STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2017-002598

Charles S. Blackmon v and South Carolinians for Responsible Practices.....Appellants,

vs.

South Carolina Department of Health and Environmental Control and David Coggins Broilers, ...Respondents.

Charles S. Blackmon v and South Carolinians for Responsible Practices.....Appellants,

vs.

South Carolina Department of Health and Environmental Control and Heath Coggins Broilers, ...Respondents.

Charles S. Blackmon v and South Carolinians for Responsible Practices.....Appellants,

vs.

South Carolina Department of Health and Environmental Control and Jim Young Broilers,.... .....Respondents.

FINAL BRIEF OF RESPONDENTS SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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STATEMENT OF THE CASE

This appeal arises out of the challenge of Appellant Charles S. Blackmon ("Blackmon") and Appellant South Carolinians for Responsible Agricultural Practices ("SCRAP") to the decision of Respondent South Carolina Department of Health and Environmental Control ("Department or "DHEC") to issue Agricultural Permit 19,876-AG to Heath Coggins Broilers ("HC Broilers"), Agricultural Permit 19,886-AG to David Coggins Broilers ("DC Broilers"), and Agricultural Permit 19,889-AG to Jim Young Broilers ("JY Broilers"), hereinafter collectively referred to as the ("Broiler Facilities").[1] Appellant Blackmon filed timely requests for final review ("RFR(s)") with the South Carolina Board of Health and Environmental Control ("DHEC Board") challenging the permits. Each RFR challenged the permits on the same five grounds. Unlike Appellant Blackmon, Appellant SCRAP did not file an RFR challenging any of the permits. In response to each RFR filed by Appellant Blackmon, the Department filed a Statement of Staff Position opposing the claims contained in each RFR on the merits. The Statements of Staff Position also expressly challenged any assertion that anyone other than Appellant Blackmon had filed timely RFRs challenging the permits. Statements of Staff Position at 5, respectively.

On January 18, 2017, the Clerk of the DHEC Board mailed written notification to Appellant Blackmon and the Department counsel notifying them that the Board had declined to hold a final review conference regarding the DC Broilers and HC Broilers

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[1] Appellants also challenged the Department's issuance of agricultural permits to two other broiler poultry facilities in the Mountville, South Carolina area. Appellants' challenges to those facilities were identical to the challenges in these cases and were also assigned to Chief Judge Anderson for adjudication. These cases were scheduled for a hearing on the merits in October 2017 but were settled before the scheduled hearing.

RFRs. Denials of Final Review Conf., DC Broilers and HC Broilers. Five days later, on January 23, 2017, written notification of the denial of a final review conference regarding JY Broilers was mailed to the parties. Denial of Final Review Conf. for JY Broilers.

Thereafter, on February 17, 2017, Appellant Blackmon and Appellant SCRAP filed a timely Request for Contested Case Hearing with the Clerk of the Administrative Law Court ("ALC") regarding each permit. (R. pp. 78-113). To efficiently litigate the case, Appellants, and Respondents filed a joint motion with the ALC for the consolidation of the cases for the purposes of trial only. This motion was granted by the ALC on March 29, 2017. On August 15-17, 2017, a hearing on the merits was held before the ALC.

Prior to the start of the hearing, the ALC heard oral argument on motions filed by Respondents. The first motion was the Department's Motion to Dismiss and (sic) Claims or in the Alternative, for Partial Summary Judgement. In this motion, the Department sought an order dismissing Appellant SCRAP as a party and dismissing all claims in the Request for Contested Case Hearing not claimed directly by Appellant Blackmon. After oral argument by the parties, the ALC ruled in favor of Appellants and denied the Department's motion. (R. p. 371, lines 23-24).

The second motion was Respondent Broiler Facilities' Motion for Partial Summary Judgment. In their motion, the Broiler Facilities sought summary judgment on Appellants' claims that the facilities had to obtain National Pollution Discharge Elimination System ("NPDES") permits to construct and operate their facilities. (R. p. 222). The basis for the Broiler Facilities' motion was the United States Court of Appeals for the Second Circuit's vacation of the requirement for Confined Animal Feeding Operations or CAFOs to apply for an NPDES permit or to prove that they had no potential to discharge in Waterkeeper

Alliance, Inc. v. U.S. EPA, 399 F.3d 486 (2d Cir. 2005), and the Fifth Circuit's vacation of "the requirement that CAFOs which 'propose to discharge' must apply for an NPDES permit" in Nat'l Pork Producers Council v. U.S. EPA, 635 F.3d 738 (5th Cir. 2011). (R. pp. 225-226). After the hearing, the ALC orally granted the Broiler Facilities' motion but did not state its reasons. (R. p. 390, lines 20-22).

Upon conclusion of the motion hearings, a hearing on the merits was held. At the hearing, in addition to the documents entered into evidence, Appellants presented the testimony of seven witnesses, including Respondent David Coggins and an expert witness, Dr. David Hargett, Ph.D. (R. pp. 342-343). The Broiler Facilities presented the testimony of the engineer who signed and stamped the plans submitted to the Department for its review, and the Department presented the testimony of the staff member who reviewed the application and made the decision to issue the permits. (R. p. 343). Subsequently, after the hearing, the ALC contacted the Department and the other parties, and submitted the following three questions to the Department for a response:

1. In light of the following Regulations – 61-9.122.21(a)(1), 61-9.122.23(a), 61-.122.23(d) and 61-9.122.23(f) – does DHEC automatically exclude CAFO's from the requirement for a NPDES permit if it grants a (no-discharge) permit under Reg. 61-43 Part 200?

2. If the permit application process under Regulation 61-43 Part 200 does meet the exception provided in subsection (d)(2) of Regulation 61-9.122.23, how does the Department interpret the notification language in (d)(2) that: 'once the owner or operator had received from the Department notification of a determination under paragraph (f) of the section that the CAFO has 'no potential to discharge' manure, litter, or process wastewater'?

3. Did the applicant provide all of the information specified in sections 122.23(f) and (i)(l)(i) through (ix) as required by 122.23(f)(2)?

Respondent DHEC's Response to Court's Inquiry, dated November 3, 2017. In response to the ALC's request, the Department's counsel drafted a response in conjunction with staff addressing each of the questions in detail. Id.

Thereafter, on November 30, 2017, the ALC issued and filed its Final Order and Decision ("FOD") upholding the Department's issuance of the permits conditioned upon six (6) modifications. (R. p. 34). The modifications pertinent to this appeal are 1) that the DC Broilers and JY Broilers facilities would be relocated to their original positions, which are significantly further from the Little River and 2) that the HC Broiler facility be moved so that it would be located at a distance "equal to the average distance that the [DC] Broilers and [JY] Broiler house will move, subject to the condition that moving the [HC] Broiler houses will continue to allow them to comply with all necessary setbacks." (R. pp. 32-33). Further, the ALC concluded that "an NPDES permit is not required for the activities at issue and that DHEC was not required to determine whether the farms have 'no potential to discharge.'" (R. pp. 5-6).

STATEMENT OF FACTS

Broiler Facilities Application

David Coggins is a poultry farmer who owns a poultry farm located on Lisbon Road in the Mountville community in Laurens County, South Carolina. (R. pp. 57-58; 693, line 25; 700, line 24; and 701, line 1). In 2016, the Department received applications from David Coggins, his son, Heath Coggins, and his son-in-law, Jim Young for agricultural

permits to construct and operate three broiler[2] poultry facilities on Lisbon Road near Highway 72 in the unincorporated town of Mountville which is located in Laurens County, South Carolina. (R. pp. 756, lines 17-21; 1337-1350; and 1496-510). The three facilities are located on a single 255-acre tract ("Site") that is bounded on the south by Lisbon Road and the north by the Little River. The Site is owned by David Coggins and will be subdivided by its current owner after the issuance of the permits is final. (R. p. 1080, lines 12-17; 1220 and 1674).

Each applicant submitted a complete application to the Department that included a Comprehensive Nutrient Management Plan ("CNMP") prepared by a staff member of Agri-Waste Technology, Inc. ("AWT") supervised by Christopher Mosely, AWT's Chief Executive Officer and a registered South Carolina Professional Engineer.[3] (R. p 1052, lines 4-16). Mr. Mosley holds Bachelor of Science and Master of Science degrees in agricultural engineering and is also certified by USDA-NRCS to prepare comprehensive nutrient management plans. (R. pp. 1043-1044, lines 9-1). As part of the drafting of each CNMP, this team used floodplain maps, soils maps, topographical maps, satellite imagery, and visited the site and took GPS coordinates to aid in placement of the facilities. (R. pp. 1049-057, lines 4-22).

