STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, Petitioners, vs. South Carolina Department of Health and Environmental Control, and David Coggins Broilers, Respondents.	Docket No. 17-ALJ-07-0041-CC **FINAL ORDER AND DECISION**
Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, Petitioners, vs. South Carolina Department of Health and Environmental Control, and Heath Coggins Broilers, Respondents.	Docket No. 17-ALJ-07-0042-CC
Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices, Petitioners, vs. South Carolina Department of Health and Environmental Control, and Jim Young Broilers, Respondents.	Docket No. 17-ALJ-07-0039-CC

APPEARANCES:

For Petitioners Blackmon and SCRAP:	M. McMullen Taylor, Esq. and Robert Guild, Esq.
For Respondent DHEC:	Stephen P. Hightower, Esq.
For Respondents Coggins and Young	Benjamin P. Mustian, Esq.

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or the Court) pursuant to requests for contested case hearings filed by Petitioners Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices (SCRAP). Petitioners challenge the decision of Respondent South Carolina Department of Health and Environmental Control (DHEC or the Department) to issue Bureau of Water Agricultural Permit Nos. 19,886-AG, 19,876-AG, and 19,889-AG (Permits) to Respondents David Coggins Broilers (D.C. Broilers), Heath Coggins Broilers (H.C. Broilers), and Jim Young Broilers (J.Y. Broilers) (collectively, Respondents), respectively.

On March 29, 2017, this Court granted the Parties' joint motion to consolidate the cases for hearing purposes. After notice was given to all parties, a hearing on the merits was held on August 15-17, 2017 at the ALC in Columbia, South Carolina.

SUMMARY JUDGMENT

Prior to the hearing, Respondents filed a Motion for Partial Summary Judgment on Petitioners' claim that Respondents must obtain a National Pollutant Discharge Elimination System (NPDES) permit pursuant to 3 S.C. Code Ann. 61-9 Part 122.23 (2011) to build and operate new poultry farms and that DHEC was required to determine whether the farms have "no potential to discharge."[1] Petitioners filed a Memorandum in Opposition to the Motion. This matter was heard prior to the hearing on the merits. For the reasons set forth below, the Court found that an NPDES permit is not required for the activities at issue and that DHEC was not required to

[1] On August 4, 2017, the Department filed a Motion to Dismiss Party and Claims or in the Alternative for Partial Summary Judgment, along with a corresponding Memorandum of Law in support thereof. First, the Memorandum of Law never addressed partial summary judgment, only dismissal. As to the dismissal of members of SCRAP and their claims, the Court denied this motion at the hearing. Though the Court used the language "[a]t this point of time" in reference to its denial of DHEC's Motion to Dismiss, the Court affirms its ruling for the reasons given at the hearing, including the application of *Bouchette v. Int'l Ladies Garment Worker's Union, AFL-CIO, Local No. 371*, 245 S.C. 586, 590-591, 141 S.E.2d 834, 835 (1965) (holding that "unincorporated associations have the right to sue in their own name . . . .").

determine whether the farms have "no potential to discharge." Therefore, the Court granted the Motion for Partial Summary Judgment.

Standard of Review

Rule 68 of the Rules of Procedure for the Administrative Law Court (SCALC Rules) provides that "[t]he South Carolina Rules of Civil Procedure [(SCRCP)]. . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." Rule 56(c), SCRCP provides that a trial court may grant a motion for summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

Facts

The facts surrounding this issue are not in dispute. D.C. Broilers, H.C. Broilers, and J.Y. Broilers filed applications with DHEC for agricultural permits to construct and operate new poultry farms in Laurens County, South Carolina, each consisting of six poultry barns housing between 162,000 and 237,600 broilers, and to dispose of the generated manure (Projects). After reviewing the applications, DHEC issued the Permits as "no-discharge" permits in which DHEC prohibited the "discharge of pollutants from the operation into surface waters of the State (including ephemeral and intermittent streams)" and the "discharge of pollutants into groundwater."

Discussion

Petitioners asserted that the Respondents must obtain an NPDES permit "for discharges or potential discharges" unless DHEC determines that they have no potential to discharge pollutants. They further contended that in issuing the Permits, DHEC failed to follow the procedure for determining whether the Houses have "no potential to discharge."

Under the Clean Water Act (CWA) and DHEC regulations governing Water Pollution Control Permits, persons or facilities are required to obtain an NPDES permit to discharge pollutants into waters of the State or the United States. *See* 33 U.S.C.A. § 1342(a)(1), (b) (West 2017); 3 S.C. Code Ann. Regs. 61-9 Parts 122.1(b)(1), 122.2(b) (2011). These permits are issued by DHEC pursuant to the provisions of the CWA. Consistent with these requirements, DHEC has promulgated effluent limitations for the discharge of pollutants, which impose "restriction[s] imposed by the Department on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into waters of the State...." Reg. 61-9 Part 122.2(b). DHEC regulations, therefore, prohibit the discharge of a pollutant by any person from any point source to navigable waters unless authorized by an NPDES permit.[2]

Petitioners asserted that pursuant to Reg. 61-9 Part 122.23(a) and (f)(1), since the Respondents' facilities are large concentrated animal feeding operation (CAFO), they are required "to obtain an NPDES permit for 'discharges or potential discharges'" unless they demonstrate "'that there is no potential for any CAFO manure, litter, or process wastewater to be added to waters of the State under any circumstance or climatic condition.'"

"Regulations are interpreted using the same rules of constructions as statutes." *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). Therefore, where the language of the regulation is plain and unambiguous, the rules of statutory interpretation are not to be utilized because the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If there is ambiguity, in determining the meaning of the regulation, "a court should not focus on any single section or provision but should consider the language of the statute as a whole." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 32S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Moreover, regulations that deal with the same subject matter

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[2] *See* 33 U.S.C.A. §§ 1311(a), 1342; 3 S.C. Code Ann. Regs. 61-9 Parts 122.1(b)(1); *see also* 3 S.C. Code Ann. Regs. 61-9 Part 122.2(b) (defining the term "discharge of a pollutant" to mean "[a]ny addition of pollutant ... to waters of the State from any point source.").

are *in pari materia* and "must be construed together, if possible, to produce a single, harmonious result." *Grant v. City of Folly Beach*, 346 S.C. 74, 551 S.E.2d 229 (2001).

Also, in examining a regulation the court must give deference to an agency's interpretation if the regulation is ambiguous. Therefore, interpreting regulations administered by an agency is a two-step process. "First, a court must determine whether the language of a statute or regulations directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation." *Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). However, "[i]f the stature or regulation is silent or ambiguous with respect to the specified issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Id.* at 411 S.C. at 33, 766 S.E.2d at 717 (internal quotation marks and citations omitted). Accordingly, the ALC must defer to the DHEC's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

> Reg. 61-9.122.1(b)(1) defines the scope of the NPDES permit requirements as follows:
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> The NPDES program requires permits for the discharge of "pollutants" from any "point source" into "waters of the State" and into "waters of the United States." The terms "pollutant", "point source", "waters of the State", and "waters of the United States" are defined in section 122.2.

