THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III
Administrative Law Judge

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SC Court of Appeals

Case No. 2017-002598

CHARLES S. BLACKMON AND SOUTH CAROLINIANS FOR RESPONSIBLE AGRICULTURAL PRACTICES, ... APPELLANTS,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, AND DAVID COGGINS BROILERS, ... RESPONDENTS,

CHARLES S. BLACKMON AND SOUTH CAROLINIANS FOR RESPONSIBLE AGRICULTURAL PRACTICES, ... APPELLANTS,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, AND HEATH COGGINS BROILERS, ... RESPONDENTS,

CHARLES S. BLACKMON AND SOUTH CAROLINIANS FOR RESPONSIBLE AGRICULTURAL PRACTICES, ... APPELLANTS,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, AND JIM YOUNG BROILERS, ... RESPONDENTS.

RECORD ON APPEAL
Volume 1 of 4
Pages 1-530

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RECORD ON APPEAL
Index

ORDERS

Order on Joint Motion to Consolidate for Hearing Purposes (March 29, 2017) 1

Final Order and Decision (November 30, 2017) 4

PLEADINGS

Request for Final Review (Heath Coggins (December 15, 2016) 36

Request for Final Review (David Coggins) (December 28, 2016) 40

Request for Final Review (Jim Young) (January 4, 2017) 44

Statement of Staff Position (Heath Coggins) (January 6, 2017) 48

Statement of Staff Position (David Coggins) (January 11, 2017) 56

Statement of Staff Position (Jim Young) (January 17, 2017) 64

DHEC Denial of Final Review Conference (David Coggins) (January 18, 2017) 72

DHEC Denial of Final Review Conference (Heath Coggins) (January 18, 2017) 74

DHEC Denial of Final Review Conference (Jim Young) (January 23, 2017) 76

Petition for Contested Case Hearing (David Coggins) (February 17, 2017) 78

Petition for Contested Case Hearing (Heath Coggins) (February 17, 2017) 91

Petition for Contested Case Hearing (Jim Young) (February 17, 2017) 102

Petitioners' Proposed Order (October 13, 2017) 114

Respondents' Proposed Order (October 13, 2017) 174

Respondent Broiler Facilities' Motion for Partial Summary Judgment (August 4, 2017) 221

Petitioners' Memorandum in Opposition to Motion for
Partial Summary Judgment (August 10, 2017) 246

TRANSCRIPT

Administrative Hearing (August 15-17, 2017) 340

EXHIBITS

Map of Existing and Proposed Poultry Facilities in Mountville Area 1212

DHEC Map of Proposed and Existing Poultry Facilities in Mountville Area 1213

Property Map 1214

David Coggins Broilers' Application and Comprehensive Nutrient Management Plan 1215

Heath Coggins Broilers' Application and Comprehensive Nutrient Management Plan 1332

Jim Young Broilers' Application and Comprehensive Nutrient Management Plan 1492

Email from Mary Basel to Bill Chaplin (October 21, 2016) 1661

DHEC Response to Questions & Comments Provided at Public Meetings 1662

Permit Checklist (David Coggins) 1666

Permit Checklist (Heath Coggins) 1678

Permit Checklist (Jim Young) 1689

DHEC Permit Issued to David Coggins with correspondence 1701

DHEC Permit Issued to Jim Young with correspondence 1706

DHEC Permit Issued to Heath Coggins with correspondence 1711

Photographs Taken by Kathy Lowman 1716

OTHER MATERIALS

Respondent DHEC's Response to Court's Inquiry (November 3, 2017) 1722

CERTIFICATE

Certificate of Appellants' Counsel 1725

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

March 29, 2017

ORDER ON JOINT MOTION TO CONSOLIDATE FOR HEARING PURPOSES

The above-captioned contested cases are pending before the South Carolina Administrative Law Court (ALC or Court). The parties have filed a Joint Motion to Consolidate For Hearing Purposes because the cases involve the same tract of land that will be subdivided into three tracts. In addition, the parties represent that the same or substantially the same evidence is relevant and material to the matters at issue in each case. The parties also request that each case retain its separate caption and docket number.

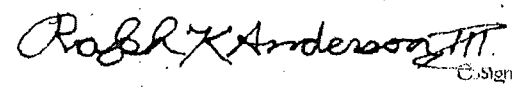
Rule 19(D) of the Rules of Procedure for the ALC (SCALC Rules) provides in relevant part:

> When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at such hearing, the administrative law judge may upon motion by any party or on his own motion order that a consolidated hearing be conducted.

Therefore,

IT IS HEREBY ORDERED that pursuant to SCALC Rule 19(D), and in the interest of judicial economy, the above-captioned cases are consolidated. However, each case shall retain its separate caption and docket number.

AND IT IS SO ORDERED.

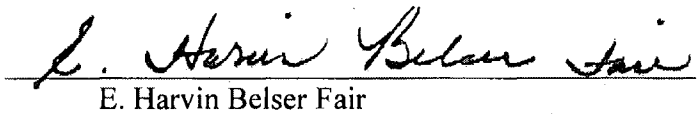


Ralph King Anderson, III
Chief Administrative Law Judge

March 29, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

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



E. Harvin Belser Fair
Judicial Law Clerk

March 29, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

FILED

November 30, 2017

SC ADMIN. LAW COURT

4

APPEARANCES:

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

STATEMENT OF THE CASE

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

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

SUMMARY JUDGMENT

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

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

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

Standard of Review

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

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

Facts

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

Discussion

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

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

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

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

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

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

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

Reg. 61-9.122.1(b)(1) defines the scope of the NPDES permit requirements as follows:

> The NPDES program requires permits for the discharge of "pollutants" from any "point source" into "waters of the State" and into "waters of the United States." The terms "pollutant", "point source", "waters of the State", and "waters of the United States" are defined in section 122.2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

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

Background

Proposed Chicken Barns

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

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

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

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

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

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

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

Petitioners

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

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

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

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

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

Proposed Permits

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

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

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

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

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

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

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

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

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

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

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

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

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

Permitting Review

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

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

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

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

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

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

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

Amended Permit Applications

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

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

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

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

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

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

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

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

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

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

Petitioners' Objections to the Permits

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

Discharge of Weapons on Adjacent Property

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

Odor

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

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

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

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

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

Health and Safety

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

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

Potential Impacts to Waters of the State

Anecdotal Testimony

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

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

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

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

Expert Testimony

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Air Quality

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

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

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

Harm to Quality of Life and Nuisance

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

CONCLUSIONS OF LAW

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

General Conclusions

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

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

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

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

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

Permitting Process for Animal Facilities

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

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

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

Petitioners' Objections to Permits

Restriction of Ability to Discharge Weapons on Adjacent Property

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

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

Odor

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

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

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

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

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

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

Effects on Health and Safety

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

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

Potential Impacts to Waters of the State

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

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

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

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

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

* * *

12. Aquifer vulnerability.

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

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

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

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

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

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

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

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

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

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

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

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

Air Quality

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

ORDER

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

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

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

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

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

Therefore, based upon the foregoing,

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

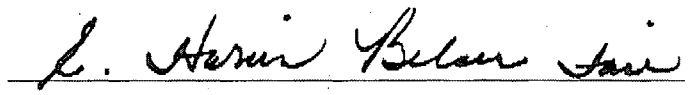
AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

November 30, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

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



E. Harvin Belser Fair
Judicial Law Clerk

November 30, 2017
Columbia, South Carolin

RECEIVED
DEC 15 2016
Clerk, South Carolina
Mining Council
16-RFR-148

South Carolina Department of Health and Environmental Control
Attention: Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201

Re: Animal Facility Permit; Heath Coggins Broilers

S.C. Board of Health and Environmental Control:

The undersigned citizens of Mountville, South Carolina respectfully request a final review conference concerning DHEC's recent decision to permit the above-referenced poultry grower. Our small town, which has been an idyllic rural agricultural community for well over a century, is being rendered virtually uninhabitable by the proliferation of poultry houses permitted by DHEC. This particular permit is the first in a string of poultry house permits currently pending with the agency, the totality of which stands to push us over the brink. In short, if something is not done very soon, Mountville will no longer be a community but rather one large industrial farm.

We, the undersigned, are as pro-agriculture and pro-farmer as a community can be. Many of our families have owned land in Mountville for centuries, during which time agriculture has always been the glue that held our community together. All of us have grown up in proximity to agriculture and have in fact participated in agriculture ourselves. But, the manner in which DHEC has permitted poultry houses in Mountville, with no regard to the density or proximity of other existing houses, and then with very little follow-up as to the operation of those houses, has left our town a stinking, blighted landscape that is becoming nearly unsuitable for non-poultry residents. If all of the pending poultry house permits are granted, which almost certainly will be the case, Mountville will have 80 industrial poultry houses within a 5 ½ mile radius of town center.

We request the Board's intervention to save our community, our property values, and the existing uses of our land.

We have sought to proactively address this ticking time bomb for many months now, and this request is our last chance for a balanced community. During DHEC public meetings at Mountville in September and October of this year, witnesses presented pictorial evidence and testimony citing numerous incidences of non-compliance with DHEC regulations by existing poultry growers in the Mountville community to include uncovered animal waste, improperly disposed of poultry carcasses, uncovered manure trucks in transit, distribution of manure during unfavorable wind conditions, animal waste being distributed onto adjacent properties without permission, and numerous instances of unpleasant odors. We have witnessed that we cannot rely on DHEC enforcement to make these poultry houses "good neighbors." The threat we are fighting is by no means theoretical, and this permit review is our one chance to protect ourselves.

On this basis, we submit the following legal opposition to the above-referenced permit:

1. DHEC staff has required only the very minimum protection for neighboring properties, even though the statute and regulations give them discretion to do more in situations like this. That is particularly true as it relates to setback distances, which dictate the spacing between poultry houses and neighboring residences, properties, wells, and other resources. The setbacks stated in DHEC's regulations are supposed to be applied as a minimum:

> "Any setback distances given in R. 61-43, Standards for Permitting of Agricultural Animal Facilities, **are minimum siting requirements** as established by the Department of Health and Environmental Control. The department **may require additional setback distances** on a case-by-case basis considering the factors set forth in the regulation." SC Code 46-45-80.

Another area where DHEC has discretion to do more is in relation to poultry manure and by-products:

> "On a case-by-case basis, the Department **may impose additional or more stringent requirements** for the management, handling, treatment, storage, or utilization of animal manure and other animal by-products." R.61-43, part 200.140(B).

If ever DHEC is to exercise its discretion in order to provide larger setbacks and more stringent requirements on waste, we believe that such discretion is appropriate here, where the proliferation of poultry houses on all sides has created demonstrable impacts on neighboring properties. DHEC staff has failed to exercise discretion in order to protect the undersigned and their properties.

2. DHEC staff completely ignored the density and proximity of existing poultry houses in the area. While it is true that DHEC's regulations do not provide a strict limit on the number of poultry houses allowed within a given area, it is an error to totally ignore the fact that Mountville already has an extremely high density of poultry houses. Fifty poultry houses exist within five and one half miles of Mountville. Thirty additional houses are currently being considered for permitting in this zone. Under the circumstances, the impact of these new houses cannot be viewed in isolation.

DHEC's regulations provide several opportunities for staff to incorporate consideration of these existing houses. For example, DHEC is to consider the proximity of a proposed poultry house to "other known point source discharges and potential nonpoint sources." R.61-43, part 200.70(F). Further, DHEC should not allow a poultry house to create a legal nuisance. R.61-43, part 200.140(H). When the number of poultry houses in an area rises to the level that it has in Mountville, the addition of any other houses is likely to create or contribute to nuisance conditions. Indeed, DHEC staff's failure to consider existing houses is likely to result in increased clean-out activity and associated odor complaints along with increased animal waste distribution issues.

3. DHEC's setback requirements in this permit do not properly take into consideration the impact of other existing laws. Specifically the DHEC regulation stating a minimum setback of 400 feet from property boundaries, when coupled with SC Code of Laws Section 50-11-356,

wherein the discharging of a weapon within 900 feet of a poultry house is declared unlawful, may effectively deny the adjacent property owners the full use of their property by at least 500 feet within their perimeter. In other words, if a poultry house is constructed 400 feet from your property line, there would be 500 foot stretch of your property where you could not lawfully shoot a gun, including for hunting and other purposes. In a rural area like Mountville, this restriction is significant. Therefore, the remedy we seek is a minimum setback of 900 feet imposed for all property boundaries now and in the future.

4. It is our position that current manure broker regulations and enforcement are insufficient to effectively deal with the additional 5,000 plus tons of animal waste to be generated annually by the 30 new poultry houses. It is our belief that air quality should be maintained and soil contamination prevented by additional regulation. Currently there seems to be no method by which the quantity of animal waste transported and site destination for distribution are recorded or verified. Also regulations pertaining to permissible weather conditions are scant. Any regulation governing distribution of animal waste by the manure broker in regards to time of day is nonexistent. Therefore, the remedy we seek is that a reporting system be established which records per event tonnage to be distributed, coordinates of distribution sites, wind speed and direction, and the location of downwind sensitive sites before a permit number is issued authorizing per event distribution. Furthermore, we seek remedy through a restriction on animal waste distribution to the hours of 8:00 a.m. until 2:00 p.m. and only when weather conditions are suitable for the issuance of a per event permit.

5. It is our position that animal waste destination sites are not sufficiently monitored for soil contamination under current SCDHEC regulations. Although SC DHEC representatives at meetings in September and October of this year cited the requirement for soil tests by manure brokers and/or land owners at destination sites, no examples were available for examination when requested. We seek a remedy to include the initiation of a requirement whereby a manure broker must submit a site specific soil test at least annually before being permitted to utilize a particular site for distribution of animal waste.

6. It is our position that SC DHEC poultry house regulations can result in corruption of the spirit of the initial Right to Farm concept. Whereby the initial intent of the concept was to protect an existing rural agricultural community from being prohibited from enjoying their property rights by encroaching new arrivals, reversely the encroachment of new poultry growers has resulted in restriction of existing property owners' right to full enjoyment of their property in the Mountville area. The examples cited are as follows: Basel and Sparrow own property along Lisbon Road which has been in their Dunlap family for over 100 years. In November 2015 SC DHEC collected fees and perked two residence sites along Lisbon Road for Basel and Sparrow. Basel and Sparrow then acquired a building permit. In August 2016 David Coggins applied for a poultry house permit with plans to build poultry houses along Lisbon Road in front of Basel's and Sparrow's proposed building sites. Coggins did not close on the property until October 2016. When Basel and Sparrow pressed SC DHEC representatives to assure a 1,000 foot setback from their proposed building sites, SC DHEC representatives would not give the assurance so Basel's and Sparrow's building plans have been suspended until the issue is resolved. SC DHEC representatives failed to notify Coggins of the pending residence sites perked and approved by the agency. Furthermore, SC Code of Laws Section 50-11-356 further complicates Basel's and

Sparrow's pre-existing firearms hunting lease agreement on their property by prohibiting the discharge of a firearm within 900 feet of a poultry house in the face of the SCDHEC regulation permitting only a 400 foot setback from any property boundary. The remedy sought is for the David Coggins and James Young Jr. poultry house setback to be increased to 900 feet from all boundaries as the undesirable condition exists on three sides of the newly acquired Coggins property.

We appreciate your willingness to give the matters of our concern your consideration. We share in your dedication to the mission and purpose of the DHEC. It is our belief that the proliferation of poultry houses in such close proximity without regulatory restriction is counter to the purposes of the agency. Thank you.

Sincerely,

Charles Blackmon

Charles Blackmon
3771 Hwy 56 South, Clinton, SC 29325, 864-833-9068, charlessblackmon@bellsouth.net

Nelly C. Blackmon
Mary D. Beard
Elijah Beard
Eric Blackmon
Lorie Blackmon
Wanda S. Woody
William R. Woody
Barbara Lee Zeger
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Tera L. Moses
Sandra K. McNair
Frank McNair
Troy Martin
Patricia J. Wham
Lori M. Wham
Elaine S. Benjamin
Kelly S. Lowmaster
Jean B. Revis
Jon R. Revis
Keith Blackmon
Karen Blackmon
Margaret Sparrow
William A. Wham
Laura B. Williams
Brian T. Rehm
Nancy M. Rehm
Gene Scott Watts

David Coggins
Due: 1-11-16

RECEIVED
DEC 28 2016
Clerk, Board of Health
and Environmental Control
16-RFR-152

South Carolina Department of Health and Environmental Control
Attention: Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201

Re: Animal Facility Permit; David Coggins Broilers (Broiler Facility)

S.C. Board of Health and Environmental Control:

The undersigned citizens of Mountville, South Carolina respectfully request a final review conference concerning DHEC's recent decision to permit the above-referenced poultry grower. Our small town, which has been an idyllic rural agricultural community for well over a century, is being rendered virtually uninhabitable by the proliferation of poultry houses permitted by DHEC. This particular permit is the first in a string of poultry house permits currently pending with the agency, the totality of which stands to push us over the brink. In short, if something is not done very soon, Mountville will no longer be a community but rather one large industrial farm.

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We request the Board's intervention to save our community, our property values, and the existing uses of our land.

We have sought to proactively address this ticking time bomb for many months now, and this request is our last chance for a balanced community. During DHEC public meetings at Mountville in September and October of this year, witnesses presented pictorial evidence and testimony citing numerous incidences of non-compliance with DHEC regulations by existing poultry growers in the Mountville community to include uncovered animal waste, improperly disposed of poultry carcasses, uncovered manure trucks in transit, distribution of manure during unfavorable wind conditions, animal waste being distributed onto adjacent properties without permission, and numerous instances of unpleasant odors. We have witnessed that we cannot rely on DHEC enforcement to make these poultry houses "good neighbors." The threat we are fighting is by no means theoretical, and this permit review is our one chance to protect ourselves.

On this basis, we submit the following legal opposition to the above-referenced permit:

1. DHEC staff has required only the very minimum protection for neighboring properties, even though the statute and regulations give them discretion to do more in situations like this. That is particularly true as it relates to setback distances, which dictate the spacing between poultry houses and neighboring residences, properties, wells, and other resources. The setbacks stated in DHEC's regulations are supposed to be applied as a minimum:

> "Any setback distances given in R. 61-43, Standards for Permitting of Agricultural Animal Facilities, **are minimum siting requirements** as established by the Department of Health and Environmental Control. The department **may require additional setback distances** on a case-by-case basis considering the factors set forth in the regulation." SC Code 46-45-80.

Another area where DHEC has discretion to do more is in relation to poultry manure and by-products:

> "On a case-by-case basis, the Department **may impose additional or more stringent requirements** for the management, handling, treatment, storage, or utilization of animal manure and other animal by-products." R.61-43, part 200.140(B).

If ever DHEC is to exercise its discretion in order to provide larger setbacks and more stringent requirements on waste, we believe that such discretion is appropriate here, where the proliferation of poultry houses on all sides has created demonstrable impacts on neighboring properties. DHEC staff has failed to exercise discretion in order to protect the undersigned and their properties.

2. DHEC staff completely ignored the density and proximity of existing poultry houses in the area. While it is true that DHEC's regulations do not provide a strict limit on the number of poultry houses allowed within a given area, it is an error to totally ignore the fact that Mountville already has an extremely high density of poultry houses. Fifty poultry houses exist within five and one half miles of Mountville. Thirty additional houses are currently being considered for permitting in this zone. Under the circumstances, the impact of these new houses cannot be viewed in isolation.

DHEC's regulations provide several opportunities for staff to incorporate consideration of these existing houses. For example, DHEC is to consider the proximity of a proposed poultry house to "other known point source discharges and potential nonpoint sources." R.61-43, part 200.70(F). Further, DHEC should not allow a poultry house to create a legal nuisance. R.61-43, part 200.140(H). When the number of poultry houses in an area rises to the level that it has in Mountville, the addition of any other houses is likely to create or contribute to nuisance conditions. Indeed, DHEC staff's failure to consider existing houses is likely to result in increased clean-out activity and associated odor complaints along with increased animal waste distribution issues.

3. DHEC's setback requirements in this permit do not properly take into consideration the impact of other existing laws. Specifically the DHEC regulation stating a minimum setback of 400 feet from property boundaries, when coupled with SC Code of Laws Section 50-11-356,

wherein the discharging of a weapon within 900 feet of a poultry house is declared unlawful, may effectively deny the adjacent property owners the full use of their property by at least 500 feet within their perimeter. In other words, if a poultry house is constructed 400 feet from your property line, there would be 500 foot stretch of your property where you could not lawfully shoot a gun, including for hunting and other purposes. In a rural area like Mountville, this restriction is significant. Therefore, the remedy we seek is a minimum setback of 900 feet imposed for all property boundaries now and in the future.

4. It is our position that current manure broker regulations and enforcement are insufficient to effectively deal with the additional 5,000 plus tons of animal waste to be generated annually by the 30 new poultry houses. It is our belief that air quality should be maintained and soil contamination prevented by additional regulation. Currently there seems to be no method by which the quantity of animal waste transported and site destination for distribution are recorded or verified. Also regulations pertaining to permissible weather conditions are scant. Any regulation governing distribution of animal waste by the manure broker in regards to time of day is nonexistent. Therefore, the remedy we seek is that a reporting system be established which records per event tonnage to be distributed, coordinates of distribution sites, wind speed and direction, and the location of downwind sensitive sites before a permit number is issued authorizing per event distribution. Furthermore, we seek remedy through a restriction on animal waste distribution to the hours of 8:00 a.m. until 2:00 p.m. and only when weather conditions are suitable for the issuance of a per event permit.

5. It is our position that animal waste destination sites are not sufficiently monitored for soil contamination under current SCDHEC regulations. Although SC DHEC representatives at meetings in September and October of this year cited the requirement for soil tests by manure brokers and/or land owners at destination sites, no examples were available for examination when requested. We seek a remedy to include the initiation of a requirement whereby a manure broker must submit a site specific soil test at least annually before being permitted to utilize a particular site for distribution of animal waste.

6. It is our position that SC DHEC poultry house regulations can result in corruption of the spirit of the initial Right to Farm concept. Whereby the initial intent of the concept was to protect an existing rural agricultural community from being prohibited from enjoying their property rights by encroaching new arrivals, reversely the encroachment of new poultry growers has resulted in restriction of existing property owners' right to full enjoyment of their property in the Mountville area. The examples cited are as follows: Basel and Sparrow own property along Lisbon Road which has been in their Dunlap family for over 100 years. In November 2015 SC DHEC collected fees and perked two residence sites along Lisbon Road for Basel and Sparrow. Basel and Sparrow then acquired a building permit. In August 2016 David Coggins applied for a poultry house permit with plans to build poultry houses along Lisbon Road in front of Basel's and Sparrow's proposed building sites. Coggins did not close on the property until October 2016. When Basel and Sparrow pressed SC DHEC representatives to assure a 1,000 foot setback from their proposed building sites, SC DHEC representatives would not give the assurance so Basel's and Sparrow's building plans have been suspended until the issue is resolved. SC DHEC representatives failed to notify Coggins of the pending residence sites perked and approved by the agency. Furthermore, SC Code of Laws Section 50-11-356 further complicates Basel's and

Sparrow's pre-existing firearms hunting lease agreement on their property by prohibiting the discharge of a firearm within 900 feet of a poultry house in the face of the SCDHEC regulation permitting only a 400 foot setback from any property boundary. The remedy sought is for the David Coggins and James Young Jr. poultry house setback to be increased to 900 feet from all boundaries as the undesirable condition exists on three sides of the newly acquired Coggins property.

