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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

JUN 26 2017

**S.C. SUPREME COURT**

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod, Administrative Law Judge

Case No. 13-ALJ-0-7-0395-CC  
Appellate Case No. 2017-001227  
S.C. App. Op. No. 2017-UP-068

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

v.

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

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**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI  
VOLUME II**

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ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith, S.C. Bar # 77475  
1052 North Church Street  
Greenville, South Carolina 29601  
(864) 349-2600; (864)-349-0303 fax  
*Attorneys for Petitioners*

Other Counsel of Record

Stephen P. Hightower  
SC DHEC - Office of General Counsel  
2600 Bull Street  
Columbia, SC 29201

Thomas E. Hite, III  
Hite & Stone  
P.O. Box 805  
Abbeville, SC 29620  
*Attorneys for Respondents*

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John D. McLeod, Administrative Law Judge

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SC Court of Appeals

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

vs.

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

**FINAL BRIEF OF RESPONDENTS  
SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL CONTROL,  
LISA SUMEREL AND SUMEREL POULTRY FARM**

Stephen P. Hightower  
Assistant General Counsel

Jacquelyn S. Dickman  
Chief Deputy General Counsel

South Carolina Department of  
Health and Environmental Control  
2600 Bull Street  
Columbia, South Carolina 29201  
TEL: (803) 898-3350  
FAX: (803) 898-3367  
Email: [hightosp@dhec.sc.gov](mailto:hightosp@dhec.sc.gov)

Attorneys for Respondent South  
Carolina Department of Health  
and Environmental Control

Thomas E. Hite, III  
Hite & Stone  
Post Office Box 805  
Abbeville, South Carolina 29620  
TEL: (864) 366-5400  
FAX: (864) 366-2638  
Email: [T3@hiteandstone.com](mailto:T3@hiteandstone.com)

Attorney for Respondents Lisa  
Sumerel and Sumerel Poultry Farm

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the ALC's Final Order and Decision upholding the Department's issuance of an agricultural permit for the construction and operation of the Sumerel Poultry Farm is supported by the Substantial Evidence in the Record.
2. Whether the Department's permit review considered agricultural and stormwater runoff from the Sumerel Farm and correctly concluded that the facility would produce no agricultural runoff and stormwater runoff is not reviewed as part of the agricultural permitting process.
3. Whether the Department's determination that stormwater runoff is to be reviewed as part of a separate permit program is entitled to deference.
4. Whether the Department's permit reviewer properly considered runoff prevention and slope of the land in his review and that determination is entitled to deference.
5. Whether the Department's review correctly concluded that in light of relevant state and federal standards, the location of the facility would not cause an increase in water pollution.
6. Whether the Odor and Vector Abatement Provisions in the CNMP satisfied all regulatory requirements for such plans.
7. Whether the ALC's conclusion that the Sumerel Poultry Farm is subject to the 200 foot property line setback is supported by the Substantial Evidence in the Record and is not affected by an error of law.
8. Whether the ALC correctly concluded that the evidence that Respondents presented regarding the exit weight for the Sumerel facility is more reliable than that presented by Appellants Respondents.
9. Whether the ALC erred in concluding that CNMP contained the correct exit weight.
10. Whether Appellants' claim that the ALC erred in excluding the Dr. Parkhurst testimony on AgraMetrics Report is not preserved for review before this Court.
11. Whether the applicable setback distance from property lines is established by the criteria in R. 61-43 Part 200.80.

## STATEMENT OF THE CASE

Appellants are appealing the Final Order and Decision of the Administrative Law Court (“ALC”) affirming the South Carolina Department of Health and Environmental Control’s (“SCDHEC” or “Department”) issuance of Bureau of Water Agricultural Permit ND0088307 No. 19647-AG (“Permit”) to Ms. Lisa Sumerel for the operation of Respondent Sumerel Poultry Farm (“Sumerel Farm”). (R. pp. 1-36). The Permit authorizes the construction and operation of a poultry broiler facility on Poole Town Road, Laurens, South Carolina, and was issued after a thorough review in which the Department determined that the Sumerel Farm would not cause an increase in air and water pollution in the surrounding area, and would not likely impair the health of residents in the community surrounding the facility. In accordance with S.C. Code Ann. § 44-1-60 (Supp. 2014), Appellants Rick Still, Donice Still, Christine Orr, and Terry Orr appealed the Permit by requesting a final review conference (“RFR”) from the South Carolina Board of Health and Environmental Control (“Board”), and then by requesting a contested case hearing before the Administrative Law Court after the Board denied their RFR.

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

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

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

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

### STATUTORY AND REGULATORY FRAMEWORK

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

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

- 1) a completed application form (R. 61-43 Part 200.50(B)(1));
- 2) an Animal Facility Management Plan prepared by qualified Natural Resources Conservation Service personnel or a SC registered professional engineer (R. 61-43 Part 200.50(B)(2));
- 3) an odor abatement plan for the animal facility, lagoon, treatment system,

- manure storage pond, and manure utilization areas (R. 61-43 Part 200.50(B)(3));
- 4) a Vector Abatement Plan (R. 61-43 Part 200.50(B)(5));
  - 5) a Dead Animal Disposal Plan (R. 61-43 Part 200.50(B)(6));
  - 6) Plans and specifications for all other manure treatment or storage structures, such as holding tanks or manure storage sheds (R. 61-43 Part 200.50(B)(8));
  - 7) all "Notice of Intent to Build or Expand an Animal Facility" forms as provided by the Department and a tax map (or equivalent) to scale showing all neighboring property owners and identifying which property has inhabited dwellings R. 61-43 Part 200.50(B)(9));
  - 8) an Emergency Plan R. 61-43 Part 200.50(B)(10)); and
  - 9) Application fee and first year's operating fee (R. 61-43 Part 200.50(B)(12)).

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

Once the Department receives the application, the Department shall "post up to four notices on the perimeter of the property or in close proximity to the property, in visible locations as determined by the Department." 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A). The Department reviews all comments received regarding the application and will schedule a public meeting, if twenty (20) or more comments are received, to discuss and seek resolution of public concerns about the proposed facility. 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D). Although resolution of concerns is a goal sought in conducting the meeting, an agreement resolving the concerns is not required. *Id.*

The decision making process for animal facility permits is set forth in R. 61-43 Part 200.70. Pursuant to this provision, the Department is required to "act on all permits

to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from new or enlarged sources.” 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E) (emphasis added). Specifically, the reviewer will determine whether the facility meets all the applicable siting requirements contained in R. 61-43 Part 200.80 and on a case-by-case basis, shall evaluate the proposed site to determine if additional distances are necessary using the following non-exclusive list of factors:

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

## 12. Aquifer vulnerability.

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

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

## STATEMENT OF FACTS

### Permit Application Process

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

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<sup>1</sup> References to JE, Pet. Ex. and Res. Ex. refer to "Joint Exhibit," "Petitioners' Exhibit," and "Respondents' Exhibit," respectively.

The Sumerels submitted their application for the Permit on October 10, 2012, when they filed a Comprehensive Nutrient Management Plan ("CNMP") and application with the Department for an agricultural permit to construct and operate a four house poultry broiler facility. (R pp. 4-5). The CNMP is a comprehensive document that contains seventeen major sections that address the following subjects: 1) South Carolina Facility Animal Management Plan; 2) Emergency Action Plan; 3) Land Treatment Practices; 4) Manure Handling and Storage; 5) Land Treatment Practices; 6) Nutrient Management; 7) Operation and Maintenance; 8) Record Keeping; 9) Feed Management; 10) Other Utilization Activities; 11) Appendix A: Manure Sampling Instructions and Forms; 12) Appendix B: Manure Broker Contract; 13) Appendix C: Land Base Needs; 14) Appendix D: Notice of Intent Forms; 15) Appendix F: Property line Waiver; 16) Appendix G: Maps and Site Characteristics; and 17) Appendix H: SC Regulations 61-43: Animal Facility Management Plan Cross-Reference. (R. pp. 211-212).<sup>2</sup> The Sumerel CNMP and other submittals were prepared by Joy S. Shealy, a registered South Carolina professional engineer. Prior to starting her business, Shealy Engineering, Ms. Shealy was employed with the Department for seven and one half years. (R. p. 188 p. 441, lines 12-22)]. For six and one half years, she was a permit reviewer in the Agricultural Permitting Section, and for one year she was a permit reviewer in the Stormwater Permitting Section. (*Id.*; R p. 4).

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

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

- 1) potable wells (required 200 feet, actual 1,300 feet);
- 2) potable wells owned by the applicant (required 50 feet, actual 500 feet);
- 3) waters of the State located downslope (excluding ephemeral & intermittent streams) (required 100 feet, actual 150 feet);
- 4) ephemeral or intermittent streams located downstream (required 100 feet, actual 150 feet);
- 5) ditches or swales located downslope (required 50 feet, actual 50 feet);
- 6) property line (500,000 lbs or less) (required 200 feet, actual 200 feet); and
- 7) occupied residence (required 1,000 feet, actual 1,300 feet).

(R p. 216).<sup>3</sup> The CNMP also specified information relevant to determining the classification of the size of the proposed facility with regard to applicable property line setback distance. Specifically, the CNMP contained the following information:

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

(R. p. 207; R. p. 215; R. p. 226) (emphasis added)).

Finally, the CNMP contained information regarding the slope of the property before construction. According to the Soil Map and the corresponding Map Unit Description, the soil in the area where the poultry houses will be located is a sandy loam that varies in slope from two (2) to ten (10) percent. (R. pp. 316-323).

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

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

As part of his review, Mr. Chaplin sent requests to the Department's Bureau of Air Quality and Bureau of Environmental Health's Division of On-Site Wastewater Management to evaluate air and groundwater impacts from the facility operations. (R. p. 5). Also as part of his review, Mr. Chaplin received medical information from four members of the community, who authorized the Department, in writing, to obtain medical information from their medical providers regarding their medical conditions and to consider this information as part of the information relied upon in arriving at a permitting decision. (R. p. 124 [p. 185, lines 5-15]; R. p. 379; R. p. 384). Mr. Chaplin sent the information that he received from the citizens to the Department's medical office for evaluation. (R. p. 384; R. p. 167 [p. 358, lines 6-19]).

The Bureau of Air Quality responded by a memorandum from Stephen W. Smutz, who is a member of the Bureau of Air Quality's Air Modeling Section. (R p. 5; R. p. 102 [p. 99]).<sup>5</sup> In that memorandum, Mr. Smutz, who was qualified as an expert in the field of meteorology and agricultural permitting without objection, set forth the following observations based on his review of the application, relevant law and other information:

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

<sup>5</sup> The page numbers in brackets are to identify the specific Transcript page numbers as they are found in the Record on Appeal, as the Record was printed with four pages of transcript per page.