3 S.C. Code Ann. Regs. 61-9.122.1(b)(1). However, Reg. 61-9 Part 122.23(d) reflects a logical limitation of the NPDES Program Requirements in the context of CAFOs. According to this and a corresponding subsection, "[a]ll CAFO owners or operators must apply for a[n NPDES] permit" unless the CAFO owner or operator "receive[s] from the Department notification of a determination . . . that the CAFO has 'no potential to discharge' manure, litter or process wastewater." 3 S.C. Code Ann. Regs. 61-9 Part 122.23(d)(1)-(2), (f).[3] Subsection (f)(1) further

[3] The Court notes that several federal circuit courts of appeal have rejected the EPA rule upon which the regulations cited above addressing the "no potential to discharge" exception to an NPDES permit requirement for CAFO owners or operators are based. *See, e.g., Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2d Cir. 2005) and *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 750 (5th Cir. 2011). However, because states are afforded the opportunity to expand the protections set forth by the federal government in the CWA, any changes to the EPA's rules by federal courts are not binding on South Carolina's regulations. *See* 33 U.S.C.A § 1251(b) (West 2017); *see also, e.g., Mich. Farm Bureau v. Dep't of Envtl. Quality*, 292 Mich. App. 106, 130-31, 807 N.W.2d 866, 884 (2011) (stating that a state which administers its own NPDES program may adopt discharge standards and effluent limitations that are more stringent than the federal standards and limitations). It is for the Department to promulgate, and the General Assembly to approve, any changes to South Carolina's regulations. Moreover, this Court is charged with interpreting regulations as they are written; and when those regulations are written clearly and unambiguously, as in this case, the

defines "no potential to discharge" as there being "no potential for any CAFO manure, litter, or process wastewater to be added to waters of the State under any circumstance or climatic condition."

In this instance, the Department could have circumvented these concerns by formally issuing a statement that it had determined that Respondents' facilities did not have potential to discharge manure, litter, or process wastewater. Rather, the Department asserts that it does not deem an Animal Feeding Operation (AFO) to be a CAFO because the Department does not allow any AFO permitted under Reg. 61-43 Part 200 to contribute pollutants to the waters of the State. However, the plain language of Reg. 61-9.122.23 (d)(4) states that its regulation extends to "all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals" as defined in 61-9.122.23(b). Section 61-9.122.23(b)(4)(x) defines an AFO as a CAFO if it confines as many as or more than 125,000 chickens (other than laying hens) as a CAFO and "uses other than a liquid manure handling system." Here, each of the facilities will house at least 125,000 chickens, and the disposal of manure will be through litter, which is a system other than a liquid manure handling system. Therefore, the plain language of Reg. 61-9.122.23 defines Respondents as CAFOs.

However, the Department's application of Reg. 61-43 Part 200 in keeping with the regulation of CAFOs under the NPDES provisions is entitled to deference. The Department asserts that when it issues a notification of the determination to issue a permit under Reg. 61-43 Part 200, then that written notification constitutes the Department's determination that the operation of the facility will not allow the discharge of pollutants into the waters of the State. Accordingly, since permits issued pursuant to Reg. 61-43 Part 200 do not allow any AFOs to contribute pollutants to the waters of the State, the Department's determination to issue an agricultural permit under Reg. 61-43 Part 200 also constitutes a determination under Reg. 61-9.122.23 (d)(2) that the AFO has no potential to discharge into the waters of the State. In other words, the Department asserts that the applicants' demonstrations are made by the very nature of the permit request and thus no formal declaration need be made.

In this case, Respondents requested permits to operate facilities pursuant to Reg. 61-43 Part 200. That regulation specifically provides that: "Permits issued under this regulation are no-

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Court cannot interpret those regulations based on how the Department interprets or enforces them. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014).

discharge permits." S.C. Code Ann. Regs. 61-43 Part 200.20. Though I agree with Petitioners that Reg. 61-43 cannot replace the State's CAFO NPDES regulations, those regulations deal with the same subject matter (the Pollution Control Act) as Reg. 61-43 and thus must be construed together, if possible, to produce a single, harmonious result. *See* Reg. 61-43 Parts 100.200, 200.200, 400.130, and 500.60. Indeed, Reg. 61-43 Part 200.140(E) states:

> No manure may be released from the premises of an animal facility to waters of the State (including ephemeral and intermittent streams) unless a permit pursuant to Section 402 or 404 of the CWA has been issued by the Department.

See also Reg. 61-43 Part 200.40(D) (explaining that requirements for concentrated animal feeding operations as defined by Reg. 61-9 may apply to facilities covered under Reg. 61-43 Part 200). Reading Regs. 61-43 and 61-9 *in pari materia*, agricultural facilities only "discharge" pollutants into waters of the State if the discharge is made through a conveyance or if surface runoff from these facilities is deliberately channeled into waters of the State. Furthermore, Reg. 61-9.122.23 (d) provides:

> An owner or operator of a Large CAFO need not seek coverage under an NPDES permit otherwise required by this section once the owner or operator has received from the Department notification of a determination under paragraph (f) of this section that the CAFO has "no potential to discharge" manure, litter, or process wastewater.

Since Reg.61-43 Part 200 provides that the proposed facilities are not allowed to discharge, there is an inherent determination that the facilities have "no potential to discharge" in keeping with Reg. 61-9.122.23(f). Furthermore, the requirement of Reg. 61-43 that permits issued under its provisions are no-discharge permits is congruous with the requirements of Reg. 61-9 Part 122.23 that the Department determine whether Respondents' facilities have no potential to discharge manure, litter, or process wastewater.

Here, it is also important that the analysis of the application of these regulations is made under the facts of this case. In that light, the Court finds in this case that both the requested Permits and **the facts of the case** reflect that the facility will not discharge pollutants into the waters of the State. DHEC has mandated –both by the plain language of the Permits and by regulation –that animal facilities like Respondents' are prohibited from discharging pollutants. *See* 4Regs. 61-43 Parts 200.140(A) and 200.20(B). Thus, DHEC necessarily found, at least by implication when it

issued the permits for the Projects, that there was no "potential to discharge."[4] Moreover, none of the applications or permits propose to discharge pollutants through a conveyance directly into waters of the State, nor do they propose to deliberately channel runoff into waters of the State. Petitioners also failed to provide evidence that the proposed facilities intended or would discharge pollution into the waters of the State. In sum, Petitioners' concerns elevate form over substance. *See Doe v. Clark*, 318 S.C. 274, 277, 457 S.E.2d 336, 338 (1995); *Chapman v. S.C. Dep't of Soc. Servs.*, 420 S.C. 184, 189, 801 S.E.2d 401, 404 (Ct. App. 2017), *reh'g denied* (July 17, 2017). Instead, the facts reflect that the applications satisfy the exception under Reg. 61-9 Part 122.23(g)(4).

Finally, the facilities have not been constructed or begun operations, and thus could not be presently producing manure, litter, or process wastewater. Furthermore, as reflected above, this Court's consideration is limited to the efficacy of the facilities as designed. Even if facts later reflect that Respondents are obligated to seek or obtain an NPDES permit because they are "new source" CAFOs, that obligation would not occur until "at least 180 days prior to the time that the CAFO[s] commence[] operation." Reg. 61-9 Part 122.23(g)(4). Therefore, this issue is not ripe for consideration.[5] *See Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006) ("[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review.").

For these reasons, the Court found that because the Projects are prohibited from discharging pollutants into waters of the State and Respondents are not seeking to discharge pollutants into waters of the State, they are not required to apply for or obtain an NPDES permit as a matter of law. Accordingly, the Court granted Respondents' Motion for Partial Summary Judgment.

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[4] The Department must assume that a permittee will comply with the conditions of the permit that it issues to the permittee. As such, the Department would have to presume that no discharge will take place at a facility where it has declared, as a condition of a permit, that no discharge will be authorized. Thus, the Department would be unable to find a potential for discharge at such a facility because it must presume that no discharge will occur there. To do otherwise would be to presume a future violation by the permittee, which would improperly penalize the permittee and create an absurd result.

[5] In fact, even after the facilities begin operation, the facilities will face further regulatory scrutiny regarding the need for an NPDES permit. *See* Reg. 61-9.122.23(f)(6).

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence:

Background

Proposed Chicken Barns

D.C. Broilers, H.C. Broilers, and J.Y. Broilers separately filed applications with DHEC for agricultural permits to construct and build new poultry farms on a 255-acre tract of land off Lisbon Road in Laurens County, South Carolina (Coggins Property), each farm consisting of six poultry houses. D.C. Broilers' facility will be designed to hold 162,000 broilers with a normal production bird live weight[6] of 737,100 pounds and will generate an estimated 988 tons of manure, or "litter," per year. H.C. Broilers' facility and J.Y. Broilers' facility each will be designed to hold 237,600 broilers with a normal production bird live weight of 1,081,080 pounds and will each generate an estimated 1,449 tons of manure per year.