We appreciate your willingness to give the matters of our concern your consideration. We share in your dedication to the mission and purpose of the DHEC. It is our belief that the proliferation of poultry houses in such close proximity without regulatory restriction is counter to the purposes of the agency. Thank you.

Sincerely,

Charles Blackmon

Charles Blackmon
3771 Hwy 56 South, Clinton, SC 29325, 864-833-9068, charlesblackmon@bellsouth.net

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Mary D. Beard
Elizabeth Beard
Eric Blackmon
Lorie Blackmon
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Teresa L. Moses
Sandra K. McNair
Frank McNair
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John R. Revis
Keith Blackmon
Karen Blackmon
Margaret Spencer
William A. Wham
Laura B. Williams
Brian T. Adams
Nancy M. Revis
Gene Scott Wells

RECEIVED
JAN 04 2017
Clerk Board of Health
and Environmental Control
17-RFR-1

South Carolina Department of Health and Environmental Control
Attention: Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201

Re: Animal Facility Permit; Jim Young Broilers (Broiler Facility)

S.C. Board of Health and Environmental Control:

The undersigned citizens of Mountville, South Carolina respectfully request a final review conference concerning DHEC's recent decision to permit the above-referenced poultry grower. Our small town, which has been an idyllic rural agricultural community for well over a century, is being rendered virtually uninhabitable by the proliferation of poultry houses permitted by DHEC. This particular permit is one in a string of poultry house permits currently pending with the agency, the totality of which stands to push us over the brink. In short, if something is not done very soon, Mountville will no longer be a community but rather one large industrial farm.

We, the undersigned, are as pro-agriculture and pro-farmer as a community can be. Many of our families have owned land in Mountville for centuries, during which time agriculture has always been the glue that held our community together. All of us have grown up in proximity to agriculture and have in fact participated in agriculture ourselves. But, the manner in which DHEC has permitted poultry houses in Mountville, with no regard to the density or proximity of other existing houses, and then with very little follow-up as to the operation of those houses, has left our town a stinking, blighted landscape that is becoming nearly unsuitable for non-poultry residents. If all of the pending poultry house permits are granted, which almost certainly will be the case, Mountville will have 80 industrial poultry houses within a 5 ½ mile radius of town center.

We request the Board's intervention to save our community, our property values, and the existing uses of our land.

We have sought to proactively address this ticking time bomb for many months now, and this request is our last chance for a balanced community. During DHEC public meetings at Mountville in September and October of this year, witnesses presented pictorial evidence and testimony citing numerous incidences of non-compliance with DHEC regulations by existing poultry growers in the Mountville community to include uncovered animal waste, improperly disposed of poultry carcasses, uncovered manure trucks in transit, distribution of manure during unfavorable wind conditions, animal waste being distributed onto adjacent properties without permission, and numerous instances of unpleasant odors. We have witnessed that we cannot rely on DHEC enforcement to make these poultry houses "good neighbors." The threat we are fighting is by no means theoretical, and this permit review is our one chance to protect ourselves.

On this basis, we submit the following legal opposition to the above-referenced permit:

1. DHEC staff has required only the very minimum protection for neighboring properties, even though the statute and regulations give them discretion to do more in situations like this. That is particularly true as it relates to setback distances, which dictate the spacing between

poultry houses and neighboring residences, properties, wells, and other resources. The setbacks stated in DHEC's regulations are supposed to be applied as a minimum:

> "Any setback distances given in R. 61-43, Standards for Permitting of Agricultural Animal Facilities, **are minimum siting requirements** as established by the Department of Health and Environmental Control. The department **may require additional setback distances** on a case-by-case basis considering the factors set forth in the regulation." SC Code 46-45-80.

Another area where DHEC has discretion to do more is in relation to poultry manure and by-products:

> "On a case-by-case basis, the Department **may impose additional or more stringent requirements** for the management, handling, treatment, storage, or utilization of animal manure and other animal by-products." R.61-43, part 200.140(B).

If ever DHEC is to exercise its discretion in order to provide larger setbacks and more stringent requirements on waste, we believe that such discretion is appropriate here, where the proliferation of poultry houses on all sides has created demonstrable impacts on neighboring properties. DHEC staff has failed to exercise discretion in order to protect the undersigned and their properties.

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DHEC's regulations provide several opportunities for staff to incorporate consideration of these existing houses. For example, DHEC is to consider the proximity of a proposed poultry house to "other known point source discharges and potential nonpoint sources." R.61-43, part 200.70(F). Further, DHEC should not allow a poultry house to create a legal nuisance. R.61-43, part 200.140(H). When the number of poultry houses in an area rises to the level that it has in Mountville, the addition of any other houses is likely to create or contribute to nuisance conditions. Indeed, DHEC staff's failure to consider existing houses is likely to result in increased clean-out activity and associated odor complaints along with increased animal waste distribution issues.

3. DHEC's setback requirements in this permit do not properly take into consideration the impact of other existing laws. Specifically the DHEC regulation stating a minimum setback of 400 feet from property boundaries, when coupled with SC Code of Laws Section 50-11-356, wherein the discharging of a weapon within 900 feet of a poultry house is declared unlawful, may effectively deny the adjacent property owners the full use of their property by at least 500 feet within their perimeter. In other words, if a poultry house is constructed 400 feet from your property line, there would be 500 foot stretch of your property where you could not lawfully shoot a gun, including for hunting and other purposes. In a rural area like Mountville, this

restriction is significant. Therefore, the remedy we seek is a minimum setback of 900 feet imposed for all property boundaries now and in the future.

4. It is our position that current manure broker regulations and enforcement are insufficient to effectively deal with the additional 5,000 plus tons of animal waste to be generated annually by the 30 new poultry houses. It is our belief that air quality should be maintained and soil contamination prevented by additional regulation. Currently there seems to be no method by which the quantity of animal waste transported and site destination for distribution are recorded or verified. Also regulations pertaining to permissible weather conditions are scant. Any regulation governing distribution of animal waste by the manure broker in regards to time of day is nonexistent. Therefore, the remedy we seek is that a reporting system be established which records per event tonnage to be distributed, coordinates of distribution sites, wind speed and direction, and the location of downwind sensitive sites before a permit number is issued authorizing per event distribution. Furthermore, we seek remedy through a restriction on animal waste distribution to the hours of 8:00 a.m. until 2:00 p.m. and only when weather conditions are suitable for the issuance of a per event permit.

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6. It is our position that SC DHEC poultry house regulations can result in corruption of the spirit of the initial Right to Farm concept. Whereby the initial intent of the concept was to protect an existing rural agricultural community from being prohibited from enjoying their property rights by encroaching new arrivals, reversely the encroachment of new poultry growers has resulted in restriction of existing property owners' right to full enjoyment of their property in the Mountville area. The examples cited are as follows: Basel and Sparrow own property along Lisbon Road which has been in their Dunlap family for over 100 years. In November 2015 SC DHEC collected fees and perked two residence sites along Lisbon Road for Basel and Sparrow. Basel and Sparrow then acquired a building permit. In August 2016 David Coggins applied for a poultry house permit with plans to build poultry houses along Lisbon Road in front of Basel's and Sparrow's proposed building sites. Coggins did not close on the property until October 2016. When Basel and Sparrow pressed SC DHEC representatives to assure a 1,000 foot setback from their proposed building sites, SC DHEC representatives would not give the assurance so Basel's and Sparrow's building plans have been suspended until the issue is resolved. SC DHEC representatives failed to notify Coggins of the pending residence sites perked and approved by the agency. Furthermore, SC Code of Laws Section 50-11-356 further complicates Basel's and Sparrow's pre-existing firearms hunting lease agreement on their property by prohibiting the discharge of a firearm within 900 feet of a poultry house in the face of the SCDHEC regulation permitting only a 400 foot setback from any property boundary. The remedy sought is for the David Coggins and James Young Jr. poultry house setback to be increased to 900 feet from all boundaries as the undesirable condition exists on three sides of the newly acquired Coggins property.

We appreciate your willingness to give the matters of our concern your consideration. We share in your dedication to the mission and purpose of the DHEC. It is our belief that the proliferation of poultry houses in such close proximity without regulatory restriction is counter to the purposes of the agency. Thank you.

Sincerely,

Charles Blackmon

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Ross Stewart

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
STATEMENT OF STAFF POSITION

Requestor: Charles Blackmon

In re: Decision dated November 30, 2016 issuing an Agricultural Permit to Heath Coggins for the construction of six (6) poultry broiler houses within Laurens County in accordance with R. 61-43, Standards for the Permitting of Agricultural Animal Facilities.
Docket No. 16-RFR- 148

Date: January 6, 2016

SUMMARY

This Request for Final Review (RFR) was filed by Mr. Charles Blackmon challenging the staff's issuance of a permit to Heath Coggins to construct and operate an agricultural facility known as Heath Coggins Broilers, ND0089362 19,876-AG (Permit).

GENERAL BACKGROUND

Animal Feeding Operations (AFO's) are permitted based on South Carolina Regulation 61-43, Standards for the Permitting of Agricultural Animal Facilities ("R.61-43"). The regulations governing all animals other than swine are found in R.61-43, Part 200. The purpose of R.61-43 is to establish standards for:

1. The growing or confining of animals, processing of animal manure and other animal by-products, and land application of animal manure and other animal by-products in such a manner as to protect the environment, and the health and welfare of the 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.

3. The establishment of standards for the frequency of monitoring and record keeping requirements for producers who operate animal facilities.

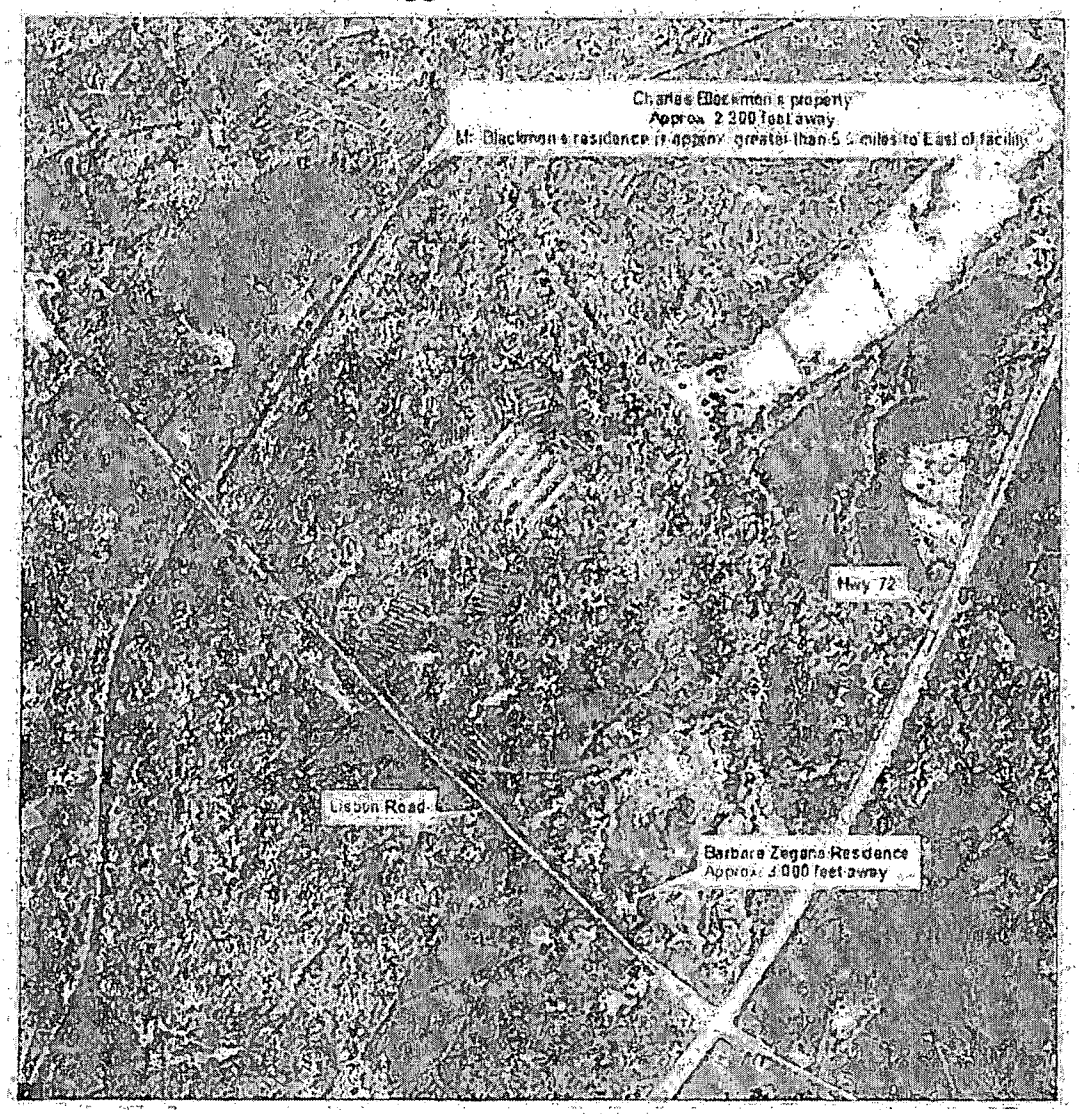
4. The establishment of standards for the proper operation and maintenance of animal facilities.

5. The establishment of criteria for animal facilities and manure utilization areas as they relate to protection of the environment and public health. The location of animal facilities and manure utilization areas as they relate to zoning in an area is not covered in this regulation.

RECEIVED
JAN 0 5 2017
Clerk, Board of Health
and Environmental Control

LOCATION OF THE PROPOSED HEATH COGGINS BROILERS AND PETITIONERS' PROPERTY

Heath Coggins Broilers ND0089362



Red Buffer Ring = 400' Property line setback
Blue Buffer Ring = 1000' Residential setback
Pink Buffer Ring = 2000' Distance from barns

0 495 990 1,980 Feet

N

dhec

2

RELEVANT CHRONOLOGY OF POULTRY FARM PERMIT APPLICATION
ND0089362
Heath Coggins Broilers, Lisbon Road, Mountville, SC 29370

April 13, 2016 - A preliminary site inspection (PSI) to determine the general suitability for animal feeding operations was performed and approved by the Department's Regional staff.

May 19 - A PSI to determine the general suitability for two (2) stacking shed and a composter at the proposed facility was performed and approved by the Department's Regional staff on April 13, 2016. The map showing the proposed location for the buildings was received on May 19, 2016.

July 29, 2016 - The Department received a Comprehensive Nutrient Management Plan (CNMP) and DHEC application from Heath Coggins for the construction of six (6) broiler houses on Lisbon Road, in Mountville, SC in Laurens County.

July 26 to October 11, 2016 - Medical evaluation request forms provided through US Mail and at public meeting to multiple concerned citizens requesting that that their health information be considered during the Department's review of the Coggins' application.

August 2, 2016 - The Administrative review is initiated.

August 3, 2016 - Documents sent to the Bureau of Air Quality (BAQ) and the Section of On-Site Wastewater Management, Bureau of Environmental Health Services (BEHS) for their review and recommendation.

August 8, 2016 - The Technical review is initiated.

August 17, 2016 - Pursuant to R.61-43 Part 200.60(A), five (5) public notices regarding the Receipt of a Permit Application for a Proposed Agricultural Facility were posted by staff from the Upstate BEHS Greenwood EA Office. The signs indicated that the applicant applied for a permit to construct six (6) broiler houses and the public notice period was from August 17, 2016 to September 16, 2016.

August 18, 2016 - Agricultural permitting staff received a memorandum from the Bureau of Air Quality (BAQ) in response to the permitting staff's request that the BAQ evaluate the potential of the facility to cause an increase in any regulated air pollutant and evaluate "Down-wind Receptors" as required by R.61-43 Part 200.70(F)(11). In its memorandum, the BAQ determined the following: An increase in air pollution will not occur, i.e., emissions will comply with all applicable air quality standards; the BAQ did not recommend any additional requirements or setbacks for this facility; and the location of the facility is in attainment for the emissions of concern, and operation of the facility will not cause any area to go out of attainment for any pollutant.

August 23, 2016 - Agricultural permitting staff received a memorandum from Regional office, confirming the posting of five (5) signs and providing the locations of the posted signs.

September 27, 2016 - Invitations to the public meeting were mailed to all concerned citizens who have communicated an interest in this proposed facility.

October 3, 2016 - The burial site was evaluated by the Department's On-Site Wastewater section.

October 11, 2016 - A public meeting was held in the Mountville Volunteer Fire Department to provide information to the concerned citizens.

November 1, 2016 - The closing date for receiving comments.

November 3, 2016 - A permitting review letter was sent to the consultant.

November 9, 2016 - A memorandum was received by the Agricultural permitting staff from the BEHS that concluded the site was suitable for burial of the daily mortality of birds and in the event of a massive die-off.

November 10, 2016 - Agricultural permitting staff received completed medical evaluations from Dr. Linda Bell from the citizens completing the required forms and whose health professionals provided requested information for the evaluation.

November 22, 2016 - The technical review is completed.

November 23, 2016 - The Public Notice of Permit issuance was posted on the DHEC public notice website to run from November 30, 2016 to December 15, 2016.

November 30, 2016 - Permit # 19,876-AG is issued to Heath Coggins to construct and operate a six (6) poultry broiler barn facility in Laurens County, on Lisbon Road.

November 30, 2016 - A Public Notice of Permit Issuance ran in the Laurens County Advertiser (Laurens).

November 30, 2016 - Letters and e-mails were sent to concerned citizens who commented or requested to be notified about the Departments decision. The letter stated that the Department has determined the permit should be issued.

December 15, 2016 - A Request for Review by the DHEC Board was filed by Mr. Charles Blackmon.

RELEVANT LAW

The permit to construct and operate a No-Discharge agricultural manure and animal by-product treatment and storage system was issued pursuant to the following statutes and regulations:

S.C. Code Ann. § 46-45-80 (Supp. 2015), Setback Distances waiver;

S.C. Code Ann. § 47-9-60 (Supp. 2015), Appeal of livestock and poultry facility permits; and

4 S.C. Code Ann. Regs. 61-43 Part 200 (2011), Standards for the Permitting of Animal Facilities (other than swine).

RESPONSE TO GROUND(S) STATED IN REQUESTS FOR REVIEW

As a preliminary matter, the RFR, which was filed by Requestor Charles Blackmon, identifies thirty (30) other individuals as additional parties to the RFR. Pursuant to S.C. Code Ann. § 44-1-60(E)(2), "[t]he staff decision becomes the final agency decision 15 calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person." According to the records of the Clerk of the Board, only Charles Blackmon filed an RFR and filing fee in accordance with the statute. Accordingly, the only challenge to the Department's issuance of the Permit for Heath Coggins Broilers is the one brought by Charles Blackmon has brought on his own behalf. *See Pieri v. South Carolina Department of Health and Environmental Control*, 2010 WL 5781644 * 2 (S.C. Admin L. Judge Div.) (stating that the filing of a request for final review with filing fee by each party challenging a Department decision is a prerequisite for jurisdiction for the DHEC Board and the Administrative Law Court to hear the challenge).

With regard to Mr. Blackmon's RFR, it makes six claims against the issuance of the permit, which are addressed below.

1. The Requestor claims that the Department only considered the minimum setbacks for the sitting of the facility and with regard to manure and animal byproducts and did not evaluate the need for any additional setbacks.

Response: The Department evaluated the sitting distances from the following locations and the facility and determined that since the distances were at least double the regulatory mandated minimum for each sitting distance, no additional distance is required:

1. Residence: 2,812 feet actual distance (1,000 feet required minimum distance);

2. Property not owned by applicant, other members of his family, and/or other persons who signed a waiver: Approx. 450 feet actual distance (400 feet required distance);

3. Wells not owned by applicant: 2,812 feet actual distance (200 feet required minimum distance);

4. The nearest Waters of the State: 834 feet actual distance (100 feet required minimal distance); and

5. The nearest ephemeral or intermittent stream: 278 feet actual distance (100 feet required minimum distance).

Additional setbacks related to the application of manure were not evaluated during the Department's review since the facility will utilize a permitted manure broker who will haul all the manure created by this facility offsite.

2. The Requestor is concerned about cumulative impact of adding this facility to existing poultry facilities in the Mountville area and claims that by permitting this facility the Department is creating a public nuisance.

Response: R. 61-43 sets forth a comprehensive legislatively approved regulatory scheme for the permitting of the construction and operation of animal facilities. The regulation contains no numerical limitation or density threshold for animal facilities permitted pursuant to its requirements. In accordance with the standards set forth in R.61-43, cumulative impacts are a requirement that the Department is to consider only when reviewing the construction or expansion of a swine facility. R.61-43 Part 100.70(G). Although the regulations do not provide a cumulative impacts requirement for non-swine animal facilities, the regulation does limit the number of facilities in a given area thorough the various setback distance requirements, which limit where a facility can be located. R.61-43 Part 200.80. Since this facility was permitted in accordance with the requirements contained in R.61-43 Part 200, including the setback distances, which the facility exceeded by at least 100%, the Department has not created a public nuisance.

3. The Requestor is concerned with the effect of Animal Facility Permitting regulations with other South Carolina (SC) laws applicable to adjoining property owners, in particular, SC Code of Laws Section 50-11-356. This law states as follows:

> It is unlawful to discharge a gun or weapon within three hundred yards of a poultry layer or broiler house containing live poultry without permission of the owner. Anyone knowingly violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned not more than thirty days. The provisions of this section do not apply to a landowner discharging a gun or weapon on his own land.

Response: Section 50-11-356 is a statute administered by the SC Department of Natural Recourses and relates to a matter, the discharge of firearms, which is outside the expertise and authority of the Department to evaluate. In addition, in this case the requirements of Section 50-11-356 have no impact on Requestor since his property line is located more than 900 feet (2,200 feet) from the location of the animal houses for the facility. See Map p. 2.

4. The Requestor is concerned with the regulations and enforcement as they relate to manure brokers and R.61-43 Part 400.

Response: The Requestor's concerns regarding manure brokers is without merit. The permit issued to the Coggins facility authorizes the facility to have its manure removed from the site by a licensed manure broker. The CNMP included a copy of the contract between the applicant and the manure broker, and the Department's review determined the broker is licensed by the Department to remove manure and is in compliance with the regulations governing manure brokers, which is located in R.61-43 Part 400. Requestor is not challenging the compliance record of the manure broker, rather, he is challenging the adequacy of the regulations contain in R.61-43 Part 400. This challenge is not properly before the Board since the purpose of a final review conference is to determine if the Department complied with the applicable regulatory standards and not as a method to challenge the sufficiency of the regulations. Moreover, even if

the Requestor were challenging the compliance record of the manure broker contracted by the applicant, such a challenge is still without merit since that challenge would not be about the adequacy of the Department's review for the construction and operation of the Coggins facility. Accordingly, Requestor's concerns are without merit and a final review conference is not warranted.

5. The Requestor claims R.61-43 should require "manure brokers to submit a site specific soil test at least annually before being permitted to utilize a particular site for distribution of animal waste".

