately.
Use approved baits, poisons, etc. as appropriate.

Actions to be taken for the abatement of a ***rodent*** problem:
Mow vegetation around facility.
Clean up any spilled feed.
Repair or replace equipment that is spilling feed.
Use covers to prevent feed from getting wet.
Dispose of any wet or contaminated feed.
Remove all excess building materials.
Remove any garbage or trash from the facility.
Check for damage or leaks from waterers, etc. and repairs as needed.
Remove and dispose of all dead animals immediately and appropriately.
Use approved baits, poisons, etc. as appropriate.

Actions to be taken for the abatement of ***scavenging animal*** problems:
Remove and dispose of all dead animate immediately and appropriately.
Mow vegetation around facility
Clean up any spilled feed.
Repair or replace equipment that is spilling feed.
Use covers to prevent feed from getting wet.
Dispose of any wet or contaminated feed.

Remove all excess building materials.
Remove any garbage or trash from the facility.
Check for digging activities that could damage or weaken buildings and repair as needed.
Contact the proper officials for additional control measures.

For more details on specifics (rats, filth, flies, etc.) information may be obtained for the Clemson Agricultural Extension Offices or the NCRS office. A source of information is also available from Clemson's South Carolina Confined Animal Manure Manager's program, in Chapter 10 of the applicable species, available at: http://www.clemson.educ/camm/
(emphasis added).

Section 7.3 contains the following information:

NRCS does not have specific technical criteria for these consideration that are required for CNMPs. However, the following items may be considered when addressing Air Quality, most Air Quality issues are associated with odor.

Air quality in and around structures, waste storage areas, and treatment sites may be impaired by excessive dust, gaseous emissions such as ammonia, and odors. Poor air quality may impact the health of workers, animals, and persons living in the surrounding areas. Ammonia emissions from animal operations may be deposited to surface waters, increasing the nutrient load to these regions. Proper siting of structures and waste storage facilities can enhance dispersion and dilution of odorous gases. Enclosing waste storage or treatment facilities can reduce gaseous emissions from AFOs in areas with residential development in the region.

For an odor to be detected downwind, odorous compounds must be (a) formed, (b) released to the atmosphere, and (c) transported to the receptor site. These three steps provide the basis for most odor control. If any of the steps is inhibited, the odor will diminish.

Growing and Storage Facilities

Odor problems can be prevented or reduced through adequate drainage, runoff management, proper care to keep animals and animal facilities clean and dry, and appropriate animal by-product removal, handling, and transport.

Locate animal by-product management facilities and utilization areas as far as practical from neighboring residences, recreational areas, or other conflicting land uses. Avoid sites where radical shifts in air movement occur between day and night, such as those near large bodies of water or steep topography. A component's location in relation to surrounding topography may also strongly influence the transfer of odor because of daily changes in temperature and

resulting airflow. To provide optimum conditions, prevailing winds should carry odors away from nearby residences.

Providing conditions or design features that alter the microclimate around specific components can further mitigate odor. An abundance of sunlight and good ventilation helps keep livestock and poultry areas dry and relatively odor free. Southern exposure with adequate slope to provide drainage for runoff is a preferred condition. Keeping animal by-products aerated and at appropriate moisture and temperature levels slows the development of anaerobic conditions and reduces odor.

Mitigation of Odor

Odor-causing substances from animal by-products are frequently attracted to dust particles in the air. Collecting or limiting the transport of dust aids in reducing odor. Vegetation is very effective in trapping dust particles. For example, pine trees planted downwind trap odor-laden dust particles and can provide a visual barrier to the animal operation. In addition, vegetation, landform, and structures can channel wind to carry odors away from nearby residences.

Chemical additives for the control or reduction of odors may be added to the bedding in the house or during removal.

Section 7.6 of the CNMP, which is labeled "Site Specific Vector and Odor Abatement Plan" contains the following information:

Odor & Vector Abatement Plan
Columbia Farms

Columbia Farms has approved the following treatments in the event that an odor problem is identified at the farm:

PI T Poultry Liter Treatment
Disinfectants

Columbia Farms has approved the following pesticide treatments in the event than a vector problem is identified on the farm:

Beneficial Insect Treatment for flies (wasps)
Larvidex
Phenolx
Rabon 50 Wettable Powder Insecticide
Rat Baits (Brands rotated for resistance prevention)

Section 7.2 lists specific actions that the Sumerels are to take if there are vectors. In addition, the Vector Abatement Plan contains separate sections containing items for specific

vectors such as insects, rodents, and scavenging animals. Similarly, Section 7.3 provides information addressing the locations of areas that can cause odors. For example, the Section contains information about how vegetation can be used to control odor and how chemical additives can be added to bedding to control odor. Finally, with regard to odor, Section 7.6 identified the specific chemical approved by the integrator for use in the bedding material, which is also known as litter. With regard to vectors, that Section specified the rodenticide and insecticides authorized by Columbia Farms for use at the proposed facility.

Petitioners, however, claim that the information contained in CNMP Section 2, Vector Control and Abatement Vector Control, and CNMP 7.6, Site Specific Vector and Odor Abatement Plan, fails to meet the regulatory requirements in Part 200.150(A) and Part 200.160(A) because they are best management practices (BMPs) and not "site specific" requirements. Specifically, Petitioners assert that the Department's permit reviewer acknowledged that the vector control requirements in the regulations do in fact require a site specific vector abatement plan. Petitioners also assert that the professional engineer and drafter of the CNMP testified that Section 7.2 was not a site-specific plan but rather general BMPs an operator may use in the event a particular issue listed arose and that Section 7.6 labeled "Site Specific Vector and Odor Plan" was *integrator* rather than *site* specific and would be the same for any facility in which Columbia Farms acted as the integrator.

Petitioners' claims are not supported by the record. Ms. Shealy testified that Section 7.6 contains the site specific odor and vector abatement plans and that they comply with the regulatory requirements. Further, she testified that if Mr. Chaplin identified any problems with the CNMP she made the necessary correction to them and did not recollect being notified about a problem with Section 7.6. In pertinent part, Part 200.150 provides that "[t]he Animal Facility Management Plan shall contain an odor abatement plan for the animal facility, lagoon, treatment system, manure storage pond, and manure utilization areas, which ***may*** consist of" five enumerated criteria. 4 S.C. Code Ann. Regs. 61-43 Part 200.150(A) (emphasis added). Similarly, Part 200.160 provides that a "Vector Abatement Plan shall at a minimum consist of . . . [a] list of ***specific actions to be taken*** by the producer ***if*** vectors are identified as a problem." 4 S.C. Code Ann. Regs. 61-43 Part 200.160(A)(2) (emphasis added). By providing that the odor plan may consist of certain criteria and that the vector plan shall consist of a list of specific action to be taken, the regulations do not mandate "site specific" criteria limited in application to

only the proposed facility and no other facility. Rather, they require plans that are capable of controlling odor and vectors.