All of the barns are located on a large tract of land off Lisbon Road that has been subdivided into three parcels. The proposed six barns at D.C. Broilers' facility would be 45-feet wide and 600-feet long, spaced 60 feet apart from one another. The proposed six barns at H.C. Broilers' facility are 66-feet wide, 600-feet long, and spaced 60 feet apart from one another. The proposed six barns at J.Y. Broilers' facility will be 65-feet wide and 600-feet long, spaced 60 feet apart from one another.

Each application is for a no-discharge permit, which does not allow wastewater discharges associated with the operation of the Projects and the handling of the manure. Reg. 61-43 Part 200.20(B). Both D.C. Broilers' and H.C. Broilers' have contracted with L&M Litter Brokers (L&M), a manure broker licensed by DHEC, pursuant to Regs. 61-43 Part 400.10 *et seq.*, to dispose of all the generated manure off-site. L&M will remove the manure from the facilities and accept all waste-utilization responsibilities, ensuring that the waste is handled, transported, stored, and/or

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[6] The normal production live weight of the birds at a facility is determined by multiplying the number of birds by average animal live weight of the birds. 4 S.C. Code Ann. Regs. 61-43 Part 50 (WW) (2011). The average live weight is determined by adding together the average entry weight to the average exit weight and dividing the sum in half. *Id.* Part 50(K).

applied in a manner consistent with DHEC regulations, thus relieving Respondents of this responsibility.

L&M will likewise dispose of the manure generated at J.Y. Broilers' facility. However, in addition to using a manure broker, J.Y. Broilers proposes to dispose of a portion of the litter generated at that facility by applying it onto 192.7 acres using a pull-behind spreader. The land-application areas are not on the Project property but off-site on parcels located in the Bush River watershed. As part of its permit application, J.Y. Broilers provided numerous maps of the land application sites, a crop management plan, land treatment conservation practices, soil and risk assessment analyses, nutrient management plans, and manure utilization area information. The application also included signed statements authorizing the spreading of the manure from the owners of the land application areas.

The Comprehensive Nutrient Management Plans (CNMP) accompanying the applications set forth odor abatement plans, vector control and abatement plans, mortality disposal plans, public notification documentation, and setback waivers. In addition, the CNMPs set forth a list and description of the planned and existing conservation practices to be applied as part of a conservation management system in order to decrease non-point-source pollution of surface and groundwater resources, and establish vegetation to reduce soil erosion on the site, among other things.

Petitioners

Petitioner Blackmon owns land near the Projects, which he uses for hunting and other recreation. He also hunts on the Belfast Wildlife Management Area located along the Little River downstream from his property and he holds a lifetime lease to hunt on property jointly owned by Mary Basel and Margaret Sparrow.

Petitioner SCRAP is an unincorporated association of citizens and property owners in the Mountville area of Laurens County. Ms. Basel and Ms. Sparrow are members of SCRAP who also jointly own three parcels of land (Basel/Sparrow Property) surrounding the Coggins Property. One parcel of the Basel/Sparrow Property is located adjacent to the western boundary of the Coggins Property alongside a railroad track. The Little River runs near the back property line of this parcel. The second adjacent parcel faces the Coggins Property on the opposite side of Lisbon Road from the Coggins Property. The third parcel, at the corner of Highway 72 and Lisbon Road, is located below the Coggins Property. On this parcel, in 2006 or 2007, Ms. Basel and Ms. Sparrow

built a cabin for family and other social gatherings. They also made plans to construct two additional houses along Lisbon Rd., though construction has not yet taken place. Beaverdam Creek and Ginger Creek, both tributaries of the Little River, run across these two parcels; however, they do not join the Little River until downstream from the Coggins Property. All tracts are in the Little River watershed.

Ms. Basel enjoys frequent hunting on the Basel/Sparrow Property. Ms. Sparrow and Ms. Basel also lease their parcels for hunting purposes.

Mr. Eugene Ross Stewart is a member of SCRAP who owns two parcels of land on the eastern side of the Coggins Property. One parcel is adjacent to the Coggins Property, with the Little River running along or across it, downstream from the Coggins Property. He has used his property for camping, hunting, and other recreational activities in the past but has not been on the property in approximately ten years. Mr. Stewart also leases his property out for hunting purposes.

Proposed Permits

Chris Mosley, a registered professional engineer in South Carolina with Agri-Waste Technologies (AWT), developed the applications and CNMPs for the Projects. In doing so, AWT used GPS information, which was subsequently verified by on-site investigations, to site the proposed facilities to meet the setback requirements of 4 S.C. Code Ann. Regs. 61-43 Part 200.10 *et seq.*

All of the facilities were sited to comply with the following required setback distances:

1) Potable wells (required: 200 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required: 100 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required: 100 feet);
4) Ephemeral or intermittent streams located downslope (required: 100 feet);
5) Ditches or swales located downslope (required: 50 feet);
6) Occupied permanent residence (required: 1,000 feet).

However, the evidence did not reflect that the facilities' distances to a potable well; an occupied permanent residence; or outstanding resource waters, critical habitats of endangered species, or shellfish harvesting waters were issues in this proceeding. Therefore, those factors will not be discussed.

Considering those distances, the D.C. Broilers' proposed barns were originally sited with the following setback distances:

1) 2,238 feet from the waters of the State located downslope (required 100 feet);
2) 448 feet from an ephemeral or intermittent stream located downslope (required 100 feet);
3) 204 feet from a ditch or swale located downslope (required 50 feet).

Although D.C. Broilers originally proposed to locate its barns within less than the minimum setback requirement of 400 feet from the property line of H.C. Broilers, H.C. Broilers granted a waiver of a reduction of this setback pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(11). With this exception, D.C. Broilers' barns, as originally proposed, were sited at least 400 feet from all other property lines.

H.C. Broilers originally sited the proposed barns with the following setback distances:

1) 834 feet from the waters of the State located downslope (required 100 feet);
2) 278 feet from an ephemeral or intermittent streams located downslope (required 100 feet);
3) 135 feet from a ditch or swale located downslope (required 50 feet).

In addition, H.C. Broilers proposed to locate its barns within less than the minimum setback requirement of 400 feet from the property lines of D.C. Broilers and J.Y. Broilers. However, D.C. Broilers and J.Y. Broilers granted waivers of a reduction of this setback pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(11). With these exceptions, H.C. Broilers' barns were sited at least 400 feet from all other property lines.

Similarly, J.Y. Broilers' proposed barns were originally sited with the following setback distances:

1) 1,672 feet from the waters of the State located downslope (required 100 feet);
2) 538 feet from an ephemeral or intermittent streams located downslope (required 100 feet);
3) 127 feet from a ditch or swale located downslope (required 50 feet);

In addition, J.Y. Broilers originally proposed to locate its barns within less than the minimum setback requirement of 400 feet from the property line of H.C. Broilers. However, H.C. Broilers granted a waiver of a reduction of this setback pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(11). With this exception, J.Y. Broilers' barns, as originally proposed, were sited at least 400 feet from all other property lines.

Permitting Review

DHEC staff member, William Chaplin, reviewed the applications pursuant to the requirements of 4 S.C. Code Ann. Regs. 61-43 Part 200.70. As part of his review, Mr. Chaplin verified the setback distances and conducted a water resources review that ascertained the location of point sources and nonpoint sources of discharges,[7] water quality monitoring stations, State Approved Source Water Protection Areas, impaired water bodies, Historic Preservation Districts, Heritage Corridors, and State and National Parks and Forests.