- 1) the only source of information on emission rates was a December 2002 United States Environmental Protection Agency (US EPA) study entitled "*Non-water Quality Impact Estimates for Animal Feeding Operations*;"
- 2) the source of emissions from animal production areas (animal housing, manure storage, and treatment areas) is manure;
- 3) the study lists ammonia, nitrous oxide, methane, and hydrogen sulfide as potential pollutants from manure;
- 4) ammonia, nitrous oxide, and methane are not regulated by the Department as either criteria or toxic air pollutants because there are no state or federal standards for the gases;
- 5) hydrogen sulfide is a regulated toxic pollutant under South Carolina law;
- 6) although regulated, hydrogen sulfide is only released by anaerobic decomposition, which only occurs in wet manure management systems;
- 7) dry manure management systems, which are used in poultry facilities in South Carolina, only produce sulfates that decompose without producing hydrogen sulfide;
- 8) that particulate matter, sulfur dioxide, and carbon monoxide, which are produced by motor vehicles associated with the spreading of manure on the land or the hauling of the manure off-site, are exempt from permitting decisions; and
- 9) there are no state or federal standards for odor.

(R. pp. 396-397). Based on these factors, Mr. Smutz concluded that "[i]n consideration of the relevant standards under state and federal laws, an increase in air pollution is not expected from the proposed operation" and that "[i]n view of the fact that no State or Federal standards exist for odors and the foregoing information, the Bureau does not recommend any additional requirements or setbacks for this permit." (R pp. 5-6; R. p. 106 [pp. 115-16]; R. p. 397).

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

The Department's medical staff reviewed the medical information submitted by the four members of the community and determined that the placement and operation of facility would not adversely impact these citizens. (R. p. 384). In fact, one of the persons who submitted their medical information for consideration by the Department is Appellant Christine Orr. Despite challenging the Department's issuance of the Permit, Ms. Orr is not challenging the Department's determination on the impact of the facility on her medical condition. (R. p. 166 [p. 355, line 25 – p. 356, lines 7]; R. p. 167 [p. 358], lines 6-19).

As part of the Department's review, Mr. Chaplin considered whether the facility would cause an increase in water pollution. Specifically, Mr. Chaplin considered the following twelve regulatory factors set forth in R. 61-43 Part 200.70(F). *See, supra*, pp. 5-6. Additionally, Mr. Chaplin took into consideration regulation R. 61-43 Part 200.20(B), which provides that all non-swine animal facility permits are no-discharge

permits, and the fact that the Sumerel Farm facility would be disposing of all the manure generated by the birds by having a manure broker haul all the manure off-site and that the facility had no manure utilization areas. (R. p. 230; R. p. 334).

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

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

(R. p. 374) (emphasis in original and added). In addition, the Project Description Section of the Permit specifies that the normal live animal weight of the facility is 493,200 lbs. and that the average live weight is based on the calculation - 109,600 broilers x 4.5 lbs.

(R. p. 374). The CNMP, as noted above, provides that:

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

(R. p. 384; R. p. 215; R. p. 226 (emphasis added)).

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

## ARGUMENTS

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

#### **A. Standard of Review**

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

(B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2014). The review of a Final Order and Decision issued by the Administrative Law Court is "limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law."

*Engaging and Guarding Laurens County's Environment v. South Carolina Department of Health and Environmental Control, et al.*, 407 S.C. 334, 341-42, 755 S.E.2d 444, 448

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

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

The record before the Administrative Law Court is replete with facts supporting its determination that the Department, in accordance with the requirements governing the issuance of agricultural permits, correctly reviewed the Sumerels’ application for the Sumerel Poultry Farm. First, the Record establishes that a preliminary site inspection was performed by a Department inspector, and the Site was approved for possible development as an animal facility. (R. p. 385; R. p. 85 [p. 30, line 1– p. 32, line 5]; R. pp. 391-392; R. p. 85 [p. 32, lines 10–24]). The Record also contains evidence that establishes that the Sumerels submitted a complete application that included a properly prepared Animal Facility Management Plan, e.g., CNMP, prepared by a registered South Carolina professional engineer as required under 4 S.C. Code Ann. Regs. 61-43 Part

200.50(B)(2). The CNMP contains information and/or documentation regarding numerous matters, including the control of odor and vectors, a United States Geological Survey map, floodplain map, and a detailed soils map. (R. p. 206; R. pp. 232-234; R. p. 242; R. p. 305; R. pp. 307-308; R. pp. 317-327). The Standard Application Form incorporated into the CNMP established that the facility is subject to the 200 foot setback distance based on the following information:

AVERAGE ANIMAL LIVE WEIGHT = average exit weight + average entry weight =  $(8.75) + (0.25)/2 = 4.5$  pounds

Type of animals – Broilers

Maximum # of Animals (at any one time) – 109,600

Normal Production Live Weight (pounds) – 493,200

(R. p. 206; R. p. 215). The CNMP established that the facility is designed so that the distances from the animal houses to the following areas meet or exceed the applicable regulatory requirement: a) potable wells – required 200 feet, actual 1,300 feet; b) potable wells owned by the applicant – required 50 feet, actual 500 feet; c) waters of the State located downslope (excluding ephemeral & intermittent streams) – required 100 feet, actual 150 feet; d) ephemeral or intermittent streams located downslope – required 100 feet, actual 150 feet; e) ditches or swales located downslope – required 50 feet, actual 50 feet; f) property line (500,000 lbs or less) required 200 feet, actual 200 feet; and g) occupied permanent residence – required 1,000 feet, actual 1,300 feet. (R. p. 206; R. p. 216). Finally, the CNMP established the uncontroverted fact that the facility will not have any manure utilization areas. (R. p. 206; R. pp. 216-217).

Also contained in the Record is evidence that the Department had complied with the notice requirements contained in 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A) and had scheduled and conducted a public meeting in accordance with 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D). (R. p. 206; R. pp. 270-300; R. p. 377-378).

Similarly, the Record also establishes the Department's review with regard to the impact of the Sumerel Poultry Farm facility on the air and water in the surrounding community. Both testimony and documentary evidence from Mr. Smutz, who was qualified, without objection, as an expert on the field of meteorology and agricultural permitting, set forth nine observations based on his review of the application, relevant law and other information. (R. pp. 396-397).<sup>7</sup> Based on these factors, Mr. Smutz concluded that "[i]n consideration of the relevant standards under state and federal laws, an increase in air pollution is not expected from the proposed operation" and that "[i]n view of the fact that no State or Federal standards exist for odors and the foregoing information, the Bureau does not recommend any additional requirements or setbacks for this permit." (R. p. 106 [pp. 115-116]; R. p. 397).

Moreover, because of the possibility of emissions from the facility impacting persons with individualized medical conditions, the Department review included obtaining medical information from members of the community for review by Department's medical staff. Specifically, the Department received medical information via a Medical Evaluation Form (R. p. 336) and an Authorization to Release Medical Information Form (DHEC 1623) from four members of the community, including one of the Appellants, Christine Orr, who lives approximately 3,600 feet from the facility. (R. p. 377-378; R. p. 137A [p. 241, lines 23-25]; R. p. 167 [p. 358], lines 16-19). The

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<sup>7</sup> The specific observations are listed in the Statement of Facts at p. 11.

documents were reviewed by medical staff, including the State Epidemiologist, Dr. Linda Bell, MD, and the citizens were individually notified of the conclusions drawn by the Department as to whether their conditions would be impacted by the facility. *Id.*

Further, the Record establishes that the facility is unlikely to impact water quality in the area. As noted above, the CNMP contained information relevant to the likelihood of the facility causing an increase in pollution of the waters of the State. In particular, the information in CNMP establishes that the waters of the State are located 150 feet from the facility. (R. p. 216). Because waters of the state were located at distance 50% further than the minimum 100 foot distance required under 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(2), the evidence presented to the ALC established that Waters of the State were located a sufficient distant from a potential source of pollution, since there was not a likelihood of an increase in pollution to them from the facility. Also, since the 150 foot distance between the foot print of the facility and Waters of the State are vegetated with grass and forest, there is additional protection for water. (R. p. 305).

Moreover, the Record establishes that the facility would not have any manure utilization areas. (R. pp. 216-217; R. p. 183 [p. 248, lines 8-10]). Since the facility has no manure utilization areas, runoff was not considered since the only runoff is stormwater runoff, which is reviewed by the Department as part of a separate permit review process. (R. pp. 133-134 [p. 224, line 10 – p. 225, line 20]; R. p. 400). Also, since there were no manure utilization fields, the Department also did not have to consider the slope of the land, since the importance of slope to the Department's review is limited to its impact on land application of manure. (*See*, R. p. 138 [p. 246, line 17 – p. 247, line 17]).

Finally, the Composting Management Plan and CNMP established how the facility will dispose of bird mortality. These documents established that mortality would be accomplished by a combination of hay bale composting, incineration, and landfill disposal, and amended CNMP pages, which included incorporation of the new mortality disposal methods. (R. pp. 206; R. pp. 217-218; R. p. 228; R. pp. 234-235; R. pp. 237-328; R. pp. 240-241; R. pp. 243-244; R. p. 312; R. p. 341). In addition, the Composting Management Plan provides information showing that the composter will be located at least 500 feet from the nearest water body, where the rejected burial was to be located. (R. p. 356; R. p. 98 [p. 82, lines 4-9]). It also shows that the composter will be built on top of either a compacted clay or concrete base, and will be loaded so that there will be alternating layers of manure, straw, chickens, and manure; and then successive layers topped with a sawdust layer on top of the pad. (R. p. 99 [p. 98, line 16 – p. 99, line 1]; R. p. 135 [p. 232, lines 3-9]; R. p. 359; R. p. 361). The manure needed to operate the composter will be obtained from the manure broker contracted to remove the manure generated by the flock, who will leave the small amount of manure needed to operate the composter on a pad near the composter. (R. p. 98 [p. 81, line 19 – p. 82 line 9]; R. p. 135 [p. 229 line 22 – p. 230, line 5]).

Although permitted by regulation, Mr. Chaplin sought technical assistance outside the agency from Mr. Steven Henry, P.E., an employee of the National Resources Conservation Service (“NRCS”), which is an agency under the United States Department of Agriculture (“USDA”), for information on the appropriateness of the system to dispose of bird mortality at the Sumerel Farm. (R. p. 135 [p. 230, line 6 – p. 231 line 23]). Seeking technical advice from USDA, NRCS is permissible under the Department’s

regulations since the regulations expressly limits the persons who can prepare plans for animal facility management plans to those designed by a registered South Carolina professional engineer or an employee of the USDA, NRCS. (R. pp. 135-135A [p. 232, line 17 – p. 234, line 10]) *see* 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(2). Based on his discussions with Mr. Henry, Mr. Chaplin determined that hay bale composting systems are an appropriate way to compost dead animals and the Composting Management Plan was incorporated into the Permit. (R. p. 135 [p. 231, lines 3-7]; R. p. 136A [p. 236, lines 3-9]; R. p. 375).