While challenging the Odor and Vector Abatement Plans based on the ground that they purportedly fail to comply with Part 200.150(A) and Part 200.160(A), respectively, Petitioners have offered no testimony or documentary evidence to establish whether the plans are effective in spite of the purported regulatory error. In fact, Respondents elicited testimony from one of Petitioners' witnesses that significantly undercuts Petitioners' claim. Dr. Carmen Parkhurst, Ph. D., is a professor of Poultry Science at North Carolina State University. The Court qualified Dr. Parkhurst as an expert in animal feeding operations, poultry science and waste management. In response to questioning by the Department, Dr. Parkhurst stated that, while he believed that it needed to be better defined, if the Sumerels followed the Vector Abatement Plan it was his expert opinion that the requirements would not be harmful and that they would deal with the vector issues. This testimony stands without contradiction and severely undercuts Petitioners' claim.

Further, Petitioners' assertion that the Department permit reviewer, Mr. Chaplin, acknowledged that the vector control requirements in the regulations do in fact require a site specific vector abatement plan, is misplaced. As noted above, Part 200.160(A)(2) does not require a "site specific" criteria that would be applicable to only one particular site and no other. Although in the cited testimony, Mr. Chaplin does state "[t]hat's correct" in response to a question about whether Part 200.160(A) "requires a site specific in that it has to identify what Mr. and Mrs. Sumerel are going to do to address each one of these problems specifically, not a list of potential best practices?" However, in that response, Mr. Chaplin also stated "[i]t says if vectors are identified as a problem. So they be able to run their facility and they don't have any vectors [sic]." This statement, without more, is incapable of constituting a Department interpretation that the Court is bound to follow. Moreover, given that Petitioners' own expert stated that the application of the Vector Abatement Plan would not be harmful and would achieve the goal of dealing with vectors, the Court finds that Petitioners' have failed to present sufficient evidence to show that the Vector Abatement Plans is inadequate. Accordingly, Petitioners have failed to establish that the Odor and Vector Abatement Plans in the CNMP are inadequate.

B. Water Impacts

Petitioners contend that the Department failed to adequately consider and evaluate the potential impacts of the Sumerel operation to the waters of the State. Specifically, Petitioners assert that the Department's review was inadequate because it was limited to determining whether the Site was suitable for mortality disposal by burial and because it did not consider the grading and stormwater management runoff.

The Department's review of water quality issues, set forth in the Agricultural Permitting Review Checklist Summary, was prepared contemporaneously by Mr. Chaplin and was admitted into evidence as Joint Exhibit 5 without objection. According to that document, Mr. Chaplin's conducted the following review:

1) Source Water Protection – checked ground water public supply well overlay and determined that the no public supply well was in the vicinity but a well, identified as G30169, is located 1.86 miles away. No additional setback distance is necessary because the regulatory minimum distance is 200 feet;

2) Impaired Water review - reviewed the 2004 303(d) State impaired water body list to distances from the proposed facility, manure treatment/storage structure, and manure utilization areas. Determinations – Proposed facility is located 21.01 miles from the Enoree River which is impaired for copper and zinc; Manure Utilization Areas – not applicable because the proposed facility will manage manure disposal with a broker; and that "Given the distance to headwaters (402 feet) from the facility footprint and this being a no discharge facility, no additional setbacks are required."

3) Stream classification – freshwater –"no additional setbacks are required."

4) Nonpoint sources – In Hydro Unit Code 0306010802 there are no other permitted facilities and there are 20 manure utilization areas. "No additional setbacks are required."

5) Topography maps for the facility site and 100-year floodplain map for facility site (JE 1, DHEC 112-13) – "Given the water resources reviews and the animal facility management plan states best management practices will be utilized, thus no anticipated increase in pollution to the waters of the state is not expected."

6) "Groundwater Review of the proposed burial sites, manure utilization areas, geography, soil types on the site, aquifer vulnerability and manure storage/treatment structures. ***Recommendations or Response***: As per memo dated October 22, 2012 from the Division of on-site wastewater management, zone of saturation was greater than 22 inches, however, the burial site is located within the SWPA. Therefore burial will not be allowed."

(emphasis in original).

Although Petitioners acknowledge that the Department correctly determined that the Site was not suitable for mortality burial, and acknowledge that the Department conducted 1) water quality reviews to determine the location of public supply wells, 2) 303(d) impaired water body list, and 3) reviewed and noted the stream classifications for the water bodies in the drainage route, Petitioners nevertheless claim that the Department should have considered the grading and stormwater runoff from the Site as part of the permitting process. To support their argument, Petitioners presented the testimony of Dr. David Hargett, Ph. D., who was qualified as an expert environmental science consultant and in water impacts. Specifically, Dr. Hargett noted that the necessary grading for the Sumerel facility would result in approximately 300,000 or more square feet (or some 6 acres) of land on the site disturbed and graded. Dr. Hargett testified that this massive grading endeavor will create "an industrial footprint with a high degree of imperviousness, a high degree of runoff." He went on to testify that this runoff would go downslope where there are multiple waters of the State and waters of the United States that are at risk from this operational runoff. Dr. Hargett opined that it was within the Department's purview to ensure these waters could handle the additional stresses presented by the Sumerel operation including manure contaminated runoff, ammonia emissions and other water transported and airborne emissions from the facility.

In response to Dr. Hargett's assertion, Respondents presented testimonial and documentary evidence regarding grading and stormwater runoff issues. Mr. Chaplin, testifying on behalf of the Department, stated that the animal facility permitting regulations contained in 4 S.C. Code Ann. Regs. 61-43 do not address stormwater. All stormwater issues are addressed in a separate permitting process conducted by the stormwater permitting section. In addition, Mr. Chaplin stated that since the proposed facility is a no-discharge facility and does not have manure utilization areas, the only expected runoff is from stormwater. Similarly, Ms. Shealy and Mr. Fulmer testified that the stormwater permitting process is separate from the agricultural permitting process.

Moreover, Dr. Hargett's testimony is contradicted by the testimony of Petitioners' second expert witness, Dr. Carmen Parkhurst, Ph. D. In response to questioning by the Department, Dr. Parkhurst stated as follows:

> Q: Okay. You're aware that in South Carolina grading, land grading and all those issues are covered in a separate permit?
> A: Yes, sir.

