

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellant Case No.: 2017-000066

Pickens CountyAppellant,

v.

South Carolina Department of Health and Environmental
Control and MRR Pickens, LLC, Respondents.

**INITIAL BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL**

Etta R. Williams Linen (SC Bar No.:16663)
Assistant General Counsel

Claire H. Prince (SC Bar No.:4574)
Special Counsel

South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201
P: (803) 898-3350 (Not for service)
F: (803) 898-3367 (Not for service)
Email: williaer@dhec.sc.gov
princech@dhec.sc.gov

Attorneys for Respondent South Carolina
Department of Health and Environmental
Control

October 4, 2017
Columbia, South Carolina

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the Administrative Law Court properly grant Respondents' Motions to Dismiss for failure of the County to timely exhaust administrative remedies under S.C. Code Ann. Section 44-1-60(E)?
2. May equitable estoppel be raised now as a defense to County's failure to exhaust administrative remedies when it was not raised at the ALC?
3. Did the Administrative Law Court properly decline to apply the doctrine of equitable tolling to cure the County's failure to timely request a final review before the DHEC Board?
4. Did the Administrative Law Court properly grant MRR Pickens' Motion to Stay Discovery and properly hold the County's Motion to Intervene in abeyance pending the Administrative Law Court's decision on Respondents' Motions to Dismiss?

STATEMENT OF THE CASE

This matter is before the Court on appeal by Appellant Pickens County ("County") from an order of the Administrative Law Court ("ALC") issued on December 12, 2016, granting Motions to Dismiss filed by Respondents MRR Pickens, LLC ("MRR Pickens") and South Carolina Department of Health and Environmental Control ("DHEC" or "the Department").

On November 3, 2008, DHEC issued Solid Waste Permit LF2-00003 to MRR Pickens for the Highway 93 Class Two Landfill ("Permit" or "Highway 93 Permit"). Prior to the issuance of the Permit, DHEC publicly noticed the draft permit in the local newspapers and provided notice in writing to adjacent landowners, Pickens County, and others on the agency's mailing list.

On March 30, 2015, MRR Pickens applied to DHEC for a minor modification to the Permit. After DHEC staff provided comments on the application, DHEC received a revised application for the minor permit modification from MRR Pickens on August 6, 2015. On August 10, 2015, DHEC staff issued the minor permit modification by mailing the decision to MRR Pickens. Per S.C. Code Ann. § 44-1-60(E) (Supp. 2016), the DHEC staff decision became final on August 25, 2015, fifteen (15) days after mailing to MRR Pickens. The County filed a Request for Final Review ("RFR") of the minor permit modification with the DHEC Board on March 23, 2016. The DHEC Board

declined to conduct a final review conference on April 21, 2016, which was 211 days after the decision became final.

On May 19, 2016, the County filed a request for a contested case hearing with the ALC. On July 28, 2016, DHEC filed a motion to dismiss. MRR Pickens filed a motion to dismiss and a motion to stay discovery on July 29, 2016. On August 18, 2016, the County, on behalf of various property owners, filed a motion to intervene. On September 7, 2016, Judge Robinson held a telephone conference with the parties, and granted MRR Pickens' motion to stay discovery and held the County's motion to intervene in abeyance pending the court's decision on the motions to dismiss. A hearing was held on the motions to dismiss on December 2, 2016. On December 12, 2016, the ALC granted the motions to dismiss because the County did not timely fulfill the procedural requirements for bringing a contested case before the ALC.

On January 11, 2017, the County filed a notice of appeal in this Court. On March 29, 2017, various property owners filed a motion to be included as parties to the appeal. On June 7, 2017, this Court denied the motion to allow intervenors to be included in the appeal because under SCACR Rule 201, "only a *party* aggrieved by an order, judgment, sentence or decision may appeal." (emphasis in original). (Ct. App. Order, June 7, 2017).

STATEMENT OF FACTS

In November 2007, MRR Pickens applied for a Class Two Landfill permit from DHEC on property located at 2180 Greenville Highway, Liberty, South Carolina, Pickens County ("Highway 93 Class Two Landfill" or "Landfill"). A Class Two Landfill is commonly referred to as a "Construction, Demolition and Debris" landfill, or a "C&D" landfill, and may accept wastes listed in Appendix I of the Solid Waste Management regulation, or as approved by the Department in accordance with the regulation. S.C. Code Ann. Regs. 61-107.19 ("R.61-107.19"), Part IV, A.1

and Appendix I (2012). On September 19, 2008, DHEC issued a draft permit for the Highway 93 Class Two Landfill. On or about September 24, 2008, DHEC publicly noticed the draft permit in the local newspapers, the *Easley Progress* and *The Pickens Sentinel*. DHEC also sent notice to adjacent landowners, Pickens County, and others on its mailing list. After the end of the public comment period, on November 3, 2008, DHEC issued Solid Waste Permit LF2-00003 to MRR Pickens for the Highway 93 Class 2 Landfill. Pickens County did not request final review by the DHEC Board on the decision to issue the permit and did not request to be notified of any future decisions relating to the Highway 93 Permit.

