

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal From the Administrative Law Court
John D. McLeod, Administrative Law Judge

Case No. 08-ALJ-07-0339-CC

South Carolina Court of Appeals
Opinion No. 4975, filed May 16, 2012

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S.C. Supreme Court

Greeneagle, Inc. Petitioner

vs.

South Carolina Department of Health and Environmental Control.....Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Appellant Greeneagle, Inc. hereby certifies that its Petition for Rehearing and Petition for Rehearing En Banc were filed with the Court of Appeals on May 31, 2012 and the Order denying both petitions was dated July 23, 2012.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in failing to recognize that its Opinion effectively nullifies the requirement of a Demonstration of Need approved by DHEC under the SWPMA?
- II. Did the Court of Appeals fail to properly consider and apply the holdings of Southeast Resource?
- III. Did the Court of Appeals err in failing to properly apply the law to the conflict between the local solid waste management plan determination of no need for the Greeneagle facility in light of the need for the facility under DHEC's DON regulation and the fact that the County's own solid waste disposal facility only had a remaining life of three (3) years?
- IV. Did the Court of Appeals err in failing to consider the issue that DHEC's practice of issuing a preliminary consistency determination and a final consistency determination is contrary to DHEC's own interpretation of S.C. Code Ann. §44-96-290?

STATEMENT OF THE CASE

This case originated when Greeneagle requested a Demonstration of Need ("DON") approval for its proposed Construction and Demolition/Land Clearing Debris ("C&D/LCD")

Landfill (“Proposed Landfill”) at the Quarry Road site in York County from the South Carolina Department of Health and Environmental Control (“DHEC” or “Department”), which DHEC issued on April 25, 2006. (Apx. p. 390) Prior to requesting the DON approval from DHEC, Greeneagle representatives Marvin Taylor and Hall Rogers met with York County officials, including Councilman Curwood Chappell and County Manager Al Greene, regarding their plan for a C&D/LCD landfill. (Apx. p. 4- 5). York County officials provided Taylor and Rogers with a copy of the Joyce Engineering Study which involved the disposal of C&D/LCD waste in York County and which indicated the need for more such landfills. The general consensus from the meeting of York County officials was that a C&D/LCD landfill facility was needed in the Clover area of York County, and Eric Greenway, Planning Director for York County was identified as the principal contact for the County. (Apx. pp. 46-47). Thereafter, Taylor and Rogers focused their efforts in the geographic area of Clover or the northwest area of York County. *Id.* Taylor and Rogers met with York County Planning Director Eric Greenway from time to time regarding a site that would meet the criteria of the Joyce Study, applicable DHEC regulations, and the geographic location of the Clover area of the County. (Apx. pp. 45 - 49). These efforts led to the identification of a site at 2405 Quarry Road in the Clover area of York County for its Proposed Landfill. (Apx. pp. 48 – 50, 389). On May 8, 2006, at the request of Greeneagle for a determination of consistency, DHEC issued a preliminary consistency determination for the Proposed Landfill based upon consistency with the local plan of record, the 1994 Catawba Region Solid Waste Management Plan. (Apx. p. 391-92).

After obtaining a DON approval and the preliminary consistency determination from DHEC, Greeneagle entered into options for purchase of the Quarry Road property. (Apx. p. 48). Greeneagle also began to undertake design, engineering, and field work to support an application

package for its Proposed Landfill. (Apx. pp. 126-28, 150-52). Greeneagle also sought zoning approval for its Proposed Landfill from York County. (Apx. pp. 51 – 55, 89 – 96, 110 - 11). The application of Greeneagle for zoning approval led to the property being granted a special exception in June 2006 for location of the Proposed Landfill. *Id.* Following the zoning approval, an adjacent landowner placed two mobile homes near the Greeneagle property line which resulted in Greeneagle being required to reduce the footprint of the Proposed Landfill and re-engineer its facility. (Apx. pp. 53 - 55). Greeneagle submitted its completed application to DHEC in January 2008. (Apx. pp. 74 – 75, 130, 393 - 94). Greeneagle also requested that DHEC consider the 1994 Regional SWMP as the appropriate local plan for making a determination on consistency for Greeneagle’s proposed landfill. (Apx. pp. 76 – 77, 400 - 17).

Prior to submission of the Greeneagle application package to DHEC, York County purported to approve by ordinance the 2007 York County Solid Waste Management Plan. York County had been engaged in preparing a separate York County Solid Waste Management Plan (“SWMP”) since approximately 2000 and submitted several drafts to DHEC. (Apx. pp. 221 - 24). On August 14, 2006, York County Council gave first reading, and on October 16, 2006, gave second reading to an ordinance which would, among other things, authorize York County to take all steps necessary or appropriate to withdraw from the 1994 Catawba Regional Plan and to adopt and provide for the implementation of a new York County SWMP. (Apx. pp. 55 – 64, 418 – 39, 542 – 607, 608 - 86). A copy of the proposed new York County SWMP was attached to the proposed ordinance on first and second reading, both of which are substantially similar and for which the Greeneagle Proposed Landfill would be consistent, i.e., the new York County SWMP specifically provided that a new C&D/LCD landfill could be located within the area where the Proposed Landfill is to be located. *Id.* With respect to C&D landfills, the new plan

divided York County into quadrants for planning purposes and projected a need for new C&D landfills in three of the four quadrants, including the northwest quadrant in which the Proposed Landfill is located. *Id.* The draft plans attached to the proposed ordinance allowed for siting of Greeneagle's Proposed Landfill. (Apx. pp. 542 – 607, 608 - 86).

