

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

S.C. SUPREME COURT

ALJ Case No.: 13-ALJ-07-0395-CC  
Appellate Case No.: 2017-001227  
S.C. App. Op. No.: 2017-UP-068

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

vs.

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


SOUTH CAROLINA DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL CONTROL'S RETURN  
TO THE PETITIONERS' WRIT FOR CERTIORARI

Respectively submitted,

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July 24, 2017  
Columbia, South Carolina

## COUNTER QUESTIONS PRESENTED

- I. Was the Court of Appeals correct in concluding that substantial evidence in the Record supports the affirmance of the Administrative Law Court's determination that the Sumerel Poultry Farm is a small animal facility in accordance with the requirements set forth in 4 S.C. Code Ann. Regs. 61-43 (2011) and is not affected by an error of law?
- II. Was the Court of Appeals correct in concluding that substantial evidence in the Record supports the affirmance of the Administrative Law Court's determination that the Department conducted a full and adequate evaluation of the Sumerel Poultry Farm in accordance with the applicable requirements set forth in 4 S.C. Code Ann. Regs. 61-43 (2011)?
- III. Did the substantial evidence in the Record support the Court of Appeals' affirmance of the Administrative Law Court's determination that the 8.75-pound exit weight contained in the Permit supports the Department determination that the Sumerel Poultry Farm is a small animal facility?

## INTRODUCTION

The subject of this Petition for Writ of Certiorari ("Petition") is an agricultural permit issued by Respondent South Carolina Department of Health and Environmental Control ("Department" or "SCDHEC") to Respondent Lisa Sumerel for the construction and operation of Respondent Sumerel Poultry Farm (hereinafter referred to as "Sumerel"). Petitioners are seeking review of a Memorandum Opinion, Unpublished Opinion No. 2017-UP-068, issued by the Court of Appeals on February 7, 2017. (App. pp. 558-60).<sup>1</sup> As will be shown below, the Petition does not satisfy the grounds for certiorari review. Specifically, the Petition does not establish that any of the following nonexclusive criteria are present: (1) a novel question(s) of law; (2) a federal question(s); (3) substantial constitutional issue(s); (4) a conflict in the Court of Appeals' interpretation of a decision of this Court; or (5) the Court of Appeals decision was the product of

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<sup>1</sup> References to "App." refer to the Appendix to Petition for Writ of Certiorari filed by Petitioners.

a divided panel. Instead, the Petition generally sets forth the same claims, twice considered and rejected by the Administrative Law Court and the Court of Appeals.<sup>2</sup> For the reasons set forth below, the Department respectfully requests that this Court deny the Petition.

### **COUNTERSTATEMENT OF THE CASE**

On April 23, 2012, Mrs. Lisa 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") of the proposed site located off Poole Town Road in Laurens County ("Site"). The PSI was conducted on the same day as the filing of the request and, based on this review, the Site was generally determined to be suitable for an animal feeding operation. (App. pp. 6, 395-96). On April 27, 2012, Mrs. Sumerel was notified in writing of the Department's determination and was authorized to submit plans for a poultry facility in accordance with R. 61-43 Part 200. (App. pp. 6, 395-96).

On October 10, 2012, Mrs. Sumerel 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.<sup>3</sup> (App. pp. 6-7). The CNMP is a comprehensive document that conforms to the criteria set forth in 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B) for an administratively complete management plan. (App. pp. 215-16). The CNMP for the Sumerel Poultry Farm other submittals were prepared by Joy S. Shealy, a registered South Carolina

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<sup>2</sup> Petitioners filed a Motion to Reconsider with the ALC and a Petition for Rehearing with the Court of Appeals. (App. pp. 39-51, 561-83).

<sup>3</sup> The CNMP identifies Mrs. Sumerel as the permittee for the Sumerel Poultry Farm and her husband Michael Sumerel as the operator of the facility. (App. p. 219).

professional engineer,<sup>4</sup> who was previously employed with the Department in its agricultural and stormwater permitting sections for seven and one-half years. (App. pp. 16, 192 [Tr. 441:12-22]<sup>5</sup>).

Based on the information contained in the CNMP, the proposed facility meets or exceeds all applicable siting distances set forth in R. 61-43 Part 200.80. Specifically, the CNMP established that the siting distances from the facility to potable wells, waters of the State and ephemeral or intermittent streams and occupied residences were exceeded, and the siting distances from ditches or swales located downstream and property lines were met. (App. pp. 7, 216).<sup>6</sup> The CNMP also specified information relevant to determining the classification of the size of the proposed facility regarding the applicable property line setback distance. The CNMP also 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. (App. pp. 322-31).

