

**THE STATE OF SOUTH CAROLINA
In The Court Of Appeals**

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod, Administrative Law Judge

**Case No. 13-ALJ-07-0395-CC
Appellant Case No. 2015-000700**

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

v.

South Carolina Department of Health and Environmental Control and
Lisa Sumerel and Sumerel Poultry FarmRespondents.

PETITION FOR REHEARING

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SC Court of Appeals

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I. INTRODUCTION

This matter is an appeal from the Administrative Law Court's ruling to uphold the issuance of an agricultural permit to Respondents Mike and Lisa Sumerel. The Appellants challenged the issuance of that permit in the proceedings below on a multitude of grounds, including by presenting evidence that (1) the weight used to calculate applicable setbacks in the management plan were inaccurately low, thereby making the operation too large to fit on the site within the mandated setbacks and ; (2) DHEC's evaluation of the permit was inadequate in a variety of ways; most notably in failing to fully and properly evaluate the water impacts of the proposed operation. This Court affirmed the ALC's decision in an unpublished *per curiam* decision issued February 8, 2017. Respectfully, this Court's affirmation of the ALC's ruling was in error for the reasons set forth below, and upon the additional grounds set forth in this petition. Therefore, Appellants respectfully move this Court to reconsider and rehear this matter pursuant to SCACR 241.

This matter came before the Administrative Law Court pursuant to S.C. Code Ann. § 1-23-310 *et seq.* and the S.C. Code Ann. § 44-1-60, for a contested case hearing regarding the South Carolina Department of Health and Environmental Control's ("DHEC" or "Department") decision to issue Bureau of Water Agricultural Permit No. 19647-AG (the "Permit") dated June 2, 2013 to Lisa Sumerel for the operation of Sumerel Poultry Farm – a proposed broiler animal feeding operation off Poole Town Rd. in Laurens, South Carolina. A hearing was held before the ALC in this matter on August 25 and 26, 2014.

The Appellants, Rick and Donice Still and Christine and Terry Orr were the Petitioners in the case below. Appellants presented the testimony of two experts witness - Dr. David Hargett, Ph. D., who the Court qualified as an expert environmental science

consultant and on water impacts and Dr. Carmen Parkhurst, Ph. D., a Professor Emeritus of Poultry Science at North Carolina State University who the Court qualified as an expert in animal feeding operations, poultry science, and waste management. Appellants also called several DHEC personnel who took part in evaluating the Sumerel Permit application and Management Plans and decision to approve the Permit. Those witnesses included Chrissy Matthews, who performed the two preliminary site inspections at the proposed site, Stephen Smutz from the Bureau of Air Modeling section who evaluated potential harmful emissions of regulated airborne pollutants, and the Section Manager over Agricultural Permitting William Chaplin who oversaw the entire permit review, performed the final review of the Sumerel application and approved the Permit. Appellants also called the permit applicant Lisa Sumerel and designated operator Mike Sumerel as witnesses in their case. Finally, Appellants Terry Orr, Christine Orr, and Rick Still testified on their own behalf.

Respondents Lisa and Mike Sumerel presented the testimony of Leon Fulmer and Joy Shealy, both of Shealy Engineering, LLC, the firm that drafted both the Comprehensive Nutrient Management Plan (the “Management Plan” or “CNMP”) and the Dead Animal Disposal Plan for the Sumerel facility.

The Department presented no witnesses, relying on cross examination of those called by Appellants and the Sumerel Respondents. The Department also did not put up a case in chief.

At the conclusion of trial, the ALC requested the parties each provide proposed orders to the Court. Per the ALC’s instructions, the Appellants submitted their proposed order on October 21, 2014. Respondents then submitted a proposed order on December 4,

2014. The lower court asked Appellants to offer comments on and responses to the Respondents proposed order, which were submitted on December 22, 2014.

The ALC issued its Final Order and Decision on January 12, 2015 (the “Order”) upholding DHEC’s decision to issue the Sumerel Permit. (R. pp. 1-36). On January 22nd Appellants filed a Motion to Reconsider the Court’s January 12th Order. (R. pp. 37-49). DHEC filed a Reply to that motion on February 5th. (R. pp. 50-71).¹ The ALC did not issue a ruling on Appellants Motion to Reconsider, and therefore, upon the passage of thirty days, effectively denied the Motion. Appellants filed a Notice of Appeal on April 6, 2015.

This Court held oral arguments on December 7, 2016. It issued an unpublished *per curiam* opinion on February 8, 2017 affirming the ALC’s holding (the “Order”). (Unpublished Opinion No. 2017-UP-068).