At its January 8, 2007 meeting after a new council had been elected and seated, the York County Council purported to adopt an emergency ordinance which placed a moratorium upon location of any new landfills in York County (“Emergency Ordinance”). (Apx. pp. 66 - 68). Following the passage of the Emergency Ordinance, York County Council again considered the proposed solid waste plan at a February 20, 2007 meeting at which there was a general discussion of the draft plan. (Apx. pp. 70 – 71, 112 – 13, 123 – 24, 332 – 34, 608 – 86, 687 - 753). Prior to the February 20, 2007 meeting, York County officials met with representatives of DHEC to discuss the draft plan. (Apx. pp. 156 – 62, 687 - 753). Finally, at a special meeting on February 28, 2007, York County Council considered third reading of the proposed ordinance on the new York County SWMP. (Apx. pp. 68 - 70). A significant number of changes were made to Plan between the February 20, 2007 meeting and the February 28, 2008 meeting of County Council to give third reading to ordinance approving the York County SWMP. (Apx. pp. 68 – 69, 334 – 36, 440 - 541). Among the numerous changes made to the proposed York County SWMP was a conclusion that no new C&D landfills were needed in York County and the addition of a number of special conditions applicable to any new C&D landfill constructed after December 31, 2006 in York County. The February 28, 2007 York County Council meeting was the first time the York County SWMP did not provide for location of a new C&D facility in the Northwest quadrant in which the Proposed Landfill is located, or in any quadrant. *Id.* The Council purported to give third reading to the ordinance and approval to the 2007 York County

SWMP. (Apx. pp. 72, 440 - 541). In addition, the Agenda for the February 28, 2007 meeting for the first time contained a new title for the proposed ordinance indicating that council was now adopting “amendments to the solid waste management plan applicable to York County” rather than a “new” York County SWMP. (Apx. pp. 339 – 40, 418 - 39).

On May 19, 2008, DHEC notified Greeneagle that its “proposed facility is not consistent with the 2007 Plan, and the permit application is hereby denied.” (Apx. pp. 77, 397). In an internal memorandum regarding the denial of Greeneagle’s DHEC Solid Waste Planning Staff stated as follows:

[T]he Department has determined that the proposed Greeneagle Part IV C&D LCD Landfill is not consistent with the York County Solid Waste Management Plan. According to the York County SWM Plan, the County’s current and projected capacity needs for C&D waste can be adequately addressed with existing facilities and the potential for expansion of existing facilities.

(Apx. pp. 228 – 34, 286 – 88, 396).

After the DHEC Board declined review of the DHEC Staff decision, Greeneagle filed a request for contested case hearing in the Administrative Law Court (“ALC”) on July 25, 2008. Administrative Law Judge John D. McLeod conducted the contested case hearing on April 19-20, 2010, in Columbia, South Carolina. Both parties submitted proposed orders to Judge McLeod on August 16, 2010. Judge McLeod issued a Final Order and Decision dated October 20, 2010, and an Amended Final Order and Decision on October 25, 2010, which upheld the DHEC decision to deny the Greeneagle permit application. (Apx. pp. 1 – 12, 13 – 24).

The Court of Appeals filed its decision on May 16, 2012, upholding the Administrative Law Court decision. (Apx. pp. 821 – 28). Greeneagle filed a Petition for Rehearing and Petition for Rehearing *En Banc*, both of which were denied by Order dated July 23, 2012. (Apx. pp. 829

– 37, 847). Greeneagle now files this Petition for Writ of Certiorari with the South Carolina Supreme Court.

ARGUMENT AND CITATION OF AUTHORITY

Summary of the Argument

Greeneagle submits that there are multiple reasons why there are errors in the Court of Appeals decision which warrant granting a writ of certiorari in its case. In addition to other reasons to grant a writ of certiorari, this case involves novel questions of law involving an environmental statute for solid waste management within the state and conflict with a prior decision of this Supreme Court.

The opinion of the Court of Appeals effectively nullifies the requirement of a Demonstration of Need approved by DHEC as part of its permitting functions under the South Carolina Solid Waste Policy and Management Act (SWPMA or Act). The permitting provisions of the Act require DHEC to make a determination of need and a determination of consistency with, among other things, the local solid waste management plan. The Act further directs DHEC to promulgate “need” regulations, which it has done, but there is no similar requirement for determination of consistency. The Court of Appeals opinion, in essence, allows a county to develop a planning document under the planning provisions of the SWPMA that can override or veto the DHEC regulation on need. Said another way, an applicant can demonstrate need for a solid waste facility under the need regulation and later have the need for the facility nullified by the county plan making a “needed” facility inconsistent with the local plan. If this reasoning is allowed to stand, every county in the state could develop local plans which say no new landfills are needed within the county in conflict with the need regulation, thus rendering null and void an entire section of the SWPMA. Such a result is also in conflict with the clear policy of the

SWPMA to create a statewide program for management of solid waste within South Carolina. Therefore, the Court of Appeals opinion creates novel questions of law with statewide implication.