Q: Okay. So you would agree that the Department's permit and the plans that were submitted here would not necessarily – it would not be required of them to have those documents because they're not going to be reviewed by the reviewer in this case, correct?
A: That's correct.
Q: Okay. That doesn't mean they can't grade that site successfully?
A: Yes.
Q: Okay.
A: ***My only concern with the grading was that it was going to be costly.***
Q: Well, it may be costly, but you would agree that cost real only impacts the permittee and –
A: Yes, sir.
Q: -- whether they're willing to spend that money, correct?
A: Yes, sir.
Q: ***But you would agree that if they're willing to spend their money and they can make an adequate plan and it's reviewed by the Department and they follow it, that site could be turned into a perfectly safe and functioning poultry farm?***
A: ***Yes, sir.***

(emphasis added).

Further, Respondents established that the Sumerels were notified of the need to obtain a separate stormwater permit. Mr. Chaplin testified that he sent an e-mail along with an attachment entitled "New Compliance Requirements for SC DHEC Stormwater Permit" to the Sumerels. These documents were received into evidence, without objection, as Respondents Exhibit 1. Additionally, the Permit, which was entered into evidence as Joint Exhibit 3, provides in Special Condition 3 that "[y]ou are responsible for obtaining any other local permits that may be required for this project, including a building permit and **stormwater permit** in some counties." (emphasis in original). Finally, Mr. Sumerel, who will operate the facility, testified that he was aware that he will have to obtain a separate stormwater permit before he could grade the site and that he intended to apply for the required permit.

Part 200.70 provides that the Department, *inter alia*, "shall evaluate" the proposed site the following criteria to determine if additional distances are necessary: proximity to 100-year floodplain; location in the watershed; classification or impairment of adjacent waters; proximity to a State Designated Focus Area, Outstanding Resource Water, and State Approved Source Water Protection Area; proximity to other known point source discharges and potential water quality nonpoint sources; runoff prevention; and aquifer protection. 4 S.C Code Ann. Regs. Part

200.70(F). Mr. Chaplin's Checklist clearly shows that the Department considered each of the regulatory required water quality impacts and determined that the setback distances for the proposed facility were adequate to prevent an increase in water pollution. While Dr. Hargett passionately testified for why stormwater runoff and grading issues should be considered as a part of the water quality review for the proposed facility; that testimony was more than contradicted by Petitioners other expert, Dr. Parkhurst. Dr. Parkhurst acknowledged that grading and stormwater concerns are for poultry facilities in South Carolina are considered and reviewed in a separate permitting process. Despite this fact, unlike Dr. Hargett, Dr. Parkhurst had no reservations with the Department's review of grading and stormwater issues in a separate permitting process. Indeed, Dr. Parkhurst stated that his "*only concern* with the grading was that it was going to be *costly*" and Dr. Parkhurst agreed that if the Sumerel's were willing to spend the money necessary the Department could permit a "perfectly *safe* and functioning poultry farm." (emphasis added).

Further, the Court finds unpersuasive Dr. Hargett's statements that it was within the Department's purview to ensure these waters could handle the additional stresses presented by the Sumerel operation including manure contaminated runoff, ammonia emissions and other water transported and airborne emissions from the facility. In raising these as potential issues, Dr. Hargett failed to provide the Court with information necessary to ascertain if the alleged issues would cause an increase in pollution of the waters and air of the State. For example, Dr Hargett stated "[m]y experience in working with similar sites is that it's well documented that ammonia from concentrated animal feeding operations does affect water quality in surrounding receiving waters." However, Dr. Hargett was not offered or qualified as an expert on air quality issues, e.g., the level of ammonia emission from an animal feeding operation. Moreover, even if he had been qualified as such an expert, his testimony would be of no value because, at a minimum, he did not establish that there is a regulatory standard for ammonia in freshwater in South Carolina and, if so, what was the standard. Indeed, the Court notes that when Petitioners questioned Mr. Smutz, who was qualified as an expert, without objection, in the field of meteorology and agricultural permitting air quality issues, about ammonia emissions, he stated that since there are no state or federal standard and that without knowing at what concentration a substance is harmful it is impossible to determine when there would be an increase in pollution.

Since Mr. Smutz was qualified as an expert and none of his testimony was contradicted by Dr. Hargett, the Court finds no probative value in Dr. Hargett's statement.

Accordingly, based upon the evidence presented, the Court finds that Petitioners have not established that the Department did not conduct an adequate evaluation of potential water impacts posed by the Sumerel facility.

C. Average Live Animal Weight

Petitioners contend that the proposed Sumerel poultry operation is not a small facility subject to the 200 foot setback distance proscribed in Part 200.80(A)(5), but a large facility subject to the 400 foot property setback under Part 200.80(A)(6). Petitioners' claim the CNMP utilizes an outdated exit weight of 8.75 lbs. to arrive at an incorrect normal production animal live weight for the facility.

The CNMP is based on a normal production animal live weight for the facility of 493,200 pounds. This calculation is based upon a .25 lb. entry weight and 8.75 lb. exit or "process" weight yielding a 4.5 lb. average animal live weight: (8.75 exit weight + .25 entry weight)/2 = 4.5 average live weight). The CNMP specifies that there will be 109,600 birds on site at any one time thus yielding the 493,200 lb. normal production animal live weight: (109,600 x 4.5 normal production animal live weight = 493,200 pounds).[2] Based upon this calculation the Sumerel facility was designated a "small" operation under the regulations subject to the 200 foot property line setback.

Petitioners presented the testimony of Dr. Carmen Parkhurst, Ph. D. Dr. Parkhurst testified that the exit weight of broilers is determined by the length of the grow cycle. He testified that the 8.75 exit weight utilized in the CNMP was a dated and inaccurate number and that chickens tend to get bigger over time through genetic selection. To support his claim, Dr. Parkhurst pointed to his own recent study completed on March 1, 2014, in which he grew 80,000 birds over a sixty (60) day cycle. In that study, he alleged that the average exit weight of the birds in his study was 9.37 lbs. Based on these factors, Dr. Parkhurst testified that over the course of the designated sixty-three (63) day grow cycle the average exit weight of the birds grown at the Sumerel facility would likely be over nine pounds rather than the 8.75 lb. average utilized in the CNMP.

[2] See p. 25 for further explanation of this calculation.

In response, Respondents offered the testimony of Mr. Fulmer and Joy Shealy of Shealy Engineering, LLC. Mr. Fulmer testified that the CNMP provides "[t]he birds will be brought into the houses as chicks and are confined for a period of sixty-three (63) days or *until they reach an exit weight of eight and three quarter (8.75) pounds.*" (emphasis added). Ms. Shealy testified that the integrator determines the average exit weight of the birds and informs the grower. Ms. Shealy stated that she and Mr. Fulmer got the average exit weight figure from the grower, and in this case, she believed Mr. Sumerel got the figure from Columbia Farms.