On March 30, 2015, MRR Pickens applied to DHEC for a minor modification to the Highway 93 Permit.¹ The minor permit modification application submitted by MRR Pickens requested an option to install a liner and associated leachate collection system for a portion of the landfill. Permit modifications are classified under the solid waste regulations as either “minor” or “major.” A major modification is defined as “a change that substantially alters the facility or its operations, e.g. tonnage increase above 25%, any volumetric capacity increase, alternate designs that vary from the design prescribed in the regulation.” R.61-107.19, Part I, 48.b. A minor modification is defined as “a change that keeps the permit current with routine changes to the facility or its operations, or an administrative change.” R.61-107.19, Part I, 48.a. A major permit modification requires public review and comment while a minor permit modification does not. R.61-107.19, Part IV, I.2; Part I, D.2.c.

On June 12 and July 8, 2015, DHEC staff provided comments to MRR Pickens in response to the application to modify the Permit. (DHEC Initial Staff Response to RFR, Page 2). On August 6, 2015, DHEC received a revised application from MRR Pickens for the minor permit

¹ The Landfill had not been constructed when the application was submitted, and to date, it is still not constructed.

modification. The Department determined that the application met the regulatory definition of a minor permit modification because inclusion of a liner is not an alternate design of the required design criteria, does not substantially change the operations of the landfill, and does not allow the landfill to accept additional waste types (i.e. Class Three municipal solid waste) or quantities of waste. Likewise, the requested modifications to the Permit did not change the existing, permitted landfill type from a Class Two (construction and demolition debris) to a Class Three (municipal solid waste) landfill. Further, in accordance with R.61-107.19, Part IV, Section D.1, the design criteria for a Class 2 landfill requires a two-foot separation between the landfill base grade and the seasonal high water table. If a permit applicant wanted to reduce the two-foot separation requirement, it would necessitate an alternate design request and would be considered a “major” permit modification. The request by MRR Pickens to modify the permit to include the option to install a liner and associated leachate collection system to a portion of the landfill did not equate to an alternate design because the two-foot groundwater separation was being maintained. (DHEC Initial Staff Response to RFR, Page 5). Finally, the minor permit modification did not allow any new waste streams for acceptance into the Class Two landfill.

On August 10, 2015, DHEC staff issued the minor permit modification to MRR Pickens, allowing the liner option. Because it was a minor permit modification, public notice and comment were not required under the solid waste regulations. Nor were public notice and comment required by statute. Rather, S.C. Code Section 44-1-60(E)(1) required only that DHEC provide notice to the applicant (MRR Pickens) and to affected persons who had requested in writing to be notified.

S.C. Code Section 44-1-60(E)(2) provides that DHEC’s staff decision becomes the final agency decision fifteen calendar days after notice of the decision has been mailed to the applicant, unless a written request for final review is filed with the Department by the applicant, permittee,

licensee, or affected person. The County did not submit an RFR request to the DHEC Board within fifteen calendar days of the Department's August 10, 2015, mailing of its decision to MRR Pickens, as required by the statute. Further, from the time the initial Permit was issued in 2008, the County did not request in writing (via certified mail, electronic mail, or by any other method) to be notified by DHEC of any decisions relating to the Highway 93 Permit. Thus, DHEC was not required to notify the County as an "affected person" under Section 44-1-60(E).

Notwithstanding the fact that DHEC was not required to notify the County, at a meeting between DHEC and the County on December 15, 2015, DHEC informed the County of the minor permit modification and it was discussed at length. (Affidavit of Joan Litton, April 15, 2016, Page 1). On January 11, 2016, DHEC sent via e-mail, a copy of the August 10, 2015 minor permit modification to Mr. Gerald Wilson, Pickens County Administrator. Even though the County knew of the minor permit modification as early as December 15, 2015, it waited until March 23, 2016 to submit an RFR to the DHEC Board. The County's RFR was submitted approximately seven (7) months after the minor permit modification became final, and 99 days after the County was informed on December 15, 2015, of the permit decision. On April 21, 2016, the DHEC Board declined to conduct a final review conference.

On May 19, 2016, the County filed a request for a contested case hearing with the ALC. On July 28, 2016, DHEC filed a motion to dismiss. MRR Pickens filed a motion to dismiss and a motion to stay discovery on July 29, 2016. On August 18, 2016, the County, on behalf of various property owners, filed a motion to intervene. On September 7, 2016, Judge Robinson held a telephone conference with the parties, and granted MRR Pickens' motion to stay discovery and held the motion to intervene in abeyance pending the court's decision on the motions to dismiss. A hearing was held on the motions to dismiss on December 2, 2016. On December 12, 2016, the

ALC granted the motions to dismiss because the County did not timely fulfill the procedural requirements for bringing a contested case before the ALC. The ALC found that failure to file a request for final review and participate in the Department's review process in a timely manner foreclosed a contested case action at the ALC. Regarding the County's request for final review to the DHEC Board, the ALC stated that "[T]he County's request was filed 226 days after the staff decision was issued, 99 days after the meeting where the decision was discussed with the County, and 72 days after the decision was e-mailed to the County." (ALC Order, p. 2). The ALC further found the County did not state a legally valid or compelling reason for its failure to timely file a request for review and, therefore, the case did not warrant the application for equitable tolling, as advocated by the County. (ALC Order, p. 4).