The Department's review of the Sumerel Poultry Farm 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>7</sup> (App. p. 5, 126 [Tr. 186:8 – 188:2]). Prior to his position in agricultural permitting, Mr. Chaplin spent twelve years

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<sup>4</sup> "An Animal Facility Management Plan [must be] prepared by qualified Natural Resources Conservations Service personnel or a SC registered professional engineer." 4 S.C. Code Ann. 61-43 Part 200.50(B)(2).

<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. The numbers after the ":" refer to the applicable line number(s) of the cited testimony.

<sup>6</sup> None of the actual distances in the application submittals were controverted by Petitioners during the hearing. However, as discussed in the Argument Section below, Petitioners challenged the applicability of the property line siting distance for facilities with an average live weight of 500,000 pounds or less.

<sup>7</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.

evaluating properties for septic tank suitability, including conducting septic tank inspections and mosquito control. (App. p. 5, 126 [Tr. 186:8 –188:2]).

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. (App. p. 7). The Bureau of Air Quality responded by a memorandum from Stephen W. Smutz, who is an Air Quality Meteorologist in the Bureau of Air Quality's Air Modeling Section. (App. pp. 7, 104 [Tr. 99:15-18]). In the memorandum, 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." (App. pp. 7-8, 400-01).

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. (App. p. 8). 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 Poultry Farm facility. Subsequently a Dead Animal Composting Facility Management Plan was submitted for the Sumerel Poultry Farm in which it was proposed that disposal of poultry mortality be achieved through a combination of a hay bale composter, incineration, and landfill disposal. (App. p. 8). Also as part of the Department's review, Mr. Chaplin considered whether the facility would cause an increase in water pollution. (App. pp. 16-18). Specifically, Mr. Chaplin considered the following twelve regulatory factors set forth in R. 61-43 Part 200.70(F):

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.

(App. pp. 7-8). Additionally, Mr. Chaplin recognized that all non-swine animal facility permits are no-discharge permits, and confirmed that the Sumerel Poultry Farm facility would be disposing of all the manure generated by the birds by having a manure broker haul all the manure off-site; the facility had no manure utilization areas where manure would be land applied. (App. pp. 234, 338; see 4 S.C. Code Ann. Regs. 61-43 Part 200.20(B)). Also, he noted that before construction could begin, the Sumerel Poultry Farm would have to obtain coverage under the Department's general permit for stormwater by filing an application with the stormwater permitting section, which would review and evaluate the information provided for compliance with the Department's stormwater regulations. (App. p. 17).

Finally, 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 records 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. (App. pp. 126 [Tr. 185:5-15], 383, 388). Mr. Chaplin sent the information that he received from the citizens to the Department's medical office for evaluation. (App. pp. 171 [Tr. 358:6-19], 388). 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. (App. p. 388).

On June 12, 2013, after all reviews had been completed and the information had been evaluated by applicable Department staff, Mr. Chaplin, as the permit reviewer, determined that the proposed Sumerel Poultry Farm met all applicable requirements to be constructed and operated as a small poultry facility, and the Permit was issued to the applicant Lisa Sumerel for the construction and operation of a four-broiler house no-discharge poultry facility. (App. pp. 8, 130 [Tr. 201:9 – 203:4], 378). The Permit authorizes the construction and operation of the facility by Lisa Sumerel with conditions, including the following express condition:

**Permission is hereby granted to:** Lisa Sumerel . . . 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>8</sup>

(App. p. 374) (emphasis in original and added). In addition, the Permit specifies that the normal live animal weight of the facility is 493,200 pounds, which was calculated by multiplying the total

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<sup>8</sup> The term "USDA/NRCS" refers to the United States Department of Agriculture's Office of Natural Resources Conservation.

number of birds at any one time by the average live weight for each bird - 109,600 broilers x 4.5 lbs. (App. p. 378). Further, the CNMP, which became a part of the Permit by reference, provides that:

The birds will be brought into the houses 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.

(App. p. 211 (emphasis added); see App. 219, 230).

