

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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SC Court of Appeals

South Carolina Coastal Conservation League,)

Petitioner,)

vs.)

South Carolina Department of Health and Environmental Control, and Oakridge Landfill, Inc.,)

Respondents.)

Docket No. 14-ALJ-07-0221-CC

FINAL ORDER AND DECISION

APPEARANCES: For Petitioner Coastal: Amy E. Armstrong, Esq.
Jessie A. White, Esq.

For Respondent DHEC: Stephen P. Hightower, Esq.

For Respondent Oakridge: Mary D. Shahid, Esq.
Joan W. Hartley, Esq.
Angelica M. Colwell, Esq.

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or the Court) pursuant to a request for contested case hearing filed by Petitioner South Carolina Coastal Conservation League (Coastal) after the Respondent South Carolina Department of Health and Environmental Control (DHEC or Department) issued a Section 401 Water Quality Certification (Water Quality Certification) and a Coastal Zone Consistency Certification (Consistency Certification) to Respondent Oakridge Landfill, Inc. (Oakridge).¹ On February 10, 2014, DHEC sent these certifications to the United States Army Corps of Engineers (Corps) in response to the permit application that Oakridge had submitted to the Corps seeking authorization to impact

¹ Oakridge was incorrectly identified in the pleadings as Oakridge Landfill, LLC. Oakridge's counsel moved for modification of the caption to reflect the correct name on the record without objection from other counsel. Also, the Court will refer to the party Oakridge Landfill, Inc. as "Oakridge," but will refer to the landfill itself as "Oakridge Landfill" or "the Landfill."

FILED

October 21, 2015

SC ADMIN. LAW COURT

fourteen contiguous acres of freshwater wetlands for expansion of an existing landfill facility located near Dorchester, South Carolina.

On February 25, 2014, Coastal requested, in accordance with the procedures set forth in S.C. Code Ann. § 44-1-60 et seq., a final review conference by the DHEC Board concerning the initial staff decision. The Board declined to conduct a final review of the staff decision, and Coastal subsequently filed a request for contested case hearing on April 24, 2014. Believing that Coastal had failed to adhere to the requirements of § 44-1-60 et seq. governing review of Department decisions, Oakridge also moved for dismissal of Coastal's case on or about June 10, 2014. After a hearing, this Court denied Oakridge's motion by Order issued August 29, 2014. The Court held a hearing on the merits April 14-18, 2015.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence:

General Background

The subject site consists of approximately 170 acres owned by Oakridge in Dorchester County, South Carolina, located thirty-five miles northwest of Charleston. The existing landfill facility (Oakridge Landfill or Landfill) is bounded to the north by U. S. Highway 78, to the east by Four Hole Swamp, to the south by Halfway Gut Creek and to the west by a Norfolk Southern Railroad rail line.

Oakridge sought authorization for the proposed expansion of its landfill in order to ensure availability of landfill capacity to continue providing disposal services for the next twenty years to the counties in close proximity to the Landfill, specifically, Berkeley, Charleston, Colleton and Dorchester Counties. Data from the 2014 Annual Solid Waste Management Report published by the Department indicates that these counties generate approximately 95% of the waste accepted by the Landfill. Without the proposed expansion, the existing landfill facility will probably reach capacity in three to five years and would thus have to close. The Landfill's closure would leave Oakridge's current customers, including Berkeley, Charleston and Dorchester Counties – three counties experiencing significant population growth – to search for other options for solid waste disposal. In fact, Oakridge's county customers have expressed concerns about the availability of disposal for the twenty-year planning period.

The current Landfill is an active disposal facility and thus requires monitoring as a condition of the permits governing its operation. As a result, both surface water discharges and groundwater are regularly tested and that data is provided to DHEC. Significantly, there have been no reported incidents of permit exceedances, groundwater contamination, or surface water impairment in over twenty years. The Landfill's stormwater system is also designed to remove sediment before discharging into Halfway Gut Creek. This design allows sediments to fall out of the water before discharging into Halfway Gut Creek.

Landfill Expansion

Oakridge proposes to expand its existing landfill on an adjacent 83.3 acre tract. The expansion would convert much of the tract to an impermeable surface to place the landfill, stormwater system, and infrastructure upon. The expansion would impact fourteen acres that are part of an 18-acre wetland finger.² However, the upper portion of this wetland, consisting of approximately four acres, are part of the lands that are encumbered by the covenants and restrictions resulting from a 1992 Agreement between Oakridge's predecessor in interest and Coastal, the S.C. Wildlife Federation, and Citizens Local Environmental Network. That wetland will not be filled. Furthermore, the proposed permit incorporates measures in the expansion design to preserve the flow of water into and out of the four acres.

The Permit will require monitoring of both surface water discharges and groundwater. Moreover, impervious liners are used today, and, according to Jeff Thompson, "[a]ny leachate or water that seeps through these landfills is collected and treated before it can be discharged[,] to remove any types of pollutants." Thus, unlike in 1977, when the policies underlying solid waste disposal siting and site-specific evaluations set forth in Part IX, Section B of Chapter III of the CZMP was written, we have technology in place that has resolved many of the concerns then-existing, such as pollution of groundwater.

Hydrology

The wetlands that will be impacted as a result of the Landfill expansion feed into Halfway Gut Creek, which is the water body that will be directly impacted by the placement of the fourteen acres of fill into the wetlands. Halfway Gut Creek feeds Four Hole Creek and ultimately that

² A road was constructed that bisects this wetland and a pipe was installed under the road to preserve the hydrological connection.

waterbody feeds into the Edisto River, which is downstream from Oakridge Landfill. The fourteen acres of wetlands at issue are also contiguous with four acres of wetlands located upstream that are protected pursuant to a contractual agreement with the Audubon Society.

The wetlands are part of the Four Hole Swamp watershed, which consists of approximately 400,000 acres.³ The fourteen-acre impact proposed for the expansion is an extremely small percentage of the overall Four Hole Swamp watershed – less than .01%. The overall drainage area flowing directly into Halfway Gut Creek is approximately 4,400 acres. Stormwater discharges from the existing Landfill and proposed expansion represent only 3% of the contributing flow to Halfway Gut Creek; 97% of the contributing drainage basin is upstream of the Landfill.

Four Hole Swamp is one component of a larger coastal wetland system. Four Hole Swamp itself is composed of many fingers of wetlands, the fourteen-acre area being one example of a “finger.” Thus, the filling of the fourteen acres would have a negligible, “miniscule” effect on Four Hole Swamp because of the extremely large size of the wetland system (tens of thousands of acres). Thompson again explained that based on additional plans that he had seen following his deposition,⁴ there are areas to the west of the four-acre wetland upstream from the landfill that will not be part of the landfill expansion and would still be pervious; and those areas currently provide a seep into that wetland. Therefore groundwater discharge would not be eliminated as a result of the fill and construction activities of the expansion. Moreover, though circulation patterns of the water moving downstream through the wetland system will be altered and the level of concentrated oxygen in the water may decrease by the filling in of the fourteen acres, there was no evidence that the oxygen levels would dip significantly enough to become detrimental to aquatic organisms. Rather, filling in the fourteen acres would not make a significant change in the fisheries habitat for aquatic organisms that use Halfway Gut Creek. There are other sources of detrital matter, including “leaf litter” and “herbaceous materials,” that will provide nutrients.

³ There are two alternate spellings that the parties have employed in reference to this swamp and the creek of the same name: “Four Hole Swamp”/“Four Holes Swamp” and “Four Hole Creek”/“Four Holes Creek.” For the sake of consistency, the Court will singularize “Hole” and thus refer to them as Four Hole Swamp and Four Hole Creek, respectively.

⁴ Thompson’s deposition testimony had been based on his admittedly erroneous assumption that the Landfill, including its impervious layers, would completely surround the wetland. However, he later realized that there will still be some areas to the west that will allow for seepage of water into the upland soils, which could then seep out into the four-acre wetland.

Furthermore, the Landfill's stormwater system is also designed to treat water quality before discharging into Halfway Gut Creek. Treatment is provided through a train of best management practices (BMPs) including vegetation; benches and diversion berms; rock check dams; and longer periods of retention in ponds. The stormwater system will create an artificial hydrologic connection between the four acres of protected wetlands and Halfway Gut Creek, including drains to prevent ponding south of the four acres and retention ponds downstream of the four acres. This design allows sediments to fall out of the water before discharging into Halfway Gut Creek.

Coastal offered evidence that Howard Bridgeman, a member of Coastal and several other organizations, has used Mellard Lake, one of the holes of Four Hole Creek. Importantly, Mellard Lake is located upstream of the Landfill. As a volunteer for the Audubon Society, he has also paddled a canoe through Four Hole Swamp, in and around Beidler Forest,⁵ and on the Edisto River, but has not paddled in Halfway Gut Creek. He has fished below Four Hole Creek, at Martin's Landing, and at Four Hole Creek, on Bridge Lake. Finally, he helped mark river miles on duck boxes on the Edisto River.

However, Bridgeman's testimony failed to show how the proposed filling of fourteen acres of wetlands would negatively impact Four Hole Creek and the Edisto River or, more specifically, his use of those waterbodies. Likewise, his testimony did not substantiate that water levels in the Edisto River and other surrounding waterways would be affected by the fill associated with the proposed expansion. Indeed, he admittedly had no knowledge of the extent of the wetlands in the Edisto River watershed. He had no knowledge of where the confluence of Four Hole Creek and the Edisto River occurs, nor has he ever canoed or otherwise traveled on Halfway Gut Creek. Finally, his concerns of increased sedimentation or large surges of runoff resulting from the wetland filling and impervious liner, or his concerns of potential contamination of municipal water supplies by toxic materials were merely speculative.

To the contrary, the record established that the Landfill has installed erosion control measures to redirect and limit the sediment runoff as it occurs on the property, as well as impervious layers to prevent leakage of contaminants. In fact, Bridgeman acknowledged that though wetlands were filled to construct the existing Oakridge Landfill, he has had full enjoyment of the surrounding waters, including eating the fish that he has caught therein.

⁵ Beidler Forest is an 1800-acre virgin forest acquired by the Audubon Society in 1969 and serves as a nature sanctuary in Four Hole Swamp.

Dr. Dan Tufford, Petitioner's wetland ecosystems, hydrology, and water quality expert initially visited the wetland area at issue in this case in 2012 as a result of the proposed expansion. However, he found no evidence that the existing landfill operations were negatively impacting the fourteen-acre area of wetlands at the time of his visit. Indeed, Dr. Tufford made it clear that by "hydrological impact," he was not referring to water quality. Rather, his concern was that there **could** be some hydrologic impact on Halfway Gut Creek, though he acknowledged that it was "hard to say what those impacts would be" on the Four Hole Swamp watershed "by the time Halfway Gut Creek empties into the Four Hole Swamp main channel."

However, I do not find that Dr. Tufford's concerns or his assertions were persuasive. Though Dr. Tufford acknowledged that Oakridge was going to have stormwater engineered structures, he asserted that "they are not required to be able to handle every possible runoff event." Yet he provided no explanation of how "every possible runoff event" could be prevented. Indeed, as he acknowledged, the Landfill is probably not the only developed property that discharges flows into Halfway Gut Creek. In fact, Dr. Tufford did not impugn the effectiveness of the water discharge devices proposed for the Landfill; in fact, he admitted that he had not even read Oakridge's final engineering design.

