STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No.: 13-ALJ-07-0395-CC
Appellate Case No.: 2015-000700

Rick Still, Donice Still, Christine Orr and Terry Orr, ...Appellants,

vs.

South Carolina Department of Health and Environmental Control
and Lisa Sumerel and Sumerel Poultry Farm, ...Respondents.

INITIAL BRIEF OF RESPONDENTS SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND LISA SUMEREL AND SUMEREL POULTRY FARMS

Respectively submitted,

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10. Whether Appellants' claim that the ALC erred in excluding the Dr. Parkhurst testimony on AgraMetrics Report is not preserved for review before this Court.

11. Whether the applicable setback distance from property lines is established by the criteria in R. 61-43 Part 200.80.

STATEMENT OF THE CASE

Appellants are appealing the Final Order and Decision of the Administrative Law Court ("ALC") affirming the South Carolina Department of Health and Environmental Control's ("SCDHEC" or "Department") issuance of Bureau of Water Agricultural Permit ND0088307 No. 19647-AG ("Permit") to Ms. Lisa Sumerel for the operation of Respondent Sumerel Poultry Farm ("Sumerel Farm"). (Final Order and Decision ("FOD" p. 1). The Permit authorizes the construction and operation of a poultry broiler facility on Poole Town Road, Laurens, South Carolina, and was issued after a thorough review in which the Department determined that the Sumerel Farm would not cause an increase in air and water pollution in the surrounding area, and would not likely impair the health of residents in the community surrounding the facility. In accordance with S.C. Code Ann. § 44-1-60 (Supp. 2014), Appellants Rick Still, Donice Still, Christine Orr, and Terry Orr appealed the Permit by requesting a final review conference ("RFR") from the South Carolina Board of Health and Environmental Control ("Board"), and then by requesting a contested case hearing before the Administrative Law Court after the Board denied their RFR.

A merits hearing was held before the Honorable John D. McLeod of the Administrative Law Court, in Columbia, South Carolina, on August 25 and 26, 2014. At the hearing, Appellants called the following witnesses: Appellants Rick Still, Christine Orr, and Terry Orr; Department employees Chrissy Mathews (the Department's regional inspector), Stephen W. Smutz (the Department's Bureau of Air Quality reviewer), and William Preston Chaplin (the Supervisor of the Department's Agricultural Permitting Section and the reviewer of the permit at issue); Lisa Sumerel (the applicant and owner of

Sumerel Farm); Michael Sumerel (the operator of Sumerel Farm); and two expert witnesses, Dr. David Hargett, Ph.D. and Dr. Carmen Parkhurst, Ph.D. Respondent Sumerel Farm called two witnesses, Joy S. Shealy, P.E. (the preparer of the management plan) and Leon Fulmer (employee of Shealy Consulting). The Department did not call any witnesses, eliciting the testimony establishing its case from the Department witnesses called by Appellants: Ms. Mathews, Mr. Smutz, and Mr. Chaplin on cross-examination. Further, the parties placed into evidence 20 exhibits, 18 Joint Exhibits and one exhibit each by Appellants and Respondents.

Based on this well-developed record, the Administrative Law Court, in a well-reasoned decision, held that: 1) the Department's review of the Permit complied with all applicable permitting requirements contained in 4 S.C. Code Ann. Regs. 61-43 *et seq.* (2011) (hereinafter referred to generally as "R. 61-43" or specifically as "R. 61-43 Part 200.xxx"); 2) the Department's technical review of the Permit correctly assessed the odor and vector abatement plans contained in the Comprehensive Nutrient Management Plan. It complied with the regulatory standards contained in R. 61-43 Part 200; 3) the Department's technical review of the Permit correctly assessed the odor control regulations in R. 61-43 Section 200; 4) the Department correctly assessed the impact of the Sumerel Farm on the waters of the State; 5) Appellants had failed to meet their burden to establish that the Permit violates any statutory or regulatory requirement; and 6) the Department's review properly considered all substantial rights claimed by Appellants as addressed by R. 61-43 Part 200. The Administrative Law Court's Final Order and Decision was issued and filed on January 12, 2015. Thereafter, on January 22, 2015, Appellants filed a Motion to Reconsider and Memorandum in Support. The

Department filed a Response to Appellants' motion on February 5, 2015, and Appellants filed a reply by email on February 6, 2015. On April 6, 2015, the Department received a copy of Appellants' Notice of Appeal, dated April 2, 2015.

STATUTORY AND REGULATORY FRAMEWORK

The requirements governing the permitting and operation of animal facilities are found in 4A S.C. Code Ann. Regs 61-43 (2011). Part 200 of the regulation sets forth a comprehensive scheme that is applicable to turkeys and animals other than swine and is applicable to this case. Under the permitting scheme, an applicant is required to first have a proposed site inspected by the Department. 4 S.C. Code Ann. Regs. 61-43 Part 200.50(A); 4 S.C. Code Ann. Regs. 61-43 Part 200.70(D). If the proposed site is approved, the applicant will be notified in writing and the applicant is free to finalize facility plans and the application. Id. Prior to submission of an application package, the applicant is required under R. 61-43 Part 200.60(A) to notify "all property owners within 1,320 feet of the proposed location of the facility (footprint of construction) with the applicant's intent to build an animal facility."

R. 61-43 Part 200.50 sets forth the information that must be contained in an application package. In general, an application package must contain the following items:

1) a completed application form (R. 61-43 Part 200.50(B)(1));

2) an Animal Facility Management Plan prepared by qualified Natural Resources Conservation Service personnel or a SC registered professional engineer (R. 61-43 Part 200.50(B)(2));

3) an odor abatement plan for the animal facility, lagoon, treatment system,

manure storage pond, and manure utilization areas (R. 61-43 Part 200.50(B)(3));

4) a Vector Abatement Plan (R. 61-43 Part 200.50(B)(5));

5) a Dead Animal Disposal Plan (R. 61-43 Part 200.50(B)(6));

6) Plans and specifications for all other manure treatment or storage structures, such as holding tanks or manure storage sheds (R. 61-43 Part 200.50(B)(8));

7) all "Notice of Intent to Build or Expand an Animal Facility" forms as provided by the Department and a tax map (or equivalent) to scale showing all neighboring property owners and identifying which property has inhabited dwellings R. 61-43 Part 200.50(B)(9));

8) an Emergency Plan R. 61-43 Part 200.50(B)(10)); and

9) Application fee and first year's operating fee (R. 61-43 Part 200.50(B)(12)).

An application package is complete when the Department receives all of the required information completed to its satisfaction. 4 S.C. Code Ann. Regs. 61-43 Part 200.50(E).

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 will schedule a public meeting, if twenty (20) of more comments are received, to discuss and seek resolution of public concerns about the proposed facility. 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D). Although resolution of concerns is a goal sought in conducting the meeting, an agreement resolving the concerns is not required. Id.