Petitioners opposed the issuance of the Permit and filed a timely request for final review with the Department. The request was denied and Petitioners filed a timely Request for Contested Case Hearing with the ALC. (App. p. 3). An Administrative Hearing on the merits was held before the ALC on August 25-26, 2014. (App. p. 80 [Tr. 1:14-17]). During the hearing, the Respondents presented evidence establishing that the Department reviewed and considered all applicable regulatory requirements for the farm. Petitioners raised several grounds to challenge the permit, e.g., the odor and vector plans in the CNMP were not site specific, but primarily they challenged the permit on the ground that the facility could not meet the regulatory 200-foot minimum set back distance from property lines and small animal facilities. Specifically, Petitioners claimed that the Sumerel Poultry Farm was not a small animal facility because the 8.75-pound exit weight for the birds was lower than the weight for birds by other growers and that if a more accurate figure was used, the facility could not be permitted since it would not meet the regulatory setback for small animal facilities. (App. p. 154 [Tr. pp. 291:16 – 292:11]).

The ALC considered this argument along with the rest of Petitioners' arguments and concluded that Petitioners had failed to meet their burden of establishing by a preponderance of the evidence that the Department's review was faulty. (App. p. 37). In particular, regarding

Petitioners' primary argument, the ALC concluded that Petitioners had failed to establish that the average exit weight was inaccurate:

[s]ince the Permit mandates that the facility must be operated in accord with the CNMP, the fact that it requires removal of the birds when the average live exit weight reaches **8.75 pounds is a binding condition of the permit and is enforceable by the Department.**

(App. p. 35) (emphasis added).

In response to the ALC's decision, Petitioners filed a Motion to Reconsider with the ALC that rehashed the same arguments that the ALC had considered and rejected. (App. pp. 30-41). Petitioners' Motion was denied by the ALC and Petitioners appealed the Final Decision and Order of the ALC to the Court of Appeals. The Court of Appeals considered the arguments raised in the parties' Final Briefs and made during a spirited oral argument and, in a unanimous Memorandum Opinion, affirmed the Final Decision and Order of the ALC. (App. pp. 558-60).

Petitioners filed a Petition for Rehearing, which restated the arguments previously rejected while adding a claim regarding the appropriateness and fairness of the Memorandum Opinion. (App. pp. 561-83). On May 8, 2017, the Court of Appeals issued an Order denying Petitioners' Petition stating that "[a]fter careful consideration of the petition for rehearing, [it was] unable to discover that any material fact or principle of law had been either overlooked or disregarded." (App. p. 595).

## LEGAL ARGUMENTS AND AUTHORITIES

### **A. The Courts Below Correctly Determined that Petitioners' Expert Failed to Establish that the Exit Weight used in the CNMP was Inaccurate.**

Petitioners' primary argument is that the substantial evidence in the Record supports their claim that the 8.75-pound exit weight for birds in the CNMP is inaccurate. To support this argument, they made several claims that they purport will illustrate the errors that the ALC allegedly made when considering the effect of Dr. Carmen Parkhurst's testimony and several claims that the ALC's conclusions were not supported by the substantial evidence in the Record. As shown in detail below, Petitioners' claims were correctly rejected by the courts below.

#### **1. Petitioners' claims that the ALC erred in discounting their expert's testimony regarding the accuracy of the exit weight in the CNMP are meritless.**

Petitioners' first claim is that the ALC's conclusion is erroneous because it relied on only one portion of Dr. Parkhurst's testimony. This claim is without merit because, in contravention to well established law, it requires the ALC, as trier of fact, to find credible all of Dr. Parkhurst's testimony. Specifically, "[t]he Trial Court must examine the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010). In addition, the weight accorded to the testimony of a fact or expert witness is solely the province of the trier of fact, and the trier of fact can accept or reject in whole or in part that testimony. Maul v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 349, 359, 768 S.E.2d 402, 408 (Ct. App. 2015).

Here, as claimed by Petitioners in their Brief at page 9, "Dr. Parkhurst testified [during direct examination] that the average process weight across all integrators is at least 9 pounds and that all integrators grow birds within hundredths of a pound of each other." He also testified during cross-examination that each integrator sets its own exit weight for the flocks being grown by its

contract farmers and that Columbia Farms was free to contract with its farmers to grow a bird based upon market and internal corporate factors. (App. pp. 156-57 [Tr. 315:18 – 317:2]). The ALC, as trier of fact, considered the reliability of Dr. Parkhurst’s testimony and found it was not credible enough to establish that the exit weight contained in the CNMP was incorrect.<sup>9</sup> (App. pp. 21, 34-35). While Petitioners disagree with the conclusion of the ALC, they are not entitled to have the conclusion overturned by this Court. See Bass v. S.C. Dep’t of Soc. Servs., 414 S.C. 558, 574, 780 S.E.2d 252, 260 (2015) (acknowledging that appellate courts cannot judge the credibility or weight to give to expert testimony). Thus, Petitioners’ claim is without merit.