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

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

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

Appellants claim that the Department's review of the Sumerel facility was

inadequate because the review did not include a review of a grading plan and stormwater management plan. The agricultural permitting regulations state that "the Department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from new or enlarged sources." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E). Here, state and federal law establishes that the review of stormwater management plans and activities, such as grading, are not conducted as part of the Department's agricultural review, to determine whether the facility should be permitted. Rather, stormwater management and grading plans are reviewed in a separate permit review process conducted by the Stormwater Permitting Section. In particular, Mr. Chaplin testified as follows:

Q. As part of 61-43, is the Department charged with looking at stormwater in issuance of an agricultural permit?

A. No, sir.

Q. Okay. Does the Department, in fact, look at stormwater for permitted agricultural facilities before they are built?

A. A stormwater permit is required prior to construction, and when I mail out a permit, I mail out a stormwater information sheet, and I also mail out a NOI for the drilling of wells on property.

\* \* \*

Q. Are you familiar with that document?

A. Yes, I wrote it.

Q. What is that document?

A. That's a little reminder and I attach the same

document I put in the mailer when I mail out a permit. It's a - - -

Q. Okay. And so it's --- I'm sorry.

A. It's a reminder that they need a stormwater plan prior to construction.

Q. Okay. To be precise, it's an email and there's an attachment and this attachment talks about stormwater permitting under 71-200 and 61-9, correct?

A. Well, I see this 72-300.

Q. Oh, sorry? 71-300.

A. 72-300.

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

A. That is correct.

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

A. Correct.

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

A. That's correct.

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

A. It is.

Q. The stormwater permitting section?

A. Yes, sir.

\* \* \*

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

A. Yes, that is correct.

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

A. Correct.

(R. p. 133 [p. 223, line 18 – p. 224, line 6]; R. p. 133 [p. 224, line 15] – p. 134 [p. 225, line 22]; R. p. 139 [p. 248, lines 11-16]). In addition, the Department admitted into evidence, as Respondents' Exhibit 1, the copy of the email and attached form, "New Compliance Requirements for SC DHEC Stormwater Permits," which Mr. Chaplin has discussed during the above-referenced colloquy. (R. p. 177 [p. 399], lines 22-24)).

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

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

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<sup>8</sup> It should be noted that Appellants' expert witnesses did not agree on whether stormwater runoff was a valid concern. Appellants' second expert witness, Dr. Carmen Parkhurst, Ph. D, who was qualified as an expert in animal feeding operations, poultry science and waste management, acknowledged that the topography would not prevent the proper grading of the Site for a poultry farm. (R. p. 146 [p. 274, line 21 – p. 276, line 8]; R. p. 155 [p. 311, line 15 – p. 312, line 19]). Moreover, the ALC found Dr. Parkhurst's testimony relevant enough as to cite his view in the FOD. Since, the ALC is the trier of fact, its view of the weight to accord the testimony of Appellants' two experts is dispositive. *Thomas Sand Company v.*

regulation requirement. The Department has exercised its discretion to review stormwater issues under the agency's stormwater program.

It is well established that "where an agency is charged with administering a statute or regulation has interpreted the statute or regulation, court, including the ALC, will defer to the agency's interpretation absent compelling reasons." *Kiawah Development Partners v. South Carolina Department of Health and Environmental Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). In sum, courts must defer to an agency's interpretation unless the interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Kiawah Development Partners*, 411 S.C. at 34-35, 766 S.E.2d at 718 quoting *Chevron, U.S.A, Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 27778, 81 L.Ed.2d 694 (1984). Here, the Department has interpreted R. 61-43 Part 200.70(E) as authorizing the Department to consider the stormwater effects of the facility as part of a separate stormwater permitting process. As noted in the "New Compliance Requirements for SC DHEC Stormwater Permits" form, since September 1, 2006, agricultural facilities, which had been previously exempt for stormwater regulation, were now subject to the regulatory requirements set forth in the Standards for Stormwater Management and Sediment Reduction, 9 S.C. Code Ann. Regs. 72-300 *et seq.* (2012) and requirements set forth in the State's National Pollution Discharge Elimination General Permit No. SCR 100000 for Stormwater, Discharges from Large and Small Construction Activities, which was issued pursuant to the requirements for Water Pollution Control Permits, 3 S.C. Code Ann. Regs. 61-9 (2011 & Supp. 2014). (R. p. 401). As the agency is charged with administering both the agricultural permitting and

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*Colonial Pipe line Company*, 349 S.C. 402, 411, 563 S.E.2d 109, 114 (Ct. App. 2002) quoting *Berkley Electric Cooperative, Inc. v. S.C. Public Service Commission*, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991).

stormwater regulations, the Department's decision to review grading and other stormwater matters associated with the permitting of new and expanded animal facilities as part of the stormwater permit review, instead of the agricultural permit review, is entitled to deference. The Department's decision merely shifts the review of stormwater issues at agricultural facilities from the Agricultural Permitting staff to the Stormwater Permitting staff, who have superior levels of expertise and training regarding stormwater matters. *See* 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E). Accordingly, deference to the Department's decision is proper since the regulatory requirement in the animal facility permitting regulations expressly provides that the Department's review is limited to reasonable standards under state and federal law. Therefore, Appellants' claim is without merit.

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

Appellants, while reluctantly conceding that the Department does bifurcate its review of runoff from agricultural facilities so that all stormwater runoff is reviewed in a separate process; nevertheless, argue that the Department's review was inadequate because runoff from agricultural activities was not considered and because Mr. Chaplin did not testify how agricultural runoff was reviewed. (R. p. 123 [p. 183, line 23 – p. 184, line 9]; App. Br. 30).<sup>9</sup> As will be shown below, each of these claims are unsupported by the facts contained in the Record.

The terms "runoff prevention" and "slope of land" are two of the enumerated criteria listed in the decision making portion of the agricultural permitting regulations. 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F)(9). The Department is charged with acting to

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<sup>9</sup> The term "App. Br." refers to the Brief filed by Appellants in this appeal.

prevent, “so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from new or enlarged sources.” 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E) (emphasis added). In applying this mandate to the criteria of runoff protection and slope of the land, the Department considers whether the new or expanded facility has or will have manure utilization areas. If the facility will not have any manure utilization areas, then as explained by Mr. Chaplin, the Department does not consider runoff as part of the method of disposing the manure on site. (R. p. 139 [p. 246, line 16 – p. 248, line 16]).

Mr. Chaplin’s interpretation of how the Department should conduct its review pursuant to R. 61-43 Part 200.70 is entitled to deference. The interpretation of a regulation by an agency’s employee is entitled to deference if that interpretation is reasonable and consistent with the plain language of the regulation. *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C. 633, 640-41, 723 S.E.2d 191, 195 (2012) (holding the interpretation of an undefined term by the Department’s permit reviewer is entitled to deference because it was reasonable and comported with the plain language of the regulation). The rationale behind Mr. Chaplin’s testimony is that R. 61-43 Part 200 regulates the Department to issue no-discharge permits to all new expanding animal facilities whether or not they will land apply manure. 4 S.C. Code Ann. Regs. 61-43 Part 200.10(B)(1) and (3); 4 S.C. Code Ann. Regs. 61-43 Part 200.20(B). Although the term “runoff protection” is not defined by R. 61-43, the term “runoff” is defined as “rainwater or other liquid that drains over land on any part of a land surface and runs off the land surface.” 4 S.C. Code Ann. Regs. 61-43 Part 50 (FFF). Taking these regulations together with the definition for manure

utilization area (an area in which animal manure is used as fertilizer), the department has determined that the criteria of "runoff protection is applicable only when the facility intends to use manure utilization areas. If the facility has or will have such areas, then the Department will consider the criteria of the slope of the land since the steepness of the topography affects how quickly manure laden runoff would leave the utilization area and potentially reach Waters of the State if located nearby.<sup>10</sup> However, when there are no manure utilization areas, such as in this case, the Department does not consider the runoff protection and slope of the land as part of its permit review since there is no reasonable potential for those criteria to cause an increase in pollution to the Waters of the State. Accordingly, Mr. Chaplin's interpretation of R. 61-43 Part 200.70(F) is entitled to deference by this Court

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

Appellants' claim that the Department's review regarding water pollution was inadequate because it only determined that the facility met the applicable setbacks. As stated in the previous section, the regulatory standard of review applicable to the Department's decision making for agricultural permits is to "act on all permits to prevent, so far as **reasonably possible considering relevant standards under state and federal laws**, an increase in pollution of the waters and air of the State from new or enlarged sources." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(E) (emphasis added). As part of his

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<sup>10</sup> To assist the Department in considering runoff protection and slope of the land, the regulations require that Animal Facility Management Plan for all facilities using manure management areas must contain the following information: the "[c]oncentration of constituents in liquid animal manure" or "[c]oncentration of constituents in dry animal manure;" and "[a] crop management plan which includes the time of year of the animal manure application and how it relates to crop, (g) type, crop planting, and harvesting scheduled (if applicable) for all manure utilization areas;" and "[f]acility and manure utilization information" 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(2)(f), (g), (h), and (i).

decision making review of the Sumerel Farm application, Mr. Chaplin determined that there was no reasonable possibility of water pollution occurring from operations at the Site. Specifically, Mr. Chaplin determined the following: the facility is located 50% further than the regulatory acceptable distance from the nearest water of State; no bird mortality will be buried at the site; none of the enumerated priority areas such as Outstanding Resource Waters or national or state parks are located within close proximity of the facility; and the facility is not using manure utilization areas. (R. pp. 380-384; R. p. 14). In the ALC, Appellants presented no evidence contradicting any of the matters above. In particular, they presented no evidence that the facility would cause an increase in pollution to Waters of the State that would cause a state or federal standard to be violated. Since the regulatory requirement requires an evaluation of pollution against a state or federal standard, Appellants' failure to show that a standard was, or reasonably would be exceeded, is fatal to their claim. Thus, this claim is without merit.

**D. The Odor and Vector Abatement Provisions in the CNMP satisfied all regulatory requirements for such plans.**

The regulatory requirements governing odor and vector abatement plans are located in Parts 200.50, 200.150 and 200.160. Part 200.50, which contains the requirements for animal feeding operation management plan, provides in pertinent part that:

- A. A producer who proposes to build a new animal facility or expand an existing animal facility shall make application for a permit under this part using an application form as designated by the Department. The following information shall be included in the package.