In addition to the testimony set forth above, the Court also received testimony from the Sumerels that is relevant to this issue. Mrs. Sumerel testified that the property upon which the proposed facility will be constructed was given to her husband and herself by her mother-in-law. The mother-in-law retains property abutting the proposed facility on the north and east. Mrs. Sumerel also testified that her mother-in-law fully supports their construction and operation of a poultry facility next to her property. In his testimony, Mr. Sumerel stated that his mother owns ninety (90) acres running along the northern, eastern, and southeastern boundaries of the proposed facility.

Considering the evidence adduced during the merits hearing, the Court finds that Petitioners have not met their burden with regard to live animal weight. Dr. Parkhurst's testimony established that each integrator, the company that owns the birds grown by the farmer, sets their own exit weight for the farms' flocks, and that the exit weight depends on the market and internal corporate factors for each integrator. Petitioners did not establish with credible evidence that the exit weight would exceed the amount calculated in the CNMP. Since it is the Petitioners' burden to establish that the calculations in the CNMP are incorrect, the Court finds that Petitioners' failure to ascertain from the integrator what exit weight they were requiring for the Sumerel facility is fatal to their claim.

D. Hay Bale Composting System

As discussed earlier, as part of the Department's review of the Sumerel application package, Mr. Chaplin requested that the Division of On-Site Wastewater, Bureau of Environmental Health to determine whether mortality could be disposed of by burial at the Site. This review was performed by Mr. Burriss, who sent a memorandum to Mr. Chaplin detailing the fieldwork performed to determine if the proposed mortality burial site was suitable. Based on

this information, Mr. Chaplin concluded that the proposed burial site was not suitable for mortality disposal.

In May 2013, the Sumerels submitted amendments to their facility plans. The amendments, which included the submission of a Composting Plan, changed the mortality disposal method from burial to hay bale composting, incineration, and landfill disposal. The amendments also included changes to the CNMP, which included incorporation of the new mortality disposal methods. Mr. Chaplin testified that composting of animal mortality is permitted under Part 200 regulations. Although permitted by regulation, Mr. Chaplin did not want to render a decision on whether it could be used in this case without seeking expert advice, since he had not observed a hay bale composting system in operation. Mr. Chaplin contacted Mr. Steven Henry, an employee of the National Resources Conservation Service (NRCS), an agency under the United States Department of Agriculture (USDA) for information on the system. The Department accepts for processing plans designed by a registered South Carolina professional engineer or an employee of the USDA, NRCS. Based on his discussions with Mr. Henry, Mr. Chaplin determined that hay bale composting systems were an appropriate way to compost dead animals.

The Composting Plan was prepared by Ms. Shealy and contains detailed information regarding construction and operation of the hay bale composting system. According to the Composting Plan, the composter will be located north of the location of the poultry houses. Based on the United States Geological Survey (USGS) Map included in the Composting Plan, the composter will be located at least 500 feet from the nearest water body. Hay bale composting is designed primarily for poultry broiler mortality disposal but is also used to dispose of swine, turkey, and bovine (cows and cattle) mortality. The composter works by loading the material in alternating layers of manure and the dead birds as indicated in Figure 2-15 entitled the *Dead bird bin compositing schematic*. Specifically, the diagram specifies from bottom to top the following: a concrete pad; first layer consisting of manure, straw, chickens, and manure; and then successive layers topped with a litter cover layer.

Regarding the operation of the Composter, Mr. Sumerel testified that the manure needed for the composter will come from the poultry houses and will be stored outside under a tarp at the facility. Mr. Sumerel also confirmed that composter would be built on top of either a compacted clay or concrete base.

Based on this information, Mr. Chaplin determined that the Compositing Plan was appropriate for the disposal of the mortality form the proposed facility and that on June 12, 2014, Mr. Chaplin determined that the Permit should be issued with conditions. Mr. Chaplin testified that the PSI performed by Ms. Matthews was not necessary for him to reach his determination on whether to authorize the hay bale composting system.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court concludes the following as a matter of law:

The ALC has jurisdiction over this contested case matter pursuant to S.C. Code Ann. § 1-23-380 (Supp. 2013), S.C. Code Ann. § 44-1-60 (Supp. 2013), and 4 S.C. Code Ann. Regs. 61-43, Part 200.70(G). In reviewing this matter, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010) (citing Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002)). The standard of proof to be used by the Court in weighing the evidence and making a decision on the merits during a contested case proceeding is the preponderance of the evidence. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2013); CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Revenue, 397 S.C. 604, 609, 725 S.E.2d 711, 713-14 (Ct. App. 2012) (citations removed). In addition, Petitioner bears the burden of proof proving his case by the preponderance of the evidence. Young v. S.C. Dep't of Health & Envtl. Control, 383 S.C. 452, 459, 680 S.E.2d 784, 759 (Ct. App. 2009). Further, it is appropriate for the Court, while evaluating the evidence, to give due consideration to an "agency's expertise, technical competence and specialized knowledge." S.C. Code Ann. § 1-23-330(4) (Supp. 2013) ("The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.").

Pursuant to the Administrative Procedures Act, the South Carolina Rules of Evidence are applicable to this hearing. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2013). Under Rule 702, SCRE, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." An expert is granted wide latitude in determining the basis of his or her opinion, and where an expert's testimony is based upon facts sufficient to form an opinion, the trier of

fact must weigh its probative value. Small v. Pioneer Mach., Inc., 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997). The trier of fact may give an expert's testimony the weight he or she determines it deserves. Florence County Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). Additionally, the trier of fact may accept the testimony of one expert over that of another. S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 220-21, 417 S.E.2d 586, 589 (1992). However, expert testimony is limited to issues of fact as issues of law is generally inadmissible. Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 207, 662 S.E.2d 444, 450 (Ct. App. 2008). "Regulations are interpreted using the same rules of constructions as statutes." Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). "In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "When interpreting a regulation, [a Court looks] for the plain, ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation." Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002). "The true guide to statutory construction is not the phraseology of an isolated section of provision, but the language of the statute as a whole considered in light of the manifest purpose." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). "The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

The Permitting Process

All animal facilities in South Carolina are governed by the regulations governing the Standards for the Permitting of Agricultural Animals Facilities. These regulations, which are codified at 4 S.C. Code Ann. Regs. 61-43, were promulgated by the Department pursuant to the Pollution Control Act. See 4 S.C. Code Ann. Regs. 61-43 Part 100.200, Part 200.200, Part 400.130, and Part 500.60. Under this comprehensive regulatory scheme, the regulations governing the permitting of poultry facilities are found in Part 200, Animal Facilities other than Swine. 4 S.C. Code Ann. Regs. 61-43 Part 200. All permits issued under this Part are no-discharge permits. 4 S.C. Code Ann. Regs. 61-43 Part 200.20(B). As a no-discharge permit,

manure generated by the facility is not discharged into the environment. Pursuant to Part 200, an applicant is required to first have a PSI inspected by the Department. 4 S.C. Code Ann. Regs. 61-43 Part 200.50(A); Part 200.70(D). The purpose of the PSI is to determine if a new animal facility or an addition to an existing facility is capable of being placed at the location. If the proposed site is approved, the applicant is notified in writing and the applicant is able to finalize facility plans and the application.