Mr. Chaplin also requested that DHEC's Bureau of Air Quality evaluate whether the proposed facilities would have an impact on air quality. In each instance, the Bureau of Air Quality determined that:

1) An increase in air pollution will not occur, i.e. emissions will comply with all applicable air quality standards.
2) The Bureau of Air Quality does not recommend additional requirements or setbacks for the facilities.
3) The location of the facilities is in attainment for the emissions of concern, and operation of the facility will not cause any area to go out of attainment for any pollutant.

During the review process and pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D), DHEC also held public meetings on September 15, 2016, and October 11, 2016. In those meetings, the Department provided an overview of the Projects and answered questions from the public in attendance. In addition, DHEC received a number of written public comments concerning the Projects.

Ms. Basel complained that her family had secured a building permit for a residence and approval for a septic tank on her family's property located across Lisbon Road from the Projects. She asked that the barns be moved so that they would meet the 1,000-foot setback residential requirement from the proposed residence. She also asked that DHEC require tree buffers along Lisbon Road to minimize dust and odor from the facilities. To accommodate Ms. Basel's request, Mr. Chaplin required that D.C. Broilers' and J.Y. Broilers' proposed facilities be moved further away from her property and Lisbon Road. In addition, Mr. Chaplin required the Projects to keep

[7] Mr. Chaplin identified point-source discharges as an existing mine and a water treatment plant. Mr. Chaplin identified as nonpoint sources 25 existing animal agricultural facilities (including poultry facilities) and 299 existing land application sites for manure. The DHEC checklist does not include evaluation of "potential" nonpoint sources, but Petitioners have failed to sufficiently demonstrate that there were any potential nonpoint sources for DHEC to consider.

the 400-foot property line setback along Lisbon Road and along the eastern side of J.Y. Broilers' parcel vegetated. Broilers complied with these requirements and amended D.C. Broilers' and J.Y. Broilers' CNMPs to relocate the proposed facilities approximately 150-200 feet further from Lisbon Road so that the 400-foot property setback would remain vegetated, as requested by Ms. Basel and DHEC.[8]

Amended Permit Applications

D.C. Broilers and J.Y. Broilers amended their applications to comply with the above requirements and relocated the proposed facilities approximately 150-200 feet further from Lisbon Road and agreed that the 400-foot property setback would remain vegetated. As a result of the amendment, D.C. Broilers' proposed barns were sited with the following setback distances:

1) 2,238 feet from the waters of the State located downslope (required 100 feet);
2) 448 feet from an ephemeral or intermittent streams located downslope (required 100 feet);
3) 204 feet from a ditch or swale located downslope (required 50 feet);

With the exception of the H.C. Broilers' property, which is subject to a waiver, D.C. Broiler's barns also comply with the 400-foot setback distance from all property lines.[9]

J.Y. Broilers' proposed barns, as amended, were sited with the following setback distances:

1) 1,760 feet from the waters of the State located downslope (required 100 feet);
2) 426 feet from an ephemeral or intermittent streams located downslope (required 100 feet);
3) 113 feet from a ditch or swale located downslope (required 50 feet);

With the exception of the H.C. Broilers' property, which is subject to a waiver, J.Y. Broilers' barns also comply with the 400-foot setback distance from all property lines.

Accordingly, the Projects each meet or exceed all the setback requirements set forth in 4 S.C. Code Ann. Regs. 61-43 Part 200.

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[8] All three Projects are designed to have a load-out area extending approximately 150 feet in front of the barns. For the purposes of meeting the setback requirements, distances are not measured from the load-out area but from the barns themselves. Although the barns as originally proposed were 400 feet from Lisbon Road, and therefore met the setback requirement, DHEC required the entire Project to be moved so that not only the barns but also the load-out area was 400 feet away from Lisbon Road. Making this modification was necessary to keep the 400-foot property setback in a vegetated state.

[9] H.C. Broilers' facility nevertheless complied with DHEC's setback requirements.

After its review, DHEC issued the Permits to H.C. Broilers, D.C. Broilers, and J.Y. Broilers on November 30, December 14, and December 21, 2016, respectively. The Permits authorize the construction of the Projects, as amended, and contain Special Conditions, including requirements that Respondents 1) operate and maintain the waste system in accordance with the Waste Management Plan developed by Mr. Mosley and with State and Federal law so as to prevent discharges to the environment; 2) obtain any other local permits that may be required for the Projects, including building permits and stormwater permits; 3) obtain Confined Animal Manure Management (CAMM) Certification from Clemson University within a year of the Permit's effective date; and 4) maintain the vegetation within the 400-foot property line setback along Lisbon Road and the property line on the eastern side of the parcel of J.Y. Broilers' parcel.

Petitioners' Objections to the Permits

Based on the evidence presented at trial, Petitioners object to the permitting of the Projects because they will prohibit adjacent landowners from discharging weapons within 900 feet of the poultry houses, create offensive odors, harm their health and safety, and increase pollution of the air and waters of the State. In sum, the Projects generally will harm their quality of life and constitute a nuisance.

Discharge of Weapons on Adjacent Property

Petitioners argue that the Projects would hinder their ability to discharge weapons on portions of their property or on property on which they have hunting rights. The evidence reflected that the discharge of firearms near David Coggins' current chicken barns have never caused any concerns. Respondents thus stipulated and requested that the Court modify the Permits to include an additional Special Condition that would require Respondents to grant permission to landowners who own land within 900 feet of the poultry houses, as well as their guests, permittees, and lessees, to discharge guns or weapons within 900 feet of the poultry houses. Therefore, if Respondents or subsequent holders of the Permits ever revoked such permission, they would be in violation of their Permits and thus no longer be able to operate the poultry facilities. Respondents also stipulated to release landowners who own land within 900 feet of the poultry houses, as well as their guests, permittees, and lessees, from any liability if the birds perished because of shots being fired within 900 feet.

Odor

Petitioners also object to the Projects because they will create offensive odors. Petitioner Blackmon testified that he has experienced odors associated with the operation of other poultry facilities and is concerned that the smell will affect his use and enjoyment of his property for hunting. Kathy Lowman also testified on behalf of Petitioners that she has smelled odors from nearby poultry facilities, which affected her enjoyment of riding her bicycle in the area.

However, each of the facilities are located a substantial distance from any residence in a rural area of Laurens County. The CNMPs set forth in the applications include an odor abatement plan which provide, in pertinent part, the following:

> Many of the potential sources of odor can be minimized by implementing some of the following best management practices for odor control: provide adequate bedding for each flock of birds, remove manure from the building as often as possible, repair all leaky waterers or pipes, clean feeding equipment regularly, remove spoiled feed regularly, remove dead animals and dispose of them promptly, cover litter stockpiles completely with an appropriate anchored and vented cover immediately after removal, avoid excess moisture in stacking sheds since excess moisture increases the amount of odor generated due to anaerobic decomposition, make sure ventilation fans are cleaned regularly and that airflow rates are adequate for the season and stage of growth, avoid orienting buildings so that ventilation fans blow exhaust air toward neighbors or adjacent roadways, land-apply manure at the appropriate times, cover manure when transporting it off site to prevent dust and spillage, incorporate manure into soil as soon as possible, land apply manure in the morning on sunny days, apply manure when winds are blowing away from neighbors, apply manure on weekdays when neighbors have a higher probability of being away from home, and finally, always contact close neighbors prior to spreading to avoid spoiling their outdoor activities.

These Odor Abatement Plans are reasonable and in compliance with the requirements of DHEC's regulations. In fact, Mr. Chaplin also explained that he reviewed the odor abatement plans and found them to be using best management practices to limit/control odors. Petitioners also offered no evidence establishing that these plans will not be effective. Accordingly, the Court finds that the evidence did not establish that the Odor Abatement Plans in the CNMP are inadequate, that additional setbacks are necessary,[10] or that the Projects need to have further precautions implemented to prevent excessive discharge of an undesirable odor.