The appeal to this Court was filed by the County on January 11, 2017. On March 29, 2017, various property owners filed a motion to be included as parties to the appeal. On June 7, 2017, this Court denied the motion to allow intervenors to be included in the appeal because under SCACR Rule 201, "only a *party* aggrieved by an order, judgment, sentence or decision may appeal." (emphasis in original). (Ct. App. Order, June 7, 2017).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act ("APA") articulates the standard for judicial review of cases decided by the ALC. *See* S.C. Code Ann. § 1-23-610(C); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 380 S.C. 349, 360, 669 S.E.2d 899, 904 (Ct. App. 2008), *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246 (2010). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health & Human Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). "Substantial evidence is evidence that, when viewing the record as whole, would

allow reasonable minds to reach the same conclusion that the ALC arrived at in justifying its decision.” *S.C. Coastal Conservation League*, 380 S.C. at 362, 669 S.E.2d at 905.

ARGUMENTS

1. **THE ALC PROPERLY GRANTED RESPONDENTS’ MOTIONS TO DISMISS BECAUSE THE COUNTY FAILED TO EXHAUST THE ADMINISTRATIVE REMEDIES AVAILABLE UNDER SECTION 44-1-60(E)**

a. The County Failed To Timely File A Request For Review Of DHEC’s Decision To Issue The Minor Permit Modification.

The ALC granted MRR Pickens’ and DHEC’s Motions to Dismiss pursuant to S.C. Code Section 44-1-60 and SCALC Rule 23(B) because the County failed to timely exhaust the administrative remedies prescribed by law as prerequisites to filing a contested DHEC case with the ALC. (ALC Order, p.4). The doctrine of exhaustion of administrative remedies generally requires a person seeking relief from the action of an administrative agency to pursue all available administrative remedies before seeking such relief from the courts. *Hyde v. S.C. Dep’t of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). S.C. Code Section 44-1-60(E)(2) provides that a staff decision becomes the final agency decision fifteen days after notice of the staff decision has been mailed to the applicant, unless a written request for final review is filed with the DHEC Board by the applicant, permittee, licensee or an affected person. Once the RFR is filed with the Board, the Board may: (1) decline to review the staff decision; (2) let the sixty-day time period for holding a review conference lapse without acting; or (3) hold a conference and issue a decision. After the Board performs one of these options, an applicant or affected person has thirty calendar days to file a contested case with the ALC. S.C. Code Ann. § 44-1-60(G). Section 1-23-380 provides that “a party who has exhausted all administrative remedies available with the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review.” S.C. Code Ann. § 1-23-380.

Here, the decision to grant the minor permit modification to MRR Pickens was mailed on August 10, 2015. As a result, the County was required to file an RFR by August 25, 2015, to be afforded review. The County did not file a request for review of the DHEC decision until March 23, 2016. Failure to adhere to the statutory deadline for filing an RFR and participate in DHEC's review process in a timely manner foreclosed a contested case action at the ALC. (ALC Order p.3). As the South Carolina Supreme Court ruled in *S.C. Coastal Conservation League*, 390 S.C. at 426, 702 S.E.2d at 251, the "clear and unambiguous language" of Section 44-1-60(E)(2) provides that the Department's staff decision becomes final fifteen days after notice of the department decision "*has been mailed*" to persons required to receive notice. (Emphasis in original). A decision for which DHEC Board review is sought more than fifteen days after mailing is not subject to review before either the DHEC Board or the ALC.

b. The County's Failure To Request To Be Notified As An "Affected Person" Of Any DHEC Staff Decision Regarding the Landfill Was A Fatal Flaw

In this instance, the Department had no obligation to notify the County of the minor modification to the Permit because it never requested to be notified as an "affected person" with respect to any DHEC decision regarding the Landfill. Therefore, the fact that the County was not sent notice of the minor modification is not an error by DHEC, but rather is attributable to the County's failure to request notification. The County does not dispute this fact. In fact, it admitted this several times over the course of the hearing before the ALC on DHEC's and MRR Pickens' Motions to Dismiss. Further, there is no assertion or evidence on the record showing or tending to show that the County requested that DHEC notify the County of any decision made regarding the Landfill. This fact has also been attested to via affidavit, by Ms. Joan Litton of DHEC. (Affidavit of Joan Litton, April 15, 2016).

The County's admissions that it did not request to be notified as an "affected person" on any decisions or determination pertaining to the Landfill commence on page 62, lines 21-24 of the Motions Hearing transcript dated December 2, 2016, when attorney for Appellant, Mr. Gary Poliakoff, states during his opening remarks to the ALC that "... the reason there are no affected persons writing in asking to be notified is because they didn't tell anybody." Another reiteration of the same admission is made at page 79, lines 11-16 of the Hearing Transcript, where Mr. Poliakoff further states: "And again, affected persons include people who request in writing to be notified. There can be no people writing in requesting to be notified if they have no information that anything new is taking place."

c. Whether the Landfill Modification Was Major Or Minor Is Of No Significance To This Appeal.

