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

Pickens County,.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT MRR PICKENS, LLC

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Columbia, South Carolina
January 8, 2018

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STATEMENT OF THE ISSUE(S) ON APPEAL

I. Did the Administrative Law Court correctly dismiss Appellant Pickens County's challenge to a DHEC permitting decision as untimely and for failure to exhaust administrative remedies?

I. STATEMENT OF THE CASE

This matter is before the Court on appeal from an Order of the South Carolina Administrative Law Court ("ALC") dismissing Appellant's challenge to the decision of South Department of Health and Environmental Control ("the Department" or "DHEC"), which granted a modification to the Class 2 Landfill Permit LF2-00003 (the "Permit") issued to Respondent MRR Pickens, LLC ("MRR") in 2008. On August 10, 2015, the Department staff issued a minor modification to the Permit ("Minor Permit Modification"). Appellant filed with the DHEC Board its Request for Final Review ("RFR") of the DHEC staff Minor Permit Modification decision on March 23, 2016. On April 16, 2016, DHEC staff submitted its initial staff response to RFR with the DHEC Board setting forth its position that the request was untimely. The DHEC Board denied the RFR by letter dated April 21, 2016, making the Minor Permit Modification decision the "final agency decision".

On May 19, 2016, Appellant Pickens County ("Appellant") mailed its Request for a Contested Case Hearing to the ALC. On July 28, 2016, DHEC filed a Motion to Dismiss. On July 29, 2016, MRR also filed a Motion to Dismiss. Appellant filed memoranda in opposition of each motion. DHEC also filed a reply to Appellant's memorandum in opposition to its motion. On December 2, 2016, a motion hearing was held at the ALC in Columbia, South Carolina. After consideration of the arguments and filings of all parties, the ALC issued an Order granting MRR and DHEC's motions to dismiss on the grounds that Appellant failed to timely fulfil procedural requirements for bringing a contested DHEC case before the ALC. On January 11, 2017, Appellant filed a notice of appeal in this Court.

II. ARGUMENT

As will be explained more fully herein, Appellant presents no basis for relief upon which this Court should reverse the ALC's order of dismissal.

SUMMARY OF ARGUMENT

Appellant asserts this case involves three (3) questions: (1) whether the modification to MRR's permit was "minor" or "major" under DHEC's regulations; (2) whether the challenges to the Minor Permit Modification brought by Pickens County and neighboring property owners are administratively barred based on timeliness; and (3) whether the Minor Permit Modification is justifiable under DHEC's landfill regulations. However, because the question of timeliness is a threshold jurisdictional question, and because the ALC Order answered this question affirmatively, whether Appellant was timely is the only issue, which may properly be presented to this Court:

> Whether [Appellant] has met the statutory and procedural requirements for filing a case before the ALC contesting a DHEC permit decision?

(R. p. 2).

Appellant failed to timely file a RFR of the DHEC staff decision pursuant to S.C. Code Ann. § 44-1-60(E). Appellant received various forms of notice over a period of months. However, Appellant waited months before filing a RFR, necessarily barring itself from appeal. Though Appellant erroneously contends it was never given notice as required by regulation, the record unequivocally shows the otherwise. Therefore, this appeal must be dismissed.

In part, Appellant argues it did not act because DHEC improperly classified the matter as a "minor" permit modification, which exempted DHEC from public notice and comment requirements applicable for "major" modifications. However, the matter before the ALC, which is the subject of the order on appeal, is MRR and DHEC's motions to dismiss on procedural

grounds. Whether DHEC improperly classified the modification or whether it should have granted the modification, is a matter that could only be decided by the ALC in a hearing on the merits and is not properly before this court.

Appellant also argued in part that DHEC's failure to comply with regulatory notice requirements caused it to file its RFR months late. However, this argument is foreclosed because Appellant received actual notice on multiple occasions yet failed to take timely action as required by statute. In fact, if this court were to consider the latest possible date of notice, Appellant's request remains untimely and this appeal is barred.[1]

STATEMENT OF FACTS

A. Class 2 Solid Waste Permit LF2-00003

On November 3, 2008, DHEC issued the Permit to MRR to construct and operate a Class 2 Landfill on property located at 2180 Greenville Highway, Liberty, South Carolina, Pickens County (the "Highway 93 Landfill"). Prior to issuing the Permit, DHEC publicly noticed the agency decision and sent written notice to neighboring landowners and the Appellant. On March 30, 2015, Respondent applied for a modification to the Permit for the option to install a liner and associated leachate collection system. (R. p. 465). On August 10, 2015, DHEC staff issued a Minor Permit Modification, allowing MRR the option to install a liner and associated leachate collection system in the Highway 93 Landfill (the "Minor Permit Modification Decision"). (R. pp. 467 – 470).

[1] As explained in more detail herein, this argument is also foreclosed because Appellant never requested to be designated an "affected party" when MRR received its Permit in 2008.

Prior to issuing the Minor Permit Modification Decision, DHEC did not publicly notice or provide a comment period on its decision because DHEC determined the requested modification qualified as "minor"; public notice and comment are only required for "major" modifications per S.C. Code Reg. 61-107.19, Part I, B. 48a. (R. p. 472). DHEC mailed the Minor Permit Modification Decision to MRR as the applicant on August 10, 2015. (R. p. 472). DHEC staff did not mail the Minor Permit Modification Decision to Appellant on August 10, 2015. (R. p. 472). Prior to DHEC's issuance of the Minor Permit Modification, Appellant had not requested in writing via certified mail, electronic mail or by any other method, to be notified by DHEC of any decisions relating to the Permit. (R. pp. 472-473.

B. Pickens County's Knowledge of the Minor Permit Modification Decision

Appellant had actual knowledge of the Minor Permit Modification as early as December of 2015 and received a copy of the same decision in January of 2016, as follows:

- In December of 2015, Appellant filed a Freedom of Information Act request with DHEC for MRR's permit file and requested a meeting to discuss the Permit. (R. pp. 503-507);
- On December 15, 2015, DHEC staff met with Pickens County representatives and discussed the August 10, 2015, Minor Permit Modification Decision. (R. p. 505, at ¶ 6; See also R. pp. 500-502);
- On January 11, 2016, DHEC sent Pickens County a copy of the Minor Permit Modification Decision via electronic mail delivered to Gerald Wilson. (R. pp. 508-509);
- On January 11, 2016, Pickens County issued a Land Use Approval Termination Letter to MRR confirming its knowledge of the Minor Permit Modification Decision. (R. pp. 510-512);
- On February 17, 2016, Gerald Wilson, an employee of Pickens County signed an affidavit that he was aware of the Minor Permit Modification Decision. (R. pp 503-507); and

- On February 18, 2016, Appellant attached a copy of the August 10, 2015, Minor Permit Modification Decision as Exhibit 12 to its pleading in C/A No: 2016-CP-39-100. (R. pp. 513-529; R. p. 525; See No. 12 on list of Exhibits (Feb. 18, 2016) (actual exhibits excluded).