Part 200.50 sets forth the requirements for the submission of Animal Facility Management Plan to the Department for review. An application package must include the following, if applicable:

1. A complete application form;
2. An Animal Facility Management Plan prepared by the qualified Natural Resource Conservation Service (NRCS) personnel or a South Carolina registered professional engineer;
3. Groundwater monitoring well details;
4. Odor Abatement Plan
5. Vector Abatement Plan;
6. Dead Animal Disposal Plan;
7. Soil Monitoring Plan;
8. Plans for other manure storage or treatment structures;
9. Documentation that the applicant has sent Notice of Intent to Build or Expand forms to all parties entitled to such notice;
10. An Emergency Plan;
11. Written agreements for the reduction of setbacks;
12. Application and other required fees.

4 S.C. Code Ann. Regs. 61-43 Part 200.50(B). Prior to submission of the application package, the applicant is required under the regulation to notify "all property owners within 1320 feet of the proposed location of the facility (footprint of construction) of the applicant's intent to build an animal facility." 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A). Once the Department receives the application, the Department shall "post up to four notices on the perimeter of the property or in close proximity to the property, in visible locations as determined by the Department." 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A). The Department reviews all comments received

regarding the application and may hold a public meeting to discuss and seek resolution of public concerns about Sumerel Farm if twenty (20) or more comments are received from different people. 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D).

Part 200.70 contains the decision-making requirements for the Department. 4 S.C. Code Ann. Regs. 61-43, Part 200.70. All decisions made by the Department are subject to the mandate to "act on all permits to prevent, so far ***as reasonably possible considering relevant standards under state and federal laws***, an ***increase in pollution of the waters and air*** of the State from any new or enlarged sources." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E) (emphasis added). Specifically, Department is required to consider the following non-exclusive factors, if applicable:

1. Proximity to 100-year floodplain;
2. Geography and soil types on the site;
3. Location in a watershed;
4. Classification or impairment of adjacent water;
5. Proximity to State Designated Focus Area; Outstanding Resource Water; Heritage Corridor; Historic Preservation District; State Approved Source Water Protection Area; state or national park or forest; state or federal research area; and privately-owned wildlife refuge, park, or trust property;
6. Proximity to other point source discharges and potential nonpoint sources;
7. Slope of the land;
8. Animal manure application method and aerosols;
9. Runoff prevention;
10. Adjacent groundwater usage;
11. Down-wind receptors; and
12. Aquifer vulnerability.

4 S.C. Code Ann. Regs. 61-43 Part 200.70(F).

In addition, the facility must meet all the applicable siting criteria contained in 4 S.C. Code Ann. Regs. 61-43 Part 200.80, which are minimum distances that the Department may, on a case-by-case basis, increase. S.C. Code Ann. § 46-45-80 (Supp. 2013); <u>see</u> 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F).

Of particular note in this case is the separation distance for facilities with a normal live production weight of 500,000 pounds or less. Specifically, Part 200.80 provides that:

> [t]he separation distance required between the animal facility or growing areas (pens or barns not including range areas) and the lot line of real property owned by another person is 200 feet or 1000 feet from the nearest residence, whichever is greater, when the normal production animal live weight at any given time is 500,000 pounds or less.

4 S.C. Code Ann. Regs 61-43 Part 200.80(A)(5). "'Normal production animal live weight at any given time' means the maximum number of animals at the facility at any one time multiplied by the average live weight of those animals." 4 S.C. Code Ann. Regs. 61-43 Part 50(WW). "'Average animal live weight' means the sum of the average exit weight of the animal from the facility and the average entry weight divided by two, as shown by the following formula: Average animal live weight = (Average Exit Weight + Average Entry Weight)/2." 4 S.C. Code Ann. Regs. 61-43 Part 50(K). The 200 foot property line setback distance can be reduced by a written waiver of the affected property owner. 4 S.C. Code Ann. Regs. Part 200.80(G).

A. Odor and Vector Abatement Plans

Petitioners claim that the Odor and Vector Abatement Plans contained in the CNMP do not comply with the regulatory requirements for such plans. The regulatory requirements governing odor and vector abatement plans are located in Parts 200.50, 200.150 and 200.160. Part 200.50, which contains the requirements for animal feeding operation management plan, provides in pertinent part that:

> B. A producer who proposes to build a new animal facility or expand an existing animal facility shall make application for a permit under this part using an application form as designated by the Department. The following information shall be included in the package.
>
> * * *
>
> 4. The Animal Facility Management Plan shall contain an odor abatement plan for the animal facility, lagoon, treatment system, manure storage pond, and manure utilization areas. For more specific details, see Section 200.150 (Odor Control Requirements).
>
> 5. A Vector Abatement Plan shall be included for the animal facility, lagoon, treatment system or manure storage pond, and manure utilization areas. For more specific details see Section 200.160 (Vector Control Requirements).

4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(4) and (5).

Part 200.150 provides in pertinent part that:

> The Animal Facility management Plan shall contain an odor abatement plan for the animal facility, lagoon, treatment system, manure storage pond, and manure utilization areas, which ***may*** consist of the following:

1. Operation and maintenance practices which are used to eliminate or minimize undesirable odor levels in the form of a Best Management Plan for Odor Control;
2. Use of treatment processes for the reduction of undesirable odor levels;
3. Additional setbacks from property lines beyond the minimum setbacks given in this part;
4. Other methods as may be appropriate; or
5. Any combination of these methods.

4 S.C. Code Ann. Regs. 61-43 Part 200.150(A) (*emphasis added*).

Part 200.160 provides in pertinent part that:

A. The Vector Abatement Plan shall at a minimum consist of the following:

1. ***Normal management practices*** used at the animal facility, lagoon, treatment system, manure storage pond, and manure utilization *areas* to ensure there is no accumulation of organic or inorganic materials to the extent and in such a manner as to create a harborage for rodents or other vectors that may be dangerous to public health.

2. A ***list of specific actions to be taken*** by the producer if vectors are identified as a problem at the animal facility, lagoon, treatment system, manure storage pond, or any manure utilization area. These actions should be listed for each vector problem, e.g., actions to be taken for fly problems, actions to be taken for rodent problems, etc.

4 S.C. Code Ann. Regs. 61-43 Part 200.160(A)(*emphasis added*).

Taken together, the language of the various regulations can be summed up as requiring that every animal facility management plan must have: an odor abatement plan for the animal facility, lagoon treatment system, manure storage pond, and manure utilization areas, as applicable, which may consist of, but not required, the five enumerated criteria; and a vector abatement plan that contains BMPs and a list of specific actions to be taken for specific identified vectors.

