

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

NOV 20 2017

SC Court of Appeals

Appellate Case No. 2017-00066

Pickens County,

vs.

Appellant,

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

Respondents.

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES iii

ARGUMENT: 1

I. The ALC erred in Concluding that the County’s Request for Review of DHEC’s Permitting Decision was Untimely. 1

A. Was DHEC only required to provide notice of the Permit Modification to “affected persons who have requested in writing to be notified,” as specified in § 44-1-60(E)? 1

B. Did actual notice of the Permit Modification cure all preceding notice deficiencies and trigger the County’s statutory limitations period for filing? .. 6

C. Summation: 10

II. The ALC Erred in Failing to Excuse any Untimeliness. 11

A. This Case is an Archetype for the “Scope of Authority” Exception. 11

B. Respondents’ Public Interest Arguments Distort Facts and Law. 12

C. Equitable relief is available to the County and appropriate in this case. 16

i. Equitable Tolling is Appropriate in This Case. 17

ii. Equitable Estoppel is Appropriate in This Case. 20

 1) Equitable Estoppel is Preserved for Appeal 20

 2) Equitable estoppel applies to DHEC. 21

III. The ALC’s Sequence of Discovery, Intervention, and Dismissal was Erroneous and Prejudicial. 22

A. Intervention should have been decided before considering dismissal. 22

B. Discovery should have been allowed before deciding on dismissal. 24

CONCLUSION: 25

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979) 22

Bishop v. City of Columbia, 401 S.C. 651, 738 S.E.2d 255 (Ct. App. 2013) 22

Bryant v. SCDHEC, 2001 WL 1326513(Oct. 9, 2001) 23

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002) 23

Gitter v. Cardiac & Thoracic Surgical Assocs., Ltd., 338 F. App'x 348 (4th Cir. 2009) 16

Hubbard v. S.C. Dep't of Health and Envtl. Control, 2008 WL 2300351 (May 2, 2008) 6

Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994) 12

Lake v. Moore 12 S.C. 563 (1879) 7

McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473 (1933) 9

Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008) ... 21, 22

Oswald v. Aiken Cty., 281 S.C. 298, 315 S.E.2d 146 (Ct. App. 1984) 22

Rogers v. SCDHEC, 2001 WL 1397451 23

S.C. Coastal Conservation League v. SCDHEC 390 S.C. 418, 702 S.E.2d 246 (2010) 4-9

S.C. Dep't of Mental Health v. Glass, 269 S.C. 91, 236 S.E.2d 412 (1977) 8

S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511 (Ct. App. 2003) 9

Storm M.H. ex rel. McSwain v. Charleston Cty. Bd. of Trustees, 400 S.C. 478,
735 S.E.2d 492 (2012) 15

Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) 22

Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010) 16

W. Carolina Reg'l Sewer Auth. v. SCDHEC, 1997 WL 435927 (Apr. 10, 1997) 23

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) 20, 21

STATUTES

S.C. Code § 44-1-60 9

S.C. Code § 44-1-60(A) 2

S.C. Code § 44-1-60(B) 5, 8

S.C. Code § 44-1-60(D) 5

S.C. Code § 44-1-60(E) 5, 6, 8, 9, 10, 17

S.C. Code § 44-1-60(E)(1) 2, 3, 5

S.C. Code Ann. § 58-27-255 21

REGULATIONS

S.C. Reg 61-107.19, Part I, D(2)(a)-(g) 3

S.C. Reg. 61-107.19 Part I.D.2.g 9

S.C. Reg. 61-107.19, Part IV, H.3 3

OTHER AUTHORITIES

Black’s Law Dictionary (10th ed. 2014) 16

SCALC Rule 20(B)) 23

South Carolina Act 138 of 2016 13

ARGUMENT:

Pickens County (the “County”) submits this Reply Brief, which addresses the issues and arguments raised in the separate briefs filed by the South Carolina Department of Health and Environmental Control (“DHEC”) and MRR Pickens, LLC (“MRR”).

At the most fundamental level, this appeal presents two issues: (1) whether the ALC erred in concluding that the County’s request for review of DHEC’s permitting decision was untimely; and (2) whether the ALC erred in failing to apply one of the several legal principles that excuse any untimeliness. The County has divided its Reply Brief based on this dichotomy and has attempted to identify and clarify the decisive questions that emerge from the course of briefing.

I. The ALC erred in Concluding that the County’s Request for Review of DHEC’s Permitting Decision was Untimely.

Looking past the complexity and convolution that is often the natural consequence of appellate briefing, the arguments presented by the parties thus far bring forth two relatively clear and discrete questions of law as it relates to the timeliness of the County’s legal challenge. At the root of all of the timeliness arguments that have been presented lies the parties’ dispute over these two questions of law, which are presented as follows:

A. Was DHEC only required to provide notice of the Permit Modification to “affected persons who have requested in writing to be notified,” as specified in § 44-1-60(E)?

While it is repackaged under several different headings, DHEC’s brief mostly consists of a single restated position: the County did not request in writing to be notified of any future

action on MRR's landfill permit, so nothing else matters. (See, e.g., DHEC's brief, p. 9 ("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.")). MRR also advances and relies heavily upon the proposition that if the County was not among the "affected persons who have requested in writing to be notified," under § 44-1-60(E)(1), any failures in notice on the part of DHEC are irrelevant. (See MRR brief, pp. 8-15). However, even if the Respondents are correct that the County did not "request in writing to be notified" of the Permit Modification,¹ they are fundamentally incorrect in contending that this fact absolves DHEC of its remaining notice obligations in relation to the County.