II. STATEMENT OF THE FACTS

On April 23, 2012, the Department received a Preliminary Site Inspection Request from the Sumerels for a proposed animal feeding operation on Poole Town Rd. in Laurens, South Carolina. On April 23rd, Chrissy Matthews from DHEC’s regional office in Greenwood conducted a preliminary site inspection. (See R. pp. 377-78). Ms. Matthews performs inspections for agricultural facilities, including routine, compliance, and preliminary site inspections. (R. p. 82/Tr. p. 19). During her inspection, Ms. Matthews completed a Preliminary Site Inspection Checklist reflecting her evaluation of the property. By letter dated April 27, 2012, DHEC notified the Sumerels that it preliminarily approved the site for a broiler facility and instructed them to proceed with obtaining and submitting

¹ Appellants filed a letter in response to a particular portion of the Department’s Reply. (R. pp. 72-75). On February 11th, the ALC emailed all counsel to address the AgraMetrics issue. (R. p. 76).

the proper permit application materials. The Sumerels obtained Joy Shealy, of Shealy Engineering to prepare and submit the plan and application materials to DHEC.

On October 11, 2012, the Department received an application and Comprehensive Nutrient Management Plan (“CNMP”) for Sumerel Poultry Farm. The Management Plan and application called for the construction and operation of four poultry houses, each housing 27,400 broilers for a total facility capacity of 109,600 birds. The Sumerels sent out notices to several of their nearby neighbors as required by the regulations, including the Rick and Donice Still and Terry and Christine Orr. (R. pp. 269-300).

On October 11, 2012, the Department began and completed its Administrative Review of the Sumerel application. (R. pp. 377-78). That same day William Chaplin sent review documents to the Bureau of Air Quality and Division of On-Site Wastewater Management in the Bureau of Environmental Health. (R. pp. 377-78; R. pp. 393-95). On October 22, 2012 Chaplin received a memorandum from the On-Site Wastewater Management Division indicating fieldwork was performed to determine if the proposed mortality burial site was suitable. It was determined that the proposed burial site was not suitable for mortality disposal. (R. p. 125/Tr. p. 191).

The Department posted numerous public notice signs as required in the nearby area noting it would accept comments on the Sumerel facility. (R. pp. 377-78). A petition with the names of 77 individuals opposed to the Sumerel operation was submitted to the Department on October 25, 2012. (R. pp. 377-78).

DHEC began its technical review of the Sumerel application and CNMP on February 2, 2013. (R. pp. 377-78). On February 25, 2013, the Department sent out letters to the 77 individuals on the petition and those who wrote letters in opposition to the

Sumerel facility notifying them of a public meeting to be held on March 11, 2013. (R. pp. 377-78). During that public meeting citizens voiced their concerns relating to the Sumerel facility's detrimental impacts on the community.

On March 23, 2013, the Sumerels submitted amendments to their CNMP. (R. pp. 206-337; R. pp. 338-373). The March 23rd amendments included submission of a new Dead Animal Disposal Plan changing the mortality disposal method from burial to hay bale composting and incineration. (R. pp. 338-373). On March 28th and 29th additional amendments to the CNMP were submitted to the Department, which included incorporation of the new mortality disposal methods. (R. pp. 217-18, 228, 234-35, 237-38, 240-41, 243-44, 305). On June 10, 2013 DHEC completed its technical review of the Sumerel application. (R. p. 378).

On June 12, 2013, the Department issued Permit No. 19647-AG to Lisa Sumerel for the operation of a broiler poultry feeding operation. (R. pp. 374-76). The Permit allows for the construction of 4 new poultry broiler houses, each housing 27,400 birds, for a total of 109,600 birds at any one time. (R. pp. 374-76). The Permit allows for 4.5 flock turns per year making the total number of birds per year on the Sumerel site 493,200. (R. pp. 374-76). Utilizing the numbers from the CNMP, the Permit indicates that the average animal live weight of those birds will be 493,200 lbs. and they will generate 669 tons of waste per year. (R. pp. 374-76). The Permit allows use of a hay bale composting system and incinerators for mortality disposal. (R. pp. 374-75). The Permit's Special Conditions section requires that drinking water wells installed on the property for animal or human consumption meet certain regulatory setbacks. (R. p. 375). Under that section the operator

Mike Sumerel is required to obtain CAMM Certification from Clemson University within a year of the Permit's effective date. (R. p. 376).

Twelve days after receiving the Permit, the Sumerels submitted a request to DHEC for a preliminary site inspection to be conducted in order to evaluate the feasibility of composting and incineration for mortality disposal, including the siting of the composter and incinerator(s) on their facility. (R. p. 398). On June 24th Chrissy Mathews went to the Sumerel property to conduct this preliminary site inspection for the new mortality disposal methods. (R. p. 399). Over two weeks after issuing the Permit, on June 27, 2013 DHEC sent the Sumerels a letter preliminarily approving the proposed composting system and incineration for mortality disposal. (R. p. 399).

On July 1, 2013 Appellants appealed the issuance of Permit No. 19647-AG to the Department requesting Board review. (R. p. 378). By letter dated July 18, 2013 the DHEC Board denied Appellants' request, making the permitting decision a "final agency decision." On August 12, 2013 Appellants filed a contested case with the ALC challenging the issuance of the Sumerel Permit.