Response: This claim does not identify any errors the Department made within regard to manure disposal. Rather it is a challenge of the sufficiency of the Broker permitting requirements contained in R.61-43 Part 400. Such a challenge should have been raised when the regulations were promulgated, and cannot be raised in a challenge to issuance of a permit for the construction and operation of a poultry facility, particularly when the manure generated by the facility will not be land applied on land surrounding the facility.

6. The Requestor claims that R.61-43 causes a "corruption of the spirit of the initial Right to Farm concept." The Requestor also claims the applicant's facility and a nearby facility already in operation is impacting a neighbors use of his property.

Response: The Requestor claims that R.61-43 conflicts with the Right to Farm concept is not properly before the Board. The matter before the Board in this RFR is whether the Department properly issued the permit for the Coggins poultry facility and not whether R.61-43 itself is flawed. Similarly, Requestor's claim that a neighbor would be impacted by the proposed facility and an existing facility is not properly before the Board. As noted above, only the Requestor filed a RFR challenging the Department's issuance of a permit to the Coggins facility. Therefore, the Requestor can only raise claims that impact him personally and not claims impacting others.

CONCLUSION

The Permit to construct and operate a No-Discharge agricultural manure and animal by-product treatment and storage system issued to Heath Coggins complies with all relevant provisions of South Carolina Regulation 61-43 Part 200, and meets or exceeds all regulatory setbacks and requirements.

REQUESTED ACTION

The Board should deny the Requestor's request for a final review conference.

[Signature page to follow]

Respectfully submitted,

Rob Devlin, Director
Director of Water Monitoring, Assessment, and Pollution
Bureau of Water, SCDHEC

Stephen P. Hightower, Assistant General Counsel
SCDHEC Office of General Counsel

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
STATEMENT OF STAFF POSITION

Requestor: Charles Blackmon

In re: Decision dated December 14, 2016 issuing an Agricultural Permit to David Coggins for the construction of six (6) poultry broiler houses within Laurens County in accordance with R. 61-43, Standards for the Permitting of Agricultural Animal Facilities. Docket No. 16-RFR- 152

Date: January 11, 2017

SUMMARY

This Request for Final Review (RFR) was filed by Mr. Charles Blackmon challenging the staff's issuance of a permit to David Coggins to construct and operate an agricultural facility known as David Coggins Broilers, ND0089338; Permit #19,886-AG.

GENERAL BACKGROUND

Animal Feeding Operations (AFO's) are permitted based on South Carolina Regulation 61-43, Standards for the Permitting of Agricultural Animal Facilities ("R.61-43"). The regulations governing all animals other than swine are found in R.61-43, Part 200. The purpose of R.61-43 is to establish standards for:

1. The growing or confining of animals, processing of animal manure and other animal by-products, and land application of animal manure and other animal by-products in such a manner as to protect the environment, and the health and welfare of the 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.

3. The establishment of standards for the frequency of monitoring and record keeping requirements for producers who operate animal facilities.

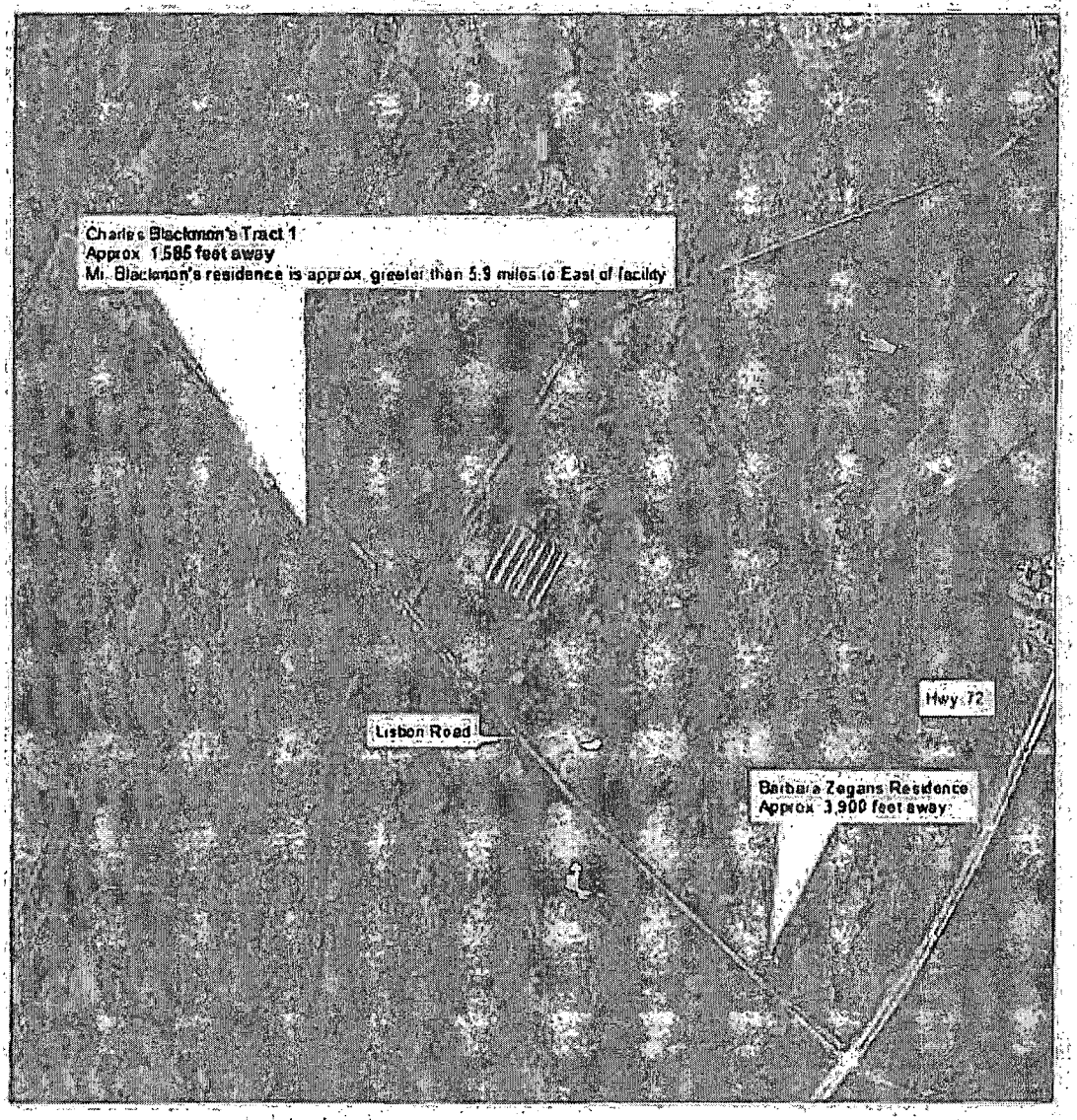
4. The establishment of standards for the proper operation and maintenance of animal facilities.

5. The establishment of criteria for animal facilities and manure utilization areas as they relate to protection of the environment and public health. The location of animal facilities and manure utilization areas as they relate to zoning in an area is not covered in this regulation.

RECEIVED
JAN 11 2017
Clerk, Board of Health
and Environmental Control

LOCATION OF THE PROPOSED DAVID COGGINS BROILERS AND PETITIONERS' PROPERTY

David Coggins Broilers ND0089338



Red Buffer Ring = 400' Property line setback
Blue Buffer Ring = 1000' Residential setback
Pink Buffer Ring = 2000' Distance from barns

0 550 1,100 2,200 Feet

N

dhec

2

REVELANT CHRONOLOGY OF POULTRY FARM PERMIT APPLICATION
ND0089338
David Coggins Broilers, Lisbon Road, Mountville, SC 29370

April 13, 2016 - A preliminary site inspection (PSI) to determine the general suitability for animal feeding operations was performed and approved by the Department's Regional staff.

May 19 2016 - A PSI to determine the general suitability for two (2) stacking shed and a composter at the proposed facility was performed and approved by the Department's Regional staff on April 13, 2016. The map showing the proposed location for the buildings was received on May 19, 2016.

July 6, 2016- The Department received a Comprehensive Nutrient Management Plan (CNMP) and DHEC application from David Coggins for the construction of six (6) broiler houses on Lisbon Road, near Mountville, SC in Laurens County.

July 6, 2016 - The Administrative review is initiated.

July 6, 2016 - The Technical review is initiated.

July 14, 2016 - Documents sent to the Bureau of Air Quality (BAQ) and the Section of On-Site Wastewater Management, Bureau of Environmental Health Services (BEHS) for their review and recommendation.

July 19, 2016 - Agricultural permitting staff received a memorandum from the Bureau of Air Quality (BAQ) in response to the permitting staff's request that the BAQ evaluate the potential of the facility to cause an increase in any regulated air pollutant and evaluate "Down-wind Receptors" as required by R.61-43 Part 200.70(F)(11). In its memorandum, the BAQ determined the following: An increase in air pollution will not occur, i.e., emissions will comply with all applicable air quality standards; the BAQ did not recommend any additional requirements or setbacks for this facility; and the location of the facility is in attainment for the emissions of concern, and operation of the facility will not cause any area to go out of attainment for any pollutant.

July 26 to October 11, 2016 - Medical evaluation request forms provided through US Mail and at public meeting to multiple concerned citizens requesting that their health information be considered during the Department's review of the Coggins application.

July 29, 2016 - Pursuant to R.61-43 Part 200.60(A), five (5) public notices regarding the Receipt of a Permit Application for a Proposed Agricultural Facility were posted by staff from the Upstate BEHS Greenwood EA Office. The signs indicated that the applicant applied for a permit to construct six (6) broiler houses and the public notice period was from July 29, 2016 to August 28, 2016.

August 4, 2016 - A permitting review letter was sent to the consultant.

August 5, 2016 - Agricultural permitting staff received a memorandum from Regional office, confirming the posting of five (5) signs and providing the locations of the posted signs.

September 1, 2016 - Invitations to the public meeting were mailed to all concerned citizens who have communicated an interest in this proposed facility.

September 15, 2016 - A public meeting was held in the Mountville Volunteer Fire Department to provide information to the concerned citizens.

October 3, 2016 - The burial site was evaluated by the Department's On-Site Wastewater section.

October 20, 2016 - The original closing date for receiving public comments for the public meeting was extended until November 1, 2016 due to Hurricane Matthew.

November 7, 2016 - The Agricultural permitting staff received updated maps indicating the barns would be relocated further back on the property. This was being done to move them further away from Lisbon Road, and also to allow the applicant the space needed to leave the 400' setback buffer vegetated as is.

November 9, 2016 - A memorandum was received by the Agricultural permitting staff from the BEHS that concluded the site was suitable for burial of the daily mortality of birds and in the event of a massive die-off.

November 10, 2016 - Agricultural permitting staff received completed medical evaluations from Dr. Linda Bell from the citizens completing the required forms and whose health professionals provided requested information for the evaluation.

December 9, 2016 - The technical review is completed.

December 12, 2016 - The Public Notice of Permit issuance was posted on the DHEC public notice website to run from December 14, 2016 to December 29, 2016.

December 14, 2016 - Permit # 19,886-AG is issued to David Coggins to construct and operate a six (6) poultry broiler barn facility in Laurens County, on Lisbon Road.

December 14, 2016 - A Public Notice of Permit Issuance ran in the Laurens County Advertiser (Laurens).

December 14, 2016 - Letters and e-mails were sent to concerned citizens who commented or requested to be notified about the Departments decision. The letter stated that the Department has determined the permit should be issued.

December 28, 2016 - A Request for Review by the DHEC Board was filed by Mr. Charles Blackmon.

RELEVANT LAW

The permit to construct and operate a No-Discharge agricultural manure and animal by-product treatment and storage system was issued pursuant to the following statutes and regulations:

S.C. Code Ann. § 46-45-80 (Supp. 2015), Setback Distances waiver;

S.C. Code Ann. § 47-9-60 (Supp. 2015), Appeal of livestock and poultry facility permits; and

4 S.C. Code Ann. Regs. 61-43 Part 200 (2011), Standards for the Permitting of Animal Facilities (other than swine).

RESPONSE TO GROUND(S) STATED IN REQUESTS FOR REVIEW

As a preliminary matter, the RFR, which was filed by Requestor Charles Blackmon, identifies thirty (30) other individuals as additional parties to the RFR. Pursuant to S.C. Code Ann. § 44-1-60(E)(2), "The staff decision becomes the final agency decision 15 calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person." According to the records of the Clerk of the Board, only Charles Blackmon filed an RFR and filing fee in accordance with the statute. Accordingly, the only challenge to the Department's issuance of the Permit for David Coggins Broilers is the one Charles Blackmon has brought on his own behalf. *See Pieri v. South Carolina Department of Health and Environmental Control*, 2010 WL 5781644 * 2 (S.C. Admin L. Judge Div.) (stating that the filing of a request for final review with filing fee by each party challenging a Department decision is a prerequisite for jurisdiction for the DHEC Board and the Administrative Law Court to hear the challenge).

With regard to Mr. Blackmon's RFR, it makes six claims against the issuance of the permit, which are addressed below.

1. The Requestor claims that the Department only considered the minimum setbacks for the sitting of the facility and with regard to manure and animal byproducts and did not evaluate the need for any additional setbacks.

Response: The Department evaluated the sitting distances from the following locations and the facility and determined that since the distances were at least double, (in all but one instance) the regulatory mandated minimum for each sitting distance, no additional distance is required:

1. Residence: 2,084 feet away (1,000 feet required minimum);
2. Property not owned by applicant or other members of the family who signed waivers: At least 400 feet away (400 feet required minimum);[1]
3. Existing wells: 2,084 feet away (200 feet required minimum if not owned by applicant); and
4. Waters of the State: 428 feet away (100 feet required minimum).

Additional setbacks related to the application of manure were not evaluated during the Department's review since the facility will utilize a permitted manure broker who will haul all the manure created by this facility offsite.

[1] During the Department's review, Staff measured the distance between the facility and the property line and determined it to be approximately 453 feet.

2. The Requestor is concerned about cumulative impact of adding this facility to existing poultry facilities in the Mountville area and claims that by permitting this facility the Department is creating a public nuisance.

Response: R. 61-43 sets forth a comprehensive legislatively approved regulatory scheme for the permitting of the construction and operation of animal facilities. The regulation contains no numerical limitation or density threshold for animal facilities permitted pursuant to its requirements. In accordance with the standards set forth in R.61-43, cumulative impacts are a requirement that the Department is to consider only when reviewing the construction or expansion of a swine facility. R.61-43 Part 100.70(G). Although the regulations do not provide a cumulative impacts requirement for non-swine animal facilities, the regulation does limit the number of facilities in a given area thorough the various setback distance requirements, which limit where a facility can be located. R.61-43 Part 200.80. Since this facility was permitted in accordance with the requirements contained in R.61-43 Part 200, including the setback distances, the Department has not created a public nuisance.

3. The Requestor is concerned with the effect of Animal Facility Permitting regulations with other South Carolina (SC) laws applicable to adjoining property owners, in particular, SC Code of Laws Section 50-11-356. This law states as follows:

> It is unlawful to discharge a gun or weapon within three hundred yards of a poultry layer or broiler house containing live poultry without permission of the owner. Anyone knowingly violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned not more than thirty days. The provisions of this section do not apply to a landowner discharging a gun or weapon on his own land.

Response: Section 50-11-356 is a statute administered by the SC Department of Natural Recourses and relates to a matter, the discharge of firearms, which is outside the expertise and authority of the Department to evaluate. In addition, in this case the requirements of Section 50-11-356 have no impact on Requestor since his property line is located more than 900 feet (1,500 feet) from the location of the animal houses for the facility. *See*, Map p. 2.

4. The Requestor is concerned with the regulations and enforcement as they relate to manure brokers and R.61-43 Part 400.

Response: The Requestor's concerns regarding manure brokers is without merit. The permit issued to the Coggin's facility authorizes the facility to have its manure removed from the site by a licensed manure broker. The CNMP included a copy of the contract between the applicant and the manure broker, and the Department's review determined the broker is licensed by the Department to remove manure and is in compliance with the regulations governing manure brokers, which is located in R.61-43 Part 400. Requestor is not challenging the compliance record of the manure broker, rather, he is challenging the adequacy of the regulations contained in R.61-43 Part 400. This challenge is not properly before the Board since the purpose of a final review conference is to determine if the Department complied with the applicable regulatory standards and not as a method to challenge the sufficiency of the regulations. Moreover, even if

the Requestor were challenging the compliance record of the manure broker contracted by the applicant, such a challenge is still without merit since that challenge would not be about the adequacy of the Department's review for the construction and operation of the Coggin's facility. Accordingly, Requestor's concerns are without merit and a final review conference is not warranted.

5. The Requestor claims that R.61-43 should require "manure brokers to submit a site specific soil test at least annually before being permitted to utilize a particular site for distribution of animal waste".

Response: This claim does not identify any errors the Department made within regard to manure disposal. Rather it is a challenge of the sufficiency of the Broker permitting requirements contained in R.61-43 Part 400. Such a challenge should have been raised when the regulations were promulgated, and cannot be raised in a challenge to issuance of a permit for the construction and operation of a poultry facility, particularly when the manure generated by the facility will not be land applied on land surrounding the facility.

6. The Requestor claims that R.61-43 causes a "corruption of the spirit of the initial Right to Farm concept." The Requestor also claims the applicant's facility and a nearby facility already in operation is impacting a neighbors use of his property.

Response: The Requestor claims that R.61-43 conflicts with the Right to Farm concept is not properly before the Board. The matter before the Board in this RFR is whether the Department properly issued the permit for the Coggin's poultry facility and not whether R.61-43 itself is flawed. Similarly, Requestor's claim that a neighbor would be impacted by the proposed facility and an existing facility is not properly before the Board. As noted above, only the Requestor filed a RFR challenging the Department's issuance of a permit to the Coggin's facility. Therefore, the Requestor can only raise claims that impact him personally and not claims impacting others.

CONCLUSION

The Permit to construct and operate a No-Discharge agricultural manure and animal by-product treatment and storage system issued to David Coggins complies with all relevant provisions of South Carolina Regulation 61-43 Part 200, and meets or exceeds all regulatory setbacks and requirements.

REQUESTED ACTION

The Board should deny the Requestor's request for a final review conference.

[Signature page to follow]

Respectfully submitted,

Rob Devlin, Director
Director of Water Monitoring, Assessment, and Pollution
Bureau of Water, SCDHEC

Stephen P. Hightower, Assistant General Counsel
SCDHEC Office of General Counsel

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
STATEMENT OF STAFF POSITION

Requestor: Charles Blackmon

In re: Decision dated December 21, 2016 issuing an Agricultural Permit to Jim Young for the construction of six (6) poultry broiler houses within Laurens County in accordance with R. 61-43, Standards for the Permitting of Agricultural Animal Facilities.
Docket No. 17-RFR- 1

Date: January 17, 2017

SUMMARY

This Request for Final Review (RFR) was filed by Mr. Charles Blackmon challenging the staff's issuance of a permit to Jim Young to construct and operate an agricultural facility known as Jim Young Broilers, ND0089354; Permit #19,889-AG.

GENERAL BACKGROUND

Animal Feeding Operations (AFO's) are permitted based on South Carolina Regulation 61-43, Standards for the Permitting of Agricultural Animal Facilities ("R.61-43"). The regulations governing all animals other than swine are found in R.61-43, Part 200. The purpose of R.61-43 is to establish standards for:

1. The growing or confining of animals, processing of animal manure and other animal by-products, and land application of animal manure and other animal by-products in such a manner as to protect the environment, and the health and welfare of the 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.

3. The establishment of standards for the frequency of monitoring and record keeping requirements for producers who operate animal facilities.

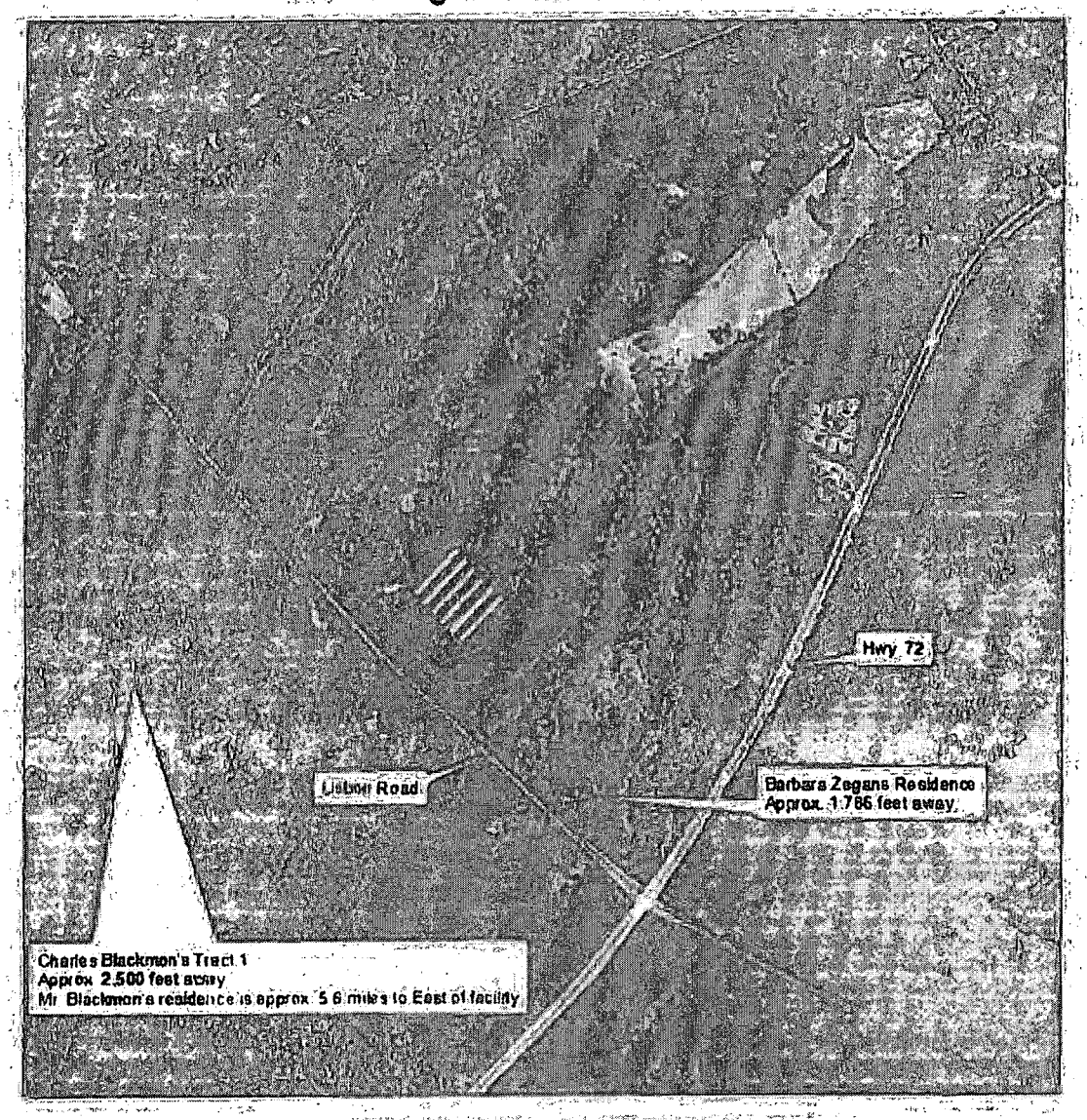
4. The establishment of standards for the proper operation and maintenance of animal facilities.