¹As the County's attorney argued before the ALC, it constitutes an extreme example of form over substance to insist that the County should have submitted an additional written request for notice to DHEC under the circumstances. The County had been extensively involved in DHEC's issuance of the landfill Permit to MRR in 2008. The County had both a Host Agreement and Development Agreement with MRR for the landfill, facts which DHEC was aware of from the permitting process. DHEC acknowledges multiple times that the County was on the agency's mailing list for matters related to the landfill Permit. (See, DHEC brief, p. 1 ("Prior to the issuance of the Permit, DHEC publicly notified 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.")). Yet, when that Permit was modified, DHEC and MRR applied an overly formalistic, "gotcha" interpretation of what it means to be an affected party under § 44-1-60(E)(1), in order to turn a willful and intentional blind eye to the County's obvious documented interest in the Permit. After participating extensively in the process through which the Permit was issued, and after receiving individual notice from DHEC as to the Permit decision, it would have been illogical and indeed bizarre for the County to turn around and formally ask again in writing for notifications related to the Permit.

Section 44-1-60(E)(1) does not require that any particular words be utilized by a party in "request[ing] in writing to be notified," and this Court would be fully justified in concluding that the County qualifies for "affected person" status.

Section 44-1-60(E)(1) is only part of the picture as it relates to the notice obligations of DHEC during its landfill permitting process. Particularly, that Section only covers the direct notice that DHEC is required to provide of its *final* permitting decisions. See (“Notice of a **department decision** must be sent...” (emphasis added)); S.C. Code § 44-1-60(A) (“All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions...”). An entire other set of provisions requires DHEC to provide notice of permitting applications and of DHEC’s undertaking of the permitting process. The County previously cited and discussed these notice provisions, which vary depending on whether a “major” or “minor” permit modification is at issue.² When an applicant applies to DHEC for a minor landfill permit modification, the applicant is required to publish notice of that application to the public, and DHEC must verify publication. S.C. Reg. 61-107.19, Part IV, H.3.³ As for a major permit modification, the County has already explained that the regulations require five separate newspaper publications and five separate instances of direct notice by mail to adjoining landowners and affected parties, occurring at all stages of the permitting process

²At various points in their briefs, the Respondents challenge the County’s contention that the Permit Modification is “major” under the law. Especially in the case of DHEC, this challenge often comes in the form of bald factual or legal assertions without supporting citations. Regardless of which party is correct, the critical point is that the ALC needed to resolve that issue prior to dismissing on the basis of timeliness. If DHEC inaccurately categorized this permit modification for the purpose of denying the County and surrounding property owners the extensive notice and opportunity for input they are properly entitled to under the law, that action cannot be shielded by the timeliness standards of a legitimate permitting decision.

³“Public Notice. When the submittal is administratively complete, the Department will notify the applicant in writing. Within 15 days of receipt of notification from the Department, the applicant shall publish notice of the permit application pursuant to Part I, Section D.2. of this regulation, and submit an affidavit of publication of the public notice in the newspaper to the Department.”

from pre-application to final decision. See S.C. Reg. 61-107.19, Part I, D(2)(a)-(g). Note the critical distinction that these regulations require DHEC and the landfill permit applicant to alert the public that an application is under consideration, so that an affected person can *then* ask in writing to receive a mailed copy of the final decision under § 44-1-60(E)(1).⁴ DHEC completely ignores its own regulations in repeatedly arguing that the statutory requirement for mailing a final permit is the only public entitlement to notice of the landfill permitting process.

While the Respondents attempt to advance an artificially narrow discussion of the pivotal case S.C. Coastal Conservation League v. SCDHEC, excluding its discussion of comparable regulatory notice provisions, the Supreme Court actually addresses this scenario directly.⁵ Again, the issue in SCCCL was whether the Conservation League had complied with the fifteen-day filing deadline in § 44-1-60(E)(2). The Conservation League actually advanced two arguments for why it had not been provided the notice required to trigger that filing deadline. First, the Conservation League did argue that it was an affected person under § 44-1-60(E)(1) and therefore entitled to mailed notice of the final permit decision under that section. 390 S.C.

⁴This distinction is particularly important here, given MRR's subterfuge against the County. During the time that DHEC and MRR were surreptitiously meeting to modify the landfill permit, MRR made false representations to Pickens County that the landfill design was undergoing "no changes" since its original permit in 2008, and that "no liner" would be added to the landfill. (Circuit Court Affidavit of Christopher Brink, p. 2-3.)

⁵DHEC actually misses the point of the SCCCL case altogether, citing the Court of Appeals opinion in that case for the proposition that: "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." (DHEC Brief, p. 13). This is the exact holding that was unequivocally reversed by the Supreme Court on appeal. Indeed, the entire point of the Supreme Court's opinion was that this proposition repeatedly stated by DHEC in its brief is wrong. DHEC ignores the holding of SCCCL altogether, while MRR excludes only part of that holding.

418, 424, 702 S.E.2d 246, 249 (2010). The Respondents place their sole focus on this part of the case and would have the Court believe that the holding of SCCCL is not implicated unless there is at least one person in the category of “affected persons who have requested in writing to be notified.” However, this position ignores the Conservation League’s second argument, which is that it was denied the notice required under DHEC’s regulations for the particular permit at issue. See Id. The SCCCL case involved a water quality permit, and not a landfill permit, so the particular notice regulations were different, but the message was the same: the Conservation League argued its request for review was not late because “it was entitled to notice of the DHEC staff decision pursuant to Regulation 61–101,” which has broader notice requirements than § 44-1-60(E), and that notice had not been provided. See Id.

The Supreme Court embraced the role of the regulatory notice provisions and reversed the ALC’s conclusion that only notice under § 44-1-60(E)(1) is relevant:

DHEC is responsible for managing the welfare of our public health systems and environment. In discharging these duties, DHEC has implemented practices and procedures which foster transparency and full disclosure in all matters regarding its regulatory authority. To this end, DHEC has enacted various notification regulations requiring it to send notice to the public of permit applications and to notify particular parties of DHEC’s decision on the applications. Regulation 61–101 is one of these types of notification regulations. ...

In our view, the notice provisions in Regulation 61–101 do not conflict with § 44–1–60(E). Section 44–1–60(E) sets forth the procedure for appealing from a staff decision and provides which parties DHEC is required to notify by certified mail of the decision. On the other hand, Regulation 61–101 serves to further DHEC’s policy goals including providing notice to the public, fostering openness, and keeping the public informed about important environmental decisions. Section 44–1–60(E) addresses appellate procedures, while Regulation 61–101 addresses public notice.