The decision making process for animal facility permits is set forth in R. 61-43 Part 200.70. Pursuant to this provision, the Department is required 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 new or enlarged sources." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E) (emphasis added). Specifically, the reviewer will determine whether the facility meets all the applicable siting requirements contained in R. 61-43 Part 200.80 and on a case-by-case basis, shall evaluate the proposed site to determine if additional distances are necessary using the following non-exclusive list of factors:

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 a 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 of 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 receptor; and

12. Aquifer vulnerability.

4 S.C. Code Ann. Regs. 61-43 Part 200.70(F). The setback distances applicable to all animal facilities are found in R. 61-43 Part 200.80(A). Specifically, that Section provides as follows: 1) the minimum separation distance between the animal growing areas, houses, pens or barns, not including range areas or manure utilization areas ("Animal Facility") and a public or private drinking water well (excluding the applicant's well) is 200 feet and the minimum separation distance between an animal facility and a potable water well owned by the applicant is 50 feet; 2) the minimum separation distance between an Animal Facility and waters of the State (including ephemeral and intermittent streams) located down slope from the facility is 100 feet; 3) the minimum separation distance required between an animal facility and a ditch or swale located down slope from the facility is 50 feet, except for those used for site drainage; 4) new or expanded Animal Facilities shall not be located in the 100-year floodplain; 5) the separation distance required between an Animal Facility (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 time is 500,000 pounds or less; and 6) the 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 400 feet or 1000 feet from the nearest residence, whichever is greater, when the normal production animal live weight at any time is greater than 500,000 pounds. 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(1) – (6).

Pursuant to S.C. Code Ann. § 46-45-80 (Supp. 2014), which was enacted in 2006, all setback distances in R. 61-43, including those in Section 100 that governs swine, are minimum distances that may be increased by the Department after a case-by-case review of the facility in question in accordance with the factors set forth in the regulations. S.C. Code Ann. § 46-45-80.

STATEMENT OF FACTS

Permit Application Process

On April 23, 2012, Mrs. Lisa Sumerel and her husband, Michael Sumerel, commenced the permitting process for a permit to construct and operate an animal facility by filing a request with relevant information with the Department's Greenwood regional office for a Preliminary Site Inspection ("PSI"). Ms. Chrissy Mathews, the regional inspector, conducted the PSI that day by visiting the proposed site off of Poole Town Road in Laurens County ("Site"). (FOD p. 3). Ms. Mathews also researched the site by accessing the Laurens County Geographic Information System ("GIS") website and using its measuring tool to measure the distance from the property lines to the footprint of the proposed facility to determine if the siting distances could be met. (FOD p. 4). Ms. Mathews' findings were recorded on an unofficial checklist known as a Preliminary Site Inspection Checklist, a copy of which was admitted into evidence as JE 6.[1] *Id.* Based on this review, Ms. Matthews determined that the Site was generally suitable for an animal feeding operation and, on April 27, 2012, sent a letter to the Sumerels, notifying them of her findings and granting them permission to submit plans for a poultry facility in accordance with R. 61-43 Part 200. *Id.*

[1] References to JE, Pet. Ex. and Res. Ex. refer to "Joint Exhibit," "Petitioners' Exhibit," and "Respondents' Exhibit," respectively.

The Sumerels submitted their application for the Permit on October 10, 2012, when they filed a Comprehensive Nutrient Management Plan ("CNMP") and application with the Department for an agricultural permit to construct and operate a four house poultry broiler facility. (FOD pp. 4, 5). The CNMP is a comprehensive document that contains seventeen major sections that address the following subjects: 1) South Carolina Facility Animal Management Plan; 2) Emergency Action Plan; 3) Land Treatment Practices; 4) Manure Handling and Storage; 5) Land Treatment Practices; 6) Nutrient Management; 7) Operation and Maintenance; 8) Record Keeping; 9) Feed Management; 10) Other Utilization Activities; 11) Appendix A: Manure Sampling Instructions and Forms; 12) Appendix B: Manure Broker Contract; 13) Appendix C: Land Base Needs; 14) Appendix D: Notice of Intent Forms; 15) Appendix F: Property line Waiver; 16) Appendix G: Maps and Site Characteristics; and 17) Appendix H: SC Regulations 61-43: Animal Facility Management Plan Cross-Reference. (JE 1: DHEC 16-17).[2] The Sumerel CNMP and other submittals were prepared by Joy S. Shealy, a registered South Carolina professional engineer. Prior to starting her business, Shealy Engineering, Ms. Shealy was employed with the Department for seven and one half years. (Tr. p. 441:12-22). For six and one half years, she was a permit reviewer in the Agricultural Permitting Section, and for one year she was a permit reviewer in the Stormwater Permitting Section. (*Id.*; FOD p. 4).

Based on the information contained the CNMP, the proposed facility meets or exceeds all applicable siting distances set forth in R. 61-43 Part 200.80. Specifically, the following applicable siting distances were established:

[2] The CNMP contains all the criteria required to be submitted in an application package. 4 S.C. Code Ann. Reg. 61-43 Part 200.50(B).

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 downstream (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).

(FOD p. 5; JE 1: DHEC 21).[3] The CNMP also specified information relevant to determining the classification of the size of the proposed facility with regard to applicable property line setback distance. Specifically, the CNMP contained the following information:

> The birds 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**. The normal production live weight of the animals in this operation is 493,200 pounds.

(JE 1: DHEC 10, 20, 31 (emphasis added)).

Finally, the CNMP contained information regarding the slope of the property before construction. According to the Soil Map and the corresponding Map Unit

[3] None of the actual distances in the application submittals were controverted by Appellants during the hearing. However, as discussed in the Argument Section below, Appellants challenged the applicability of the property line siting distance for facilities with an average live weight of 500,000 pounds or less.

Description, the soil in the area where the poultry houses will be located is a sandy loam that varies in slope from two (2) to ten (10) percent. (JE 1: DHEC 116-19).

The Department's review of the Sumerel Application was conducted by several employees. The primary reviewer was William Chaplin, who is the Section Manager of the Agricultural Permitting Section and has held that position for eight years.[4] (FOD p. 5). Prior to his position in agricultural permitting, Mr. Chaplin spent twelve years evaluating properties for septic tank suitability, including conducting septic tank inspections and mosquito control. *Id.*

As part of his review, Mr. Chaplin sent requests to the Department's Bureau of Air Quality and Bureau of Environmental Health's Division of On-Site Wastewater Management to evaluate air and groundwater impacts from the facility operations. (FOD p. 5). Also as part of his review, Mr. Chaplin received medical information from four members of the community, who authorized the Department, in writing, to obtain medical information from their medical providers regarding their medical conditions and to consider this information as part of the information relied upon in arriving at a permitting decision. (Tr. p. 185: 5-15; JE 5, DHEC 5, 10). Mr. Chaplin sent the information that he received from the citizens to the Department's medical office for evaluation. (JE 5, DHEC 10; Tr. p 358: 6 – 19).

The Bureau of Air Quality responded by a memorandum from Stephen W. Smutz, who is a member of the Bureau of Air Quality's Air Modeling Section. (FOD p. 5; Tr. p. 99).[5] In that memorandum, Mr. Smutz, who was qualified as an expert in the field of

[4] At the time of the trial, Mr. Chaplin was the Section Manager of the Agricultural Permitting and Dam Safety Section. Subsequently, the Department's Bureau of Water reorganized some of its Programs and separated the agricultural permitting and dam safety sections.