\* \* \*

4. The Animal Facility Management Plan shall contain an odor abatement plan for the animal facility, lagoon, treatment system, manure storage pond, and manure utilization areas. For more specific details, see Section 200.150 (Odor Control Requirements).

5. A Vector Abatement Plan shall be included for the animal facility, lagoon, treatment system or manure storage pond, and manure utilization areas. For more specific details see Section 200.160 (Vector Control Requirements).

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

Part 200.150 provides in pertinent part that:

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

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

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

Part 200.160 provides in pertinent part that:

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

1. *Normal management practices* used at the animal facility, lagoon, treatment system, manure storage pond, and manure utilization *areas* to ensure there is no accumulation of organic or inorganic materials to the extent

and in such a manner as to create a harborage for rodents or other vectors that may be dangerous to public health.

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

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

Taken together, the language of the various regulations can be summed up as requiring that every animal facility management plan must have: an odor abatement plan for the animal facility, lagoon treatment system, manure storage pond, and manure utilization areas, as applicable, which may consist of or contain any requirement, including non-mandatory five enumerated criteria; and a vector abatement plan that contains BMPs (Best Management Plan) and list of specific actions to be taken for specific identified vectors.

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

Indeed, the ALC recognized this fact in its decision, where it concluded that “[b]y providing that the odor plan may consist of certain criteria and that the vector plan shall consist of a list of specific actions to be taken, the regulations do not mandate ‘site specific’ criteria limited in application to only the proposed facility and no other facility. Rather, they require plans capable of controlling odor and vectors.” (R. pp. 12-13).

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

The regulations governing the construction and operation of animal facilities for animals other than swine set forth two setback distances from the property lines of the land parcel upon which the facility is sited. For a facility with a normal production animal live weight at any one time of 500,000 pounds or less, the setback distance is 200 feet. 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(5). For a facility with a normal production animal live weight at any one time of greater than 500,000 pounds, the setback distance is 400 feet. 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(6). The Department formula for determining whether a facility is subject to the 200 foot setback or the 400 foot setback is in part set forth on the Department’s Standard Application Form for New or Expanding Agricultural Animal Facility (other than swine) (DHEC 3580) as follows: average animal live weight = (average exit weight + average entry weight)/2. (R. p. 215; R. 128 [p. 202, lines 4-8]).<sup>11</sup> Once the average live weight is ascertained, this figure is then multiplied by the maximum number of birds to be housed at the facility at one time to obtain the facility’s normal live animal weight, which establishes the applicable property line setback. (See R. p. 215; R. p. 374). Applying

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

this formula to the specifications for the Sumerel Poultry Farm as set forth in the CNMP, the average live weight for the facility is 4.5 pounds  $[(8.75 \text{ pounds} + .25 \text{ pounds})/2 = 4.5 \text{ pounds}]$  and 4.5 pounds x 109,600 broilers = 493,200 pounds. (R. p. 215; R. p. 374). Since the Sumerel Poultry Farm normal production animal live weight is 493,200 pounds, which is less than the regulatory 500,000 pound limit, the facility is subject to the 200 foot setback distance. (R. p. 207; R. p. 215; R. p. 374). Therefore, the substantial evidence fully supports the ALC's conclusion that the applicable regulatory setback distance for the facility is 200 feet.

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

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

Procedurally, this claim must be rejected because Appellants are merely attempting to have the Court substitute its view of the facts for that of the ALC. Under the substantial evidence standard, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Risher v. South Carolina Department of Health and Environmental Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) quoting *Palmetto Alliance, Inc. v. Public Service Commission*, 282 S.C. 430, 432, 319

S.E.2d 695, 696 (1984). Appellants argue in support of this claim that the testimony of their expert, Dr. Carmen Parkhurst, Ph.D, established that “the 8.75 exit weight utilized in the Sumerel CNMP was a dated and inaccurate number.” (App. Br. p. 10). Moreover, Appellants argue that the ALC should have accept Dr. Parkhurst’s figure since he was qualified as an expert and had impressive credentials, and “Respondents did not provide expert testimony and/or reliable evidence to contradict Dr. Parkhurst’s expert opinion on this issue.” (App. Br. p. 16). Simply put, these arguments seek to have this Court attempt to determine the weight of the testimony before the ALC based on a cold transcript, unlike the ALC which heard the testimony of witnesses and was able to make judgments on the credibility of the testimony based on factors not apparent in the record. *See Tims v. J.D. Kitts Construction*, 393 S.C. 496, 508, 713 S.E.2d 340, 346 (Ct. App. 2011) (“The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel] . . . It is not the task of this Court to weigh the evidence as found by the [Appellate Panel]”) quoting *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Therefore, by claiming that the ALC decision was in error because the “preponderance of the reliable evidence presented at trial established the average exit weight for the Sumerel facility would be at least 9 pounds,” Appellants have run afoul of the standard discussed in *Risher* that substantial evidence exists even if the evidence supports inconsistent conclusions.

Further, even if it were considered by this Court, Appellants’ claim is without merit. Although Appellants’ claim that Dr. Parkhurst’s exit weight figure of 9 pounds is more reliable, the evidence in the Record presents a different picture. First, Dr. Parkhurst testified that the figure was not based on information obtained from Columbia Farms, the

integrator for the Sumerel Poultry Farm, despite the fact that he could easily obtain the information since he knows the President of Columbia Farms. (R. p. 157 [p. 317, line 21 – p. 318, line 8]). Second, Dr. Parkhurst conceded that he had prepared an eight-page report in which he stated that, except for the possibility of a problem with using a hay bale compositing system for mortality disposal, there were no problems raised by the CNMP. (R. p. 158 [p. 321, lines 6-16]). Third, Dr. Parkhurst acknowledged that each integrator, the company that owns the birds grown by the farmer, sets their own exit weight for the flocks being grown out by their contract farmers. (R. p. 156 [p. 315, line 18 – p. 316, line 7]). He also acknowledged that each integrator sets their own exit weight, and the figure is dependent upon the market and internal corporate factors for each integrator. (R. p. 156 [p. 316, lines 4-7]). In fact, Dr. Parkhurst acknowledged that Columbia Farms, the integrator for the proposed Sumerel facility, could want its farmers to grow an eight pound chicken, despite the fact that a competitor, such as Perdue, might want its farmers to grow the chickens to ten pounds. (R. p. 156 [p. 316, lines 8-12]). It was these caveats and qualifications that the ALC found to undercut the probative value of the testimony. (R. p. 19; R. p. 32).

In their brief, Appellants attempt to rehabilitate Dr. Parkhurst's testimony by claiming it was not necessary for Dr. Parkhurst to find out specific information from the company, given that he had personal knowledge and experience upon which to base his expert opinion. (App. Br. p. 18). The ALC did not reject Dr. Parkhurst's testimony, rather, it considered the testimony to be neither probative nor persuasive, since the information as to what exit weight Columbia Farms was seeking for farms contracted to the company at the time of the trial in August 2014, would have been the type of

information that the Court would have reasonably considered to have been information that an expert in the field of poultry science would have consulted before rendering an opinion. See Rule 703, South Carolina Rules of Evidence (“SCRE”). Had he stated that he had contacted Columbia Farms and had considered information from it in opining that the 8.75 pound exit weight figure was low, and that the 9 pound exit weight figure was more accurate, the ALC might have concluded that Dr. Parkhurst’s testimony was more credible. However, Dr. Parkhurst did not take this extra step and the ALC concluded this failure undermined his testimony. (R. p. 19; R. p. 30).

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

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

Appellants' claim that evidence in the Record does not establish that Columbia Farms actually provided the 8.75 exit weight figure. Specifically, they claim that the figure constitutes "[t]hird hand/double hearsay testimony" since the CNMP preparer, Ms. Shealy, obtained the figure from her employee, Mr. Fulmer, who obtained it from Mr. Sumerel, who received the information from the integrator. (App. Br. p. 20). Appellants' claim is meritless.

As a threshold issue, Appellants' argument is barred by the rules governing appellate review. "It is well settled that a contemporaneous objection must be made to preserve an argument for appellate review. *Washington v. Whitaker*, 317 S.C.108, 113, 451 S.E.2d 894, 898 (1994) citing *Taylor v. Bridgebuilders, Inc.*, 275 S.C. 236, 238, 269, S.E.2d 337, 339 (1980); *Webb v. CSX Transportation, Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005). At trial, when Appellants' counsel cross-examined Ms. Shealy and elicited testimony on where she obtained the figure for the exit weight for the facility, counsel made no contemporaneous objection to the testimony. (R. p. 194 [p. 466, lines 15-21]; R. p. 194 [p. 467, line 19 – p. 468, line 25]). A contemporaneous objection would have allowed the Court to rule on the issue. Even if the ALC had upheld such an objection, that fact would have been inconsequential to whether the record contained substantial evidence on the source of the exit weight figure since Mr. Sumerel was present for the entire trial and was available to be recalled. Had he been recalled, Mr. Sumerel would have been able to provide information upon which the ALC could have decided the issue in detail. However, by not making a contemporaneous objection,

Appellants prevented the ALC from having an opportunity to address the issue, and that failure bars them from raising the issue now.

Moreover, Appellants' failure to make a contemporaneous objection cannot be resuscitated by their post-trial motion. Appellate courts at all levels of review have held that a post-trial motion does not preserve an issue not previously raised for appellate review. *In re Beard*, 359 S.C. 351, 361, 597 S.E.2d 835, 840 (Ct. App. 2004) *cert. denied* (2005) (holding that an issue raised for the first time in a Rule 59(e), SCRC motion (News trials; Amendment of Judgments) not preserved for appellate review); *see Gainey v. Gainey*, 382 S.C. 414, 424-25, 675 S.E.2d 792, 797 (2009) (holding that an issue raised for the first time in a Rule 60(b)(4), SCRC motion to vacate judgement unpreserved for appellate review). Therefore, Appellants' discussion of this issue for the first time in their Motion to Reconsider and Memorandum in Support did not preserve this issue for review by this Court. (*See* R. pp. 41-42; R. pp. 44-45).<sup>12</sup> Accordingly, Appellants' claim of error by the ALC is not properly before this Court and must be denied.