Therefore, Appellant had actual and constructive notice and knowledge of the Minor Permit Modification Decision including: December 15, 2015; January 11, 2016; February 17, 2016; and at the latest, on February 18, 2016 (the date it used the Minor Permit Modification Decision as an Exhibit in a related State court proceeding).

STANDARD OF REVIEW

"Under the Administrative Procedures Act, the ALC presides as the fact-finder in contested cases." White v. S.C. Dep't. of Health & Envtl. Control, 392 S.C. 247, 252, 708 S.E.2d 812, 814 (Ct. App. 2011); see also Jones v. S.C. Dep't. of Health & Envtl. Control, 384 S.C. 295, 303, 682 S.E.2d 282, 287 (Ct. App. 2009) ("In a contested permitting case, the ALC presides as the fact finder."). "[T]his [c]ourt's [review] is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." White, 392 S.C. at 252, 708 S.E.2d at 814 (first and third alterations in original) (internal quotation marks omitted). "In determining whether the ALC's decision was supported by substantial evidence, this [c]ourt need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the AL[C] reached." Id. (internal quotation marks omitted). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Id. (internal quotation marks omitted).

A. The ALC correctly dismissed Appellant's challenge to the DHEC permitting decision as untimely and for failure to exhaust administrative remedies.

S.C. Code Ann. § 44-1-60 (Supp. 2015) provides the exclusive procedure for bringing a contested case regarding permitting or licensing actions taken by DHEC. S.C. Coastal Conservation League vs. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 423; 702 S.E.2d 246, 251 (Nov. 15, 2010); A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, Docket No.: 16-ALJ-07-0082-CC, 2016 WL 2771749 (May 5, 2016); S.C. Code Ann. § 44-1-60(A). A DHEC staff decision on a permit becomes the "final agency decision" fifteen (15) calendar days after it has been mailed to the permit applicant and other affected persons who have properly requested notification, unless an RFR is filed with the DHEC Board within that time frame. S.C. Code Ann. § 44-1-60(E)(1)-(2). If an RFR is filed, the DHEC Board has three (3) choices: (1) decline in writing to review the staff decision; (2) do nothing and let the sixty (60) day time frame to hold a review conference lapse; or (3) hold a conference and/or issue its own decision in the matter. S.C. Code Ann. § 44-1-60(F). Where the DHEC Board declines in writing to conduct a final review conference, the applicant or other affected person has thirty (30) calendar days from receipt of the DHEC Board denial to file a contested case with the ALC. S.C. Code Ann § 44-1-60(G)(1). "The exclusive process established by Section 44-1-60 is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies....Under the statute, unless the steps prescribed are followed, beginning with the initial decision of the Department, a party may not bring a contested case before [the ALC]." A.O. Smith Corp., 2016 WL 2771749, at *2; see Ward v. State, 343 S.C. 14, 18-19, 538 S.E.2d 245, 247 (2000) ("The general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few.")

Appellant argues it should have been notified by DHEC staff of the Minor Permit Modification Decision at the time it was made on August 10, 2015, either by Option (1) mailing the decision directly to the Appellant; and/or Option (2) by publicly noticing the decision through publication in a newspaper of general circulation.

i. **DHEC was not required to mail the Minor Permit Modification Decision to Appellant because Appellant was not an "affected person" who requested such notice.**

Option (1) is notice by direct mailing of the staff decision to Appellant. Section 44-1-60(E) requires a party, such as Appellant, to notify DHEC in writing by certified, U.S. or electronic mail, that it is an "affected person" and wishes to be notified of any subsequent decisions relating to a permit. Appellant was provided notice through direct mailing and public notice of MRR's Permit issued in 2008. Appellant never requested in writing or otherwise that DHEC notify it of any decisions relating to the Permit. (R. p. 501; ¶ 4). Appellants were aware - since 2008 - that MRR intended to operate a Class 2 Landfill in Pickens County. In fact, as stated in Appellant's Prehearing Statement at the ALC, Appellant and MRR executed a Development Agreement in 2008 to allow MRR to use the property for that purpose. (R. p. 17, at § 5). However, between 2008 and August 10, 2015, Appellant never requested DHEC notify it as an "affected person" for purposes of future staff decisions on the Permit. Appellant does not allege it made such a request in its filings to the ALC. Therefore, DHEC was not required to notify Appellant by mailing of the Minor Permit Modification Decision.

The ALC addressed this exact issue in a similar case where a party did not request DHEC provide notice of subsequent decisions on a previously issued permit. Hubbard v. S.C. Dep't of Health & Envtl. Control, Docket No.: 07-ALJ-07-0594-CC, 2008 WL 2300351 (May 2, 2008). In Hubbard, the Court held where notice was not requested of future staff decisions after an initial

license or permit was issued, DHEC was not required to give subsequent notices of renewals or otherwise treat them as an "affected party." Hubbard, 2008 WL 2300351, at *6-7. The Court further held a party cannot claim ignorance to avoid the requirement it notify DHEC of its "affected party" status to trigger future notifications of permitting decisions:

> Petitioners argue they were unaware that, pursuant to § 44-1-60(E), they had to notify the Department by certified mail, return receipt requested,[2] that they were affected persons concerning the Department's decision. This argument lacks credibility; all citizens in this state are presumed to know the law.

Id. at *6; citing Morgan v. S.C. Budget and Control Bd., Op. No. 4356 (S.C. Ct. App. filed Mar. 13, 2008) (Shearhouse Adv. Sh. No. 12 at 56, 62) ("[C]itizens are presumed to know the law and are charged with exercising reasonable care to protect [their] interest[s].")