Whether the modification issued on August 10, 2015, was a major or minor modification is of no significance because the issue at the center of this appeal is whether the County timely filed an RFR with the DHEC Board, thereby exhausting its administrative remedies. No matter what type of modification it was or is, if the County had requested of DHEC that it be notified, as an "affected person," of any future decisions regarding the Landfill, the County would have been appropriately notified of any such decision. The County then would have known about the modification and would have been afforded the benefit of the 15-calendar day statutory deadline in which to file an RFR with the DHEC Board. However, since the County never requested to be notified, DHEC did not notify the County of the minor modification, and without the County's written request to DHEC for notification there was no statutory or regulatory requirement for DHEC to notify the County. The County's failure to request to be notified makes it impossible for it to prevail in this appeal because the DHEC administrative review statute must be adhered to. Therefore, due to its own failure to request to be notified, the County did not exhaust its

administrative remedies in a timely fashion. Therefore, the fact that the County never requested to be notified is a fatal flaw that prevents it from being able to prevail on this appeal.

d. The County's Hands Are Unclean

The County does not come to the table with clean hands, because even though it argues that DHEC never notified it of the minor modification decision until months after the decision had been issued, the reason DHEC did not notify the County, as already stated, is the County's doing, not DHEC's. DHEC would have notified the County if it had submitted a request to DHEC to be notified of any DHEC decision pertaining to the Landfill. Since the Highway 93 Permit was issued in 2008, the County has never requested that DHEC notify it of any decisions relating to the Permit even though it had ample time - seven years in fact - to request to be notified of any future decisions regarding the Permit. The County is not an uninformed bystander – it had been working closely with MRR Pickens even before the original Class Two Permit was issued when the County and MRR Pickens entered into a Development Agreement to allow MRR Pickens to use the property for a Class Two landfill. (Administrative Hearing Transcript, December 2, 2016, at 26:1). The County was aware that each year since the Permit was issued, extensions on the construction of the landfill had been requested. (Administrative Hearing Transcript, December 2, 2016, at 54:21-24). The County had ample opportunity to request notice in writing. The County cannot now expect that its failure to request to be notified by DHEC and to follow the statutory prerequisites to receive notice as an affected person, can somehow now be resolved in its favor.

Ultimately, several months after the issuance of the modification, the County was given verbal and actual notice of the minor permit modification by DHEC at a meeting between DHEC and the County held on December 15, 2015. In addition, on January 11, 2016, DHEC staff e-mailed a copy of the minor permit modification to the County. At the ALC hearing, Judge

Robinson repeatedly asked the County why it waited until March 23, 2016, to file an RFR with the DHEC Board when it had received notice of the decision at least as early as December 15, 2015. (Administrative Hearing Transcript, December 2, 2016, at 60:3-9; 65:5-8; 72:22-25; 73:1-11; 73:18-19; 76:3-4; 81:13-22). In response to the ALC's question, the County responded several times that it was "trying to figure out what" it was supposed to do (Administrative Hearing Transcript, December 2, 2016, at 62:4-5; 66:6-7; and 73:20-21) and acknowledged that it "would have been better to have filed that request sometime in January, February or thereabouts" but did not do so because it was a "done deal" and the permit was issued and it was trying to figure out what to do. (Administrative Hearing Transcript 73:1-25). When pressed by the ALC to explain what prompted the County to later decide to file an RFR, Mr. Poliakoff, attorney for the County, replied that what changed was that he became involved. (Administrative Hearing Transcript 76:3-14).

As the Court noted in its Order granting the Motions to Dismiss, the County did not state a legally valid or compelling reason for its failure to pursue administrative remedies in a timely fashion. (ALC Order, p. 4). An extraordinary amount of time passed – 226 days – before the County filed an RFR with the DHEC Board, and the County waited 99 days to file an RFR after it was informed of the permit modification. Having received actual notice of the permit decision on multiple occasions following the permit modification, the County "still failed to take prompt action." (ALC Order p. 4). As the ALC held, even "[u]sing the latest possible date of notice still renders Petitioner's request untimely." (ALC Order p. 4). Having thus failed to exhaust an administrative remedy provided by statute, the ALC correctly dismissed the County's request for a contested case hearing.

e. Other Court Holdings Addressing Situations Where A Party Did Not Request Notice Of Subsequent Decisions Support Dismissal in This Case.

The County could not rely on having received notice of the initial permit in 2008 and expect that it would receive notice of subsequent decisions related to the permit. In *Hubbard v. S.C. Dep't of Health and Envtl. Control and Shavon's Purple Lotus Body Art Boutique*, 2008 WL 2300351 (S.C. Admin. Law Ct. May 2, 2008), the ALC held that where notice of future staff decisions was not requested after an initial license or permit was issued, the Department was not required to give subsequent notices or otherwise treat the party seeking review as an "affected person." The ALC further held that a Petitioner cannot claim ignorance to avoid the requirement that it notify DHEC of its "affected person" status to trigger future notification of permitting decisions. The ALC found that all citizens are presumed to know the law, and are charged with exercising reasonable care to protect their interests. *Id* at *6 (citing *Morgan v. S.C. Budget and Control Board*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) ("[C]itizens are presumed to know the law and are charged with exercising 'reasonable care to protect [their] interest[s].'"). Having failed to request notice under the statute, the County is not an affected person, and DHEC was not required to notify it of its permit decision. The County's failure to request to be notified of any DHEC decision regarding the Landfill is a fatal flaw and the reason why it cannot prevail on this appeal. The County simply did not do its due diligence to be informed of the department decision.

f. Exhaustion Of Administrative Remedies Is A Fundamental Concept.