Id. at 429, 702 S.E.2d at 252. While it was unnecessary for the Supreme Court to reach this conclusion directly, the clear message in SCCCL was that regulatory notice is a condition sine qua non of the timeliness inquiry. As previously explained by the County, such conclusion is also apparent in the plain language of § 44-1-60, which requires that DHEC “shall comply with **all requirements for public notice**” (subsection B) as a precursor to the limitations period (subsection D). Taking off the blinders of the Respondents’ limited reading, the holding of SCCCL is that the fifteen-day limitations period does not begin to run on a permit decision until the requisite public notice of that permit is provided, whether such public notice requirement springs from § 44-1-60 or the regulations. See also, Lake v. Moore, 12 S.C. 563, 563 (1879) (“unless [legally required] notice is given, the appellant is unrestricted as it regards the time within which an appeal may be taken.”). In other words, DHEC can’t ignore the public notice due under its permitting regulations and then weaponize that failure by strictly applying the review deadline to those who were kept in the dark.⁶

⁶The other case primarily relied upon by the Respondents in placing sole importance on the County’s purported failure to request notice in writing is a non-binding ALC case, Hubbard v. S.C. Dep’t of Health and Env’tl. Control, 2008 WL 2300351 (May 2, 2008). That case is of very limited relevance to the inquiry here, as, unlike this case and SCCCL, it does not involve a situation where DHEC failed to provide the requisite notice prior to issuing a permitting decision. Rather, the only relevant question discussed in Hubbard is whether a party involved in initial issuance of a permit has to separately request notice of subsequent action on that permit. Id. at *6. In other words, Hubbard is relevant only to the question of whether the County is an “affected person who has requested in writing to be notified,” by virtue of its involvement with the Permit. Here, that is a secondary issue at best, and Hubbard conveys only one Administrative Law Judge’s opinion on that issue. Hubbard says nothing about timeliness when DHEC has not followed the proper notice and comment procedure.

The Respondents have not disputed that the public notice required by DHEC's regulations, whether for "minor" or "major" permit modifications, was not provided.⁷ Indeed, the record reveals that notice of this permitting process was not provided to anyone but MRR. It must be taken as true at this stage, then, that "all requirements for public notice" were not followed and that the County was thereby denied an opportunity to learn of the Permit Modification within fifteen days of its issuance. Under the legal authority laid out in this section and in the County's previous brief, the limitations period in § 44-1-60(E) cannot begin to run in the absence of compliance with the regulatory notice provisions. Respondents' counter to this conclusion is the subject of the second decisive legal question before the Court:

B. Did actual notice of the Permit Modification cure all preceding notice deficiencies and trigger the County's statutory limitations period for filing?

The other pillar of the Respondents' arguments is their contention that whatever improprieties might have occurred regarding notice to the County and the public, and regardless of the intent behind those improprieties, it is all rendered moot by the fact that Pickens County received actual notice of the permit modification and did not request review within fifteen days of that actual notice. The County anticipated this argument and previously explained several reasons why the County's actual notice does not carry the legal significance the Respondents contend. (Brief, pp. 18-19). The Respondents have not refuted that prior explanation.

⁷Rather, they contend simply that because the County did not request notice of the final permit in writing, it doesn't matter.

To start, neither DHEC nor MRR cite any legal authority to support the proposition that actual notice is the cure-all that they argue. Rather, they expect this Court to accept as self-evident that actual notice, no matter how late it arrives, and even if delivered with form and substance contrary to the legal requirements, and even if accompanied by representations from DHEC staff that it was too late to bring legal challenge, is sufficient to trigger the limitations period for a duly enacted permitting decision. Obviously the County disagrees that such conclusion is self-evident, and the Respondents' failure to cite supporting authorities is telling. To accept the Respondents' position, the Court would have to adopt a significant legal principle for which no authority has been cited: that actual notice is a perfect substitute for notice provided in accordance with the applicable statutory/regulatory scheme, so much so that actual notice (whenever it comes) triggers the limitations period that is supposed to run from issuance of the permit.

However, our appellate courts have repeatedly rejected the proposition that actual notice can serve to trigger a filing deadline in place of the notice required by law. Lake v. Moore, in particular, speaks directly and resoundingly in the County's favor on this issue. In that case, the law required that an appeal be filed within thirty days of the appealing party receiving written notice of judgment. 12 S.C. 563, 563 (1879). Based on an oversight, the appellant had never been provided the written notice required by law. Id. However, the appellant had seen and reviewed the judgment in the clerks office, and he filed his appeal more than thirty days after that actual notice. Id. at 563-64. Just like here, the respondent argued that the limitations period should begin to run from the actual notice. Not only did the Supreme Court reject the argument, but it provided an additional principle that is of utmost importance in the Court's resolution of

this case: “The object of the notice is to apprise the appellant that the respondent intends to insist on an appeal within the time fixed by law, and **unless such notice is given, the appellant is unrestricted as it regards the time within which an appeal may be taken.**” Id. (emphasis added). In other words, the specific notice required by law serves a purpose for which actual notice is not a substitute, and unless and until the specific notice required by law is provided, the appellant is never “on the clock.” The parallel to this case is direct and obvious. Until the County got the notice it was due under the law, it was not subject to the fifteen-day limitation, and actual notice in some other form does not do the job. See also, S.C. Dep’t of Mental Health v. Glass, 269 S.C. 91, 236 S.E.2d 412 (1977) (appeal deadline began running when statutory notice was provided, even though actual notice was received earlier).

Adoption of the Respondent’s position (that the County had fifteen days from actual notice to file its request for review) is contrary to this binding precedent, as well as the plain language of § 44-1-60(E), which establishes that a necessary condition for the running of the limitations period is the issuance of a decision in full compliance with the requirements for public notice. See S.C. Code § 44-1-60(B) (“The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision.”); SCCCL, 390 S.C. 418, 702 S.E.2d 246.