The CNMP prepared for the DC Broilers facility specified that the facility would consist of six (6) barns spaced 60 feet apart housing a maximum of 27,000 broilers for a facility total of 162,000 broilers. (R. p. 259). Each barn would be 600 feet long and 45 feet

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2 "A young chicken raised for broiling or roasting." THE CONCISE OXFORD DICTIONARY141 (8th ed. 1990).

3 The CNMPs were prepared by a team of AWT employees supervised by Mr. Mosley, who signed and stamped each plan after reviewing them for compliance with the Standards for Agricultural Permitting.

wide and the broilers would be raised on compacted clay floors covered with wood shavings. (R. p. 259). The broilers would enter the barns at a weight of one ounce and would be removed approximately eight (8) – nine (9) weeks later when they reached nine (9) pounds. (R. p. 259). After removal of the broilers and in the two to three weeks in between flocks, the top few inches of wood shavings in the barn, which would contain the excrement of the birds and drippings from drinking water apparatus lines for the broilers would be removed in a process known as crusting. (R. pp. 715-716, lines 8-12). Once each year, the wood shavings in the barns would be totally removed and replaced with new shavings. (R. p. 259). This schedule would allow the facility to produce 4.5 flocks per year which would produce a total of 988 tons of litter annually that would be removed from the site by a licensed manure broker, L & M Litter Brokers. (R. p. 259).

The CNMP also established that the setback distances from the DC Broiler facility to applicable waters of the State exceed all applicable minimum requirements.[4] Specifically, the CNMP established that the required and actual distances are as follows:

1) Waters of the State located Downslope (excluding ephemeral & intermittent streams): Required – 100 feet; Actual- 1975 feet;

2) Outstanding Resource Waters, Critical Habitat for Endangered Species, Shellfish Harvesting Waters: Required - 100 feet; Actual – 27,129 feet;

3) Ephemeral or Intermittent Streams located Downslope: Required – 100 feet; Actual – 428 feet; and

4) Ditches or Swales located Downslope: Required – 50 feet; Actual – 164 feet.

(R. p. 1222).

[4] Appellants limited their challenge to the Permits to impacts on surface waters of the State. (R. 823, lines 21-24).

The CNMPs for the HC Broiler and JY Broiler facilities also established that each facility would consist of six (6) barns 600 feet long and 66 feet wide spaced 60 feet apart. Each barn would house a maximum of 39,600 broilers for a facility total of 237,600 broilers at each facility. (R. p. 1338). The flock would be managed by each facility in a manner similar to that used by the DC Broiler facility. Specifically, each facility would take in chicks weighing one ounce and remove the broilers in eight to nine weeks when they were nine pounds. In addition, the facility would crust in between flocks and totally remove and replace the litter once a year. (R. pp 1335 and 1495). The HC Broiler facility would use L & M Litter Brokers to remove the 1,449 tons of litter produced annually. (R. p. 1335). The JY Broiler facility would dispose of its litter by land applying it on field designated in the CNMP, with the excess being removed by L&M Litter Brokers. (R. p. 1497).

Both the HC Broilers and JY Broilers CNMPs also established that the setback distances from each facility to waters of the State exceed all applicable minimum requirements. Specifically, the CNMPs established that the required and actual distances are as follows:

For HC Broilers:

1) Waters of the State located Downslope (excluding ephemeral & intermittent streams): Required – 100 feet; Actual - 834 feet;

2) Outstanding Resource Waters, Critical Habitat for Endangered Species, Shellfish Harvesting Waters: Required - 100 feet; Actual – 26,859 feet;

3) Ephemeral or Intermittent Streams located Downslope: Required – 100 feet; Actual – 278 feet; and

4) Ditches or Swales located Downslope: Required – 50 feet; Actual – 135 feet.

(R. p. 1338).

For JY Broilers:

1) Waters of the State located Downslope (excluding ephemeral & intermittent streams): Required – 100 feet; Actual - 1760 feet;

2) Outstanding Resource Waters, Critical Habitat for Endangered Species, Shellfish Harvesting Waters: Required - 100 feet; Actual – 27,498 feet;

3) Ephemeral or Intermittent Streams located Downslope: Required – 100 feet; Actual – 426 feet; and

4) Ditches or Swales located Downslope: Required – 50 feet; Actual – 113 feet.

(R. p. 1497).

Department Review

Each application was reviewed by William Chaplin. Mr. Chaplin is a DHEC employee with more than 23 years of experience, including more than ten years in agricultural permitting, of which eight were as the section manager for the program. (R. p. 1147-1148, lines 17-23). Mr. Chaplin considered all the applicable enumerated requirements set forth in the Standards for Permitting Animal Facilities, including water resources for each facility, and contemporaneously memorialized his findings and conclusions in a document entitled Agricultural Permitting Review Checklist Summary. (R. pp. 1668-1688 and 1695-1699). Mr. Chaplin used the Department's geographic measuring tool, GIS (geographic information system), to check the accuracy of the actual setback distances recorded in Section 5 of the Application Section in the CNMPs. He found the distances to be generally accurate and, for the few inaccurate measurements, he had AWT submit corrected pages for inclusion in the CNMPs.[5] (R. pp. 1154, lines 15-25; 1155, lines 1-2; 819, line 25 and 1157, lines 1-13).

[5] The CNMPs contain both the original page with an "X" strikethrough and the corresponding corrected page. For example, (R. p. 1222) corrects (R. p. 1223) of the DC Broilers CNMP.

Mr. Chaplin's review also included the review and consideration of the 2004 TMDL ("Total Maximum Daily Load") document issued by the Department for the Little River. (R. p. 1166, lines 8-12). To update the information contained in that document, Mr. Chaplin consulted the most current Clean Water Act Section 303(d) list of impaired waterbodies, which was issued by the Department in 2014. Mr. Chaplin also updated his information on the Little River TMDL by consulting with the Department's watershed manager for the Little River, who informed him that the Department no longer considered agricultural facilities pursuant to S.C. Code Ann. Regs. 61-43 Part 200 to be contributors to fecal coliform pollution of waters of the State because they are no discharge facilities. (R. pp. 1166, line 2 and 1167, lines 1-15).

Further, Mr. Chaplin's review determined that the CNMPs included plans for the establishment and maintenance of post construction stormwater controls around the Broiler Facilities. (R. pp. 1173, lines 2-25; 1294, 1428 and 1532). These controls would be in addition to the controls contained in the State Stormwater NPDES General Permit.

Based on his conversation with the watershed manager, the facts that the DC and HC Broiler Facilities would use manure brokers for the disposal of manure and the JY Broiler Facility would land apply in areas outside of the Little River watershed, and the fact that stormwater runoff would be addressed both in the CNMPs and thorough coverage under the State Stormwater General Permit, Mr. Chaplin concluded that no additional distance from the Broiler Facilities to waters of the State were required, even though the Little River remains subject to the TMDL. (R. pp. 1167, lines 3-8; 1184, lines 1-15; 1551, 1670-1671; 1681-1682 and 1692-1693).

Finally, Mr. Chaplin considered all relevant comments received from the public. One of the comments received by Mr. Chaplin was from Mary Basel, who, along with her sister Margaret Sparrow, own the property on Lisbon Road across from the proposed facilities and requested that the facilities be moved further from Lisbon Road to provide a 1000-foot residential setback from their proposed home sites. (R. pp. 573-574, lines 19-4). Although there is no required setback from structures that do not meet the regulatory definition of the term "residence,"[6] Mr. Chaplin requested that the Broiler Facilities modify their CNMPs to move the locations of the facilities closer to the Little River. (R. pp. 1676-1677, lines 5-18; and 1674).

After conducting a thorough review of each application, Mr. Chaplin concluded that the applications complied with the Standards for Permitting of Animal Facilities and noted this on the checklist for the review of each facility. (R. pp. 1668-1699). He also concluded that the Department should issue permits to the Broiler Facilities authorizing their construction and operation conditioned on the Broiler Facilities maintaining a partial vegetative buffer to provide further separation from property owned by Ms. Basel and her sister Ms. Sparrow. (R. pp. 233, 238 and 243).