It is fundamental that "an appellant is required to exhaust administrative remedies prior to filing an appeal" in the ALC. *Hill v. S.C. Dep't of Health and Envtl. Control*, Docket No. 08-ALJ-07-0353-CC, at 2 (S.C. Admin. Law Ct. Sept. 16, 2009) (citing *Howard v. Mutz*, 315 S.C. 356, 434 S.E.2d 254 (1993)); *see also Chris's Dry Cleaning and Shirt Service v. S.C. Dep't of Health and Envtl. Control*, Docket No. 15-ALJ-07-07-0368-CC, at 2 (S.C. Admin. Law Ct. Nov. 6, 2015)

(dismissing case for failure to exhaust administrative remedies where the appellant did not submit a timely request for review to the DHEC Board). Section 44-1-60 provides the exclusive procedure for bringing a contested case regarding permitting or licensing actions taken by DHEC. *A.O. Smith Corporation v. S.C. Dep't of Health and Env'tl. Control and Town of McBee*, 2016 WL 2771749 (S.C. Admin. Law Ct. May 5, 2016). “The exclusive process established by Section 44-1-60 is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies.... Under the statute, unless the steps prescribed are followed, beginning with the initial decision of the Department, a party may not bring a contested case before the ALC.” *A.O. Smith Corporation*, 2016 WL at 2771749, at *2 (citing *Ward v. State*, 343 S.C. 14, 18-19, 538 S.E.2d 245, 247 (2000) (“The general rule is that while there are several exceptions that may be applied to the judicially imposed exhaustion requirement, those that apply to a statutory requirement are few.”)).

The County failed to timely adhere to the statutory requirement of Section 44-1-60 by failing to request an RFR before the DHEC Board within fifteen calendar days following the mailing of DHEC’s decision to issue the minor permit modification. Pursuant to the statutory mandate of Section 44-1-60, the DHEC Board only has authority to review a decision if a written request for final review is submitted to the Board within fifteen calendar days after notice of the staff decision has been mailed to the applicant. As articulated by this Court:

The DHEC Board ha[s] no authority to extend or expand the period in which appeals requests could be timely filed and was limited to the fifteen-day filing window enacted by the General Assembly,...[In the event of a] failure to comply with the mandatory appeals term, the DHEC Board lack[s] jurisdiction and could not validly exercise dominion over the matter without erroneously extending the span in which appeals could be filed. Because the appeal was untimely and the DHEC Board lacked jurisdiction, the ALC could not invoke jurisdiction to hear the matter.

S.C. Coastal Conservation League, 380 S.C. at 377, 669 S.E.2d at 914, *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246. Because the County failed to exhaust its administrative remedies

by timely filing an RFR with the DHEC Board, the ALC correctly dismissed the County's request for a contest case hearing.

- g. Exceptions To The Requirement Of Exhaustion Of Administrative Remedies Do Not Apply to County's Failure To Timely Follow the Procedural Requirements Of Section 44-1-60.

The County argues that exceptions to the requirement of exhaustion of administrative remedies should be applied, first, by claiming DHEC acted outside the scope of its legal authority in issuing the minor permit modification to MRR Pickens and second, by claiming that matters of crucial public interest are involved. The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to the application of the general rule. *Hyde*, 314 S.C. at 208, 442 S.E.2d at 583 (citing *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 201 S.E.2d 241 (1973)).

As to the County's first claim, DHEC acted within the scope of its legal authority under the S.C. Solid Waste Policy and Management Act ("Act") as the agency is authorized to issue permits for solid waste landfills. (S.C. Code. Ann. § 44-96-260). Under the solid waste regulations, promulgated by DHEC pursuant to the Act, DHEC acted consistent with its regulatory authority by reviewing the minor permit modification application submitted by MRR Pickens and determining that the requested modifications met the regulatory definition of a minor permit modification. R.61-107.19, Part I, 48(a). DHEC further acted within the scope of its legal authority by following the procedures in the regulations for issuing a minor permit modification, which do not require notice and public comment. Contrary to the County's assertion, the general permit application procedures contained in R.61-107.19, Part IV, H. do not apply to minor permit modifications.

The County's second claim is that a public interest exception to the exhaustion of administrative remedies requirement should be applied to forgive County's failure to comply with the statutory requirements of Section 44-1-60. The County incorrectly claims that the minor permit modification allows "special wastes" to be accepted for disposal at the Highway 93 Landfill.² On the contrary, the term "special wastes" refers to waste that may be accepted into Class Three landfills. The minor permit modification does not change the Highway 93 Landfill from a Class Two to a Class Three landfill, and there is no newly authorized waste stream because of the minor modification to the Permit.

The County's real concern is the acceptance of coal combustion residuals ("CCR" or "coal ash") for disposal at the Highway 93 landfill. First, the permit modification does not authorize the acceptance of either special wastes or coal ash. Any request seeking approval of wastes other than permitted construction and demolition debris into the Landfill would require a separate review and approval process by DHEC. Second, the County was instrumental in securing the passage of legislation that became effective on March 2, 2016, prohibiting coal ash from being disposed into a Class Two landfill and requiring such material to be disposed of in a Class Three landfill, with limited exceptions. (Act 138 of 2016, S.C. Code Ann. § 58-27-255 (2016)). Therefore, by law, coal ash cannot be placed into the Highway 93 Landfill. Any effort by MRR Pickens to change the Highway 93 Permit from a Class Two to a Class Three would require a new application and permitting process and be subject to public notice and comment procedures. Thus, the minor permit modification does not carry the weight of critical public interest considerations that should override the County's failure to exhaust its administrative remedies.