Appellants challenged the Sumerel Permit on several grounds contending that DHEC's decision to issue it violated constitutional or statutory provisions; was made upon unlawful procedure; affected by error of law; clearly erroneous in view of the reliable, probative, and substantial evidence; arbitrary and capricious and an abuse of discretion. Specifically, Appellants contended that due to the true average exit or "process" weight of the birds and under applicable regulatory definitions, the Sumerel operation was a "large animal facility" subject to 400 ft. property line setbacks. These increased setbacks, all witnesses at trial agreed, rendered the Sumerel operation impossible due to the size and

shape of the land upon which it is slated to operate. Appellants also argued that DHEC failed to perform an adequate evaluation of the permit application package as required under the regulations. To that end, Appellants offered evidence that the Department issued the Permit upon an incomplete application and failed to adequately consider and evaluate the potential environmental impacts of the Sumerel operation, including those to the waters of the State.

The ALC found that Appellants did not offer sufficient evidence warranting reversal of the Department's decision to issue the Permit. The lower court accepted the all-important 8.75 lbs. average process weight figure utilized in the Sumerel CNMP and concluded that the Sumerel operation was correctly classified as a "small animal feeding operation" subject to the lesser setback distances. The ALC also found that DHEC took all the necessary actions to evaluate the proposed operation prior to issuing the Permit.

III. LEGAL ARGUMENTS AND AUTHORITIES

A. Appellants' expert testimony the live weight used in the Management Plan was inaccurately low warrants reversal of the ALC's decision

This Court's Order states that "[a]s to Appellant's expert's testimony regarding the live weight issues" and goes on to string cite the applicable substantial evidence standard of review for the Appellate court's reversal of an ALC decision. (Order at 1). The Order gives no substantive treatment or indication of the specific grounds for affirming the ALC's holding that the Appellants' not asking Columbia Farms what its process weight was and offer that hearsay testimony to the lower court was fatal to their position, presented through the expert testimony of poultry science expert Dr. Carmen Parkhurst, that the live weight figure used in the Management Plan was inaccurately low. The implication from the Order is that this Court found substantial evidence in the record to support the ALC's decision on

this issue. Respectfully, without the reasoning behind that conclusion or citation to the record in support of it, Appellants are unable to truly evaluate the Court's analysis of the issue and its application of the law to it. That said, the implication that substantial evidence supports the ALC's determination on this issue Appellants contend necessary must be rooted in oversight of the record or misapprehension of it because the ALC's decision on this issue is not supported by substantial evidence reflected in the record when considered as a whole. Specifically, it appears the Court misapprehended the basis for the ALC's holding on this issue and relied upon one or more oversights when viewing the record in this case.

First, the ALC's Order found that Appellants failed to show the 8.75 average live weight figure utilized in the CNMP was inaccurate surmising:

Dr. Parkhurst's testimony established that each integrator, the company that owns the birds grown by the farmer, sets their own exit weight for the farms' flocks, and that the exit weight depends on the market and internal corporate factors for each integrator....Since it is the Appellants' burden to establish that the calculations in the CNMP are incorrect, the Court finds that Appellants' failure to ascertain from the integrator what exit weight they are requiring for the Sumerel facility is fatal to their claim.

(R. p. 19).

The ALC's finding that Appellants' position is fatally undermined because they did not ask Columbia Farms what exit weight it requires and presumably offer that figure to the Court was in err. (R. p. 19). The Court's reasoning that Dr. Parkhurst testified the integrator sets the exit weight and he did not ask Columbia Farms what it required for its process/exit weight ignores his testimony as a whole. Namely, Dr. Parkhurst testified that the average process weight across *all integrators* is at least 9 pounds and that *all integrators* grow birds weighing within hundredths of a pound of each other. (R. pp. 159-60/Tr. pp.

328-29)(“What one integrator has the other ones within a few hundredths of a point of being the same.”). Therefore, Appellants did in fact offer testimony on Columbia Farms exit weight via the expert testimony of Dr. Parkhurst which was based upon reliable and identifiable sources. (See R. pp. 150-51/Tr. pp. 290-94; R. pp. 158-59; Tr. pp. 324-326; R. pp. 159-60/Tr. pp. 328-30). The lower court’s findings on this issue rely on a portion of Dr. Parkhurst’s testimony in which he agreed that market and internal corporate factors impact exit weight. (See R. pp. 19, 33). Therefore, according to the ALC, evidence needed to be presented as to what Columbia Farms, as the integrator, requires as an exit weight. There being none in the ALC’s view negated Appellants’ position on the issue. The ALC’s ultimate conclusion depends upon the absence of evidence as to what Columbia Farms requires as an average process weight. However, Dr. Parkhurst’s testimony provided this purportedly absent evidence.