Merits Hearing

During the hearing on the merits, Appellants presented the testimony of lay witnesses and their expert regarding the issue of potential impacts to waters of the State. Appellants' expert witness, Dr. David Hargett, Ph.D. opined on the potential impacts to waters of the State. Dr. Hargett was qualified by the ALC as an expert in soil and water

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[6] In pertinent part, residence is defined a permanent inhabited structure that is occupied by the same person or persons for more than 12 hours a day. S.C. Code Ann. Regs. 61-43 Part 50(EEE).

resource management and testified as to the effect of the Broiler Facilities upon waters of the State. (R. p. 828, lines 5-17).[7] During direct examination, Dr. Hargett testified that the greatest risk to waters of the State is sediment caused by the mass grading needed to construct the Broiler Facilities because along its northern boundary, the Site slopes steeply down to the Little River. (R. p. 856, lines 8-20). On cross-examination, Dr. Hargett acknowledged that his concerns regarding sediment impacts from stormwater runoff upon the location of the facilities along the Little River property boundary would be alleviated by a combination of riparian buffers with natural vegetation and if the facilities were moved from the permitted locations to the locations originally proposed by the applicants. (R. pp. 911-912, lines 19-5; 912, lines 1-5; 958, lines 1-15, 959-960, lines 17-1). Dr. Hargett also acknowledged that absent rain events, uncovered manure piles would not impact waters of the State. (R. p. 995, lines 21-25). Moreover, Dr. Hargett acknowledged that the State's stormwater permitting process established a robust comprehensive regulatory scheme that addressed all aspects of runoff during construction activities and post construction operations. (R. pp. 942-944, lines 2-12).

Further, Dr. Hargett acknowledged that the best way for him to collect the data to make an informed determination of the suitability of the site for an agricultural facility would be to visit the site, However, he did not visit the site in this case despite having done so in previous cases. (R. p. 897, lines 4-25).

STATUTORY/REGULATORY FRAMEWORK

Standards for Permitting Animal Facilities

[7] Dr. Hargett testified that he would not render opinions on the effects of poultry facilities on: air quality; epidemiology, and respirational health issues in general and on the health of workers at the facilities; entomology; appraisal of residential property values; and groundwater. (R. pp. 818-823) (generally)).

The construction and operation of animal facilities in South Carolina is regulated by the Standards for Permitting of Animal Facilities, S.C. Code Ann. Regs. 61-43 (2011). The Department promulgated these regulations in 1998 and amended them in 2002, both times pursuant to Section 48-1-30 of the Pollution Control Act.[8] Both the original promulgation and amended regulations were reviewed and approved by the Legislature in accordance with the Administrative Procedures Act.

The amended regulations established a comprehensive permitting scheme for the construction, operation, and closeout of animal facilities. The regulations are set forth in six substantive Parts[9] (Parts 50, 100, 200, 300, 400, and 500) relating to the following issues: 1) Part 50 – the definition of general terms; 2) Part 100 – swine facilities; 3) Part 200 – animals other than swine; 4) Part 300 – the use of innovative and alternative technologies; 5) Part 400 – the operation of manure brokers; and 6) Part 500 – the registration of integrators.[10] Further, four of the Parts (Parts 100, 200, 400, and 500) contain provisions authorizing the imposition of criminal and/or civil penalties by the State for the violations of these regulations. S.C. Code Ann. Regs. 61-43 Parts 100.200; 200.200; 400.130; and 500.60.

Pertinent to this case are the provisions contained in Part 200. As set forth in the regulation, the purpose of the regulation is to regulate:

> 1) "the growing or confining of animals, processing of animal manure and other animal by-products, and land application

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8 This section authorizes the Department to promulgate regulations implementing the requirements of the Pollution Control Act. S.C. Code Ann. § 48-1-30 (Rev. 2008 & Supp. 2017).

9 The seventh Part, Part 600, is a severability clause.

10 An "integrator" is "any entity or person(s) who contracts with agricultural animal producers to grow animals to be supplied to this person(s) at the time of removal from the animal growing houses or facilities and exercises substantial operational control over an animal facility along with the owner/operator of the facility. S.C. Code Ann. Regs. 61-43 Part 50(JJ).

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;"

2) "the utilization of animal manure and other animal by-products generated at animal facilities," including land applying animal manure and other animal by-products;

3) "the frequency of monitoring and record keeping requirements for producers who operate animal facilities;

4) "the proper operation and maintenance of animal facilities;" and

5) the "animal facilities and manure utilization areas location as they relate to protection of the environment and public health."

S.C. Regs. Ann. 61-43 Part 200.20. Central to achieving these goals is the provision that all permits issued under the Part 200 provisions are "no-discharge permits." S.C. Regs. Ann. 61-43 Part 200.20(B).

To determine whether a new facility should be constructed or an existing facility can be expanded, the applicant must submit to the Department an application package containing the following pertinent items for the Department to review: 1) a completed application form; 2) an Animal Facility Management Plan prepared by qualified Natural Resources Conservation Service personnel or a SC registered professional engineer; and 3) plans and specifications for all other manure treatment or storage structures, such as holding tanks or manure storage sheds. S.C. Code Ann. Regs. 61-43 Part 200.50(B)(1), (2), and (8).

The decision-making process for the issuance of non-swine animal facility permits is set forth in the Part 200 provisions. Pursuant to Part 200.70, the Department is required to review applications with the goal of preventing, to the extent reasonably possible,

increases in pollution above state and/or federal standards from new or enlarged facilities. S.C. Code Ann. Regs. 61-43 Part 200.70(E). The Department is also required to review each application to determine whether, after considering a non-exclusive list of 12 factors, the Department should increase the setback distances. S.C. Code Ann. Regs. 61-43 Part 200.70(F). The setback distances referred to in Part 200.70(F) are the minimal distances between an animal facility (animal growing areas, houses, pens, or barns) and the following areas pertinent to this case:

- public or private drinking water wells not owned by the applicant (200 feet);
- waters of the State (including ephemeral and intermittent streams) located down slope from the facility (100 feet);
- ditches or swales located down slope from the facility, except for those used for site drainage (50 feet); and
- the lot line of real property owned by another person and a large animal facility (average live production weight greater than 500,000 pounds) (400 feet). S.C. Code Ann. Regs. 61-43 Part 200.80(A)(1), (2), (3), (5), and (6). In addition, the setback provisions prohibit the placement of any regulated animal facility within the 100-year floodplain. S.C. Code Ann. Regs. 61-43 Part 200.80(A)(4).

Once a decision whether to issue a State Animal Facility permit has been reached by the Department, the applicant, all persons who submitted written comments to the Department for evaluation, and all persons who attended the public meeting regarding the application, if held, will be notified in writing of the decision. S.C. Code Ann. Regs. 61-43 Part 200.60(G). If the State Animal Facility permit is to be issued, the Department will also publish notice of the issuance of the permit in a local newspaper of general circulation

within the area of the animal facility. S.C. Code Ann. Regs. 61-43 Part 200.60(H). Both the written notification and the public notification in the newspaper will contain the name of the facility, a description of the operation and how manure will be handled, and instructions on how to appeal the Department decision. S.C. Code Ann. Regs. 61-43 Part 200.60(K).

Regulating Concentrated Animal Feeding Operations

1. Original EPA CAFO Rule

In 1976, pursuant to the authority granted it by the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), the United States Environmental Protection Agency ("EPA") issued a rule regulating the discharge of pollutants from confined animal feeding operations ("CAFOs") into waters of the United States. Nat'l Pork Producers Council, 635 F.3d at 743, 753 (citing 41 Fed. Reg. 11, 458 (Mar. 18, 1976)). This rule provided that CAFOs that discharge pollutants into waters of the United States must have an NPDES permit or be subject to civil or criminal liability under the Clean Water Act. Id., at 733-734. When the Department promulgated the legislatively reviewed and approved Standards for Permitting Animal Facilities to govern the construction and operation of animal facilities in South Carolina, the Department did not also codify the federal CAFO Rule into State law because it considered the state permitting scheme that expressly banned discharges to waters of the State by animal facilities to be more protective to the environment than the federal permitting scheme that allowed such discharges if regulated. See S.C. Code Ann. Regs. 61-43 Part 200.20 ("Permits issued under this regulation are no-discharge permits.") and Part 200.140(A)

("There shall be no discharge of pollutants from the operation into surface waters of the State (including ephemeral and intermittent streams).") (emphasis added).