² "Special wastes" are defined as nonresidential or commercial solid wastes that are either difficult or dangerous to handle and require unusual management *at Class Three landfills*, including, but not limited to, those wastes contained in S.C. Code Section 44-96-390(A) (emphasis added).

2. EQUITABLE ESTOPPEL DOES NOT APPLY IN THIS CASE.

- a. County did not claim equitable estoppel at the ALC, and cannot now raise it to excuse its failure to exhaust administrative remedies.

The County argues DHEC should be estopped from invoking exhaustion of administrative remedies as a basis for dismissal. (App. Initial Brief, p. 30). The County did not raise equitable estoppel at the ALC, and therefore, is barred from raising it for the first time on appeal. *S.C. Coastal Conservation League*, 380 S.C. at 379, 669 S.E.2d at 899 (citing *Doc v. Roe*, 379 S.C. 291, 297, 665 S.E.2d 182, 185 (Ct. App. 2008)). In *Coastal Conservation League*, the issues of waiver, equitable estoppel, and equitable tolling were not initially raised to and ruled upon by the ALC and, therefore, were not properly preserved on appeal. *Id.* at 380. An issue must have been raised to and ruled upon by the trial judge to be preserved for review. *Id.* at 379 (citing *Pye v. Est. of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006); *Singleton v. Sherer*, 377 S.C. 185, 208, 659 S.E.2d 196, 208 (Ct. App. 2008)). “To preserve an issue for appeal, it must be: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity.” *Id.* at 379 (citing *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (citing Jean Hoefler Toal et al., *Appellate Practice in South Carolina*, 57 (2d ed. 2002))). Having failed to raise equitable estoppel at the ALC, the County cannot now raise it for the first time as a reason to excuse its failure to exhaust administrative remedies.

- b. County fails to establish grounds for the application of equitable estoppel.

Even if equitable estoppel is considered by this Court, the County’s claim should fail. The County claims that even after it received actual notice of the permit modification, it did not file an administrative appeal (with the DHEC Board) because it relied on a statement by a DHEC staff person that the administrative review process was over. (App. Initial Brief at p. 31). It argues

DHEC should be estopped from asserting exhaustion because of the “misinformation” provided by DHEC. Assuming the County’s assertion of “misinformation” is accurate, this argument still fails because estoppel will not lie against a government entity where a government employee gives erroneous information in contradiction of statute. *Morgan v. S.C. Budget and Control Bd.*, 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008). In *Morgan*, Appellant claimed that Retirement Systems administrators misled him concerning his eligibility to purchase non-qualified service credit. However, the Court found that estoppel based on erroneous advice was inappropriate because eligibility to establish service credit was a purely statutory matter, and the Retirement Systems had no discretion to determine Morgan’s eligibility and no authority to contradict the statute. *Id.* at 320. Here, the requirements for appealing to the DHEC Board are governed by Section 44-1-60(E). DHEC staff has no discretion to determine whether the County could or could not appeal, and DHEC lacked authority to contradict the statute.

Further, the County, as the party asserting estoppel, has the burden of establishing all its elements. A party asserting estoppel against the government must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government’s conduct, and (3) a prejudicial change in position. Absent one element, estoppel will not lie. *Morgan*, 377 S.C. at 320. The County’s estoppel claim fails the first two elements. First, the County had ample knowledge of the Highway 93 Landfill permit, having participated in the permitting process when the permit was first issued, and other activities with MRR associated with the Landfill. The County knew, and had the means to know, that it could be apprised of any decisions affecting the Landfill by simply requesting in writing to be notified of any Department decisions affecting the landfill. Further, the County acknowledged receiving actual notice of the permit modification at the meeting with DHEC staff, and had knowledge of the facts at that time

as well as the means to decide for itself whether to file a request for an RFR to the DHEC Board. Second, the County cannot argue that it was justified in relying on the DHEC staff's purported statement at the meeting when the County acknowledges that "...it would have been better to have filed that request sometime in January, February, or thereabouts..." but waited because "the County was trying to figure out what to do." The County did not justifiably rely on any statement that might have been made by DHEC regarding its rights to appeal. As this Court stated in *Morgan*, "citizens are presumed to know the law and are charged with exercising 'reasonable care to protect [their] interest[s].'" *Morgan*, 377 S.C. at 320 (citing *Smothers v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 210-11, 470 S.E.2d 858, 860 (Ct. App. 1996)).

3. THE ALC PROPERLY DECLINED TO APPLY EQUITABLE TOLLING TO CURE THE COUNTY'S FAILURE TO TIMELY REQUEST FINAL REVIEW BEFORE THE DHEC BOARD.

The County's failure to timely file an RFR with the DHEC Board within fifteen days of the staff decision on the minor permit modification cannot be cured by application of equitable tolling principles. The ALC rejected the County's equitable tolling arguments, finding that "[t]he doctrine of equitable tolling is applied when it is necessary to suspend the timeframe set by statute in order to preserve justice and provide fairness..." (ALC Order, p. 4 (citing *Hooper v. Ebenezer Sr. Servs. & Rehab Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009))). The ALC noted that there must be a compelling reason for granting such relief: "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." (ALC Order, p. 4 (citing *Hooper*, 386 S.C. at 116, 687 S.E.2d at 33)). Furthermore, "[T]he party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief." 54 C.J.S. Limitations of Actions § 115.