[5] Tr. refers to the Transcript of Hearing in this matter.

meteorology and agricultural permitting without objection, set forth the following observations based on his review of the application, relevant law and other information:

1) the only source of information on emission rates was a December 2002 United States Environmental Protection Agency (US EPA) study entitled "*Non-water Quality Impact Estimates for Animal Feeding Operations*;"

2) the source of emissions from animal production areas (animal housing, manure storage, and treatment areas) is manure;

3) the study lists ammonia, nitrous oxide, methane, and hydrogen sulfide as potential pollutants from manure;

4) ammonia, nitrous oxide, and methane are not regulated by the Department as either criteria or toxic air pollutants because there are no state or federal standards for the gases;

5) hydrogen sulfide is a regulated toxic pollutant under South Carolina law;

6) although regulated, hydrogen sulfide is only released by anaerobic decomposition, which only occurs in wet manure management systems;

7) dry manure management systems, which are used in poultry facilities in South Carolina, only produce sulfates that decompose without producing hydrogen sulfide;

8) that particulate matter, sulfur dioxide, and carbon monoxide, which are produced by motor vehicles associated with the spreading of manure on the land or the hauling of the manure off-site, are exempt from permitting decisions; and

9) there are no state or federal standards for odor.

(JE 9, DHEC 185-86). Based on these factors, Mr. Smutz concluded 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 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.'" (FOD pp. 5-6; Tr. pp. 115-16; JE 9, DHEC 186).

The Bureau of Environmental Health responded with a memorandum that detailed the Bureau staff's field investigation into the suitability of the Site for disposing of dead broiler chickens by burial. (FOD p. 6). Based on the information contained in this memorandum, Mr. Chaplin determined that burial was not an appropriate method for disposing of dead chickens at the Sumerel facility. *Id.* Subsequently, the Sumerels submitted a Dead Animal Composting Facility Management Plan that proposed disposal of poultry morality by combination of a hay bale composter, incineration, and landfill disposal. (FOD p. 6). This plan was accepted by the Department after modification and on June 10, 2013, the Department completed its technical review of the Sumerel application. *Id.*

The Department's medical staff reviewed the medical information submitted by the four members of the community and determined that the placement and operation of facility would not adversely impact these citizens. (JE 5, DHEC 10). In fact, one of the persons who submitted their medical information for consideration by the Department is Appellant Christine Orr. Despite challenging the Department's issuance of the Permit, Ms. Orr is not challenging the Department's determination on the impact of the facility on her medical condition. (Tr. pp. 355:25 – 356:7; 358: 6 – 19).

As part of the Department's review, Mr. Chaplin considered whether the facility would cause an increase in water pollution. Specifically, Mr. Chaplin considered the following twelve regulatory factors set forth in R. 61-43 Part 200.70(F). *See, supra,* pp. 5-6. Additionally, Mr. Chaplin took into consideration regulation R. 61-43 Part

200.20(B), which provides that all non-swine animal facility permits are no-discharge permits, and the fact that the Sumerel Farm facility would be disposing of all the manure generated by the birds by having a manure broker haul all the manure off-site and that the facility had no manure utilization areas. (JE 1: DHEC 20 and 130).

On June 12, 2013, after all reviews had been completed and the information evaluated by applicable Department staff and Mr. Chaplin, as the permit reviewer, the Department issued the Permit to the applicant Lisa Sumerel for the construction and operation of a four broiler house no-discharge poultry facility. *Id.* The Permit expressly authorizes the construction and operation of the facility by Lisa Sumerel as follows:

> **Permission is hereby granted** for construction and operation of a **NO-DISCHARGE** agricultural manure by-products treatment and storage system **in accordance with the construction plans, specifications, engineering report, animal facility management plan and construction permit application prepared by Joy S. Shealy, P.E.**, TSP for USDA/NRCS.[6]

(JE 3: DEHC 1) (emphasis in original and added). In addition, the Project Description Section of the Permit specifies that the normal live animal weight of the facility is 493,200 lbs. and that the average live weight is based on the calculation - 109,600 broilers x 4.5 lbs. (JE 3: DEHC 1). The CNMP, as noted above provides that:

> The birds will be brought into the house as chicks and are **confined for a period of sixty-three (63) days or until they reach and exit weight of eight and three quarter (8.75) pounds**. The normal production live weight of the animals in this operation is 493,200 pounds.

JE 1: DHEC 10, 20, 31 (emphasis added)).

[6] The term "USDA/NRCS" refers to the United States Department of Agriculture's Office of Natural Resources Conservation.

ARGUMENTS

I. THE ALC'S FINAL ORDER AND DECISION UPHOLDING THE DEPARTMENT'S ISSUANCE OF AN AGRICULTURAL PERMIT FOR THE CONSTRUCTION AND OPERATION OF THE SUMEREL POULTRY FARM IS SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD.

A. Standard of Review

An appellate court's review of an ALC decision is governed by the Administrative Procedures Act ("APA"). Specifically, the APA provides as follows:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2014). The review of a Final Order and Decision issued by the Administrative Law Court is "limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law." *Engaging and Guarding Laurens County's Environment v. South Carolina Department of Health and Environmental Control, et al.*, 407 S.C. 334, 341-42, 755 S.E.2d 444, 448

(2014) citing *Hill v. South Carolina Department of Health and Environmental Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). "'The Court may not substitute its judgment for the ALC's judgment as to the weight of the evidence on questions of fact. In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached.'" *Engaging and Guarding Laurens County's Environment*, 407 S.C. at 341-42, 755 S.E.2d at 448, *Hill*, 389 S.C. at 9-10, 698 S.E.2d at 617 (internal citation omitted). Moreover, "'[t]he mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.'" *Hill*, 389 S.C. at 10, 698 S.E.2d at 617 (citations omitted).

B. The Substantial Evidence in the Record supports the Department's issuance of the Permit to construct and operate the Sumerel Poultry Farm.

The record before the Administrative Law Court is replete with facts supporting its determination that the Department, in accordance with the requirements governing the issuance of agricultural permits, correctly reviewed the Sumerels' application for the Sumerel Poultry Farm. First, the Record establishes that a preliminary site inspection was performed by a Department inspector, and the Site was approved for possible development as an animal facility. (JE 6; Tr. 30:1 – 32:5; JE 7; Tr. 32:10 – 24). The Record also contains evidence that establishes that the Sumerels submitted a complete application that included a properly prepared Animal Facility Management Plan, e.g., CNMP, prepared by a registered South Carolina professional engineer as required under 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(2). The CNMP contains information

and/or documentation regarding numerous matters, including the control of odor and vectors, a United States Geological Survey map, floodplain map, and a detailed soils map. (JE 1: DEHC 37-38, 39, 47, 110, 112, 113, and 116-23). The Standard Application Form incorporated into the CNMP established that the facility is subject to the 200 foot setback distance based on the following information:

> AVERAGE ANIMAL LIVE WEIGHT = average exit weight + average entry weight = (8.75) + (0.25)/2 = 4.5 pounds
>
> Type of animals – Broilers
>
> Maximum # of Animals (at any one time) – 109,600
>
> Normal Production Live Weight (pounds) – 493,200

(JE 1: DHEC 20). The CNMP established that the facility is designed so that the distances from the animal houses to the following areas meet or exceed the applicable regulatory requirement: a) potable wells – required 200 feet, actual 1,300 feet; b) potable wells owned by the applicant – required 50 feet, actual 500 feet; c) waters of the State located downslope (excluding ephemeral & intermittent streams) – required 100 feet, actual 150 feet; d) ephemeral or intermittent streams located downslope – required 100 feet, actual 150 feet; e) ditches or swales located downslope – required 50 feet, actual 50 feet; f) property line (500,000 lbs or less) required 200 feet, actual 200 feet; and g) occupied permanent residence – required 1,000 feet, actual 1,300 feet. (JE 1: DHEC 21). Finally, the CNMP established the uncontroverted fact that the facility will not have any manure utilization areas. (JE 1: DHEC 21-22).