Additionally, in making the case for actual notice, the Respondents put forward some contentions that are incomplete or completely inaccurate. First, in contrast to what is argued by MRR, DHEC has never provided Pickens County with the notice it would be entitled to under § 44-1-60(E). Our Supreme Court has held unequivocally that § 44-1-60(E) requires DHEC to mail notice *simultaneously* to the permit applicant and every other party entitled to notice.

SCCCL, 390 S.C. at 429, 702 S.E.2d at 252 (“Interpreting the statute to require DHEC to mail the notice of decision to the applicant, permittee, licensee, and affected person at the same time provides a uniform procedure, gives all parties equal opportunity to challenge a decision, and is consistent with the legislative purpose.”). Notice provided four months after a permitting decision, regardless of form, literally cannot constitute statutory notice under § 44-1-60. In addition, as mentioned in the County’s original brief, DHEC’s landfill regulations require that notice of a permitting decision under § 44-1-60 include instructions for how to request review of that decision. See S.C. Reg. 61-107.19 Part I.D.2.g. These instructions would have alerted County staff to the fifteen-day limitation period, but the instructions were not included in the permitting documents emailed from a DHEC staff member to a County staff member. On top of all the other reasons why the actual notice here is not equivalent to legal notice, it is apparent that DHEC staff never intended its communications with the County to constitute notice under § 44-1-60(E).

MRR also paints an incomplete picture as it relates to the County’s explanation for the timing of its request for review. To do so, MRR relies almost exclusively on isolated, out-of-context statements from the County’s attorney during oral arguments before the ALC. (MRR Brief, pp. 13-14). MRR contends that these statements from counsel demonstrate a lack of justification for the County’s “delay” in filing for review after receipt of actual notice. (Id.). As an initial matter, these transcript excerpts of attorney argument do not constitute competent evidence for the Court’s consideration. S.C. Dep’t of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (“**Arguments made by counsel are not evidence.**” (emphasis added)); McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933)

(“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.” (emphasis added)). MRR’s sole reliance on statements during oral argument is especially misguided in light of the posture of this case on motion to dismiss, and the Court cannot ignore uncontradicted allegations explaining the County’s timing (including representations from DHEC staff at the time of actual notice that the permit could not be challenged) in favor of whatever inferences MRR would have the Court draw from its excerpts of oral argument. Finally, and more fundamentally, neither MRR nor DHEC has explained why the County’s justification for not requesting review immediately upon receiving actual notice should be given legal relevance. In other words, while the Respondents argue that the County should have acted faster after receiving actual notice, those arguments are irrelevant without some legal standard by which to judge the County’s promptness. The County’s timing was not unreasonable, given all that was done to obstruct the County from requesting review, but the truth of the matter is that the County’s justification for its “delay” in requesting review is irrelevant when DHEC issued its permitting decision without the notice required by law.

C. Summation:

The law clearly establishes that DHEC must comply with its regulatory notice provisions, and not just mail copies of final landfill permits to “affected persons who have requested in writing to be notified. *If* DHEC complied § 44-1-60(E) (it is not at all clear that the County’s activities in relation to the Permit do not constitute a written request), it still failed to provide the notice required by its regulations.⁸ Those regulatory notice provisions are designed to alert

⁸The question of whether DHEC provided the notice required by its regulations was unresolved in the ALC, as the court declined to take up that issue prior to dismissing.

interested parties that a landfill permit is under consideration, so that such parties can then request written notice under § 44-1-60(E). A permitting decision issued without the notice required by law cannot trigger the limitations clock, and, indeed, that clock never starts until the proper notice procedures are followed. Actual notice absolutely cannot serve to trigger the limitations clock in place of legally required notice, and the Respondents have not cited any authority to support the proposition that the timing of Pickens County's request for review was otherwise unreasonable. Therefore, as stated in the County's original brief, the ALC had to resolve whether the Permit Modification was "major" or "minor," and resolve whether DHEC provided the proper notice for that type of modification, in order to make a proper evaluation of timeliness. That was not done here, and the ALC's finding of untimeliness, which underlies its dismissal of this case, is invalid.

II. The ALC Erred in Failing to Excuse any Untimeliness.

If the Court does determine that the County's request for review was untimely under the law, the second fundamental issue in this appeal is whether the ALC erred in failing to apply one of the several legal principles that excuse any untimeliness.

A. This Case is an Archetype for the "Scope of Authority" Exception.

Our administrative system cannot function if there is no check on DHEC's ability to misclassify a controversial permitting decision for the purpose of hiding that decision. Our courts therefore must have a mechanism to prevent DHEC from employing unlawful tactics to deny public notice and shield permitting decisions. If the mechanism to prevent such abuse is not the principle discussed above—that a decision issued without requisite notice does not initiate the filing deadline—then the most logical and straightforward check on this conduct is the "scope

of authority” exception to administrative exhaustion. As explained in the County’s previous brief, this principle supports the general proposition that DHEC cannot wield administrative exhaustion to protect a decision that represents an abuse of the administrative process. The Respondents have provided little opposition to this principle, other than the same arguments discussed above, that DHEC acted properly because the County did not request notice in writing and received actual notice. The County respectfully requests that this Court reaffirm the “scope of authority” exception as an important check on agency abuse, which requires DHEC to at least follow the proper channels in issuing its decision, the merits of which can then be subject to debate.

Support for such proposition can be found in the cases relied on by Respondents. For example, DHEC relies on Hyde v. S.C. Dep’t of Mental Health for the proposition that exhaustion of remedies is required. (DHEC Brief, p. 7). However, the court in Hyde recognized that exhaustion is a requirement only when “an adequate administrative remedy is available.” Hyde v. S.C. Dep’t of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). The actions of the Respondents’ in this case had the purpose and effect of eliminating the County’s adequate administrative remedy.

B. Respondents’ Public Interest Arguments Distort Facts and Law.

The County previously explained that South Carolina courts decline to apply administrative exhaustion when the rationale for such doctrine is outweighed by the significant public interest at stake in litigation. In their briefs, the Respondents distort the facts and law most relevant to this public interest exception.