This Court has stated that:

“equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights. In other words, if the relevant facts present sufficiently *rare and exceptional circumstances* that would warrant application of the doctrine.” *Pelzer v. State of South Carolina*, 378 S.C. 516, 521, 662 S.E.2d 618, 620 (Ct. App. 2008) (emphasis added).

In *Pelzer*, this Court upheld the circuit court’s dismissal of Petitioner’s post-conviction relief application for having failed to file within the one-year statute of limitations. The Court stated that, “[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes...[W]e believe, therefore, that any resort to equity must be reserved for those rare instances where – due to circumstances external to the party’s own conduct – it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” *Id.*, 378 S.C. at 522, 662 S.E.2d at 621 (citing *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)).

Here, the County has presented no extraordinary or exceptional circumstances that warrant overriding the County’s failure to meet a clear statutory deadline for filing an RFR with the DHEC Board. The County was aware of the requirements of Section 44-1-60(E) because it had previously been notified of the 2008 permit application. The County was engaged in a series of development and host agreements with MRR Pickens regarding the landfill. The County’s own conduct – failure to request to be notified of permit decisions affecting the Highway 93 landfill – constitutes the circumstances that resulted in failure to meet the statutory deadline. The County’s own responses to the ALC’s numerous questions as to why it did not timely file - the County was trying to figure out what it was supposed to do after the permit was issued, the permit was already a “done deal,” the County did not engage its attorney until sometime in January or February 2016 - are not

evidence of extraordinary circumstances external to the County's own conduct such that tolling should be permitted. (Admin. Hear. Transcript 62:4-16; 65:9; 76:5-10).

Further, no gross injustice would result by enforcing the RFR filing deadline. First, as discussed before, the minor permit modification does not alter the designation of the Landfill from a Class Two to a Class Three landfill. Second, the minor permit modification does not allow new waste types such as coal ash to be disposed in the Landfill. If disposal of new waste types is desired, MRR Pickens would be required to seek DHEC's approval through a separate and discrete process. Third, the minor permit modification gives MRR Pickens the *option* to install a liner and leachate collection system for a portion of the Landfill. The Landfill has not yet been constructed, and the minor permit modification provides a liner option that MRR Pickens may or may not decide to use once it begins construction. Fourth, beyond the instant appeal, MRR Pickens and the County are engaged in a civil lawsuit involving the County's January 2016 decision to suspend MRR Pickens' land use permit, the outcome of which may determine the future of the Landfill. (Pickens County Planning Comm. To MRR Pickens, Letter dated January 11, 2016, suspending land use permit). (Administrative Hearing Transcript, December 2, 2016, at 55:6-12). Finally, the disposal of coal ash in Class Two landfills is now prohibited by law, with limited exceptions. (Act 138 of 2016). As noted in *Pelzer*, "[T]o apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation." *Pelzer*, 378 S.C. at 522, 662 S.E.2d at 621. The County did not present any extraordinary circumstances that would warrant application of the doctrine, and the ALC properly concluded that the County did not state a legally valid or compelling reason for its failure to pursue the available remedies in a timely fashion. (ALC Order, p. 4).

4. THE ALC PROPERLY GRANTED MRR PICKENS' MOTION TO STAY DISCOVERY AND PROPERLY HELD THE COUNTY'S MOTION TO INTERVENE IN ABEYANCE PENDING THE ALC'S DECISION ON MRR PICKENS AND DHEC'S MOTIONS TO DISMISS

a. The Motion To Stay Discovery Was Properly Granted By The ALC Pending Its Ruling On The Motions To Dismiss.

The County argues that the ALC based its dismissal on evidence outside of the pleadings, thus converting the dismissal proceedings to summary judgment proceedings and precipitating the need for discovery. However, nowhere does the County articulate what "evidence" it is referring to, or how it needed discovery to defend itself against such evidence. In fact, it is the County that throughout these proceedings has interjected testimony and evidence that was obtained outside of the confines of the appeal of the minor permit modification. The County has repeatedly used DHEC staff testimony obtained in a deposition as part of a separate civil case between the County and MRR Pickens to improperly argue the merits of its case. (pp. 9-11, and pp.14-15 of County's Initial Brief). The County has already engaged in substantial discovery through the civil case to delve into issues it is attempting to raise in this appeal.

In any event, the ALC's dismissal was not based on evidence outside of the pleadings, but rather on the fact that the County failed to timely fulfill the procedural requirements for bringing a contested case before the ALC. (ALC Order, p.1). Thus, the motion to dismiss was not a summary judgment motion disguised as a motion to dismiss. As the ALC noted, under SCALC Rule 23(B), "[U]pon motion of any party, or on its own motion, the Court may dismiss a contested case or resolve the contested case adversely to the offending party for failure to comply with any of the rules of procedure for contested cases, including the failure to comply with any of the time limits provided in these rules or by order of the Court." The ALC concluded that the County "failed to timely exhaust its administrative remedies prescribed by law as prerequisites to filing a

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contested DHEC case in the ALC” and therefore “this matter must be dismissed pursuant to Section 44-1-60 and SCALC Rule 23(B).” (ALC Order, p. 4).

b. The ALC Properly Held the County’s Motion to Intervene In Abeyance Pending A Ruling On The Motions To Dismiss.