However, even if this Court were to review this issue, which it should not for the reasons above, Appellants nevertheless would not prevail. The substantial evidence in the Record shows that 8.75 pound exit weight figure had already been admitted into evidence by Appellants' counsel. During the trial, Appellants' counsel, while questioning the first witness, sought the admission of the CNMP as JE 1. (R. p. 82 [p. 20, lines 16-24]). As noted previously, the Standard Application Form contained in the CNMP indicates that the Sumerel Poultry Farm is to operate using 8.75 as the exit weight

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<sup>12</sup> The term "Memo in Support" refers to the Motion to Reconsider and Memorandum in Support filed by Appellants on January 22, 2015.

of the birds. (R. p. 215). Moreover, the Standard Application Form was signed by Mr. Sumerel and the signature block signed by Mr. Sumerel contained the following certification, which is printed in capital letters for emphasis, and in pertinent part states:

Section 8 – CERTIFICATION

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

(R. p. 217) (emphasis added). Clearly at the time that he sought admission of the CNMP into evidence, Appellants' counsel did not believe that the information contained therein was hearsay, since he never sought to limit the evidentiary value of the document. This failure constitutes a waiver of Appellants' claim of error by the ALC's admission of evidence of the 8.75 exit weight and a forfeiture of the right to object to the admissibility of the evidence on appeal. *See Holroyd v. Requa*, 361 S.C. 43, 59-60, 603 S.E.2d 417, 425-26 (Ct. App. 2004) (holding failure to object to evidence elicited by a party constituted a waiver of party's right to object to evidence on appeal). Therefore, Appellants' claim is meritless.

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

“The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.’ Even a finding of an abuse of discretion does not end the analysis, however, ‘because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the

error of the ruling and prejudice.’ Prejudice is a reasonable probability that the fact-finder’s determination was influenced by the challenged evidence or the lack thereof.” *Hill v. South Carolina Department of Health and Environmental Control, Inc.*, 389 S.C. 1, 14, 698 S.E.2d 612, 619 (2010) (citations omitted). During the trial, Dr. Parkhurst testified during cross-examination that it was his opinion that the 8.75 exit weight for the Sumnerel facility was low. (R. p. 153 [p. 302, line 25]). This opinion was based, in part, on studies that he performed, and in part on a document that was not readily available and was a document of the type that the Department sought and which had not been turned over to the Department during discovery. (R. p. 153 [p. 303, line 1 – p. 305, line 10]; R. p. 56). The Department objected to Dr. Parkhurst basing any of his testimony on this document since he admitted that he chose not to provide the document to his attorney, despite the fact that he was aware of the counsel’s duty to disclose pursuant to the South Carolina Rules of Civil Procedure and the Rules of the South Carolina Administrative Law Court. (R. p. 152 [p. 305, lines 4-14]). After an off the record sidebar, the ALC sustained the Department’s objection to the report, which was prepared by a third party and not Dr. Parkhurst. (R. p. 154 [p. 307, lines 1-8]).

Appellants’ challenge of the ALC’s ruling based on the fact that an expert can rely on third party material in support of their opinions misses the point of the ALC’s decision. (See App. Br. p. 22). The ALC did not deny Dr. Parkhurst the right to base his opinion of the report because of the type of document, but because Dr. Parkhurst had unilaterally decided not to disclose the report prior to trial, which prejudiced the Department. (R. p. 153 [p. 303, line 1] – R. p. 154 [p. 305, line 10]; R. p. 56). The ALC’s action was a reasonable resolution of the issue and was well within the discretion

accorded trial courts in admitting evidence. *Hill*, 391 S.C. at 14, 698 S.E.2d at 619. Moreover, Appellants' claim is in error because they cannot show prejudice. The ALC allowed Dr. Parkhurst to testify that he believed the exit weight in the CNMP was low. (R. p. 154 [p. 307, lines 1-6]). Indeed, as noted by Appellants in their Motion to Reconsider, the only prejudice from the ALC's decision to exclude the testimony based on the report was "it provided further evidence of the inaccuracy of the 8.75 lbs. process weight figure utilized in the CNMP." Thus, Appellants' claim is without merit.

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

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

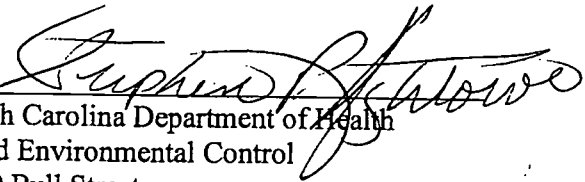
**CONCLUSION**

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

Respectively submitted,

Stephen P. Hightower  
Assistant General Counsel

Jacquelyn S. Dickman  
Deputy General Counsel  
Chief Counsel, EQC

By:   
South Carolina Department of Health  
and Environmental Control  
2600 Bull Street  
Columbia, South Carolina 29201  
Tel: 803-898-3350  
Fax: 803-898-3367  
Email: [hightosp@dhec.sc.gov](mailto:hightosp@dhec.sc.gov)  
Attorneys for Respondent South Carolina  
Department of Health and Environmental  
Control

Thomas E. Hite, III  
Hite and Stone  
Post Office 805  
Abbeville, South Carolina 29620  
Tel: (864) 366-5400  
Fax: (864) 366-2638  
Email: [T3@hiteandstone.com](mailto:T3@hiteandstone.com)  
Attorney for Respondents Lisa Sumerel  
And Sumerel Poultry Farm

November <sup>24</sup> 2015  
Columbia, South Carolina

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Administrative Law Judge

Appellate Case No. 2015-000700

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

vs.

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

**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.

Stephen P. Hightower  
Assistant General Counsel

Jacquelyn S. Dickman  
Chief Deputy General Counsel

By 

South Carolina Department of  
Health and Environmental Control  
2600 Bull Street  
Columbia, South Carolina 29201  
TEL: (803) 898-3350  
FAX: (803) 898-3367  
Email: [hightosp@dhec.sc.gov](mailto:hightosp@dhec.sc.gov)

Attorneys for Respondent South  
Carolina Department of Health  
and Environmental Control

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
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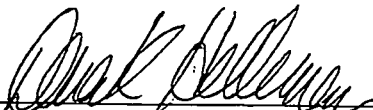
**CERTIFICATE OF SERVICE**

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I, Donna Hellerman, Legal Assistant for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this 24 day of November, 2015, served a copy of the *Final Brief of Respondents South Carolina Department of Health and Environmental Control, Lisa Sumerel and Sumerel Poultry Farm* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

Joseph O. Smith, Esquire  
Roe Cassidy Coates & Price PA  
Post Office Box 10529  
Greenville, South Carolina 29603

Thomas E. Hite, III, Esquire  
Hite & Stone  
Post Office Box 805  
Abbeville, South Carolina 29620

  
Donna Hellerman

November 24, 2015  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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NOV 30 2015

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT  
SC Court of Appeals

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 Farm .....Respondents.

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**FINAL REPLY BRIEF OF APPELLANTS**

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ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith, S.C. Bar # 77475  
1052 North Church Street  
Greenville, South Carolina 29601  
(864) 349-2600  
(864)-349-0303 fax  
jsmith@roecassidy.com  
*Attorneys for Appellants*

November 25, 2015  
Greenville, South Carolina

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## I. REPLY ARGUMENT

### A. Appellants properly preserved their arguments for appellate review

#### 1. *Appellants' claim that the ALC erred in failing to admit the AgraMetrics report was properly preserved for appellate review*

Respondents' argue the ALC's decision not to admit the AgraMetrics report at trial is not preserved for appellate review. (Resp. Br. at 39-40). This is incorrect, as this issue was raised to and ruled upon by the ALC during trial. Specifically, 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 Comprehensive Nutrient Management Plan ("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" (the AgraMetrics report). (R. p. 154/Tr. pp. 305-07). On appeal 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). This issue was properly preserved for appellate review.

During trial DHEC objected to admission of Dr. Parkhurst's testimony regarding AgraMetrics. Both parties were given an opportunity to argue their respective positions on the issue. (R. p. 154/Tr. pp. 305-307). DHEC counsel made a specific argument on

the record against admission. (R. p. 154/Tr. pp. 305-06). The ALC then gave Appellants an opportunity to make a specific argument for inclusion of the AgraMetrics testimony. (R. p. 154/Tr. p. 306:13-25). After consideration of those arguments, the lower court chose to exclude the AgraMetrics evidence. (R. p. 154/Tr. p. 307:1-6). Thus, the issue being raised to and ruled upon by the trial court properly preserved it for appellate review. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (Ct. App. 2000).<sup>1</sup>

Respondents go on to argue that “[t]he ALC did not deny Dr. Parkhurst the right to base his opinion of [*sic*] the report because of the type of document [*sic*], but because Dr. Parkhurst had unilaterally decided not to disclose the report prior to trial, which prejudiced the Department.” (Resp. Br. at 40). DHEC claims it “objected to Dr. Parkhurst basing any of his testimony on this document since he admitted that he chose not to provide the document to his attorney....” (Resp. Br. at 40). Respondents made a similar assertion in their Response to [Appellants’] Motion to Reconsider. (R. pp. 55-57). In that filing the Department also failed to cite any portions of the transcript or record to support its position. (R. pp. 55-57). In response, Appellants were forced to submit a reply to this accusation to the ALC, with Judge McLeod determining that this “assertion as an advocate should be disregarded as overcome by the record.” (R. pp. 72-75; R. p. 76). The Department’s more recent claim is also completely unsupported by the record. As noted both parties argued their respective positions on this issue, with DHEC counsel not once saying the report (or testimony concerning it) should be excluded

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<sup>1</sup> Following issuance of the Final Order, Appellants’ Motion for Reconsideration and Memorandum in Support again raised the issue. (See R. pp. 37-49).

because it was not provided prior to trial. (R. p. 154/Tr. pp. 305-06).<sup>2</sup> Following both counsels' arguments, the lower court sustained DHEC's objection "in respect to the third-party studies...." (R. p. 154/Tr. p. 307:1-6). Thus, the record clearly reflects the parties' positions and the ALC's ruling on this issue at trial. The record remains unchanged and unresponsive of Respondents' position on this issue.

**2. Appellants' properly preserved their objection to the ALC's reliance upon Joy Shealy's testimony regarding exit weight**

Respondents claim that because Appellants did not make a contemporaneous objection to Joy Shealy's testimony regarding exit weight, 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

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<sup>2</sup> During the Department's questioning of Dr. Parkhurst DHEC requested an off the record sidebar to discuss this issue. After this sidebar the parties put their respective objections on the record.

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.

### ***3. Admission of Joint Exhibit 1 does not bar a challenge to its contents***

Respondents summarily claim that Appellants' agreement to admit Joint Exhibit 1 (the CNMP) bars them from challenging the accuracy of its contents; namely the exit weight figure. (Resp. Br. at 38-39). Admission of a joint exhibit is not a concession to the truth or accuracy of its contents. The heart of this controversy lies in the accuracy and adequacy of the Sumerel CNMP and DHEC's review of it. All parties recognized the CNMP needed to be admitted into evidence as one of the, if not the, most important document at trial. Appellants' pre-trial agreement to admit Joint Exhibit 1/the CNMP was merely done to get this seminal document into evidence and before the ALC. If Appellants agreed with its content then they would not have gone through a two day trial

challenging it. Respondents' cited authority, *Holroyd v. Requa*, 361 S.C. 43, 59-60, 603 S.E.2d 471, 426-26 (Ct. App. 2004), in support of their argument is distinguishable and inapplicable to this case. In *Requa* this Court held that a party who testified concerning evidence he previously argued should be excluded cannot then challenge admission of that evidence on appeal. *Id.* Here, pursuant to the ALC's pre-trial order, the parties cooperated and agreed upon joint exhibits prior to trial. Joint Exhibit 1/the CNMP was admitted as a practical necessity. Appellants' did not "elicit" or offer testimony or evidence that all of its contents were true and accurate. In fact, they offered the opposite, including expert testimony of Dr. Parkhurst that the 8.75 lb. exit weight figure in the CNMP was inaccurate. Appellants agreed to admission of Joint Exhibit 1/the CNMP as an accurate depiction of the plan submitted to and evaluated by DHEC in this case and nothing more.