"A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." S.C. Code Ann. § 1-23-380(A). The exclusive process established by S.C. Code Ann. § 44-1-60 is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies. See Ward, 343 S.C. at 18-19. The South Carolina Supreme Court has held dismissal of a case is proper where there is a requirement to first exhaust administrative remedies as a matter of law. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176-77, 551 S.E.2d 263, 273 (2001) (citation omitted). In this case, because Appellant failed to timely exhaust its administrative remedies through a timely RFR, the ALC properly declined to hear its appeal. See Hubbard at *8 (holding "[t]he doctrine of exhaustion of administrative remedies generally requires a person seeking relief from

[2] Certified mail is no longer required for notification of requests for decisions. However, notification still must be in writing and by electronic, U.S. or Certified Mail. See S.C. Code Ann. § 44-1-60 (E)(I).

the action of an administrative agency to pursue all available administrative remedies before seeking such relief from the courts." (citing Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994)).

ii. **Even if the ALC found Appellant was an "affected person" requiring notice, Appellant failed to file its RFR within fifteen (15) days of DHEC's mailing of notice to Appellant.**

The seminal case on notice and timeliness of DHEC RFRs is S.C. Coastal Conservation League vs S.C. Dep't of Health & Envtl. Control, 390 S.C. 418 (2010), where the South Carolina Supreme Court interpreted the requirements set forth in S.C. Code Ann. §44-1-60(E). In S.C. Coastal Conservation League, the appellants argued the fifteen (15) day time frame to file an RFR with the DHEC Board does not run until the "affected person" receives notice of the DHEC staff decision on a permit, not when notice of the staff decision is mailed to the applicant, as held by the lower courts in that case. The South Carolina Supreme Court disagreed and held the fifteen (15) day time frame begins to run on the day the notice is mailed to an "affected party" who requested to be notified of the staff decision. Id. at p. 252 (holding that in situations when DHEC fails to simultaneously notify the applicant, permittee, licensee, and affected persons, the latest date of mailing controls when the fifteen-day period begins to run).

Here, Appellant does not qualify as an "affected party," entitled to mailing and notice of the DHEC staff Minor Permit Modification Decision. However, in the alternative and without waiving any arguments, even if the ALC ruled Appellant was an "affected party," or otherwise should have received notice, Appellant failed to meet the fifteen (15) day deadline for filing its RFR to the DHEC Board. Using the time frame of fifteen (15) days after the later of mailing to the applicant and "affected party" set forth in the S.C. Coastal Conservation League decision,

DHEC staff mailed a copy of the Minor Permit Modification to MRR as applicant on August 10, 2015. (R. pp. 471-502). DHEC staff later emailed a copy of the Minor Permit Modification to Appellant on January 11, 2016. (R. pp. 508-509). Appellant did not file its RFR until seventy-two (72) days after DHEC provided it with a written copy of the Minor Permit Modification. (See generally, R. pp. 162-173). Therefore, no matter what date the Court applies, Appellant exceeded the fifteen (15) day filing period after mailing and thus failed to exhaust its administrative remedies.[3]

Appellant cannot request the ALC hear its review because the Court lacked appellate jurisdiction over the appeal. See Grand Bees Dev., LLC v. S.C. Dep't of Health & Envtl. Control, 2012 WL 10841840, at *1 (Ct. App. 2012)); citing Great Games, Inc. v. S.C. Dep't. of Revenue, 339 S.C. 79, 82, 529 S.E.2d 6, 7 n. 5 (2000); Allison v. W.L. Gore & Assocs., 394 S.C. 185, 188-89, 714 S.E.2d 547, 549-50 (2011) (noting it is a general rule "that an appellate body may not extend the time to appeal"). While subject matter jurisdiction may not be the issue here, **appellate jurisdiction** is and the ALC correctly held that it did not have appellate jurisdiction over the Appellant's request where it failed to timely file its RFR with the DHEC Board. This proposition has been clarified by the South Carolina Supreme Court – holding that timely exhaustion of administrative remedies is jurisdictional in the appellate setting - and no court can find jurisdiction

[3] In fact, Appellant had actual and constructive notice of the Minor Permit Modification Decision on December 15, 2016. Id. Appellant waited ninety-nine (99) days after it met DHEC and discussed the modification, seventy-two (72) days after it received a copy of and notified MRR of its knowledge of the modification, thirty-two (32) days after it signed an affidavit in Court of Common Pleas attesting under oath to its knowledge of the contents of the Minor Permit Modification Decision, and thirty-three (33) days after it used a copy of the Minor Permit Modification Decision as an exhibit in a civil proceeding in South Carolina. (R. p. 513-529; R. p. 525; See No. 12 on list of Exhibits (Feb. 18, 2016)).

by enlarging the time for appeal. See Allison v. W.L. Gore & Assocs., 394 S.C. 185, 188–89, 714 S.E.2d 547, 549–50 (2011)(the failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of "appellate" jurisdiction over the case...the Commission lacks the authority to extend the fourteen days permitted for the filing of an appeal from the decision of a single commissioner... This holding is consistent with the general rule that an appellate body may not extend the time to appeal. Citing Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 83, 529 S.E.2d 6, 8 (2000)Rule 263(b), SCACR; S.C. Code Ann. § 1–23–380(A)(1) (Supp.2010); S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 380 S.C. 349, 669 S.E.2d 899 (Ct.App.2008) *overruled on other grounds* 390 S.C. 418, 702 S.E.2d 246 (2010); Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals, 340 S.C. 57, 530 S.E.2d 383 (2000)).

iii. DHEC was Not Required to Public Notice the Minor Permit Modification. Even if it was, Appellant had Actual and Constructive Notice of the Decision in December of 2015 and failed to File its RFR Within Fifteen (15) Days of Mailing and Receipt of Notice. Therefore, the Minor versus Major Legal Determination is Moot.

Option (2) provides for notice by public notice and a comment period. Appellant attempts circumvent and confuse its timeliness deficiencies by arguing the Minor Permit Modification should have been deemed a "major modification" by DHEC, thus requiring public notice and comment period under S.C. Code Ann. Regs. 61-107.19. Although the evidence supports a finding that MRR's modification request was appropriately deemed minor[4], the ALC properly declined to address this issue when granting MRR's Motion to Dismiss. Simply, Appellant was emailed a

[4] DHEC testified that the option to install a liner and associated leachate system were the only modifications, that those modifications were more protective of the environment, and thus qualified as minor modifications. (R. pp. 689:9 – 699:6).

copy of the Minor Permit Modification Decision on January 11, 2016, Appellant received actual and constructive notice of the Minor Permit Modification Decision on December 15, 2015, and Appellant failed to file a RFR of the decision within the fifteen (15) day deadline required by S.C. Code Ann. § 44-56-60(E). During the hearing on Respondents' Motions to Dismiss, the Court repeatedly asked Appellant to explain why it had not complied with the statute and filed the RFR within 15 days of receiving notice:

> THE COURT: Mr. Poliakoff, in December county officials met with DHEC officials. At that point, they learned about the modification that was -- they learned about -- they got actual notification that yes, there is a modification. There was a permit issued. Why didn't the County file their Request for Review at that point?

(R. p. 106:3-10).

> THE COURT: But, Mr. Poliakoff, we can't get to that issue until we get beyond did the ---

(R. p. 110:13-14).