2. 2003 Amendment To the EPA CAFO Rule and DHEC's Enactment of the State CAFO Regulation To Make the State's NPDES Consistent With Federal Law.

After decades of regulating only CAFOs that discharge, on February 12, 2003, the EPA published a final rule in the Federal Register amending the CAFO regulations. 68 Fed. Reg. 7,175 (Feb. 12, 2003). The revised 2003 CAFO Rule "shifted from a regulatory framework that explained what type of CAFO *must have* a permit to a broader regulatory framework that explained what type of CAFO must apply." Nat'l Pork Producers Council, 635 F.3d at 734 (emphasis in original).

In addition, the 2003 EPA Rule provided that

> [t]he Rule requires that all CAFO owners or operators must apply for an individual NPDES Permit or submit a notice of intent for coverage under an NPDES general permit . . . There is however, an exception: Section 122.23(d)(2) provides, in effect that an owner or operator of a Large CAFO need not seek coverage under an NPDES permit if the owner or operator secures a determination from the director of the relevant permitting authority that the Large CAFO has 'no potential to discharge' manure, litter or process wastewater.

Nat'l Pork Producers Council, 635 F.3d at 753.

Because the EPA amendment expanded the reach of CAFO NPDES permitting scheme to include "the potential to discharge," the Department determined that the State Animal Facility permitting program was no longer consistent with federal law. As the Administrator of an authorized State NPDES Program, the Department must maintain the Program in compliance with federal law or face the possibility that the EPA will suspend or terminate its authorization of the Program and take over its administration. 33 U.S.C.S.

§§ 1342(b) and (c)(2). Accordingly, the Department amended the State's NPDES Program to add the federal CAFO requirements[11] to the South Carolina NPDES Program.[12] In the Preamble to the final regulation filed in the December 23, 2003, volume of the State Register, the Department set forth the purpose of the regulation and its limitations.[13] Specifically, the Preamble states as follows:

> The Department is amending Regulation 61-9 to incorporate Federal Concentrated Animal Feeding Operation (CAFO) discharge permit regulations promulgated at 40 CFR 122. The requirement for South Carolina to include equivalent regulations is stated at 40 CFR 123.25 and 36. See the Discussion of the Revisions below and the Statement of Need and Reasonableness herein. The amendments are being promulgated to maintain consistency with federal regulations. Neither a preliminary fiscal impact statement nor an assessment report is applicable.
>
> A notice of Drafting for this amendment was published in the State Register on June 27, 2003. No public comments were received from the notice. Notice of Proposed Regulation was published in the State Register September 26, 2003. No comment was received in response to the second notice. The amendments do not require legislative approval.

27 S.C. Reg. 50 (Dec. 23, 2003) (emphasis added). Pursuant to the State Administrative Procedures Act ("APA"), then in effect, the Preamble summarized the Department's rationale and authority to amend the NPDES program to ensure compliance with the provision, which exempted regulations enacted to maintain consistency with federal law

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[11] Pursuant to S.C. Code Ann. § 48-1-50(17), the Department is authorized to "[t]ake all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act," which is common referred to as the Clean Water Act.

[12] The NPDES regulations are codified generally in S.C. Code Ann. Regs. 61-9.122 (2011 & Supp. 2017), and the CAFO provisions are codified specifically in S.C. Code Ann. Regs. 61-9.122.23.

[13] The Administrative Procedures Act ("APA") provides that before a regulation becomes effective it must be published in the State Register. S.C. Code Ann. §§ 1-23-40, -06, and 120 (Rev. 2005 & Supp. 2017).

from the statutory requirement that agency regulations must be reviewed and approved by the General Assembly. Specifically, the statute provides that "General Assembly review is not required for regulations promulgated to maintain compliance with federal law . . . ; however, the synopsis of the regulation required to be submitted by subsection (B) must include citations to federal law, if any, mandating the promulgation of or changes in the regulation justifying this exemption."). S.C. Code Ann. § 1-23-120(G)(1) (1976).[14] The enacted State CAFO regulations are codified at S.C. Code Ann. Regs. 61-9.122.23 (2011).

3. Legal Challenges to 2003 CAFO Rule

After the promulgation of the 2003 EPA CAFO Rule, several plaintiffs filed suit challenging the Rule. The challenges, which were brought by various environmental and industry groups, were consolidated by the federal courts into a single case before the United States Court of Appeals for the Second Circuit. In that case, Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F.3d 486 (2d Cir. 2005), the Second Circuit considered three general categories of claims regarding the CAFO Rule: challenges to the permitting scheme; challenges to the types of discharges subject to regulation; and challenges to the effluent limitations set by the rule. Waterkeeper Alliance, Inc., 399 F.3d at 497. Pertinent to this case, the Second Circuit considered the validity of the "duty to apply" and "potential to discharge" provisions contained in the CAFO Rule and found them to be unenforceable. Specifically, the Second Circuit stated that while the Court "appreciate[d] the policy consideration underlying the EPA's approach to the CAFO Rule, however, [it was] without

[14] In 2011, Section 1-23-120 was amended to expand the requirements of the Department under this provision and the citation for the provision was changed. S.C. Code Ann. § 1-23-120(H)(1) (Supp. 2017). The 1976 edition of the statute was in effect in 2003. Accordingly, hereinafter, all citations to Section 1-23-10 et seq. will be from the 1976 edition unless cited otherwise.

authority to permit it because it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves." Id., at 505 (emphasis in original). Accordingly, the Second Circuit held that the "provisions of the CAFO Rule that . . . require CAFOs to apply for NPDES permits or otherwise demonstrate that they have no potential to discharge [were vacated]." Id., at 524.

4. DHEC Response To Overruling of the 2003 CAFO Rule Provision

The Waterkeeper Alliance, Inc. decision vacating the "duty to apply" and "no potential to discharge" provisions in the 2003 CAFO Rule impacted the State CAFO regulation. Although the Waterkeeper Alliance, Inc. decision was a federal appellate court's ruling construing a federal regulation, it affected the enforceability of the identical provisions in the State CAFO regulation since the regulation was enacted solely for the State NPDES Program to maintain consistency with federal law, and the regulation was not reviewed and approved by the General Assembly. Therefore, the Department determined that it did not have authority to require animal facilities qualifying as large CAFOs to apply for an NPDES permit or demonstrate that they had no potential to discharge.[15] The Department's decision was rendered academic in 2008, when the EPA issued a new CAFO Rule (hereinafter referred to as the 2008 CAFO Rule) that did not contain a requirement that CAFO owners or operators apply for a NPDES permit based on

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[15] At the time the Second Circuit overruled the EPA CAFO Rule provisions, there was no provision of law that authorized the repeal of a regulation promulgated to comply with federal law when the regulation is no longer enforceable because of a change in the underlying federal law. S.C. Code Ann. § 1-23-120 (Rev. 2005). In 2011, the Legislature enacted an amendment to Section 1-23-120 that corrected this problem by providing that "if the federal law underlying regulations exempt from General Assembly review . . . is vacated, repealed, or otherwise does not have the force and effect of law, the state regulation is deemed repealed without legal force and effect as of the date the promulgating state agency publishes notice in the State Register that the regulation has been deemed repealed." S.C. Code Ann. § 1-23-120(H)(1) (Supp. 2017).

a potential to discharge as mandated by the court in Waterkeeper Alliance, Inc.. 73 Fed. Reg. 70418, 73,225 (Nov. 18, 2008).[16]

Although the Department no longer requires animal facilities that qualify as large CAFOs to apply for a NPDES permit pursuant to the State CAFO regulation, the permitting process set forth in S.C. Code Ann. Regs. 61-43 Part 200 nevertheless mandates that the Department determine, among other matters, whether a new or expanded Animal Feeding Operation will discharge to Waters of the State. As part of the application package, the applicant is required to submit an Animal Facility Management Plan prepared by a registered South Carolina engineer or qualified personnel from the Natural Resources Conservation Service.[17] Such plans contain detailed information regarding a multitude of issues including how the animals will be confined and cared for during the operation of the facility and how manure and other potential pollutants will be stored, maintained for beneficial use, and/or disposed of by the facility in order to prevent discharges into waters of the State. S.C. Code Ann. Regs. 61-43 Part 200.50(B)(2).