In addition, Appellants contend that not submitting what would have been blatant hearsay testimony to the ALC leaves Dr. Parkhurst’s expert opinion unscratched. His expert opinion that the process weight of the birds would be at least 9 lbs. was based upon clearly articulated facts and his knowledge and experience from decades in poultry science; including the results of his own recently completed study. (R. pp. 150-51/Tr. pp. 290-94; R. pp. 158-59/Tr. pp. 324-26; R. pp. 159-60/Tr. pp. 328-30). Dr. Parkhurst had no need to speak with Columbia Farms about this issue as he is more than equipped with the knowledge to offer an expert opinion on process weight. His testimony concerning process weight is much more reliable than a statement from Columbia Farms, who as the integrator has an interest in the permit being issued. Even if Dr. Parkhurst had asked and been given a response from Columbia Farms President his testifying to that figure would have been

inadmissible hearsay testimony. The ALC erred in discounting Dr. Parkhurst's testimony on this seminal issue because he did not speak with the Columbia Farms President.

Furthermore, a Columbia Farms representative's statement of what exit weight it requires would be inconsequential because Dr. Parkhurst (as Appellants' expert) opined that the 8.75 average exit weight in the Sumerel CNMP was inaccurately low. That expert opinion was based upon extensive experience in and knowledge of the industry developed over a long career. Dr. Parkhurst testified that a 63 day flock cycle would yield at least a 9 lbs. bird. He also testified that the average process weight across *all integrators* is at least 9 pounds and that *all integrators* grow birds weighing within hundredths of a pound of each other. (R. pp. 159-60/Tr. pp. 328-29)("What one integrator has the other ones within a few hundredths of a point of being the same."). "All integrators" necessarily includes Columbia Farms. That aside, assuming Columbia Farms told Dr. Parkhurst that it requires an 8.75 lbs. exit weight, his expert opinion would remain unchanged. The conclusion that Appellants' choosing not to ascertain what Columbia Farms representatives say its required exit weight is fatally undermines scientific evidence based expert testimony was in error. It is not Appellants' obligation to seek out and obtain statements from the integrator, who has an interest in the permit being upheld, that would potentially rebut their expert's testimony.

Second, the ALC's decision on this issue is not supported by the substantial evidence as reflected in the record when it is considered as a whole. At oral argument, the Court was acutely attuned to the lack of countervailing evidence in the record that challenged Appellants' expert testimony that the process weight in the plan was inaccurately low. On multiple occasions, the Court requested Respondents cite to portions

of the record in which they offered evidence that the 8.75 figure utilized in the plan was accurate. The Respondents time and time again failed to oblige that request. That consistent failure was due to the absence of such evidence in the record, when considered as a whole, shows that the ALC's decision on this issue was not supported by substantial evidence warranting reversal by this Court.

The appellate court reviews the ALC's findings to determine if they were supported by substantial evidence or were controlled by an error of law. *Hill v. S.C. Dep't Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). A reviewing court may reverse or modify an administrative decision if the findings of fact are not supported by substantial evidence. "Substantial evidence is 'evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.'" *Risher v. South Carolina Dep't of Health and Envtl. Control*, 393 S.C. 198, 211, 712 S.E.2d 428, 434 (2011)(*internal citations omitted*).

S.C. Reg. 61-43 Part 200.80 specifies the siting requirements (setback distances) for animal facilities other than swine. The applicable setback distances for a particular facility are determined by the birds' "normal production animal live weight" which "means the maximum number of animals at the facility at any one time multiplied by the average live weight of those animals." S.C. Reg. 61-43 Part 50(WW). The average animal live weight is "the sum of the average exit weight from the facility and the average entry weight divided by two....: Average animal live weight = (Average Exit Weight + Average Entry Weight)/2." S.C. Reg. 61-43 Part 50(K). A "small animal facility means an animal facility that has a capacity for 5000,000 pounds of normal production animal live weight or less at any one time." S.C. Reg. 61-43 Part 50(HHH). A "large animal facility" is "an animal

facility that has capacity for more than 500,000 pounds of normal production animal live weight at any one time.” S.C. Reg. 61-43 Part 50(NN). The regulations require a 200 foot property line setback from the lot line of real property owned by another person when the normal production animal live weight at any time is 500,000 pounds or less. S.C. Reg. 61-43 Part 200.80(A)(5). For a large facility, where the normal production animal live weight at any one time is greater than 500,000 pounds, the property line setback increases to 400 feet. S.C. Reg. 61-43 Part 200.80(A)(6).

At trial Appellants contended that the Sumerel poultry operation is actually a “large animal facility” subject to the 400-foot property setback under 200.80(A)(6) which cannot be accommodated by the proposed site. Appellants’ claimed that the Sumerel CNMP utilizes an outdated average exit weight of 8.75 lbs. to arrive at an incorrectly calculated normal production animal live weight of 493,200 lbs. for the facility.

The Sumerel CNMP calculates the normal production animal live weight for the facility to be 493,200 pounds. (R. p. 215). This calculation is based upon a .25 lb. entry weight and 8.75 lb. exit or “process” weight yielding a 4.5 lb. average animal live weight: $(8.75 \text{ exit weight} + .25 \text{ entry weight})/2 = 4.5 \text{ average live weight}$. (R. p. 215). The Management Plan specifies that there will be 109,600 birds on site at any one time thus yielding the 493,200 lb. normal production animal live weight: $(109,600 \times 4.5 \text{ normal production animal live weight}) = 493,200 \text{ lbs.}$ (R. p. 215). Based upon this calculation the Sumerel facility was designated a “small” operation under the regulations subject to the 200 foot property line setback.