First, while attempting to diminish the public importance of the issues at stake here, the Respondents advance arguments reflecting a fundamental rift that is of significant public consequence. Specifically, DHEC has issued a landfill Permit and Permit Modification to Pickens County, and those permits are the topic of two intensive legal proceedings, yet it is apparent from the Respondents' briefs that they disagree as to what is (and will be) authorized by the permits, especially in terms of the disposal of coal ash and other dangerous waste. The Respondents' divergent positions amplify, rather than diminish, the public interest at stake here.

DHEC contends that coal ash and similar waste never has been authorized for disposal in MRR's landfill, nor could it or would it ever be authorized. In making such assertions, DHEC plays fast and loose with the law, stating major legal propositions with little or no supporting citations or explanation. DHEC states without citation or explanation that the Permit Modification does not authorize the landfill to accept coal ash. (DHEC Brief, p. 15 ("the permit modification does not authorize the acceptance of either special wastes or coal ash.")). DHEC also cites a new legislative act, which has never been tested and for which regulations have not even been developed, for the conclusion that coal ash could never be disposed of in MRR's landfill, unless it is converted to a Class 3 landfill. (*Id.*, citing Act 138 of 2016 ("**Therefore, by law, coal ash cannot be placed into the Highway 93 Landfill.**" (emphasis added))). Perhaps not surprisingly, MRR disagrees to the maximum possible extent with DHEC as it relates to coal ash disposal. While DHEC says coal ash never could be authorized in the landfill, MRR says it always has been authorized: "**The Permit as originally issued in 2008 allowed disposal of coal ash or coal combustion residuals (CCR) that meet Class 2 testing thresholds.**" (MRR Brief, p. 16). While DHEC claims that Act 138 totally outlaws disposal of coal ash in MRR's landfill,

MRR makes no mention whatsoever of this law. As covered in more detail in the discussion that follows, MRR plainly intends to dispose of coal ash, utilizing the landfill design authorized in the Permit Modification, and this fact explains why MRR would never join in DHEC's bold, unsupported assertions that coal ash is not in play for this landfill.

The Respondents' briefs invite the Court to adopt the implausible proposition that MRR, a for-profit landfill company, has gone through the process of securing and defending the Permit Modification just for the sake of providing gratuitous environmental protection (in the form of a landfill liner), and that this action has nothing to do with MRR's intent to dispose of more dangerous waste. If such proposition had any basis in reality, one would be justified in questioning why the parties are embroiled in multiple lawsuits over this voluntary gift of corporate benevolence. Obviously there is something at play here other than MRR's desire to go above and beyond environmental standards, and that fact is readily apparent in the evidence on record. In securing the Permit Modification, MRR submitted a series of detailed engineering plans prepared by its consultant, Civil & Environmental Consultants, Inc. ("CEC"), which included additions of a landfill liner and leachate storage pond. CEC explains in the reports submitted to DHEC that it was retained because MRR seeks "[t]o satisfy the Class Three Landfill requirements" at its landfill. (Investigation Report, p. 1). Further, CEC specifies that the landfill, as modified, "will accept Class 2 and certain special wastes." (Minor permit application, p. 51). Ken Coleman, the DHEC staff person who issued the Permit and Permit Modification testified that MRR's addition of a liner reflected an intent to dispose of waste beyond what was originally permitted. (Coleman Depo., p. 211 ("Well, when they first asked if they could put a liner in a Class Two, of course we wondered why.")). Once Mr. Coleman

received MRR's full permit application, he realized that MRR's intent was to create a landfill design suitable for coal ash disposal: "**we certainly knew at that point that they were considering maybe putting some coal ash**, but we didn't really have any detail on where or how much and that sort of thing." (Coleman depo, pp. 189-90). Unequivocally and indisputably, DHEC approved the new landfill design that MRR developed for the purpose of facilitating disposal of coal ash.

The Respondents employ varying levels of subterfuge and segmentation, based around the fact that the Permit Modification authorizes a Class 3 landfill design, while the landfill is (for now) still Class 2 in name, but the undeniable reality is that MRR intends to dispose of coal ash, and the DHEC decision at issue in this appeal is necessary and critical to facilitating that intent. Consequently, the issues at stake in this case are of utmost public importance, especially given the manner in which this important decision was couched as a hidden "minor" permit modification.

In terms of the Respondents' legal analysis of the public interest exception, MRR significantly mischaracterizes Storm M.H. ex rel. McSwain v. Charleston Cty. Bd. of Trustees, which the County previously cited as an authority recognizing the public interest exception to administrative exhaustion. What the Supreme Court actually ruled in McSwain was that three separate bases to excuse the appellant's failure to exhaust were applicable: futility, inadequacy, and public importance.⁹ 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012). MRR contorts and

⁹The Court's full ruling was as follows:

"Notwithstanding the alleged procedural problems, we have chosen to address the merits of the parties' appeals **for several reasons**. First, we find that it would have been futile for Parent to exhaust her administrative remedies as the Board's

completely misstates this ruling to say that futility and inadequacy are elements of the public importance exception. (See MRR Brief, p. 18 (“Appellant states that McSwain holds there is a broadly applied ‘public interest’ exception to administrative exhaustion. This is not the holding.”)). MRR’s misstatement of the McSwain ruling is patently apparent from a plain reading of that decision.¹⁰

In sum, the overarching question presented in this case—which is whether an existing construction and demolition landfill can be converted to coal ash disposal through a minor permit modification, in contravention of local waste disposal planning—raises public interests significantly more compelling than the interests served by applying administrative exhaustion, particularly considering the circumstances under which the purported failure to exhaust occurred here.

C. Equitable relief is available to the County and appropriate in this case.

The County previously explained that equitable principles dictate both that the applicable limitations period was tolled and that the Respondents are estopped from asserting administrative exhaustion. Those principles are taken up separately below, but first, the County

decision was certain to be unfavorable. Secondly, we believe the administrative remedies would have been inadequate given the immediacy of Student’s enrollment date and the potential delay of an administrative appeal. Finally, we find the instant case presents issues of important public interest and a resolution would promote judicial economy.”