After reviewing all required regulatory information and any information requested from the applicant, if the Department determines that the animal facility will not discharge pollutants into waters of the State, the facility can be permitted if it also meets other applicable regulatory requirements. S. C. Code Ann. Regs. 61-43 Part 200.70. Department notification of its determination to issue a permit under S.C. Code Ann. Regs. 61-43 Part 200 to the applicant and affected persons requesting notification in writing constitutes the

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[16] The 2008 CAFO Rule was reviewed by the Fifth Circuit in Nat'l Pork Producers Council v. U.S. EPA, 635 F.3d 738 (5th Cir. 2011).

[17] The NRCS is an agency within the United States Department of Agriculture charged with the conservation of the nation's soil and water resources.

Department's determination that the operation of the facility will not allow the discharge of pollutants into waters of the State.

ARGUMENTS

I. APPELLANTS' CLAIMS ARE UNPRESERVED FOR REVIEW BY THIS COURT; THEREFORE, THEY CANNOT BE CONSIDERED.

As a threshold matter, Appellants failed to preserve the claims presented in their Brief. It well established that the losing party below must raise and obtain a ruling from the trial court on all issues that the party intends to raise on appeal. I'On, L.L.C. v. Town of Mt Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Id. The requirement forces the appellant to thoroughly prepare its case and not to purposely or accidently withhold an argument from the lower court as a trump card to obtain a reversal on appeal in order to relitigate the matter anew. Id.

Further, even "[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." Id.; see also Home Med. Sys. v. S.C. Dep't of Revenue, 382 S.C. 556, 562-563, 677 S.E.2d 582, 586 (2009) (holding "Rule 59(e) motions serve a vital purpose for proper issue preservation. As in other appellate matters, we require issue preservation in administrative appeals.").

Here, Appellants raise issues in their brief that they did not raise or receive a ruling upon at the ALC. Specifically, Appellants raise the following issues:

1. "DHEC's position that the issuance of a 'no-discharge' agricultural animal permit constitutes DHEC's determination that the [Projects] have no potential

to discharge," renders the term "'no potential to discharge' as meaningless," which is "contrary to the well-established rule of statutory construction ..." App. Br. at 19-22 (citations omitted).

2. DHEC's interpretation of its regulations that no NPDES permit is required because the Permits are "no discharge" permits "is merely a post hoc rationalization." App. Br. at 23-24.
3. "Appellants need not prove that Respondents will discharge or intend to discharge pollutants" into waters of the State. App. Br. at 24-25.
4. The performance standard for an NPDES permit is not the same as an animal facility permit and "federal best management practices promulgated as effluent standards for CAFOs are intended to be the absolute minimum that States must apply and enforce ...." App. Br. at. 25-26.
5. The issue of whether the Projects require an NPDES permit is ripe for review because "[t]here is nothing contingent, hypothetical or abstract about the duty of [Respondents] to apply for an NPDES or otherwise seek a determination from DHEC that their proposed operations have 'no potential to discharge.'" App. Br. at 26-27.
6. DHEC failed to meaningfully evaluate whether additional or more stringent requirements were required based on the Projects' proximity to impaired waterbodies. App. Br. at 29-32.
7. DHEC's determination that no additional setbacks are required because the facility is a "no discharge" facility is contrary to the rules of statutory construction. App. Br. at 32-35.

8. Requiring Appellants to bear the burden "of proving existing agricultural facilities actually discharge pollutants into waters of the State" creates an impossible and unfair burden on Appellants" because they "lack legal access to existing poultry facilities." App. Br. at 35.
9. If Appellants do in fact bear such a burden of proof, any such burden would not involve proof of actual discharges, but whether discharges may occur from animal facilities. App. Br. at 35-37.

A review of the Record establishes that Appellants either did not raise these issues before the ALC or, if raised, the ALC did not specifically address the issues in its Final Order and Decision. Appellants filed a Notice of Appeal with this Court instead of first filing a Motion to Alter or Amend as provided for in Rule 59(e), SCRCP, and SCALC Rule 29(D) and then filing a Notice of Appeal. The issues presented by Appellants were not preserved because the ALC was deprived of a final opportunity to correct any of the errors now alleged by Appellants or to provide specific findings and/or conclusion of law sufficient to preserve these issues for appellate review. See Shealy v. Aiken City, 341 S.C. 448, 460, 535 S.E.2d 438, 444 (2000) (finding a general ruling by the trial court insufficient to preserve the issue for appellate review absent the filing of a motion pursuant to Rule 59(e), SCRCP). Accordingly, the issues presented by Appellants in their brief are unpreserved and cannot be considered by this Court.

II. THE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE DEPARTMENT'S ISSUANCE OF THE PERMITS TO THE BROILER FACILITIES PURSUANT TO S.C. CODE ANN. REGS. 61-43 PART 200 AND THE ALC'S AFFIRMANCE.

A. Standard Of Review.

An appellate court's review of an ALC decision is governed by the Administrative Procedures Act ("APA"). Specifically, the APA provides as follows:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2017). The review of a Final Order and Decision issued by the Administrative Law Court is "limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law." Engaging and Guarding Laurens County's Environment v. S.C. Dep't of Health and Envtl. Control, et al., 407 S.C. 334, 341-42, 755 S.E.2d 444, 448 (2014) (citing Hill v. S.C. Dep't of Health and Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010)). "'The Court may not substitute its judgment for the ALC's judgment as to the weight of the evidence on questions of fact. In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC

reached.'" Engaging and Guarding Laurens County's Environment, 407 S.C. at 341-42, 755 S.E.2d at 448; Hill, 389 S.C. at 9-10, 698 S.E.2d at 617 (internal citation omitted). Moreover, "'[t]he mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.'" Hill, 389 S.C. at 10, 698 S.E.2d at 617 (citations omitted).

B. The Substantial Evidence In the Record Supports the Department's Issuance Of the Permit To Construct And Operate the Broiler Facilities.

1. The Department has no duty to consider the cumulative impacts of poultry facilities.

Appellants' claim that the Department should have reviewed the cumulative impacts of poultry facilities on the Little River and the surrounding communities is without merit. See App. Br. at 29-30. The regulations applicable to the permitting of poultry facilities makes no mention of cumulative impacts or creates a duty requiring the Department to consider cumulative impacts to the environment from the addition of new facilities to an area with existing facilities. See S.C. Code Ann. Regs. 61-43 Part 200.70. In contrast, the animal permitting regulations applicable to swine expressly mention cumulative impacts and place a duty upon the Department to consider cumulative impacts as part of the review process. Specifically, the provision provides as follows:

> The Department also shall act on all permits so as to prevent degradation of water quality due to the cumulative and secondary effect of permit decisions. Cumulative and secondary effects are impacts attributable to the collective effects of a number of swine facilities in a defined area and include the effects of additional projects similar to the requested permit proposed on sites in the vicinity.

S.C. Code Ann. Regs. 61-43 Part 100.70(G) (emphasis added).

The fact that the regulations limited the duty of the Department to consider cumulative impacts as part of the Department's permitting review solely to swine facilities is a clear indication that the Legislature does not believe that the consideration of such impacts is necessary with other animal facilities. See Horry Tel. Corp. Inc. v. City of Georgetown, 408 S.C. 348, 353, 259 S.E.2d 122, 134 (2014) ("'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'"). Without this duty, the Department has no authority to conduct a cumulative review in this case. See Mungo v. Smith, 289 S.C. 560, 564, 347 S.E.2d 514, 517 (Ct. App. 1986) (quoting 1 A. Jur. (2d), Administrative Law Section 70, Page 88(G)) ("'[A]dministrative agencies are creatures of statute and their power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim.'"). Therefore, Appellants' claim is without merit.