Also contained in the Record is evidence that the Department had complied with the notice requirements contained in 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A) and

had scheduled and conducted a public meeting in accordance with 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D). (JE 1: DHEC 75-105; JE 4; and JE 16).

Similarly, the Record also establishes the Department's review with regard to the impact of the Sumerel Poultry Farm facility on the air and water in the surrounding community. Both testimony and documentary evidence from Mr. Smutz, who was qualified, without objection, as an expert on the field of meteorology and agricultural permitting, set forth nine observations based on his review of the application, relevant law and other information. (JE 9, DHEC 185-86).[7] Based on these factors, Mr. Smutz concluded 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 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.'" (Tr. pp. 115-16; JE 9, DHEC 186).

Moreover, because of the possibility of emissions from the facility impacting persons with individualized medical conditions, the Department review included obtaining medical information from members of the community for review by Department's medical staff. Specifically, the Department received medical information via a Medical Evaluation Form (DHEC 0132) and an Authorization to Release Medical Information Form (DHEC 1623) from four members of the community, including one of the Appellants, Christine Orr, who lives approximately 3,600 feet from the facility. (JE 4; Tr. pp. 241:23-25; 358:6-19). The documents were reviewed by medical staff, including the State Epidemiologist, Dr. Linda Bell, MD, and the citizens were

[7] The specific observations are listed in the Statement of Facts at p. 11.

individually notified of the conclusions drawn by the Department as to whether their conditions would be impacted by the facility. *Id.*

Further, the Record establishes that the facility is unlikely to impact water quality in the area. As noted above, the CNMP contained information relevant to the likelihood of the facility causing an increase in pollution of the waters of the State. In particular, the information in CNMP establishes that the waters of the State are located 150 feet from the facility. (JE 1: DHEC 21). Because waters of the state were located at distance 50% further than the minimum 100 foot distance required under 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(2), the evidence presented to the ALC established that Waters of the State were located a sufficient distant from a potential source of pollution, since there was not a likelihood of an increase in pollution to them from the facility. Also, since the 150 foot distance between the foot print of the facility and Waters of the State are vegetated with grass and forest, there is additional protection for water. (JE 1: DHEC 110).

Moreover, the Record establishes that the facility would not have any manure utilization areas. (JE 1: DHEC 21-22; Tr. 248:8-10). Since the facility has no manure utilization areas, runoff was not considered since the only runoff is stormwater runoff, which is reviewed by the Department as part of a separate permit review process. (Tr. pp. 224:10 – 225:20; Res. Ex. 1). Also, since there were no manure utilization fields, the Department also did not have to consider the slope of the land, since the importance of slope to the Department's review is limited to its impact on land application of manure. (*See,* Tr. pp. 246:17 – 247:17).

Finally, the Composting Management Plan and CNMP established how the facility will dispose of bird mortality. These documents established that mortality would

be accomplished by a combination of hay bale composting, incineration, and landfill disposal, and amended CNMP pages, which included incorporation of the new mortality disposal methods. (JE 1: DHEC 22, 23, 33, 39, 40, 42, 43, 45, 46, 48, 49, 110; JE 2: DHEC 288). In addition, the Composting Management Plan provides information showing that the composter will be located at least 500 feet from the nearest water body, where the rejected burial was to be located. (JE 2: DHEC 302; Tr. p 82:4-9). It also shows that the composter will be built on top of either a compacted clay or concrete base, and will be loaded so that there will be alternating layers of manure, straw, chickens, and manure; and then successive layers topped with a sawdust layer on top of the pad. (Tr. pp. 87:16 – 88:1; 232:3-9; JE 2: DHEC 305; 307). The manure needed to operate the composter will be obtained from the manure broker contracted to remove the manure generated by the flock, who will leave the small amount of manure needed to operate the composter on a pad near the composter. (Tr. pp. 81:19 – 82:9; 229:22 – 230:5).

Although permitted by regulation, Mr. Chaplin sought technical assistance outside the agency from Mr. Steven Henry, P.E., an employee of the National Resources Conservation Service ("NRCS"), which is an agency under the United States Department of Agriculture ("USDA"), for information on the appropriateness of the system to dispose of bird mortality at the Sumerel Farm. (Tr. pp. 230:6 – 231:23). Seeking technical advice from USDA, NRCS is permissible under the Department's regulations since the regulations expressly limits the persons who can prepare plans for animal facility management plans to those designed by a registered South Carolina professional engineer or an employee of the USDA, NRCS. (Tr. pp. 232:17 – 234:10) *see* 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(2). Based on his discussions with Mr. Henry, Mr. Chaplin

determined that hay bale composting systems are an appropriate way to compost dead animals and the Composting Management Plan was incorporated into the Permit. (Tr. pp. 231:3-7; 236:3-9; JE. 3: DHEC 2).

Based on these facts, it is clear from the testimony adduced at the merits hearing and the documents received into evidence that the Department complied with all of the applicable requirements set forth in R. 61-43 Part 200 for the permitting of non-swine animal facilities, and the Department's issuance of the permit was permissible.

Appellants do not present any evidence to meet their burden in this appeal of establishing that the substantial evidence does not support the Department's issuance of the Permit and the decision of the Administrative Law Court. Instead, Appellants seek to invite this Court to conduct de novo review of the facts and to substitute its view of the facts for those of the Administrative Law Court. As will be shown in the following sections, the substantial evidence in the Record establishes that the Appellants' claims that the Sumerel Poultry Farm facility will impermissibly impair the water and air of the State are without merit.

C. The Department's permit review considered agricultural and stormwater runoff from the Sumerel Farm and correctly concluded that the facility would produce no agricultural runoff and stormwater runoff is not reviewed as part of the agricultural permitting process.

Appellants claim that the Department's review of the Sumerel facility was inadequate because the review did not include a review of a grading plan and stormwater management plan. The agricultural permitting regulations state that "the 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 new or enlarged sources." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E).