Petitioners’ second claim is that the ALC erred when it concluded that Dr. Parkhurst’s testimony was not credible because it did not contain information from the Sumerels’ integrator, Columbia Farms, regarding the exit weight that it required for its growers. The gravamen of this claim is that seeking such information would inject hearsay into Dr. Parkhurst’s testimony. However, contrary to Petitioners’ claim, Rule 703, SCRE, allows experts to base their opinion upon inadmissible hearsay if the hearsay information is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. See Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 295, 529 S.E.2d 45, 50-51 (Ct. App. 2000). Thus, Petitioners’ claim is without merit.

Petitioners’ final claim is that the ALC’s conclusion regarding Dr. Parkhurst’s testimony is in error because even if Columbia Farms had informed him that the 8.75-pound exit figure is correct, his opinion would not change. More than a century ago, this Court stated that “[o]n damages, **as on other subjects of expert opinion evidence**, the opinions of witnesses must not be speculative or conjectural, but must be based on facts and conditions existing and proved.”

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<sup>9</sup> In contested case hearings, the ALC is the trier of fact. Risher v. S.C. Dep’t of Health & Env’tl. Control, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011).

Millam v. Southern Railroad Co., 58 S.C. 247, 250-51, 36 S.E. 571, 572 (1900) (emphasis added).

Had Columbia Farms communicated the 8.75-pound exit weight to Dr. Parkhurst, his continued endorsement of a contrary opinion would be both conjectural and nonsensical, and certainly would not be reliable expert evidence. Moreover, nothing would change the fact that the weight accorded to the testimony of an expert witness is solely the province of the trier of fact, and the trier of fact can accept or reject in whole or in part that testimony. See Maull, 411 S.C. at 359, 768 S.E.2d at 408. Accordingly, Petitioners' claim is without merit.

**2. Petitioners' claims that the substantial evidence in the Record supports their interpretation of the credibility of Dr. Parkhurst's testimony were raised and rejected before the Court of Appeals.**

As a threshold issue, Petitioners' claim that during oral argument, the Court of Appeals "was acutely attuned to the lack of countervailing evidence in the record that challenged Petitioners' expert testimony that the process weight in the plan was inaccurately low," is not properly before this Court. (Petition p. 11). The Department respectfully submits that this claim is improper because Petitioners did not make a transcript of the oral argument before the Court of Appeals a part of the Appendix, and a party is not entitled to use information outside the Appendix without first either obtaining the written consent of opposing counsel or petitioning the Court. See Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 638, 321 S.E.2d 63, 66 (1984) (construing former Supreme Court Rule 8, Section 7). Additionally, Petitioners' argument is belied by the fact that after reviewing the briefs and the record filed in the appeal and listening to the oral argument, the Court of Appeals, nevertheless, unanimously determined that Petitioners' appeal should be denied because one or more of the following circumstances was applicable: "(1) that the 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; [and] (4) that no error of law appears.” See S.C. Code Ann. § 18-9-280 (Rev. 2004). Accordingly, Petitioners’ claim is without merit.

Petitioners’ next claim is that substantial evidence in the Record supports Dr. Parkhurst’s conclusion that the exit weights for the birds at the Sumerel Poultry facility was low. This claim is without merit for three reasons. First, it presupposes that Dr. Parkhurst’s testimony should have been credited in whole by the ALC. As discussed previously, the weight to accord Dr. Parkhurst’s testimony was solely within the purview of the ALC and the ALC had a reasonable basis for its decision to find only a portion of Dr. Parkhurst’s testimony credible. (Supra, pp. 9-11). Second, Petitioners’ claim omits the fact that this Court has consistently stated that “[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.” Rischer v. S.C. Dep’t of Health and Env’tl. Control, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) (citing Palmetto Alliance, Inc. v. Pub. Serv. Comm’n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)); Bartley v. Allendale Co. Sch. Dist., 392 S.C. 300, 306, 709 S.E.2d 619, 622 (2011) (“The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s finding from being supported by substantial evidence.”). During the trial, the evidence presented to the ALC to establish the exit weight included the CNMP, which was admitted into evidence by Petitioners’ counsel, as well as the testimony of Lisa and Michael Sumerel, Leon Fulmer, and Joy Shealy, PE. Taken together, those witnesses established that the Sumerels had met with and entered into a contract with Columbia Farms for growing birds to an exit weight of 8.75 pounds. (App. pp. 84 [Tr. 20: 16-24], 91 [Tr. 46:6-13], 103 [Tr. 94:6-8], 145 [Tr. 254:8-21], 198 [Tr. 467:19 – 468:3]).