[10] Based upon the established setbacks discussed above, the Projects greatly exceed the minimum setback requirements from residences. Moreover, Petitioners did not adequately demonstrate that the current setbacks will not be sufficient, much less that even greater setbacks are needed.

Health and Safety

Some Petitioners expressed concerns that the Projects would affect their health and safety. Specifically, Petitioner Blackmon testified about previous instances when plowed-in chicken litter had been applied to his property. He stated that following those instances, he experienced upper respiratory infections. Kathy Lowman also testified that odors from nearby poultry facilities caused her to experience migraines. However, on cross-examination, Petitioner Blackmon admitted that his physician was unable to conclude that the chicken litter was the cause of his upper-respiratory infections. Moreover, Petitioners did not introduce any written diagnoses or supporting documents that supported Mr. Blackmon's or Ms. Lowman's health claims or demonstrated the adverse effect of poultry facilities on human health. In addition, although DHEC mailed Mr. Blackmon and Ms. Lowman Medical Evaluation Instruction letters, neither responded nor provided information during the review process to allow DHEC to evaluate their medical concerns.

Based upon the record in this case, the Court finds that the evidence did not support Petitioners' claims that the Projects will have negative impacts on the health of the residents surrounding the proposed facilities. Accordingly, the evidence did not reflect a need for additional requirements to address any human health concerns.

Potential Impacts to Waters of the State

Anecdotal Testimony

Petitioners assert that poultry facilities, in general, contribute to the pollution of waters of the State. To support their argument, Petitioners presented anecdotal evidence of several environmental concerns. For instance, Eugene Stewart testified that following the delivery of manure from another poultry operator (not Respondents), he offered the results he had obtained from the soil test to the delivery driver, but the truck driver, who was "just driving the truck," did not want them. He further explained that the manure broker never asked for the soil test or maps from him nor did he deliver the amount Mr. Stewart requested. Mr. Stewart also testified that he observed manure brokers delivering litter but did not observe any paperwork being exchanged between the broker and the owner of the field in which the manure was being applied. However, Mr. Stewart's anecdotal evidence about the delivery of manure to his property concerned one instance in 2008 involving one manure broker (and not the one hired by Respondents). Indeed, Mr. Stewart has not even been on his property in approximately ten years. And in that instance,

Mr. Stewart only offered the test results to the driver; he did not submit soil tests to the operator for reporting to DHEC or inclusion in the operator's records. Furthermore, Mr. Stewart's testimony did not establish that the DHEC did not obtain similar information.

Ms. Lowman also testified that in 2013, she observed manure piles at a poultry facility (not operated by Respondents) being left uncovered for more than three days. But again, this was evidence at another facility several years earlier. Moreover, Ms. Lowman only reported her observation to DHEC once.[11] This evidence, though indicating a violation of the DHEC regulations, does not demonstrate that pollutants reached the waters of the State through a discharge, runoff, or otherwise from existing poultry facilities, or that runoff from these facilities was not controlled by vegetative or riparian buffers. Rather, the testimony from Petitioners' witnesses regarding the operations at other facilities suggests, at most, that certain growers are operating out of compliance with DHEC's regulations, which is an enforcement issue and not relevant to the Department's review of Respondents' applications.[12]

In sum, the testimony of Petitioners' witnesses on the issue of whether the Projects will increase pollution to waters of the State was unpersuasive.

Expert Testimony

Additionally, Petitioners presented the testimony of Dr. David Hargett to support their environmental concerns. As an initial matter, the Court finds Dr. Hargett's testimony as to his concerns regarding the impacts of the Projects on waters of the State to be suspect. It was only after his deposition that Dr. Hargett developed several of his opinions, including those regarding the location of ephemeral streams, flood plains, soils, the amount of "cut and fill" that would be on the site, and whether additional setbacks were needed on the site.[13] Moreover, Dr. Hargett has never been involved in the construction of animal facility. On the other hand, Christopher Mosley has significant experience in the construction of animal facilities, and his testimony was persuasive. Furthermore, Dr. Hargett testified that before he could render an opinion on whether

[11] Ms. Sparrow also testified about water quality impacts, but admitted that her water would not be affected. Rather, she was testifying out of concern for the State of South Carolina.

[12] The record reflects that when DHEC was advised of these issues, it responded by sending an enforcement officer to investigate the complaints.

[13] Based on Dr. Hargett's testimony, "even with meticulous implementation of the general permit" or "even with the implementation of the NPDES permit to the highest standard," there would always be the possibility that "a lot of things can go wrong."

a release of water from a manure pile would pollute waters of the State, he would need to know whether there are riparian and vegetative buffers between the pile and waters of the State. However, Petitioners failed to present probative evidence addressing whether vegetative or riparian buffers will exist between the manure piles and waters of the State.[14]

Nevertheless, even considering Dr. Hargett's testimony, he opined that if rainwater falls on uncovered manure stockpiles, fecal bacteria and other contaminants could run into waters of the State. In addition, he opined that in handling the manure at poultry facilities, including clean-outs of the barns, manure would be spilled onto the ground and rainwater would wash the manure into waters of the State. At the outset, Dr. Hargett's conjecture that rainwater will cause fecal bacteria and other contaminants to run into waters of the State is based upon the assumption of the manure being removed from the barns and left uncovered during a rainfall event sufficient to wash the contaminants into waters of the State. However, as explained below, the design of these facilities will reasonably preclude that possibility.[15]

Dr. Hargett also testified that according to a total maximum daily load (TMDL) for the Little River watershed, the Little River is impaired, raising concerns of permitting additional animal agricultural facilities within that impaired watershed. However, the evidence reflects that the Projects will not have an impact to impaired bodies of water so as to necessitate more stringent requirements as required by 4 S.C. Code Ann. Regs. 61-43 Part 200.140(C).

To be clear, Dr. Hargett testified that the TMDL states that agricultural facilities "may be" a source of contamination, which nevertheless implies that these facilities also "may not be" a potential source. Also, as Mr. Chaplin testified, the agricultural facilities are not contributors to the TMDL. Mr. Chaplin also explained that he prepared an Agricultural Permitting Review Checklist Summary (Summary). The Summaries set forth each of the 12 criteria contained in Reg. 61-43 Part 200.70(F) and reflect that "additional requirements or setbacks" were required.[16]

In fact, in this case, D.C. Broilers, H.C. Broilers, and J.Y. Broilers do not propose to dispose of manure on the Project sites, but each propose to use a manure broker in its operations (though

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[14] In making this finding, this Court wishes the courts above to recognize that the Petitioners bear the burden of proof.

[15] I state "reasonably" because, as reflected by Dr. Hargett's testimony, if the facilities are built to protect the environment from a 50-year stormwater event, then he could raise concerns about a 100-year stormwater event.

[16] Neither the form nor Mr. Chaplin's testimony on this fact was challenged by Petitioners.

J.Y. Broilers proposes a limited land-application). Manure brokers are regulated by DHEC, are required to obtain separate permits from DHEC subject to enforcement by DHEC, and are required to submit annual reports to DHEC regarding their operations pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 400. The approved broker will thus be responsible for the proper disposal of manure once it is taken out of the barns. Because manure will not be disposed of or discharged from the proposed Project sites, the Projects will have no impact on the Little River as an impaired water body.

Furthermore, the limited land-application by J.Y. Broilers' on other property offsite from the Project will not result in an increase of pollution to waters of the State. Indeed, Dr. Hargett testified that J.Y. Broilers land application sites appeared to be "well-suited sites." The Court therefore finds that there is insufficient evidence to suggest that the land-application sites proposed by J.Y. Broilers will increase pollution to waters of the State.