Here, state and federal law establishes that the review of stormwater management plans and activities, such as grading, are not conducted as part of the Department's agricultural review to determine whether the facility should be permitted. Rather, stormwater management and grading plans are reviewed in a separate permit review process conducted by the Stormwater Permitting Section. In particular, Mr. Chaplin testified as follows:

> Q. As part of 61-43, is the Department charged with looking at stormwater in issuance of an agricultural permit?
>
> A. No, sir.
>
> Q. Okay. Does the Department, in fact, look at stormwater for permitted agricultural facilities before they are built?
>
> A. A stormwater permit is required prior to construction, and when I mail out a permit, I mail out a stormwater information sheet, and I also mail out a NOI for the drilling of wells on property.
>
> * * *
>
> Q. Are you familiar with that document?
>
> A. Yes, I wrote it.
>
> Q. What is that document?
>
> A. That's a little reminder and I attach the same document I put in the mailer when I mail out a permit. It's a - - -
>
> Q. Okay. And so it's --- I'm sorry.
>
> A. It's a reminder that they need a stormwater plan prior to construction.
>
> Q. Okay. To be precise, it's an email and there's an attachment and this attachment talks about

stormwater permitting under 71-200 and 61-9, correct?

A. Well, I see this 72-300.

Q. Oh, sorry? 71-300.

A. 72-300.

Q. 72-300 . . . And that was reminding the applicant that the fact that they have a permit, they cannot construct, correct?

A. That is correct.

Q. And that before they actually engage in construction, they have to apply for and obtain stormwater coverage under the stormwater general permit; isn't that correct?

A. Correct.

Q. And the permit is not reviewed by you; isn't that correct?

A. That's correct.

Q. It's reviewed by a different section, correct?

A. It is.

Q. The stormwater permitting section?

A. Yes, sir.

* * *

Q. Okay. So the only expected runoff would be stormwater, correct?

A. Yes, that is correct.

Q. And stormwater will be addressed in a separate permit, correct?

A. Correct.

(Tr. pp. 223:18 – 224:6; 224:15 – 225:22; and 248:11-16). In addition, the Department admitted into evidence, as Respondents' Exhibit 1, the copy of the email and attached form, "New Compliance Requirements for SC DHEC Stormwater Permits," which Mr. Chaplin has discussed during the above-referenced colloquy. (Tr. p. 399:22-24).

1. The Department's determination that stormwater runoff is to be reviewed as part of a separate permit program is entitled to deference.

Appellants put forth no evidence contradicting the evidence submitted by the Department that established that stormwater runoff from the grading of the land for agricultural purposes is reviewed by the Department as part of a separate permitting program. Nevertheless, Appellants claim that the Department review is faulty since they claim that, without the information on grading, the Department is unable to comply with the regulatory requirement of preventing an increase in pollution to the Waters of the State at the Site.[8] Contrary to Appellants' claim, the Department has complied with the regulation requirement. The Department has exercised its discretion to review stormwater issues under the agency's stormwater program.

It is well established that "where an agency is charged with administering a statute or regulation has interpreted the statue or regulation, court, including the ALC, will defer to the agency's interpretation absent compelling reasons." *Kiawah*

[8] It should be noted that Appellants' expert witnesses did not agree on whether stormwater runoff was a valid concern. Appellants' second expert witness, Dr. Carmen Parkhurst, Ph. D, who was qualified as an expert in animal feeding operations, poultry science and waste management, acknowledged that the topography would not prevent the proper grading of the Site for a poultry farm. (Tr. pp. 274:21 – 276:8; 311:15 – 312:19). Moreover, the ALC found Dr. Parkhurst's testimony relevant enough as to cite his view in the FOD. Since, the ALC is the trier of fact, its view of the weight to accord the testimony of Appellants' two experts is dispositive. *Thomas Sand Company v. Colonial Pipe line Company*, 349 S.C. 402, 411, 563 S.E.2d 109, 114 (Ct. App. 2002) quoting *Berkley Electric Cooperative, Inc. v. S.C. Public Service Commission*, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991).

Development Partners v. South Carolina Department of Health and Environmental Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). In sum, courts must defer to an agency's interpretation unless the interpretation is "'arbitrary, capricious, or manifestly contrary to the statute.'" *Kiawah Development Partners*, 411 S.C. at 34-35, 766 S.E.2d at 718 quoting *Chevron, U.S.A, Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 27778, 81 L.Ed.2d 694 (1984). Here, the Department has interpreted R. 61-43 Part 200.70(E) as authorizing the Department to consider the stormwater effects of the facility as part of a separate stormwater permitting process. As noted in the "New Compliance Requirements for SC DHEC Stormwater Permits" form, since September 1, 2006, agricultural facilities, which had been previously exempt for stormwater regulation, were now subject to the regulatory requirements set forth in the Standards for Stormwater Management and Sediment Reduction, 9 S.C. Code Ann. Regs. 72-300 *et seq.* (2012) and requirements set forth in the State's National Pollution Discharge Elimination General Permit No. SCR 100000 for Stormwater, Discharges from Large and Small Construction Activities, which was issued pursuant to the requirements for Water Pollution Control Permits, 3 S.C. Code Ann. Regs. 61-9 (2011 & Supp. 2014). (Res. Ex. 1 p. 2). As the agency is charged with administering both the agricultural permitting and stormwater regulations, the Department's decision to review grading and other stormwater matters associated with the permitting of new and expanded animal facilities as part of the stormwater permit review, instead of the agricultural permit review, is entitled to deference. The Department's decision merely shifts the review of stormwater issues at agricultural facilities from the Agricultural Permitting staff to the Stormwater Permitting staff, who have superior levels of expertise and training regarding stormwater

matters. *See* 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E).Accordingly, deference to the Department's decision is proper since the regulatory requirement in the animal facility permitting regulations expressly provides that the Department's review is limited to reasonable standards under state and federal law. Therefore, Appellants' claim is without merit.

2. The Department's permit reviewer properly considered runoff prevention and slope of the land in his review and that determination is entitled to deference.

Appellants, while reluctantly conceding that the Department does bifurcate its review of runoff from agricultural facilities so that all stormwater runoff is reviewed in a separate process; nevertheless, argue that the Department's review was inadequate because runoff from agricultural activities was not considered and because Mr. Chaplin did not testify how agricultural runoff was reviewed. (Tr. pp. 183:23 – 184:9; App. Br. 30).[9] As will be shown below, each of these claims are unsupported by the facts contained in the Record.

The terms "runoff prevention" and "slope of land" are two of the enumerated criteria listed in the decision making portion of the agricultural permitting regulations. 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F)(9). The Department is charged with acting 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 new or enlarged sources." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E) (emphasis added). In applying this mandate to the criteria of runoff protection and slope of the land, the Department considers whether the new or expanded facility has or will have manure utilization areas. If the facility will not have any manure utilization areas, then as

[9] The term "App. Br." refers to the Brief filed by Appellants in this appeal.

explained by Mr. Chaplin, the Department does not consider runoff as part of the method of disposing the manure on site. (Tr. pp. 246:16 – 248:16).