2. The Facilities are sited more than double the applicable minimum distances from Waters of the State.

Appellants' claim that the Department should have considered additional siting distances is belied by the facts in the record. Pursuant to S.C. Code Ann. Regs. 61-43 Part 200.70(F), the Department is authorized to increase minimum setbacks on a case by case basis after considering the enumerated and other factors that the Department determines are relevant. Here, Mr. Chaplin testified that he reviewed the distances for accuracy and had any inaccurate distances corrected. (R. pp. 1154-1156, lines 15-25; 166, lines 1-2). The actual distances were at least double the minimum distance and in some instances many times the required distance. For example, the closest facility to the Little River is the HC Broiler facility, which is located 834 feet away. (R. p. 1338). Although, Appellants' expert expressed concern that the distance was inadequate given the amount of grading necessary

to construct the facility and steepness of the slope from the edge of the facility to the Little River, he acknowledged that stormwater management is part of a separate permit process that would include a review of detailed engineering drawings and calculations on grading and stormwater runoff management for the Broiler Facilities, and would address pre- and post-construction stormwater runoff. (R. pp. 936, lines 1-5; 937-938, lines 20-10). Additionally, "in an effort to address [Appellants'] concerns regarding the potential impacts of the Projects on the waters of the State" the ALC approved the Department's issuance of the State Animal Facility permits to the Broiler Facilities conditioned on the facilities being moved even further away from the Little River than had been approved by the Department. (R. pp. 32-33).

Moreover, the Department review noted that the CNMPs included a stormwater management plan, which would be in addition to the plans that the Department would require as part of the separate stormwater permit review. (R. pp. 1173, lines 2-25; 1295, 1428, and 1532). Further, Dr. Hargett acknowledged that the stormwater permitting program has rigorous requirements addressing a wide range of stormwater issues applicable to construction and post-construction activities. (R. pp. 937-938, lines 2-17).

Accordingly, the substantial evidence establishes that the Department did consider whether additional setbacks were needed and supports the determination that none were needed given that the distances were already greater than the minimums and the fact that stormwater runoff would be reviewed and addressed by the Department during its review of the separate stormwater permit.

3. The Broiler Facilities will not negatively impact the TMDL for the Little River.

Appellants' claim that additional distance between the Broiler Facilities and the Little River is warranted because of the 2004 TMDL for the Little River is also without merit. See Appellants' Br. at 30-31. Part of the Department's review of poultry facility applications is the requirement that the Department may increase the minimum setbacks on a case by case basis considering the enumerated and other factors that the Department may consider necessary. S.C. Code 61-43 Part 200.70(F). As stated above, the Department permit reviewer conducted a review of the Broiler Facilities' applications to determine whether addition distances were needed, and concluded that additional distances were not required. In conducting this review, Mr. Chaplin reviewed the 2004 watershed report upon which the TMDL is based and noted that it identified the Laurens County wastewater treatment facility as the greatest contributor of fecal coliform bacteria to the watershed. (R. p. 1183, lines 13-17). Mr. Chaplin also discussed the TMDL with the Department's watershed manager for the Little River and based on this conversation and his research he determined that no additional setback distances were required. (R. p. 1166, lines 8-23).

Further, it should be noted that the 2004 TMDL only identified poultry facilities as a potential or possible cause, and not a likely or definitive cause of the fecal coliform bacteria impairing the Little River. See (R. pp. 927-929, lines 14-15). There is no empirical evidence that such facilities caused or contributed to the fecal coliform bacteria impairment in the Little River. Indeed, since the issuance of the 2004 TMDL, the Department's data has led it to conclude that animal facilities permitted under the S.C. Code Ann. Regs. Part 200 are no longer a potential source of fecal coliform bacteria since they operate without discharging waste or wastewater into waters of the State. (R. pp. 1183-1184, lines 16-23).

Moreover, since the final placement of the Broiler Facilities by the ALC places them even further from the Little River than the distances set forth in the CNMP, there is not potential for them to discharge into the Little River. Indeed, even Appellants' expert, Dr. Hargett, conceded that such a move would relieve many of his concerns about the Broiler Facilities. See (R. pp 350-351, lines 22-1). Accordingly, this claim is without merit.

C. Appellants Presented No Credible Evidence That the Broiler Facilities Have A Reasonable Potential To Discharge Into Waters Of the State.

Appellants claim that the Department should not have issued State Animal Facility permits to the Broiler Facilities since facilities currently in operation in the Mountville area, including one owned by David Coggins, have been observed discharging into surface waters of the State. In proceedings before the ALC, the complaining party bears the burden of proof. Leventis v. S.C. Dep't of Health and Envlt. Control, 340 S.C. 118, 132, 530 S.E. 2d 643, 651 (Ct. App. 2000). "'The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact.'" Barton v. S. C. Dep't of Prob. Parole & Pardon Servs., 404 S.C. 395, 401, 745 S.E.2d 110, 113 (2013) (alterations in original) (citations omitted). Appellants introduced photographs taken by Kathy Lowman that showed puddles of standing water beside what she testified she thought were manure piles. (R. p 350-351, lines 22-1). ("I can say they were manure piles because I believe it is."). Appellants also introduced satellite photographs collected by Mr. Blackmon that he claims showed uncovered manure piles at several poultry facilities including one currently owned by David Coggins. (R. pp. 506-507, lines 19-7).

As the trier of fact, the ALC considered this evidence and found it unpersuasive and at best anecdotal as it "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 applications to construct and operate broiler facilities." (R. p. 21). In addition, the ALC found this evidence did "not demonstrate that pollutants reached the waters of the state ... or that runoff from these facilities was not controlled by vegetative or riparian buffers." Id. Absent a showing that the ALC's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, there is no basis for this Court to disturb the ALC's finding of fact. See Barton, 404 S.C. at 401, 745 S.E.2d at 113 citing S.C. Code Ann. § 1-23-610(B) (Supp. 2012).[18]

Notwithstanding, Appellants' attempt to explain away their failure to persuade the ALC to find in their favor, by claiming the ALC decision was erroneous because it "looked to [them] . . . for evidence proving that existing permitted facilities actually increased pollution to waters of the State," which they could not obtain since "Appellants lack legal access to existing poultry facilities." App. Br. 34-35. This meritless claim strains credulity since Appellants could have but did not seek access to the Respondent David Coggins' facility by a request to enter pursuant to Rule 34(a), SCRCP, and SALC Rule 21(A) and/or to the non-party facilities by a subpoena pursuant to Rule 45, SCRCP, and SCALC Rule 22. Consequently, there is no reason why Appellants could not have met their burden of proof and their failure to do so is fatal to their claim. See Leventis, 340 S.C. at 132, 530 S.E. 2d at 651.

III. AS AN ADDITIONAL SUSTAINING GROUND, THE "DUTY TO APPLY" AND "NO POTENTIAL TO DISCHARGE" PROVISIONS OF THE STATE CAFO REGULATION ARE NOT ENFORCEABLE AS A MATTER OF LAW.[19]

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[18] This version of this Section is identical to that in Supp. 2017.

[19] It is recognized by appellate courts that "it is not . . . necessary for a respondent – as the winning party in the lower court – to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review." I'On, L.L.C., 338 S.C. at 420, 526 S.E.2d at 723.

Appellants seek to have this Court enforce the "duty to apply" and "no potential to discharge" provisions contained in the State CAFO regulation against the Broiler Facilities. For the reasons set forth below, these provisions of the State CAFO are unenforceable as a matter of law.

A. The Provisions Are Unenforceable Under the Clean Water Act Because Of the Waterkeeper Alliance, Inc. Decision.

Appellants erroneously claim that the "duty to apply" and "potential to discharge" provisions in the State CAFO regulations are enforceable by the Department. See App. Br. at 27-29. This claim is erroneous because as set forth below, there is no federal or state law that authorizes the Department to enforce the provisions.

The Department lacks authority under federal law to enforce the provisions, because the EPA does not have the authority to enforce the provisions. The EPA's authority to regulate discharge into Waters of the United States is set forth in Section 402 of the Clean Water Act. 33 U.S.C.S § 1342(a). In Waterkeeper Alliance, Inc., the "duty to apply" and "potential to discharge" provisions of the 2003 CAFO Rule were analyzed for consistency with the Clean Water Act by the Second Circuit. The Second Circuit's review found that the language of the Clean Water Act expressly provides that

> in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with the EPA regulations for point sources discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

Waterkeeper Alliance, Inc., 399 F.3d at 505 (emphasis added). Because of this finding, the Second Circuit found that the 2003 CAFO Rule "contravened the regulatory scheme enacted by Congress" and "that the Clean Water Act, on its face, prevents the EPA from

imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge." Id. at 505, 506. Therefore, the EPA has no authority to enforce the duty to apply" and "potential to discharge" provisions of the 2003 CAFO Rule.