5. The establishment of criteria for animal facilities and manure utilization areas as they relate to protection of the environment and public health. The location of animal facilities and manure utilization areas as they relate to zoning in an area is not covered in this regulation.

RECEIVED
JAN 17 2017
Clerk, Board of Health and Environmental Control

LOCATION OF THE PROPOSED JIM YOUNG BROILERS AND PETITIONERS' PROPERTY

Jim Young Broilers ND0089354



Red Buffer Ring = 400' Property line setback
Blue Buffer Ring = 1000' Residential setback
Pink Buffer Ring = 2000' Distance from barns

0 550 1,100 2,200 Feet

N

dhec

2

REVELANT CHRONOLOGY OF POULTRY FARM PERMIT APPLICATION
ND0089354
Jim Young Broilers, Lisbon Road, Mountville, SC 29370

April 13, 2016 - A preliminary site inspection (PSI) to determine the general suitability for animal feeding operations was performed and approved by the Department's Regional staff.

May 19, 2016 - A PSI to determine the general suitability for two (2) stacking shed and a composter at the proposed facility was performed and approved by the Department's Regional staff on April 13, 2016. The map showing the proposed location for the buildings was received on May 19, 2016.

July 18, 2016 - The Department received a Comprehensive Nutrient Management Plan (CNMP) and DHEC application from Jim Young for the construction of six (6) broiler houses on Lisbon Road, in Mountville, SC in Laurens County.

July 18, 2016 - The Administrative review is initiated.

July 26, 2016 - Documents sent to the Bureau of Air Quality (BAQ) and the Section of On-Site Wastewater Management, Bureau of Environmental Health Services (BEHS) for their review and recommendation.

July 26 to October 11, 2016 - Medical evaluation request forms provided through US Mail and at public meeting to multiple concerned citizens requesting that their health information be considered during the Department's review of the Young application.

July 28, 2016 - Agricultural permitting staff received a memorandum from the Bureau of Air Quality (BAQ) in response to the permitting staff's request that the BAQ evaluate the potential of the facility to cause an increase in any regulated air pollutant and evaluate "Down-wind Receptors" as required by R.61-43 Part 200.70(F)(11). In its memorandum, the BAQ determined the following: An increase in air pollution will not occur, i.e., emissions will comply with all applicable air quality standards; the BAQ did not recommend any additional requirements or setbacks for this facility; and the location of the facility is in attainment for the emissions of concern, and operation of the facility will not cause any area to go out of attainment for any pollutant.

August 5, 2016 - The Technical review is initiated.

August 9, 2016 - Pursuant to R.61-43 Part 200.60(A), five (5) public notices regarding the Receipt of a Permit Application for a Proposed Agricultural Facility were posted by staff from the Upstate BEHS Greenwood EA Office. The signs indicated that the applicant applied for a permit to construct six (6) broiler houses and the public notice period was from August 9, 2016 to September 08, 2016.

August 23, 2016 - Agricultural permitting staff received a memorandum from Regional office, confirming the posting of five (5) signs and providing the locations of the posted signs.

August 25, 2016 - A permitting review letter was sent to the consultant.

September 27, 2016 - Invitations to the public meeting were mailed to all concerned citizens who have communicated an interest in this proposed facility.

October 3, 2016 - The burial site was evaluated by the Department's On-Site Wastewater section.

October 11, 2016 - A public meeting was held in the Mountville Volunteer Fire Department to provide information to the concerned citizens.

November 1, 2016 - The closing date for receiving comments.

November 1, 2016 - A memorandum was received by the Agricultural permitting staff from the BEHS that concluded the site was suitable for burial of the daily mortality of birds and in the event of a massive die-off.

November 10, 2016 - Agricultural permitting staff received completed medical evaluations from Dr. Linda Bell from the citizens completing the required forms and whose health professionals provided requested information for the evaluation.

December 13, 2016 - The technical review is completed.

December 13, 2016 - The Public Notice of Permit issuance was posted on the DHEC public notice website to run from December 21, 2016 to January 05, 2017.

December 21, 2016 - Permit # 19,889-AG is issued to Jim Young Broilers to construct and operate a six (6) poultry broiler barn facility in Laurens County, on Lisbon Road.

December 21, 2016 - A Public Notice of Permit Issuance ran in the Laurens County Advertiser (Laurens).

December 21, 2016 - Letters and e-mails were sent to concerned citizens who commented or requested to be notified about the Departments decision. The letter stated that the Department has determined the permit should be issued.

January 4, 2016 - A Request for Review by the DHEC Board was filed by Mr. Charles Blackmon.

RELEVANT LAW

The permit to construct and operate a No-Discharge agricultural manure and animal by-product treatment and storage system was issued pursuant to the following statutes and regulations:

S.C. Code Ann. § 46-45-80 (Supp. 2015), Setback Distances waiver;

S.C. Code Ann. § 47-9-60 (Supp. 2015), Appeal of livestock and poultry facility permits; and

4 S.C. Code Ann. Regs. 61-43 Part 200 (2011), Standards for the Permitting of Animal Facilities (other than swine).

RESPONSE TO GROUND(S) STATED IN REQUESTS FOR REVIEW

As a preliminary matter, the RFR, which was filed by Requestor Charles Blackmon, identifies thirty (30) other individuals as additional parties to the RFR. Pursuant to S.C. Code Ann. § 44-1-60(E)(2), "The staff decision becomes the final agency decision 15 calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person." According to the records of the Clerk of the Board, only Charles Blackmon filed an RFR and filing fee in accordance with the statute. Accordingly, the only challenge to the Department's issuance of the Permit for Jim Young Broilers is the one Charles Blackmon has brought on his own behalf. *See Pieri v. South Carolina Department of Health and Environmental Control*, 2010 WL 5781644 * 2 (S.C. Admin L. Judge Div.) (stating that the filing of a request for final review with filing fee by each party challenging a Department decision is a prerequisite for jurisdiction for the DHEC Board and the Administrative Law Court to hear the challenge).

With regard to Mr. Blackmon's RFR, it makes six claims against the issuance of the permit, which are addressed below.

1. The Requestor claims that the Department only considered the minimum setbacks for the sitting of the facility and with regard to manure and animal byproducts and did not evaluate the need for any additional setbacks.

Response: The Department evaluated the sitting distances from the following locations and the facility and determined that since the distances were greater than the regulatory mandated minimum for each sitting distance, no additional distance is required:

1. Residence: 1,786 feet away (1,000 feet required)

2. Property not owned by applicant or other members of the family who signed waivers: Approx. 422 feet away. (400 feet required)

3. Nearest Wells existing: 1,786 feet away (200 feet required if not owned by applicant)

4. The nearest Waters of the State is 1,760 feet away and the nearest ephemeral or intermittent stream is 426 feet away (100 feet required)

The Department evaluated the sitting distances from the following locations and the facility manure utilization areas (MUA's) and determined that no additional distance was required:

1. Residence: 300 feet away (300 feet required). The CNMP indicates that two of the MUAs are located 300 feet from a residence.[1] The animal permitting regulations provide that "[i]f the application method is [by] injection or immediate incorporation, manure may be applied up to the property line." R.61-43 Part 200.100(C). Staff determined no additional setback distance from the residences were since the applicant intends to immediately incorporate the manure when applied.

2. Nearest wells: The closest distance to a potable well is approximately 300 feet. (100 feet required).

3. Nearest Waters of the State or ephemeral & intermittent streams: 100 feet. (100 feet required). No additional distance was determined to be necessary because the manure will be incorporated in the soil immediately after land application. *See* R.61-43 Part 200.100(C).

2. The Requestor is concerned about cumulative impact of adding this facility to existing poultry facilities in the Mountville area and claims that by permitting this facility the Department is creating a public nuisance.

Response: R. 61-43 sets forth a comprehensive legislatively approved regulatory scheme for the permitting of the construction and operation of animal facilities. The regulation contains no numerical limitation or density threshold for animal facilities permitted pursuant to its requirements. In accordance with the standards set forth in R.61-43, cumulative impacts are a requirement that the Department is to consider only when reviewing the construction or expansion of a swine facility. R.61-43 Part 100.70(G). Although the regulations do not provide a cumulative impacts requirement for non-swine animal facilities, the regulation does limit the number of facilities in a given area thorough the various setback distance requirements, which limit where a facility can be located. R.61-43 Part 200.80. Since this facility was permitted in accordance with the requirements contained in R.61-43 Part 200, including the setback distances, the Department has not created a public nuisance.

3. The Requestor is concerned with the effect of Animal Facility Permitting regulations with other South Carolina (SC) laws applicable to adjoining property owners, in particular, SC Code of Laws Section 50-11-356. This law states as follows:

> It is unlawful to discharge a gun or weapon within three hundred yards of a poultry layer or broiler house containing live poultry without permission of the owner. Anyone knowingly violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned not more than thirty days. The provisions of this section do not apply to a landowner discharging a gun or weapon on his own land.

[1] The Requestor's residence is located 1.6 miles from the nearest manure utilization field to be used for land application by the Applicant.

Response: Section 50-11-356 is a statute administered by the SC Department of Natural Recourse and relates to a matter, the discharge of firearms, which is outside the expertise and authority of the Department to evaluate. In addition, in this case the requirements of Section 50-11-356 have no impact on Requestor since his property line is located more than 900 feet (2,500 feet) from the location of the animal houses for the facility. See Map p. 2.

4. The Requestor is concerned with the regulations and enforcement as they relate to manure brokers and R.61-43 Part 400.

Response: The Requestor's concerns regarding manure brokers is without merit. The permit issued to Mr. Young authorizes the facility to remove the litter from the barns and land apply the waste in accordance with R. 61-43 on land contained within the facilities approved CNMP. This permit also authorizes the Young Broiler facility to utilize a licensed manure broker in the event the fields in the approved CNMP cannot be land applied on during the time the litter is being removed. The CNMP included a copy of the contract between the applicant and the manure broker, and the Department's review determined the broker is licensed by the Department to remove manure and is in compliance with the regulations governing manure brokers, which is located in R.61-43 Part 400. Requestor is not challenging the compliance record of the manure broker, rather, he is challenging the adequacy of the regulations contained in R.61-43 Part 400. This challenge is not properly before the Board since the purpose of a final review conference is to determine if the Department complied with the applicable regulatory standards and not as a method to challenge the sufficiency of the regulations. Moreover, even if the Requestor were challenging the compliance record of the manure broker contracted by the applicant, such a challenge is still without merit since that challenge would not be about the adequacy of the Department's review for the construction and operation of the Young facility. Accordingly, Requestor's concerns are without merit and a final review conference is not warranted.

5. The Requestor claims R.61-43 should require "manure brokers to submit a site specific soil test at least annually before being permitted to utilize a particular site for distribution of animal waste".

Response: This claim is without merit since R.61-43 provides the precise relief sought by Requestor. Specifically, R.61-43 Part 200.100(B)(9), provides, in pertinent part, as follows:

> [s]oil sampling (usually 6-8 inch depth) shall be conducted on each field prior to manure application to determine the appropriate application rate. Each field should be sampled at least once per year. If manure application frequency shall be less than once per year, then at least one soil sample shall be taken prior to returning to that field for land application.

6. The Requestor claims that R.61-43 causes a "corruption of the spirit of the initial Right to Farm concept." The Requestor also claims the applicant's facility and a nearby facility already in operation is impacting a neighbors use of his property.

Response: The Requestor claims that R.61-43 conflicts with the Right to Farm concept is not properly before the Board. The matter before the Board in this RFR is whether the Department properly issued the permit for the Young poultry facility and not whether R.61-43 itself is

flawed. Similarly, Requestor's claim that a neighbor would be impacted by the proposed facility and an existing facility is not properly before the Board. As noted above, only the Requestor filed a RFR challenging the Department's issuance of a permit to the Young facility. Therefore, the Requestor can only raise claims that impact him personally and not claims impacting others.

CONCLUSION

The Permit to construct and operate a No-Discharge agricultural manure and animal by-product treatment and storage system issued to Jim Young complies with all relevant provisions of South Carolina Regulation 61-43 Part 200, and meets or exceeds all regulatory setbacks and requirements.

REQUESTED ACTION

The Board should deny the Requestor's request for a final review conference.

Respectfully submitted,

Rob Devlin, Director
Director of Water Monitoring, Assessment, and Pollution
Bureau of Water, SCDHEC

Stephen P. Hightower, Assistant General Counsel
SCDHEC Office of General Counsel

Healthy People. Healthy Communities.

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
L. Clarence Batts, Jr.
David W. Gillespie, MD

January 18, 2017

U.S. Mail – Certified
9214 8969 0099 9790 1407 1512 00
Charles S. Blackmon
3771 Hwy. 56
Clinton, SC 29325

U.S. Mail
David Coggins
1094 Lisbon Road
Mountville, SC 29370

Electronic Mail Delivery
Stephen P. Hightower
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 16-RFR-152, David Coggins - Issuance of Permit No. 19,886-AG for the construction and operation of six (6) new poultry broiler houses.

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office

South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
L. Clarence Batts, Jr.
David W. Gillespie, MD

Healthy People. Healthy Communities

January 18, 2017

U.S. Mail – Certified
9214 8969 0099 9790 1407 1508 38
Charles S. Blackmon
3771 Hwy. 56
Clinton, SC 29325

U.S. Mail
Heath Coggins
113 Moreland Avenue
Laurens, SC 29360

Electronic Mail Delivery
Stephen P. Hightower
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 16-RFR-148, Heath Coggins - Issuance of Permit No. 19,876-AG for the construction and operation of six (6) new poultry broiler houses.

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office

South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

Board:
Allen Amsler, Chairman
Ann B. Kirol, DDS, Secretary
R. Kenyon Wells
Charles M. Joye II, P.E.
L. Clarence Batts, Jr.
David W. Gillespie, MD

January 23, 2017

U.S. Mail – Certified
9214 8969 0099 9790 1407 1899 44
Charles S. Blackmon
3771 Hwy. 56
Clinton, SC 29325

U.S. Mail
Jim Young
107 Batteaux Place
Blythewood, SC 29016

Electronic Mail Delivery
Stephen P. Hightower
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 17-RFR-1, Jim Young - Issuance of Permit No. 19,889-AG for the construction and operation of six (6) new poultry broiler houses.

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

MULLEN TAYLOR LLC
ATTORNEY AT LAW

Post Office Box 8567
Columbia, South Carolina 29202
1230 Richland Street (29201)

Phone 803-254-1344
Fax 803-253-6084
mmt@MullenTaylorLLC.com

February 17, 2017

VIA HAND DELIVERY
The Honorable Jana Shealy, Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

RE: Petition for Contested Case Hearing:
Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices v. S.C. Department of Health and Environmental Control and David Coggins Broilers
DHEC Permit No. 19,886-AG
DHEC Docket No. 16-RFR-152

Dear Ms. Shealy:

Enclosed for filing are the original and one copy of a Petition for Contested Case Hearing for the above-described Agricultural Animal Facility, a Proof of Service, and a check in the amount of $500.00 for the filing fee. Please file-stamp the additional copy and return to me. By copy of this letter, the Respondents are hereby served copies of this filing.

Thank you for your assistance.

Sincerely Yours,

M. McMullen Taylor

Cc: SCDHEC, Office of General Counsel, Stephen P. Hightower, Esq.
David Coggins

FILED
FEB 17 2017
SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and David Coggins Broilers, Respondents.	)	Docket No. 17-ALJ-_____ **PETITION FOR CONTESTED CASE HEARING**

RE: David Coggins Broilers
DHEC Permit No. 19,886-AG: Agricultural Animal Facility
1094 Lisbon Road, Mountville, South Carolina 29370

The Petitioners, Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices ("SCRAP"), an unincorporated association of affected community members, hereby request the conduct of a contested case hearing by the Administrative Law Court to review and reverse the DHEC decision granting the above-referenced Agricultural Animal Facility Permit for the expansion of a Poultry Facility consisting of six (6) broiler barns housing 162,000 birds and generating 988 tons per year of animal waste. This Facility will threaten water quality, and emit air pollution and noxious odors into the environment of Mountville, South Carolina in close proximity to Petitioners' homes and property. The Petitioners breathe the air, drink water, and like to use and enjoy their property for outdoor recreation. However, the foul and noxious odors that would emanate from the proposed Facility will interfere with their ability to use and enjoy their property and the other natural resources of the Mountville area in the vicinity of the proposed Facility which they believe will be at risk of harm if the Respondent David Coggins Broilers is allowed to construct and operate the proposed Facility expansion. The Petitioners would be injured and adversely affected in the form of harm to their health and safety, the use and enjoyment of their properties, by the lowering of the value of their properties, and in their

enjoyment of the clean air and water and other natural resources of the Mountville area by the proposed activities of the Respondent David Coggins Broilers.

Petitioners seek administrative review of the final decision of the South Carolina Department of Health and Environmental Control ("DHEC"), dated January 18, 2017, attached as Exhibit A, declining review by the DHEC Board of DHEC's staff decision to issue Permit No. 19,886, attached as Exhibit B. In support of this Petition, Petitioners would respectfully show:

1. On December 14, 2016, DHEC issued a permit to Respondent for the construction and operation of six poultry broiler barns ("Facility") on Lisbon Road in Laurens County, South Carolina ("Permit").
2. The Facility is located near the Little River, and its tributaries, Beaverdam Creek and Ginger Creek, and other ephemeral and intermittent streams.
3. DHEC issued the Permit as a "no-discharge" permit for the construction and operation of poultry farms. "No-discharge" means that DHEC presumes that a Facility does not constitute a discharge into waters of the State as defined by the Clean Water Act, or that a Facility operating pursuant to an Animal Agricultural Permit will not cause pollutants to run into rivers, streams or creeks.
4. On December 28, 2016, Charles S. Blackmon, Neely C. Blackmon, John Basel, Mary Basel, Eliza Basel, Eric Blackmon, Wanda S. Woody, William R. Woody, Barbara Lee Zegan, Mary M. Moses, Sandra K. McNair, Frank McNair, Tony Marler, Lorie M. Wham, Patricia J. Wham, Edgar Benjamin, Elaine S. Benjamin, Kathy S. Lowman, Jean B. Revis, Don Revis, Keith Blackmon, Karen Blackmon, Margaret Sparrow, William Wham, Lura B. Williams, Brian T. Roberts, Nancy M. Roberts, and Gene Scott Watts timely filed a Request for Review by the DHEC Board.
5. On January 18, 2017, the Clerk of the DHEC Board mailed the Board's decision to Petitioner Blackmon declining to conduct a Final Review of the Permit, attached as Exhibit A.
6. Petitioner Charles S. Blackmon is a citizen and property owner in Laurens County.

7. Petitioner South Carolinians for Responsible Agricultural Practices ("SCRAP") is an unincorporated association of citizens and property owners in the Mountville area of Laurens County who advocate for poultry farming practices and permitting to be compatible with the use and enjoyment of non-poultry farming property owners, and in a manner that does not impair air and water quality, emit noxious odors, or otherwise cause the quality of life in the Mountville area to deteriorate.
8. Members of SCRAP include John and Mary Basel, Margaret Sparrow, Jean and Don Revis, Keith and Karen Blackmon, Eric and Lorie Blackmon, Mary Moses, Tina L. Moses, and Charles S. Blackmon.
9. Contrary to DHEC's presumption that poultry farms operating in compliance with an Animal Agricultural Permit do not discharge pollutants into surface waters of the State, Petitioners have observed frequent occasions where waste from Animal Agricultural Facilities come into contact with stormwater and, upon information and belief, runs into the Little River, Beaver Dam Creek, Ginger Creek, and/or ephemeral and intermittent streams.
10. Respondent's proposed Facility is to be located on sloping property which drains to the Little River.
11. Petitioner Charles S. Blackmon is an affected person entitled to seek a contested case proceeding pursuant to S.C. Code Ann. § 44-1-60 and S.C. Code Ann. § 47-9-60.
12. Petitioner SCRAP and its members are affected persons entitled to seek a contested case proceeding pursuant to S.C. Code Ann. § 44-1-60 and S.C. Code Ann. § 47-9-60.
13. Charles Blackmon owns land within approximately 582 yards of the nearest poultry houses to be managed by David Coggins Broilers under the proposed Permit. He owns a work shop within 900 yards of David Coggins Broilers' proposed poultry houses and frequently works in this shop and farms the land. The Little River, Beaverdam Creek, and Ginger Creek run through Mr. Blackmon's property. As part of the permitting process for Respondent's proposed Facility, Mr. Blackmon submitted documentation of a heart condition and frequent upper respiratory infections to DHEC, with no response.

14. SCRAP Members Mary and John Basel maintain a residence for frequent recreational use that is located on land adjacent to David Coggins Broilers' property. David Coggins Broilers' proposed Facility is located within approximately 600 feet from their property line. They use and lease their land for hunting wild game with a firearm. Because S.C. Code Ann. § 50-11-356 prohibits discharging of a firearm within 900 feet of a poultry house, their leasing and hunting rights will be impaired by the proposed Facility. The Little River, Beaverdam Creek, and Ginger Creek run through their property.
15. SCRAP Member Margaret Sparrow owns land adjacent to David Coggins Broiler's proposed Facility and this Facility is proposed to be located approximately 600 feet from her property line. She leases her land for hunting wild game with a firearm. Because S.C. Code Ann. § 50-11-356 prohibits discharging of a firearm within 900 feet of a poultry house, her leasing of hunting rights will be impaired by the proposed Facility. The Little River, Beaverdam Creek, and Ginger Creek run through her property.
16. SCRAP Members Jean and Don Revis own land within approximately 582 yards of the Respondent's proposed Facility. The Little River, Beaverdam Creek and Ginger Creek run through the property. They enjoy walking, hiking and fishing on their property.
17. SCRAP Members Keith and Karen Blackmon own land within approximately 582 yards from David Coggins Broiler's proposed Facility. The Little River, Beaverdam Creek and Ginger Creek run through the property. They enjoy hiking, fishing and hunting on their property.
18. SCRAP Members Lorie and Eric Blackmon reside approximately .95 miles from the David Coggins Broiler's proposed Facility. They enjoy hiking, hunting and fishing on the property. The Little River, Beaverdam Creek, and Ginger Creek run through the property.
19. SCRAP Member Mary Moses owns property 2 miles from David Coggins Broilers' proposed Facility. She enjoys hiking on her property.
20. SCRAP Member Tina L. Moses resides 2 miles from David Coggins Broilers' proposed Facility. She enjoys hiking on her property.
21. Petitioners contend, upon information and belief, that DHEC erred in issuing the proposed Permit due to failure to comply with or adhere to the applicable requirements under S.C.

Code Reg. 61-43 and other applicable regulations referenced therein, including but not limited to failure to comply with S.C. Code Reg. 61-43, Part 200.70.