The Court of Appeals opinion does not properly consider and apply the holding of *Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Env'tl. Control*, 358 S.C. 402, 595 S.E.2d 468 (2004). By allowing a county to make a determination based upon need that no new landfills are needed within the County when the DHEC need regulation allows the location of additional facilities results in a veto of the need regulation in clear violation of Southeast Resource. The facts of the Greeneagle case clearly reveal that but for York County developing a 2007 solid waste management plan in the middle of the permitting sequence for the proposed Greeneagle landfill, Greeneagle's proposed landfill would be permitted. The 2007 York County plan allowed the county to veto the need requirement expressed in the DON regulation, a power specifically reserved to DHEC in the SWPMA, and prevented DHEC from permitting Greeneagle's proposed landfill. This result is clearly inconsistent with the holding of *Southeast Resource*.

The Court of Appeals opinion failed to properly apply the law to the conflict between the 2007 York County Plan determination that there was no need for the Greeneagle facility in light of the fact that the County's own solid waste disposal facility only had a remaining life of three (3) years. The 2007 York County Plan required all C&D/LCD waste within the County to be directed to the County landfill, which led to York County's conclusion that no new landfills were needed within York County. This provision was placed in the final version of the York County Plan, whereas several prior versions allowed for location of additional facilities within York County. Clearly, York County and DHEC did not adequately assess "disposal need" for

C&D/LCD waste in York County when the plan, a twenty year planning document, directed all C&D/LCD waste to the York County landfill which had only three (3) years capacity remaining.

Finally, the Court of Appeals opinion failed to consider the issue that DHEC's practice of issuing a preliminary consistency determination and later, just prior to issuing a permit, making a final consistency determination is contrary to DHEC's interpretation of S.C. Code Ann. §44-96-290 as provided in regulations issued under the Act. This issue raises a separate, independent basis for the Greeneagle facility to be permitted by DHEC.

For all of these reasons, more fully developed below, this Supreme Court should grant a writ of certiorari to review and reverse the decision of the Court of Appeals.

I. **The Court of Appeals failed to recognize that its Opinion effectively nullifies the requirement of a Demonstration of Need approved by DHEC under the SWPMA.**

The Act provides a comprehensive statewide scheme to control and manage solid waste in South Carolina, including C&D/LCD waste. S.C. CODE ANN. §§ 44-96-10 through 44-96-470 (2002 & 2009 Supp.). DHEC is the only entity authorized by the Act to issue permits for solid waste management facilities. S.C. CODE ANN. §§ 44-96-260(2) and 44-96-290(A). Solid waste management facilities are defined by the Act to include C&D landfills. S.C. CODE ANN. §44-96-40 (49) (2002). The Permitting Section of the Act provides that “[n]o permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved **by the department.**” S.C. CODE ANN. § 44-96-290(E) (2002) (emphasis added). The Permitting Section of the Act also provides that “[n]o permit to construct a new solid waste management facility or to expand an existing solid waste management facility within a county or municipality may be issued **by the department** unless the proposed facility or expansion . . . is consistent with the local or regional solid waste

management plan and the state solid waste management plan” S.C. CODE ANN. § 44-96-290(F) (2002) (emphasis added).

The Act does not specify procedures for DHEC to following in making need determinations and “need” is not defined by the Act. *Southeast Resource*, 358 S.C. at 408, 595 S.E.2d at 471. However, the Act requires DHEC to promulgate regulations to implement its Demonstration of Need responsibility. S.C. CODE ANN. § 44-96-290(E) (2002). DHEC’s DON Regulation established the criteria for demonstration of need for the construction of new Part IV (long-term) C&D/LCD landfills. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2007). The DON Regulation, for C&D/LCD landfills, establishes geographic planning areas for determining the need for new disposal facilities and expansions of existing disposal facilities. 25A S.C. CODE ANN. REGS. § 61-107.17.B.6 (Supp. 2007). The planning area for C&D/LCD landfills is the area within a ten mile radius of the proposed facility. S.C. CODE ANN. REGS. § 61-107.17.B.6.a (Supp. 2007). The DON Regulation mandates that the criteria be used for determining need for a new landfill. 25A S.C. CODE ANN. REGS. § 61-107.17.D.3 (Supp. 2007). The need for a new C&D/LCD landfill is demonstrated when there are fewer than two commercial C&D/LCD landfills within the ten mile radius of the proposed facility. 25A S.C. CODE ANN. REGS. 61-107.17.D.3a (Supp. 2007).¹

Prior to issuing a permit for a new C&D/LCD facility, DHEC must determine whether or not the facility is consistent with local zoning, land use or other applicable local ordinances, the local or regional solid waste management plan, and the state’s solid waste management plan. S.C. CODE ANN. § 44-96-290(F) (2002). The Act does not specify procedures for DHEC to

¹ In 2009, the General Assembly approved revisions to the DON Regulations. 33 S.C. Reg. 119 (June 26, 2009) (*See* 25 A S.C. Code Ann. Regs. §61-107.17, effective June 26, 2009). However, the DON approval in this case was made by DHEC prior to the amendment to these regulations. The revised DON Regulation used a similar geographic scheme for determining need for a facility.

follow in making consistency determinations. *Southeast Resource*, 358 S.C. at 408, 595 S.E.2d at 471. However, DHEC is the final arbiter on consistency and DHEC cannot delegate its responsibility or authority to determine consistency. *Id.*