> THE COURT: Yes, but what your argument is, is that we have got a major modification as to a minor modification that was approved by DHEC.
>
> * * *
>
> THE COURT: But, before we get to that proof, we've got to get beyond these Motions for Dismissal which is why didn't Pickens County file their request for review earlier than. . .
>
> MR. POLIAKOFF: It was already a done deal at that time. The permit was already issued four months. The final agency decision was already issued for four months. They assumed it was a done deal. It was a done deal. . . .

(R. pp. 110:24 – 111:13).

> [MR. POLIAKOFF:] I think they made a specific request for the crucial document so I would argue at least January 11th or thereabouts is the date,

> there's probably a few days after that, that they actually received that paper. The County was trying to figure out what to do, Your Honor, with a permit that there was already a final agency decision for four months before they got word one about it.

(R. p. 112:1-10) (emphasis added).

> THE COURT: Yes, but subsequent to that, you did file a Request For a Review. What changed?
>
> MR POLIAKOFF: I became involved. . . . It was a huge Motion Hearing that occupied much of February, and once we got into the case better, I figured out that we should really oppose this because this was illegally obtained. . . .

(R. p. 122:3-8).

> THE COURT: And once the County learned of that permit, when did the County file their Request for Review with the Board?

(R. p. 140:20-22).

As shown above and within the Transcript of Proceeding, Appellant failed to provide any justification for failing to comply with statutory requirements to timely file its RFR but instead waited more than two (2) months after receiving a copy of the Minor Permit Modification Decision to act. Therefore, Appellant failed to exhaust its administrative remedies after actual notice, and the ALC lacked appellate jurisdiction to decide whether the Minor Permit Decision should have been publicly noticed; the issue is moot.

iv. Equitable tolling is not warranted in this case and is not appropriate where Appellant sat on its rights.

Appellant argues due process, public interest and urgency justify the drastic remedy of equitable tolling and an exception to the requirement that a party exhaust its administrative remedies. These claims are unsupported by any facts or matters of record and are irrelevant in this case where Appellant had actual notice and sat on its rights. Nonetheless, in a last-ditch effort to

revive its position, Appellant cites to portions of the currently incomplete deposition of Kent Coleman, former Director of DHEC's Division of Mining and Solid Waste Management, in a separate case to support its plea for equitable relief. (Appellant's Initial Brief at pp. 6-10.) Kent Coleman's testimony was not a part of the record on appeal to the ALC and is improperly used to cloud the relevant issues here.

a. This is not a "public interest case" of urgency: the Minor Permit Modification does not add coal ash as a new waste stream.

Although these facts are not properly before this Court, to the extent this Court may consider assertions relating to the merits of the case asserted by Appellant, MRR is compelled to succinctly clarify Appellant's misrepresentation of Mr. Coleman's testimony about the modification:

1. **The Permit as originally issued in 2008 allowed disposal of coal ash or coal combustion residuals (CCR) that meet Class 2 testing thresholds.**

> Q. Would MRR's 2008 permit allow them to accept coal combustion residuals if they met the threshold and notwithstanding the new law?
> A. Yes.

(R. p. 689:9-12).

2. **The Minor Permit Modification for the option to install a liner was deemed "minor" because it was not a change to the waste stream and because it was more protective of the environment.**

> Q. Okay. So let's talk about the modification itself. It appears -- it states this is an issuance of a modified Class Two landfill permit. Was this a minor or a major modification?
> A. We issued this modification as a minor modification.
> Q. Okay. Can you tell me why?
> A. Yes. I can. I've had to recall those conversations a few times lately. But the -- basically, we looked at it, and since there were no new waste streams involved, and it was an optional upgrade so to speak -- it was only basically, you know, making the facility more

environmentally protective than we had already issued. We felt like it was -- you know, we felt like we could do it as a minor because any, you know, any impact would just be positive, if they decided to install the liner. And since we didn't approve any new waste streams or increase in volume or anything like that, we felt like an upgrade was with a minor modification.

(R. pp. 696:17- 697:11).

3. **A liner like the one at issue is more protective of the environment and the public.**

Q. And in your opinion, if a permittee, came to DHEC and asked to install a liner that is not required in the regulations –
A. Uh-huh.
Q. -- would there be any reason for DHEC to deny that request?
MR. POLIAKOFF: Objection, form. Leading.
A. I -- I can't think of a reason why we would deny a liner request, if it were not required.
Q. And I guess what I'm asking, is there any negative impacts to the presence of a liner in a solid waste landfill, to your knowledge?
A. Not for the department or the environment. No.

(R. pp. 693:13- 694:1).

4. **The Minor Permit Modification did not change the waste stream allowed at the Highway 93 Landfill.**

Q. Does the modification alter the waste stream that MRR Pickens would be allowed to take under its '08 permit.
A. No. I mean, the regs were the same under both permits.

Q. Okay. So since no new waste streams were added
A. Uh-huh.
Q. -- the liner itself does not automatically modify the permit to allow a new waste stream. Is that correct?
A. Correct.

(R. pp. 695:8-12; 697:15-18).

5. **The Minor Permit Modification is not the final agency decision which determines whether MRR is allowed take coal ash or coal combustion residuals at the Highway 93 Landfill.**

Q. So for MRR Pickens to take coal combustion in residuals –

A. Uh-huh.
Q. -- at its Pickens County Class Two landfill, there is still a regulatory process that is not complete at this time. Is that true?
A. Yes.

(R. pp. 698:25-699:6).

As stated above, the Minor Permit Modification does not include the addition of any waste stream – including coal ash or coal combustion residuals (CCR) – to the Permit. It is simply an option to install a liner – and therefore, according to DHEC, it does not pose any public health or environmental concerns. (R. 693:2-22). In fact, the option to install a liner does not substantially change the Permit – a permit which Pickens County did not appeal or request to DHEC in writing to be notified of decisions relating thereto (and thus be treated as an "affected person"). Therefore, there is no public interest or due process right denied if the Minor Permit Modification remains – rather a landfill that is more protective of public health and the environment exists.

Second, the Storm M.H. ex rel. McSwain case cited by Appellant is not applicable here. Appellant states that McSwain holds there is a broadly applied "public interest" exception to administrative exhaustion. This is not the holding. Rather, McSwain holds there is a very limited exception. The Court found in McSwain that it can excuse the requirement for exhaustion of administrative remedies only where such exhaustion: (1) would be "a vain or futile act" because of the certainty of an adverse decision; and (2) where exhaustion of administrative remedies would have been inadequate given the need for an immediate ruling. Storm M.H. ex rel. McSwain v. Charleston Cty. Bd. of Trustees, 400 S.C. 478, 486–87, 735 S.E.2d 492, 497 (2012) In McSwain, the School Board had already notified the plaintiff that it would not allow her to enroll in the school based on her lack of County citizenship. Id. Therefore, the plaintiff in that case knew the outcome of its initial appeal to the Board and, therefore, intentionally skipped that step. Also, in McSwain

the school year was quickly approaching when the appeal was filed, and the student needed to know if she would be permitted to enroll in the school or not as quickly as possible. Id.