22. DHEC failed to comply with S.C. Code Reg. 61-43, Part 200.70 in many respects, including DHEC's lack of considering as part of its evaluation under S.C. Code Reg. 61-43, Part 200.70(F) the impact of S.C. Code Ann. § 50-11-356 as a factor in considering additional setback distances. The lack of evaluating the proposed Facility in light of S.C. Code Ann. § 50-11-356 effectively impairs certain Petitioners from using or leasing the full extent of their property for hunting purposes, and causes pecuniary loss for certain Petitioners who lease their property for hunting purposes.

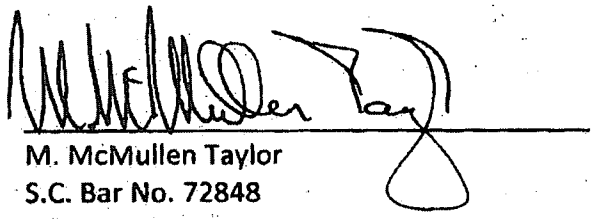
23. The Petitioners are informed and believe that the proposed Permit would violate state and federal environmental law and regulations and the law of nuisance, including: (1) DHEC Regulations 61-68; (2) the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.* (3) the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, *et seq.*; (4) the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10, *et seq.*; and (5) S.C. Code Ann. § 46-45-80.

24. The Petitioners contend that DHEC's decision that the proposed Facility does not constitute a discharge of pollutants or will not cause any discharge of pollutants into waters of the State lacks any rational basis and therefore, violates the Due Process Clause of the South Carolina and United States Constitutions.

25. The Petitioners contend that DHEC's air quality analysis and decision-making as applied to the proposed Permit lacks any rational basis and therefore, violates the Due Process Clause of the South Carolina and United States Constitutions.

WHEREFORE, Petitioners request that the Administrative Law Court conduct a contested case evidentiary hearing and thereafter, issue an order reversing the decision of Respondent DHEC to issue a permit to Respondent David Coggins Broilers, or so conditioning the permit to afford relief to Petitioners and adequately protect the environment.

Respectfully Submitted,



M. McMullen Taylor
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Columbia, South Carolina 29201
Phone: 803-917-5738
Email: bguild@mindspring.com

Attorneys for Petitioners

February 17, 2017
Columbia, South Carolina

EXHIBIT A

85

Healthy People. Healthy Communities.

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
L. Clarence Batts, Jr.
David W. Gillespie, MD

January 18, 2017

U.S. Mail – Certified
9214 8969 0099 9790 1407 1512 00
Charles S. Blackmon
3771 Hwy. 56
Clinton, SC 29325

U.S. Mail
David Coggins
1094 Lisbon Road
Mountville, SC 29370

Electronic Mail Delivery
Stephen P. Hightower
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 16-RFR-152, David Coggins - Issuance of Permit No. 19,886-AG for the construction and operation of six (6) new poultry broiler houses.

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office

South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

EXHIBIT B

88

Healthy People. Healthy Communities.

December 14, 2016

Concerned Citizen

RE: David Coggins Broilers, (Broiler Facility)

Dear Concerned Citizen:

The Department is sending this letter in response to your concerns in reference to the above-mentioned facility. After due consideration of the facts applicable to the above-named facility and the requirements and policies expressed in the Pollution Control Act of South Carolina and appropriate regulations, the Department of Health and Environmental Control has determined that the construction permit should be issued.

The concerns raised in the public meeting and the letters to the Department were carefully considered during this application review process. Concerns over odors, vectors, water quality, and dead animal disposal are concerns the Department's regulation address. The applicant's Comprehensive Nutrient Management Plan, prepared by Chris Mosley, PE, Agri-Waste Technology, Inc. has measures for controlling odors, vectors, and protecting groundwater. The permit will require the applicant to leave the 400 foot property line setback along Lisbon Road vegetated as it currently exists. The applicant was required to relocate his barns to accommodate the previous requirement. The Department has also included, with this letter, the answers to the questions asked during the public meeting.

This permit will be issued on December 14, 2016 and become effective December 29, 2016, provided that no request for board review is filed. Once the construction permit is issued, any person(s) can request a review of the issuance of that permit, as outlined in the "Guide for Board Review" enclosed with this mailing.

If you have any further questions regarding the review procedures, you may contact the Legal Office, Department of Health and Environmantal Control, 2600 Bull St., Columbia, SC 29201 or by calling (803) 898-3350. If you have any questions regarding the permit decision, please contact me at (803) 898-3532.

Sincerely,

William Chaplin

William Chaplin
SC DHEC - Bureau of Water
Agricultural Permitting Section

cc: Chrissy Matthews, Upstate BEHS Greenwood EA Office, SCDHEC
David Coggins, applicant
"Guide for Board Review" enclosure
Questions and Answers from public meeting enclosure

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and David Coggins Broilers, Respondents.	)	Docket No. 17-ALJ-_____ **PROOF OF SERVICE**

RE: David Coggins Broilers
DHEC Permit No. 19,886-AG: Agricultural Animal Facility
Lisbon Road, Mountsville, South Carolina 29370

I hereby certify that, on behalf of the Petitioners, I have served the above-described Petition for Contested Case Hearing in the above-captioned matter by depositing it in the United State Mail, postage prepaid, on February 17, 2017 to the below named parties at their address of record:

David Coggins
1094 Lisbon Road
Mountville, South Carolina 29370

Stephen P. Hightower, Esq.
S.C. Department of Health and Environmental Control
Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201

M. McMullen Taylor, Esq.
Mullen Taylor LLC
1230 Richland Street
Columbia, South Carolina 29201

FILED
FEB 17 2017
SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and Heath Coggins Broilers, Respondents.	)	Docket No. 17-ALJ-_____ **PETITION FOR CONTESTED CASE HEARING**

RE: Heath Coggins Broilers
DHEC Permit No. 19,876-AG: Agricultural Animal Facility
Lisbon Road, Mountville, South Carolina 29370

The Petitioners, Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices ("SCRAP"), an unincorporated association of affected community members, hereby request the conduct of a contested case hearing by the Administrative Law Court to review and reverse the DHEC decision granting the above-referenced Agricultural Animal Facility Permit for a Poultry Facility consisting of six (6) broiler barns. This Facility will threaten water quality, and emit air pollution and noxious odors into the environment of Mountville, South Carolina in close proximity to Petitioners' homes and property. The Petitioners breathe the air, drink water, and use and enjoy their property for outdoor recreation. However, the foul and noxious odors that would emanate from the proposed Facility will interfere with their ability to use and enjoy their property and the other natural resources of the Mountville area in the vicinity of the proposed Facility which they believe will be at risk of harm if the Respondent Heath Coggins Broilers is allowed to construct and operate the proposed Facility. The Petitioners would be injured and adversely affected in the form of harm to their health and safety, the use and enjoyment of their properties, by the lowering of the value of their properties, and in their enjoyment of the clean

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FEB 17 2017
SC ADMIN LAW COURT

air and water and other natural resources of the Mountville area by the proposed activities of the Respondent Heath Coggins Broilers.

Petitioners seek administrative review of the final decision of the South Carolina Department of Health and Environmental Control ("DHEC"), dated January 18, 2017, attached as Exhibit A, declining review by the DHEC Board of DHEC's staff decision to issue Permit No. 19,876-AG, attached as Exhibit B. In support of this Petition, Petitioners would respectfully show:

1. On November 30, 2016, DHEC issued a permit to Respondent Heath Coggins Broilers for the construction and operation of six poultry broiler barns ("Facility") on Lisbon Road in Laurens County, South Carolina ("Permit").
2. The Facility is located near the Little River, and its tributaries, Beaverdam Creek and Ginger Creek, and other ephemeral and intermittent streams.
3. DHEC issued the Permit as a "no-discharge" permit for the construction and operation of poultry farms. "No-discharge" means that DHEC presumes that a Facility does not constitute a discharge into waters of the State as defined by the Clean Water Act, or that a Facility operating pursuant to an Animal Agricultural Permit will not cause pollutants to run into rivers, streams or creeks.
4. On December 15, 2016, Charles S. Blackmon, Neely C. Blackmon, John Basel, Mary Basel, Eliza Basel, Eric Blackmon, Wanda S. Woody, William R. Woody, Barbara Lee Zegen, Mary M. Moses, Sandra K. McNair, Frank McNair, Tony Marler, Lori M. Wham, Patricia J. Wham, Edgar Benjamin, Elaine S. Benjamin, Kathy S. Lowman, Jean B. Revis, Don Revis, Keith Blackmon, Karen Blackmon, Margaret Sparrow, William Wham, Lura B. Williams, Brian T. Roberts, Nancy M. Roberts, and Gene Scott Watts timely filed a Request for Review by the DHEC Board.
5. On January 18, 2017, the Clerk of the DHEC Board mailed the Board's decision to Petitioner Blackmon declining to conduct a Final Review of the Permit, attached as Exhibit A.
6. Petitioner Charles S. Blackmon is a citizen and property owner in Laurens County.
7. Petitioner South Carolinians for Responsible Agricultural Practices ("SCRAP") is an unincorporated association of citizens and property owners in the Mountville area of

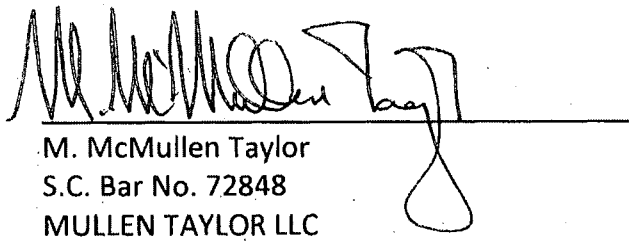
compatible with the use and enjoyment of non-poultry farming property owners, and in a manner that does not impair air and water quality, emit noxious odors, or otherwise cause the quality of life in the Mountville area to deteriorate.

8. Members of SCRAP include Barbara Lee Zegen, Jean and Don Revis, Mary and John Basel, Keith and Karen Blackmon, Ross Stewart, Margaret Sparrow and Charles S. Blackmon.
9. Contrary to DHEC's presumption that poultry farms operating in compliance with an Animal Agricultural Permit do not discharge pollutants into surface waters of the State, Petitioners have observed frequent occasions where waste from Animal Agricultural Facilities come into contact with stormwater and, upon information and belief, runs into the Little River, Beaver Dam Creek, Ginger Creek, and/or ephemeral and intermittent streams.
10. Respondent's proposed Facility is to be located on sloping property which drains to Beaverdam Creek and ultimately to the Little River.
11. Petitioner Charles S. Blackmon is an affected person entitled to seek a contested case proceeding pursuant to S.C. Code Ann. § 44-1-60 and S.C. Code Ann. § 47-9-60.
12. Petitioner SCRAP and its members are affected persons entitled to seek a contested case proceeding pursuant to S.C. Code Ann. § 44-1-60 and S.C. Code Ann. § 47-9-60.
13. Charles Blackmon owns land approximately 2,200 feet from ' proposed Facility. He owns a work shop on this property and frequently works in this shop and farms the land. The Little River, Beaverdam Creek, and Ginger Creek run through Mr. Blackmon's property. As part of the permitting process for Respondent's proposed Facility, Mr. Blackmon submitted documentation of a heart condition and frequent upper respiratory infections to DHEC, with no response.
14. SCRAP Members Jean and Don Revis own land within approximately 2,200 feet from the Respondent's proposed Facility. The Little River, Beaverdam Creek and Ginger Creek run through the property. They enjoy walking, hiking and fishing on their property.
15. SCRAP Members Keith and Karen Blackmon own land within approximately 2,200 feet from Green Acres' proposed Facility. The Little River, Beaverdam Creek and Ginger Creek run through the property. They enjoy hiking, fishing and hunting on their property.

16. SCRAP Member Barbara Lee Zegen resides in her home located approximately 3,450 feet from Heath Coggins Broilers' proposed Facility. Ms. Zegen likes to hike on her property. She is very sensitive to certain odors and submitted to DHEC information documenting this medical condition. Her medical issues were dismissed by DHEC.
17. SCRAP Members Mary and John Basel own land approximately 742 yards from Heath Coggins Broilers' proposed Facility. The Little River, Beaverdam Creek, and Ginger Creek run through their property.
18. SCRAP Member Margaret Sparrow owns land approximately 742 yards from Heath Coggins Broilers' proposed Facility. The Little River, Beaverdam Creek, and Ginger Creek run through their property.
19. Petitioners contend, upon information and belief, that DHEC erred in issuing the proposed Permit due to failure to comply with or adhere to the applicable requirements under S.C. Code Reg. 61-43 and other applicable regulations referenced therein, including but not limited to failure to comply with S.C. Code Reg. 61-43, Part 200.70.
20. The Petitioners are informed and believe that the proposed Permit would violate state and federal environmental law and regulations and the law of nuisance, including: (1) DHEC Regulations 61-68; (2) the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.* (3) the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, *et seq.*; (4) the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10, *et seq.*; and (5) S.C. Code Ann. § 46-45-80.
21. The Petitioners contend that DHEC's decision that the proposed Facility does not constitute a discharge of pollutants or will not cause any discharge of pollutants into waters of the State lacks any rational basis and therefore, violates the Due Process Clause of the South Carolina and United States Constitutions.
22. The Petitioners contend that DHEC's air quality analysis and decision-making as applied to the proposed Permit lacks any rational basis and therefore, violates the Due Process Clause of the South Carolina and United States Constitutions.

WHEREFORE, Petitioners request that the Administrative Law Court conduct a contested case evidentiary hearing and thereafter, issue an order reversing the decision of Respondent DHEC to issue a permit to Respondent Heath Coggins Broilers, or so conditioning the permit to afford relief to Petitioners and adequately protect the environment.

Respectfully Submitted,



M. McMullen Taylor
S.C. Bar No. 72848
MULLEN TAYLOR LLC
1230 Richland Street
Columbia, South Carolina 29201
Phone: 803-254-1344
Email: mmt@MullenTaylorLLC.com

Robert Guild
S.C. Bar No. 2358
314 Pall Mall Street
Columbia, South Carolina 29201
Phone: 803-917-5738
Email: bguild@mindspring.com

Counsel for Petitioners

February 17, 2017
Columbia, South Carolina

EXHIBIT A

96

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
L. Clarence Batts, Jr.
David W. Gillespie, MD

Healthy People. Healthy Communities.

January 18, 2017

U.S. Mail – Certified
9214 8969 0099 9790 1407 1508 38
Charles S. Blackmon
3771 Hwy. 56
Clinton, SC 29325

U.S. Mail
Heath Coggins
113 Moreland Avenue
Laurens, SC 29360

Electronic Mail Delivery
Stephen P. Hightower
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 16-RFR-148, Heath Coggins - Issuance of Permit No. 19,876-AG for the construction and operation of six (6) new poultry broiler houses.

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office

South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

EXHIBIT B

99

Healthy People. Healthy Communities.

November 30, 2016

Concerned Citizen

RE: Heath Coggins Broilers, (Broiler Facility)

Dear Concerned Citizen:

The Department is sending this letter in response to your concerns in reference to the above-mentioned facility. After due consideration of the facts applicable to the above-named facility and the requirements and policies expressed in the Pollution Control Act of South Carolina and appropriate regulations, the Department of Health and Environmental Control has determined that the construction permit should be issued.

The concerns raised in the public meeting and the letters to the Department were carefully considered during this application review process. Concerns over odors, vectors, water quality, and dead animal disposal are concerns the Department's regulation address. The applicant's Comprehensive Nutrient Management Plan, prepared by Chris Mosley, PE, Agri-Waste Technology, Inc. has measures for controlling odors, vectors, and protecting groundwater. The permit will require the applicant to leave the 400 foot property line setback along Lisbon Road vegetated as it currently exists. The Department has also included, with this letter, the answers to the questions asked during the public meeting.

This permit will be issued on November 30, 2016 and become effective December 15, 2016, provided that no request for board review is filed. Once the construction permit is issued, any person(s) can request a review of the issuance of that permit, as outlined in the "Guide for Board Review" enclosed with this mailing.

If you have any further questions regarding the review procedures, you may contact the Legal Office, Department of Health and Environmantal Control, 2600 Bull St., Columbia, SC 29201 or by calling (803) 898-3350. If you have any questions regarding the permit decision, please contact me at (803) 898-3532.

Sincerely,

William Chaplin
SC DHEC - Bureau of Water
Agricultural Permitting Section

cc: Chrissy Matthews, Upstate BEHS Greenwood EA Office, SCDHEC
Heath Coggins, applicant
"Guide for Board Review" enclosure
Questions and Answers from public meeting enclosure

S.C. Department of Health and Environmental Control
2600 Bull Street, Columbia, SC 29201 (803) 898-3432 www.scdhec.gov

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

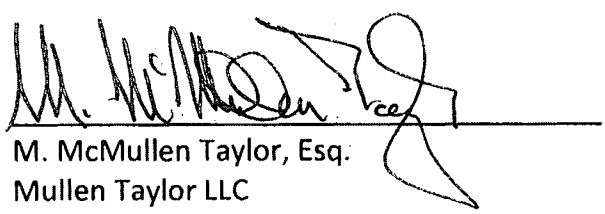
Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and Heath Coggins Broilers, Respondents.	)	Docket No. 17-ALJ-_____ **PROOF OF SERVICE**

RE: Heath Coggins Broilers
DHEC Permit No. 19,876-AG: Agricultural Animal Facility
Lisbon Road, Mountsville, South Carolina 29370

I hereby certify that, on behalf of the Petitioners, I have served the above-described Petition for Contested Case Hearing in the above-captioned matter by depositing it in the United State Mail, postage prepaid, on February 17, 2017 to the below named parties at their address of record:

Heath Coggins
113 Moreland Avenue
Laurens, South Carolina 29360

Stephen P. Hightower, Esq.
S.C. Department of Health and Environmental Control
Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201



M. McMullen Taylor, Esq.
Mullen Taylor LLC
1230 Richland Street
Columbia, South Carolina 29201

FILED
FEB 17 2017
SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and Jim Young Broilers, Respondents.	)	Docket No. 17-ALJ-_____ **PETITION FOR CONTESTED CASE HEARING**

RE: Jim Young Broilers
DHEC Permit No. 19,889-AG: Agricultural Animal Facility
Lisbon Road, Mountville, South Carolina 29370

The Petitioners, Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices ("SCRAP"), an unincorporated association of affected community members, hereby request the conduct of a contested case hearing by the Administrative Law Court to review and reverse the DHEC decision granting the above-referenced Agricultural Animal Facility Permit for the expansion of a Poultry Facility consisting of six (6) broiler barns housing 237,600 birds generating 1,449 tons per year of animal waste. This Facility will threaten water quality, and emit air pollution and noxious odors into the environment of Mountville, South Carolina in close proximity to Petitioners' homes and property. The Petitioners breathe the air, drink water, and use and enjoy their property for outdoor recreation. However, the foul and noxious odors that would emanate from the proposed Facility will interfere with their ability to use and enjoy their property and the other natural resources of the Mountville area in the vicinity of the proposed Facility which they believe will be at risk of harm if the Respondent Jim Young Broilers is allowed to construct and operate the proposed Facility expansion. The Petitioners would be injured and adversely affected in the form of harm to their health and safety, the use and enjoyment of their properties, by the lowering of the value of their properties, and in their enjoyment of the clean

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FEB 17 2017
SC ADMIN LAW COURT

air and water and other natural resources of the Mountville area by the proposed activities of the Respondent Jim Young Broilers.

Petitioners seek administrative review of the final decision of the South Carolina Department of Health and Environmental Control ("DHEC"), dated January 23, 2017, attached as Exhibit A, declining review by the DHEC Board of DHEC's staff decision to issue Permit No. 19,889-AG, attached as Exhibit B. In support of this Petition, Petitioners would respectfully show:

1. On December 21, 2016, DHEC issued a permit to Respondent for the construction and operation of six poultry broiler barns ("Facility") on Lisbon Road in Laurens County, South Carolina ("Permit").
2. The Facility is located near the Little River, and its tributaries, Beaverdam Creek and Ginger Creek, and other ephemeral and intermittent streams.
3. DHEC issued the Permit as a "no-discharge" permit for the construction and operation of poultry farms. "No-discharge" means that DHEC presumes that a Facility does not constitute a discharge into waters of the State as defined by the Clean Water Act, or that a Facility operating pursuant to an Animal Agricultural Permit will not cause pollutants to run into rivers, streams or creeks.
4. On January 4, 2017, Charles S. Blackmon, Neely C. Blackmon, John Basel, Mary Basel, Eliza Basel, Eric Blackmon, Wanda S. Woody, William R. Woody, Barbara Lee Zegen, Mary M. Moses, Sandra K. McNair, Frank McNair, Tony Marler, Lori M. Wham, Patricia J. Wham, Edgar Benjamin, Elaine S. Benjamin, Kathy S. Lowman, Jean B. Revis, Don Revis, Keith Blackmon, Karen Blackmon, Margaret Sparrow, William Wham, Lura B. Williams, Brian T. Roberts, Nancy M. Roberts, and Gene Scott Watts timely filed a Request for Review by the DHEC Board.
5. On January 23, 2017, the Clerk of the DHEC Board mailed the Board's decision to Petitioner Blackmon declining to conduct a Final Review of the Permit, attached as Exhibit A.
6. Petitioner Charles S. Blackmon is a citizen and property owner in Laurens County.
7. Petitioner South Carolinians for Responsible Agricultural Practices ("SCRAP") is an unincorporated association of citizens and property owners in the Mountville area of

compatible with the use and enjoyment of non-poultry farming property owners, and in a manner that does not impair air and water quality, emit noxious odors, or otherwise cause the quality of life in the Mountville area to deteriorate.

8. Members of SCRAP include Barbara Lee Zegen, John and Mary Basel, Margaret Sparrow, Ross Stewart, Jean and Don Revis, Keith and Karen Blackmon, and Charles S. Blackmon.
9. Contrary to DHEC's presumption that poultry farms operating in compliance with an Animal Agricultural Permit do not discharge pollutants into surface waters of the State, Petitioners have observed frequent occasions where waste from Animal Agricultural Facilities come into contact with stormwater and, upon information and belief, runs into the Little River, Beaver Dam Creek, Ginger Creek, and/or ephemeral and intermittent streams.
10. Respondent's proposed Facility is to be located on sloping property which drains to the Little River.
11. Petitioner Charles S. Blackmon is an affected person entitled to seek a contested case proceeding pursuant to S.C. Code Ann. § 44-1-60 and S.C. Code Ann. § 47-9-60.
12. Petitioner SCRAP and its members are affected persons entitled to seek a contested case proceeding pursuant to S.C. Code Ann. § 44-1-60 and S.C. Code Ann. § 47-9-60.
13. Charles Blackmon owns land within .81 miles of the nearest poultry houses to be managed by Jim Young Broilers under the proposed Permit. He owns a work shop on this property and frequently works in this shop and farms the land. The Little River, Beaverdam Creek, and Ginger Creek run through Mr. Blackmon's property. As part of the permitting process for Respondent's proposed Facility, Mr. Blackmon submitted documentation of a heart condition and frequent upper respiratory infections to DHEC, with no response.
14. SCRAP Members Mary and John Basel maintain a residence for frequent recreational use that is located on land adjacent to Jim Young Broilers' property. Jim Young Broilers' proposed Facility is located within approximately 600 feet from their property line. They use and lease their land for hunting wild game with a firearm. Because S.C. Code Ann. § 50-11-356 prohibits discharging of a firearm within 900 feet of a poultry house, their

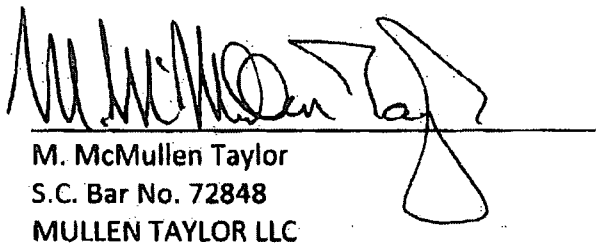
leasing and hunting rights will be impaired by the proposed Facility. The Little River, Beaverdam Creek, and Ginger Creek run through their property.