Petitioners further contend that the slope of the land at the facilities and potential grading present potential runoff issues on the proposed sites. They also contend that the Department failed to evaluate this issue. However, as will be discussed in the Conclusions of Law, though pollution runoff can be interrelated with sediment runoff, the two are distinct concepts. Here, Mr. Chaplin also explained that the CNMPs require Respondents to establish permanent vegetation on the sites if there is an expectation of high erosion rates. Further, if Respondents do not comply with this requirement, DHEC would consider them to be in violation of their permit and could take enforcement action. Indeed, Dr. Hargett also testified that riparian and vegetative buffers can be very effective in reducing sediment, nutrients, and other constituents of concern. However, the CNMPs did not establish those vegetative buffers. Rather, the Department left this issue to be resolved through the stormwater permit. Indeed, Dr. Hargett acknowledged that Respondents can address site-specific stormwater issues when they apply for a stormwater permit.

Dr. Hargett nonetheless challenged the potential effectiveness of a stormwater permit, particularly at the J.Y. Broilers facility. He noted that the Projects will require significant grading to prepare the sites for construction. According to Dr. Hargett, grading of the Project sites will create large areas of impermeable surface, thereby increasing runoff at the site. He also expressed concerns that no calculation has been performed of the final slope or of how much runoff will occur following the construction of the Projects. He opined that because of the slopes of the land at the facility, they are very vulnerable to runoff.

However, Regulation 61-43 does not address stormwater. Rather, the stormwater permitting process is separate from the agricultural permit process. Therefore, those issues will be considered and reviewed by DHEC in a separate permitting process conducted by the stormwater permitting section.

Nevertheless, Respondents can employ various stormwater control practices to address these issues. For example, various methods, such as terracing, pipe drops, rock drops, and high-velocity fabric, can be used to address soil erosion issues. In fact, Dr. Hargett acknowledged that there are a number of best management practices that can be engaged to address stormwater and runoff issues, and that he trusts that Respondents will employ those practices. Moreover, he stated that the stormwater permitting requirements are rigorous and could control issues regarding grading and erosion. He even testified that it is logical for the Department to bifurcate these different types of permitting decisions.

Finally, I find that in light the concerns raised about the proximity of the J.Y. Broilers facility to the waters of the State, and the resulting grading and slopes that will occur as a result of it, this facility should be placed at the site reflected in the original application. This change will greatly reduce the land disturbance and its proximity to the waters of the State.

In conclusion, Respondents will be required to apply for and obtain construction stormwater permits for the Projects. Furthermore, the evidence established that several best management practices are available to minimize runoff and erosion concerns and Respondents have agreed to employ whatever such methods DHEC may require. Nevertheless, a stormwater permit application process has not begun yet.

Air Quality

Petitioners raised general concerns regarding the impacts of air quality in the surrounding area; however, they failed to present any expert testimony or other evidence demonstrating that such an impact would occur. The predominant concern would be the production of hydrogen sulfide. However, hydrogen sulfide is produced from manure decomposing under anaerobic conditions, and these conditions exist only in operations using a wet manure management system. The facilities in this case will use a dry manure system under Reg. 61-43 Part 50(X), with the ventilation system removing moisture from the chicken houses. Thus, sulfates from a dry manure system are reduced aerobically without emitting hydrogen sulfide.

Though a line may occasionally drip water, the amount of water that would leak would be very minute. Furthermore, even in those instances, this minute amount of water would not create "liquid manure" or hydrogen sulfide, and certainly not an amount of hydrogen sulfide that would exceed an ambient air quality standard. Hydrogen sulfide should not be present in poultry farms using a dry manure system and thus will not be emitted by the proposed poultry facilities.

As to ammonia, which is not regulated by an air quality standard, it will not accumulate in an excessive amount due to the proposed ventilation of the poultry houses. Accordingly, the evidence demonstrates that the Projects will not negatively impact the air quality of the surrounding area. Therefore, the location of the facility is in attainment for the emissions of concern, and operation of the facility will not cause any area to go out of attainment for any pollutant. Moreover, additional requirements or setbacks for this facility are not needed.[17]

Harm to Quality of Life and Nuisance

Finally, Petitioners generally complain that the Projects will harm their quality of life and constitute a nuisance. The Petitioners do not live near the proposed facilities. Furthermore, these claims are unspecified and are cumulative to the specific issues addressed above. The Court therefore finds that there is insufficient evidence to demonstrate that the Projects will have detrimental effects upon Petitioners' quality of life or the enjoyment of their property.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court makes the following conclusions of law:

General Conclusions

The ALC has jurisdiction over this contested case matter pursuant to S.C. Code Ann. § 1-23-380 (Supp. 2017), S.C. Code Ann. § 1-23-600 (Supp. 2017), S.C. Code Ann. § 44-1-60 (2018), and 4 S.C. Code Ann. Regs. 61-43, Part 200.70(G) (2011).

In reviewing this matter, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. *See* S.C. Code Ann. § 1-23-600(B) (Supp. 2014); *Brown v S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413

[17] Down-wind receptors, which, pursuant to Reg. 61-43.200.70(F)(11), must be considered in determining whether additional setbacks are necessary, measure emissions for comparison to air quality standards, according to the Bureau of Air Quality. Because no regulated air pollutants will be emitted by the poultry facilities, there would be no way to compare any other kinds of odors emitted by the facilities to air quality standards.

(2002); *see also Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (2004). Therefore, as the trier of fact, the Court may give testimony, including an expert's testimony, the weight that he or she determines it deserves. *Florence Cnty. Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992), and may accept the testimony of one expert over that of another. *S.C. Cable Television Ass'n v. S. Bell Te. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992).

The burden of proof is upon the party asserting the affirmative of an issue based upon a preponderance of the evidence. *Anonymous (M-156-90) v. State Bd. Of Med. Exam'rs*, 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998); *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Therefore, Blackmon and SCRAP, as Petitioners, bear the burden of proving that the agency decision was in error under the statutory and regulatory standards. *Id.* Here, Petitioners failed to demonstrate by a preponderance of the evidence that the Projects are inconsistent with the statutory and regulatory requirements for Bureau of Water Agricultural Permits.

Permitting Process for Animal Facilities

All animal facilities in South Carolina are governed by the Standards for the Permitting of Agricultural Animals Facilities. These regulations are codified at 4 S.C. Code Ann. Regs. 61-43 (2011). Under this comprehensive regulatory scheme, the regulations governing the permitting of poultry facilities are found in Part 200, "Animal Facilities (Other Than Swine)." Reg. 61-43 Part 200. All permits issued under this Part are no-discharge permits. Reg. 61-43 Part 200.20(B). Part 200.50 sets forth the requirements for the submission of Animal Facility Management Plan to the Department for review.

Prior to submission of the application package, the applicant is required under the regulation to notify "all property owners within 1320 feet of the proposed location of the facility (footprint of construction) of the applicant's intent to build an animal facility." Reg. 61-43 Part 200.60(A). Once the Department receives the application, the Department shall "post up to four notices on the perimeter of the property or in close proximity to the property, in visible locations as determined by the Department." Reg. 61-43 Part 200.60(A). The Department reviews all comments received regarding the application and may hold a public meeting to discuss and seek resolution of public concerns about an application if twenty or more comments are received from different people. Reg. 61-43 Part 200.60(D).

Part 200.70 contains the decision-making requirements for the Department. Reg. 61-43 Part 200.70. In addition, the facility must meet all the applicable siting criteria contained in Reg. 61-43 Part 200.80, which are minimum distances that the Department may, on a case-by-case basis, increase. S.C. Code Ann. § 46-45-80 (2017); *see also* Reg. 61-43 Part 200.70(F).

Petitioners' Objections to Permits

Restriction of Ability to Discharge Weapons on Adjacent Property

Under South Carolina law, "it is unlawful to discharge a gun or weapon within three hundred yards of a poultry layer or broiler house containing live poultry without permission of the owner." S.C. Code Ann. § 50-11-356 (2008). Although the barns are sited to be set back from the property line 400 feet as required by 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(6), Petitioners assert that the provisions of S.C. Code Ann. § 50-11-356 will have the effect of restricting adjacent property owners from using a swath of land 500 feet wide along their property line for hunting purposes or from discharging weapons on that portion of land. Petitioners also assert that certain adjacent property owners lease their property for hunting purposes and, for the same reasons, those property owners will incur a pecuniary loss because the Projects will effectively limit hunting on those portions of property.