In this case, Appellant did not skip or bypass the DHEC Board appeal process and go straight to the ALC because the DHEC Board's ultimate decision would be futile. Rather, Appellant requested review of the DHEC Board, but did so late. The mere possibility, or even likelihood of an adverse decision does not render the process futile. Neiman v. Yale University, 270 Conn. 244, 851 A.2d 1165, 189 Ed. Law Rep. 741 (2004). Appellant also did not skip or bypass the DHEC Board because it needs immediate relief or will suffer irreversible harm. In fact, Appellant has not alleged irreparable harm without immediate relief. Appellant cannot make such an argument given the testimony from DHEC that the permit decision is not the final agency decision that will allow (or disallow) coal ash or CCR into the landfill. Appellant sat on its rights, waited too long to contest the Minor Permit Modification Decision, and now wants an extreme remedy to excuse its own error.

b. Appellant was not prevented from exercising its rights in December 2015 and January 2016 and thus, cannot invoke extreme equitable remedies.

"Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations." Pelzer v. State, 662 S.E.2d 618, 620 (Ct. App. 2008), citing Hooper v Ebenezer Senior Svcs. and Rehabilitation Ctr., 377 S.C. 217, 659 S.E.2d 219 (Ct. App. 2008). The doctrine is "typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." Id. at 620. See also Fabri v. S.C. Dep't of Health & Envtl. Control, Docket No.: 08-ALJ-07-0336-CC, 2009 WL 332981, * at 3 (Jan. 13 2009). The Fabri case is directly applicable. In that case, the Court held

that parties given actual notice when a permit was first issued, do not necessarily have the right to future notices related to that permit. Id. Here, Appellant (and the public) received notice of the Highway 93 Permit in 2009 but did not request in writing to be treated as an "affected person" or have any other notice of future decisions relating to the Permit – including the Minor Permit Modification.

Even if the Court disagrees and Appellant was required to be provided notice, Appellant received actual notice over six (6) months ago but it did not timely file its appeal. Therefore, no lack of due process applies in this case. A **citizen** whose claim arises under the Constitution rather than under a specific statute or regulation, however, must still act to preserve his claim within a reasonable time after having received actual or constructive notice of the agency action he seeks to challenge. Smothers v. U.S. Fidelity and Guaranty Co., 322 S.C. 207, 470 S.E.2d 858 (Ct. App. 1996); citing 25 S.C. Code Ann. Regs. 61-72, §102 (Supp. 2000). Every citizen is presumed to have knowledge of the law and must exercise reasonable care to protect his interests. Id. See also Citizens for Sandy Flat vs. S.C. Dep't of Health & Envtl. Control, Docket No.: 01-ALJ-07-0009-CC, 2001 WL 1502396, *4 (Oct. 12, 2001)("[o]ne cannot complain of a due process violation if [he] has recourse to a constitutionally administrative procedure but merely declines or fails to take advantage of it.") In other words, Appellant cannot now claim that it represents "the public at large" in order to repair or resurrect its fatal flaw in failing to timely file its RFR of the Minor Permit Modification Decision.

Finally, whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof.

McSwain; citing Hyde v. S.C. Dep't of Mental Health, 314 S.C. 14, 17 n. 5, 538 S.E. 2d 245, 246 n. 5 (2000). Here, there is no evidence to support such an abuse.

c. Equitable Estoppel is not appropriate here.

Appellant further tries to avoid the consequences for its failure to exhaust its administrative remedies by stating DHEC should be equitably estopped from using the timeliness issue to dismiss the case because it misrepresented the status of the permit modification to Appellant. In all pleadings filed by Appellant at the ALC, and exhibits thereto, Appellant never alleged DHEC made misrepresentations or provided misinformation to Appellant during any meetings held prior to the filing of the RFR. Moreover, Appellant provided no reason for failing to file the appeal within fifteen (15) days of actual notice. Appellant's new accusations of misrepresentation and misinformation as grounds for equitable estoppel not properly asserted for consideration in this proceeding and not based on any facts in the record.

In its Initial Brief, Appellant now accuses DHEC of making false representations to Appellant as to the availability of administrative review of the Minor Permit Modification. Appellant, however, cites no support for this assertion. Paragraph 6 of the Affidavit of Gerald Wilson states that Appellant met with DHEC in December of 2015 to discuss the permit modification, after making a Freedom of Information Act request. (R. p. 304, ¶ 6). It does not state any facts regarding statements made by DHEC relating to Appellant or anyone else's rights to file an appeal of the Minor Permit Modification Decision. The only evidence to support that any such discussions were had was made by Gary Poliakoff, Esquire, attorney for Appellant during oral argument. Mr. Poliakoff stated: "[e]xcuse me, I'm just handed a note from a county attorney, Your Honor, and I will read it verbatim...Quote, when we met with DHEC in December, they told

us the notification period was over and the permit was issued." (R. p. 121:16-22). This statement is the basis of the Appellant's claim of a misrepresentation to warrant tolling of the fifteen (15) day period to file its request: a statement on a note from one attorney to another, not an affidavit.

This argument is unsupported by sworn testimony or other evidence and is not proper for the court to rely on to make a finding of whether there were any misrepresentations during the December meeting. However, for the sake of argument and without waiving objection to use of this as "testimony" in this case, MRR responds that the law on equitable estoppel for tolling requires much more support than this.

The party claiming estoppel must show: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001); Brayboy v. Ewing, 311 S.C. 272, 273, 428 S.E.2d 731, 732 (Ct.App.1993).. The South Carolina Supreme Court has consistently upheld a trial court's refusal to grant equitable estoppel where the plaintiff had not proved the delay was due to the defendant's conduct. "In Vines [v. Self Memorial Hospital], 314 S.C. 305, 443 S.E.2d 909 [(1994)], which was brought under the Tort Claims Act, the defendant claimed the statute of limitations as a bar, and the plaintiff argued the defendant was equitably estopped from asserting the statute. The plaintiff based her equitable estoppel argument on the fact the defendant's employees assisted her in completing certain claim forms. She argued that this assistance 'caused her to believe she had done all that she needed to do.' Vines, 314 S.C. at 308, 443 S.E.2d at 911. The trial court rejected this argument and granted the defendant's motion for summary judgment based on the statute of limitations. On appeal, this Court affirmed, finding there was no showing that the plaintiff had delayed filing suit in reliance

on the defendant hospital's conduct." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 242, 659 S.E.2d 213, 226 (Ct. App. 2008), rev'd sub nom. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009); citing Black v. Lexington School Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997).