15. SCRAP Member Margaret Sparrow owns land adjacent to Jim Young Broilers' proposed Facility and this Facility is proposed to be located approximately 600 feet from her property line. She leases her land for hunting wild game with a firearm. Because S.C. Code Ann. § 50-11-356 prohibits discharging of a firearm within 900 feet of a poultry house, her leasing of hunting rights will be impaired by the proposed Facility. The Little River, Beaverdam Creek, and Ginger Creek run through her property.
16. SCRAP Member Ross Stewart owns property adjacent to Jim Young Broilers' property. Jim Young Broilers' proposed Facility is located within approximately 400 feet from his property line. He uses and leases his land for hunting wild game with a firearm. Because S.C. Code Ann. § 50-11-356 prohibits discharging of a firearm within 900 feet of a poultry house, his leasing and hunting rights will be impaired by the proposed Facility. The Little River runs through Mr. Stewart's property.
17. SCRAP Members Jean and Don Revis own land within approximately .81 miles from the Respondent's proposed Facility. The Little River, Beaverdam Creek and Ginger Creek run through the property. They enjoy walking, hiking and fishing on their property.
18. SCRAP Members Keith and Karen Blackmon own land within approximately .81 miles from Jim Young Broilers' proposed Facility. The Little River, Beaverdam Creek and Ginger Creek run through the property. They enjoy hiking, fishing and hunting on their property.
19. SCRAP Member Barbara Lee Zegen resides in her home located 1,768 feet from Jim Young Broilers' proposed Facility. Ms. Zegen likes to hike on her property. She is very sensitive to certain odors and submitted to DHEC information documenting this medical condition. Her medical issues were dismissed by DHEC.
20. Petitioners contend, upon information and belief, that DHEC erred in issuing the proposed Permit due to failure to comply with or adhere to the applicable requirements under S.C. Code Reg. 61-43 and other applicable regulations referenced therein, including but not limited to failure to comply with S.C. Code Reg. 61-43, Part 200.70.

21. DHEC failed to comply with S.C. Code Reg. 61-43, Part 200.70 in many respects, including DHEC's lack of considering as part of its evaluation under S.C. Code Reg. 61-43, Part 200.70(F) the adverse impact of S.C. Code Ann. § 50-11-356 as a factor in considering additional setback distances. The lack of evaluating the proposed Facility in light of S.C. Code Ann. § 50-11-356 effectively impairs certain Petitioners from using or leasing the full extent of their property for hunting purposes, and causes pecuniary loss for certain Petitioners who lease their property for hunting purposes.
22. The Petitioners are informed and believe that the proposed Permit would violate state and federal environmental law and regulations and the law of nuisance, including: (1) DHEC Regulations 61-68; (2) the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.* (3) the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, *et seq.*; (4) the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10, *et seq.*; and (5) S.C. Code Ann. § 46-45-80.
23. The Petitioners contend that DHEC's decision that the proposed Facility does not constitute a discharge of pollutants or will not cause any discharge of pollutants into waters of the State lacks any rational basis and therefore, violates the Due Process Clause of the South Carolina and United States Constitutions.
24. The Petitioners contend that DHEC's air quality analysis and decision-making as applied to the proposed Permit lacks any rational basis and therefore, violates the Due Process Clause of the South Carolina and United States Constitutions.

WHEREFORE, Petitioners request that the Administrative Law Court conduct a contested case evidentiary hearing and thereafter, issue an order reversing the decision of Respondent DHEC to issue a permit to Respondent Jim Young Broilers, or so conditioning the permit to afford relief to Petitioners and adequately protect the environment.

Respectfully Submitted,



M. McMullen Taylor
S.C. Bar No. 72848
MULLEN TAYLOR LLC
1230 Richland Street
Columbia, South Carolina 29201
Phone: 803-254-1344
Email: mmt@MullenTaylorLLC.com

Robert Guild
S.C. Bar No. 2358
314 Pall Mall Street
Columbia, South Carolina 29201
Phone: 803-917-5738
Email: bguild@mindspring.com

Counsel for Petitioners

February 17, 2017
Columbia, South Carolina

EXHIBIT A

108

Healthy People. Healthy Communities

Board:
Allen Amsler, *Chairman*
Ann B. Kirol, DDS, *Secretary*
R. Kenyon Wells
Charles M. Joye II, P.E.
L. Clarence Batts, Jr.
David W. Gillespie, MD

January 23, 2017

U.S. Mail - Certified
9214 8969 0099 9790 1407 1899 44
Charles S. Blackmon
3771 Hwy. 56
Clinton, SC 29325

U.S. Mail
Jim Young
107 Batteaux Place
Blythewood, SC 29016

Electronic Mail Delivery
Stephen P. Hightower
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 17-RFR-1, Jim Young - Issuance of Permit No. 19,889-AG for the construction and operation of six (6) new poultry broiler houses.

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

S.C. Department of Health and Environmental Control
2600 Bull Street, Columbia, SC 29201 (803) 896-3637 www.scdhec.gov

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

EXHIBIT B

111

Healthy People. Healthy Communities.

December 21, 2016

Concerned Citizen

RE: Jim Young Broilers, (Broiler Facility)

Dear Concerned Citizen:

The Department is sending this letter in response to your concerns in reference to the above-mentioned facility. After due consideration of the facts applicable to the above-named facility and the requirements and policies expressed in the Pollution Control Act of South Carolina and appropriate regulations, the Department of Health and Environmental Control has determined that the construction permit should be issued.

The concerns raised in the public meeting and the letters to the Department were carefully considered during this application review process. Concerns over odors, vectors, water quality, and dead animal disposal are concerns the Department's regulation address. The applicant's Comprehensive Nutrient Management Plan, prepared by Chris Mosley, PE, Agri-Waste Technology, Inc. has measures for controlling odors, vectors, and protecting groundwater. The permit will require the applicant to leave the 400 foot property line setback along Lisbon Road and the eastern property line vegetated as it currently exists. The Department has also included, with this letter, the answers to the questions asked during the public meeting.

This permit will be issued on December 21, 2016 and become effective January 5, 2017, provided that no request for board review is filed. Once the construction permit is issued, any person(s) can request a review of the issuance of that permit, as outlined in the "Guide for Board Review" enclosed with this mailing.

If you have any further questions regarding the review procedures, you may contact the Legal Office, Department of Health and Environmantal Control, 2600 Bull St., Columbia, SC 29201 or by calling (803) 898-3350. If you have any questions regarding the permit decision, please contact me at (803) 898-3532.

Sincerely,

William Chaplin

William Chaplin
SC DHEC - Bureau of Water
Agricultural Permitting Section

cc: Chrissy Matthews, Upstate BEHS Greenwood EA Office, SCDHEC
Jim Young, applicant
"Guide for Board Review" enclosure
Questions and Answers from public meeting enclosure

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and Jim Young Broilers, Respondents.	)))))))))))))))	Docket No. 17-ALJ-_____ **PROOF OF SERVICE**

RE: Jim Young Broilers
DHEC Permit No. 19,889-AG: Agricultural Animal Facility
Lisbon Road, Mountsville, South Carolina 29370

I hereby certify that, on behalf of the Petitioners, I have served the above-described Petition for Contested Case Hearing in the above-captioned matter by depositing it in the United State Mail, postage prepaid, on February 17, 2017 to the below named parties at their address of record:

Jim Young
107 Batteaux Place
Blythewood, South Carolina 29016

Stephen P. Hightower, Esq.
S.C. Department of Health and Environmental Control
Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201

M. McMullen Taylor, Esq.
Mullen Taylor LLC
1230 Richland Street
Columbia, South Carolina 29201

FILED
FEB 17 2017
SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

FINAL ORDER AND DECISION

For the Petitioners: M. McMullen Taylor, Esquire, and Robert Guild, Esquire
For Respondents Jim Young Broilers, David Coggins Broilers, and Heath Coggins Broilers: Benjamin P. Mustian, Esquire
For Respondent South Carolina Department of Health and Environmental Control: Stephen P. Hightower, Esquire

STATEMENT OF THE CASE

Pursuant to S.C. Code Ann. § 1-23-310 *et seq.* and the S.C. Code Ann. § 44-1-60, Petitioners Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices ("SCRAP") timely filed petitions for contested cases challenging the South Carolina Department of Health and Environmental Control's ("DHEC" or "Department") decision to issue animal agricultural permits to Jim Young Broilers, David Coggins Broilers, and Heath Coggins Broilers. On March 29, 2017, this Court granted the Parties' joint motion to consolidate the cases for hearing purposes because the cases involve the same tract of land that will be subdivided into three tracts, and the same or substantially the same evidence is relevant and material to the matters at issue in each case. However, each case retains its separate caption and docket number. After notice was given to all parties, a hearing on the merits was held on August 15-17, 2017 in the Administrative Law Court ("ALC" or "Court") in Columbia, South Carolina.

FINDINGS OF FACT

Having observed the witnesses and reviewed the exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

1. Jim Young Broilers, David Coggins Broilers and Heath Coggins Broilers individually sought permits to each construct an animal agricultural facility comprised of six poultry barns to grow broiler chickens ("Proposed Facilities") on an approximately 255-acre tract on Lisbon Road in the Mountville area of Laurens County, South Carolina ("Coggins Property"). DHEC_003188 – DHEC_003192; DHEC_000922 – DHEC_000927, DHEC_000950; DHEC_001159; DHEC_002067 – DHEC_002070; Hrg. Tr. p. 430, lines 10-14. A total of eighteen broiler barns is proposed to be located on the Coggins Property. Id. This parcel has been or will be subdivided into three parcels for each respective permittee's facility. DHEC_003217, DHEC_003483; Pet. Exh. 4(T) PET-02189; PET-02190; Hrg. Tr. p. 66, line 12 – p. 68, line 9.
2. In the Mountville area, there are twelve existing poultry facilities totaling approximately 50 poultry barns. PET-01836; Hrg. Tr. p. 113, line 2 – p. 114, line 15. All of the existing poultry facilities are located along or near tributaries of the Little River. PET-01836; Hrg. Tr. p. 114, lines 19-24.
3. The Little River watershed is impaired due to excessive levels of fecal bacteria in the Little River and its tributaries. Hrg. Tr. p. 524, line 7 – p. 528, line 16. In 2004, DHEC issued a Total Maximum Daily Load for the Little River and its tributaries for the purpose of assessing the watershed and examining how to bring the watershed into compliance with the Clean Water Act and South Carolina water quality regulations. Id.; Hrg. Tr. p. 929, lines 3-7. The TMDL identifies poultry facilities as a contributor to the impairment of the Little River watershed. Hrg. Tr. p. 863, line 9 – p. 865, line 6. The TMDL is still in effect. Hrg. Tr. p. 862, line 24 – p. 863, line 8.

The Petitioners

4. Through a corporate entity, Dunlap Homeplace, LLC, Ms. Mary Basel and Ms. Margaret Sparrow jointly own four parcels of land ("Basel/Sparrow Property") surrounding the Coggins Property. PET-02189; Hrg. Tr. p. 209, lines 12-14.

5. Ms. Basel and Ms. Sparrow are members of SCRAP. Hrg. Tr. p. p. 207, lines 21-22; p. 228, lines 21-23.

6. One parcel of the Basel/Sparrow Property is located adjacent to the western boundary of the Coggins Property alongside a railroad track. Id. The Little River runs near the back property line of this parcel. Id.; DHEC_000947; Hrg. Tr. p. 224, lines 11-15. Maps included in David Coggins' Comprehensive Nutrient Management Plan show that the Coggins Property slopes down from David Coggins' proposed barns toward the Basel/Sparrow Property. DHEC_000958. On the Basel/Sparrow Property, the land continues to slope down to the Little River. Id.

7. Another adjacent parcel faces the Coggins Property on the opposite side of Lisbon Road from the Coggins Property. Id.

8. Another parcel at the corner of Highway 72 and Lisbon Road is located below the Coggins Property. PET-02189. On this parcel, Ms. Basel and Ms. Sparrow built a cabin for family and other social gatherings. Hrg. Tr. p. 205, line 17 – p. 206, line 20. Tributaries of the Little River, Beaverdam Creek and Ginger Creek, runs across these two parcels. Id.

9. All tracts are located in the Little River watershed. PET-02189; Hrg. Tr. p. 206, line 25 – p. 207, line 11.

10. Ms. Sparrow enjoys recreating on the Basel/Sparrow Property, and in Beaverdam Creek and Ginger Creek, both tributaries of the Little River that run across two of the properties

she owns. Hrg. Tr. p. 205, line 9 – p. 207, line 14. She expressed her concern that water quality and aquatic wildlife of the Little River and its tributaries will be adversely affected by the proposed facilities. Hrg. Tr. p. 222, line 22 – p. 223, line 7.

11. Ms. Basel frequently hunts on the Basel/Sparrow Property. Hrg. Tr. p. 224, line 16 – p. 225, line 4. Ms. Basel's use and enjoyment of her property and recreational interests will be harmed by odors emanating from the proposed facilities. Hrg. Tr. p. 230, lines 7-12.

12. Ms. Basel is familiar with the topography of the Coggins Property and has observed the gullies and drop in elevation. Hrg. Tr. p. 230, line 13 – p. 234, line 18. She expressed her concern that the proposed facilities would adversely impact water quality of the Little River. Id.

13. Ms. Basel and Ms. Sparrow lease their parcels for hunting purposes. PET-02271 – PET-02276; Hrg. Tr. p. 224, lines 16-21.

14. Ms. Basel and Ms. Sparrow both complained of the fifty existing poultry houses within and five-and-a half-mile radius from the Coggins Property and how the addition of the proposed 18 barns would create or contribute to nuisance conditions, adverse environmental impacts, and reduced quality of life. DHEC_000890 – DHEC_000893; DHEC_002037 – DHEC_002040; DHEC_003161 – DHEC_003164.

15. The proposed facilities interfere with the interest of Ms. Basel and Ms. Sparrow in leasing her property for hunting purposes because state law prohibits discharging of a firearm within 300 yards (or 900 feet) from a poultry barn unless the grower, at his discretion, provides consent. S.C. Code Ann. § 50-11-356. The proposed barns of David Coggins Broilers and Jim Young Broilers are located 400 feet from property owned by Ms. Basel and Ms. Sparrow on the opposite side of Lisbon Road. DHEC_000947; DHEC_003217;

PET-02189. The proposed barns of David Coggins Broilers are located 400 feet from property owned by Ms. Basel and Ms. Sparrow to the west of the Coggins Property. DHEC_000947; PET-02189. Thus, 500 feet of each of their two parcels is limited in their ability to offer the full extent of their property to others for hunting. Hrg. Tr. p. 225, line 9 – p. 226, line 20.

16. Prior to the filing of permit applications by the Permittees, Ms. Basel and Ms. Sparrow had planned to build homes on the Basel/Sparrow Property. Hrg. Tr. p. 234, lines 19-25; DHEC_002375 – DHEC_002376. She and Ms. Sparrow asked DHEC if the setback requirement for residences under S.C. Code Regs. 61-43 would apply to the contemplated homes, but DHEC never gave them a clear answer. They did not proceed with the construction of the homes. Hrg. Tr. p. 234, line 19 – p. 235, line 4; DHEC_002393; DHEC_002407. In a letter from DHEC to Ms. Sparrow, dated September 21, 2016, DHEC responded to this issue by stating that the required 1,000 foot setback only applies to "permanent inhabited dwelling ... which is routinely occupied by the same person or persons for more than twelve hours per day by the same person or persons under the age of eighteen for more than two hours per day, except those owned by the applicant." DHEC_002406 (citing to S.C. Code Regs. 61-43 Part 50.EEE).

17. Mr. Charles Blackmon owns or jointly owns seven parcels surrounding the Coggins Property. PET-02189. The Little River runs across one parcel. Id.; Hrg. Tr. p. 70, line 12 – p. 71, line 20. Tributaries of the Little River border two of Mr. Blackmon's parcels. PET-02168; Hrg. Tr. p. 72, line 22 – p. 73, line 22.

18. Mr. Blackmon uses his property for recreational purposes such as fishing, hunting, hiking and camping. Hrg. Tr. p. 64, lines 15-20; p. 131, lines 1-8.

19. Mr. Blackmon also hunts on the Belfast Wildlife Management Area located along the Little River downstream from his property. Hrg. Tr. p. 64, line 15 – p. 65, line 10.

20. Mr. Blackmon holds a lifetime lease to hunt on the Basel/Sparrow Property. Hrg. Tr. p. 144, line 1 p. 146, line 17; PET-02271 – PET-02274; PET-02276. Mr. Blackmon's interests in hunting on the Basel/Sparrow land is impaired by the proposed poultry facilities at issue in this case because state law prohibits discharging of a firearm within 300 yards (or 900 feet) from a poultry barn, unless the grower, at his discretion, provides consent. S.C. Code Ann. § 50-11-356; see also ¶ 17 above. This statute limits his ability to fully exercise his hunting rights on the Basel/Sparrow Property. Hrg. Tr. p. 149, line 19 – p. 151, line 16.

21. From his experience as a hunter, Mr. Blackmon is concerned that his enjoyment of hunting would be impaired by the proposed poultry facilities because the odor emanating from poultry facilities provide a cover scent for deer. Hrg. Tr. p. 154, line 23 – p. 156, line 21.

22. Mr. Blackmon's property interests and recreational interests would be harmed by the odor emanating from the Proposed Facilities. Hrg. Tr. p. 95, lines 19-24; Hrg. Tr. p. 160, lines 9-19.

23. Mr. Blackmon complained of the fifty existing poultry houses within and five-and-a-half-mile radius from the Coggins Property and how the addition of the proposed 18 barns would create or contribute to nuisance conditions, adverse environmental impacts, and reduced quality of life. DHEC_000890 – DHEC_000893; DHEC_002037 – DHEC_002040; DHEC_003161 – DHEC_003164.

24. Mr. Ross Stewart owns two parcels of land on the eastern side of the Coggins Property. PET-02168. One parcel is adjacent to the Coggins Property, with the Little River running

along or across it, downstream from the Coggins Property. Hrg. Tr. p. 245, line 23 – p. 246, line 16; PET-02189. He has used his property for camping, hunting, hiking, and other recreational activities. Hrg. Tr. p. 262, line 18 – p. 264, line 8. He has an interest in taking care of his land and teaching his children and grandchildren to love, respect, and care for the land. Id. Mr. Stewart wants his grandchildren to swim in the Little River and enjoy the land. Hrg. Tr. p. 263, lines 13-18.

25. He is a member of SCRAP. Hrg. Tr. p. 262, lines 8-9; DHEC_003161 – DHEC_003164.
26. Mr. Stewart leases his property for hunting purposes. Hrg. Tr. p. 262, lines 10-16; Hrg. Tr. p. 264, lines 9-12.
27. The proposed facilities would impair the property interests of Mr. Stewart in the water quality of Little River. Hrg. Tr. p. 278, line 13 -24; p. 279, line 9 – 280, line 13; p. 281, lines 3-25; p. 282, line 24 – p. 284, line 2; p. 285, lines 2-5; p. 293, line 8 – p. 295, line 18; DHEC_003541. Mr. Stewart asserted that the proposed facilities would reduce the value of his property. DHEC_003541.
28. Jim Young's proposed facility interferes with Mr. Stewart's interest in leasing his property for hunting purposes because state law prohibits discharging of a firearm within 300 yards (or 900 feet) from a poultry barn unless the grower, at his discretion, provides consent. S.C. Code Ann. § 50-11-356. Jim Young's proposed barns are located 400 feet from Mr. Stewart's property line. DHEC_003217. Thus, 500 feet of Mr. Stewart's property would be subject to S.C. Code Ann. § 50-11-356, limiting his ability to offer the full extent of his adjacent property to others for hunting. PET-02280 – PET-02284.
29. Mr. Stewart complained of the fifty existing poultry houses within and five-and-a-half mile radius from the Coggins Property and how the addition of the proposed 18 barns would

create or contribute to nuisance conditions, adverse environmental impacts, and reduced quality of life. DHEC_003161 – DHEC_003164.

Procedural History

30. On November 30, 2016, the Department issued an animal agricultural permit ("Permit"), 19,889-AG, to Heath Coggins Broilers "for construction and operation of a **NO-DISCHARGE** agricultural manure and animal by-products treatment and storage system in accordance with the construction plans, specifications, engineering report, animal facility management plan and construction permit application prepared by Chris Mosley, P.E., Agri-Waste Technology, Inc." (emphasis in the original). The Permit authorized construction of six (6) poultry broiler houses in the Mountville area of Laurens County to grow 4.5 flocks of 237,600 broilers per year, totaling 1,069,200 birds annually. Pet. Exh. 3(B), DHEC_002042.

31. On December 7, 2016, citizens of the Mountville area formed an organization called South Carolinians for Responsible Agricultural Practices ("SCRAP") for the primary purpose of challenging the proposed permits by filing a Requests for DHEC Board review ("RFR") followed by action in the Administrative Law Court. Hrg. Tr. p. 184, line 17 – p. 186, line 9. Mr. Blackmon is President of SCRAP. Hrg. Tr. p. 188, lines 15-17.

32. In preparation for filing the RFRs for each proposed facility, Mr. Blackmon spoke with the DHEC clerk, Ms. Longshore, several times. Hrg. Tr. p. 17 – p. 188, line 9. He understood from Ms. Longshore that the RFRs needed to include a contact person. Hrg. Tr. p. 187, line 22 – p. 188, line 17. As President of SCRAP, he agreed to serve as the contact person on the RFRs. Id. Mr. Blackmon's intent was that the RFRs were filed as a request by an organization or group of individuals. Hrg. Tr. p. 190, lines 16-24. SCRAP was not

represented by an attorney prior to or at the time the RFRs were filed. Hrg. Tr. p. 188, line 18 – p. 189, line 25.

33. On December 14, 2016, the Department issued an animal agricultural permit ("Permit"), 19,886-AG, to David Coggins Broilers "for construction and operation of a **NO-DISCHARGE** agricultural manure and animal by-products treatment and storage system in accordance with the construction plans, specifications, engineering report, animal facility management plan and construction permit application prepared by Chris Mosley, P.E., Agri-Waste Technology, Inc." (emphasis in the original). The Permit authorized construction of six (6) poultry broiler houses in the Mountville area of Laurens County to grow 4.5 flocks of 162,000 broilers per year, totaling 729,000 birds annually. DHEC_000895.

34. On December 15, 2016, a Request for Board Review ("RFR") was filed seeking DHEC Board review of Department's decision to issue the Permit to Heath Coggins Broilers. DHEC_002037 – DHEC_002040. The RFR repeatedly referred to the Requestors as "we" or "our," and was signed by 31 individuals, with Charles Blackmon listed first as the contact person for the group. Other signatories included Mary Basel, Margaret Sparrow, and Kathy Lowman. DHEC_000893. All of the signatories were members of SCRAP. Hrg. Tr. p. 187, lines 17-21.