According to the maps submitted with the Management Plan, the barns as sited meet that 200 foot setback distance. (R. p. 302). The testimony of all that were asked at

trial, including Mike Sumerel, Lisa Sumerel, William Chaplin, Dr. Hargett and Dr. Parkhurst was uniform in agreeing that the Sumerel site could not accommodate a “large animal feeding facility” as it lacked the space to account for a 400 foot property line setback required for that size operation. (R. p. 88/Tr. p. 41:18-23; R. pp. 92-93/Tr. pp. 60-61; R. p. 128/Tr. p. 203:1-25). The maps included in the Management Plan also show that the proposed facility fits closely within the 200 foot property line setbacks for small facilities. (R. p. 302).

Appellants presented the testimony of Dr. Carmen Parkhurst, Ph. D., a Professor Emeritus of Poultry Science at North Carolina State University. Dr. Parkhurst has dedicated his nearly 50 year long career to agriculture, primarily in the area of poultry science. He holds both a master’s degree and Ph. D. in Poultry Science from Ohio State University. Dr. Parkhurst has been with North Carolina State University since 1971 as a professor. Following a brief retirement in 2008, he returned to N.C. State and now acts as Manager of the University’s Animal & Poultry Waste Management Center. The Court qualified Dr. Parkhurst as an expert in animal feeding operations, poultry science and waste management. (R. p. 146/Tr. pp. 274-76.).

Dr. Parkhurst testified that the exit weight of broilers is determined by the length of the grow cycle. (R. p. 159/Tr. p. 326:15-23). He opined that the 8.75 exit weight utilized in the Sumerel CNMP was a dated and inaccurate number. (R. p. 150/Tr. pp. 290-91). Dr. Parkhurst testified that chickens tend to get bigger over time through genetic selection. (R. p. 150/Tr. p. 291:20-21). He opined that the average exit weight has and will continue to rise with genetic selection, new houses and other advancements in the grow process. (R. pp. 150-51/Tr. pp. 290-94). Dr. Parkhurst pointed to his own recent study completed on

March 1, 2014 in which he grew 80,000 birds over a 60 day cycle. (R. p. 150/Tr. pp. 291-92). The average exit weight of the birds in his study was 9.37 lbs. (R. pp. 150-51/Tr. pp. 292-93). Dr. Parkhurst testified that over the course of the designated 63 day grow cycle the average exit weight of the birds grown at the Sumerel facility would likely be over nine pounds rather than the 8.75 lb. average utilized in the CNMP. (R. pp. 150/Tr. pp. 291-94; R. p. 158-59/Tr. pp. 324-26; R. pp. 159-60/Tr. pp. 328-30). Based on what he considered the more accurate exit weight number, Dr. Parkhurst testified that the Sumerel operation would yield over 500,000 pounds of live production weight making it a “large animal facility.” (R. p. 150/Tr. p. 292:12-15). On cross examination, the Department pushed extensively on the issue of exit weight. Dr. Parkhurst reiterated that 9 lbs. average process weight was a minimum making the weight difference per bird at least .25 lbs. While the Department tried to downplay the significance of what in isolation may be viewed as a nominal weight difference, it is more than significant when multiplied by 109,600 per flock or 493,200 birds per year. (R. pp. 159-60/Tr. pp. 328-30). During DHEC examination, Dr. Parkhurst affirmed that the integrators each set their own process weight, which is influenced by market and internal corporate forces. (R. p. 156/Tr. p. 316). Dr. Parkhurst noted however that *all integrators* produce birds that are nearly the same weight, only varying by a few hundredths of a point - “what one integrator has the other ones within a few hundredths of a point of being the same.” (R. p. 160/Tr. p. 329:1-4). That slight variation does not come close to bridging the gap between the 9 lb. plus average exit weight identified by Dr. Parkhurst as the more accurate and current figure and the 8.75 lb. exit weight relied upon in the Sumerel CNMP.

The Sumerels offered the testimony of Leon Fulmer of Shealy Engineering, LLC. Mr. Fulmer is an agricultural engineer who works with Joy Shealy at Shealy Engineering, LLC. Mr. Fulmer has a B.S. from Clemson University and worked in the Department's agricultural permitting program for approximately nine years until coming to work for Shealy Engineering in 2006. (R. p. 178/Tr. p. 402). He worked with Joy Shealy on the Sumerel CNMP and DAD Plans. All parties questioned Mr. Fulmer on the average exit weight issue. During direct examination Mr. Fulmer was directed to pg. 1 of the Management Plan that contains certain pertinent information regarding the Sumerel facility such as the owner's name and address. (R. p. 179/Tr. p. 408; R. p. 207). Page 1 has a "Basic Operation Description" which provides a summary type overview of the Sumerel operation including a sentence that reads "[t]he birds will be brought into the houses as chicks and are confined for a period of 63 days or until they reach an exit weight of eight and three quarter (8.75) pounds." (R. p. 207). On cross examination Appellants explored the issue with Mr. Fulmer. Under questioning, Mr. Fulmer testified that "the [the integrator] *don't necessarily dictate the exact weight*, but they will determine *exactly when* they want the birds pulled from the farm, which normally will then dictate the live weight coming out." (R. p. 181/Tr. p. 416:3-10)(*emphasis added*). On cross examination Appellants' attorney pressed Mr. Fulmer on the issue, asking for details on how an integrator would determine when the average weight of a flock had reached the 8.75 mark and whether and how they would pull the birds before the end of the scheduled grow cycle. (R. pp. 181-82/Tr. pp. 416-420). Mr. Fulmer provided little to no detail or explanation of how this would be the case in general or for the Sumerel facility. All indications in the CNMP, and Permit itself, indicate, call for and allow a 63 day flock cycle (or 4.5 "turns"