Finally, the 8.75-pound exit weight is an enforceable requirement of the permit. The CNMP expressly states that “birds will be brought in the houses 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**.” (App. p. 211 (emphasis added); see App. 219, 230). The Permit expressly provides that the operation of the Sumerel Poultry Farm must be in accordance with the criteria set forth in the CNMP. (App. p. 374). Based on these factors, the ALC found, and the Court of Appeals affirmed, that the “removal of the birds when the average live exit weight reaches 8.75 pounds is a binding condition of the permit and is enforceable by the Department.”<sup>10</sup> (App. p. 35). Accordingly, the substantial evidence in the record supports the issuance of the Permit with an 8.75-pound exit weight since even if the weight was inaccurate, the weight is nevertheless a binding requirement of the Permit and enforceable by the Department.

**B. The ALC Properly Excluded the AgraMetrics Testimony.**

Petitioners claim that the ALC erred when it barred Dr. Parkhurst’s testimony based on the AgraMetrics industry report, and alleged that the exclusion was improper because expert witnesses can base their opinions upon information in material produced and/or obtained from a third party. (Petition p. 20). ““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.”” Hill v. S.C. Dep’t of Health and Env’tl. Control, 389 S.C. 1, 14, 698 S.E.2d 612, 619 (2010) (citations omitted). The ALC excluded testimony based on the AgraMetrics report because Dr. Parkhurst had failed to disclose and turn over the report prior to testifying, which prejudiced the Department’s ability to effectively cross-examine him on the report. (App. pp. 58; see 157-58 [Tr. 302:23 – 307:8]).

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<sup>10</sup> The importance of the binding nature of the requirement was emphasized by the Court of Appeals, which interrupted Petitioners’ rebuttal portion of the oral argument to ask counsel to confirm whether the Department had the authority to enforce the 8.75-pound weight.

Curiously, Petitioners do not address this factor. However, even if they did, their claim would still fail, since Dr. Parkhurst's testimony based on the AgraMetric's report was cumulative evidence. Indeed, Petitioners conceded this point in their Motion to Reconsider, wherein they stated that the ALC's exclusion was in error since "testimony [based on the report] provided further evidence of the inaccuracy of the 8.75 lbs. process weight figure utilized in the CNMP." (App. p. 580). Accordingly, Petitioners' claim is meritless since the ALC's action was a reasonable resolution of the issue and well within the discretion accorded trial courts in admitting evidence. See Hill, 391 S.C. at 14, 698 S.E.2d at 619.

**C. The Courts Below Correctly Held that Exit Weight and Other Data Contained in the CNMP Was Properly Admitted in Evidence.**

Petitioners' claim that they had to wait until Ms. Shealy's testimony before they could object to the CNMP because the 8.75-pound exit weight figure was hearsay is without merit. (Petition p. 21). This claim is belied by the long-standing doctrine that "[t]he proponent of admission [of evidence] has the burden of establishing the required conditions [for its admittance]." Brown v. Orndorff, 309 S.C. 320, 323, 422 S.E.2d 151, 153 (Ct. App. 1992). Although Petitioners claim that it was not until the testimony of Respondent Sumerel Poultry Farm's witnesses that they became aware of the objectionable nature of the exit weight figure contained in the CNMP, this claim is belied by the fact that the central theme of Dr. Parkhurst's testimony is that the exit weight was inaccurately low. (Petition pp. 9-10). Thus, when Petitioners sought admission of the CNMP, they were aware or should have been aware that the figure was in doubt and should have conditioned the admission of the document accordingly. (See App. p. 84 [Tr. 20:16-24]).

Indeed, there was a ready solution to Petitioners' purported conundrum. Under Rule 105, South Carolina Rules of Evidence (SCRE), Petitioners could have sought admission of the CNMP

for the limited purpose of establishing that the document was received and reviewed by the Department. Brown, 309 S.C. at 323, 422 S.E.2d at 153 (finding that testimony about a driving record limited to the determination of future wages and not for the determination of liability under Rule 105, SCRE). Since Petitioners had this obvious solution, their failure to avail themselves of it cannot be resurrected by the claim that they now are presenting to this Court. Accordingly, Petitioners' claim is without merit.