Mr. Chaplin's interpretation of how the Department should conduct its review pursuant to R. 61-43 Part 200.70 is entitled to deference. The interpretation of a regulation by an agency's employee is entitled to deference if that interpretation is reasonable and consistent with the plain language of the regulation. *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C. 633, 640-41, 723 S.E.2d 191, 195 (2012) (holding the interpretation of an undefined term by the Department's permit reviewer is entitled to deference because it was reasonable and comported with the plain language of the regulation). The rationale behind Mr. Chaplin's testimony is that R. 61-43 Part 200 regulates the Department to issue no-discharge permits to all new expanding animal facilities whether or not they will land apply manure. 4 S.C. Code Ann. Regs. 61-43 Part 200.10(B)(1) and (3); 4 S.C. Code Ann. Regs. 61-43 Part 200.20(B). Although the term "runoff protection" is not defined by R. 61-43, the term "runoff" is defined as "rainwater or other liquid that drains over land on any part of a land surface and runs off the land surface." 4 S.C. Code Ann. Regs. 61-43 Part 50 (FFF). Taking these regulations together with the definition for manure utilization area (an area in which animal manure is used as fertilizer), the department has determined that the criteria of "runoff protection is applicable only when the facility intends to use manure utilization areas. If the facility has or will have such areas, then the Department will consider the criteria of the slope of the land since the steepness of the topography affects how quickly manure laden runoff would leave the utilization area and

potentially reach Waters of the State if located nearby.[10] However, when there are no manure utilization areas, such as in this case, the Department does not consider the runoff protection and slope of the land as part of its permit review since there is no reasonable potential for those criteria to cause an increase in pollution to the Waters of the State. Accordingly, Mr. Chaplin's interpretation of R. 61-43 Part 200.70(F) is entitled to deference by this Court

3. The Department's review correctly concluded that in light of relevant state and federal standards, the location of the facility would not cause an increase in water pollution.

Appellants' claim that the Department's review regarding water pollution was inadequate because it only determined that the facility met the applicable setbacks. As stated in the previous section, the regulatory standard of review applicable to the Department's decision making for agricultural permits is 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 new or enlarged sources." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E) (emphasis added). As part of his decision making review of the Sumerel Farm application, Mr. Chaplin determined that there was no reasonable possibility of water pollution occurring from operations at the Site. Specifically, Mr. Chaplin determined the following: the facility is located 50% further than the regulatory acceptable distance from the nearest water of State; no bird mortality will be buried at the site; none of the enumerated priority areas such as

[10] To assist the Department in considering runoff protection and slope of the land, the regulations require that Animal Facility Management Plan for all facilities using manure management areas must contain the following information: the "[c]oncentration of constituents in liquid animal manure" or "[c]oncentration of constituents in dry animal manure;." and "[a] crop management plan which includes the time of year of the animal manure application and how it relates to crop, (g) 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)(f), (g), (h), and (i).

Outstanding Resource Waters or national or state parks are located within close proximity of the facility; and the facility is not using manure utilization areas. (JE 5: DHEC 6-10; FOD p. 14). In the ALC, Appellants presented no evidence contradicting any of the matters above. In particular, they presented no evidence that the facility would cause an increase in pollution to Waters of the State that would cause a state or federal standard to be violated. Since the regulatory requirement requires an evaluation of pollution against a state or federal standard, Appellants' failure to show that a standard was, or reasonably would be exceeded, is fatal to their claim. Thus, this claim is without merit.

D. The Odor and Vector Abatement Provisions in the CNMP satisfied all 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:

> A. 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(A) and (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 or contain any requirement, including non-mandatory five enumerated criteria; and a vector abatement plan that contains BMPs (Best Management Plan) and list of specific actions to be taken for specific identified vectors.

Appellants' claim that the ALC erred in finding that the Odor and Vector Abatement Plans for the Sumerel facility met the regulatory requirement because the plans were developed by the integrator and not developed by the particular farm and no other. (App. Br. 38). The best evidence of the intent of the regulation is its language and "[w]here the [regulation's] language is plain 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." *Ventures South Carolina, LLC v. South Carolina Department of Revenue*, 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008). Reviewing each regulation under this standard does not support Appellants' claim.

Indeed, the ALC recognized this fact in its decision, where it concluded that "[b]y providing that the odor plan may consist of certain criteria and that the vector plan shall consist of a list of specific actions 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 capable of controlling odor and vectors." (FOD pp.12-13).

II. THE ALC'S CONCLUSION THAT THE SUMEREL POULTRY FARM IS SUBJECT TO THE 200 FOOT PROPERTY LINE SETBACK IS SUPPORTED BY THE SUBSTANIAL EVIDENCE IN THE RECORD AND IS NOT AFFECTED BY AN ERROR OF LAW.

The regulations governing the construction and operation of animal facilities for animals other than swine set forth two setback distances from the property lines of the land parcel upon which the facility is sited. For a facility with a normal production animal live weight at any one time of 500,000 pounds or less, the setback distance is 200 feet. 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(5). For a facility with a normal production animal live weight at any one time of greater than 500,000 pounds, the setback distance is 400 feet. 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(6). The Department formula for determining whether a facility is subject to the 200 foot setback or the 400 foot setback is in part set forth on the Department's Standard Application Form for New or Expanding Agricultural Animal Facility (other than swine) (DHEC 3580) as follows: average animal live weight = (average exit weight + average entry weight)/2. (JE 1: DHEC 20; Tr. p. 202:4-8).[11] Once the average live weight is ascertained, this figure is then multiplied by the maximum number of birds to be housed at the facility at one time to obtain the facility's normal live animal weight, which establishes the applicable property line setback. (*See* JE 1: DHEC 20; JE 3: DEHC 1). Applying this formula to the specifications for the Sumerel Poultry Farm as set forth in the CNMP, the average live weight for the facility is 4.5 pounds [(8.75 pounds + .25 pounds)/2 = 4.5 pounds] and 4.5 pounds x 109,600 broilers = 493,200 pounds. (JE 1: DHEC 20; JE 3: DHEC 1). Since the Sumerel Poultry Farm normal production animal

[11] The formula for average animal live weight cited in the Standard Application Form is located in the regulations at 4 S.C. Code Ann. Regs. 61-43 Part 50(K).

live weight is 493,200 pounds, which is less than the regulatory 500,000 pound limit, the facility is subject to the 200 foot setback distance. (JE 1: DHEC 12, 20; JE 3: DHEC 1). Therefore, the substantial evidence fully supports the ALC's conclusion that the applicable regulatory setback distance for the facility is 200 feet.

Appellants, despite conceding that this evidence exists in the Record, cite four reasons that they claim should lead this Court to the conclusion that the ALC decision was in error. (App. Br. pp. 11-12). As will be shown in detail below, each of these claims fails to establish that either the ALC decision was not supported by the substantial evidence in the Record or was affected by an error of law, and in fact, constitute an attempt to persuade this Court to substitute its view of the facts for the ALC's.

A. Appellants' claim that the evidence that they presented to the ALC regarding the exit weight for the Sumerel facility is more reliable than that presented by Respondents is without merit.

Procedurally, this claim must be rejected because Appellants are merely attempting to have the Court substitute its view of the facts for that of the ALC. Under the substantial evidence standard, "'[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Risher v. South Carolina Department of Health and Environmental Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) quoting *Palmetto Alliance, Inc. v. Public Service Commission*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Appellants argue in support of this claim that the testimony of their expert, Dr. Carmen Parkhurst, Ph.D, established that "the 8.75 exit weight utilized in the Sumerel CNMP was a dated and inaccurate number." (App. Br. p. 10). Moreover, Appellants argue that the ALC should have accept Dr. Parkhurst's figure since he was

more accurate, the ALC might have concluded that Dr. Parkhurst's testimony was more credible. However, Dr. Parkhurst did not take this extra step and the ALC concluded this failure undermined his testimony. (FOD pp. 19, 30).