While the fill might cut off an existing downstream connection between the four-acre conserved area and downstream waters, Dr. Tufford agreed that an engineered connection could preserve the connection between the two areas. Furthermore, though he claimed that the Landfill's designed engineered connection would not work, he had no basis for this belief, having not seen the final design and having only read some other planned pages that he could not recall and one page of stormwater review dated 2013. Moreover, Dr. Tufford is not a professional engineer, nor does he have experience designing stormwater plans to be compliant with state standards or in designing a landfill. He also confirmed no extensive experience with state stormwater standards and no experience with NPDES (National Pollutant Discharge Elimination System) construction general permits or DHEC's design requirements for landfills.

In sum, the evidence did not sufficiently establish that loss of functions of the fourteen acres of wetlands will impact Halfway Gut Creek, Beidler Forest, Four Holes Swamp Creek, and/or the Edisto River. Indeed, the water will most likely continue to flow underground which will subject it to further filtration. Moreover, while the Landfill has been in full operation, Beidler Forest has received several recognitions, including being designated a Society of American

Forestry natural area, a Bird Life International habitat of international importance, and a Ramsar site of Wetland International Importance. Moreover, the Landfill was not identified as a surrounding activity of concern on the application Dr. Tufford completed for the Ramsar Award for Beidler Forest.

Seeps

Much of the on-site wetlands at the Landfill, including the fourteen acres of wetlands proposed for impact, has been timbered in the past ten years and currently consist of dense shrub/scrub habitat. Coastal nevertheless contends that the wetland that is proposed to be filled discharges water at stable temperatures and with high dissolved oxygen, which provide a high quality habitat for aquatic species like salamander. Indeed, Jeff Thompson observed numerous seeps coming from the uplands out of the sandy soils and into the wetland. He explained that the fourteen-acre wetland is classified as a headwater wetland⁶ that is dominated by hardwoods.⁷ These types of wetlands are not rare, as nearly every wetland starts as a headwater wetland. Headwater seepage wetlands are areas immediately around seeps where water is emerging from the ground.

Seeps are relatively common in South Carolina's coastal plain and are often an important habitat to a group of amphibians, such as a family of lungless salamanders, because they provide a stable water source and stable temperatures. However, Steve Bennett, an expert witness for Petitioner in herpetology, could not quantify the likelihood of systems around the fourteen acres being negatively impacted as a migratory route of amphibians, such as lungless salamanders or other organisms, down the seep streams. Indeed, when he inspected the fourteen acres, he found no salamanders, and he could not specify any particular effect on any other particular organisms in that area. Likewise, he inspected the four acres of protected area, found no salamanders therein, and was unable to confirm the probability of any impact to reptiles in the four acres of protected area as a result of the fill.

Furthermore, seeps in other areas of the swamp would still exist even after the filling of the fourteen-acre area. At least two seeps exist in Beidler Forest, which is adjacent to the Landfill.

⁶ The Court will use the terms "headwater wetland" and "headwater seepage wetland" interchangeably.

⁷ The Court recognizes that the area was timbered and now consists of much smaller hardwood trees.

In fact, Petitioner's experts specifically identified multiple seeps within the Four Hole Swamp watershed.

Alternative Projects

Designing the possible footprints for the expanded Landfill required taking into account the actual boundary of the prospective site, the setbacks required by regulations, existing wetlands on each site, and the project purpose. Initially, onsite alternatives were considered for the expansion. However, the ability to expand the Landfill onsite was limited by the presence of utility transmission lines that traverse the eastern portion of the current Landfill. A utility company also maintains its right-of-way or easement path to the lines. Utilities require a fifty-foot setback from landfill operations. While the location of where the utility lines cross the site might be moved, the entrance and exit points of the lines to the landfill have to remain constant. Any movement of the lines would also have to avoid the protected wetlands and their buffers within the Landfill site and the two older, closed landfills located on site. Based on these site constraints, it was not feasible to move the utility transmission lines and easement in order to locate the expansion east of the current operations. Likewise, the regulatory setbacks from a residence near the Landfill limited expansion in that direction.

Another limiting factor to expansion onsite was the location of the borrow area for the Landfill where Oakridge currently obtains soil for covering the waste. The borrow area is located west of the utility transmission line. Similarly, the necessary siting of administration facilities complicated an on-site expansion. Finally, the two closed landfills currently on the property, which are un-lined and capped, limited expansion of the landfill east of the current operations. Disturbance of these landfills was not a good option because of the negative impacts that may result from the disturbance of stable waste. The eastern portion of the site adjacent to current operations also contains wetlands and buffers preserved in the 1992 Agreement, which could be disturbed.

When all these factors were accounted for – the utility transmission lines, the closed landfills, the location of protected wetland and buffer areas, the location of the borrow area, regulatory setbacks, and the location of the Landfill offices/administration building – only a very small footprint was left for expansion onsite, in the areas east of existing operations. Specifically, onsite expansion east of the existing operations was inefficient and provided insufficient disposal capacity to justify expansion.

Oakridge, as well as this Court, were required to further consider offsite alternatives to the Oakridge Facility. Based on the current service area of the existing Landfill and the solid waste management plans of the surrounding counties, an alternative facility must have a minimum property size of 300 acres to accommodate construction of a new landfill facility, associated infrastructure, and 17,000,000 cubic yards of disposal capacity. The presence of wetlands on any suitably sized tract, the ability to avoid wetland impacts, and timing (or adequate time) for permitting a new landfill facility in light of the remaining life of the existing Landfill facility must also be considered.

Within the 75-mile radius of Oakridge's planning area, there are nine Class Three landfills.⁸ However, Dorchester County was the only county in the planning area that would allow construction of a new solid waste landfill. The evidence established that only three properties within Dorchester County have sufficient acreage to be considered offsite alternatives. Notably, the only alternatives considered were offered by Oakridge because Coastal offered no alternative sites.

The first offsite alternative is north of the existing Landfill. Nevertheless, that site is not feasible because of the presence of a nearby airport, with its associated regulatory setbacks. Moreover, there would be more wetland impacts at this site than at the proposed expansion site.

The second offsite alternative is near the existing Landfill. Though the parcel was available for sale and was the appropriate size for construction, it is not feasible for use because it lacks suitable road access to the site and again has a very large wetland in the middle of the property, which limited the construction area to the south end of the property where there were multiple utility transmission lines. To meet the volume requirement, this alternative would likely result in more wetland impacts than will likely be caused by the proposed expansion site.

The third offsite alternative is located near a densely populated neighborhood. Because of regulatory setbacks, this site's configuration would have provided inadequate access to the site, which would have made it unable to meet the disposal volume requirements.⁹

⁸ There was some confusion as to whether there were nine or ten such landfills. Horry County, although reflected as within the 75-mile radius on Petitioner's Exhibit 18, is actually outside of the radius. The nine Class Three landfills are Bee's Ferry, Berkeley County, Georgetown County, Hickory Hill, Lee County, Northeast, Oakridge, Pepperhill, and Richland.

⁹ It is also noteworthy that each of the offsite alternatives lacked the necessary Demonstration of Need that DHEC required for the expansion.

Without any suitable offsite alternatives, Oakridge considered several options to expand the footprint of the existing landfill. Without any suitable offsite alternatives or alternatives on the footprint of the existing landfill, the remaining alternatives for the construction of a new facility consisted of sites that resulted in some wetlands impact. That consideration would entail the above sites as well as a consideration of expansion onsite. However, the site that resulted in the least wetlands impact but met a reasonable expansion objective of at least twenty years of disposal capacity was the proposed site at issue in this case.

For instance, the first onsite alternative presented by Oakridge resembles the proposed alternative but would result in nineteen acres of wetland fill instead of fourteen acres. While this alternative satisfied the project purpose and provided at least twenty years of disposal capacity, this onsite alternative is not feasible based on the restrictions on the four acres of wetlands and because it impacts more wetlands than the proposed alternative.

A second onsite alternative considered involved use a parcel near the current administration building, north of the existing site across Highway 78. However, the existence of residential properties and the applicable regulatory setbacks limited the establishment of an acceptable footprint for disposal on this property. In addition, the property was ultimately determined to be unavailable for acquisition. Also, Oakridge and this Court considered areas on either side of the wetlands. But those areas were also unfeasible because expansion thereto would have carried over into two old landfills and into residential setbacks, and would not have met the project purpose of providing at least twenty years of disposal capacity.

A third onsite alternative was located east of the existing disposal area and was owned by Waste Management. However, expansion into the property east of the existing disposal area was limited by the existing borrow area utilized by the Landfill, the protected wetlands, the residential setback, and landfill infrastructure. The resulting landfill footprint was oddly shaped and inefficient; the footprint did not come close to creating the airspace needed for twenty years of disposal.

A fourth onsite alternative – also classified as “onsite” because it was contiguous to the existing Landfill – involved expansion to either a small property south of the existing Landfill and north of Halfway Gut Creek and the railway, or south of the existing railway. However, railway setbacks posed a problem, and the presence of the large wetland area around Halfway Gut Creek and Four Hole Creek in this area eliminated the possibility.

A sixth onsite alternative (the fifth being the permitted alternative), which resulted in the least impact to the wetlands, encompassed the use of four-acre protected wetlands but left a downstream section of the remaining wetland acreage unimpacted in order to preserve the area as a headwater wetland. While this design satisfied the project purpose of providing for at least twenty years of disposal capacity, this alternative was rejected because the Audubon Society, through Norman Brunswig, would not consent to releasing the four acres from the covenants.¹⁰

Finally, a no-action alternative was also considered. This alternative contemplated the imminent closure of Oakridge Landfill - in three to five years - based on the small remaining capacity of approximately 60,000 tons. However, as further explained below, this alternative failed to address the needs of Oakridge's major customers - Berkeley, Charleston, Dorchester, and Colleton Counties - and the legal obligation of the counties to plan for twenty years of disposal capacity.

The alternative that DHEC permitted is feasible, has the least environmental impacts, is within the 2009 Determination of Need (DON), and provides for sufficient capacity to allow for twenty years of planning. Moreover, Oakridge has also agreed to mitigate the unavoidable wetland impacts with the purchase of mitigation credits at Pigeon Pond mitigation bank.

Demonstration of Need

The DON Regulation has achieved the goal of regionalization of "fewer, better managed" municipal solid waste (MSW) (Class Three) landfills. When the South Carolina Solid Waste Policy and Management Act (Solid Waste Act) was enacted in 1991, there were seventy-nine municipal solid waste landfills. There are now seventeen commercial Class Three landfills that accept municipal solid waste.¹¹ Oakridge Landfill serves as a regional landfill, with Berkeley, Charleston, Dorchester, and Colleton counties relying heavily on the Landfill to meet their Class Three disposal needs.