Here, Appellant cannot claim it meets the three elements required of the party seeking estoppel. While DHEC staff may or may not have made certain statements in the meeting with Appellant relating to the status of the Minor Permit Modification Decision, it was Appellant's duty to determine the truth and its legal rights and cannot now claim it blindly relied on DHEC staff to make such a determination. Appellant clearly had the means of knowledge of truth as to the facts in question, as a municipality with counsel. In fact, when asked by the lower court what changed that made Appellant decide to file the RFR with the Board, it had no answer. Rather, Appellant stated in open court the reason for the delay from December 2016 to late March 2016 as follows:

> THE COURT: Then there is also, and I think the County has also acknowledged that they met with DHEC in December of 2015 at which point there was discussion about the permit. They were later provided a copy of the permit. My question to you is, when they received those notices, is what they are contesting now is the issuance of that permit, when they received notices that that permit had been issued, why – what took them so long to file their request for review with the DHEC Board.
>
> MR. POLIAKOFF: As far as county government, it was a done deal. It was already a final agency decision at that point in time. I agree with your Honor, it would have been better to have filed that request sometime in January, February or thereabout, once they ---
>
> THE COURT: Well why wasn't that done? Let's get to the arguments on your equitable tolling:
>
> MR. POLIAKOFF: The County was trying to figure out what to do.

(R. p. 119:1-21).

MRR does not waive its argument that the Minor Permit Modification Decision was not required to be public noticed or mailed to Appellant or any other parties, because it was properly treated as "minor" modification and because no parties asked to be treated as "affected persons" when the Permit was originally issued in 2008. Notwithstanding this position, any statements made in the December, 2015, meeting between staff of DHEC and Appellant do not trigger the drastic remedy of equitable estoppel in this case. Appellant presented no evidence to the ALC that: (1) misrepresentations as to the facts and its rights were made by DHEC; (2) it had no means of knowledge to the facts; and (3) it relied on those statements to its detriment. Therefore, equitable estoppel should not be provided here.

v. <u>The ALC properly dismissed the case for failure to exhaust administrative remedies and not Rules 12b(6) or 56, SCRCP.</u>

Appellant tries to distract the Court from its admitted failure to file its RFR within fifteen (15) days of receiving actual notice by improperly characterizing the lower court's ruling as one for summary judgment. Appellant gets there by first arguing the parties motions to dismiss were based on Rule 12(b)(6), SCRCP, even though no party's motion was based on Rule 12(b)(6). Appellant than takes another leap and argues, because the lower court looked outside the Request for Contested Case Hearing document ("the complaint"), the motions to dismiss were converted to motions for summary judgment under Rule 56 of the SCRCP and granted as such. Appellant than says because the lower court looked outside of the facts stated in its "complaint" to find it had actual notice (which is not allowed in ruling on summary judgment) the lower court ruling should be overturned. This argument is creative but has no basis in fact or procedure.

Here, MRR and DHEC's Motions to Dismiss were not Rule 12(b)(6), SCRCP, motions and the Order of the Court was not based on Rule 12(b)(6). Also, neither MRR nor DHEC moved,

in the alternative, on Rule 56, SCRCP. Therefore, the ALC was not required to look only at the Complaint (or Request for Contested Case) to decide whether Appellant exhausted its administrative remedies. Rather, MRR's motion was made pursuant to Rules 11, 19 and 38 of the SCALCR and Rule 12(b)(1), SCRCP. MRR's motion was also pursuant to S.C. Code Ann. § 44-1-60(A)-(E) and 1-23-380 of the APA. Failure to comply with the S.C. Code Ann. § 44-1-60 fifteen (15) day timeframe to file a RFR with the Board, as required by S.C. Code Ann. § 1-23-380, is grounds for dismissal for failure to exhaust administrative remedies. This is the basis of the lower court's decision.

As stated above, the lower court held that Appellant cannot request the ALC hear its review because the Court lacked appellate jurisdiction over the appeal. Great Games, Inc. v. S.C. Dep't. of Revenue, 339 S.C. 79, 82, 529 S.E.2d 6, 7 n. 5 (2000); Allison v. W.L. Gore & Assocs., 394 S.C. 185, 188-89, 714 S.E.2d 547, 549-50 (2011) (noting it is a general rule "that an appellate body may not extend the time to appeal"). The lower court correctly held that it did not have appellate jurisdiction over the Appellant's request where it failed to timely file its RFR with the DHEC Board. The lower court determined the facts in the pleadings and oral arguments supported a finding that Appellant failed to comply with S.C. Code Ann. § 44-1-60 and thus, could not avail itself of judicial review under S.C. Code Ann. § 1-23-380(A). The lower court did not hold that Appellant failed to state facts sufficient to constitute a cause of action under Rule 12(b)(6), S.C. R. Civ. P. – and no party asked the Court to do so. Therefore, cases cited by Appellant addressing conversion of Rule 12(b)(6) motions to Rule 56 motions are not relevant to this matter.[5]

[5] Appellant has misrepresented the facts and findings in the case law cited to support its position. Regarding, conversion to Rule 12(b)(6), the Appellant cites to Capital City Ins. Co. v. BP Staff, Inc. case for support. Capital City Ins. Co. v. BP Staff, Inc.; citing Unisys Corp. v. SC Budget and

B. The ALC correctly denied Pickens County's request for discovery.

On July 29, 2016, MRR moved the ALC to stay all discovery in this matter until the ALC adjudicated the Motion to Dismiss filed by MRR contemporaneously to the Motion to Stay Discovery and issued a final decision on same.

Rule 26(b)(1), SCRCP, provides parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." However, Rule 26(c) provides that "[u]pon motion by a party . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including . . . that the discovery not be had." Similarly, ALC Rule 21(A) provides "[u]pon motion for good cause shown or upon his own motion, discovery may be expanded or curtailed by the administrative law judge."