per year) for the Sumerel facility. (R. pp. 206-337; R. pp. 374-76). There is nothing within the Plan or Permit calling for or specifying weight monitoring, record keeping or reporting so that Columbia Farms as the integrator would come out before the end of the scheduled 63 day cycle to haul off the birds because they reached the 8.75 lbs. exit weight average. Mr. Fulmer was definitive that the integrator specifies the duration of the grow cycle, which in turn dictates the average exit weight. (R. p. 181/Tr. p. 416:3-10). He was much less sure and specific on how an integrator would pull birds prior to the end of a specific grow cycle.

Respondents Mike and Lisa Sumerel also offered the testimony of Joy Shealy, the professional engineer who drafted and signed off on the Sumerel Management and DAD Plans. Ms. Shealy is a licensed professional engineer in South and North Carolina. She received a B.S. in Agricultural Engineering from Clemson University and worked for the Department in the agricultural permitting section for several years prior to establishing Shealy Engineering, LLC in 2004. Ms. Shealy testified that the integrator determines the average exit weight of the birds and informs the grower. (R. p. 190/Tr. pp. 449-50). According to Ms. Shealy she and Mr. Fulmer get the average exit weight figure from the grower and in this case, she believed Mr. Sumerel got the figure from Columbia Farms. (R. p. 194/Tr. pp. 466-67). Neither Ms. Shealy, Mr. Fulmer, or the Respondents could say how up to date the 8.75 average exit weight was. Such an important and impactful piece of information needs to come from a reliable and identifiable source. Ms. Shealy did not testify that 8.75 lbs. exit weight was Columbia Farm's number. Rather, she only said either her or Mr. Fulmer obtained it from Mr. Sumerel.

Despite the evidence presented at trial the ALC erroneously concluded that “the preponderance of reliable evidence established that the 8.75 lbs. average exit weight figure utilized for the Sumerel CNMP is accurate and the proposed facility is correctly permitted as a small facility.” (R. p. 33). As a “small animal feeding operation” the ALC found it was rightly subject to the 200 foot property line setback proscribed under Part 200.80(A)(5), rather than the 400 foot property line setback mandated under Part 200.80(A)(6). (R. p. 18).

At trial the Appellants provided expert testimony of Dr. Carmen Parkhurst who testified that the 8.75 average live weight figure utilized in the Sumerel CNMP was inaccurately low. (R. p. 150/Tr. pp. 290-92). As noted above, Dr. Parkhurst’s expert opinion on this seminal issue was based upon his vast knowledge and experience in the industry as well as his own recently completed study in which 80,000 birds grown over a 60 day period weighed an average 9.37 lbs. He offered his expert opinion that the average process weight across *all integrators* is at least 9 pounds and that *all integrators* (which necessarily includes Columbia Farms) grow birds weighing within hundredths of a pound of each other. (R. pp. 159-60/Tr. pp. 328-29). Respondents did not provide expert testimony or any reliable evidence to contradict Dr. Parkhurst’s expert opinion on this issue. Rather they provided testimony from Joy Shealy who could not testify as to the source of the 8.75 figure, much less the accuracy of it, stating that she got it from her associate Leon Fulmer who obtained it from Mr. Sumerel who “she believed” got it from Columbia Farms. Ms. Shealy’s assumption as to the source of the live weight figure and not to its accuracy pales in comparison to Dr. Parkhurst’s detailed expert opinion on the issue; and in fact does not even challenge it. In issuing its ruling, the ALC also relied upon

the CNMP's "Basic Operation" page which states the birds would be pulled from the facility after a 63 day grow cycle or when they reach an average weight of 8.75 lbs. No witness, including Joy Shealy or Leon Fulmer, could provide any detailed information on how the Sumerels would take on this onerous and daunting task. In fact, Mr. Fulmer's testimony on cross examination undermined this position when he admitted that the integrators "don't necessarily dictate the exact weight, but they will determine exactly when they want the birds pulled from the farm, which normally will then dictate the live weight coming out." (R. p. 181/Tr. p. 416:3-10).