35. On December 21, 2016, the Department issued an animal agricultural permit ("Permit"), 19,889-AG, to Jim Young Broilers "for construction and operation of a **NO-DISCHARGE** agricultural manure and animal by-products treatment and storage system in accordance with the construction plans, specifications, engineering report, animal facility management plan and construction permit application prepared by Chris Mosley, P.E., Agri-Waste

Technology, Inc." (emphasis in the original). The Permit authorized construction of six (6) poultry broiler houses in the Mountville area of Laurens County to grow 4.5 flocks of 237,600 broilers per year, totaling 1,069,200 birds annually. DHEC_003167.

36. On December 28, 2016, a Request for Board Review ("RFR") was filed seeking DHEC Board review of Department's decision to issue the Permit to David Coggins Broilers. DHEC_000890 – DHEC_000893. The RFR repeatedly referred to the Requestors as "we" or "our," and was signed by 31 individuals, with Charles Blackmon listed first as the contact person for the group. Other signatories included Mary Basel, Margaret Sparrow, and Kathy Lowman. DHEC_000893. All of the signatories were members of SCRAP. Hrg. Tr. p. 187, lines 17-21.

37. On January 4, 2017, a Request for Board Review ("RFR") was filed seeking DHEC Board review of Department's decision to issue the Permit to Jim Young Broilers. DHEC_003161 – DHEC_003164. The RFR repeatedly referred to the Requestors as "we" or "our," and was signed by 32 individuals, with Charles Blackmon listed first as the contact person for the group. Other signatories included Mary Basel, Margaret Sparrow, Kathy Lowman, and Ross Stewart. DHEC_003164. All of the signatories to the RFR own property within two miles of Jim Young's proposed facility. Hrg. Tr. p. 186, line 21 – p. 187, line 14. All of the signatories to the RFR are members of SCRAP. Hrg. Tr. p. 187, lines 17-21.

38. The filing fees for the three RFRs were paid collectively by Ms. Sparrow, Ms. Basel and Mr. Blackmon. Hrg. Tr. p. 190, lines 5-15. p. 238, line 24 – 239, line 9.

39. On January 18, 2017, the Department notified the Petitioners that the DHEC Board declined to conduct a final review conference concerning the permits issued to David

Coggins Broilers and Heath Coggins Broilers. DHEC_000874 – DHEC_000875; DHEC_002021 – DHEC_002022.

40. On January 23, 2017, the Department notified the Petitioners that the DHEC Board declined to conduct a final review conference concerning the permit issued to Jim Young Broilers. DHEC_003145 – DHEC_003146.

41. The Petitioners filed Petitions for Contested Case for all three permits on February 17, 2017.

Jim Young Broilers

42. Jim Young's proposed facility includes six barns are 65 feet wide and 600 feet long, spaced 60 feet apart from one another. DHEC_003209. According to DHEC, the barns are approximately 422 feet from the Dunlap Homeplace property facing the Property on the opposite side of Lisbon Road. DHEC_003151. Behind Jim Young's barns, the Property drops in elevation by eighty (80) feet down to the Little River and its floodplain. Hrg. Tr. p. 266, lines 9-14.[1] DHEC_003209.

43. Maps included in Jim Young's Comprehensive Nutrient Management Plan ("CNMP") show that an ephemeral stream – an old channel of the Little River - runs along the rear property line parallel to the Little River. DHEC_003209, DHEC_003217; Hrg. Tr. p. 285, lines 8-14. Delineated wetlands are located downslope near the barns as well as a smaller stream that feeds into the wetlands. Id. In total, there are three surface water streams and one area of wetlands located in proximity to Jim Young's proposed facility.

[1] Dr. Hargett described a forty-foot drop in elevation, but his testimony did not concern the topography from Jim Young's barns to the Little River. Compare Hrg. Tr. 503, line 18 – p. 504, line 3 (describing drop in elevation from barns to 500-foot contour line, which is not the contour line closest to the Little River) to DHEC_003209 (topographic map showing an additional thirty-foot drop from the 500-foot contour line to the Little River).

44. The barns are located anywhere from 1,672 feet to 1,760 feet from the Little River, and 1,446 feet from the old channel of the Little River. DHEC_003174 (describing an intermittent stream as 1,446 feet away); DHEC_003190 (Permit application showing waters of the state to be located 1,672 feet away); DHEC_003447 (DHEC's Application Summary stating water of the state located 1,672 feet away); DHEC_003151 (DHEC's Statement of Staff Position stating that nearest water of the state is 1,760 feet away).

45. DHEC's permit file appears to state that the wetlands are located anywhere from 426 feet to 538 feet from the barns. DHEC_003174 (Permit checklist describing nearest water of the State to be 426 feet away); DHEC_003190 (Notes on permit application showing measurement of 426-foot distance to "ephemeral or intermittent streams" to actually be the distance to delineated wetlands); DHEC_003447 (DHEC's Application Summary stating that an unidentified "ephemeral stream" is located 538 feet away from facility); DHEC_003151 (DHEC's Statement of Staff Position representing to DHEC Board that nearest "ephemeral or intermittent stream" is 426 feet away).

46. Jim Young's CNMP shows a surface water stream located closer to the barns than the delineated wetlands. DHEC_003217 (showing surface water stream verified by Agri-Waste flowing into wetlands). The Department's permit file lacks any evidence of consideration of this stream in relation to the facility.

47. DHEC's permit file for Jim Young Broilers does not show any movement of the poultry barns' location except to move the barns back slightly in order to maintain the mandatory 400-foot setback from Lisbon Road as a vegetated buffer. Hrg. Tr. 842, line 11 – p. 843, line 1; compare Jim Young's Headquarter Map dated Nov. 3, 2016 (DHEC_003217) to maps dated June 8, 2016 (DHEC_003218).

48. Although the Department's animal agricultural permit issued to Jim Young grants permission to construct and operate "in accordance with construction plans, specifications, engineering report, animal facility management plan[2] and construction permit application prepared by Chris Mosley, P.E., Agri-Waste Technology, Inc., DHEC's permit file for Jim Young does not include any construction plans, an engineering report, or a construction permit application. Hrg. Tr. p. 12 – p. 851, line 12. There is no grading plan or stormwater plan contained in Jim Young's application. Hrg. Tr. p. 781, lines 3-6.

49. Jim Young's proposed site would have to be graded, which will significantly alter the landscape. Once the site is graded, the facility's proximity to waterbodies and ditches and swales may not be the same as what is identified in the application. Hrg. Tr. p. 775, line 25 – p. 776, line 7; p. 779, line 22 – p. 780, line 16.

50. The Department's review of Jim Young's permit is contained in written permit checklists. The purpose of the checklists is to provide for a comprehensive review of the proposed sites and facilities. Hrg. Tr. 820, lines 3 – 13.

51. Pursuant to S.C. Code Regs. 61-43.200.70(E), the "department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from any new or enlarged sources."

52. Petitioners' expert stated that:

> There is an abundance of documentation that these sites produce pollution. They produce them through the emissions, be they water or other, that come from these sites and they enter the environment, they enter water resources. And that will happen here. It will certainly happen. You aren't not going to retain all the stormwater. Some of it will leave the site and it will follow gravity. It will follow the course of least resistance and find its way into

[2] The specified Animal Facility Management Plan within S.C. Code Regs. 61-43 Part 200.50(B)(2) is referred to as Comprehensive Nutrient Management Plans within the DHEC permit files. Tr. Hrg. p. 711, lines 13-18.

waters of the state. So, my answer is yes, definitively there will be an increase in pollution from these sites. Hrg. Tr. p. 545, line 13 – p. 546, line 1.

53. Mr. Chaplin relied on a memorandum from the Bureau of Air Quality ("BAA") to determine whether Jim Young's facility will cause an increase in air pollution. DHEC_003398. The BAA defined "increase in air pollution" as an emissions increase that would cause an exceedance of an ambient air quality standard." Id. The BAA used the term "down-wind receptors" in its analysis, which BAA defined as "virtual three-dimensional coordinates placed offsite where concentration of emissions would be measured for comparison to air quality standards." DHEC_003399. While the BAA recognized that ammonia, nitrous oxide, methane, and hydrogen sulfide are potential air pollutants generated from manure, the BAA noted that only hydrogen sulfide is regulated by an air quality standard. Id. The BAA explained that hydrogen sulfide can only be emitted through manure decomposing under anaerobic conditions, and that anaerobic conditions occur only in a wet manure system. Because poultry operations use a dry manure system,[3] hydrogen sulfide "should not be present in poultry farms ...." Id. Therefore, under DHEC's reading of Part 200.70(E), there is no increase in pollution to be prevented.

54. Jim Young's CNMP states that odor in and around poultry houses may be caused by "wet litter from leaky waterers, poultry bedding that is overloaded with manure, ... exhaust ventilation air, gaseous emissions of ammonia or hydrogen sulfide, [and] uncovered manure piles ...." DHEC_003235. Unlike the BAA, the CNMP acknowledges that hydrogen sulfide may be emitted from poultry operations. Id. S.C. Code Regs. 61-43 Part 200.150(E) recognizes that poultry manure become odorous if wet. See Part

[3] "Dry manure" is defined as "manure, bedding, litter, feed losses, or composted animal material (animal manure or dead animals) that is not in liquid form." S.C. Code Regs. 61.43 Part 50 (X).

200.150(E)(2)(a) (stating that drying manure to a moisture content below 50% can minimize emissions); Part 200.150(E)(2)(c)(stating that aerating manure can minimize emissions); Part 200.150(E)(3) (stating that keeping feeding areas dry is a standard to reduce emissions).

55. Evidence was presented showing manure piles outside of poultry barns that were exposed to and in contact with rain and snow. PET-02228, PET-02239, PET-02223. Mr. Coggins testified that the litter in poultry barns becomes saturated with chicken excretion. Hrg. Tr. p. 376, lines 16-20. Throughout the poultry growing process, water comes into contact with manure. Hrg. Tr. p. 377, lines 6-12.

56. Mr. Chaplin testified that the term "new or enlarged sources" includes any existing poultry operation permitted under S.C. Code Reg. 61-43.200, as well as the new permits issued to David Coggins Broilers and Heath Coggins Broilers. Hrg. Tr. p. 859, line 1 – p. 860, line 22. In addressing Part 200.70(E), DHEC reasoned that, because these three permits are no-discharge permits, then no increase in pollution will occur. Hrg. Tr. p. 860, line 14 – p. 861, line 12.

57. The Little River's 100-year floodplain is near Jim Young's barns. Pet. Exh. 1(B) DHEC_003213. S.C. Code Regs. 61-43.200.70(F)(1) requires DHEC to evaluate the proposed site's proximity to a 100-year floodplain to determine whether setback limitations should exceed the minimum setback requirements. The Department's permit checklist stated that no additional setbacks are warranted because the facility is not within the 100-year floodplain. DHEC_003175. No consideration was given to the proposed site's proximity to the 100-year floodplain. Id.

58. S.C. Code Regs. 61-43.200.70(F)(4) requires DHEC to evaluate the proposed site's location in relation to "classification or impairment of adjacent waters" to determine whether setback limitations should exceed the minimum setback requirements. The Little River is an impaired waterbody due to fecal bacteria levels exceeding state water quality standards. A TMDL was issued by the Department in 2004 and remains in effect. Hrg. Tr. p. 862, line 24 – p. 863, line 7. The Little River TMDL states that poultry facilities may be a contributing factor to the impairment of the Little River. Hrg. Tr. p. 863, line 9 – p. 865, line 6. Mr. Chaplin testified that he did not require any additional setbacks because "ag facilities are not contributors to the TMDL ..." Hrg. Tr. p. 829, line 1 – p. 830, line 2; DHEC_003174.

59. S.C. Code Regs. 61-43.200.70(F)(6) requires DHEC to evaluate the proposed site's location in relation to "proximity to other known point source discharges and potential nonpoint sources" to determine whether setback limitations should exceed the minimum setback requirements. In evaluating this factor, Mr. Chaplin identified point source discharges as an existing mine and a water treatment plant. DHEC_003174. Mr. Chaplin identified as nonpoint sources 25 existing animal agricultural facilities (including poultry facilities) and 299 existing land application sites for manure. DHEC_003176. The DHEC checklist does not include evaluation of "potential nonpoint sources." Id. Mr. Chaplin determined that no additional setbacks were needed because poultry facilities "are required to not be allowed to discharge into waters of the state. Tr. Hrg. p. 826, lines 6-12; DHEC_003173.

60. S.C. Code Regs. 61-43.200.70(F)(7) requires DHEC to evaluate the proposed site's location in relation to "slope of the land" to determine whether setback limitations should

exceed the minimum setback requirements. According to DHEC, downslope ditches or swales are located 113 to 127 feet from the barns. DHEC_003188 – DHEC_003192. The Property drains to the Little River. DHEC_003177 (Permit checklist stating that drainage route for proposed site is the Little River to the Atlantic Ocean). The location of ditches and swales have more of an impact on water quality than the location of the waters of the State because it is the ditches and swales that carry stormwater to the waters of the State. Hrg. Tr. p. 500, line 13 – p. 501, line 10. DHEC's permit review checklist states that the site slope for the Property is 6%. DHEC_003177. However, the Petitioners' expert testified that DHEC's calculation of 6% "may be an average slope across the entire tract." Hrg. Tr. p. 514, lines 4-7. DHEC missed what was important to consider:

> But, you know, the sensitive issue there is what is the steepest slope. What -- and especially proximal to the gullies on that northeast corner of the Young compound. And those slopes are -- you know, they're mapped I think as Wilkes F slopes, if I' m recalling that correctly. They're very steep. They're 15 to 40 percent slopes. And so, they're extremely vulnerable to runoff. And, you know, the steeper the slope, the harder it is to control water. And gravity is a power thing. But the appropriate way to look at the drainage – that first proposed facility drainage route doesn't really describe what's coming off the site or where it's going. And that's why you really need a detailed engineering drawing ultimately to make those kinds of decisions. You know, recognizing that it's in the Little River watershed and the Saluda watershed and it ultimately goes to the Atlantic Ocean is all good to know, but that really doesn't have any direct implication for making decisions on sites that are built. Hrg. Tr. p. 514, line 6 – p. 515, line 4.

61. DHEC did not perform any evaluation of whether the slope of the land warranted additional setbacks under S.C. Code Regs. 61-43.200.70(F)(7).

62. S.C. Code Regs. 61-43.200.70(F)(9) requires DHEC to evaluate the proposed site's location in relation to "runoff prevention" to determine whether setback limitations should exceed the minimum setback requirements. "Runoff" is defined within S.C. Code Regs.

61-43 as "rainwater or other liquid that drains overland on any part of a land surface and runs off of the land surface." S.C. Code Regs. 61-43 Part 50(FFF).

63. DHEC did not perform any analysis of whether to require additional setbacks under S.C. Code Regs. 61-43.200.70(F)(9) to prevent runoff from the site. DHEC_003172 – DHEC_003177 (DHEC permit check with no evaluation of runoff prevention); Hrg. Tr. p. 834, line 17 – p. 835, line 22 (Mr. Chaplin testifying that the issue of stormwater runoff is addressed by a separate stormwater permit for construction of the facility). Mr. Chaplin testified that the way DHEC handles stormwater issues is by notifying the poultry grower that, after the animal agricultural permit is issued, a stormwater permit for construction of the facility is needed. Hrg. Tr. p. 834, line 17 – p. 835, line 22. A grading plan or stormwater management plan was not included in Jim Young's application. Hrg. Tr. p. 781, lines 3-6. None of the setbacks identified in the CNMP account for stormwater runoff, and DHEC did not raise any question to the preparer of the permit application about stormwater runoff prevention. Hrg. Tr. p. 787, lines 8-13; p. 791, lines 18-22; p. 794, lines 4-16. The CNMP only contemplates planting vegetation on 1.46 acres to reduce soil erosion. DHEC_003223 – DHEC_003224.[4]

64. Construction of the facility would require significant grading and filling of the Property, creating a post-construction environment where significant amounts of stormwater will run off the site from impervious surfaces. Hrg. Tr. p. 501, line 1 – p. 509, line 2. The Department's consideration of the facility failed to take into account the prevention of runoff from the constructed facility. Hrg. Tr. p. 517, line 21 – p. 518, line 11.

[4] The Permittees' engineer testified that he was not requested by Jim Young, David Coggins or Heath Coggins to prepare any plans for other potential stormwater management practices such as terracing or vegetated buffer between the barns and the floodplain. Hrg. Tr. p. 794, lines 4-16. Further, these particular practices were not included as best management practices within the CNMPs.

65. Once constructed, Petitioners' expert stated that Jim Young's facility "will be a significant threat to waters of the state as well as the tributaries, intermittent, ephemeral, and the ditches and swales that will have to convey that water." Hrg. Tr. p. 517, lines 8-20.

66. In addressing whether to require additional setbacks under S.C. Code Regs. 61-43.200.70(F)(11) to take into consideration "down-wind receptors," DHEC defined "down-wind receptor" as "virtual three-dimensional coordinates placed offsite where concentration of emissions would be measured for comparison to air quality standards." DHEC_003399. "As a result, down-wind receptors would only apply if a regulated pollutant were emitted, and a US Environmental Protection Agency (EPA) or state ambient air quality standard for that pollutant exists." Id. Because DHEC concluded that no regulated pollutant should be present at poultry farms, "impacts will not occur at any offsite down-wind receptors." Id. Therefore, DHEC's Bureau of Air did not recommend any additional setbacks or Jim Young's facility. DHEC_003400. No additional setbacks were applied to Jim Young's facility because "down-wind receptor" was interpreted by DHEC to mean a receptor of pollutants. Hrg. Tr. p. 854, lines 3-14. Because odor is not a pollutant, DHEC reasoned that no additional setback was necessary. Hrg. Tr. p. 854, lines 13-17.

67. Yet Jim Young's CNMP states that "potential sources of odors in and around the poultry houses may include: wet letter from leaky waterers, ... dust from feeders, bedding and animals, exhaust ventilation air, gaseous emissions of ammonia or hydrogen sulfide, uncovered manure piles, ... [and] poorly managed or located covered manure piles, ..." DHEC_003235. "These sources may cause poor air quality in and around the facility and potentially impact the health of the farm workers, animals, and the surrounding

community." Id. The CNMP goes on to explain that "odor problems can be prevented or reduced through "adequate drainage" and "runoff management," and avoiding "sites where radical shifts in air movement occur between day and night, such as those near large bodies of water or steep topography."

68. Mr. Chaplin found the odor abatement plan to be "using best management practices ... to eliminate odor ..., to limit the amount of odors leaving the facility ...." Hrg. Tr. p. 833, lines 15-24. However, the odor abatement plan does not require Jim Young Broilers to undertake any odor abatement measures except to install ventilation fans. DHEC_003235. The remaining practices use permissive language. See DHEC_003235 ("Many of the sources of odor can be minimized by implementing some of the following best management practices ...." (emphasis added); DHEC_00329 (..."[t]he following items may be considered when addressing Air Quality ...." (emphasis added).

Heath Coggins Broilers

69. Heath Coggins' barns are 66 feet wide and 600 feet long, spaced 60 feet apart from one another. Pet. Exh. 3(B) DHEC_002050. The proposed six barns are located more than 400 feet away from Lisbon Road and close to numerous surface waterbodies. Pet. Exh. 3(B) DHEC_002089. According to Heath Coggins' Headquarters Map within his CNMP, there are two streams running across the back portion of the Property. Id. Another surface water stream is located quite close to the western side of the barns. Id. A delineated wetland sits on the planned property line between Heath Coggins's facility and David Coggins' facility. Id. Behind Heath Coggins barns, the Property near the Little River slopes steeply down to the River. DHEC_ 002092; Tr. Hrg. p. 283, lines 8-12.

70. Maps included in Heath Coggins' Comprehensive Nutrient Management Plan show that another surface water stream runs along the back property line parallel to the Little River. DHEC_002089, DHEC_002092. The Department's Statement of Staff Position states that the barns are located 278 feet from an unidentified intermittent or ephemeral stream. DHEC_002033. The Department's permit checklist states that an unidentified intermittent stream is located in the drainage route of the facility, measured as 339 feet from the facility. DHEC_002052. Yet a map included in Heath Coggins' Comprehensive Nutrient Management Plan shows a surface water stream located within 200 feet of the barns that DHEC has not identified nor measured. DHEC_002033, DHEC_002089. Although the Department's animal agricultural permit issued to Jim Young grants permission to construct and operate "in accordance with construction plans, specifications, engineering report, animal facility management plan[5] and construction permit application prepared by Chris Mosley, P.E., Agri-Waste Technology, Inc., DHEC's permit file for Heath Coggins does not include any construction plans, an engineering report, or a construction permit application. Hrg. Tr. p. 12 – p. 851, line 12. There is no grading plan or stormwater plan contained in Heath Coggins' application. Hrg. Tr. p. 781, lines 3-6.

71. The Department's review of Heath Coggins permit application is contained in a written permit checklist. DHEC_002050 – DHEC_002059. The purpose of the checklists is to provide for a comprehensive review of the proposed sites and facilities. Hrg. Tr. 820, lines 3 – 13.

72. Pursuant to S.C. Code Regs. 61-43 Part 200.70(E), the "department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and

[5] The specified Animal Facility Management Plan within S.C. Code Regs. 61-43 Part 200.50(B)(2) is referred to as Comprehensive Nutrient Management Plans within the DHEC permit files. Tr. Hrg. p. 711, lines 13-18.

federal laws, an increase in pollution of the waters and air of the State from any new or enlarged sources."

73. Petitioner's expert stated that:

> There is an abundance of documentation that these sites produce pollution. They produce them through the emissions, be they water or other, that come frome these sites and they enter the environment, they enter water resources. And that will happen here. It will certainly happen. You aren't not going to retain all the stormwater. Some of it will leave the site and it will follow gravity. It will follow the course of least resistance and find its way into waters of the state. So, my answer is yes, definitively there will be an increase in pollution from these sites. Hrg. Tr. p. 545, line 13 – p. 546, line 1.

74. Mr. Chaplin relied on a memorandum from the Bureau of Air Quality ("BAA") to determine whether Heath Coggins' facility will cause an increase in air pollution. DHEC_002244 – DHEC_002246. The BAA defined "increase in air pollution" as an emissions increase that would cause an exceedance of an ambient air quality standard." Id. The BAA used the term "down-wind receptors" in its analysis, which BAA defined as "virtual three-dimensional coordinates placed offsite where concentration of emissions would be measured for comparison to air quality standards." DHEC_003399. While the BAA recognized that ammonia, nitrous oxide, methane, and hydrogen sulfide are potential air pollutants generated from manure, the BAA noted that only hydrogen sulfide is regulated by an air quality standard. Id. The BAA explained that hydrogen sulfide can only be emitted through manure decomposing under anaerobic conditions, and that anaerobic conditions occur only in a wet manure system. Because poultry operations use a dry manure system,[6] hydrogen sulfide "should not be present in poultry farms ...." Id.