Petitioners nevertheless claim the information in the foregoing Sections consist of BMPs and not "site specific" requirements as required under the regulations. The best evidence of the intent of the regulation is its language and "[w]here the [regulation's] language is plan and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed 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). Reviewing each regulation under this standard does not

support Petitioners' claim. Part 200.150(A) provides that the odor abatement plan must contain a plan that addresses the appropriate components of the facility such as the animal facility, lagoon, and manure utilization area. The Odor Abatement Plan contained in Section 7.3 and 7.6 complies with the regulatory standard. It provides information on how to control odors in growing and storage areas through the use of general information such as the use of vegetation and chemical treatment and specifically identifies the chemical approved by the integrator, who own the broilers, for use around the birds.

Similarly, Part 200.160(B) provides that the vector abatement plan must contain BMPs to be used and a list of specific actions to be taken if vectors are identified. The Vector Abatement Plan contained in Sections 7.2 and 7.6 complies with these requirements. Section 7.2 complies with Part 200.160(A)(1) in that it contains numerous BMPs, categories by vector type, i.e., insect, rodent, and scavenging animal, to be used if such vectors become a problem. Section 7.6 complies with Part 200.160(A)(2) in that it lists specific rodenticides and insecticides that are to be used in the event of specific vectors. Since the regulation merely asks for the plan to contain a list of the actions to be taken and does not mandate the inclusion of information such as the precise number of rodenticide bait traps and their locations, which would clearly be "site specific," it is clear that Vector Abatement Plan complies with the regulation. Thus, the express language of the regulation does not support Petitioners' claim.

Petitioners claim that to interpret the regulations as set forth above would be to say that a Facility Management Plan may contain general BMPs and integrator, rather than site specific abatement measures. "When interpreting a regulation, [a Court looks] for the plain, ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation." Converse Power Corp., 350 S.C. at 47, 564 S.E.2d at 346. Further, "[t]he true guide to statutory construction is not the phraseology of an isolated section of provision, but the language of the statute as a whole considered in light of the manifest purpose." Floyd, 367 S.C. at 260, 626 S.E.2d at 10. With regard to odor abatement, Part 200.150 expressly mandates that facility operators are to use BMPs normally associated with proper operation. 4 S.C. Code Ann. Regs. 61-43 Part 200.150(B) ("Producers ***shall utilize Best Management Practices normally associated with the proper operation and maintenance*** of an animal facility, lagoon, treatment system, manure storage pond, and any manure utilization area to ensure an undesirable level of odor does not exist.") (emphasis added). Further, Part 200.150 expressly provides that

although a producer cannot "cause, allow, or permit emission into the ambient air" of any substance or substances "in quantities that an undesirable level of odor is determined to result," and that after such a determination the Department may specific abatement or control practices. 4 S.C. Code Ann. Regs. 61-43 Part 200.150(C), (D), and (E). With regard to vector abatement, the regulation does not mandate BMPs but provides a substantial list of BMPs that the Department may require. 4 S.C. Code Ann. Regs. 61-43 Part 200.160(D). Since Part 200.150(B) mandates BMPs and only mandates specify criteria after an operating facility has been found to be emitting undesirable levels of odor, and Part 200.160(D) provides a list of BMPs that the Department can require and which the Sumerel Vector Abatement Plan incorporated, the Court finds ample support in the Odor Abatement Plan and Vector Abatement Plan contained in the CNMP fully comply with the requirements set forth in Part 200.150 and Part 200.160, respectively.

Finally, the Court is persuaded by the testimony of Dr. Parkhurst when he was cross-examined about the Vector Abatement Plan. Dr. Parkhurst stated that, while he believed that it should be better defined, if the Sumerels followed the Vector Abatement Plan, it was his expert opinion that the BMPs would not be harmful and that they would deal with the vector issues. This Count finds this concession important since Petitioners have characterized the Vector Abatement Plan as not being protective of the public and environment. Accordingly, because the express language of Part 200.150 and Part 200.160 do not mandate "site specific" odor and vector abatement plans and because the Odor Abatement and Vector Abatement Plans in the Sumerel CNMP contain all of the required actions and most of the recommended actions, the Court concludes that Petitioners' claims are unfounded.

B. Water Impacts

Petitioners contend that the Department failed to uphold the charge of Part 200.70, which mandates that "[t]he Department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from any new or enlarged sources." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E). Petitioners' argue that the Department did not consider all of the relevant information necessary to adequately evaluate potential impacts of the Sumerel operation upon the surrounding waters of the State and therefore the agency's determination that the proposed operation presents no detrimental water impacts was clearly erroneous, affected by an error of law, made upon unlawful procedures and arbitrary and capricious. The Court does not agree and

finds that the Department adequately evaluated whether the Sumerel operation would cause an increase in pollution to the waters of the State as required under the applicable regulations.

In evaluating a permit application under Part 200, the Department is required to consider the non-exclusive list of consideration set out in Part 200.70(F). The requirements of that provision are as follows:

> The setback limits given in this part are minimum siting requirements . . . . On a case-by-case basis the Department may require additional separation distances applicable to animal facilities . . . . The Department shall evaluate the proposed site including, but not limited to, the following factors when determining if additional distances are necessary:

1) Proximity to 100-year floodplain;
2) Geography and soil types on the site;
3) Location in a watershed;
4) Classification or impairment of adjacent water;
5) Proximity to State Designated Focus Area; Outstanding Resource Water; Heritage Corridor; Historic Preservation District; State Approved Source Water Protection Area; state or national park or forest; state or federal research area; and privately-owned wildlife refuge, park, or trust property;
6) Proximity to other point source discharges and potential nonpoint sources;
7) Slope of the land;
8) Animal manure application method and aerosols;
9) Runoff prevention;
10) Adjacent groundwater usage;
11) Down-wind receptors; and
12) Aquifer vulnerability.

4 S.C. Code Ann. Regs. 61-43 Part 200.70(F).

The plain and clear language of this subsection requires that the Department take the factors listed in subsection (F)(1)-(12) into account when evaluating an animal feeding operation permit application such as the one at issue. It is within the Department's discretion as to whether, after consideration of those factors and others, the facility requires additional setbacks. Further, with regard to the following particularly sensitive areas, the regulations mandate that the Department shall evaluate them for more stringent requirements: 1) Source water protection; 2) 303(d) Impaired Waterbodies List; 3) Proximity to Outstanding Resource Waters; and 4) Aquifer Vulnerability Area. 4 S.C. Code Ann. Regs. 61-43 Part 200.140(C). Based upon the evidence presented in this case, the Court finds that the Department fulfilled its obligations under the regulations.