The planning provisions of the Act for solid waste management required a county or region to develop a solid waste management plan (“SWMP”). S.C. CODE ANN. § 44-96-80 (2002). This section of the Act identifies the minimum requirements for development of a local SWMP. *Id.* One of the items that must be included in a local SWMP is “an analysis of the existing and new solid waste facility which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period.” S.C. Code Ann. § 44-96-80(A)(3). In addition, the statute further provides as follows:

The governing body of a county has the responsibility and authority to provide for the operation of solid waste management facilities to meet the needs of all incorporated or unincorporated areas of the county. Nothing in this chapter, however, prohibits a local government from continuing to operate or to use an existing management facility, permitted on or before this chapter is effective, and in accordance with the provisions of the solid waste management plan submitted by the county or region within which the local government is located. Notwithstanding any provision of law to the contrary, a county which does not regulate the operation or closure of a solid waste management facility, or which has not obtained a permit for that solid waste management facility, shall not be held liable for the operation, closure, and postclosure of that solid waste management facility if it is owned and operated by a private entity under a permit issued by the department. However, that inclusion in a county or regional plan shall not constitute regulation by a county or region under this section.

S.C. CODE ANN. § 44-96-80(J) (2002). This section of the Act also provides that the governing body of a county “may not enact an ordinance inconsistent with the state solid waste management plan, with any provision of this chapter, with any other applicable provision of state law, or with any regulation promulgated by the department providing for the protection of public health and safety or for protection of the environment.” S.C. CODE ANN. § 44-96-80(K) (2002). DHEC has not promulgated any regulation relative to the content or review of local SWMPs.

The Court of Appeals opinion recognizes that the determination of need and the determination of consistency with the local solid waste management plan are two separate and distinct factors in the permitting process. (Apx. pp. 821 – 28). These two factors are statutorily based, S.C. Code Ann. § 44-96-290(E) provides for the determination of need and S.C. Code Ann. § 44-96-290(F) provides for the determination of consistency with, among other things, the local plan. In addition, the Court of Appeals opinion recognizes that the SWPMA requires DHEC to promulgate regulations to carry out its responsibilities for making decisions under the DON requirement. DHEC has promulgated DON regulations which “require DHEC to look to the number of surrounding disposal facilities when determining whether there is a need for a new solid waste facility.” The Court of Appeals then concludes that the DON determination is based upon a geographical need. The Court of Appeals considered the requirements of the SWPMA with regard to planning, more specifically S.C. Code Ann. § 44-96-80(A)(3) which requires a local plan to include “an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within the county or region during the projected twenty-year period.” With respect to the need for planning purposes, the Court of Appeals concluded that this represented a “disposal need” which was properly used by DHEC in making the consistency determination.

The problem with this approach by the Court of Appeals is that the DON provisions of the SWPMA become meaningless, i.e. a local solid waste management plan can totally nullify the DON provisions of the SWPMA. The facts of this case are a perfect example of how a local plan can totally render null and void an entire section of the SWPMA. When DHEC issued the DON determination for the Greeneagle landfill, it concluded that there was a need for the proposed landfill. At the same time it issued the DON determination, DHEC issued a

preliminary consistency determination in which it concluded that the proposed Greeneagle landfill was consistent with the local plan of record at that time, the Catawba Regional plan of which York County was a participating county. In the meantime York County withdrew from the regional plan and developed its own county plan which DHEC utilized to make the final consistency determination. DHEC concluded that the Greeneagle landfill was inconsistent with the 2007 York County local plan. The difference in the Catawba Regional Plan and the 2007 York County Plan is that the 2007 Plan concluded that “no new landfills are needed for the service area.”² (Apx. p. 502).

Simply and solely by changing the local plan, the Greeneagle landfill was determined to be inconsistent. Consequently the DON determination issued by DHEC was vetoed or overridden by the action of York County in changing its plan. This impact of the Court of Appeals opinion is clearly inconsistent with legislative intent. The legislature required DHEC to issue regulations for the DON requirement. The regulation, based upon a provision in the permitting section of the SWPMA, provides the means for determining need for C&D landfills within a geographic area. It is clearly inconsistent to require a regulation to determine need and then allow another section of the same statute to override or nullify the need provision. Moreover, the approach of the Court of Appeals opinion is to import a provision from the planning section of the SWMPA and allow it, under the guise of consistency, to trump the DON requirement. By doing so, this approach simply ignores the reasons for the DON regulation in the first place which was to reduce the distance for hauling waste, prevent illegal dumping, maintain reasonable tipping fees, and prevent monopolies. (Apx. pp. 144 – 49).

² The proposed Greeneagle landfill is a construction and demolition land clearing debris (“C&D/LCD”) landfill. With respect to construction and demolition waste, the 2007 York County Plan divided the county into four quadrants, with the proposed Greeneagle landfill being in the northwest quadrant. Similar language is contained in the Plan for the other three quadrants, i.e. “no new landfills are needed for the service area.” (R. pp. 500-02).

This approach destroys a unified, statewide approach to the management of solid waste as required by the SWPMA. The DON regulation considers planning areas that are within ten miles of a proposed facility and these planning areas can overlap county lines. However, by allowing a county plan to control need based upon a capacity analysis, or “disposal need” as referred to by the Court, a county is allowed to determine the number of C&D landfills within the county regardless of the need determination established within the DON regulation. This impact of the Court of Appeals decision does not provide for a statewide approach to solid waste management planning as required by the SWPMA, but rather thwarts a statewide approach.