Control Bd., 346 S.C. 158, 551 S.E. 2d 263 (S.C. Aug. 14, 2001)). The Capital City Ins. case, cites Unisys Corp. v. SC Budget & Cntrl Bd. for the proposition that 12(b)(6) can be the appropriate method to dismiss a case for failure to exhaust administrative remedies. Unisys Corp. v. SC Budget and Control Bd., 346 S.C. 158, 551 S.E. 2d 263 (S.C. S.Ct. (Aug. 14, 2001)). However, Unisys involved a lawsuit filed in circuit court not as an appeal of an administrative review board's decision, but as a separate suit running parallel to the administrative process. The State moved to dismiss under Rule 12(b)(1), 12(b)(6) and 12(b)(8). The Court held that the procedure in the Procurement Code was the exclusive means of resolving the dispute and of the three motions plead, both 12(b)(6) and 12(b)(8) (since the procurement appeal was still pending) were proper bases for dismissal. Again, 12(b)(6) was not pled in this case by any party. To jump from a 12(b)(6) case to a summary judgment ruling, Appellant cites to Brown v. James, 389 S.C. 41, 48–49, 697 S.E.2d 604, 608 (Ct. App. 2010). In Brown, the lower court did not, *sua sponte*, convert the case from a Rule 12(b)(1) to a Rule 12(b)(6) motion to dismiss, then convert the Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment. Rather, in that case, the Defendant Superintendent filed "a motion to dismiss under Rule 12(b)(6), SCRCP, or in the alternative, a motion for summary judgment under Rule 56, SCRCP." Brown v. James, 389 S.C. 41, 48–49, 697 S.E.2d 604, 608 (Ct. App. 2010) The lower court there dismissed the case for failure to exhaust administrative remedies. The Court of Appeals held the lower court based its decision on facts found during discovery (which was had in that case prior to the ruling) and not simply the facts in the complaint, and thus, the case was resolved under the plead and argued motion for summary judgment under Rule 56, not Rule 12(b)(6).

Rulings of the ALC in matters involving discovery "must not be disturbed on appeal absent a clear showing of an abuse of discretion." Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 352, 559 S.E.2d 327, 334 (Ct.App. 2001); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001), cert. denied. "An abuse of discretion occurs when there is no evidence to support the trial judge' factual conclusion or when the ruling is based upon an error of law." Id.

Here, in the interest of judicial economy and efficiency, and to avoid undue burden and expense on the parties, on September 7, 2016, the ALC correctly Ordered a stay of discovery pending final decision upon MRR's Motion to Dismiss. (Respondents MRR and DHEC's Joint Response in Opposition to Movant's Motion to be included as Appellants, Exhibit D, April 10, 2017). The facts in which the Court based its decision on appeal are not in dispute: (1) DHEC provided public notice and actual notice of the 2008 permit to Appellant and all parties ; (2) no person, including the County and the interviewers requesting in writing to be treated as an "affected party" to any future decisions or the 2008 permit; (3) DHEC treated the modification in August of 2015 as "Minor" and did not public notice prior to issuance; (4) the Appellants received actual notice at the lasts on January 11, 2017; and (5) Appellants did not file their RFR with the DHEC Board until March 23, 2015. Discovery of in this case would not, could not have shed light on the only issue but the Court: why the county failed to file the RFR within 15 days of actual notice.

C. The ALC correctly dismissed the case on the basis of timeliness without addressing the request for intervention.

According to representations made by Appellant and DHEC records, Appellant received actual notice of the Minor Permit Modification in December of 2015 and received a copy of the Minor Permit Modification no later than January 11, 2016. (R. pp. 471-502; see also R. pp. 189-191) Appellant filed a RFR of the Minor Permit Modification on or about March 23, 2016. Robert

L. Traber, Matthew W. Stone, Randolph E. Revis, Sr. (P.R. Randy Martin), Tony Charping and Randall Kind (the "Neighboring Property Owners") were not named as parties, were not referenced or identified in Appellants' pleadings, or otherwise involved in Appellant's RFR to the DHEC Board. On April 21, 2016, the DHEC Board declined in writing to hold a final review conference. After Appellant filed its Request for Consented Case (May 19, 2016), MRR and DHEC filed their Motions to Dismiss (July 25, 2016 and July 29, 2016), and MRR filed a Motion to Stay Discovery (July 29, 2016). Appellant then filed a Motion to Intervene on behalf of the Neighboring Property Owners (August 18, 2016). The Motion to Intervene was filed in an attempt to "cure" the untimeliness of the Appellants' RFR to the DHEC Board.

On September 7, 2016, the ALC held a conference call with the parties whereby the Court listened to the bases of the pending motions and ruled via email the "Motion to Intervene be HELD IN ABEYANCE pending the Court's decision on the Motions to Dismiss." (Respondents MRR and DHEC's Joint Response in Opposition to Movant's Motion to be included as Appellants, Exhibit D, April 10, 2017).

On December 2, 2016, a hearing on the MRR and DHEC's Motions to Dismiss was held at the ALC in Columbia, South Carolina. During the hearing, counsel for Appellants attempted to argue it's Motion to Intervene. The transcript reflects the arguments made during the hearing and the ALC's position on the attempt to prematurely argue those motions during the Motions to Dismiss hearing:

> "MS. LINEN: Your Honor, Mr. Poliakoff continues to reference adjoining landowners and that they weren't noticed about this decision, but he represents Pickens County.
>
> THE COURT: Yes.

> MS. LINEN: And I know he has a Motion to Intervene, but that had not been addressed and they have not intervened yet. So, I mean, I think that, you know, that he should contain his comments to his clients and not the clients that have not been brought into this case as of yet.
>
> MR. POLIAKOFF: Your Honor ---
>
> THE COURT: MR. Poliakoff, I do agree that, we're only -- the only parties to this action at this point is Pickens County and I have held your motion in abeyance on whether those adjoining landowners would be allowed to ---

(R. p. 123:3-19).

On December 12, 2016, the ALC issued an Order Granting Respondents' Motion to Dismiss. (R. pp. 1-5). Appellant did not file a Motion for Reconsideration of the ALC's order requesting that the Court consider its Motion to Intervene that was filed on August 18, 2016. (R. pp. 1-5). On January 11, 2017, Appellant filed its Notice of Appeal to this Court the Court's Order Granting MRR Pickens' Motion to Dismiss. The Neighboring Property Owners were not named in Appellant's Notice of Appeal to this Court because they were not parties to the lower case. On March 29, 2017, the Neighboring Property Owners served this Court with a Motion to be Included as Appellants. After consideration of Memoranda both in support of and in opposition to the motion, this Court denied the Motion to be Included as Appellants. (See Order Denying Intervenors Motion to be Included as Appellants, June 7, 2017).

i. <u>Neighboring Property Owners' Motion to Intervene in the underlying ALC case was moot and did not give rise to party status for the Neighboring Property Owners.</u>