This Court has already denied the motion of various property owners to intervene as parties to the appeal because under SCACR Rule 201, “only a *party* aggrieved by an order, judgment, sentence or decision may appeal.” (Order of the Ct. App. June 7, 2017) (emphasis in original). Yet, the County persists in arguing that the ALC erred in not considering the motion to intervene and that this Court should allow the County to advance arguments for intervention on behalf of the property owners.

Simply put, the motion to intervene was held in abeyance because if the underlying request for a contested case was dismissed there would be no case into which the property owners could intervene. (Administrative Law Court Conference Call Summary of Rulings and Instructions, dated September 7, 2017). Rule 20(B), ALC Rules, clearly states that a movant may intervene “in any pending contested case hearing...” and that, unless otherwise ordered by the administrative law judge, such motion must be filed at least twenty days “before the hearing.” (Rule 20(C), ALC Rules). If there is no contested case, there is no opportunity to intervene. Judge Robinson correctly held the motion to intervene in abeyance until she ruled on the threshold question of whether there was even a contested case properly before the ALC. Once the Motions to Dismiss were granted, there was no pending “contested case hearing” for intervention purposes.

CONCLUSION

For all the reasons discussed herein, DHEC respectfully requests that this Court uphold the Order of the ALC dismissing the County's request for a contested case hearing.

Respectfully submitted,

Etta R. Williams Linen

Etta R. Williams Linen
SC Bar No.: 16663
Assistant General Counsel

Claire H. Prince
SC Bar No.: 4574
Special 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: williaer@dhec.sc.gov
princech@dhec.sc.gov

October 3, 2017
Columbia, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

OCT 06 2017

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Court of Appeals

Appellant Case No.: 2017-000066

Pickens County,Appellant,

v.

South Carolina Department of Health and Environmental Control and MRR
Pickens, LLC,Respondents

CERTIFICATE OF SERVICE

I, Donna K. Hellerman, Legal Assistant with the South Carolina Department of Health and Environmental Control, hereby certify that I have this 4 day of Oct, 2017 served the foregoing ***South Carolina Department of Health and Environmental Control's Initial Brief and Designation of Matter*** upon all parties and counsel of record by placing a copy of same in an envelope and depositing it in the U.S. Mail, first-class, with sufficient postage paid, at the address indicated below:


Gary J. Poliakoff, Esquire
Poliakoff & Associates
Post Office Box 1571
Spartanburg, SC 29304

Jessica J. O. King, Esquire
Allen K. McAlister, Jr., Esquire
Williams Mullen
P.O. Box 8116
Columbia, SC 29202

Amy E. Armstrong, Esquire
Amelia A. Thompson
Michael G. Corley
South Carolina Environmental Law Project
Post Office Box 13380
Pawleys Island, SC 29585

Robert F. Goings, Esquire
Goings Law Firm, LLC
914 Richland Street, Suite A-101
Columbia, SC 29201

October 24th, 2017
Columbia, South Carolina



Donna K. Hellerman



RECEIVED
OCT 06 2017
SC Court of Appeals

October 4, 2017

Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Pickens County vs. South Carolina Department of Health and Environmental Control and MRR Pickens, LLC
Appellate Case No.: 2017-000066; OGC #22666

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the *Respondent South Carolina Department of Health and Environmental Control's Initial Brief and Designation of Matter* for filing in the above referenced case. I would appreciate your office returning the stamped copy in the enclosed self addressed stamped interoffice envelope.

By copy of this letter, I am serving all counsel of record.

Should you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

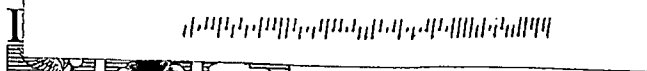
A handwritten signature in black ink that reads "Donna K. Hellerman".

Donna K. Hellerman
Legal Assistant to Etta R. Williams Linen

/dkh

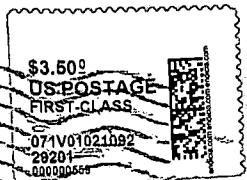
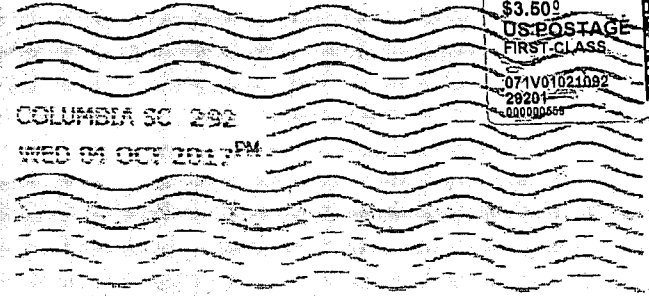
Enclosure as stated

ec: Etta R. Williams Linen, Esquire
Claire H. Prince, Esquire
cc: Jessica J. O. King, Esquire
Allen K. McAllister, Jr., Esquire
Robert F. Going, Esquire
Amy E. Armstrong, Esquire
Amelia A. Thompson, Esquire
Michael G. Corley, Esquire
Gary W. Poliakoff, Esquire



2600 Bull Street
Columbia, SC 29201

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**Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina
Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211**

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