The Court’s dichotomy of “geographical need” under the DON regulation and “disposal need” under the consistency determination has no support within the SWPMA. The Court of Appeals opinion simply fails to address the critical issue of nullifying the DON provision in the statute. It seems clear that the legislature placed the DON requirement in the SWPMA for a reason and that it should not be so easily dismissed. There is a way to reconcile the need requirement of the DON provision of the statute and the capacity analysis required by the planning provision of the SWPMA. The capacity analysis to be performed in the local plan represents the minimum requirements that a county must project for disposal capacity for solid waste generated within the County. Therefore, any facilities allowed by the DON regulation in excess of minimum required facilities within the county should be permitted by DHEC absent compelling reasons to the contrary. In this instance, the County’s action alone belies any compelling reason to hastily insert the language that “no new landfills are needed” into the 2007 Plan between second and third readings.³ To allow the DON as set forth in the regulation to control need within DON geographical areas is not only consistent with the local plan but supports all of the reasons considered in development of the DON regulation while fostering a

³ See details in Section III below regarding the no new landfill provision in the 2007 York County Plan.

statewide approach to solid waste management. Moreover, consistent with principles of statutory construction, such an interpretation of these two provisions eliminates the conflict between the two sections of the SWPMA and leaves DHEC in sole control of permitting of solid waste facilities with no veto authority in a county government. *See, Nat'l Adver. Co., Inc. v. Mt. Pleasant Bd. of Adjustment*, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994) (when reasonably possible, statutes in apparent conflict should be interpreted to allow both to stand); *Duvall v. S.C. Budget and Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) (appellate courts must presume the legislature intended to accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile); *Charleston Co. Parks and Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (determination of legislative intent is a matter of law).

II. The Court of Appeals failed to properly consider and apply the holding of *Southeast Resource*.

DHEC argued to the Court of Appeals that it fulfilled its “charge” under the Act and York County fulfilled its “charge” under the Act. (Apx. pp. 796 - 99). DHEC asserted that it made an independent evaluation of the York County Plan as part of its consistency determination. York County provided an analysis in its local plan of facilities needed for disposal of solid waste during the planning period and concluded that no new C&D landfills were needed anywhere in the county. Specifically, in the chapter on “Future Solid Waste Management,” York County included a subsection on C&D/LCD Landfills entitled “Geographic Location and Landfill Needs,” which provided its conclusions of the need for additional C&D landfill in four quadrants of York County. (Apx. pp. 500 - 02). With respect to the quadrants identified as the Northeastern Service Area, Southwestern Service Area, and the Northwestern Service Area, the Plan included the following conclusion regarding need: “The existing landfills

currently meet the C&D disposal needs of this service area; therefore, no new landfills are needed for the service area.” *Id.* With respect to the Southeastern Service Area, the Plan included the following conclusions regarding need: “To meet the needs of this service area, York County anticipates expanding the capacity of the York County Landfill to provide sufficient disposal capacity for the service area. Therefore, no new landfills are needed for the service area.” (Apx. p. 501). In an internal memorandum regarding the determination that Greeneagle’s Proposed Landfill is inconsistent with the York County Plan, the DHEC staff stated as follows:

[T]he Department has determined that the proposed Greeneagle Part IV C&D LCD Landfill is not consistent with the York County Solid Waste Management Plan. According to the York County SWMP Plan, the County’s current and projected capacity needs for C&D waste can be adequately addressed with existing facilities and the potential for expansion of existing facilities.

(Apx. pp. 228 – 34, 286 – 88, 396). It is clear that the DHEC staff improperly deferred to the County’s conclusions regarding need in denying a permit to Greeneagle based upon lack of consistency with the York County plan.

DHEC had granted Greeneagle a DON approval and a preliminary consistency determination based upon the 1994 Catawba Regional Solid Waste Management Plan in which York County was included. Between the time Greeneagle obtained a DON approval and preliminary consistency determination, York County developed its own, stand-alone local solid waste management plan in which it concluded that no new C&D landfills were needed within York County during the next twenty years. DHEC used this conclusion to deny Greeneagle’s application based upon lack of consistency with the York County SWMP. Even though Greeneagle had successfully obtained a DON approval for its landfill under the DON Regulation, DHEC concluded that its application is now inconsistent with the local plan. DHEC made this

conclusion based upon the County's "need" analysis as expressed in the York County Plan. Therefore, DHEC delegated its authority to determine need to York County or, in the alternative, provided York County with veto authority. This action by DHEC is inconsistent with *Southeast Resources*.

DHEC's practice of considering and allowing a county's capacity analysis to control need overlooks the economic realities of the solid waste application process. After obtaining DON approval, an applicant must undertake the time and expense of developing the application, including geotechnical and engineering site work, as well as proper zoning of the proposed site. It is illogical for an applicant to expect that need can simply disappear with the development of a revised county plan when a regulation indicates the facility is needed. Indeed, a county placing in its plan a statement or conclusion that no additional facilities are needed anywhere in the County is tantamount to a zoning decision that is more appropriately made under the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. CODE ANN. §§ 6-29-310 *et seq.* Moreover, this approach allows a county to zone within a municipality which is forbidden by the Planning Act unless municipal ordinance provides otherwise. S.C. CODE ANN. §6-29-330.