In determining need, DHEC has made a policy decision to give a preference to expansion of landfills at current locations instead of replacement of landfills at a new site. Reflecting this preference, the 2009 DON Regulation developed new criteria for the annual disposal rate for Class

¹⁰ Norman Brunswig was the manager of Beidler Forest from 1973 to 2014. Beidler Forest was acquired by the Audubon Society in 1969 to protect it and develop an outreach program to educate people on the importance of forested wetlands.

¹¹ Pepperhill Landfill is a commercial Class Three landfill, but does not accept MSW.

Three landfills. Furthermore, the DON regulation contains more requirements for a replacement of landfill facilities than for an expansion at the current location.

CZMP Policy Considerations - Overwhelming Public Need

There is a need for municipal solid waste disposal capacity for the State and in particular for the citizens of Charleston, Berkeley, and Dorchester Counties. These counties have experienced a significant population growth rate over the last twenty years, which is reflected in an increasing number of permit applications and permit reviews for basic infrastructure, such as new water and sewage treatment plants and road systems, and for development projects, such as subdivisions, shopping centers, and industrial complexes. Therefore, the Oakridge Landfill is integral in meeting the current waste disposal needs for Charleston, Berkeley, and Dorchester Counties for at least the next twenty years.

The Landfill currently provides Class Three disposal for local governments and businesses and thus plays an important role in meeting the State's Class Three disposal needs. The S.C. Solid Waste Management Annual Report (Annual Report) for Fiscal Year (FY) 2014, shows that the Landfill accepted 535,444 tons of waste for disposal with 506,323 tons (almost 95%) generated in Colleton, Charleston, Dorchester, and Berkeley Counties. The reports for FY2010 through FY2013, further reflect that the percentage of waste accepted at the Landfill from these four counties ranged from approximately 88% to 95% of the total waste disposed of at the Landfill. During that time period, Oakridge Landfill has received substantially all of the Class Three waste generated in Dorchester and Colleton Counties, and a significant percentage of the waste generated in Charleston and Berkeley Counties. In FY 2014, Oakridge received approximately 59% of the Class Three waste generated in Charleston County and approximately 44% of the Class Three waste generated in Berkeley County.

Coastal nevertheless asserts that expansion of Oakridge Landfill is not needed because there is capacity at other landfills within the 75-mile radius planning area for Oakridge Landfill. In support of that argument, Coastal presented a table summarizing disposal at Class Three commercial landfills in FY2010 through FY2014. This table included reporting data from the Annual Reports for those fiscal years and included Coastal's calculation of a factor it describes as "utilization of capacity." Coastal calculates "utilization of capacity" by dividing the annual capacity (permitted annual disposal rate) by the amount of waste disposed of for a landfill or region in FY2014.

However, the “utilization percentage” as calculated by Coastal fails to take into consideration significant restrictions regarding the operations of landfills in the area and the management of solid waste by those counties. Despite the surface appearance of available annual disposal capacity in the region served by the Landfill, I find that the loss of disposal capacity at the Landfill would materially and adversely impact the counties currently served by the Landfill and would result in an overburdening increase in the costs of disposal for the customers currently served by Oakridge Landfill. Moreover, the proposed expansion will allow Charleston, Berkeley, and Dorchester Counties to address the disposal needs for twenty to possibly thirty years by prolonging the remaining life of Bee’s Ferry Landfill and Berkeley County Landfill.

Therefore, as explained below, I find that there is an overwhelming public need for the proposed expansion. In making that determination, I further find that the no-action alternative is not a viable option, in part, because the statutory planning period goal of twenty years would not be met. Though there are possible alternatives for disposing of garbage from this particular project, those alternatives are not feasible given all the constraints and multiplicity of impacts to the counties if the disposal capacity of Oakridge Landfill is removed from the region.¹² The public need is addressed below on a county-by-county basis.

Dorchester County

Oakridge Landfill is centrally located in Dorchester County, and Dorchester County relies on the Landfill for its Class Three waste disposal needs. Approximately 95% of the municipal solid waste generated in Dorchester County is disposed at Oakridge. Oakridge Landfill also provides disposal services for the sludge from Dorchester County’s two wastewater treatment plants. Because Dorchester County relies almost exclusively on the Landfill to meet its Class Three waste disposal needs, it is depending on the proposed expansion to meet its statutory requirement to plan for solid waste disposal for a twenty-year period. Population projections are one factor that local governments use in projecting their future waste disposal needs as part of the waste management planning required under Section 44-96-80 of the Solid Waste Act. The 2009 Dorchester Solid Waste Management Plan provides in relevant part as follows:

¹² Though the Department did not include the no-action alternative in its written (DHEC) staff assessment, Ms. Owen explained that the Department did consider it and found that “[i]t wouldn’t meet the project purpose and need.” Moreover, this Court, hearing this matter *de novo*, has taken the no-action alternative into account in its findings of fact, remedying any oversight by DHEC in that respect.

Waste Management, owner of Oakridge Landfill, has a long-term contract with Dorchester County to take the residential waste generated in the county. Based on the aforementioned population projections and subsequent waste generation for disposal, this landfill has fifteen (15) years of permitted capacity remaining and its planned expansion or replacement is expected to fulfill the requirements of the County for at the least the next twenty (20) years.

The 2009 Dorchester County Solid Waste Management includes projections for 2009 through 2028 (i.e., the twenty-year planning period) based on data published by the South Carolina Department of Administration (formerly, the South Carolina Budget and Control Board).

Moreover, Oakridge provides funding to assist Dorchester County in controlling the costs of solid waste disposal for its citizens. Dorchester County receives host fee revenues as a part of its contract with Oakridge. The County is paid one dollar per ton for out-of-county waste disposed of at Oakridge Landfill. Dorchester County is paid an additional fifty cents per ton for Charleston County waste disposed of at the Landfill. The annual total host fees paid to Dorchester County is generally in the \$300,000 to \$400,000 range. In the prior year, the host fees paid to Dorchester County exceeded \$400,000. Dorchester County uses the host fees to offset direct costs to its residents for municipal solid waste disposal.

Also, the location of Oakridge Landfill allows the vast majority of the waste generated in Dorchester County to be shipped to the Landfill in collection trucks without transfer to a larger transport truck. Therefore, Dorchester County would be significantly impacted by closure of the Landfill because the county would have to find an alternative location for disposal of its waste. If that alternative does not meet the same criteria provided by Oakridge, the County would experience a considerable reduction in revenue due to loss of the host fees and an increase in transportation costs to dispose of the county waste. Therefore, Dorchester County is substantially dependent upon the Oakridge Landfill to meet its waste disposal needs for a twenty-year period.

Charleston County

Charleston County owns and operates the Bee's Ferry Landfill, which is the only permitted Class Three landfill in Charleston County. The permitted annual disposal rate for the Class Three landfill is 316,709 tons per year. However, Bee's Ferry does not have sufficient annual disposal capacity to accept disposal of all of the Class Three waste generated in Charleston County, nor does it accept any of special waste generated in Charleston County. According to the 2014 Annual Report, 415,193 tons of Class Three waste was generated in Charleston County in FY2014.

Furthermore, in FY2010 through FY2014, the following percentages of Charleston County Class Three waste were disposed of at the Oakridge Landfill:

Reporting Year	Class Three Waste Generated in Charleston County	Charleston County Class Three Waste Disposed of at Oakridge	Percentage of Charleston County Waste Disposed of at Oakridge
FY2014	415,193	245,049	59%
FY2013	416,222	229,904	55%
FY2012	646,461	485,090	75%
FY2011	497,192	343,142	69%
FY2010	325,997	165,799	50%

Oakridge Landfill thus has been the primary Class Three disposal provider for waste generated within, and shipped outside of, Charleston County for disposal. For instance, in 2014, 93% of the Charleston County Class Three waste shipped outside of the county was disposed of at the Oakridge Landfill.¹³ Similarly, from FY2010 through FY2013, the percentage of total Class Three waste exported from Charleston County for disposal at the Landfill were as follows: 99% in FY2010 and FY2011; 97% in FY2012; and 86% in FY2013. Therefore, based on the reporting data for each of the last five years, 86% to 99% of the Class Three Waste exported from Charleston County for disposal in each year has been shipped to Oakridge Landfill for disposal.

Since the Bee's Ferry Landfill does not have sufficient annual capacity to accept the Class Three waste generated in Charleston County, the County relies on Oakridge Landfill to meet its statutory requirement to plan for solid waste disposal for a twenty-year period. In fact, even if the Bee's Ferry Landfill received an annual disposal capacity tonnage increase, Charleston County could not meet the 20-year planning requirement under S.C. Code Ann. § 44-96-80 if it relied solely on the Bee's Ferry Landfill for disposal of Class Three waste generated in the County.

¹³ The total amount of Class Three waste exported from Charleston County is calculated by deducting the amount of Charleston County Class Three waste disposed of at Bee's Ferry Landfill from the total amount of Class Three waste generated in Charleston County. The percentage of Class Three Waste exported from Charleston County that is disposed of at Oakridge Landfill is calculated by dividing the amount of Charleston County waste disposed of at Oakridge Landfill by the total amount of waste exported from Charleston County for disposal.

Coastal nevertheless claims that the Bee's Ferry Landfill has a remaining life of 33.7 years. However, to achieve that estimate of remaining life, Coastal calculated the total remaining permitted air space at a landfill divided by the permitted annual disposal rate. To the contrary, the 2014 Annual Report reflects that the remaining life of the Bee's Ferry Landfill is 16.1 years. Furthermore, while the current permitted annual disposal rate appears to give Bee's Ferry Landfill almost twenty years of capacity, this alone does not satisfy Charleston County's statutory obligation to plan for waste disposal for twenty years. The Bee's Ferry Landfill is not currently permitted to accept all of the Class Three waste generated in Charleston County. If Bee's Ferry Landfill took all of the Class Three waste generated in the County, it would have only 12.8 years of disposal capacity.

Accordingly, Charleston County is substantially dependent on Oakridge Landfill for its Class Three waste disposal needs and to meet its statutory requirement to plan for solid waste disposal for a twenty-year period.

Berkeley County

Berkeley County owns and operates a Class Three Landfill – the Berkeley County Landfill. Coastal argues that Berkeley County does not need the Oakridge Landfill because the Berkeley County Landfill has a permitted annual disposal rate of 1,000,000 tons. Coastal further claims that the Berkeley County Landfill has a remaining life of 22.7 years. However, again, the remaining life is calculated based of the total remaining permitted air space at a landfill divided by the permitted annual disposal rate. Therefore, according to the 2014 Annual Report, the remaining life of the Berkeley County Landfill would only be 4.3 years.

The 2014 Annual Report shows that 290,429 tons of Class Three waste was generated in Berkeley County and disposed of at commercial landfills in FY2014. However, although the Berkeley County Landfill has annual disposal capacity in excess of the waste generated in Berkeley County, the 2012 Berkeley County Solid Waste Management Plan provides that, "[t]he landfill is permitted to accept 1,000,000 tons of Class Three Waste each year, but currently only takes in about 175,000 tons per year. [Therefore], [i]t has more than twenty (20) years of permitted disposal capacity at the currently rate of disposal." In other words, although the Berkeley County Landfill is permitted to accept one million tons of waste per year, the County's disposal plan limits the amount of waste accepted at its landfill in order to preserve landfill space and extend the life

of the permitting landfill. It fulfills that plan by sending the remainder to be disposed of at Oakridge Landfill.