However, under S.C. Code Ann. § 50-11-356 (2008), it is only "unlawful to discharge a gun or weapon within three hundred yards of a [poultry house] **without permission of the owner**." This provision thus allows owners of poultry houses to grant permission for persons to discharge guns or weapons within 300 yards (900 feet) of those houses. Here, Respondents have stipulated and agreed that they are willing to grant such permission to all adjoining landowners and their guests, permittees, and lessees; to release them from liability should they shoot within 900 feet and the birds perish as a result; and to modify their Permits to require such permission and release as an additional condition to operate the facilities. Accordingly, the Court finds that the Permits should be modified to contain this additional Special Condition, and that this issue has consequently been rendered moot.

Odor

Odor abatement is one of the issues required by DHEC regulations to be addressed. Thus, in determining whether additional siting requirements are needed the Court must consider "down-wind receptors." 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F) (11). Furthermore, 4 S.C. Code Ann. Regs. 61-43 Part 200.150(A) provides that a CNMP:

shall contain an odor abatement plan for the animal facility ... which may consist of the following:

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

Producers also are required to "utilize Best Management Practices normally associated with the proper operation and maintenance of an animal facility ... to ensure an undesirable level of odor does not exist." 4 S.C. Code Ann. Regs. 61-43 Part 200.150(B). In this case, Petitioners did not present sufficient evidence demonstrating that the proposed odor abatement plans contained in the CNMPs would not abate odor from the proposed facilities.[18] Furthermore, the odor abatement plans are reasonable and comply with the requirements of 4 S.C. Code Ann. Regs. 61-43 Part 200.150(A). Accordingly, Petitioners have failed to establish that the odor abatement plans contained in the CNMPs are inadequate to control odors at the Projects. [19]

[18] Petitioners also argue that the facilities will be a nuisance and will reduce their quality of life. However, pursuant to Reg. 61-43 Part 100.150(C)(4), the Department need not consider the "[e]njoyment of life or use of affected property" until "an odor problem comes to the attention of the Department through field surveillance or specific complaints," at which point the Department will then "determine if the odor is at an undesirable level[.]" Though Petitioners filed a general complaint with the Department voicing their concerns about the possible negative impacts of odor from the facilities, these concerns were merely conjectural, as the facilities have not yet been constructed. Thus, there has been no odor for the Department to even consider, let alone to make a determination as to whether that odor has reached "an undesirable level." And, in compliance with Reg. 61-43 Part 100.150(A) and (B), Respondents have submitted odor abatement plans and have demonstrated that they will be using best management practices to limit/control odors to "ensure that an undesirable level of odor does not exist."

[19] To the extent that Petitioners argue that the odor abatement plans for the Projects' CNMPs only require Respondents to install ventilation fans as the only odor abatement measure and that all of the other measures contain permissive language, there is no requirement that a specific plan be implemented; the only requirement is that the facilities utilize the best management practices to "ensure an undesirable level of odor does not exist." Reg. 61-43 Part 200.150(B). Subsection (A) of this regulation provides certain criteria that an odor abatement plan "**may** consist of," (emphasis added) but these measures are not mandatory. Here, as discussed above, DHEC reviewed Respondents' odor abatement plans and found that they were using the best management practices to limit/control odors.

Effects on Health and Safety

A purpose of Part 200 is "[t]o establish standards for the growing or confining of animals, processing of animal manure and other animal by-products, and land application of animal manure and other animal by-products in such a manner as to protect the environment, and the health and welfare of citizens of The State from pollutants generated by this process." Reg. 61-43 Part 200.10(A)(1). Another purpose is to "establish criteria" for the location of animal facilities "as they relate to protection of the environment and public health." *Id.* at (A)(5).

Here, Petitioners expressed general concerns that the Projects would affect their health and safety. However, the Court concludes that Petitioners failed to establish that the Projects will have negative impacts on the health of the residents surrounding the proposed facilities or that additional requirements for the Projects are necessary to address health concerns.

Potential Impacts to Waters of the State

Petitioners contend that the Department failed to adequately consider and evaluate the potential impacts of the Projects to the waters of the State. Specifically, Petitioners assert that DHEC did not consider pollution allegedly generated from other poultry facilities or the grading and stormwater management runoff issues associated with the Project sites.

In reviewing an animal facility permit application, the Court must determine whether the permit application package meets all applicable regulatory requirements. Reg. 61-43 Part 200.70(C). However, the evidence presented by Petitioners concerning the alleged improper operations of existing facilities did not demonstrate that poultry facilities actually increase pollution to waters of the State. Therefore, alleged violations of other existing poultry facilities are not relevant to DHEC's consideration of whether the applications filed by Respondents comply with applicable regulations.

With respect to Petitioners' stormwater runoff concerns, in evaluating an agricultural facility permit application, the Court is required to consider the non-exclusive list of considerations set forth in Reg. 61-43 Part 200.70(F), determining whether additional siting requirements are needed. Those considerations are as follows:

1. Proximity to 100-year floodplain;
2. Geography and soil types on the site;
3. Location in a watershed;
4. Classification or impairment of adjacent waters;

5. Proximity to a State Designated Focus Area; Outstanding Resource Water; Heritage Corridor; Historic Preservation District; State Approved Source Water Protection Area; state or national park or forest; state or federal research area; and privately-owned wildlife refuge, park, or trust property;
6. Proximity to other known point source discharges and potential nonpoint sources;
7. Slope of the land;
8. Animal manure application method and aerosols;
9. Runoff prevention;
10. Adjacent groundwater usage; [and]

* * *

12. Aquifer vulnerability.

Further, DHEC regulations mandate that the Department evaluate the following particularly sensitive areas for more stringent requirements: 1) source water protection; 2) 303(d) Impaired Waterbodies List; 3) Proximity to Outstanding Resource Waters; and 4) Aquifer Vulnerability Area. Reg. 61-43 Part 200.140(C).

At the outset, each of the Projects is sited as to well exceed the minimum setback requirements. Therefore, under this regulation, the Court is concerned with whether additional setbacks are needed. As referenced in the Findings of Fact, Petitioners failed to present probative evidence addressing whether vegetative or riparian buffers will exist between the manure piles and waters of the State. They nevertheless contend that the slope of the land at the facilities and potential grading present potential runoff issues on the proposed sites. They also contend that the Department failed to evaluate this issue.

First, it is important to recognize the context of the evaluation of runoff in this case. Though pollution runoff can clearly be interrelated with sediment runoff, the two are distinct concepts. Regarding this permit, Reg. 61-43, which regulates pollution resulting from the operation of animal facilities, is concerned with the runoff of the constituents from those permitted animal facilities. The evidence that Petitioners presented on that issue of the potential for the runoff of manure or it constituents was both limited and unimpressive. Rather, Petitioners evidence concerning runoff centered upon runoff of sediment, principally the runoff from the J.Y. Broilers facility. Obviously, as pointed out by Dr. Hargett, if soil possesses the constituents of manure, the two will be interrelated. However, Petitioners' evidence failed to establish the existence of an interrelated concern at the proposed facilities.

Additionally, the subsequent installation of best management practices to control stormwater runoff will inferentially reduce the potential of runoff related to the potential pollutants from the permitted animal facilities. Indeed, while Petitioners raised concerns about runoff on the site, their witnesses acknowledged that these issues could be addressed as part of a comprehensive stormwater plan[20] and did not doubt that Petitioners would undertake the necessary steps to control stormwater runoff. The Court therefore finds that no additional setbacks are required to address runoff issues under Reg. 61-43 and that it is appropriate for DHEC to address those specific issues in the context of a construction stormwater plan.