III. The Court of Appeals failed to properly apply the law to the conflict between the local solid waste management plan determination of no need for the Greeneagle facility in light of the need for the facility under DHEC's DON regulation and the fact that the County's own solid waste disposal facility only had a remaining life of three (3) years.

As pointed out at oral argument in the Court of Appeals, any DHEC or County determination that existing facilities had the capacity to adequately handle the expected amount of construction and demolition waste was flawed because the York County plan acknowledged that it only had three (3) years of capacity remaining. (Apx. p. 476). The County Plan in its

analysis of existing “C&D/LCD” landfills indicated that the York County landfill had approximately three (3) years of capacity remaining and that other such existing landfills would soon close or the permit life would expire (Apx. pp. 475 - 76). In its analysis of “Geographical Location and Landfill Needs”, i.e. facilities needed in the future, the County plan required all waste to be directed to the York County Landfill. (Apx. pp. 500 - 02). This directing of waste to the York County Landfill was certainly a basis for concluding that no new landfills were needed for each service area. In addition, earlier versions of the York County Plan, particularly the ones attached to first reading of the plan ordinance and second reading of that ordinance indicate that new C&D/LCD facilities were needed in certain service areas including the northwest quadrant where the Greeneagle facility would be located (Apx. pp. 590 – 94, 656 - 59). Finally, a draft Plan dated February 6, 2007, included provisions for new C&D/LCD facilities in York County service areas, including the northeast service area where the Greeneagle facility would be located. (Apx. pp. 738 - 42). The proposed Greeneagle landfill would have been consistent with these earlier versions of the York County Plan. However, when the Plan ordinance received third reading on February 28, 2007, the Plan included last minute changes, one of which provided that no new C&D/LCD facilities were needed in York County. Clearly, York County and DHEC did not adequately address “disposal need” for C&D/LCD waste in York County when the plan, a twenty year planning document, directed all C&D/LCD waste to the York County Landfill with only three (3) years capacity remaining. Moreover, this approach removes the DON requirement from the Act and dismisses the reasons for development of the DON regulations as discussed in Section I above.

IV. The Court of Appeals erred in failing to consider the issue the DHEC's practice of issuing a preliminary consistency determination and a final consistency determination is contrary to DHEC's own interpretation of S.C. Code Ann. §44-96-290.

The ALC concluded that there is nothing found in the Act to prohibit DHEC from making more than one consistency determination; especially where the preliminary consistency determination contained a warning that a new local SWMP was under development and that the final consistency determination would be based upon the most recent plan of record prior to a permit decision. The ALC was unpersuaded by instances in DHEC regulations that tie the consistency determination to the time of the demonstration of need approval. This conclusion of the ALC is erroneous as a matter of law (Apx. p. 21) and this argument was not considered by the Court of Appeals. (Apx. pp. 821 – 28).

Despite DHEC's initial determination that the Proposed Greeneagle Landfill is consistent with the local solid waste management plan on May 8, 2006, DHEC thereafter denied Greeneagle's permit application based on a second consistency determination conducted immediately prior to its final decision on the permit on May 19, 2008. It is undisputed that but for the second consistency determination, DHEC would have issued a permit to Greeneagle for construction and operation of its proposed landfill. As discussed more fully *infra*, the denial of Greeneagle's permit application based on this second consistency determination is contrary to DHEC's own interpretation of the statute as reflected in DHEC regulations promulgated pursuant to the Act.

As previously discussed, pursuant to Section 44-96-290(F) of the Act, DHEC may not issue a permit for construction of a new solid waste management facility unless the proposed facility is consistent with, among other things, the local solid waste management plan. S.C. CODE ANN. § 44-96-290(F) (2002). The Act does not specify the procedure and timing for

making this consistency determination. However, Section 44-96-290 of the Act requires DHEC to promulgate regulations for the permitting of solid waste management facilities to include regulations establishing “contents of permit applications and application procedures.” S.C. CODE ANN. § 44-96-290(D)(1) (2002). Under South Carolina law, regulations are an agency’s interpretation of the statutes which it administers pursuant to a legislative delegation of authority. *See Action Mortg. Corp. v. Van Deusen*, 291 S.C. 208, 211, 352 S.E.2d 711, 713 (Ct. App. 1987) (noting that the interpretation of the agency charged with the administration of a statute is reflected in its regulations). The regulations promulgated pursuant to Section 44-96-290(D)(1) of the Act are found at S.C. CODE REGS. §§ 61-107 *et seq.* (the “Regulations”) and require that applicants for solid waste management facilities demonstrate consistency with the local solid waste management plan.