Therefore, based on consideration of the entire record, reasonable minds could not conclude that Appellants' position on this issue was "fatally undermined" by not asking Columbia Farms what its process weight number is as the ALC did. Thus, the lower court's conclusion on this issue is not supported by the substantial evidence and should be reversed.

B. Exclusion of the Agrametrics Testimony

As with the previous issue, the Order does not substantively treat the issue of the ALC's exclusion of the Agrametrics testimony. The Order notes the issue and goes on to string cite the applicable standard of review for the Appellate court's reversal of the lower court's exclusion of expert testimony. (Order at 1-2). As with the previous issue, Appellants respectfully note that the absence of substantive treatment of this issue makes it difficult to evaluate the legal and factual basis for this ruling. That said, Appellants respectfully contend that the Court's conclusion on this issue necessarily relies on misapprehension of the record as it reflects the ALC's exclusion of this testimony was an abuse of its discretion and an error of law that prejudiced the Appellants.

The ALC's exclusion of Dr. Parkhurst's testimony regarding the AgraMetrics report was in error and prejudicial to the Appellants as that testimony provided further evidence of the inaccuracy of the 8.75 lbs. process weight figure utilized in the CNMP. (R. p. 154/Tr. pp. 305-07). On cross examination DHEC counsel questioned Dr. Parkhurst extensively on the average live weight issue including asking if there was some "readily available source" reflecting the current average live weight of broiler chickens in 2014. (R. p. 153/Tr. pp. 302-303). In response, Dr. Parkhurst cited to an industry report from AgraMetrics "that gets the data from literally every company in the US and generates a weekly average body weight of poultry [report]." (R. p. 153/Tr. pp. 303-04). He testified that this AgraMetrics report reflected an average live weight above the 8.75 lb. figure utilized in the Sumerel CNMP. (R. p. 153/Tr. pp. 303-04). The ALC sustained DHEC's objection to admission of Dr. Parkhurst's testimony concerning "information from a third party," namely the AgraMetrics report. (R. p. 154/Tr. pp. 305-07). Appellants contend exclusion of this testimony was in error and Dr. Parkhurst, as a qualified expert in poultry science, could rely upon and cite to third party materials in support of his expert opinion. *State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432, 436 (1997).²

As detailed above, based on the evidence presented to the ALC, the Sumerel Poultry Farm will produce chickens with an average live weight in excess of 500,000 lbs. making it a "large animal feeding operation" subject to the 400 foot property line setback. The

² "The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." *Hutto* 481 S.E.2d at 436 (internal citations omitted).

uniform testimony at trial was that the parcel upon which the operation is to be located cannot accommodate a “large” facility and therefore DHEC wrongly approved the CNMP and issued the Sumerel Permit. Thus, the ALC’s exclusion of this vital testimony was an error that was prejudicial to the Appellants and should be reversed by this Court.

C. Live Weight in the Comprehensive Nutrition Management as Hearsay

On this issue, the Order cites case law in which it was found that failure to raise a cotemporaneous objection to hearsay testimony rendered the issue unpreserved for appellate review. (Order at 2). This holding appears to be based upon a misapprehension of Appellants’ argument on this issue and the portions of the record bearing upon it. Specifically, the Order reflects this Court’s conclusion that Appellants did not make a contemporaneous objection to Joy Shealy’s testimony regarding exit weight and therefore the issue of it constituting inadmissible double hearsay was not properly preserved for appellate review. (Resp. Br. at 37). At trial, Ms. Shealy was questioned by both parties about where she obtained the 8.75 figure. (R. p. 190/Tr. pp. 449-50; R. p. 194/Tr. pp. 466-68). Respondents asked her where she got the 8.75 figure, to which she replied Columbia Farms. (R. p. 190/Tr. pp. 449-50). On cross, Ms. Shealy contradicted her earlier testimony stating that she could not identify the origin of the 8.75 figure beyond presuming Mr. Sumerel obtained it from Columbia Farms.

Q: So at the time, you got this number from Columbia for the Sumerel site?

A: Well, I got it from Mr. Sumerel or my – Leon got it from Mr. Sumerel, but they get that information from their desired integrator.

(R. p. 194/Tr. pp. 467-68). It was only when Ms. Shealy testified on cross examination that she got the 8.75 figure from Leon Fulmer who received it from Mr. Sumerel (who

presumably got it from Columbia Farms) would her testimony constitute double hearsay if it were being offered for the truth of the matter asserted concerning the exit weight figure. However, it was not offered for that purpose. Appellants elicited and offered this testimony to show that the professional engineer who signed off on the CNMP could not identify with particularity where she obtained the incredibly important exit weight figure and to challenge her earlier statement. Therefore, no objection was or should have been, made at the time. More to the point, the issue presented on appeal arose out of the ALC's reliance on that testimony as a basis for concluding the 8.75 lb. figure in the CNMP was accurate. (R. pp. 19, 33). It was only then that admission and utilization of this testimony became objectionable on double hearsay grounds. Under the circumstances, the Appellants had to address the issue in their Motion to Reconsider and Memo in Support as it first arose in the ALC's Final Order. The issue was therefore raised to and ruled upon by the lower court and preserved for appellate review. Appellants respectfully contend that this Court's finding to the contrary was in error.