**B. The ALC erred in finding DHEC conducted a full and adequate evaluation of the proposed Sumerel operation as required under applicable statutes and regulations, including S.C. Reg. 61-43 Part 200.70(E)**

**1. DHEC did not complete all reviews and evaluations before issuing the Sumerel Permit**

Respondents assert that "[o]n June 12, 2013, after all reviews had been completed and the information evaluated by applicable Department staff and Mr. Chaplin...the Department issued the Permit..." (Resp. Br. at 14). All inspections and evaluations had not in fact been completed when DHEC issued the Sumerel Permit on June 12, 2013. As noted in Appellants' Initial Brief, the uncontroverted evidence at trial established that 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 24<sup>th</sup> 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).

***2. The Department did not adequately evaluate the proposed site and its operational impacts***

On brief, DHEC concedes it did not consider the slope of the land or runoff prevention in evaluating the Sumerel facility despite the clear mandate of S.C. Reg. 61-43 Part 200.70(F) to do so. (Resp. Br. at 19-28). Respondents attempt to justify these failures by an appeal for deference and insertion of conditions precedent not found in the regulations.

First, Respondents argue that “since there were no manure utilization fields, the Department did not have to consider the slope of the land....” (Resp. Br. at 19).

Respondents also claim that

[A]pplying [the] mandate [of 200.70(E)] to the criteria of runoff protection and slope of the land, the Department considers whether the new or expanded facility has or will have manure utilization areas. If the facility will not have any manure utilization areas, then as explained by Mr. Chaplin, the Department does not consider runoff as part of the method of disposing manure on site.

(Resp. Br. at 26-27). To reach this conclusion, DHEC contends that it interprets “runoff protection” [*sic*] to apply only when a plan calls for manure utilization areas. (Resp. Br. at 26-28). Specifically, Respondents note that “runoff protection” [*sic*] is not defined under the applicable regulations but “runoff” is as “rainwater or other liquid that drains over land on any part of a land surface and runs off the land surface.” (Resp. Br. at 27

citing 4 S.C. Code Ann. Reg. 61-43 Part 50(FFF)). They go on to say that “these regulations together with the definition of manure utilization area” led to the Department determining it only need evaluate runoff prevention for proposed poultry operations when manure utilization areas are in a plan. (Resp. Br. at 27-28).

This is not a regulatory interpretation issue, but rather an attempt to insert a condition precedent to adherence to the regulatory mandates of 200.70(E) & (F). Such a condition is not found within the regulations. Even if were an interpretation issue, the plain language of 200.70(F) says “[t]he Department *shall* evaluate the proposed site including, but not limited to, the following factors when determining if additional distances are necessary:...(7) slope of the land...and (9) runoff prevention.” S.C. Code Ann. Reg. 61-43 Part 200.70(F)(*emphasis added*). It does not say the Department shall consider runoff prevention and the slope of the land only when the plan calls for manure utilization areas. In short, this is a phantom condition that cannot excuse DHEC’s failure to conduct an adequate evaluation of the Sumerel Plan in accordance with Part 200.70(F)(7) & (8) by evaluating runoff prevention and the slope of the land.

As argued in Appellants’ Initial Brief, consideration of the slope of the land as it will be when the facility is operational (after it is graded) is necessary to ensure the proposed operation will not detrimentally impact waters of the State. (*See Ap. In. Br. at 33-35*). More to the point, Respondents fail to cite any authority allowing them to forego this mandatory consideration when the plan does not call for manure utilization fields. This is a mandated consideration under 200.70(F) that is not conditioned upon whether the facility has manure utilizations areas. DHEC flatly recognizes on brief it failed to consider the slope of the land once graded. Its excuses for not doing so are inadequate.

Dr. Hargett, as the only qualified water expert at trial, testified that this is a necessary consideration to determine whether a proposed operation will detrimentally impact receiving waters. (R. pp. 112-13/Tr. pp. 140-44; R. p. 114/Tr. pp. 145-46; R. p. 119/Tr. p. 165).

Second, Respondents attempt to excuse noncompliance with 200.70(E) and (F) claiming that DHEC evaluates stormwater runoff prevention “from the grading of the land for agricultural purposes...as part of a separate permitting program.” (Resp. Br. at 24). Appellants recognize and never challenged the fact that DHEC has a separate stormwater permit one must obtain before grading land. This evaluation however, contrary to Respondents’ claims, does not evaluate agricultural runoff. The testimony at trial showed that DHEC’s stormwater runoff evaluation does not consider the impact of agricultural operations or runoff. Specifically, Dr. Hargett testified DHEC “customarily would not look at pollutants being emitted from the chicken house” in evaluating a stormwater pollution prevention plan. (R. p. 123/Tr. p. 183:12-22). Likewise, Respondents’ witness, Leon Fulmer, testified:

*Q: Now, based on your experience with stormwater permitting, when the Department evaluates that permit, do they take into consideration any of the emissions from the poultry or ag operation that’s going to be on that site?*

*A: Not from a stormwater standpoint, no.*

(R. p. 184/Tr. p. 425:6-11). Review and consideration of runoff prevention in another permitting program does not excuse nonadherence to the mandates of Part 200.70(F); especially when that separate evaluation does not consider emissions from the proposed agricultural operation.

Finally, DHEC attempts to bypass the mandated considerations under Part 200.70(F) by claiming it only need evaluate whether a proposed operation will likely violate state or federal pollution standards. (Resp. Br. at 28). The regulations mandate that “[t]he Department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from new or enlarged sources.” 4 S.C. Code Ann. Reg. 61-43 Part 200.70(E). The regulation does not confine DHEC’s evaluation to determining whether state or federal pollutant standards will be violated by operation of the proposed facility. An “increase in pollution” is not akin to “an increase in pollution to a level that violates state or federal standards.” Thus, to abide by the mandate of Part 200.70(E) DHEC need consider an increase in pollutants to the waters of the State caused by the proposed Sumerel facility, and not simply if it will pollute receiving waters to such a degree it violates state or federal pollution standards.

## **II. Conclusion**

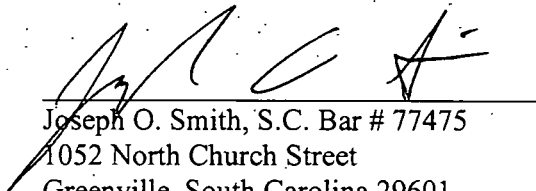
Appellants adequately addressed the remaining issues in their Initial Brief and do not believe it necessary to burden the Court with additional briefing on those issues.

For the reasons set forth above and in Appellants’ Initial Brief, the Administrative Law Court’s Order of January 12, 2015 should be reversed.

**(signature page to follow)**

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.

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

Joseph O. Smith, S.C. Bar # 77475

1052 North Church Street

Greenville, South Carolina 29601

(864) 349-2600

(864)-349-0303 fax

[jsmith@roecassidy.com](mailto:jsmith@roecassidy.com)

*Attorneys for the Appellants.*

November 25, 2015  
Greenville, South Carolina

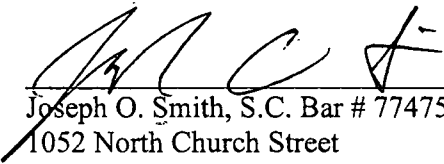
5

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Reply Brief of the Appellants complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

ROE CASSIDY COATES & PRICE, P.A.

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NOV 30 2015  
SC Court of Appeals

  
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Joseph O. Smith, S.C. Bar # 77475

1052 North Church Street

Greenville, South Carolina 29601

(864) 349-2600

(864)-349-0303 fax

[jsmith@roecassidy.com](mailto:jsmith@roecassidy.com)

*Attorney for the Appellants*

November 25, 2015  
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

RECEIVED

NOV 30 2015

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW SC COURT of Appeals

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  
And Lisa Sumerel and Sumerel Poultry Farm ..... Respondents.

PROOF OF SERVICE

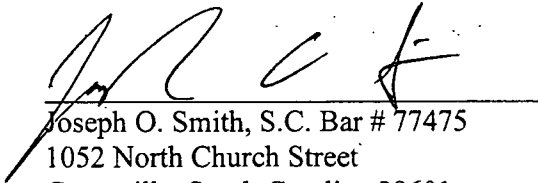
I certify that I have served the Final Reply Brief of Appellants on the Respondents Lisa Sumerel and Sumerel Poultry Farm and South Carolina Department of Health and Environmental Control by depositing a copy of it in the United States Mail, postage pre-paid, this 25th day of November, 2015, addressed as follows:

Stephen P. Hightower  
Assistant General Counsel  
Office of the General Counsel  
Bureau of Water & Special Enforcement  
South Carolina DHEC  
2600 Bull Street  
Columbia, SC 29201  
*Attorney for Respondent SC DHEC*

Thomas E. Hite, III  
Hite & Stone  
P.O. Box 805  
Abbeville, SC 29620  
*Attorney for Respondents Lisa Sumerel  
and Sumerel Poultry Farm*

(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.

Joseph O. Smith, S.C. Bar # 77475

1052 North Church Street

Greenville, South Carolina 29601

(864) 349-2600

(864)-349-0303 fax

[jsmith@roecassidy.com](mailto:jsmith@roecassidy.com)

*Attorney for the Appellants*

November 25, 2015  
Greenville, South Carolina

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

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.

Appellate Case No. 2015-000700

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

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Unpublished Opinion No. 2017-UP-068  
Heard December 7, 2016 – Filed February 8, 2017

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**AFFIRMED**

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Joseph Owen Smith, of Roe Cassidy Coates & Price, PA,  
of Greenville, for Appellants.

Thomas Erskine Hite, III, of Hite and Stone, of  
Abbeville, for Respondents Lisa Sumerel and Sumerel  
Poultry Farm; Jacquelyn Sue Dickman and Stephen  
Philip Hightower, both of Columbia, for Respondent

South Carolina Department of Health and Environmental  
Control.