Section 61-107.11 of the Regulations establishes the permitting requirements for construction, demolition and land-clearing debris landfills, but does not address the timing for the consistency determination required by Section 44-96-290(F) of the Act. 25A S.C. CODE REGS. § 61-107.11 (Supp. 2008).⁴ For long-term C&D/LCD landfills, the DHEC regulation provides that these landfills “shall be consistent with the host Region/County Solid Waste Management Plan.” 25A S.C. CODE ANN. REGS. § 61-107.11, Part IV.A.4 (Supp. 2008). However, at the time of the permitting decision for the Proposed Greeneagle Landfill, other provisions of the Regulations addressed the timing for the consistency determination and unequivocally provide that the relevant time for such determination is at the time that the permit application is submitted to DHEC. *See* S.C. CODE ANN. REGS. § 61-107.13.78(b) (requiring

⁴ S.C. CODE REGS. § 61-107.11 was repealed by S.C. CODE REGS. § 61-107.19, effective May 23, 2008 (*See* S.C. CODE REGS. § 61-107.19 Part I.A.2). However, S.C. CODE REGS. § 61-107.11 was the regulation governing permitting of C S.C. CODE REGS. § 61-107.11 C&D landfills at the time of the Department’s permitting decision on May 19, 2008.

applicant for municipal solid waste incinerator ash landfill to “demonstrate compliance with the County or Regional Solid Waste Management Plan in effect at the time of submittal of the demonstration to the Department”); S.C. CODE ANN. REGS. § 61-107.16.83(b) (requiring applicant for commercial industrial solid waste landfill to “demonstrate compliance with the County or Regional Solid Waste Management Plan in effect at the time of submittal of the demonstration to the Department”); S.C. CODE ANN. REGS. § 61-107.258.83(b) (requiring applicant for municipal solid waste landfill to “demonstrate compliance with the County or Regional Solid Waste Management Plan in effect at the time of submittal of the demonstration to the Department”); S.C. CODE ANN. REGS. § 61-107.3(G)(12) (requiring applicant for waste tire collection facility to certify that “the project is consistent with the applicable goals and objectives of solid waste management plans in the proposed service area of the facility and of the South Carolina State Solid Waste Management Plan in effect at the time of permit application”).⁵

Significantly, in 2008 DHEC promulgated amended regulations governing permitting of landfills (“Amended Landfill Regulations”). *See* S.C. CODE REGS. § 61-107.19 (effective May 23, 2008). The Amended Landfill Regulations expressly address the timing of the determination of consistency with the local solid waste management plan. The Amended Landfill Regulations require a permit applicant to request a Department determination that the proposed landfill is consistent with the local solid waste management plan “[p]rior to submittal of a permit application to the Department.” *Id.* at 61-107.19, Part I (D)(3). Unlike DHEC staff’s practice at the time of denying the Greeneagle permit application, an additional consistency determination is not conducted following DHEC’s technical review of the permit application. *See* S.C. CODE REGS. § 61-107.19, Part I (I)(2). As such, it is abundantly clear that DHEC has interpreted

⁵ S.C. CODE REGS. §§ 61-107.13, 61-107.16, AND 61-107.258 were repealed by S.C. CODE REGS. § 61-107.19, effective May 23, 2008 (*See* S.C. CODE REGS. § 61-107.19 Part I.A.2). S.C. CODE REGS. § 61-107.3 remains in effect.

Section 44-96-290(F) to require only one consistency determination to be conducted at the beginning of the permitting process.

Since DHEC has promulgated Regulations interpreting the relevant time for making the consistency determination, the DHEC staff cannot implement procedures which are inconsistent with the agency's interpretation of Section 44-96-290(F). *Comm'rs of Public Works v. S.C. Dep't of Health and Env'tl. Control*, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007) (citing *Brown v. S.C. Dep't of Health & Env'tl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002) (holding that the court will reject an agency interpretation which is contrary to regulations promulgated by the agency); "Courts 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 and Env'tl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) (citing *Brown v. South Carolina Dep't of Health & Env'tl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); *Byerly Hosp. v. Health and Human Serv. Fin. Comm'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995)). DHEC, not the DHEC staff, is entitled to deference from the courts. *Id.* (citing S.C. CODE ANN. § 1-23-610(A); S.C. CODE ANN. § 48-39-40(A); S.C. CODE ANN. § 48-39-150(D); *Dorman v. S.C. Dep't of Health and Env'tl. Control*, 350 S.C. 159, 167, 565 S.E.2d 119, 123-24 (Ct. App. 2002)). The unambiguous expression of DHEC's interpretation of the statutory requirements for the consistency determination in its Regulations cannot be reconciled with DHEC staff's practice of conducting a second consistency determination prior to its final decisions on a permit application. Accordingly, based on its own interpretation of Section 44-96-290(F) of the Act, DHEC's initial consistency determination for the Proposed Greeneagle Landfill precludes a subsequent denial of Greeneagle's permit

application based on a second consistency determination. Therefore, the conclusion by the ALC that a final or second consistency determination was proper should be reversed.

In conducting a second consistency determination immediately prior to its final decision on a permit application, DHEC defers to the county in making the final decision on an application for a proposed solid waste management facility. As discussed above, this practice is clearly inconsistent with the South Carolina Supreme Court holding in *Southeast Resource*. In *Southeast Resource*, the Court held that DHEC's practice of delegating to the counties the consistency determination required by Section 44-96-290(F) was an impermissible delegation of authority. *Id.*, 358 S.C. at 408, 595 S.E.2d at 471.

DHEC is the agency authorized by the General Assembly to make final decisions concerning whether or not Facilities are permitted in the State of South Carolina. S.C. CODE ANN. § 44-96-260(2) (2002); S.C. CODE ANN. § 44-96-290(A) (2002). The Act does not give the County authority to make permitting decisions and, because the Act requires Local Plans to be consistent with the Act, the local SWMP cannot give the County any authority over DHEC permitting decisions. By interpreting the York County SWMP as legally prohibiting the Department from issuing a permit to the Proposed Landfill, DHEC has improperly ceded its statutory authority to permit landfills in York County to the County.