Neighboring Property Owners argue because they filed a Motion to Intervene in the underlying ALC case, they were a party to the case and are now properly a party to this Appeal. Neighboring Property Owners implied the ALC had a duty to rule on their Motion to Intervene, notwithstanding the pending Motion to Dismiss. However, South Carolina Courts have

consistently held, where a Motion to Dismiss was filed prior to a Motion to Intervene, such that granting the Motion to Dismiss would make the Motion to Intervene moot, the Motion to Dismiss should be considered first. Western Carolina Regional Sewer Authority v. S.C. Dep't of Health & Envtl. Control, 96-ALJ-07-0547-CC, 1997 WL 435927 (April 10, 1997); Thomas and Victoria Rogers v. S.C. Dep't of Health & Envtl. Control, 01-ALJ-07-0402-CC, 2001 WL 139745 (October 23, 2001); Brenda Bryant v. S.C. Dep't of Health & Envtl. Control, 01-ALJ-07-0404-CC, 2001 WL 1326513 (October 9, 2001). Whether the matter was dismissed for lack of jurisdiction or procedural issues is not relevant. Where no judicial action exists in which to join in, there can be no intervention.

In Western Carolina, the ALC considered Western Carolina's motion to voluntarily dismiss a permit contest. Also before the ALC was a Motion to Intervene by Suitt Construction. Because dismissing the case would make the motion to intervene moot, the ALC dismissed the case. Western Carolina, 1997 WL 435927, at *1. Likewise, in Rogers the ALC held, where three motions were pending, one of which was a Motion to Dismiss, the motion to dismiss would be heard first. Rogers, 2001 WL 139745, at *1. The Court reasoned, if the case was dismissed, the issues raised in the other two motions were moot. Id. Finally, in Bryant the ALC held where multiple motions to dismiss were pending along with a motion to intervene, "[s]ince this order is issued based on the two motions to dismiss made by the Respondents, there is no reason to reach the issues" raised in the motion to intervene. Bryant, 2001 WL 1326513, at *4 (emphasis added). If in this scenario a Motion to Dismiss was granted, there would no longer be any judicial "action" into which a moving party could intervene, and the Motion to Intervene should not be granted. Id.; citing Ex Parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661, 664 (1993)(holding because "Reichlyn's

motion to intervene was filed after DHEC and COCC entered into a consent order ... there is no ongoing judicial 'action' into which Reichlyn can intervene.").

The case of S.C. Coastal Conservation League is also instructive in this matter. In that case, the South Carolina Supreme Court held that a party that does not seek party status in the agency proceedings, as they properly could have done, removed themselves from an active role in the administrative decision making process. "Because they were not "parties," as defined by the Administrative Procedures Act ("APA"), in the previous proceedings, Petitioners lack standing under the APA to challenge the resulting order." S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 97-ALJ-07-0763-CC, 1998 WL 229742, at *3 (Apr. 14, 1998); citing Home Health Services, Inc., 379 S.E.2d at 736 (Ct. App.. 1989); David E. Shipley, South Carolina Administrative Law at 7-25 (2d ed. 1989) (to have standing to seek judicial review of an agency's decision, a person aggrieved by a final decision in a contested case must have had standing in the initial agency proceeding, and he also must have participated in the case as a "party;" and if a person "received notice and decided not to participate in the agency proceeding, then he should not have standing to secure review.").

Because Neighboring Property Owners' attempt to intervene in the underlying ALC case was mooted by the Court's grant of Respondents' Motion to Dismiss, there was no judicial action into which Neighboring Property Owners may have intervened and Neighboring Property Owners were never a party to the case.

ii. Neighboring Property Owners' are not a party to the underlying ALC case because they did not properly seek nor were they entitled to party status.

In their Motion to be Included as Appellants, Neighboring Property Owners cited SCALC Rule 2(H), which defines a party to a case as "each person or agency named or admitted as a party

or properly seeking and entitled to be admitted as a party, including a license or permit applicant." SCALC Rule 2(H). Neighboring Property Owners relied on their filing of an untimely motion to intervene to support their argument they were "properly seeking and entitled to be admitted as a party." Id. Neighboring Property Owners were neither "properly seeking," nor were they "entitled to be" a party to the ALC case and this Court therefore correctly decided they were not entitled to be a party to this Appeal.

South Carolina courts have held, even where a party may have been "entitled to be" a party to the underlying case, where the potential party did not "properly seek" review, it should not be entitled to seek review on appeal. Home Health Services, Inc. v. S.C. Dep't of Health & Envtl. Control, 298 S.C. 258, 379 S.E.2d 734 (1989). Neighboring Property Owners were never a party to the underlying ALC case, nor were they "entitled to be." There was no underlying judicial action into which Neighboring Property Owners may have intervened, so intervention was never "properly" sought.

Furthermore, to become a party to this Appeal, Rule 201(b) requires Neighboring Property Owners must be "a party aggrieved by an order, judgment ... or decision ...." SCCAPR 201(b). Neighboring Property Owners were not "a party aggrieved by an order, . . . or decision . . ." because they were not a party to the ALC matter and Pickens County's Motion on behalf of Intervenors to Intervene had been held in abeyance and not ruled upon. Moreover, after the Motion to Dismiss was issued by the ALC, Appellant did not move for reconsideration of the ALC's Order Granting Respondents Motion to Dismiss, or request reconsideration of the ALC's decision to hold the ruling on the Motion to Intervene in abeyance. This Court has held "the word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party

of a burden or obligation." Powell v. Bank of America, 379 S.C. 437, 447, 665 S.E.2d 237, 243 (2008) (citing Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). "A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." Id. In light of Powell, Neighboring Property Owners may not properly claim the ALC's denial of subject matter jurisdiction to Appellants based on Appellants failure to timely file their appeal affects Neighboring Property Owners property rights or otherwise bears on their interests. The Court correctly denied Neighboring Property Owners Motion to be Included as Appellants.

III. CONCLUSION

For all these reasons, Respondent MRR Pickens requests this Court to affirm the Order of the ALC dismissing this case prior to discovery in this case and prior to ruling on the Motion to Intervene.

Respectfully Submitted,

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January 7, 2018

Columbia, South Carolina

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SC Court of Appeals

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

Pickens County,.....Appellant,

v.

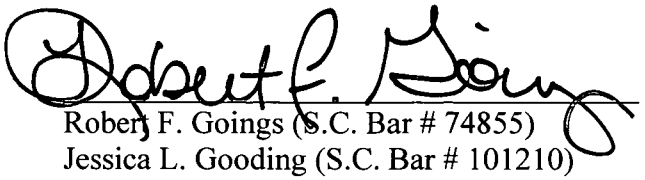
South Carolina Department of Health
and Environmental Control and
MRR Pickens, LLC,.....Respondents,

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,



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