Moreover, contrary to Appellants' claim in their brief, basing his opinion on information obtained from Columbia Farms as opposed to restating the information during the trial would not have constituted the admission of impermissible hearsay. Rule 703, SCRE, expressly provides that, in pertinent part, testimony based on hearsay may be used "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Since the issue of whether the 8.75 pound exit weight figure was low for a farm contracted to Columbia Farms was a central portion of Dr. Parkhurst's testimony, it was reasonable for the ALC to assess and determine that the persuasiveness of the testimony was undercut by the fact that Dr. Parkhurst had not considered any information from the company in forming his opinion. *Williams v. Moore*, 400 S.C. 90, 105, 733 S.E.2d 224, 231 (Ct. Appeals 2012) (the weight to give evidence presented by two expert witnesses is a matter for the trier of fact). Accordingly, Appellants' claim is without merit.

B. The ALC did not err in concluding that CNMP contained the correct exit weight.

Appellants' claim that evidence in the Record does not establish that Columbia Farms actually provided the 8.75 exit weight figure. Specifically, they claim that the figure constitutes "[t]hird hand/double hearsay testimony" since the CNMP preparer, Ms. Shealy, obtained the figure from her employee, Mr. Fulmer, who obtained it from Mr.

system for mortality disposal, there were no problems raised by the CNMP. (Tr. p. 321:6-16). Third, Dr. Parkhurst acknowledged that each integrator, the company that owns the birds grown by the farmer, sets their own exit weight for the flocks being grown out by their contract farmers. (Tr. pp. 315:18 – 316:7). He also acknowledged that each integrator sets their own exit weight, and the figure is dependent upon the market and internal corporate factors for each integrator. (Tr. 316:4-7). In fact, Dr. Parkhurst acknowledged that Columbia Farms, the integrator for the proposed Sumerel facility, could want its farmers to grow an eight pound chicken, despite the fact that a competitor, such as Perdue, might want its farmers to grow the chickens to ten pounds. (Tr. 316:8-12). It was these caveats and qualifications that the ALC found to undercut the probative value of the testimony. (FOD pp. 19, 32).

In their brief, Appellants attempt to rehabilitate Dr. Parkhurst's testimony by claiming it was not necessary for Dr. Parkhurst to find out specific information from the company, given that he had personal knowledge and experience upon which to base his expert opinion. (App. Br. p. 18). The ALC did not reject Dr. Parkhurst's testimony, rather, it considered the testimony to be neither probative nor persuasive, since the information as to what exit weight Columbia Farms was seeking for farms contracted to the company at the time of the trial in August 2014, would have been the type of information that the Court would have reasonably considered to have been information that an expert in the field of poultry science would have consulted before rendering an opinion. *See* Rule 703, South Carolina Rule of Evidence ("SCRE"). Had he stated that he had contacted Columbia Farms and had considered information from it in opining that the 8.75 pound exit weight figure was low and that the 9 pound exit weight figure was

qualified as an expert and had impressive credentials, and "Respondents did not provide expert testimony and/or reliable evidence to contradict Dr. Parkhurst's expert opinion on this issue." (App. Br. p. 16). Simply put, these arguments seek to have this Court attempt to determine the weight of the testimony before the ALC based on a cold transcript, unlike the ALC which heard the testimony of witnesses and was able to make judgments on the credibility of the testimony based on factors not apparent in the record. *See Tims v. J.D. Kitts Construction*, 393 S.C. 496, 508, 713 S.E.2d 340, 346 (Ct. App. 2011) ("'The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel] . . . It is not the task of this Court to weigh the evidence as found by the [Appellate Panel]'") quoting *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Therefore, by claiming that the ALC decision was in error because the "preponderance of the reliable evidence presented at trial established the average exit weight for the Sumerel facility would be at least 9 pounds," Appellants have run afoul of the standard discussed in *Risher* that substantial evidence exists even if the evidence supports inconsistent conclusions.

Further, even if it were considered by this Court, Appellants' claim is without merit. Although Appellants' claim that Dr. Parkhurst's exit weight figure of 9 pounds is more reliable, the evidence in the Record presents a different picture. First, Dr. Parkhurst testified that the figure was not based on information obtained from Columbia Farms, the integrator for the Sumerel Poultry Farm, despite the fact that he could easily obtain the information since he knows the President of Columbia Farms. (Tr. 317:21 – 318:8). Second, Dr. Parkhurst conceded that he had prepared an eight-page report in which he stated that, except for the possibility of a problem with using a hay bale compositing

Sumerel, who received the information from the integrator. (App. Br. p. 20). Appellants' claim is meritless.

As a threshold issue, Appellants' argument is barred by the rules governing appellate review. "It is well settled that a contemporaneous objection must be made to preserve an argument for appellate review. *Washington v. Whitaker*, 317 S.C.108, 113, 451 S.E.2d 894, 898 (1994) citing *Taylor v. Bridgebuilders, Inc.*, 275 S.C. 236, 238, 269, S.E.2d 337, 339 (1980); *Webb v. CSX Transportation, Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005). At trial, when Appellants' counsel cross-examined Ms. Shealy and elicited testimony on where she obtained the figure for the exit weight for the facility, counsel made no contemporaneous objection to the testimony. (Tr. pp. 466:15-21; 467:19 – 468:25). A contemporaneous objection would have allowed the Court to rule on the issue. Even if the ALC had upheld such an objection, that fact would have been inconsequential to whether the record contained substantial evidence on the source of the exit weight figure since Mr. Sumerel was present for the entire trial and was available to be recalled. Had he been recalled, Mr. Sumerel would have been able to provide information upon which the ALC could have decided the issue in detail. However, by not making a contemporaneous objection, Appellants prevented the ALC from having an opportunity to address the issue, and that failure bars them from raising the issue now.

Moreover, Appellants' failure to make a contemporaneous objection cannot be resuscitated by their post-trial motion. Appellate courts at all levels of review have held that a post-trial motion does not preserve an issue not previously raised for appellate review. *In re Beard*, 359 S.C. 351, 361, 597 S.E.2d 835, 840 (Ct. App. 2004) *cert. denied* (2005) (holding that an issue raised for the first time in a Rule 59(e), SCRCP

motion (News trials; Amendment of Judgments) not preserved for appellate review); *see Gainey v. Gainey*, 382 S.C. 414, 424-25, 675 S.E.2d 792, 797 (2009) (holding that an issue raised for the first time in a Rule 60(b)(4), SCRCP motion to vacate judgement unpreserved for appellate review). Therefore, Appellants' discussion of this issue for the first time in their Motion to Reconsider and Memorandum in Support did not preserve this issue for review by this Court. (*See* Memo. in Support pp. 2-3, 5-6).[12] Accordingly, Appellants' claim of error by the ALC is not properly before this Court and must be denied.