¹⁰Additionally, the extent of the public interest at stake in this litigation is also central to the issue of whether equitable relief from the exhaustion requirement is appropriate, so from that standpoint, whether or not McSwain recognizes a stand-alone public interest exception is not decisive.

must address DHEC's contention that "unclean hands" bars the County from all equitable relief.

DHEC argues that Pickens County is not entitled to equitable remedies because it has unclean hands based on its purported failure to request in writing to be notified of the permit modification decision. (DHEC Brief, pp. 10-11.) In support of this theory, DHEC does not cite to a single legal authority, because no such authority exists. The clean-hands doctrine is "[t]he principle that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith." Black's Law Dictionary (10th ed. 2014). "Before the unclean hands doctrine will bar an equitable remedy ..., the alleged wrongdoing of the party seeking relief must have 'encouraged, invited, aided, compounded, or fraudulently induced' the other party's wrongful conduct." Gitter v. Cardiac & Thoracic Surgical Assocs., Ltd., 338 F. App'x 348, 349 (4th Cir. 2009). See also, Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244, 248 (Ct. App. 2010) (barring Wachovia from equitable relief because the unauthorized practice of law on its part resulted in unclean hands). Applying those principles here, the County's purported failure to request notification of a permit modification decision that it did not even know was being contemplated is hardly a violation of good faith, or any other equitable principle. The legal theory of "unclean hands" is out of place in relation to the issues of equity before this Court, and the doctrine does not bar Pickens County from equitable relief.

i. Equitable Tolling is Appropriate in This Case.

Respondents submit several arguments in opposition to equitable tolling, all of which are rooted in the contention that this case does not involve "extraordinary or exceptional circumstances" that warrant use of an uncommon remedy. (See, e.g., DHEC Brief, p. 19.).

Fundamentally, though, one must hope that it is extraordinary and unusual for an administrative agency and a permit applicant to cooperate in avoiding public scrutiny of a controversial decision. Further, in considering fairness in relation to the parties' respective conduct giving rise to this case, surely the interests of justice are better served by rebuking the deceptive actions of the Respondents than by punishing the County for not taking more affirmative steps to account for the possibility of such deception. Moving beyond these generalities, the arguments relied upon by the Respondents in arguing against tolling are flawed for the reasons that follow.

Underlying many of the Respondents' arguments in this appeal, especially including their arguments on tolling, is the assumed conclusion that Pickens County waited an unreasonable amount of time to request review after receiving actual notice of the Permit Modification. While the Respondents press such conclusion early and often, they never actually examine the details that make it up. Considering those details, it is apparent that Pickens County acted as promptly as can reasonably be expected under the circumstances.

Pickens County staff received a permitting decision that had been issued four months prior. The Respondents frequently tout in their briefing that Pickens County is required to know the law and to act accordingly. Applying that requirement, and considering the nominal fifteen-day filing deadline in § 44-1-60(E) that had long passed, it was perfectly reasonable for County staff to conclude that the Permit Modification was a "done deal" in terms of the opportunity for an administrative challenge. Indeed, the issue of whether the County had any right to administrative review at the time it received actual notice (as well as the applicable limitations period for requesting that review) presents complex legal questions that form the basis for this appeal and that have occupied the bulk of the 100+ pages of briefing submitted by the parties.

Yet, the Respondents fault the County as dilatory for not immediately recognizing that it still had a right to review and for not immediately recognizing that the statutory limitations period that typically runs from initial permit issuance was still applicable (note that, even now, the parties do not agree on either of these points). The Respondents disparage statements by the County's attorney in arguments before the ALC that the County had to retain counsel and initiate sister litigation in order to recognize the continuing viability of this administrative challenge. However, considering the complexity bound up in the question of the County's right to administrative review, such explanation follows perfectly. Under the circumstances, it was not unreasonable for the County to take just over three months after receiving a copy of the Permit Modification to file for review. It took longer than that for the County to get a copy of the Permit Modification in the first place.

And that says nothing of the fact that the County was facing this complex legal question alongside related misrepresentations from the County and MRR.¹¹ While DHEC accepts as true that one of its staff members represented to the County, at the time actual notice was provided, that the Permit Modification was final and beyond challenge, MRR contests that allegation on the basis that it originated from statements of the County's attorney in arguments before the ALC. (MRR Brief, p. 21). Ironically, as discussed, in section I.2 above, MRR relies heavily on

¹¹Note that neither of the Respondents has contested MRR's misrepresentations and non-disclosures regarding modifications to the landfill, including those of an MRR representative before the Pickens County Planning Commission, where he hid the fact that MRR was in an ongoing permitting discussions with DHEC. (See County Brief, p. 13). MRR misrepresented the fact that it was seeking to modify the landfill permit, even while it was meeting privately with DHEC for that very purpose, and despite its obligation to inform the County of such activities. These misrepresentations prevented Pickens County from learning of the permit modification at issue in this case, and reliance on such representations thereby prevented the County from timely pursuing its administrative remedies.

such attorney statements in other parts of its brief. MRR mischaracterizes the County's argument as being based on "new accusations" of misrepresentation, while at the same time acknowledging that the same argument was presented to the ALC. (Id. at 20). The main point of MRR's objection seems to be that the issue of DHEC's misrepresentations was not included in pleadings filed by the County with the ALC. (Id. at 20). However, DHEC's misrepresentations as the availability of administrative review are not relevant to the underlying merits of this case, but rather only to the issue of timeliness, and it would have been illogical to raise such misrepresentations prior to the Respondents moving to dismiss on timeliness. At any rate, MRR stops short of providing any legal basis or legal argument upon which the Court could ignore or exclude DHEC's misrepresentations.¹² It must be taken as true, then, that DHEC misinformed the County as to its right to administrative review, which factored into the timing of the County's request for review.¹³

¹²As is a recurring theme in this appeal, the question of what DHEC told the County about its right to administrative review would be much clearer if the ALC had not denied discovery.