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**PER CURIAM:** Rick and Donice Still and Christine and Terry Orr (collectively, Appellants) appeal the Administrative Law Court's (ALC's) decision affirming the Department of Health and Environmental Control's (DHEC's) grant of a permit to Lisa Sumerel to operate Sumerel Poultry Farms in proximity to the Appellants' property. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Appellants' expert's testimony regarding the live weight issues: S.C. Code Ann. § 1-23-610(B)(a)-(f) of the South Carolina Code (Supp. 2016) (providing the appellate court may reverse or modify the ALC's decision if the substantive rights of a party have been prejudiced due to constitutional or statutory violations; an agency exceeding its authority; unlawful procedure; an error of law; a clearly erroneous view of evidence in the record; or an abuse of discretion); *Murphy v. S.C. Dep't of Health & Env'tl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194 (2012) (indicating with regard to factual issues, the ALC's findings should be affirmed if they are supported by substantial evidence in the record); *id.* at 639, 723 S.E.2d at 194-95 ("When finding substantial evidence to support the ALC's decision, the [c]ourt need only determine that, based on the record as a whole, reasonable minds could reach the same conclusion."); *Olson v. S.C. Dep't of Health & Env'tl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008) ("The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence."); *Leventis v. S.C. Dep't of Health & Env'tl. Control*, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (Ct. App. 2000) (stating the DHEC Board's findings are presumptively correct and the challenging party bears the burden of proving the issuance of a permit is clearly erroneous in view of the substantial evidence on the whole record); *Bryant v. Levy*, 196 S.W.3d 166, 173 (Tex. App. 2006) ("[T]here must be a comparison of apples to apples, not apples to oranges, before the findings are probative.").

2. As to the exclusion of Appellants' expert's testimony regarding Agrametrics: *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (stating the admission or exclusion of expert testimony or evidence in general is a matter within the sound discretion of the trial court); *id.* at 26, 609 S.E.2d at 509 ("A trial court's ruling on the admissibility of an expert's testimony constitutes an

abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair."); *id.* ("To warrant reversal, an appellant must prove error and resulting prejudice.").

3. As to the live weight used in the Comprehensive Nutrition Management Plan being hearsay: *State v. Kirton*, 381 S.C. 7, 43, 671 S.E.2d 107, 125-26 (Ct. App. 2008) (finding the failure to raise a contemporaneous objection to hearsay testimony rendered the issue unpreserved for appellate review); *State v. Ladner*, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (indicating in the absence of an anticipatory objection immediately prior to testimony, a contemporaneous hearsay objection must be made to preserve the issue for review).

4. As to Appellants' remaining issues: § 1-23-610(B)(a)-(f) (providing the appellate court may reverse or modify the ALC's decision if the substantive rights of a party have been prejudiced due to constitutional or statutory violations; an agency exceeding its authority; unlawful procedure; an error of law; a clearly erroneous view of evidence in the record; or an abuse of discretion); *Murphy*, 396 S.C. at 639, 723 S.E.2d at 194 (indicating with regard to factual issues, the ALC's findings should be affirmed if they are supported by substantial evidence in the record); *id.* at 639, 723 S.E.2d at 194-95 ("When finding substantial evidence to support the ALC's decision, the [c]ourt need only determine that, based on the record as a whole, reasonable minds could reach the same conclusion."); *Olson*, 379 S.C. at 63, 663 S.E.2d at 501 ("The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence."); *Leventis*, 340 S.C. at 136, 530 S.E.2d at 653 (stating the DHEC Board's findings are presumptively correct and the challenging party bears the burden of proving the issuance of a permit is clearly erroneous in view of the substantial evidence on the whole record); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014) ("[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984))).

**AFFIRMED.**

**LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.**

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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 Farm .....Respondents.

PETITION FOR REHEARING

RECEIVED  
MAR 10 2017  
SC Court of Appeals

ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith, S.C. Bar # 77475  
1052 North Church Street  
Greenville, South Carolina 29601  
(864) 349-2600  
(864)-349-0303 fax  
jsmith@roecassidy.com  
*Attorneys for Appellants*

March 9, 2017  
Greenville, South Carolina

## 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 22<sup>nd</sup> Appellants filed a Motion to Reconsider the Court’s January 12<sup>th</sup> Order. (R. pp. 37-49). DHEC filed a Reply to that motion on February 5<sup>th</sup>. (R. pp. 50-71).<sup>1</sup> 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 23<sup>rd</sup>, 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

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<sup>1</sup> Appellants filed a letter in response to a particular portion of the Department’s Reply. (R. pp. 72-75). On February 11<sup>th</sup>, 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 23<sup>rd</sup> 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 28<sup>th</sup> and 29<sup>th</sup> 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 24<sup>th</sup> 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:  $(109,600 \times 4.5 \text{ normal production animal live weight}) = 493,2000 \text{ lbs.}$  (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).<sup>2</sup>

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

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<sup>2</sup> "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

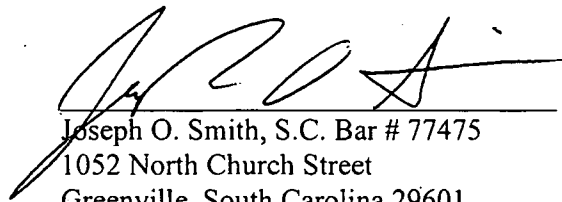
Sumerel facility was a "small" animal feeding operation subject to the lesser 200 foot property line setbacks on statutory interpretation grounds looking to the applicable definitions of what constitutes a "small" versus a "large" animal feeding operation. (See App. Br. at 21-22). Appellants respectfully 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.



Joseph O. Smith, S.C. Bar # 77475  
1052 North Church Street  
Greenville, South Carolina 29601  
(864) 349-2600  
(864)-349-0303 fax  
[jsmith@roecassidy.com](mailto:jsmith@roecassidy.com)  
*Attorneys for the Appellants.*

March 9, 2017  
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod, Administrative Law Judge

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

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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.

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PROOF OF SERVICE

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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 9<sup>th</sup> day of March, 2017, addressed as follows:

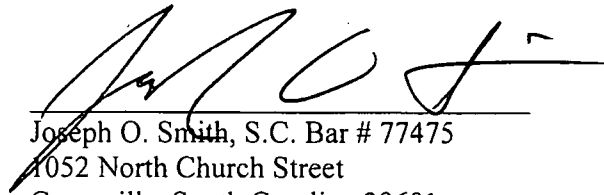
Stephen P. Hightower  
Assistant General Counsel  
Office of the General Counsel  
Bureau of Water & Special Enforcement  
South Carolina DHEC  
2600 Bull Street  
Columbia, SC 29201  
*Attorney for Respondent SC DHEC*

Thomas E. Hite, III  
Hite & Stone  
P.O. Box 805  
Abbeville, SC 29620  
*Attorney for Respondents Lisa Sumerel  
and Sumerel Poultry Farm*

**RECEIVED**  
MAR 10 2017  
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.

Joseph O. Smith, S.C. Bar # 77475

4052 North Church Street

Greenville, South Carolina 29601

(864) 349-2600

(864)-349-0303 fax

[jsmith@roecassidy.com](mailto:jsmith@roecassidy.com)

*Attorneys for the Appellants*

March 9, 2017  
Greenville, South Carolina

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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Case No.: 13-ALJ-07-0395-CC  
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MAR 20 2017

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

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and Lisa Sumerel and Sumerel Poultry Farm, .....Respondents.

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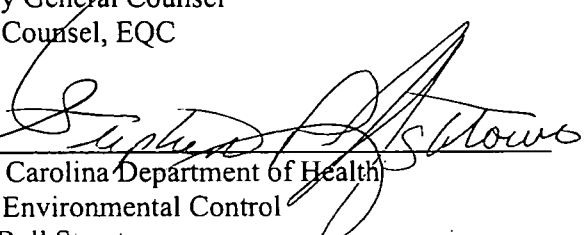
***SOUTH CAROLINA DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL CONTROL'S  
RETURN TO PETITION FOR REHEARING***

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Respectfully submitted,

Stephen P. Hightower  
Assistant General Counsel

Jacquelyn S. Dickman  
Deputy General Counsel  
Chief Counsel, EQC

By:   
South Carolina Department of Health  
And Environmental Control  
2600 Bull Street  
Columbia, South Carolina 29201  
Tel: 803-898-3350  
Fax: 803-898-3367  
Email: [hightosp@dhec.sc.gov](mailto:hightosp@dhec.sc.gov)

Attorneys for Respondent South Carolina  
Department of Health and Environmental Control

Thomas E. Hite, III  
Hite and Strone  
Post Office Box 805  
Abbeville, South Carolina 29620  
Tel: 864-366-5400  
Fax: 864-366-2638  
Email: [T3@hitedandstone.com](mailto:T3@hitedandstone.com)  
Attorney for Respondents Lisa Sumerel  
and Sumerel Poultry Farm

March 20, 2017  
Columbia, South Carolina

## INTRODUCTION

Respondents respectfully submit this Return in response to Appellants' Petition for Rehearing ("Petition"). In their Petition, Appellants claim that this Court's affirmation of the Final Order and Decision of the Administrative Law Court ("ALC") upholding the decision of Respondent South Carolina Department of Health and Environmental Control ("Department") to issue Bureau of Water Agricultural Permit No. 19647-AG (the "Permit") to Respondent Lisa Sumerel for the Operation of Respondent Sumerel Poultry Farm was in error. Specifically, Appellants' claim that 1) the Court's *per curiam* memorandum order fails to give substantive treatment or indication of the specific ground of the affirmance; and 2) in issuing the *per curiam* memorandum the Court misapprehended the basis for the ALC's Final Order law and Appellants' arguments. As discussed below, Appellants' claims are without merit and are merely a veiled attempt to reargue the same claims reviewed, considered, and rejected by this Court. In the interests of brevity, Respondents respectfully refer the Court to the Statements of Facts and the Case contained in their Final Brief for a full and complete recitation of the facts and procedure applicable to this case.

## LEGAL ANALYSIS

### I. THE COURT'S *PER CURIAM* MEMORANDUM DECISION PROPERLY ADDRESSES THE SUBSTANTIVE ISSUES AND THE BASIS FOR THE COURT'S AFFIRMANCE OF THE LOWER COURT'S DECISION.