In sum, the Court finds that DHEC's interpretation of its regulations in this regard is reasonable. When runoff is referred to in Reg. 61-43 Part 200, it is in the context of discharge of manure into the environment. *See Still v. S.C. Dep't of Health & Envtl. Control*, No. 13-ALJ-07-0395-CC, 2015 WL 224891, at *23 (ALC Jan. 12, 2015), *aff'd per curiam*, 2017-UP-068, 2017 WL 563333 (S.C. Ct. App. 2017). "Nothing in the regulations indicate that grading and general stormwater runoff is considered[, and] information on these issues is not required to be included in the Animal Facility Management Plan." *Id.* at *23 (*citing* Reg. 61-43 Part 200.50). The Court therefore concludes that DHEC's construction of its regulations as to require stormwater issues to be addressed in a separate permitting process is entitled to respectful consideration, and no compelling reasons exist to overrule its interpretation. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.").

Notwithstanding these conclusions, the Court notes that a number of Petitioners' concerns regarding runoff, erosion, stormwater control, and related impacts to waters of the State arise out of the location of the barns as presently proposed. Yet as previously recognized, to accommodate Ms. Basel, DHEC requested during the review process that D.C. Broilers and J.Y. Broilers move their houses closer to the Little River and away from Lisbon Road to increase the distance between

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[20] Pursuant to 9 S.C. Code Ann. Regs. 72-302(A)(1) (2012), "construction of an agricultural structure of one or more acres, such as broiler houses . . . which require the issuance of a building permit shall require the submittal and approval of a stormwater management and sediment control plan prior to the start of the land disturbing activity." According to Reg. 72-307(B)(1), those plans "shall include details and descriptions of **temporary and permanent** erosion and sediment control measures and other protective measures shown on the stormwater and sediment management plan. . . ." (Emphasis added). *See also id.* Reg. 72-307(C) (setting forth specific requirements for permanent stormwater management plans).

the facilities and the potential location of Ms. Basel's proposed house. However, neither of these restrictions or modifications is required by the applicable regulations.

DHEC regulations do not require animal facilities to be set back from permitted, but unconstructed, residences. *See* Reg. 61-43 Part 200.80(A)(6) (setback requirement is 400 feet from the property line or "1000 feet from the nearest residence, whichever is greater"); Reg. 61-43 Part 50(EEE) (defining residence to mean any structure that is "routinely occupied by the same person or persons more than twelve hours per day or by the same person or persons under the age of eighteen for more than two hours per day."). Here, Ms. Basel's proposed house has not been constructed and the evidence did not establish that it would be her residence. Thus, because the proposed house has yet to be constructed on Ms. Basel's property, it is not necessary to consider the proposed house in the context of siting the location of the proposed facilities. Second, with respect to the vegetative buffer, DHEC regulations only require that animal facilities be setback 400 feet from the property lines, and there is no regulatory requirement that this buffer be maintained in a vegetative state. Reg. 61-43 Part 200.80(A)(6).

While this accommodation was made to resolve some of the concerns of Ms. Basel, she as well as the other Petitioners used this accommodation to increase the concerns that D.C. Broilers and J.Y. Broilers' houses are located too close to the Little River and to certain ditches or swales existing on the property. In fact, Dr. Hargett testified that if the houses were moved closer to Lisbon Road and away from Little River, it would alleviate some of his concerns regarding the amount of cutting and filling needed, would provide a larger buffer area, would be more attractive in terms of the potential for impact to water resources, stormwater, and lessened slopes, and would provide additional protection for the water resources.

The evidence reflects that the D.C. Broilers and J.Y. Broilers barns can be placed on the site as originally proposed, which is further away from the Little River, thereby alleviating concerns about water impacts. The Court therefore finds that D.C. Broilers and J.Y. Broilers Permits should be amended to require them to be placed on the sites as originally proposed. Similarly, the Court finds that H.C. Broilers' Permit should be amended to require those houses to be moved away from the Little River and towards Lisbon Road a distance equal to the average distance that the D.C. Broilers and J.Y. Broilers houses will move, subject to the condition that that moving the H.C. Broilers houses will continue to allow them to comply with all necessary

setbacks.[21] By necessity, amending the Permits in this manner also requires that the 400-foot vegetative buffer along Lisbon Road, which is a Special Condition of the Permits, be reduced by a commensurate amount so as to permit D.C. Broilers and J.Y. Broilers to construct the load-out areas of the houses within the 400-foot property setback. Nevertheless, in light of the Department's dependence upon the stormwater permitting to ensure compliance with runoff requirements at the proposed facilities, all of the permits must be amended to reflect that they are conditioned upon each Respondent obtaining a stormwater permit that addresses whether setback limitations should exceed the minimum setback requirements.

Air Quality

Reg. 61-43 Part 200.70(E) states that DHEC "shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal law, an increase in pollution of the . . . air of the State from any new or enlarged sources." Here, however, as discussed in the Findings of Fact, Petitioners raised only general issues concerning the impacts of air quality on the surrounding area but failed to present any expert testimony or other evidence demonstrating that such an impact would occur. To the contrary, the record reflects that DHEC properly considered the impact of the Projects on air quality and determined that the facilities would not cause an increase of regulated air pollutants. Accordingly, the Court finds that the Projects will not negatively impact the air quality of the surrounding area.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Court finds that Petitioners have failed to meet their burden of proof and have not shown by a preponderance of the evidence that Respondents should not be issued the Permits. Rather, the Court finds and concludes that Respondents have fully, correctly, and completely complied with all statutory and regulatory prerequisites to the issuance of the subject Permits.

However, in an effort to address Petitioners' concerns regarding the potential impacts of the Projects on the waters of the State, even though such concerns were not demonstrated by a

[21] DHEC never requested that the H.C. Broilers houses be moved, as they were outside of the 1,000-foot residential setback as originally proposed. However, in order to address Petitioners' concerns regarding the Little River, the Court finds that the H.C. Broilers' facility should be moved approximately the same distance as the D.C. Broilers and J.Y. Broilers houses, so long as it continues to comply with the setback requirements.

preponderance of the evidence, and to reflect the stipulations of Respondents discussed above, the Court further orders that the Permits be modified as follows:

1. The Permits shall include an additional Special Condition requiring Respondents to grant permission to landowners who own land within 900 feet of the poultry houses, as well as their guests, permittees, and lessees, to discharge guns or weapons within 900 feet of the poultry houses.
2. The Permits shall include an additional Special Condition requiring Respondents to release landowners who own land within 900 feet of the poultry houses, as well as their guests, permittees, and lessees, from any liability should any of the birds perish as a result of those persons shoot within 900 feet.
3. D.C. Broilers and J.Y. Broilers shall be permitted at the sites proposed in their original applications.
4. H.C. Broilers shall move its houses away from the Little River and towards Lisbon Road a distance equal to the average distance that the D.C. Broilers and J.Y. Broilers houses will move, subject to the condition that moving the H.C. Broilers houses will continue to allow them to comply with all necessary setbacks.
5. The 400-foot vegetative buffer along Lisbon Road, which currently is a Special Condition of the Permits, shall be reduced by an amount commensurate with the distance that the D.C. Broilers and J.Y. Broilers' houses will move to allow D.C. Broilers and J.Y. Broilers to construct the load-out areas of the houses within the 400-foot property line setback requirement.
6. The Permits shall be conditioned upon each of the permittees obtaining a stormwater permit that addresses whether the setback limitations should exceed the minimum requirements.

Therefore, based upon the foregoing,

IT IS HEREBY ORDERED that the Bureau of Water Agricultural Permit Nos. 19,886-AG, 19,876-AG, and 19,889-AG to Respondents D.C. Broilers, H.C. Broilers, and J.Y Broilers, respectively, are **APPROVED**. The Department shall issue these permits for the proposed projects.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

November 30, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

November 30, 2017
Columbia, South Carolin