**D. The Court of Appeals' Decision Addressed All Issues Raised by Petitioners in Their Final Brief.**

Finally, Petitioners' claim that the Court of Appeals did not provide adequate reasoning for dismissing its claims regarding the adequacy of the Department's review of the application, treatment of potential water quality impacts caused by the facility, and their interpretation that the facility is a categorically large facility under the regulatory definitions for small and large animal facilities. This claim is nothing more than another attempt to challenge the Court of Appeals' decision to issue a Memorandum Opinion. As discussed more fully in the Return to Petition for Rehearing, S.C. Code Ann. § 18-9-280 (Rev. 2004) authorizes the use of Memorandum Opinions to decide cases in which the Court unanimously determines that an opinion would not have precedential value and any one or more enumerated criteria is applicable. (App. pp. 588-90). In addition, in In re Memorandum Decisions by the Court of Appeals, 322 S.C. 53, 471 S.E.2d 456 (1993), this Court set forth the format that Memorandum Opinions must follow to be utilized. (App. p. 589). Further, the Department noted that the only way to challenge the adequacy of a Memorandum Opinion is to show that the Court of Appeals failed to comply with the requirements set forth in In re Memorandum Decisions by the Court of Appeals. (App. p. 590).

Here, Petitioners do not show how the Memorandum Opinion issued in this case, Unpublished Opinion No. 2017-UP-068, fails to comply with the requirements established for the

use of such decisions. Instead, Petitioners merely claim that they are entitled to a full written substantive opinion because the ALC's Final Decision and Order purportedly erred in its findings. (Petition p. 22). There is no right to a full written opinion, as the Court of Appeals may decline to issue a written opinion "when an issue is manifestly without merit." In re Memorandum Decisions by the Court of Appeals, 322 S.C. at 56, 471 S.E.2d at 456 (citing Rule 220(b)(1) and (2), SCACR). Bald claims such as these are patently insufficient to establish that the Court of Appeals should have issued a full opinion as opposed to a Memorandum Opinion. Indeed, pursuant to S.C. Code Ann. § 18-9-280, the Supreme Court is authorized to issue a Memorandum Opinion just like the Court of Appeals.

Moreover, Unpublished Opinion No. 2017-UP-068 did provide the basis and reasoning supporting the Court of Appeals decision. Specifically, the decision cites several cases and parentheticals that when taken together stand for the following propositions: 1) substantial evidence is evidence based on the entire record that would lead reasonable minds to the same conclusion and, if present, supports the decision of the ALC even if another reasonable conclusion is possible; and 2) the deference doctrine presumes that Department permitting decisions are correct unless proven to be clearly erroneous and that interrelations of statutes or regulations by the Department are entitled to deference by a reviewing court unless proven to be arbitrary, capricious, or manifestly contrary to the statute or regulation. (App. p. 560). When applied to the arguments presented by the Department in its Final Brief, it is clear the Court of Appeals adopted the rationale set forth therein. (See App. pp. 519-27). For example, with regard to stormwater impacts and runoff, the Department explained that it interprets the defined term "runoff" in the agricultural permitting regulations to refer to only runoff from fields identified in the CNMP for the disposal of manure from the facility by land application, and that stormwater runoff from the

construction of the barns is addressed in a separate permitting process, that includes providing construction drawings and other information to the Department's Stormwater Permitting section for review and approval. (App. pp. 519-26). Accordingly, Petitioners' claim is without merit.

**CONCLUSION**

For the foregoing reasons and those contained in the Department's Final Brief and Return to Petition for Rehearing, the Department respectfully requests that the Court should deny the Petition for Writ of Certiorari.

Respectively submitted,

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July 24, 2017  
Columbia, 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  
Appellate Case No.: 2017-001227  
S.C. App. Op. No.: 2017-UP-068

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

vs.

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

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CERTIFICATE OF SERVICE

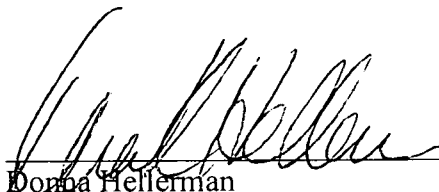
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I, Donna Hellerman, Legal Assistant for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this 24<sup>th</sup> day of July, 2017, served a copy of *Defendant South Carolina Department of Health and Environmental Control's Return to Petition for Writ of Certiorari* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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July 24, 2017  
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