Oakridge Landfill is thus the primary disposal site for Class Three waste exported from Berkeley County. In FY2010 through FY2014, the following percentages of Berkeley County waste were disposed of at the Landfill:

Reporting Year	Class Three Waste Generated in Berkeley County	Berkeley County Class Three Waste Disposed of at Oakridge	Percentage of Berkeley County Waste Disposed of at Oakridge
FY2014	290,429	128,922	44%
FY2013	321,016	154,072	48%
FY2012	329,172	161,513	49%
FY2011	310,367	144,083	46%
FY2010	324,793	139,043	42%

From FY2010 to FY2014, more than 99 % of the Berkeley County Class Three Waste shipped outside of Berkeley County for disposal was sent to the Landfill. Moreover, based on Class Three waste data for FY2014, the remaining life of the Berkeley County Landfill would be only 13.5 years if it also accepted all of the Berkeley County waste disposed of at Oakridge Landfill. Therefore, Berkeley County is substantially dependent upon the Oakridge Landfill to meet its waste disposal needs.

Special Waste

Oakridge Landfill also accepts special waste generated in Charleston and Berkeley Counties and thereby serves a critical need in the region. The Bee's Ferry Landfill is not permitted to accept special waste. Much of the Class Three waste exported from Charleston and Berkeley Counties to Oakridge Landfill is "special waste."

Alternate Landfills for Acceptance of Waste Currently Disposed at Oakridge

Coastal submitted a summary table that identified three other Class Three landfills in this tri-county region: Pepperhill, Bee's Ferry, and Berkeley. In addition to Oakridge Landfill, Coastal's summary reflects that the Class Three landfills in the tri-county region of Dorchester, Charleston, and Berkeley Counties have a current "utilization of capacity" of 32.7%. However,

none of those three landfills could accept the waste currently being disposed of at Oakridge Landfill:

Pepperhill Landfill

Coastal argues that Pepperhill Landfill is available to accept waste currently disposed of at Oakridge Landfill. While Pepperhill Landfill is a commercial Class Three landfill under the new Landfill Regulations, the Landfill does not accept MSW. Moreover, Pepperhill Landfill has limited available capacity to accept other Class Three wastes. According to Coastal's summary table, Pepperhill Landfill has a "utilization of capacity" of 2.5% based on 53 tons of waste accepted at Oakridge Landfill and an annual capacity of 214,500 tons. Additionally, Coastal's summary table calculates the remaining life at more than 6,000 years based on the 53 tons of disposal in FY2014 and the remaining airspace of 337,631 tons. However, according to the 2014 Annual Report, the remaining life of Pepperhill would be 1.6 years if the landfill accepted waste up to its permitted annual disposal rate. Coastal's utilization of 2.5% fails to take into account the limitations on the type of waste that is permitted to be accepted at Pepperhill Landfill and the limited remaining airspace available at the landfill. Based on these limitations, Pepperhill Landfill cannot provide the tri-county region with the disposal services currently provided by Oakridge Landfill.

Bee's Ferry Landfill

As addressed above, the Bee's Ferry Landfill has a permitted annual disposal rate of 316,709 tons. The 2014 Annual Report reflects that 415,193 tons of Class Three waste was generated in Charleston County in FY2014. In the previous five years, the amount of waste generated in Charleston County ranged from 325,997 to 646,461 tons per year. As such, Charleston County's Bee's Ferry Landfill does not have sufficient annual disposal capacity to accept disposal of all of the Class Three waste generated in Charleston County.

Additionally, much of the Charleston County waste shipped to Oakridge Landfill for disposal is special waste. In the last quarter of 2014 and in the first quarter of 2013, Oakridge Landfill accepted 200,000 tons of special waste in a three-month period on one job. The Bee's Ferry Landfill is not permitted to accept special waste. Therefore, the Bee's Ferry Landfill is not capable of accepting much of the Charleston County waste currently disposed of at Oakridge Landfill.

Even if the Bee's Ferry Landfill were permitted to accept all of just the Charleston County waste, the Landfill would exhaust its remaining airspace within less than the twenty-year planning period required under the Solid Waste Act. For instance, the 2014 Annual Report shows that 151,169 tons of Class Three waste was disposed of at the Bee's Ferry Landfill, and 245,049 tons of Charleston County waste was disposed of at Oakridge Landfill. The Bee's Ferry Landfill has remaining airspace of 5,090,650 tons. Therefore, if the Bee's Ferry Landfill accepted for disposal all of the waste generated in Charleston County, the remaining life of the landfill would be only 12.8 years. Moreover, if Bee's Ferry Landfill replaced Oakridge Landfill, based on the 2014 Annual Report data of 151,169 tons of Class Three waste disposed of at the Bee's Ferry Landfill and 535,444 tons disposed of at Oakridge Landfill, Bee's Ferry would have only 7.4 years of remaining life.

In sum, the Bee's Ferry Landfill does not have a permitted annual disposal rate that would allow it to accept that waste; and like other county-owned landfills, Charleston County has no obligation to accept waste from outside of the county and may choose to preserve its landfill's airspace to meet the needs of its own citizens.

Berkeley County Landfill

Coastal argues that Berkeley County Landfill has a "utilization of capacity" of 18.8%. This calculation is based on the permitted annual disposal rate of 1,000,000 tons and the 187,726 tons of Class Three waste disposed of at the Berkeley County Landfill in FY2014. However, as explained above, although the Berkeley County Landfill has an annual disposal rate that could possibly allow the Landfill to accept much of the waste currently disposed of at the Oakridge Landfill, Berkeley County has chosen to limit the amount of waste accepted at the Berkeley County Landfill in order to extend the life of its landfill. Nevertheless, even if the Berkeley County Landfill were willing to accept all of the waste currently disposed of at Oakridge Landfill or only the Berkeley County waste shipped to Oakridge Landfill for disposal, the Berkeley County Landfill would exhaust its remaining airspace in less than the twenty-year planning period required under the Solid Waste Act. Accordingly to the 2014 Annual Report, Berkeley County Landfill accepted 187,726 tons of Class Three waste. An additional 128,922 tons of Berkeley County waste was thus disposed of at the Oakridge Landfill in FY2014. The Berkeley County Landfill has remaining airspace of 4,261,487 tons. Therefore, if the Berkeley County Landfill accepted for disposal all of the waste generated in Berkeley County, the remaining life of the landfill would be

only 13.5 years and would not be sufficient to meet the 20-year planning obligation under the Solid Waste Act.

Additionally, if the 187,726 tons of Class Three waste disposed of at the Berkeley County Landfill were combined with the 535,444 tons disposed of at Oakridge Landfill based on the 2014 Annual Report, the Berkeley County Landfill would have only 5.9 years of remaining life.¹⁴ Moreover, Berkeley County limits the Class Three waste disposed of in the county-owned landfill "to reserve permitted airspace for waste within Berkeley County." Therefore, despite the 18.8% utilization of capacity according to Coastal's summary table, the Berkeley County Landfill cannot be relied on to provide the disposal services currently provided by Oakridge Landfill.

Other Landfills within Oakridge Landfill's 75-mile Planning Area

Coastal also argues that the proposed expansion is not needed because other landfills within Oakridge Landfill's 75-mile planning area could provide the disposal services currently provided by Oakridge Landfill. The summary table prepared by Coastal identifies the following landfills within Oakridge Landfill's planning area, but outside of the tri-county (Dorchester /Charleston/Berkeley) region:

- Horry County SWA Landfill;
- Georgetown County Landfill;
- Hickory Hill Landfill;
- Northeast Landfill;
- Richland Landfill; and
- Lee County Landfill.

The Horry County SWA Landfill is outside of the 75-mile planning area for Oakridge Landfill. However, even if the Horry County SWA Landfill were in the 75-mile planning area, the Landfill does not provide an alternative disposal option for the current customers of Oakridge Landfill. In the 2011 Horry County Solid Waste Management Plan, the County states the following policy regarding disposal of out-of-county waste at the Horry County SWA Landfill:

The HCSWA serves the solid waste need of the citizens of Horry County. Only minor amounts of municipal solid waste are imported each year from Georgetown

¹⁴ The Court recognizes that this and the subsequent arguments presume that all of the waste would go to one place instead of multiple places, should Oakridge close under the no-action alternative, and that there is a possibility that the waste could be disposed of at multiple places within the 75-mile planning area. However, Coastal did not sufficiently establish the feasibility of this alternative.

County and exported to Georgetown County in a cooperative effort with Georgetown County. During Fiscal Year 2010 only 104 tons of MSW were imported from Georgetown County, with 11 tons exported from Horry County to Georgetown.

The 2005 Georgetown County Solid Waste Management Plan contains a similar provision:

Georgetown County serves the solid waste needs of the citizens of Georgetown County. Only minor amounts of waste are imported from outside the county and only as a cooperative effort with other local governments.

Georgetown County currently has an inter-governmental agreement with Horry County to import and/or export waste on an as needed basis. Additional inter-governmental agreements may be considered in the future, if considered to be in the best interest of Georgetown County.

The disposal data for the last five reporting years confirms that both Horry County and Georgetown County limit the use of the county-owned landfills, as stated in their solid waste management plans. Therefore, neither the Horry County SWA Landfill nor the Georgetown County Landfill would be available to meet the disposal needs of Oakridge's customers if the proposed expansion is not permitted. Thus, even if the waste going to Oakridge was divided up and sent to multiple locations, restrictive disposal policies in counties such as Horry and Georgetown would also limit possible disposal locations, regardless of disposal capacity.

The Hickory Hill Landfill is located in Jasper County. According to the 2014 Annual Report, the Hickory Hill Landfill has a permitted annual disposal rate of 302,000 tons and remaining airspace of 2,083,899 tons. The Hickory Hill Landfill does not have the permitted capacity to accept all of the Class Three waste disposed of at Oakridge Landfill. Moreover, even if the permitted annual disposal rate for Hickory Hill Landfill were increased to allow additional yearly disposal, the Hickory Hill Landfill does not have the airspace capacity to take the waste currently disposed of at Oakridge Landfill. Based on the 535,444 tons of waste disposed of at Oakridge Landfill in FY2014, which was the lowest in five years, and the 177,410 tons of waste disposed of at Hickory Hill Landfill in FY2014, the remaining life of Hickory Hill Landfill would be 2.9 years if it also accepted the Class Three waste disposed of at Oakridge Landfill. Indeed, the Beaufort County administrator has been in discussion with Waste Management regarding the company's ability to meet the County's disposal needs at Hickory Hill Landfill, considering there are only twelve years of remaining life at the current rate of disposal.

The Northeast Landfill is located in Richland County and has a permitted annual capacity of 529,600 tons. In FY2014, the Northeast Landfill accepted 144,625 tons of Class Three waste for disposal. This was the lowest annual disposal total for the Northeast Landfill in five years. Therefore, even considering the annual disposal for FY2014 for the Northeast Landfill and Oakridge Landfill, which was the lowest annual disposal in five years for both landfills, the Northeast Landfill does not have an annual disposal rate sufficient to accept the waste currently disposed of at Oakridge Landfill.