¹³The other major argument advanced by the Respondents in relation equitable tolling is the above-discussed proposition that the Permit Modification basically means nothing because it won't result in coal ash disposal. Remarkably, DHEC goes so far as to comment that the Permit Modification only gives MRR Pickens the "option to install a liner," which it "may or may not" do once the landfill is constructed. (DHEC Brief, p. 20). Putting aside the absurdity of the idea that MRR has applied for, and is defending, a landfill design that it won't use, the County references and incorporates its arguments on this issue presented above. The new landfill design meets the design criteria for a Class 3 landfill in every relevant way because MRR contracted for CEC to modify the design to meet Class 3 requirements. (CEC Investigation Report at 1, Dec. 2014). This landfill design is a Class 3 with a Class 2 nametag, and Class 3 landfills can accept CCR, which is extremely hazardous to public health as explained in the County's brief. Respondents again tout that it is illegal to dispose of coal ash in a Class 2 landfill, but the exceptions to that rule are broad and untested. See S.C. Code Ann. § 58-27-255 (listing broad exceptions to the Class 3 landfill requirement for CCR including if the waste is "placed into beneficial reuse" or even merely "intended to be beneficially reused.").

ii. Equitable Estoppel is Appropriate in This Case.

Where Pickens County's purported failure to exhaust administrative remedies was based on misrepresentations and misinformation provided by Respondents, those parties are estopped from invoking exhaustion as a basis for dismissal. The factual and legal arguments relevant to estoppel are, for the most part, the same as those already covered herein, but two issues raised by DHEC—preservation and government employee estoppel—warrant additional discussion.

1) Equitable Estoppel is Preserved for Appeal.

DHEC argues that the County's equitable estoppel argument is barred because it is not preserved for appeal. The general rule of issue preservation requires that an issue must be raised to and ruled upon by the court below in order to be reviewed on appeal. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In advancing its preservation argument, DHEC misapprehends the level of specificity that is required to meet this standard.

From a factual standpoint, the County has of course been arguing all along that DHEC and MRR's wrongful actions in denying notice of the Permit Modification are to blame for the timing of the County's request for review. (See, e.g., Pickens Prehearing Statement, pp. 6-7; Pickens Amd. Response to DHEC's Motion to Dismiss, pp. 3-4, 11). Further, as discussed above and as pointed out by MRR, during the motion to dismiss hearing before the ALC, Pickens County specifically raised the issue of DHEC's misrepresentations as to the availability of administrative review. (Administrative Hearing Transcript, at 75:16-76:2, 106:6-22). Factually, all of the points underlying the County's estoppel argument were very clearly laid out below. Those facts were then tied to equitable principles and equitable relief, through extensive discussion at the motions hearing. (See, e.g., Id. at 41, 82, 109). Indeed, counsel's closing

before the ALC was basically a statement of equitable estoppel. (See Id. at 109).¹⁴ In sum, equitable relief of the type sought here was raised to the ALC and, indeed, constituted a pillar of the County's arguments to the ALC.

Further, the ALC ruled upon the County's equitable arguments by rejecting those arguments in favor of strict application of the limitations period in § 44-1-60. (See Order, p. 3). If the point of the County's equitable estoppel argument is that the limitations period does not apply because of the wrongful conduct of the Respondents, then the ALC's strict application of the limitations period is clearly a denial of that argument. Apparently DHEC takes issue with the fact that the remedy of equitable estoppel was not specifically named in the ALC's dismissal order, but the Order clearly rejects that argument by rejecting equitable principles, rejecting the factual basis of the County's estoppel argument, and adopting a contrary holding. Specificity on the level sought by DHEC is not required for preservation. See Wilder Corp., 330 S.C. at 77, 497 S.E.2d at 734 (1998) (finding that objections had been ruled upon and were therefore preserved, because the trial court adopted a ruling contrary to those objections).

2) Equitable estoppel applies to DHEC.

DHEC also contends that erroneous information given by a government employee cannot be the basis of equitable estoppel, relying on Morgan v. S.C. Budget & Control Bd. However, DHEC's treatment of Morgan is incomplete and fails to include the critical rule of law, which is: "Misrepresentations by government officials acting within the proper scope of their authority

¹⁴ "Your Honor, I'll close with this, the general nature of equitable relief is when the facts and circumstances show that justice, fundamental fairness and due process are being denied. That's what happened here, Your Honor. So many regulations were violated. They're in my brief. Absolutely there's been no defense to that. They violated those regulations. These people are entitled to be heard."

may subject the government to estoppel.” 377 S.C. 313, 319, 659 S.E.2d 263, 267 (Ct. App. 2008). The part of Morgan relied upon by DHEC relates only to an agency employee speaking on matters entirely outside the purview of an agency. Id. In such case, estoppel cannot lie against the agency. Here, however, it is certainly within the purview of DHEC to advise the County on the status of a permit modification and on the right to seek review of that modification before the DHEC Board. Our appellate courts have regularly applied estoppel under such circumstances.. See, e.g., Abbeville Arms v. City of Abbeville, 273 S.C. 491, 494, 257 S.E.2d 716, 718 (1979); Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 87, 221 S.E.2d 773, 776 (1976); Bishop v. City of Columbia, 401 S.C. 651, 666, 738 S.E.2d 255, 262 (Ct. App. 2013); Oswald v. Aiken Cty., 281 S.C. 298, 302, 315 S.E.2d 146, 149 (Ct. App. 1984).

III. The ALC’s Sequence of Discovery, Intervention, and Dismissal was Erroneous and Prejudicial.

Finally, overlaying the issues of whether the County’s request for review was untimely and whether the ALC should have excused any untimeliness, the manner in which the ALC undertook its consideration of dismissal reflects multiple prejudicial errors, without which this case would have survived dismissal.