However, even if this Court were to review this issue, which it should not for the reasons above, Appellants nevertheless would not prevail. The substantial evidence in the Record shows that 8.75 pound exit weight figure had already been admitted into evidence by Appellants' counsel. During the trial, Appellants' counsel, while questioning the first witness, sought the admission of the CNMP as JE 1. (Tr. p. 20:16-24). As noted previously, the Standard Application Form contained in the CNMP indicates that the Sumerel Poultry Farm is to operate using 8.75 as the exit weight of the birds. (JE 1: DHEC 20). Moreover, the Standard Application Form was signed by Mr. Sumerel and the signature block signed by Mr. Sumerel contained the following certification, which is printed in capital letters for emphasis, and in pertinent part states:

Section 8 – CERTIFICATION

> I hereby certify that all operations, maintenance and associated activity pertaining to this site shall be accomplished pursuant to and in keeping with the terms and conditions of the approved plans. **I have read the application and agree to the requirements and conditions that are contained within. The information**

[12] The term "Memo in Support" refers to the Motion to Reconsider and Memorandum in Support filed by Appellants on January 22, 2015.

submitted is, to the best of my knowledge and belief, true, accurate, and complete.

(JE 1: DHEC 22) (emphasis added). Clearly at the time that he sought admission of the CNMP into evidence, Appellants' counsel did not believe that the information contained therein was hearsay, since he never sought to limit the evidentiary value of the document. This failure constitutes a waiver of Appellants' claim of error by the ALC's admission of evidence of the 8.75 exit weight and a forfeiture of the right to object to the admissibility of the evidence on appeal. *See Holroyd v. Requa*, 361 S.C. 43, 59-60, 603 S.E.2d 417, 425-26 (Ct. App. 2004) (holding failure to object to evidence elicited by a party constituted a waiver of party's right to object to evidence on appeal). Therefore, Appellants' claim is meritless.

C. Appellants' claim that the ALC erred in excluding the Dr. Parkhurst testimony on AgraMetrics Report is not preserved for review before this Court.

"'The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.' Even a finding of an abuse of discretion does not end the analysis, however, 'because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice.' Prejudice is a reasonable probability that the fact-finder's determination was influenced by the challenged evidence or the lack thereof." *Hill v. South Carolina Department of Health and Environmental Control, Inc.*, 389 S.C. 1, 14, 698 S.E.2d 612, 619 (2010) (citations omitted). During the trial, Dr. Parkhurst testified during cross-examination that it was his opinion that the 8.75 exit weight for the Sumerel facility was low. (Tr. p. 302:23). This opinion was based, in part, on studies that he performed, and in part on a document that was not readily available and was a

document of the type that the Department sought and which had not been turned over to the Department during discovery. (Tr. pp.303:1 – 305:10; SCDHEC Response to Motion to Reconsider p. 7). The Department objected to Dr. Parkhurst basing any of his testimony on this document since he admitted that he chose not to provide the document to his attorney, despite the fact that he was aware of the counsel's duty to disclose pursuant to the South Carolina Rules of Civil Procedure and the Rules of the South Carolina Administrative Law Court. (Tr. 305:4-14). After an off the record sidebar, the ALC sustained the Department's objecton to the report, which was prepared by a third party and not Dr. Parkhurst. (Tr. p. 307:1-8).

Appellants' challenge of the ALC's ruling based on the fact that an expert can rely on third party material in support of their opinions misses the point of the ALC's decision. (See App. Br. p. 22). The ALC did not deny Dr. Parkhurst the right to base his opinion of the report because of the type of document, but because Dr. Parkhurst had unilaterally decided not to disclose the report prior to trial, which prejudiced the Department. (Tr. pp.303:1 – 305:10; SCDHEC Response to Motion to Reconsider p. 7). The ALC's action was a reasonable resolution of the issue and was well within the discretion accorded trial courts in admitting evidence. *Hill*, 391 S.C. at 14, 698 S.E.2d at 619. Moreover, Appellants' claim is in error because they cannot show prejudice. The ALC allowed Dr. Parkhurst to testify that he believed the exit weight in the CNMP was low. (Tr. p. 307:1-6). Indeed, as noted by Appellants in their Motion to Reconsider, the only prejudice from the ALC's decision to exclude the testimony based on the report was "it provided further evidence of the inaccuracy of the 8.75 lbs. process weight figure utilized in the CNMP." Thus, Appellants' claim is without merit.

D. The applicable setback distance from property lines is established by the criteria in Regs. 61-43 Part 200.80.

Appellants' claim that the Sumerel Poultry Farm meets the regulatory definition of a large animal facility is not a fact material to determining the property line setback distance. R. 61-43 Part 200.80 expressly provides that the 400 foot property line setback distance only applies to facilities that have a normal production animal live weight at any one time of greater than 500,000 pounds. 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(6). Since the substantial evidence in the Record establishes that the normal animal live weight at any one time for the Sumerel Farm is less than 500,000 pounds, the applicable property line setback distance for the facility is 200 feet. *See* 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(5). Here again, Appellants' claim does not materially affect the ALC's determination that the Department's issuance of the Permit for the Sumerel Poultry Farm should be upheld.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court affirm the Final Order and Decision of the Honorable John D. McLeod, Administrative Law Judge.

Respectively submitted,

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Jacquelyn S. Dickman
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Chief Counsel, EQC

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August 21, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No.: 13-ALJ-07-0395-CC
Appellate Case No.: 2015-000700

Rick Still, Donice Still, Christine Orr and Terry Orr, ...Appellants,

vs.

South Carolina Department of Health and Environmental Control
and Lisa Sumerel and Sumerel Poultry Farm, ...Respondents.

PROOF OF SERVICE

I, Donna K. Hellerman, Legal Assistant for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **21th day of August, 2015,** served a copy of **Respondents' South Carolina Department of Health and Environmental Control and Lisa Sumerel and Sumerel Poultry Farm's Initial Brief and Designation of Matter** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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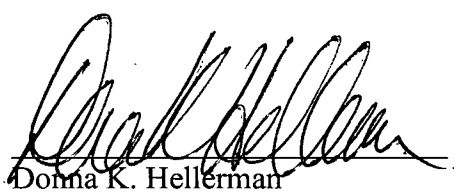

Donna K. Hellerman

August 21, 2015
Columbia, South Carolina

D H E C
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August 21, 2015

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 116729
Columbia, South Carolina 29211

Re: *Rick Still, Donice Still, Christine Orr and Terry Orr vs. South Carolina Department of Health and Environmental Control and Lisa Sumerel and Sumerel Poultry Farm*
Appellate Case No. 2015-000700

Dear Ms. Kitchings:

Please find enclosed herewith the original and one (1) copy of the Respondents' DHEC and Lisa Sumerel and Sumerel Poultry Farm's Initial Brief and Designation of Matter in reference to the above matter. Also enclosed is Proof of Service for the same. Please file the original and return the clocked copy to our office in the enclosed interoffice envelope which I have provided for your convenience.

Should you have any questions regarding this matter please contact the under signed counsel at you earliest convenience.

Very truly yours,

Donna K. Hellerman
Legal Assistant to Stephen P. Hightower
Assistant General Counsel
Office of General Counsel

Enclosures as stated
cc: Joseph O, Smith, Esquire
Thomas E. Hite, III, Esquire

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Honorable Jenny Abbott Kitchings
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