DHEC has exclusive authority for permitting solid waste management facilities. However, local governments control the siting of facilities within their jurisdiction through zoning and land use ordinances. Indeed, if a proposed facility does not conform to local zoning and land use ordinances, DHEC is prohibited from permitting the facility. However, the Act clearly provides that DHEC has exclusive authority for permitting solid waste management facilities, and a local government is not allowed to participate in individual permitting decisions.

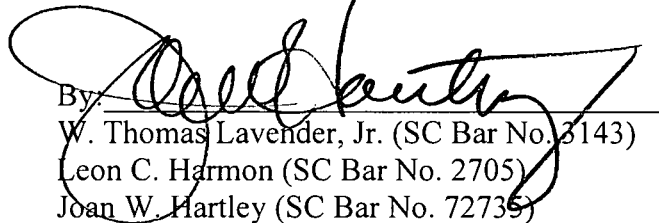
In *Southeast Resource*, the South Carolina Supreme Court expressly held that “DHEC, not the county, is charged with ensuring such facilities meet the requirements for permitting.” *Southeast Resource*, 358 S.C. at 408, 595 S.E.2d at 471. Yet, in conducting a second consistency determination just prior to the final decision on a permit application, DHEC allows a county to affect an individual permitting decision by amending its local solid waste management plan in an attempt to prohibit a proposed facility which has otherwise satisfied all permitting requirements, including a determination of consistency with the local solid waste management plan in the initial stages of the permitting process. DHEC staff’s practice of conducting a second consistency determination thus allows the county to become the “final arbiter” in the permitting process. *Id.* In this manner, DHEC’s practice of conducting a second consistency determination is clearly contrary to the Supreme Court holding in *Southeast Resource*, requiring reversal of the ALC and the Court of Appeals.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Appellant Greeneagle respectfully requests this Supreme Court to grant it a writ of certiorari to review and reverse the decision of the Court of Appeals.

Respectfully submitted,

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August 22, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
in The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 08-ALJ-07-0339-CC

RECEIVED

AUG 22 2012

S.C. Supreme Court

Greeneagle, Inc., Petitioner

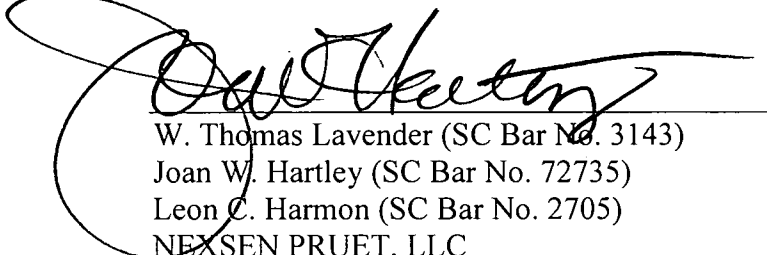
v.

South Carolina Department of Health and Environmental Control..... Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on counsel of record for the South Carolina Department of Health and Environmental Control by depositing a copy of it in the United States Mail, postage prepaid, on August 22, 2012, addressed to:

Jacquelyn S. Dickman, Esquire
Etta R. Williams, Esquire
SCDHEC - Office of General Counsel
2600 Bull St.
Columbia, SC 29201



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Admitted in SC, NC

August 22, 2012

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HAND DELIVERED

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

S.C. Supreme Court

Re: *Greeneagle, Inc. vs. South Carolina Department of Health and
Environmental Control*
Docket No.: 08-ALJ-07-0339-CC
Court of Appeals Opinion No. 4975

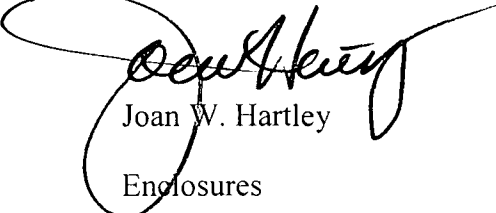
Dear Mr. Shearouse:

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

Enclosed for filing are the original and seven (7) copies of the Petitioner for Writ of Certiorari for review of Opinion No. 4975 and Proof of Service of same on counsel for South Carolina Department of Health and Environmental Control. Also enclosed for filing are the original and two (2) copies of the Appendix to the Petition. Please return a clocked-in copy of each to us via our courier. We are also enclosing is our firm's check for \$100 for the filing fee.

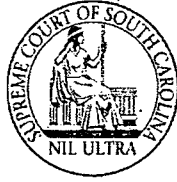
Thank you for your assistance in this matter.

Best regards,


Joan W. Hartley

Enclosures

cc: Jacquelyn S. Dickman, Esquire
Etta Williams Linen, Esquire
Greeneagle, Inc.



The Supreme Court of South Carolina

Nexsen Pruett

08/23/2012

RECEIPT #65296

Fee Type:	Case Initiation Fee
Amount:	\$100.00
Payment Type:	Check
Reference No:	388616
Check/Money Order Date:	08/22/2012
Comments:	Greeneagle, Inc. v. SC Dept of Health and Environmental Control

COA #

2010-177886