The Second Circuit's holding is applicable to the State CAFO regulation. In addition to authorizing the EPA to regulate discharges in Waters of the United States through the NPDES Program, Section 402 of the Clean War Act also allows states to run their own NPDES Program after the EPA has reviewed and approved the Program. 33 U.S.C.S § 1342(b). Essentially, Section 402 allows EPA authorized state NPDES Programs to stand in the shoes of the EPA for the purposes of issuing and enforcing NPDES permits. 33 U.S.C.S § 1342(b). Therefore, when the Second Circuit held that the EPA could not enforce the "duty to apply" and "potential to discharge" provisions it necessarily held that authorized state NPDES Program could not enforce the provisions, unless there is an independent state law basis for enforcement. Accordingly, under the Clean Water Act the provisions are unenforceable.

B. The Provisions Are Unenforceable Under State Law Because the State CAFO Regulation Was Enacted Without Legislative Approval.

While conceding that enforcement under federal law is not possible, Appellants claim that the Department can enforce the provisions under State law. See App. Br. at 27. Specifically, Appellants claim that the Department can enforce the provisions because while the Clean Water Act mandates what a state must do to maintain consistency with federal law, the Act does not prevent states from having a more stringent NPDES Program than the federal Program. While Appellants' claim correctly states a general proposition of law under the Clean Water Act, the claim, nevertheless, fails because the dispositive issue

is not whether the Clean Water Act bars more stringent Programs but whether in this case the Legislature authorized the Department to enforce the provisions of the State CAFO regulations in the absence of the federal underpinnings.

To determine whether the Legislature authorized the Department to enforce the provisions of the State CAFO regulations in the absence of the federal underpinnings, the Court must look at how the regulation was enacted. The APA "specifically requires an agency to: provide public notice of a drafting period where public comments can be accepted; conduct a public hearing on the proposed regulation; possibly prepare reports about the regulation's impact on the economy, environment, and public health; and submit the regulation to the Legislature for review, modification, and approval or rejection." Joseph v. S.C. Dep't of Labor, Licensing and Regulation, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016) (citing S.C. Code Ann. §§ 1-23-110 to -160); see Drummond v. State, 378 S.C. 362, 368, 662 S.E.2d 582, 590 (2008). These comprehensive requirements allow the Legislature to receive and consider information from the public and the agency about the following factors:

> (1) a description of the regulation, the purpose of the regulation, the legal authority for the regulation, and the plan for implementing the regulation;
>
> (2) a determination of the need and reasonableness of the regulation as determined by the agency based on analysis of the factors listed in the subsection and the expected benefit of the regulation;
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> (3) a determination of the cost and benefits associated with the regulation and an explanation of why the regulation is considered to be the most cost-effective, efficient, and feasible means for allocating public and private resources and for achieving the stated purpose;
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> (4) the effect of the regulation on competition;

(5) the effect of the regulation on the cost of living and doing business in the geographical area in which the regulation would be implemented;

(6) the effect of the regulation on employment in the geographical area in which the regulation would be implemented;

(7) the source of revenue to be used for implementing and enforcing the regulation;

(8) a conclusion on the short-term and long-term economic impact upon all persons substantially affected by the regulation, including an analysis contain in a description of which persons will bear the costs of the regulation and which persons will benefit directly and indirectly for the regulation;

(9) the uncertainties associated with the estimation of particular benefits and burdens and the difficulties involved in the comparison of qualitatively and quantitatively dissimilar benefits and burdens. A determination of the need for the regulation shall consider qualitative and quantitative benefits and burdens;

(10) the effect of the regulation on the environment and public health;

(11) the detrimental effect on the environment and public health if the regulation is not implemented. An assessment report must not consider benefits or burdens on out-of-state political bodies or businesses. The assessment of benefits and burdens which cannot be precisely quantified may be express in qualitative terms. This subsection must not be interpreted to require numerically precise cost-benefit analysis, at no time is an agency required to include items (4) through (8) in a preliminary assessment report or statement of the need and reasonableness; however, these items may be included in the final assessment report prepared by the division.

S.C. Code Ann. § 1-23-115(C). Moreover, the importance of this information is highlighted by the fact that the APA expressly provides that if any of the information required in the agency report materially changes before the Legislature has been approved or disapproved the regulation, the agency must provide the corrected or supplemented information. S.C. Code Ann. § 1-23-115(D). Consequently, by enacting the rulemaking provisions of the APA, the Legislature ensured that regulations would be approved only after it received and considered information it deemed necessary to make an intelligent decision.

As a comprehensive statute, the APA also recognizes the fact that some regulations can be enacted without legislative review and approval. Specifically, the statute provides that regulations addressing the following issues are not required to undergo legislative review and approval: maintaining compliance with federal laws; authorizing state chartered financial institutions such as banks, and savings and loans; and addressing specific emergencies. S.C. Code Ann. §§ 1-23-120(A) and (G), and -120(H) (Supp. 2017). The statute also provides that regulations exempted pursuant to Section 1-23-120 are not required to have an assessment report filed with the Legislative Council for legislative review. S.C. Code Ann. § 1-23-115(E)(1). Finally, the statute expressly provides that any portion of a regulation enacted to maintain consistency with federal law that is more stringent that the federal law is not exempt from the rulemaking provisions, e.g., the agency must prepare an assessment report and the Legislature must review and approve. S. C. Code Ann. § 1-23-115(E)(1); see Myers v. S.C. Health and Human Services, 418 S.C. 608, 621, 795 S.E.2d 301, 308 (Ct. App. 2016) (noting that under state law an agency cannot impose a regulation necessary for consistency with federal law with more stringent requirements that has not gone through the state process for promulgating regulations). Thus, unlike

other agency regulations, regulations that fall within the enumerated category exempting regulations enacted to maintain consistency with federal law are only valid so long as the underlying federal law is valid.

In this case, the CAFO regulation was enacted in accordance with Sections 1-23-115(E)(1) and -120(G)(1). The regulation was published in the State Register with a Preamble,[20] which provided all the information required to meet the statutory requirements for exemption from review and approval by the Legislature. See S.C. Code Ann. § 1-23-120(G)(1). Specifically, the Preamble provided the following information: (1) that the State NPDES regulations were being amended to maintain consistency with 40 CFR §§ 123.25 and 36; (2) that the Department was exempted from preparing a preliminary fiscal statement and assessment report; and (3) that the regulation was exempt from legislative review and approval. 27 S.C. Reg. 50 (Dec. 23, 2003). Thus, so long as the 2003 CAFO Rule was valid so was the State CAFO regulation. However, when the underlying "duty to apply" and "potential to discharge" provisions were ruled invalid by the federal courts, the State law provisions also ceased to be enforceable. See Myers, 418 S.C. at 621, 795 S.E.2d at 308.

Indeed, the subsequent 2011 amendment to Section 1-23-120 expressly states that if the federal law for which a regulation is enacted to maintain consistency is no longer valid, the regulation is deemed invalid upon the date that the agency publishes notice

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[20] The rules of construction in South Carolina authorizes courts to look at the preamble for guidance in the meaning of a regulation. See Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("While the preamble is not a part of the effective portion of a statue, it may supply the guide to the meaning of an act.").

thereof in the State Register.[21] S.C. Code Ann. § 1-23-120(H)(1) (Supp. 2017). Although Appellants' claim that the Legislature intended for the State CAFO regulation "duty to apply" and "potential to discharge" provisions to survive the voiding and subsequent withdrawal of the provisions at the federal level, that claim is erroneous considering the factors contained in S.C. Code Ann. §§ 1-23- 115(E)(1), 120(G)(1), and -120(H)(1) (Supp. 2017).