Appellants' claim that Unpublished Opinion No. 2017-UP-068 ("UP Opinion 068") provides "no substantive treatment or induction of the specific grounds for affirming the ALC's holding," is without merit. Appellants' Br. at 7. Black's Law Dictionary defines "memorandum opinion" as "[a] unanimous appellate opinion that succinctly states the decision of the court; an opinion that briefly reports the court's conclusion . . . without elaboration because the decision

follows a well-established legal principle or does not relate to any point of law.” *Black’s Law Dictionary* 1125 (8<sup>th</sup> ed. 2004) (emphasis added). The issuance of memorandum decisions by appellate courts in South Carolina is governed by statute. The applicable statute, in pertinent part, provides that:

When a judgment or decree is reversed or affirmed by the Supreme Court . . . the Court may file memorandum opinions in **unanimous** decisions when the Court determines that the a full written opinion would have no precedential value **and any one or more of the following** circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the trial court is based on findings of fact which are not clearly erroneous; . . . (3) that the order of an administrative agency is supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; (4) that no error of law appears.

S.C. Code Ann § 18-9-280 (Rev. 2014) (emphasis added). The right to issue memorandum decisions has been extended to the Court of Appeals by the South Carolina Supreme Court in *In re Memorandum Decisions by the Court of Appeals*, 322 S.C. 53, 471 S.E.2d 456 (1993). In that case, the Supreme Court clarified the scope of the statute and held that the Court of Appeals may also issue memorandum opinions so long as the decision is unanimous and utilized the following format:

Per Curiam. Affirmed pursuant to Rule 220(b)(1), SCACR and the following authorities: Issue 1: *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (a party cannot argue one ground at trial and another on appeal); Issue 2: S.C. Code Ann. § 19-5-510 (1985); *Kershaw County DSS v. McCaskill*, 276 S.C. 360, 278 S.E.2d 771 (1981); *Peagler v. Atlantic Coast Line Railway Co.*, 234 S.C. 140, 107 S.E.2d 15 (1959).

*In re Memorandum Decisions by the Court of Appeals*, 322 S.C. at 54-55, 471 S.E.2d at 457.

Further, use of this format complies with the legislative mandate in S.C. Code Ann. § 14-8-250 (Supp. 2016) that decisions of the Court of Appeals address every distinct point not

manifestly without merit that are necessary to render a decision in each case. *In re Memorandum Decisions by the Court of Appeals*, 322 S.C. at 55, 471 S.E.2d at 457.

Moreover, the Supreme Court has stated although “a case is disposed of without a full written opinion [this does] not intimate that the issues are not important or justiciable.” *Golston v. Gunter*, 275 S.C. 389, 391, 271 S.E.2d 601, 602 (1980) (constructing former Rule 23, SCRAP). “The use of Rule 23 does not minimize the time required to review a record; it does minimize the time devoted to the writing of an opinion and, accordingly, permits the court to keep its docket more current than it would otherwise be.” *Id.* 275 S.C. at 391-92, 271 S.E.2d. at 602. Thus, in order for Appellants’ claim to prevail they must show that UP Decision 068 does not comply with the requirements set forth in *In re Memorandum Decisions by the Court of Appeals*.

Here, UP Decision 068 complied with all the requirements set forth in *In re Memorandum Decisions by the Court of Appeals*. First, as a *per curiam* decision, UP Decision 068 was unanimous.<sup>1</sup> Second, the decision followed the format approved by the Supreme Court for providing parties with an understanding of the basis for the decision.

Nevertheless, Appellants’ claim that UP Opinion 068 provides “no substantive treatment or induction of the specific grounds for affirming then ALC’s holding.” Appellants’ Pet. at 7. Appellants cite no authority to support this claim, which is a fatal to their argument. *Hunt v. S.C. Forestry Com ’m*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (“Issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal.”). Indeed, no authority supports Appellants’ claim. UP Decision 068 expressly identifies the issues raised in this appeal and succinctly explains that Appellants cannot prevail because to do so would

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<sup>1</sup> The term “*per curiam*” is defined in *Black’s Law Dictionary* as meaning “by the whole court.” *Black’s Law Dictionary* 1172 (8<sup>th</sup> ed. 2004).

contravene well-established authority. In particular, the opinion addresses the primary argument in Appellants' Brief that the exit weight listed in the Comprehensive Nutrient Management Plan for the birds was inaccurate. This argument centered around the testimony of Appellants' expert, Dr. Carmen Parkhurst, Ph.D.. UP Opinion 068 discussed this argument by splitting the argument into three issues. See Appellants Br. at 8-23; see also UP Decision 068 at 2-3. For each of these issues the opinion sets forth pin cites for the applicable standard of review and/or the general standard of proof, and the well-established legal principles that prevent Appellants from prevailing. For example, "[a]s to Appellants' expert's testimony regarding the live weight issues," the opinion cites 1) S.C. Code Ann. § 1-23-610(B)(a) for the standard of review; 2) *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194-95 (2012) for the standard and level of proof to overturn ALC findings; and 3) *Olsen v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008); *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (Ct. App. 2000); and *Bryant v. Levy*, 196 S.W.3d 166, 173 (Tex. App. 2006) for the well-established legal principles that bar ruling for Appellants. See UP Decision 068 at 2. Accordingly, Appellants' claim is without merit and the Petition should be denied.

**II. THE PETITION SHOULD BE DISMISSED BECAUSE IT PRESENTS NO NEW ARGUMENTS OR LEGAL AUTHORITY TO SHOW THAT THE COURT MISAPPREHENDED THE RECORD OR MADE AN ERROR OF LAW.**

Appellants' Petition should be dismissed since it constitutes nothing more than an attempt to relitigate arguments that this Court reviewed, considered, and dismissed because they were in contradiction of well-established legal principles. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a

**second time.**” *Heron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) citing *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)). The South Carolina Supreme Court long ago noted that most petitions for rehearing are filed just for delay. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). In *Arnold*, the Supreme Court noted further that “[u]sually . . . [a petition is] dismissed with a simple order . . . for the reason that they contain nothing but a ‘rehash’ of what the losing party has said before, matters which the court has already considered well and disposed of.” *Id.* Here, Appellants have rehashed their claims. Not only have they restated the claims as set forth in their brief, they have used identical language and phrasing. Indeed, the first issue in the Petition, which is set forth on pages 8-10 of the Petition regarding the purported strength of Dr. Parkhurst’s testimony on the weight of birds is a verbatim recitation of pages 17-19 of their brief. Neither the statement nor the argument contains any citation to authority that would support their arguments that Dr. Parkhurst’s testimony was credible and should have been considered dispositive. This failure was fatal to the issue during the pendency of the appeal and again in this petition for rehearing. *Hunt*, supra. Further, the fact that the language is identical is irrefutable proof that the Petition is nothing more than a rehashing of the arguments that this Court correctly rejected as against the weight of clearly established law. *Heron*, 395 S.C. at 466, 719 S.E.2d at 643; *Arnold*, 168 S.C. 163, 167S.E. at 238. Accordingly, the Petition should be dismissed as it fails to provide any grounds upon which a rehearing can be granted.

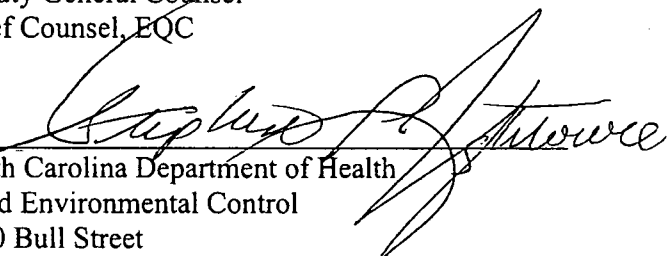
**CONCLUSION**

For the reasons set forth in this Return, Respondents' Final Brief, and Respondents oral argument, Respondents respectfully request that the Court deny Appellants' Petition for Rehearing.

Respectfully submitted,

Stephen P. Hightower  
Assistant General Counsel

Jacquelyn S. Dickman  
Deputy General Counsel  
Chief Counsel, EQC

By:   
South Carolina Department of Health  
And Environmental Control  
2600 Bull Street  
Columbia, South Carolina 29201  
Tel: 803-898-3350  
Fax: 803-898-3367  
Email: [hightosp@dhec.sc.gov](mailto:hightosp@dhec.sc.gov)  
Attorneys for Respondent South Carolina  
Department of Health and Environmental Control

Thomas E. Hite, III  
Hite and Strone  
Post Office Box 805  
Abbeville, South Carolina 29620  
Tel: 864-366-5400  
Fax: 864-366-2638  
Email: [T3@hitedandstone.com](mailto:T3@hitedandstone.com)  
Attorney for Respondents Lisa Sumerel  
and Sumerel Poultry Farm

March 20, 2017  
Columbia, South Carolina

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

RECEIVED

John D. McLeod, Administrative Law Judge

MAR 20 2017

SC Court of Appeals

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

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

vs.

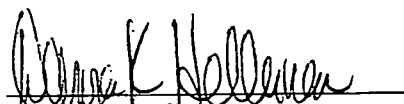
South Carolina Department of Health and Environmental Control  
and Lisa Sumerel and Sumerel Poultry Farm, ..... Respondents.

*Certificate of Service*

I, Donna K. Hellerman, Legal Assistant for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **20<sup>th</sup> day of March, 2017**, served a copy of *Respondent South Carolina Department of Health and Environmental Control's Return to Petition for Rehearing* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

Joseph O. Smith, Esquire  
Roe Cassidy Coates & Price PA  
Post Office Box 10529  
Greenville, South Carolina 29603

Thomas E. Hite, III, Esquire  
Hite & Stone  
Post Office Box 805  
Abbeville, South Carolina 29620

  
Donna K. Hellerman

March 20<sup>th</sup>, 2017  
Columbia, South Carolina

# The South Carolina Court of Appeals

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 Farm,  
Respondents.

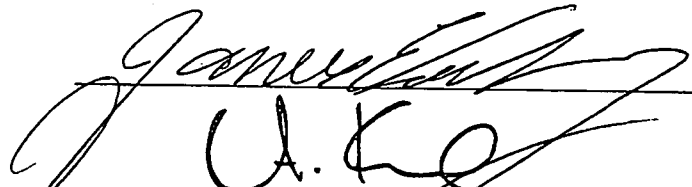
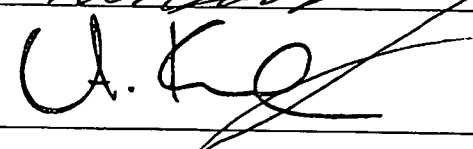
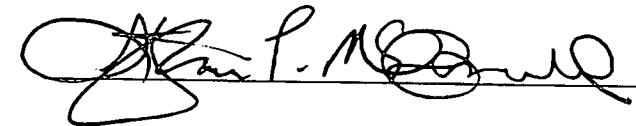
Appellate Case No. 2015-000700

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
C.J.  
  
J.  
  
J.

Columbia, South Carolina

cc:  
Joseph Owen Smith, Esquire  
Stephen Philip Hightower, Esquire

**FILED**

May 8, 2017

Thomas Erskine Hite, III, Esquire  
Jacquelyn Sue Dickman, Esquire  
The Honorable John D. McLeod