Similarly, the Richland Landfill has been operating within 100,000 tons per year or less of its annual disposal rate for the last five reporting years. The Richland Landfill has a permitted annual disposal rate of 988,209. In the last five reporting years, the total annual disposal at the Landfill has ranged from 888,983 to 956,061 tons per year. Therefore, the Richland Landfill has no available capacity to accept waste currently disposed of at Oakridge Landfill.

Lee County Landfill

Of the landfills identified by Coastal as being within Oakridge Landfill's 75-mile planning area, only the Lee County Landfill has the permitted annual disposal rate and remaining airspace to accept waste currently disposed of at Oakridge Landfill. While the Lee County Landfill has sufficient permitting capacity to accept waste currently sent to Oakridge Landfill, the cost to transport that waste to the Lee County Landfill would substantially and unreasonably increase the total cost for disposal for Oakridge Landfill's current customers.

The Lee County Landfill is located close to the perimeter of the 75-mile planning radius for Oakridge Landfill itself. However, certain areas of Charleston County that Oakridge Landfill serves are more than seventy-five miles from the Lee County Landfill. In fact, the majority of waste transported to Oakridge Landfill is outside of a 75-mile radius of the Lee County Landfill. For instance, the average travel distance from the North Charleston transfer station to the Lee County Landfill is 125 miles; from the North Charleston station to Oakridge is twenty-five miles; and from the station to Goose Creek, where the majority of the Berkeley County waste is generated, to Lee County is 105 miles.

Thus, should Oakridge Landfill have to close, the transportation of waste from Charleston County to the Lee County Landfill would require consolidation at a transfer station of all of the waste for hauling via tractor-trailer. Also, since the route from Charleston County to the Lee County Landfill would be longer than the route from Charleston County to the Oakridge Landfill,

transportation of that waste to the Lee County Landfill would require more trips and more trucks than required for transportation to Oakridge Landfill.

For the Charleston County waste currently disposed of at Oakridge Landfill, approximately 150,000 tons of this waste is consolidated at a transfer station in North Charleston and then shipped to Oakridge Landfill on tractor-trailer trucks. The remaining waste from Charleston County is transported directly to Oakridge Landfill on dump trucks. The Berkeley County waste disposed of at Oakridge Landfill is primarily special waste and therefore transported on dump trucks. In Dorchester County, much of the municipal solid waste is transported directly to Oakridge Landfill on residential collection trucks without consolidation at a transfer station. Colleton County also uses Oakridge Landfill and transports some waste through a transfer station in Green Pond within Colleton County and hauls other volumes directly to Oakridge on short trucks.

Taking all of these additional costs into consideration, it would cost approximately an **additional \$10 million per year** for Berkeley, Charleston, Colleton, Dorchester and Orangeburg Counties to transport their wastes to the Lee County Landfill instead of Oakridge Landfill.¹⁵

Decrease in Statewide Disposal Capacity

Oakridge's parent company, Waste Management, had experienced substantial difficulty and made several unsuccessful attempts to permit a replacement facility for its Palmetto Landfill, located in Spartanburg County. The Palmetto Landfill has a permitted annual disposal rate of 1,200,000 tons, but only has remaining a total remaining airspace capacity of 179,849 tons. If the Proposed Expansion for Oakridge Landfill is not approved and the Palmetto Landfill is unable to replicate at another site, which has been the situation to date, the permitted annual disposal rate for Class Three Landfills in South Carolina will be reduced from 10,643,539 tons to 8,299,539 tons. Taking into consideration the decision of Berkeley County to limit its annual disposal to

¹⁵ For Dorchester County, the additional transportation to the Lee County Landfill would result in an approximate \$30.00-per-ton increase in costs. Based on a Class Three waste generation rate of approximately 100,000 tons per year, the increased costs would be approximately \$3 million. For waste shipped from counties other than Dorchester County, a conservative estimate of the increased costs would be \$14 per ton. These calculations are based on an average mileage from Charleston County's transfer station to Oakridge of twenty-seven miles. Communities to the north and east of Charleston, such as Mount Pleasant, North Charleston, Isle of Palms, and Sullivan's Island, currently direct their waste to the transfer station in North Charleston. Communities around the Bee's Ferry Landfill currently haul waste directly to the Bee's Ferry Landfill. For the special waste currently shipped to Oakridge Landfill, that waste is required to be shipped on short trucks and would not be consolidated on tractor-trailers prior to shipment to the Lee County Landfill. Additionally, the special waste currently transported to Oakridge Landfill would be shipped to an alternate site on dump trucks and could not be combined onto tractor-trailer trucks.

approximately 175,000 tons per year, the available annual disposal is further reduced by approximately 800,000 tons to approximately 7,499,539 tons per year. Additionally, there are other government-owned Class Three landfills in the state that accept only waste generated within their counties.

The new formula for determining the annual disposal rate for Class Three Landfills under the 2009 DON Regulation was intended to reduce the statewide annual disposal capacity down to ten-to-eleven million tons per year, or roughly double the statewide generation rate. Accordingly, with the loss of both Oakridge Landfill and Palmetto Landfill, and considering the decision of certain county-owned landfills to limit the amount and origin of waste accepted for disposal, the available statewide annual disposal capacity would be substantially less than double the statewide generation rate.

CONCLUSIONS OF LAW

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

General Conclusions

The ALC has jurisdiction over this case pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-600 et seq. (APA); 44-1-60; 48-1-10 et seq. (2008 & Supp. 2014) (Pollution Control Act); and S.C. Code Ann. § 48-39-10 et seq. (Coastal Tidelands and Wetlands Act).

In reviewing this matter, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. *See* S.C. Code Ann. § 1-23-600(B) (Supp. 2014); *Brown v. S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); *see also Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (2004). Therefore, as the trier of fact, the Court may give testimony, including an expert's testimony, the weight that he or she determines it deserves. *Florence Cnty. Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992), and may accept the testimony of one expert over that of another. *S.C. Cable Television Ass'n v. S. Bell Te. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992).

The proper standard of proof to be applied by the ALC is a "preponderance of the evidence." *Anonymous (M-156-90) v. State Bd. Of Med. Exam'rs*, 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998); *Nat'l Health Corp. v. Dep't of Health and Envtl. Control*, 298 S.C. 373, 380

S.E.2d 841 (Ct. App. 1989). Furthermore, the burden of proof is upon the party asserting the affirmative of an issue. *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Therefore, Coastal, as Petitioner, bears the burden of proving that the agency decision was in error under the statutory and regulatory standards. *Id.* Here, Coastal failed to demonstrate by a preponderance of the evidence that the proposed landfill expansion is inconsistent with the requirements of Reg. 61-101 and the Policies and Procedures of the Coastal Zone Management Program Document and Refinements.

Standing

South Carolina law provides “three ways in which a party can acquire standing: ‘(1) by statute; (2) through what is called “constitutional standing”; and (3) under the public importance exception.’” *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). “When no statute confers standing, the elements of constitutional standing must be met.” *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court stated the three-prong Constitutional standing test and held that the plaintiff bears the burden of establishing each prong of this test. 504 U.S. at 561 (citations omitted). The Court further explained that this burden increases with each stage of litigation such that “at the final stage, those facts (if controverted) must be ‘supported adequately by the evidence adduced at trial.’” *Id.* (citation omitted). According to the Court in *Lujan*, in order to establish standing three requirements must be satisfied:

[(1) T]he plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) ‘actual or imminent, not conjectural or hypothetical’. . . [; (2) T]here must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court[; and (3) I]t must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

504 U.S. at 560-61 (1992) (internal quotations and citations omitted) (*quoted in Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)); *see also Town of Arcadia Lakes v. DHEC*, 404 S.C. 515, 845 S.E.2d 385 (2014)); *Smiley v. SCDHEC*, 374 S.C. 326, 328, 649 S.E.2d 31, 32-33 (2007)). Additionally, evidence of prior general harm from similar activities does not satisfy the requirement of a threat of “imminent and concrete harm” to a party challenging governmental action “because it relates to past injury rather

than imminent future injury that is sought to be enjoined.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009).

Recently, the South Carolina Supreme Court clarified that standing in a case cannot be based on potential harms to the community as a whole. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846 (2014). Rather, an organization has associational standing “if one or more of its members will suffer **an individual injury** by virtue of the contested act.” *Id.* at 76, citing *Sea Pines*, 345 S.C. at 600-01, 550 S.E.2d at 291 (emphasis added). Therefore, the three-part test for associational standing requires that an association’s members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)); see also *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 59 (Ct.App.2001) (applying the test). Accordingly, to possess standing, either the Petitioner alone must have suffered a concrete, particularized injury or its members must have suffered such an injury, and the other elements of associational standing must be satisfied. *Id.*

As the party seeking to establish standing, Petitioner bears the burden of proof at trial to present such evidence. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (citing *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm’n*, 336 S.C. 174, 519 S.E.2d 567 (1999)). Furthermore, Coastal is required to demonstrate a particularized harm, with “individual or specific damages in addition to that suffered by the public.” *Carnival, supra*. In this case, Coastal has failed to demonstrate by a preponderance of the evidence injury to any of its members by the proposed expansion.

Here, Petitioner failed to demonstrate a negative impact to the downstream waterbodies – Halfway Gut Creek, Four Holes Swamp Creek, and the Edisto River. For instance, Coastal failed to present sufficient evidence, other than concern and speculation, that the placement of fill in fourteen acres of wetlands located at the headwaters of Halfway Gut Creek near the confluence of Halfway Gut Creek and Four Hole Swamp Creek would negatively impact water quality in the Edisto River. Moreover, any alleged impact to the Edisto River is an impact or injury suffered by the general public and is not unique to Coastal. Petitioner’s witnesses’ generalized concerns for the project do not rise to the level of injury sufficient to demonstrate standing to proceed with this

contested case. Specifically, Howard Bridgeman testified that the operation of the Landfill – which includes the prior filling of wetlands – has not affected his use and enjoyment of the waterbodies in the area of the Landfill. Moreover, Mr. Bridgeman's lay concerns about faster runoff and the potential of siltation from the proposed expansion making it harder to swim, paddle, fish, and enjoy views of the waterways are merely speculative and conjectural, as are his concerns about the possibility of chemicals from the landfill leaking through the liner and contaminating the Edisto River.¹⁶ Petitioner also failed to demonstrate a negative impact to the Beidler Forest and the Four Hole Swamp.

Having failed to demonstrate a negative impact to the use and enjoyment of resources by Petitioner's members, Petitioner has failed to establish standing sufficient to invoke this Court's jurisdiction. But even if Petitioner had established sufficient standing, the Court would still have granted Oakridge the Water Quality Certification and Consistency Certification for the reasons discussed below.