D. This Court should rule on all issues and arguments presented on appeal

Relying on citation to the applicable standard of review for reversal of the lower court's rulings, the Order dispatches with all "Appellants' remaining issues." (Order at 2). Respectfully, this was in error, because there are other issues and arguments raised that impact the outcome of this matter. Specifically, Appellants challenged the ALC's determination that DHEC performed an adequate review of the permit application on a variety of substantive grounds – not the least of which dealt with the Department's substantial failure to adequately evaluate the adverse water impacts of the proposed operation. (*See App. Br. at 25-34*). Appellants also challenged the ALC's ruling that the

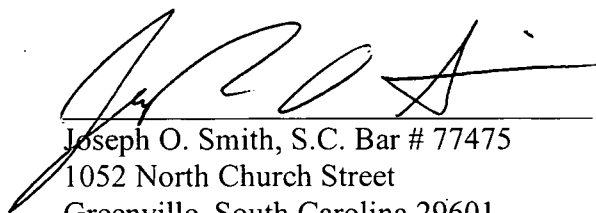
Sumerel facility was a “small” animal feeding operation subject to the lesser 200 foot property line setbacks on statutory interpretation grounds looking to the applicable definitions of what constitutes a “small” versus a “large” animal feeding operation. (See App. Br. at 21-22). Appellants respectfully contend that those issues warrant substantive consideration and treatment by this Court as they both directly impact the outcome of this matter.

IV. Conclusion

For these reasons, and for all of the additional reasons set forth herein and in the Appellants’ briefs, which are incorporated herein by reference, it is respectfully submitted that this Court should grant rehearing and issue a substitute opinion that reverse the appealed order and remands for entry of judgment in favor of the Petitioner below.

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.



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Attorneys for the Appellants.

March 9, 2017
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod, Administrative Law Judge

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

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

v.

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

PROOF OF SERVICE

I certify that I have served the Appellants' Petition for Rehearing on the Respondents Lisa Sumerel and Sumerel Poultry Farm and South Carolina Department of Health and Environmental Control by depositing a copy of it in the United States Mail, postage pre-paid, this 9th day of March, 2017, addressed as follows:

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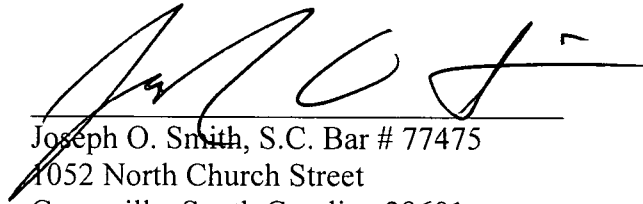
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SC Court of Appeals

(signature on following page)

ROE CASSIDY COATES & PRICE, P.A.

A handwritten signature in black ink, appearing to read 'J. O. Smith', is written over a horizontal line.

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March 9, 2017
Greenville, South Carolina

March 9, 2017

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SC Court of Appeals

VIA FEDERAL EXPRESS

The Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

**Re: Rick Still, Donice Still, Christine Orr and Terry Orr v. South Carolina Department of Health and Environmental Control and Lisa Sumerel and Sumerel Poultry Farm
Appellate Case No. 2015-000700
C.A. 13-ALJ-07-0395-CC
RCCP 2015.0002**

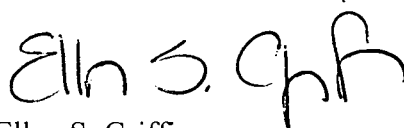
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of **Appellants' Petition for Rehearing** in the above-referenced appeal. Also enclosed is a Proof of Service for the same. Please file the enclosed documents in your usual manner and kindly return a clocked copy of the same to me in the stamped, self-addressed envelope provided herein.

If you have any questions or concerns, please do not hesitate to call. Thank you for your assistance.

With kind regards, I am

ROE CASSIDY COATES & PRICE



Ellen S. Griffin
Paralegal to Joseph O. Smith

Enclosures: (as stated above)

cc: Stephen P. Hightower w enclosures
Thomas E. Hite, III w enclosures

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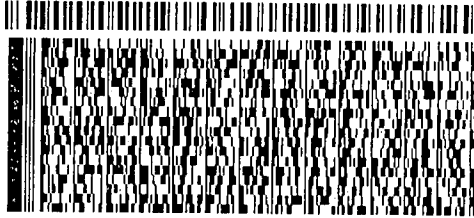
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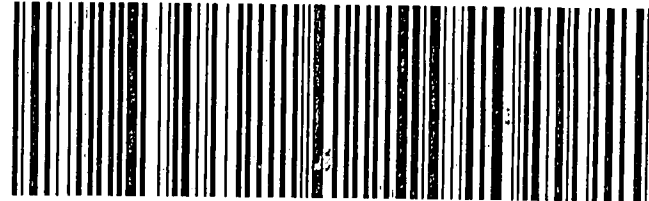
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