A. Intervention should have been decided before considering dismissal.

The County has explained that the ALC had to consider the request of neighboring property owners to join this case prior to dismissing the County and doing away with the case altogether. The first argument Respondents advance against such conclusion is the proposition that dismissal had to be considered first, in order to determine whether there was a valid contested case in which to intervene. (See DHEC Brief, p. 22). Such argument reflects a failure

in logic, in that it ignores the possibility that the neighboring property owners, if timely joined, could have continued the contested case even after the County's absence. An illustration of this principle can be found in the context of class action lawsuits. When a party brings a class action as the named plaintiff, and the claims of that party are then dismissed, the entire class action is typically lost. See Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 566, 564 S.E.2d 94, 98 (2002). However, if another party intervenes as a named plaintiff prior to dismissal of the party that brought the class action, that party can carry forward the case. Id. ("Where the named plaintiffs' claims become moot after class certification by death or other means, the class claims become moot unless intervenors can be substituted as named plaintiffs."). Just the same, while it was the County who originally filed this contested case, the neighboring property owners would have been perfectly able to maintain the case in the absence of the County, had they been allowed to intervene prior to dismissal. The property owners would have intervened into a pending contested case, as required by ALC Rule 20(B), and the dismissal of one party would not destroy the viability of that contested case.

MRR cites three old ALC cases for the proposition that "South Carolina Courts have consistently held" that the motion to dismiss should be considered before intervention. These cases represent an entirely false comparison. First, in Western Carolina, a party moved to intervene as *respondent*, because it wanted to seek dismissal of petitioner's case. W. Carolina Reg'l Sewer Auth. v. SCDHEC, 1997 WL 435927, at *1 (Apr. 10, 1997). When petitioner moved to voluntarily dismiss its own case, it became unnecessary for the ALC to consider the intervenor's efforts to have the case dismissed. Id. This outcome bears no relevance to the case

at hand.¹⁵ In Rogers v. SCDHEC, the other case cited by MRR, the ALC held that the DHEC action under review was preliminary and did not actually constitute a reviewable permit decision. 2001 WL 1397451. *2 (Oct. 23, 2001). Because an agency decision cannot be challenged by anyone until it is final, it was unnecessary for the ALC to consider a party's motion to intervene as challenger. Id. This outcome bears no relevance to the case at hand, where the ALC's reasoning for dismissing the County would not have applied to the property owners. This is not a circumstance like Rogers, where intervention could not change the fact that DHEC's preliminary action could not be challenged.

In sum, the ALC's actions in refusing to consider intervention reflect an eagerness to dismiss this action that is not supported by facts or law. There is rightfully no precedent for dismissing an action in its entirety, while a group of proposed intervenors who are not subject to the rationale for dismissal remain on the sidelines.

B. Discovery should have been allowed before deciding on dismissal.

DHEC argues that the County has not pointed to evidence outside of the pleadings relied upon to dismiss this case. While the County disagrees, consider the following illustrative examples:

- The key holding in the dismissal order is that: "Petitioner received actual notice on multiple occasions and still failed to take prompt action." (Order, p. 4). The pleadings in this case would not even allow the ALC to determine when and how the County received actual notice, much less allow it to weigh whether the County's response was "prompt" under the circumstances. The ALC's order fundamentally reflects a weighing

¹⁵Bryant v. SCDHEC likewise involves a party's motion to intervene as respondent and dismiss the case, which was rendered moot by the ALC granting dismissal on another basis. Bryant v. SCDHEC, 2001 WL 1326513, at *2 (Oct. 9, 2001). In these respondent-intervenor cases, the proposed intervenor is being granted, rather than denied, the outcome they seek.

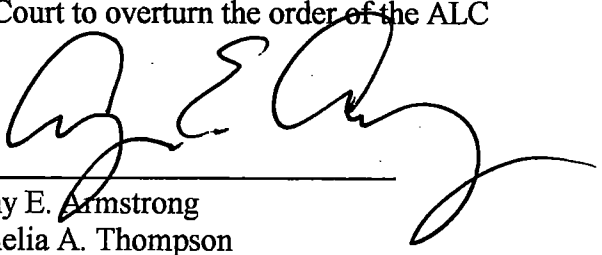
of the parties' respective culpability as it relates to notice, which is entirely inappropriate without discovery.

- MRR's attorney extensively argued to the ALC that Pickens County should have been aware that DHEC was considering the Permit Modification, citing and handing over "almost 20 other newspaper articles" for such proposition. (Hearing Transcript, at 28:16-33:5). The County's attorney specifically objected to consideration of such evidence, on the basis that discovery had not been allowed, but such objection was denied. (Id.)

The County has done as well as it could to piece together sufficient evidence to defend against dismissal, pulling especially from the other pending lawsuit, but this has been an approach of last resort, in response to the Respondents moving for dismissal with a multitude of extra-pleading exhibits and arguments. The ALC had no problem considering whatever evidence was submitted by either side, which in itself reflects that discovery was necessary. Instead, the evidence considered by the court was artificially constrained by the fact that the Respondents possess almost all the relevant documents and information and were able to introduce it in whatever self-serving manner they chose.

CONCLUSION:

For all of these reasons, the Appellant asks this Court to overturn the order of the ALC dismissing this case.



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November 16, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2017-000066

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SC Court of Appeals

Pickens County,

Appellant,

vs.

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

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Initial Reply Brief and Motion to Exceed Page Limit on Respondents SCDHEC and MRR Pickens, LLC, by placing copies of same in the U.S. Mail addressed to:

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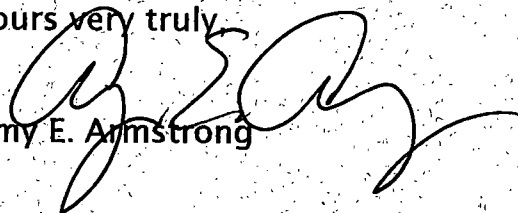
Re: Pickens County v. SCDHEC
Appellate Case No. 2017-000066

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy of the Appellant's Initial Reply Brief and an original and 7 copies of the Appellant's Motion to Exceed Page Limit, along with my certificate of service.

Please return a clocked-in copy of each of the filings in the enclosed, postage-paid envelop. Thank you for your assistance.

Yours very truly,


Amy E. Armstrong

cc: Etta R. Linen, Esquire
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