Background Statutory and Regulatory Standards

The Corps regulates the placement of fill material in the fourteen acres of freshwater wetlands for expansion of the Landfill, under Sections 401 and 404 of the Clean Water Act. 33 U.S.C. § 1344. DHEC regulates this activity under the Coastal Tidelands and Wetlands Act, S.C. Code Ann. §§ 48-39-10 et seq. and the S. C. Pollution Control Act S.C. Code Ann. §§ 48-1-10 et seq.; DHEC is required to certify all state and federal permits for consistency with the Coastal Zone Management Program (CZMP). Thus, the Corps' Section 404 permit triggered the requirement of a Consistency Certification pursuant to S.C. Code Ann. § 48-39-80(B)(11) (2008).

The Corps Section 404 permit also triggers the requirement for a Water Quality Certification from DHEC. In fulfilling its obligation to the Corps under Section 401 of the Clean Water Act, DHEC applies Reg. 61-101, which governs water quality certifications. And, in determining whether there may be water quality impacts associated with the proposed expansion,

¹⁶ The fact that there is no evidence of past or present contamination by Oakridge of the downstream water bodies is a distinction between the speculative, conjectural harm alleged in this case and the harm alleged by members of the environmental group in *Laidlaw, supra*. In that case, members complained of concerns about the potential of pollutants in the water that would inhibit aesthetic and recreational activities. However, in that case, unlike here, "Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed." *Laidlaw*, 528 U.S. at 184. The Court thus found their fears reasonable based on Laidlaw's "continuous and pervasive illegal discharges of pollutants into [the river]." *Id.* Here, there is no evidence of any contamination by Oakridge of the downstream water bodies, but rather evidence that they have taken the reasonable steps necessary to prevent such contamination and siltation.

DHEC considers Reg. 61-68 (Water Classifications and Standards) and Reg. 61-69 (Classified Waters). In addition, Reg. 61-101 specifically incorporates by reference "the Federal Clean Water Act, 33 U.S.C. 1341, and regulations promulgated thereunder by the U.S. Environmental Protection Agency." Reg. 61-101(F)(1). This reference is to 40 C.F.R. Part 230, "Guidelines for Specification of Disposal Site for Dredged and or Fill Material."

Part IX, Section B of Chapter III of the CZMP (CZMP-62 to 63, Section (B)) also applies to "Solid Waste Disposal." Subsection (1)(b) under this section reads in full as follows:

b) The location of solid waste disposal or landfill sites in salt, brackish or freshwater wetlands will not be approved unless **no alternative exists** and an overwhelming public need can be demonstrated. Wherever possible, solid waste disposal sites must be located in appropriate upland sites, **where they will not pollute surface waters, coastal waters and ground waters**. Site-specific evaluations are made in each case by the Department of Health and Environmental Control to determine the suitability of the site; considering variables such as soil permeability, the characteristics of the leached refuse, and the distance from groundwater.

(emphasis added).¹⁷ This policy in CZMP-63, Section (B)(1)(b) is based upon a presumption that solid waste disposal sites will "pollute surface waters, coastal waters and ground waters." The purpose of the "[s]ite-specific evaluations" required under this policy is further explained in the Findings for Section III-B, which describes solid waste disposal facilities as "dump sites":

In addition to their direct loss from filling with solid wastes, wetland and lower flood plain dump sites have high potentials for causing water pollution. In these areas there is a high rate of leaching of toxic chemicals, nutrient chemicals, and dissolved organic matter from the town dump into the groundwater, combined with the wash-off of the same pollutants during rainstorms and flooding. Coastal waters may be adversely affected by the downstream flow of polluted water from dump or landfill sites located far inland on coast tributaries.¹⁸

¹⁷ According to S.C. Code Ann. § 44-96-330(B)(4) (2002), "landfills, at a minimum, shall not be located in the following locations: (d) within proximity of airports or wetlands **to be determined by the department by regulation**." (emphasis added). In this case, DHEC has addressed this issue in Part IX, Section (B)(1)(b) in Chapter III of the CZMP, which is discussed above. DHEC has clearly allowed for possibility of the construction or expansion of solid waste landfills in wetlands. Had the General Assembly or DHEC wished to prevent such construction or expansion *in toto*, either could have done so. However, the General Assembly deferred to DHEC to promulgate regulations as to the issue, and DHEC, in turn, allowed for the possibility of construction or expansion of solid waste landfills where "no alternative exists and an overwhelming public need can be demonstrated," and "[w]herever possible," they can be sited "where they will not pollute surface waters, coastal waters and ground waters." CZMP, Chapter III, Part IX, Section (B)(1)(b).

¹⁸ CZMP, pp. III-62-63 (quoting Clark, J. R.: COASTAL ECOSYSTEM MANAGEMENT. A TECHNICAL MANUAL FOR THE CONSERVATION OF COASTAL ZONE RESOURCES (1977)).

This finding is based on landfill design and operating practices prior to the enactment of the Solid Waste Act that had allowed direct "filling with solid wastes" in wetlands and "downstream flow of polluted water from dump or landfill sites." These "[s]ite-specific evaluations" identified in the Policies for solid waste disposal in the coastal zone are now governed by the Solid Waste Act and regulations promulgated thereunder. Design and siting criteria set forth in these regulations directly address and prevent the environmental harms detailed in Section III-B of the CZMP.

This contested case also warrants consideration of waste disposal policies and requirements of the Solid Waste Act, codified at S.C. Code Ann. § 44-96-10, et seq. (2002) and which governs landfills in South Carolina. The Solid Waste Act grants DHEC exclusive authority to determine need for a new landfill or expansion of an existing landfill pursuant to regulations promulgated under Section 44-96-290(E). The South Carolina Supreme Court has recognized that "there is no doubt the express language of the [Solid Waste Act] provides for DHEC's exclusive authority in the area of permitting" *Sandlands*, 394 S.C. at 463, 716 S.E.2d at 286 (citing Sections 44-96-290(E) and 44-96-260(2)). By letter dated January 17, 2012, DHEC issued Oakridge Landfill a final determination of need for the Proposed Expansion pursuant to the DON Regulation. This determination of need was not challenged and is administratively final.

Importantly, in enacting the Solid Waste Act, the General Assembly recognized the vital need to establish a state-wide program of solid waste management which would be protective of human health and the environment and also ensure adequate disposal capacity to meet the needs of a growing population. When the Solid Waste Act was enacted in 1991, the General Assembly stated findings and purposes directly addressing the projected shortage of landfill disposal capacity and a further reduction in that disposal capacity resulting from the closure of existing landfills that could not meet the new federally-mandated technical requirements for municipal solid waste landfills. Specifically, in Section 44-96-20 of the Solid Waste Act, the General Assembly includes the following findings:

(6) Most of the permitted landfill capacity will be used within the next ten years. Twenty-three of forty-six counties have ten years or less of landfill space remaining;

(7) Siting of solid waste facilities is becoming increasingly difficult due to the opposition of local residents;

(8) The costs of solid waste management will increase significantly due to decreased landfill capacity and more stringent federal requirements for solid waste

management facilities. More stringent federal and state requirements may also force a number of existing solid waste landfills to close;

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(10) The economic growth and population growth of our State have required increased industrial production which, together with related commercial and agricultural operations to meet our needs, have resulted in increased amounts of discarded materials.

S.C. Code Ann. § 44-96-20(A)(6), (7), (8), (10) (2002). Similarly, in Section 44-96-240(A) of the Act, the General Assembly made the following findings:

(1) South Carolina is generating increasingly large volumes of solid waste which may pose a threat to human health and safety and to the environment if not properly managed or if managed in facilities inadequately designed and operated to ensure protection of human health and safety and the environment.

(2) Many communities are managing solid waste in existing facilities not designed and operated with technology and engineering controls that are adequately protective of the environment.

(3) A number of new solid waste management facilities will have to be established in coming years to replace older facilities as they reach capacity or as they are required to close because they cannot meet new state or federal regulatory requirements.

(4) It is the policy of the State of South Carolina to protect human health and safety and the environment from the effects of improper or inadequate solid waste management.

(5) Legislation is needed to establish an adequate regulatory framework for the siting, design, construction, operation, and closure of solid waste management facilities in order to provide protection for human health and safety and for the environment.

(6) A regional approach to the establishment of solid waste management facilities should be strongly encouraged in order to provide solid waste management services in the most efficient and cost-effective manner and to minimize any threat to human health and safety or to the environment.

Id. § 44-96-240(A)(1)-(6).¹⁹ The General Assembly further stated in Section 44-96-50(A) that “[i]t is the policy of this State that the methods of management of solid waste shall protect public

¹⁹ These findings are consistent with a 1988 EPA report to Congress entitled, “A Report to Congress: Solid Waste Disposal in the United States.” In the preamble to the 1991 Regulations, the EPA included the following summary of certain results of this study:

health, safety, and the environment by employing the best available technology which is economically feasible for the control of pollution and the release of hazardous constituents into the environment.”

The General Assembly recognized that the new more stringent federal regulations would require the closure of a number of existing landfills and that solid waste disposal could no longer be managed as a fragmented system with local government primarily responsible for solid waste management disposal with only general regulatory oversight by the State. The express provisions of the Solid Waste Act clearly manifest a legislative intent to establish a comprehensive solid waste management program on a statewide level. *See, e.g.,* Section 44-96-20(A)(13) (“A coordinated statewide solid waste management program is needed to protect public health and safety, protect and preserve the quality of the environment, and conserve and recycle natural resources.”). In addition to the legislative mandate to establish a statewide solid waste management program, the General Assembly authorized DHEC to “encourage counties and municipalities to pursue a regional approach to solid waste management within a common geographical area.” S.C. Code Ann. § 44-96-260(10). “There is no doubt the [Solid Waste Act] favors regionalism.” *Sandlands*, 394 S.C. at 464-65, 716 S.E.2d at 287 (citation omitted).²⁰

The results of this study confirmed that the United States is in the midst of a municipal solid waste disposal crisis. EPA's most recent data show that in 1988 the nation generated nearly 180 million tons of municipal solid waste and that this quantity would likely grow to 216 million tons by the year 2000. This growing volume of waste is coupled with a steadily decreasing availability of disposal capacity. In a 1986 EPA survey (Ref. 2), 45 % of the municipal solid waste landfill owners/operators reported that their landfills would reach capacity by 1991. Today's disposal capacity crisis is further compounded by the difficulty in siting new solid waste management facilities.

56 Fed. Reg. 50978, 50980 (Oct. 9, 1991).

²⁰ *See also* Section 44-96-260(10) (authorizing DHEC to promote “a regional approach to solid waste management within a common geographical area”); *id.* § 44-96-20(B)(14) (stating that a purpose of the Act is to “encourage local governments to pursue a regional approach to solid waste management”); *id.* § 44-96-50(C) (“It is the policy of this State to encourage a regional approach to solid waste management.”); *id.* § 44-96-50(A)(12) (requiring the state solid waste management plan to include “procedures for encouraging and ensuring cooperative efforts in solid waste management by the State, local governments, and private industry, including a description of the means by which the State may encourage local governments to pursue a regional approach to solid waste management”); *id.* § 44-96-270 (requiring DHEC to conduct a study “on ways to encourage counties and municipalities to pursue a regional approach to solid waste management, including incentives to encourage the siting, construction, and operation of regional solid waste management facilities”); *id.* § 44-96-240(6) (2002) (“A regional approach to the establishment of solid waste management facilities should be strongly encouraged in order to provide solid waste management services in the most efficient and cost-effective manner and to minimize any threat to human health and safety or to the environment.”).