The Department's review of water quality issues, set forth in the Agricultural Permitting Review Checklist Summary, was admitted into evidence as Joint Exhibit 5 without objection. The Review Checklist Summary set forth each of the criteria contained in Part 200.70(F) and requires the reviewer to input the steps taken to obtain the relevant information and to provide a determination as to whether "additional requirements or setbacks" were required. A review of the Review Checklist Summary indicates that Mr. Chaplin reviewed each of the twelve (12) criteria set forth in Part 200.70(F) and rendered setback determinations on all relevant criteria. Further, Mr. Chaplin testified that he completed the form contemporaneous to his review of the criteria, and neither the form nor Mr. Chaplin's testimony on this fact was challenged by the Petitioners. Accordingly, the Court finds that the Department complied with the requirements contained in Part 200.70(F).

Instead of challenging the review of the twelve (12) mandated criteria set forth in Part 200.70(F), Petitioners challenge the water quality review on the grounds that the Department did not consider the grading necessary to prepare the Site for construction and stormwater runoff. According to Dr. Hargett, this grading will create large areas of impermeable surface, thereby increasing runoff at the site. The Department countered this argument by presenting evidence establishing that issue regarding grading of a proposed facility and stormwater runoff are considered and reviewed by the Department in a separate permitting process.

Mr. Chaplin, testifying on behalf of the Department, stated that the animal facility permitting regulations contained in 4 S.C. Code Ann. Regs. 61-43 do not address stormwater. All stormwater issues are addressed in a separate permitting process conducted by the stormwater permitting section. In addition, Mr. Chaplin stated that since the proposed facility is a no-discharge facility and that it had not manure utilization areas, the only expected runoff is from stormwater. Similarly, Ms. Shealy and Mr. Fulmer testified that the stormwater permitting process is separate from the agricultural permitting process.

It is well established that "[t]he construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." Sloan, 370 S.C. at 469, 636 S.E.2d at 607. The Department's reviewer, Mr. Chaplin, testified that the animal facility permitting regulations contained in 4 S.C. Code Ann. Regs. 61-43 do not address stormwater. However, Petitioners assert that stormwater is covered because "runoff prevention" is one of the mandatory review criteria enumerated in Part

200.70(F). 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F)(9). Also, Petitioners posit that "Runoff" is a defined by regulation as "rainwater or other liquid that drains over land on any part of a land surface and runs off of the land surface." 4 S.C. Code Ann. Regs. 61-43 Part 50(FFF). After reviewing the Part 200, the Court is convinced that Department's interpretation is not contrary to the plain language of the regulation and would not lead to an absurd result.

As discussed in the permitting process section, Part 200 contains Standards for the Permitting of Agricultural Animal Facilities (other than swine).[3] The "part applies to: a. [a]ll new animal facilities; b. [a]ll expansions of existing animal facilities; c. [n]ew manure utilization areas for existing animal facilities . . . and all land where animal manure and other animal by-products are applied." 4 S.C. Code Ann. Regs. 61-43 Part 200.10(B)(1) and (3). A "manure utilization area" is defined as "land on which animal manure (including swine manure) is spread as a fertilizer and is synonymous with land application site or land application area." 4 S.C. Code Ann. Regs. 61-43 Part 50(SS).

If an applicant seeks a permit for a facility that will apply manure, the Animal Facility Management Plan is required to include "[c]oncentration of constituents in liquid animal manure" or "[c]oncentration of constituents in dry animal manure." 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(2)(f) and (g). Part 200 also requires that such Animal Facility Management Plan include the following: "[a] crop management plan which includes the time of year of the animal manure application and how it relates to crop type, crop planting, and harvesting scheduled (if applicable) for all manure utilization areas;" and "[f]acility and manure utilization information" 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(2)(h) and (i). In addition to these requirements, Part 200 contains the following regulatory provisions: Part 200.100 (Manure Utilization Area Requirement); Part 200.110 (Spray Application System Requirements); and Part 200.120 (Frequency of Monitoring for Animal Manure). 4 S.C. Code Ann. Regs. 61-43 Parts 200.100; 200.110; and 200.120. Runoff as it relates to manure utilization areas is discussed in the following subsections of these regulations: Part 200.100(B)(9) ("fields that are high in phosphorous may also be required to incorporate additional runoff control or soil conservation features as directed by the Department"); Part 200.110(D)(1) ("As determined by soil conditions, the hydraulic application rate may be reduced below the agronomic rate to ensure no surface ponding, runoff, or excessive nutrient migration to the groundwater occurs."); and Part

[3] Part 100 governs the standards for swine and in most respects its provisions are identical to Part 200.

200.110(F) ("Conservation measures, such as terracing, strip cropping, etc., may be required in specific areas determined by the Department as necessary to prevent potential surface runoff from entering or leaving the manure utilization areas. The Department may consider alternate methods of runoff controls that may be proposed by the applicant, such as berms."). 4 S.C. Code Ann. Regs. Parts 200.100(B)(9); 200.110(D)(1); and 200.110(F).

These provisions clearly indicate that when runoff is referred to in the Part 200 regulations it is in the context of discharge of manure into the environment. Nothing in the regulations indicate that grading and general stormwater runoff is considered. Indeed, information on these issues is not required to be included in the Animal Facility Management Plan. See 4 S.C. Code Ann. Regs. 61-43 Part 200.50. Further, the regulations do not contain any separate provisions like those for manure utilization fields and spray fields. Accordingly, the Court finds that interpretation that grading and stormwater issues are not reviewed under the Part 200 regulations is fully supported by the regulations when considered in their entirety.

C. Average Live Animal Weight

Petitioners contend that the 8.75 lb. average exit weight figure utilized in the Sumerel Plan is dated and inaccurate and that the birds will have an exit weight of at least nine (9) lbs. Based upon this figure, according to the Petitioners, the Sumerel operation is a "large animal feeding facility" subject to the 400 foot property line setbacks which cannot be accommodated on the proposed site.

The Court disagrees with Petitioners position on this issue and finds the testimony of Petitioners' expert unpersuasive and sufficiently challenged by the Respondents' witnesses. Dr. Parkhurst testified that the average exit weight of a broiler chicken over a sixty-three (63) day flock cycle would be at least nine (9) lbs. He pointed to his own very recent study in which he grew 80,000 birds over a sixty (60) day cycle which yielded an average exit weight of 9.37 lbs. per bird. But, Dr. Parkhurst did not present information regarding the conditions under which the flock was grown. For example the size of the barn and the type of feed provided to the birds. However, even if this information was presented, the Court would still have found Dr. Parkhurst's testimony unpersuasive since Dr. Parkhurst presented no testimony contradicting the average exit weight being required by Columbia Farms. Dr. Parkhurst testified that each integrator sets their own exit weight for their flocks based on factors including market forces and internal corporate factors.