Nevertheless, Appellants' press their claim that the 2003 CAFO regulation was enforceable by ignoring the APA and asserting that the regulation was promulgated pursuant to the Pollution Control Act, which generally authorizes the Department to "'develop a general comprehensive program for the abatement, control and prevention of air and water pollution.'" App. Br. at 29.[22] This claim fails because, while the Department has the authority to develop a comprehensive program to control and prevent water pollution, it chose not to create a state discharge elimination program, but instead become the administrator of an authorized state NPDES program. See S.C. Code Ann. § 48-1-50(17) ("The Department may [t]ake all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act or the Federal Air Quality Act and any and all other Federal and State acts concerning air and water pollution."); see, also City of Columbia v. S.C. Board of Health and Envtl. Control, 292 S.C. 199, 202, 355

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[21] The subsequent amendment of a statute may clarify the Legislature's original intent. Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 361-362, 782 S.E.2d 590, 595 (2016) (citing Stuckey v. State Budget and Control Bd. 339 S.C. 397, 401, 529 S.cE.2d 706, 708 (2000)); Neal v. Brown, 374 S.C. 641, 652 649 S.E.2d 164, 170 (Ct. App. 2006) ("Reference to the General Assembly's subsequent amendment of a statute can be considered clarification of the legislative intent."). However, the subsequent amendment of statue applies prospectively unless the language provides otherwise. See Jenkins v. Meares, 302 S.C. 142, 145, 394 S.E.2d 317, 319 (1990) (recognizing a general "presumption that statutory enactments are to be given prospective rather than retroactive effect").

[22] Appellants mistakenly cite to S.C. Code Ann. § 48-1-50(5) as authority. The correct citation is S.C. Code Ann. § 48-1-50(9).

S.E.2d 536, 537-538 (1987). Therefore, as previously discussed, the enforcement of State CAFO regulation is inexorably tied to the validity of 2003 CAFO Rule since the regulation was enacted to maintain consistency with federal law and was not subject to the legislative review and approval necessary to authorize the regulation to be more stringent that the federal law. Appellants' claim is without merit since there is no valid basis under federal or state law to enforce the provisions.

C. The ALC Correctly Found That A State Animal Facility Permit Can Satisfy The "No Potential To Discharge" Provision Contained In The State CAFO Regulation.

In its Final Order and Decision, the ALC held that since both the State CAFO regulation, S.C. Code Ann. Regs. 61-9.122.23, and animal permits under S.C. Code Ann. Regs. 61-43 Part 200 arise under the Pollution Control Act, they must be construed together and can be read in pari materia to provide that "agricultural facilities only 'discharge' pollution 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." (R. p. 10). Specifically, because the State Animal Facility permits do not allow the discharge of pollutants into waters of the State and because of the specific facts in this case, i.e., that the Broiler Facilities will be located significant distances from waters of the State, the ALC found that the Broiler Facilities established that they had no potential to discharge pollutants into waters of the State. (R. p. 10). Further, the ALC found that even if the Broiler Facilities had not established that they had no potential to discharge, Appellants' claim that the Broiler Facilities were in violation of the State CAFO regulation is premature because the time period in which they must file applications has not expired.

Nevertheless, Appellants challenge the ALC's determination as an error of law based on the following claims: 1) that the "no discharge" provision in a State Animal Facility permit is not equal to the "no potential to discharge" provision in the State CAFO regulation; 2) that Appellants need not show that "Respondents' facilities would convey or channel pollutants, for CAFOs are by definition point sources of pollutants" and that "Respondents will discharge or intend to discharge pollutants;" and 3) that the Broiler Facilities are required to file NPDES applications with the Department simultaneously with the application for State Animal Facilities permits. As shown below, each of these claims is without merit and, therefore, fail to establish Appellants' assertion that the ALC determination on the State CAFO regulation was in error.

1. The ALC correctly determined that the State Animal Facility permit's "no discharge" provision satisfies the State CAFO regulation's "no potential to discharge" provision.

Appellants claim that the ALC's determination is an error of law because "the term 'no-discharge' is plainly different from 'no potential to discharge.'" App. Br. at 20. Specifically, they claim that the term "no discharge" is a performance standard for compliance, while the term "no potential to discharge" is the possibility, no matter how remote, that something may happen in the future. Id. Therefore, Appellants' claim that the two cannot be equated.

However, Appellants' claim fails because it construes the term "no potential to discharge" in opposition to the standard set forth in the Pollution Control Act. As noted by the ALC and conceded by Appellants, the State CAFO regulation was promulgated under the authority of the Pollution Control Act. See App. Br. at 28. In the public purpose section of the statute, the Legislature stated that:

> It is declared to be the public policy of the State to maintain reasonable standards of purity of the air and water resources of the State, consistent with the public health, safety and welfare of it citizens, maximum employment, the industrial development of the State, the propagation and protection of terrestrial and marine flora and fauna, and the protection of physical property and other resources. It is further declared that to secure these purposes and the enforcement of the provisions of this chapter, the Department of Health and Environmental Control shall have authority to abate, control and prevent pollution.

S.C. Code Ann. § 48-1-20 (emphasis added). By asserting that the term "no potential to discharge" be construed without a reasonableness standard, Appellants seek to render the "no potential to discharge" exception from the "duty to apply" meaningless, since it would be impossible for any CAFO to show "no potential to discharge" with absolute certainty. Indeed, in their brief, Appellants expressly state that although "[a] person can accept a permit that requires 'no-discharge,' . . . that does not mean that a person's permitted operations have absolutely 'no potential to discharge.'" (R. pp. 946-947, lines 2-16). (emphasis added); (Appellants' expert acknowledges that Appellants want the Broiler Facilities to establish that there would be no potential to discharge under every conceivable level of storm event.).

Moreover, it should be noted that unlike the State CAFO regulation and its "no potential for discharge" provision, the "no discharge" provision in the Standards for the Permitting of Animal Facilities was reviewed and approved by the Legislature in accordance with the APA. Compare Vol. 27 No. 12 S.C. Reg. 50 (Dec. 26, 2003)[23] with Vol. 26 No. 6 S.C. Reg. 1 (June 28, 2002).[24] Therefore, it was not an error for the ALC to conclude that the Legislature approved a reasonable standard for permits to regulate and

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23 Publishing the final State CAFO regulation.

24 Publishing the amended Standards for Animal Facilities Permitting.

prevent the discharge of pollutants in the State. Accordingly, Appellants' claim is without merit and should be dismissed.

2. The ALC correctly found that Appellants' claim that the Broiler Facilities had failed to apply for NPDES permits is premature.

Appellants' claim that the Broiler Facilities were required to file applications for NPDES permits simultaneously with their applications for State Animal Facility permits is without merit. The State CAFO regulation provides that "[n]ew sources for the must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation." S.C. Code Ann. Regs. 61-9.122.23(g)(4) (emphasis added). Here, the Department received and reviewed applications for State Animal Facility permits for the Broiler Facilities. The applications were for the construction and eventual operation of proposed facilities. Since each State Animal Facility permit authorizes the permittee a period of two years from the effective date of the permit to commence construction and three years from that date to complete construction, under the plain language of the State CAFO regulation, Broilers Facilities have months, if not years before they must apply. See S.C. Code Ann. Regs. 61-43 Part 200.70(O)(1). Further, a facility cannot be constructed while any appeals are pending. S.C. Code Ann. Regs. 61-43 Part 200.70(K).

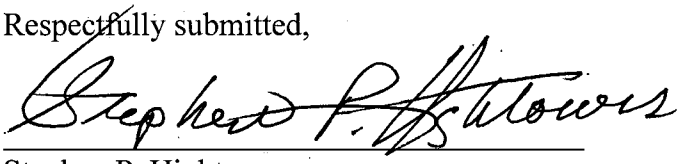
Appellants, nevertheless, claim that the ALC determination was in error because "[t]he regulation contemplates a permit requirement for 'potential discharges.'" App. Br. at 26. However, the "potential to discharge" provision expressly provides that "[i]n requesting a determination of 'no potential to discharge,' the CAFO owner or operator must submit any information that would support such a determination, within the time frame provided by the Department and in accordance with paragraphs (g) and (h) of this section." S.C. Code Ann. Regs. 61-9.122.23(f)(2) (emphasis added). Simply put, in this case, it will

be years before the facility could potentially be placed into operation and, even then, the official date that operation would commence is dependent upon the date in which the Department issues written authorization to facilities that they can commence operations. See S.C. Code Ann. Regs. 61-43 Part 200.70(K). Since Appellants cannot cite to any provision that would overrule or negate this express time schedule, Appellants' claim must fail. Consequently, the ALC correctly determined that Appellants' claim that the Broiler Facilities should have filed an application for NPDES permits when they applied for State Animal Facilities permits is premature since they can apply at any time prior to 180 days before the facilities become operational.

CONCLUSION

Based on the foregoing arguments, the Court should affirm the Final Order and Decision issued by the Administrative Law Court.

Respectfully submitted,



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