DHEC has promoted the regionalization of landfills through regulations promulgated pursuant to Section 44-96-290(E). Section 44-96-290(E) 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." Significantly, Section 44-96-290(E) further requires DHEC to promulgate a regulation for demonstrating need for new solid waste management facilities or expansion of existing facilities. In promulgating the DON Regulation pursuant to Section 44-96-290(E), DHEC has established a structure and criteria for determining need for new landfills and expansion of existing landfills, which promote the goals of the Solid Waste Act to ensure adequate disposal capacity throughout the state and to promote regionalization of landfills.

In 2000, DHEC promulgated the original Demonstration of Need Regulation (2000 DON Regulation), which established the criteria for the demonstration of need for new or expanded solid waste management facilities, including municipal solid waste landfills (MSW Landfills). 24 S.C. State Register, Final Regs. 45 (Jun. 23, 2000).²¹ The preamble to the 2000 DON Regulation stated the following purpose for promulgating the Regulation:

This regulation is needed so that solid waste disposal capacity is managed to meet the long-term disposal needs of the State while protecting the State's natural resources. This regulation is reasonable because it limits the total number of landfills in the State, while at the same time ensuring there is more than adequate capacity to meet the State's disposal needs. **The regulation encourages competition within planning area, and encourages the establishment of regional landfills.**

Id. Final Regs. 50 (emphasis added). The 2000 DON Regulation established a 75-mile radius planning area for the following facilities: municipal solid waste landfills, industrial landfills, municipal solid waste incinerators, and industrial incinerators. 25A S.C. Code Ann. Regs. 61-107.17.B.6.a (Supp. 2008) (prior to 2009 amendment). As stated in the preamble, the DON Regulation seeks to strike the appropriate balance of limiting the total number of landfills through a planning area concept framework while ensuring that the siting of a sufficient number of landfills within each planning area promotes a level of competition that controls the costs of disposal.

²¹ Prior to promulgation of the 2000 DON Regulation, DHEC had determined need for new solid waste management facilities under Reg. 61-100, but this regulation was found to be unconstitutional and was repealed by the General Assembly in 1996. See *Northeast Sanitary Landfill, Inc. v. S.C. Dep't of Health and Envtl. Control*, 843 F.Supp. 100, 110 (D.S.C. 1992); *Ballenger v. S.C. Dep't of Health and Envtl. Control*, 331 S.C. 247, 257, 500 S.E.2d 183, 188 (Ct. App. 1998).

Under the DON Regulation, need for a new solid waste management facility is demonstrated when there are fewer than two facilities of that type within the applicable planning area around the proposed landfill. 25A S.C. Code Ann. Regs. 61-107.17.D.3.a (Supp. 2008) (prior to 2009 amendment). Additionally, need for more than two landfills in a planning area is demonstrated if the existing facilities in the planning area do not have capacity to meet the disposal needs for the area. *Id.* In 2009, the General Assembly approved revisions to the DON Regulation (2009 DON Regulation). 33 S.C. State Register, Final Regs. 119-32 (Jun. 26, 2009). In promulgating the 2009 DON Regulation, DHEC maintained the planning area framework as the predominant means of ensuring a regional approach to solid waste disposal. 25A S.C. Code Ann. Regs. 61-107.17.C.3 (Supp. 2009). In the preamble, DHEC explained that “[d]emonstration-of-need and planning areas ensure **fewer, better managed solid waste management facilities** are placed throughout the State to ensure that each county has the facilities to meet its needs without an overabundance of similar facilities.” 33 S.C. State Register, Final Regulations 132 (June 26, 2009) (emphasis added). Finally, as part of this “regionalization of landfills,” the General Assembly further recognized the role that private industry would play in providing the citizens of the State with safe and cost-effective solid waste disposal. A stated purpose of the Solid Waste Act is to “encourage local governments to utilize all means reasonably available to promote efficient and proper methods of managing solid waste, which may include contracting with private entities to provide management services or operate management facilities on behalf of the local government, when it is cost effective to do so.” S.C. Code Ann. § 44-96-20(B)(7); *see also* S.C. Code Ann. § 44-96-50(A)(12) (requiring the state solid waste management plan to include “procedures for encouraging and ensuring cooperative efforts in solid waste management by the State, local governments, and private industry, including a description of the means by which the State may encourage local governments to pursue a regional approach to solid waste management”).

Solid Waste Disposal

Pursuant to S.C. Code Ann. § 44-96-80(A) (2002), all counties in South Carolina must estimate the amount of solid waste that will be generated over twenty years and to plan for disposal of that amount. Thus, the selection in this case of a twenty-year planning period and design for expansion to provide twenty years of capacity was not only reasonable, but statutorily appropriate. The DON Regulation, in addition to determining the number of permitted landfills in the State,

establishes the criteria for determining the annual disposal rate for those landfills. The 2009 DON Regulation drastically reduced the total annual disposal rate for permitted landfills in the State. The preamble to the 2009 DON Regulation stated the following purpose for promulgating the amended regulation:

[This amendment] revises the size of the planning areas around some solid waste facilities, adds new criteria for determining the disposal rate limit for Class Two and Class Three landfills, and determines when disposal rate increases may be requested. It redefines "non-commercial" and "commercial" solid waste management facilities. These changes will help reduce the number of potential locations for new solid waste facilities and help to reduce and install a cap on the over-all allowable disposal rate in the State while ensuring an adequate number of facilities throughout the State to meet disposal needs.

33 S.C. Reporter, Final Regs. 119 (Jun. 26, 2009).

Under the 2009 DON Regulation, the planning area for Class Three Landfills (which includes former MSW landfills) remains a 75-mile radius of the proposed facility. Reg. 61-107.17.C.3. However, the calculation of annual disposal rate for permitted facilities is significantly reduced under the 2009 DON Regulation. The reformulation of annual disposal capacity rates took the potential capacity from approximately fifty to sixty million tons per year to approximately ten to eleven million tons. Under the 2009 DON Regulations, increases in annual disposal rates are only allowed if the actual waste generated in the State increase and only if a given facility is already close to the maximum. Reg. 61-107.17.D.3.c. Increases are allowed incrementally up to 150,000 tons. Reg. 61-107.17.D.3.c.2. This substantial decrease in the total state-wide annual disposal capacity rate creates a presumption of need for, and reliance upon, the continued operation of the fewer, existing landfills. The 2009 DON Regulation recognizes that need through the express provision for a variance for expansion or replacement of existing landfills. Reg. 61-107.17.D.6.

Nevertheless, Berkeley County and other counties that own and operate landfills may restrict the waste received at a county-owned landfill. The courts have consistently held that a state or local government's operation of a landfill is not subject to Commerce Clause scrutiny for failure to accept waste from non-residents. "If a state or local government is a market participant in a business, it may pursue its own economic interests free from the constraints imposed by the Commerce Clause within the market in which it is a participant." *Red River Serv. Corp. v. City of Minot*, 146 F.3d 583, 586 (8th Cir. 1998) (citing *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984)); see also *Nat'l Solid Waste Mgmt. Ass'n v. Williams*, 146 F.3d 595, 599

(8th Cir. 1998) (holding that a state or local government acting as a market participant has “the right to choose its own trading partners without regard to whether its choices discriminate against out-of-state businesses or favor its own citizens”).

Finally, Oakridge Landfill accepts “special waste” from Charleston and Berkeley Counties. Indeed, much of the Class Three waste exported from Charleston and Berkeley Counties to Oakridge Landfill is special waste. Section 44-96-390(A) of the Solid Waste Act defines special waste as “nonresidential or commercial solid wastes, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at municipal solid waste landfills.” Special wastes can only be accepted for disposal at a Class Three landfill upon approval of a “Special Wastes Analysis and Implementation Plan.” *Id.* § 44-96-390; 8 S.C. Code Ann. Regs. 61-107.19, Part IV.C.258.20 (2012).

Water Quality Certification

An applicant for a federal permit that might result in any discharge into navigable waters of the United States is required under the federal Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2014), to obtain a Water Quality Certification from the state in which the discharge is or will be located. 33 U.S.C. § 1341 (2014). In South Carolina, the regulations that establish the policies and procedures for implementing Section 401 requirements are codified at 8 S.C. Code Ann. Regs. 61-101 (2012). Additionally, 8 S.C. Code Ann. Regs. 61-101(F)(3) (2012) states the following:

In assessing the water quality impacts of the project, the Department will address and consider the following factors:

- (a) Whether the activity is water dependent and the intended purpose of the activity;
- (b) Whether there are feasible alternatives to the activity;
- (c) All potential water quality impacts of the project, both direct and indirect, over the life of the project including:
 - (1) Impact on existing and classified water uses;
 - (2) Physical, chemical, and biological impacts, including cumulative impacts;
 - (3) The effect on circulation patterns and water movement;
 - (4) The cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others. (emphasis added).

Subsections 5(a) and (b) go on to state that “[c]ertification will be denied if:

- (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired; or
- (b) if there is a feasible alternative to the activity, which reduces adverse consequence on water quality and classified uses.

Moreover, the applicant must provide “reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” *Id.* 61-101(A)(4). Also, the Department “may require water quality monitoring data” to assess the project. *Id.* 61-101(C)(2). Moreover, a certification will also not be issued “unless the Department is assured appropriate and practical steps . . . will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.” *Id.* 61-101(F)(6).

There is no definition of “feasible” within the context of Reg. 61-101 governing the Water Quality Certification. However, the interpretation by an agency of its own regulation is given great deference. *Earl v. HTH Assocs., Inc./Ace USA Ins. Co. of N. Am.*, 368 S.C. 76, 81, 627 S.E.2d 760, 762 (Ct. App. 2006). *Murphy v. SCDHEC and Dist. 5 of Lexington and Richland Cntys.*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012). Based upon the vagueness of the regulation, which arises from a lack of regulatory definition of the term “feasible alternative,” I look to the South Carolina Supreme Court’s adoption of a definition for this phrase in *Murphy, supra*. In that case, the Court affirmed the lower court’s determination that the meaning of “feasible,” when used in the context of a Section 401 Water Quality Certification, is equivalent to “practicable,” a term utilized by the Corps of Engineers and by the EPA in its 404(b)(1) Guidelines. 396 S.C. at 643, 723 S.E.2d at 196.

For purposes of review of the Water Quality Certification, I conclude that the applicant satisfied the requirement to consider feasible alternatives and appropriately rejected the alternatives that were not practicable, that did not satisfy the project purpose, and/or that had greater environmental impact than the preferred alternative. Additionally, Coastal has failed to demonstrate by a preponderance of the evidence that the proposed expansion will negatively impact water quality in Halfway Gut Creek, Four Hole Swamp Creek, Mellard Lake, the Four Hole Swamp, or the Edisto River. Coastal also failed to demonstrate that the Beidler Forest will be negatively impacted by the proposed expansion. In so finding, I am persuaded, in part by the historic performance of the Landfill to date and the fact that its operations have not caused any

water quality degradation nor diminished the importance of the Beidler Forest or contributed to impairment in the Four Hole Swamp. I am also persuaded by the testimony of Thompson discussed above in the Findings of Fact.