In the Court's view, Dr. Parkhurst's testimony fails to show by a preponderance of the evidence that the average exit weight is inaccurate. Since the Permit mandates that the facility must be operated in accord with the CNMP, the fact that it requires removal of the birds when the average live exit weight reaches 8.75 pounds is a binding condition of the permit and is enforceable by the Department. Accordingly, the Court finds that the preponderance of the reliable evidence established that the 8.75 lbs. average exit weight figure utilized for the Sumerel CNMP is accurate and the proposed facility is correctly permitted as a small animal facility.

D. The Department's Review of the Application

Petitioners contend the Permit is invalid because the application was purportedly incomplete. To support this contention, the Petitioners set forth a litany of alleged deficiencies. Specifically they allege as follows: 1) nowhere within the CNMP and the Composting Plan indicates or establishes where a manure stacking shed for storage of such material would be located; 2) the Composting Plan fails to specify a clay of concrete pad or which model incinerator will be used; 3) the Composting Plan does not contain diagrams indicating how a hay bale composting system works, and 4) the Composting Plan lacks an adequate Odor and Vector Abatement Plan. "An adequate *de novo* review renders harmless a procedural due process claim of the lower administrative body." Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 346 S.C. 158, 174, 551 S.E.2d 263, 274 (2001); see also Waste Mgmt. of Carolinas, Inc. v. S.C. Dep't of Health & Envtl. Contol, et al., 2008 WL 4659522 at * 3, Docket No. 07-ALJ-07-0429-CC (Sept. 4, 2008) ("since the ALC hears these cases de novo, after an evidentiary hearing on the merits of this case, the Court can factually and legally address these issues, and decide whether a permit should be issued according to the proper legal standards."). In this case, all parties were noticed and in fact appeared for a merits hearing that lasted two days. Each side was accorded latitude to present their case and each party made their case. Therefore, any procedural insufficiencies with the CNMP and the Composting Plan can be corrected by this Court based on the Court's view of the record before it.

With regard to the stacking shed, Mr. Chaplin testified that Part 200 does not have a requirement for a stacking shed, and that a producer can stack manure outside of the barns for up to three days without being covered. He also testified that because of cost many permittees wait until after they have constructed their facility and are in operation before applying for a stacking

shed permit because of NRCS's cost sharing program. Given these factors, the Court finds that the fact that neither the CNMP nor the Composting Plan contains information regarding the stacking shed is immaterial to the permit since it is not required by regulation.

With regard to whether a pad should be required under the hay bale composter, the Court finds that the Permit should specify that the composter must be placed upon a clay or concrete pad in accord with Part 200.100(B)(21) ("If the manure is stockpiled more than three (3) days, the manure shall be stored on a concrete pad or other approved pad (such as plastic or clay lined) and covered with an acceptable cover to prevent odors, vector attraction, and runoff."). Further, the Court finds that the Sumerels are not required to identify the model of incinerator that they intend to use. Part 200 provides that if they do not use a model already approved by the Department, they will have to apply for a permit from the Department Bureau of Air Quality before they could install and operate an incinerator. 4 S.C. Code Ann. Regs. 61-43 Part 200.40(F) and Part 200.140(C).

With regard to diagrams contained in the Composting Plan, the Court finds that the purpose of the illustrations is to provide a graphic representation of how the composting system should work. In reviewing the diagram in Figure 2-15, the Court finds that there is no indication that the illustration is not a hay bale composting system. In addition to the concrete pad and layers of manure and dead poultry, the illustration indicates that the poultry are to be placed on a layer of straw, which in turn is on top of a layer of manure. Further, the illustration indicates that the top-most layer is a layer of litter which acts as a cover. During her testimony, Ms. Shealy stated that the diagram illustrates the layering recommendation that is applicable to all types of composter, including hay bale composters. Based on the representations of composting systems described during the trial, the Court finds that this illustration does not appear to be that of a drum system. Therefore, the Court finds the illustrations adequate for their intended purpose.

Finally, with regard to the Odor and Vector Abatement Plans, the Court has previously discussed this in depth with regard to the CNMP. With regard to the Composting Plan, the Court finds the plans contained in the document more than adequate since Part 200.130, which governs the requirements for dead animal disposal has no requirements for such plans. See 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(4) and (5).

Accordingly, the Court finds for the reasons set forth above, the procedural defects asserted by Petitioners are insufficient grounds upon which to deny the Permit.

E. Impact Upon Petitioners' Substantial Rights

Finally, Petitioners claim that allowing the Sumerel facility to be constructed and to operate will harm their quality of life and constitute a nuisance. These claims are unspecified and are cumulative to the specific issues presented above. The Court finds that these claims are at best speculative, as the facility has not been constructed or placed in operation. Further, the Court notes that the legislative purpose for the promulgation of the Standards for Permitting of Agricultural Animal Facilities is to set objective criteria for the Department and for courts reviewing Department permitting decisions to balance the competing interests of the public and the farming. Based upon the evidence presented at trial, the Court finds that the proposed Sumerel operation will not have detrimental effects upon Petitioners' substantial rights, including the quiet use and enjoyment of their property.

ORDER

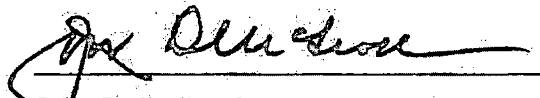
Based upon the forgoing Findings of Fact and Conclusions of Law, the Court finds that Petitioners have failed to meet their burden of proof and have not shown by a preponderance of the evidence that the Department issued Permit No. 19647-AG in violation of 4 S.C. Code Ann. Regs. Part 200 or that the Department's decision: 1) constituted a violation of constitutional or statutory provisions; 2) was made upon unlawful procedure; 3) was affected by error of law; 4) is clearly erroneous in view of the reliable, probative, and substantial evidence; and/or 5) was arbitrary and capricious and an abuse of discretion; and 6) prejudiced Petitioners' substantial rights.

I further find and conclude that the Department has fully, correctly and completely complied with all statutory and regulatory prerequisites to the issuance of the subject permit.

Therefore based upon the foregoing,

IT IS HEREBY ORDERED that the issuance of Bureau of Water Agricultural Permit ND0088307, Permit Number 19,647-AG to Respondents Lisa Sumerel and Sumerel Poultry Farm by the South Carolina Department of Health and Environmental Control is **AFFIRMED.**

AND IT IS SO ORDERED.

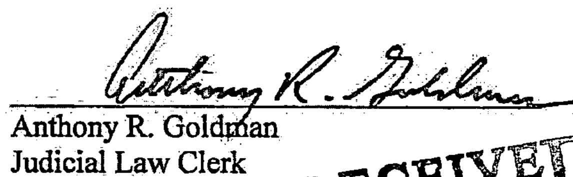


John D. McLeod
Administrative Law Judge

January 12, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, 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, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



January 12, 2015
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk

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