Moreover, I conclude that the wetland to be impacted is not a "special or unique habitat" as referenced in Reg. 61-101(A)(5). I also conclude that the proposed expansion will not alter the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired, as the vicinity of the project does not extend to the confluence of Halfway Gut Creek and Four Hole Creek.

Finally, I conclude that Oakridge provided reasonable assurances to the Department, in accordance with Reg. 61-101(A)(4), that water quality standards would not be violated by the proposed expansion. These assurances include the design of the surface water management system and overall design of the landfill that (1) controls the flow of stormwater run-off into Halfway Gut Creek; (2) provides water quality treatment through a series of BMPs; (3) allows for uninterrupted flow of groundwater from the 4-acre protected area to Halfway Gut Creek; (4) allows for surface water and groundwater to flow from the 4-acre protected area; and (5) collects and treats leachate. These assurances further include the groundwater and surface water monitoring history of the existing landfill.

Therefore, based upon the foregoing, I conclude that the proposed expansion does not violate the CZMP and the Section 401 water quality regulations, and, therefore, DHEC should issue a Water Quality Certification.

Coastal Zone Consistency Certification

When the project for which the Water Quality Certification is requested is located in the State's coastal zone, the Consistency Certification determination issued by DHEC's Ocean and Coastal Resource Management shall be issued as a component of and consistent with the Water Quality Certification. *Id.* Reg. 61-101(A)(7). Accordingly, CZMP III-63, Section B(1) requires:

1. In the coastal zone, Council review and certification of permit applications for solid waste disposal sites and facilities will be based on the following considerations:

- a. All solid waste disposal sites in the coastal zone must meet applicable Federal, State water and air quality standards and local regulations for siting and operation.
- b. The location of solid waste disposal or landfill sites in salt, brackish or freshwater wetlands will not be approved unless no alternative

exists and an overwhelming public need can be demonstrated. Wherever possible, solid waste disposal sites must be located in appropriate upland sites, where they will not pollute surface waters, coastal waters and ground waters. Site-specific evaluations are made in each case by the Department of Health and Environmental Control to determine the suitability of the site, considering variables such as soil permeability, the characteristics of the leached refuse, and the distance from groundwater.

“Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulations directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. *Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). However, “[i]f the statute or regulation is silent or ambiguous with respect to the specified issue, the court then must give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference.” *Kiawah*, 411 S.C. at 33, 766 S.E.2d at 717 (internal quotation marks and citations omitted). *Id.* Accordingly, the ALC must defer to the DHEC’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

Moreover, in light of the discussion regarding the development of the policy regulating the placement of landfills in the wetlands, the Supreme Court’s discussion of the policy behind this deference is noteworthy. In *Kiawah*, the Court recognized that “we give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations. *Kiawah*, 411 S.C. at 33-34, 766 S.E.2d at 718.

Furthermore, the National Environmental Policy Act (NEPA) includes a requirement that a federal agency must consider “alternatives to the proposed action.” 42 U.S.C. § 4332(C)(iii) (current through June 15, 2015). The term “alternative” lacks a modifier in NEPA, as it does in the CZMP’s policies regarding solid waste disposal. In reviewing what constitutes an “alternative,” the United States Supreme Court considered the meaning of “alternative” within the context of NEPA. “[A]s should be obvious even upon a moment’s reflection, the term ‘alternatives’ is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.” *Vt. Yankee Nuclear Power v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978). This principle

is applicable here in reference to the policy set forth at III-63 of the CZMP, requiring consideration of alternative sites when siting solid waste disposal or landfill sites. Specifically, CZMP III-63, Subsection B(1)(b) states in pertinent part: "The location of solid waste disposal or landfill sites in salt, brackish or freshwater wetlands will not be approved unless no alternative exists and an overwhelming public need can be demonstrated"

Neither, "alternative," "overwhelming public need," nor any of the words comprising that phrase, are defined in the CZMP. Therefore, the Court looks to the ordinary dictionary definition for guidance. See *Estate of Nicholson ex rel. Nicholson v. S.C. Dep't of Health and Human Servs.*, 377 S.C. 590, 596, 660 S.E.2d 303, 305 (Ct. App. 2008) ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning."). "Alternative" has been defined as "One of a number of things from which one must be chosen." Am. Heritage Dictionary, 4th ed. (2000). "Overwhelming" has been defined as "very great in number, effect or force"; or "extreme, great." <http://www.merriam-webster.com/dictionary/overwhelming> (last visited October 15, 2015). "Need" has been defined as "a condition requiring supply or relief." *Id.* (last visited October 15, 2015). "Public need" has been defined by our Supreme Court as focusing on the need of "the people," as opposed to need of a private company. *Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control*, 411 S.C. 16, 41, 766 S.E.2d 707, 721 (2014) ("[T]he CZMA was intended to achieve a balance between environmental and public considerations on the one hand and economic and private considerations on the other.").

There is no definition of "alternatives" in the CZMP, although "feasible" in the context of "feasible alternative" is defined:

As used within the coastal program, (for example, 'unless no feasible alternative exists') feasibility is determined by the Coastal Council with respect to individual project proposals. Feasibility in each case is based on the best available information, including technical input from relevant agencies with expertise in the subject area, and considering factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes the concept of reasonableness and likelihood of success in achieving the project goal or purpose. . . .

CZMP Glossary, v-8.²²

²² "Practicable alternative" is defined in the EPA's 404(b)(1) guidelines, which are adopted by reference in Reg. 61-101. "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes. If it is otherwise a practicable alternative,

It is arguable that "feasibility" is not a requirement here and instead, an applicant must meet a higher standard under the CZMP of showing that absolutely "no alternative exists" in order to fill wetlands for landfill space. However, I find this interpretation of the CZMP's "no alternative" requirement to be unreasonable in light of the inclusion of feasible alternatives with respect to Water Quality Certification (e.g., 8 S.C. Code Ann. Regs. 61-101(F)(3)(b), (5(b)), as well as in a number of policies and procedures in the CZMP where wetlands filling is at issue for other reasons, such as for residential or commercial development (*see, e.g.*, CZMP, III-14, Guidelines for Evaluation of All Projects (8); III-16, I(1)(b); III-19 to 20, II(A)(1); III-24, II(C)(1)(a); and III-27, II(E)(1)(a)).

Rather, I conclude that DHEC's interpretation that the policies regarding solid waste disposal require that alternatives be reasonable or feasible is not "arbitrary, capricious, or manifestly contrary to the statute." This interpretation is based in part on the fact that the applicable policy, published in 1978, is outdated and does not reflect the present law and technology used in solid waste disposal in the State of South Carolina. Moreover, the Department's interpretation of the policies of the CZMP governing waste disposal is longstanding, dating back to at least 1992, and results in a just, equitable, and beneficial operation of the law. The interpretation in this case gives recognition to the public need for properly designed and constructed landfills, the reduced number of landfills, the Department's desire to have regional landfills for efficient and cost-effective transport and disposal of waste, and the need for twenty years of capacity to serve County planning requirements. Also, the applicable policy seeks to prevent waste from being placed in wetlands and coming into contact with groundwater and surface water, which would likely result in contamination of that water. Here, the wetlands will be filled with clean fill and then a liner and leachate collections system will be installed to manage and prevent pollutions from runoff from the landfill.

In addition to giving DHEC's interpretation deference as explained above, this interpretation is also based on the fact that whether it is expressly stated or not, feasibility and reasonableness are part of any analysis of alternatives. "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.

an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered." 40 C.F.R. § 230.10(a)(2) (current through July 30, 2015).

The real purpose and intent of the lawmakers will prevail over the literal import of particular words.” *Sloan v. S.C. Bd. Of Physical Therapy Ex’mnrs*, 636 S. E. 2d 598, 607 (2006). Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.” *State v. Landis*, 362 S. C. 97, 606 S. E. 2d 503, 506 (2004). The Department’s interpretation of the policies of the CZMP governing waste disposal is longstanding, dating back to at least 1992, and results in a just, equitable, and beneficial operation of the law. Furthermore, Coastal’s strict interpretation would also lead to absurd results. Indeed, it would become virtually impossible to fill a wetland under such an interpretation, because every square inch of South Carolina – or outside of South Carolina, for that matter – that is not an existing landfill or a wetland would be an existing “alternative.” See *Florence Cnty. Democratic Party v Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (“Court[s] will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly.”).

While the Department interpreted the policies of the CZMP by concluding that an alternative, or a choice, must be an option that can be implemented rather than one that is impossible to implement, I conclude that whether the standard is “no reasonable alternative” or “no feasible alternative,” there is no evidence of such alternatives to expansion in this matter. None of the other solid waste disposal sites and facilities were reasonable alternatives. It would not be reasonable to require Oakridge’s customers to transport the waste that is currently being transported to the Oakridge Landfill to another landfill due to distance, the remaining capacity in other available landfills, and existing limitations on waste received at other landfills. There would also be an increase in cost associated with transporting waste greater distances than to Oakridge. It is also difficult to site new landfills, and there is more public controversy associated with new landfill construction.

Finally, Coastal is also required to show that there was not an overwhelming public need for the expansion. Population projections for the tri-county region of Berkeley, Charleston, and Dorchester support a finding that there is an overwhelming public need for additional landfill capacity to allow local governments to plan for twenty years of disposal. It is obvious here that the Landfill is expanding because it is needed and utilized by the surrounding counties and is running out of disposal space. Additionally, there is clearly a significant economic benefit to the public from the expansion project, resulting from reduced tipping fees, host fees, and limited

transportation costs. But there are also additional public benefits, including less air pollution from decreased trucking of waste to more distant disposal options. There is also a public benefit in the preservation of capacity in the Berkeley County and Charleston County that results from the continued use of Oakridge Landfill. There is also a public benefit derived from having available disposal capacity that allows for growth and development, and a benefit to having environmentally safe landfills.

Therefore, I conclude that there are no other feasible alternatives to the proposed expansion, that there is an overwhelming public need, that it complies with the CZMP, and that DHEC should thus issue the Consistency Certification.

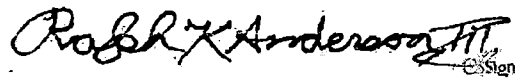
CONCLUSION

Upon hearing all of the testimony and reviewing the evidence, I find that Coastal lacked standing to bring this action. But even if Coastal had standing, the actions of the Department in issuing a Section 401 Water Quality Certification and Coastal Zone Consistency Certification to Respondent Oakridge are supported by the evidence and the applicable regulatory and statutory requirements.

ORDER

IT IS THEREFORE ORDERED that the Section 401 Water Quality Certification and Coastal Zone Consistency Certification are **APPROVED**. The Department shall issue these certifications for the proposed expansion.

AND IT IS SO ORDERED.

A handwritten signature in black ink, reading "Ralph King Anderson, III". The signature is written in a cursive, flowing style. To the right of the signature, there is a small, faint stamp that appears to say "eSign".

Ralph King Anderson, III
Chief Administrative Law Judge

October 21, 2015
Columbia, South Carolina

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CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

October 21, 2015
Columbia, South Carolina