[6] "Dry manure" is defined as "manure, bedding, litter, feed losses, or composted animal material (animal manure or dead animals) that is not in liquid form." S.C. Code Regs. 61.43 Part 50 (X).

Therefore, under DHEC's reading of Part 200.70(E), there is no increase in pollution to be prevented.

75. Heath Coggins' CNMP states that odor in and around poultry houses may be caused by "wet litter from leaky waterers, poultry bedding that is overloaded with manure, ... exhaust ventilation air, gaseous emissions of ammonia or hydrogen sulfide, [and] uncovered manure piles ...." DHEC_002169. Unlike the BAA, the CNMP acknowledges that hydrogen sulfide may be emitted from poultry operations. Id. S.C. Code Regs. 61-43 Part 200.150(E) recognizes that poultry manure become odorous if wet. See Part 200.150(E)(2)(a) (stating that drying manure to a moisture content below 50% can minimize emissions); Part 200.150(E)(2)(c) (stating that aerating manure can minimize emissions); Part 200.150(E)(3) (stating that keeping feeding areas dry is a standard to reduce emissions).

76. Evidence was presented showing manure piles outside of poultry barns that were exposed to and in contact with rain and snow. PET-02228, PET-02239, PET-02223. Mr. David Coggins testified that the litter in poultry barns becomes saturated with chicken excretion. Hrg. Tr. p. 376, lines 16-20. Throughout the poultry growing process, water comes into contact with manure. Hrg. Tr. p. 377, lines 6-12.

77. Mr. Chaplin testified that the term "new or enlarged sources" includes any existing poultry operation permitted under S.C. Code Reg. 61-43.200, as well as the new permits issued to David Coggins Broilers and Jim Young Broilers. Hrg. Tr. p. 859, line 1 – p. 860, line 22. In addressing Part 200.70(E), DHEC reasoned that, because these three permits are no-discharge permits, then no increase in pollution will occur. Hrg. Tr. p. 860, line 14 – p. 861, line 12.

78. The Little River's 100-year floodplain is near Heath Coggins' barns. DHEC_002093. S.C. Code Regs. 61-43 Part 200.70(F)(1) requires DHEC to evaluate the proposed site's proximity to a 100-year floodplain to determine whether setback limitations should exceed the minimum setback requirements. The Department's permit checklist stated that no additional setbacks are warranted because the facility is not within the 100-year floodplain. DHEC_002053. No consideration was given to the proposed site's proximity to the 100-year floodplain. Id.

79. S.C. Code Regs. 61-43.200.70(F)(4) requires DHEC to evaluate the proposed site's location in relation to "classification or impairment of adjacent waters" to determine whether setback limitations should exceed the minimum setback requirements. The Little River is an impaired waterbody due to fecal bacteria levels exceeding state water quality standards. A TMDL was issued by the Department in 2004 and remains in effect. Hrg. Tr. p. 862, line 24 – p. 863, line 7. The Little River TMDL states that poultry facilities may be a contributing factor to the impairment of the Little River. Hrg. Tr. p. 863, line 9 – p. 865, line 6. Mr. Chaplin testified that he did not require any additional setbacks because "ag facilities are not contributors to the TMDL ..." Hrg. Tr. p. 829, line 1 – p. 830, line 2; DHEC_003174.

80. S.C. Code Regs. 61-43.200.70(F)(6) requires DHEC to evaluate the proposed site's location in relation to "proximity to other known point source discharges and potential nonpoint sources" to determine whether setback limitations should exceed the minimum setback requirements. In evaluating this factor, Mr. Chaplin identified point source discharges as existing mine and a water treatment plant. DHEC_002051. Mr. Chaplin identified as nonpoint sources 25 existing animal agricultural facilities (including poultry

facilities) and 299 existing land application sites for manure. DHEC_002054. The DHEC checklist does not include evaluation of "potential nonpoint sources." Id. Mr. Chaplin determined that no additional setbacks were needed because poultry facilities "are required to not be allowed to discharge into waters of the state. Tr. Hrg. p. 826, lines 6-12; Pet. Exh. 3(B) DHEC_002051.

81. S.C. Code Regs. 61-43.200.70(F)(7) requires DHEC to evaluate the proposed site's location in relation to "slope of the land" to determine whether setback limitations should exceed the minimum setback requirements. According to DHEC, downslope ditches or swales are located 135 feet from the barns. DHEC_002323. The location of ditches and swales have more of an impact on water quality than the location of the waters of the State because it is the ditches and swales that carry stormwater to the waters of the State. Hrg. Tr. p. 500, line 13 – p. 501, line 10. The Property drains to the Little River. DHEC_002055 (Permit checklist stating that drainage route for proposed site is the Little River to the Atlantic Ocean).

82. The Petitioners' expert testified that there is approximately forty (40) feet of slope down to the Little River. Hrg. Tr. p. 521, line 16 – p. 522, line 14. As with DHEC's evaluation of Jim Young's proposed facility, DHEC's evaluation of the slope on Heath Coggins' site does not reflect the reality that the site will be significantly graded, resulting in the creation of a massive impervious surface. Rainwater will flow off this impervious surface onto new downward sloping contours that will likely lead to two surface waters on the site. Hrg. Tr. p. 502, line 1 – 15; p. 504, line 3 – p. 507, line. 16. Petitioners' expert opined that "recognizing that it's in the Little River watershed and the Saluda watershed and it ultimately goes to the Atlantic Ocean is all good to know, but that really doesn't have any

direct implication for making decisions on sites that are built." Hrg. Tr. p. 514, line 6 – p. 515, line 4.

83. DHEC did not perform any evaluation of whether the slope of the land warranted additional setbacks under S.C. Code Regs. 61-43.200.70(F)(7).

84. S.C. Code Regs. 61-43.200.70(F)(9) requires DHEC to evaluate the proposed site's location in relation to "runoff prevention" to determine whether setback limitations should exceed the minimum setback requirements. "Runoff" is defined within S.C. Code Regs. 61-43 as "rainwater or other liquid that drains overland on any part of a land surface and runs off of the land surface." S.C. Code Regs. 61-43 Part 50(FFF).

85. Heath Coggins' proposed site would have to be graded, which will significantly alter the landscape. Once the site is graded, the facility's proximity to waterbodies and ditches and swales may not be the same as what is identified in the application. Hrg. Tr. p. 775, line 25 – p. 776, line 7; p. 779, line 22 – p. 780, line 16.

86. DHEC did not perform any analysis of whether to require additional setbacks under S.C. Code Regs. 61-43.200.70(F)(9) to prevent runoff from the site. Hrg. Tr. p. 517, lines 21 p. 518, line 11; DHEC_002050 – DHEC_002059 (DHEC permit check with no evaluation of runoff prevention); Hrg. Tr. p. 834, line 17 – p. 835, line 22 (Mr. Chaplin testifying that the issue of stormwater runoff is addressed by a separate stormwater permit for construction of the facility). Mr. Chaplin testified that the way DHEC handles stormwater issues is by notifying the poultry grower that, after the animal agricultural permit is issued, a stormwater permit for construction of the facility is needed. Hrg. Tr. p. 834, line 17 – p. 835, line 22. A grading plan or stormwater management plan was not included in Heath Coggins' application. Hrg. Tr. p. 781, lines 3-6. None of the setbacks identified in the

CNMP account for stormwater runoff, and DHEC did not raise any question to the preparer of the permit application about stormwater runoff prevention. Hrg. Tr. p. 787, lines 8-13; p. 791, lines 18-22; p. 794, lines 4-16. The CNMP only contemplates planting vegetation on 1.42 acres to reduce soil erosion. DHEC_002157 – DHEC_002158.[7]

87. Construction of the facility would require significant grading and filling of the Property, creating a post-construction environment where significant amounts of stormwater will run off the site from impervious surfaces. Hrg. Tr. p. 501, line 1 – p. 509, line 2; p. 521, line 16 – 524, line 6. The Department's consideration of the facility failed to take into account the prevention of runoff from the constructed facility. Hrg. Tr. p. 517, line 21 – p. 518, line 11.

88. Once constructed, Petitioners' expert stated that Heath Coggins' facility "will be a very significant threat to waters of the state as well as the tributaries, intermittent, ephemeral, and the ditches and swales that will have to convey that water." Hrg. Tr. p. 517, lines 8-20.

89. In addressing whether to require additional setbacks under S.C. Code Regs. 61-43.200.70(F)(11) to take into consideration "down-wind receptors," DHEC defined "down-wind receptor" as "virtual three-dimensional coordinates placed offsite where concentration of emissions would be measured for comparison to air quality standards." DHEC_003399. "As a result, down-wind receptors would only apply if a regulated pollutant were emitted, and a US Environmental Protection Agency (EPA) or state ambient air quality standard for that pollutant exists." Id. Because DHEC concluded that no

[7] The Permittees' engineer testified that he was not requested by Jim Young, David Coggins or Heath Coggins to prepare any plans for other potential stormwater management practices such as terracing or vegetated buffer between the barns and the floodplain. Hrg. Tr. p. 794, lines 4-16. Further, these particular practices were not included as best management practices within the CNMPs.

regulated pollutant should be present at poultry farms, "impacts will not occur at any offsite down-wind receptors." Id. Therefore, DHEC's Bureau of Air did not recommend any additional setbacks or Heath Coggins' facility. DHEC_003400. No additional setbacks were applied to Heath Coggins' facility because "down-wind receptor" was interpreted by DHEC to mean a receptor of pollutants. Hrg. Tr. p. 854, lines 3-14. Because odor is not a pollutant, DHEC reasoned that no additional setback was necessary. Hrg. Tr. p. 854, lines 13-17.

90. Yet Heath Coggins' CNMP states that "potential sources of odors in and around the poultry houses may include: wet letter from leaky waterers, ... dust from feeders, bedding and animals, exhaust ventilation air, gaseous emissions of ammonia or hydrogen sulfide, uncovered manure piles, ... [and] poorly managed or located covered manure piles, ..." DHEC_003235. "These sources may cause poor air quality in and around the facility and potentially impact the health of the farm workers, animals, and the surrounding community." Id. The CNMP goes on to explain that "odor problems can be prevented or reduced through "adequate drainage" and "runoff management," and avoiding "sites where radical shifts in air movement occur between day and night, such as those near large bodies of water or steep topography."

91. Mr. Chaplin found the odor abatement plan to be "using best management practices ... to eliminate odor ..., to limit the amount of odors leaving the facility ...." Hrg. Tr. p. 833, lines 15-24. However, the odor abatement plan does not require Heath Coggins Broilers to undertake any odor abatement measures except to install ventilation fans. DHEC_003235. The remaining practices use permissive language. See DHEC_003235 ("Many of the sources of odor can be minimized by implementing some of the following

best management practices....." (emphasis added); DHEC_00329 (..."[t]he following items may be considered when addressing Air Quality ...." (emphasis added).

David Coggins Broilers

92. David Coggins' barns are 45 feet wide and 600 feet long, spaced 60 feet apart from one another. DHEC_000920. David Coggins' proposed six barns are located approximately 453 feet from Lisbon Road. DHEC_000880.

93. According to David Coggins' Headquarters Map within his CNMP, there is a stream running across the back portion of the Property. DHEC_000947. A delineated wetland is located between this stream and the proposed barns. Id. Another stream flows into the wetlands. Id. Behind David Coggins' barns, the Property near the Little River slopes steeply down to the River. Id.; DHEC_000958; Tr. Hrg. p. 283, lines 8-12.

94. DHEC's permit file for David Coggins Broilers does not show any movement of the poultry barns' location except to move the barns back slightly in order to maintain the mandatory 400-foot setback from Lisbon Road as a vegetated buffer. Hrg. Tr. 842, line 11 – p. 843, line 1; compare David Coggins' Headquarter Map dated Oct. 7, 2016 (DHEC_000947) to maps dated Sept. 21, 2016 (DHEC_000948), May 26, 2016 (DHEC_000949), Nov. 3, 2016 (DHEC_000950).

95. Although the Department's animal agricultural permit issued to David Coggins grants permission to construct and operate "in accordance with construction plans, specifications, engineering report, animal facility management plan[8] and construction permit application prepared by Chris Mosley, P.E., Agri-Waste Technology, Inc., DHEC's permit file for David Coggins does not include any construction plans, an engineering report, or a

[8] The specified Animal Facility Management Plan within S.C. Code Regs. 61-43 Part 200.50(B)(2) is referred to as Comprehensive Nutrient Management Plans within the DHEC permit files. Tr. Hrg. p. 711, lines 13-18.

construction permit application. Hrg. Tr. p. 12 – p. 851, line 12. There is no grading plan or stormwater plan contained in David Coggins' application. Hrg. Tr. p. 781, lines 3-6.

96. The Department's review of David Coggins permit application is contained in a written permit checklist. DHEC_000899 – DHEC_00910. The purpose of the checklists is to provide for a comprehensive review of the proposed sites and facilities. Hrg. Tr. 820, lines 3 – 13.

97. Pursuant to S.C. Code Regs. 61-43 Part 200.70(E), the "department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from any new or enlarged sources."

98. Petitioner's expert testified that:

> there is an abundance of documentation that these sites produce pollution. They produce them through the emissions, be they water or other, that come from these sites and they enter the environment, they enter water resources. And that will happen here. It will certainly happen. You aren't not going to retain all the stormwater. Some of it will leave the site and it will follow gravity. It will follow the course of least resistance and find its way into waters of the state. So, my answer is yes, definitively there will be an increase in pollution from these sites. Hrg. Tr. p. 545, line 13 – p. 546, line 1.

99. Mr. Chaplin relied on a memorandum from the Bureau of Air Quality ("BAA") to determine whether David Coggins' facility will cause an increase in air pollution. DHEC_001075 – DHEC_001077. The BAA defined "increase in air pollution" as an emissions increase that would cause an exceedance of an ambient air quality standard." Id. The BAA used the term "down-wind receptors" in its analysis, which BAA defined as "virtual three-dimensional coordinates placed offsite where concentration of emissions would be measured for comparison to air quality standards." DHEC_003399. While the BAA recognized that ammonia, nitrous oxide, methane, and hydrogen sulfide are potential

air pollutants generated from manure, the BAA noted that only hydrogen sulfide is regulated by an air quality standard. Id. The BAA explained that hydrogen sulfide can only be emitted through manure decomposing under anaerobic conditions, and that anaerobic conditions occur only in a wet manure system. Because poultry operations use a dry manure system,[9] hydrogen sulfide "should not be present in poultry farms ...." Id. Therefore, under DHEC's reading of Part 200.70(E), there is no increase in pollution to be prevented.

100. David Coggins' CNMP states that odor in and around poultry houses may be caused by "wet litter from leaky waterers, poultry bedding that is overloaded with manure, ... exhaust ventilation air, gaseous emissions of ammonia or hydrogen sulfide, [and] uncovered manure piles ...." DHEC_001008. Unlike the BAA, the CNMP acknowledges that hydrogen sulfide may be emitted from poultry operations. Id. S.C. Code Regs. 61-43 Part 200.150(E) recognizes that poultry manure become odorous if wet. See Part 200.150(E)(2)(a) (stating that drying manure to a moisture content below 50% can minimize emissions); Part 200.150(E)(2)(c) (stating that aerating manure can minimize emissions); Part 200.150(E)(3) (stating that keeping feeding areas dry is a standard to reduce emissions).

101. Evidence was presented showing manure piles outside of poultry barns that were exposed to and in contact with rain and snow. PET-02228, PET-02239, PET-02223. Mr. David Coggins testified that the litter in poultry barns becomes saturated with chicken excretion. Hrg. Tr. p. 376, lines 16-20. Throughout the poultry growing process, water comes into contact with manure. Hrg. Tr. p. 377, lines 6-12.

[9] "Dry manure" is defined as "manure, bedding, litter, feed losses, or composted animal material (animal manure or dead animals) that is not in liquid form." S.C. Code Regs. 61.43 Part 50 (X).

102. Mr. Chaplin testified that the term "new or enlarged sources" includes any existing poultry operation permitted under S.C. Code Reg. 61-43.200, as well as the new permits issued to Heath Coggins Broilers and Jim Young Broilers. Hrg. Tr. p. 859, line 1 – p. 860, line 22. In addressing Part 200.70(E), DHEC reasoned that, because these three permits are no-discharge permits, then no increase in pollution will occur. Hrg. Tr. p. 860, line 14 – p. 861, line 12.

103. The Little River's 100-year floodplain is near David Coggins' barns. DHEC_000960. S.C. Code Regs. 61-43 Part 200.70(F)(1) requires DHEC to evaluate the proposed site's proximity to a 100-year floodplain to determine whether setback limitations should exceed the minimum setback requirements. The Department's permit checklist stated that no additional setbacks are warranted because the facility is not within the 100-year floodplain. DHEC_000904. No consideration was given to the proposed site's proximity to the 100-year floodplain. Id.

104. S.C. Code Regs. 61-43.200.70(F)(4) requires DHEC to evaluate the proposed site's location in relation to "classification or impairment of adjacent waters" to determine whether setback limitations should exceed the minimum setback requirements. The Little River is an impaired waterbody due to fecal bacteria levels exceeding state water quality standards. A TMDL was issued by the Department in 2004 and remains in effect. Hrg. Tr. p. 862, line 24 – p. 863, line 7. The Little River TMDL states that poultry facilities may be a contributing factor to the impairment of the Little River. Hrg. Tr. p. 863, line 9 – p. 865, line 6. Mr. Chaplin testified that he did not require any additional setbacks because "ag facilities are not contributors to the TMDL ..." Hrg. Tr. p. 829, line 1 – p. 830, line 2; DHEC_000903.

105. S.C. Code Regs. 61-43.200.70(F)(6) requires DHEC to evaluate the proposed site's location in relation to "proximity to other known point source discharges and potential nonpoint sources" to determine whether setback limitations should exceed the minimum setback requirements. In evaluating this factor, Mr. Chaplin identified point source discharges as existing mine and a water treatment plant. DHEC_000902. Mr. Chaplin identified as nonpoint sources 25 existing animal agricultural facilities (including poultry facilities) and 299 existing land application sites for manure. DHEC_000905. The DHEC checklist does not include evaluation of "potential nonpoint sources." Id. Mr. Chaplin determined that no additional setbacks were needed because poultry facilities "are required to not be allowed to discharge into waters of the state. Tr. Hrg. p. 826, lines 6-12; DHEC_000905.

106. S.C. Code Regs. 61-43.200.70(F)(7) requires DHEC to evaluate the proposed site's location in relation to "slope of the land" to determine whether setback limitations should exceed the minimum setback requirements. According to DHEC, downslope ditches or swales are located 204 feet from the barns. DHEC_001147. The location of ditches and swales have more of an impact on water quality than the location of the waters of the State because it is the ditches and swales that carry stormwater to the waters of the State. Hrg. Tr. p. 500, line 13 – p. 501, line 10. The Property drains to the Little River. DHEC_000906 (Permit checklist stating that drainage route for proposed site is the Little River to the Atlantic Ocean).

107. The Petitioners' expert testified that there is approximately twenty (20) feet of slope down to the Little River. Hrg. Tr. p. 519, line 6 – p. 521, line 15. DHEC's evaluation of the slope on David Coggins' site does not reflect the reality that the site will be significantly

graded, resulting in the creation of a massive impervious surface. Rainwater will flow off this impervious surface onto new downward sloping contours that will likely lead to two surface waters on the site. Hrg. Tr. p. 520, line 18 – p. 524, line 6. Petitioners' expert opined that "recognizing that it's in the Little River watershed and the Saluda watershed and it ultimately goes to the Atlantic Ocean is all good to know, but that really doesn't have any direct implication for making decisions on sites that are built." Hrg. Tr. p. 514, line 6 – p. 515, line 4.

108. DHEC did not perform any evaluation of whether the slope of the land warranted additional setbacks under S.C. Code Regs. 61-43.200.70(F)(7).

109. S.C. Code Regs. 61-43.200.70(F)(9) requires DHEC to evaluate the proposed site's location in relation to "runoff prevention" to determine whether setback limitations should exceed the minimum setback requirements. "Runoff" is defined within S.C. Code Regs. 61-43 as "rainwater or other liquid that drains overland on any part of a land surface and runs off of the land surface." S.C. Code Regs. 61-43 Part 50(FFF).

110. David Coggins' proposed site would have to be graded, which will significantly alter the landscape. Once the site is graded, the facility's proximity to waterbodies and ditches and swales may not be the same as what is identified in the application. Hrg. Tr. p. 519, line 22 – p. 524, line 6.

111. DHEC did not perform any analysis of whether to require additional setbacks under S.C. Code Regs. 61-43.200.70(F)(9) to prevent runoff from the site. Hrg. Tr. p. 517, lines 21 p. 518, line 11; DHEC_000899 – DHEC_000910 (DHEC permit check with no evaluation of runoff prevention); Hrg. Tr. p. 834, line 17 – p. 835, line 22 (Mr. Chaplin testifying that the issue of stormwater runoff is addressed by a separate stormwater permit

for construction of the facility). Mr. Chaplin testified that the way DHEC handles stormwater issues is by notifying the poultry grower that, after the animal agricultural permit is issued, a stormwater permit for construction of the facility is needed. Hrg. Tr. p. 834, line 17 – p. 835, line 22. A grading plan or stormwater management plan was not included in David Coggins' application. Hrg. Tr. p. 781, lines 3-6. None of the setbacks identified in the CNMP account for stormwater runoff, and DHEC did not raise any question to the preparer of the permit application about stormwater runoff prevention. Hrg. Tr. p. 787, lines 8-13; p. 791, lines 18-22; p. 794, lines 4-16. The CNMP only contemplates planting vegetation on 1.42 acres to reduce soil erosion. DHEC_000996 – DHEC_000997.[10]

112. Construction of the facility would require significant grading and filling of the Property, creating a post-construction environment where significant amounts of stormwater will run off the site from impervious surfaces. Hrg. Tr. p. 501, line 1 – p. 509, line 2; p. 521, line 16 – 524, line 6. The Department's consideration of the facility failed to take into account the prevention of runoff from the constructed facility. Hrg. Tr. p. 517, line 21 – p. 518, line 11.

113. Once constructed, Petitioners' expert stated that David Coggins' facility "will be a very significant threat to waters of the state as well as the tributaries, intermittent, ephemeral, and the ditches and swales that will have to convey that water." Hrg. Tr. p. 517, lines 8-20.

[10] The Permittees' engineer testified that he was not requested by Jim Young, David Coggins or Heath Coggins to prepare any plans for other potential stormwater management practices such as terracing or vegetated buffer between the barns and the floodplain. Hrg. Tr. p. 794, lines 4-16. Further, these particular practices were not included as best management practices within the CNMPs.

114. In addressing whether to require additional setbacks under S.C. Code Regs. 61-43.200.70(F)(11) to take into consideration "down-wind receptors," DHEC defined "down-wind receptor" as "virtual three-dimensional coordinates placed offsite where concentration of emissions would be measured for comparison to air quality standards." DHEC_003399. "As a result, down-wind receptors would only apply if a regulated pollutant were emitted, and a US Environmental Protection Agency (EPA) or state ambient air quality standard for that pollutant exists." Id. Because DHEC concluded that no regulated pollutant should be present at poultry farms, "impacts will not occur at any offsite down-wind receptors." Id. Therefore, DHEC's Bureau of Air did not recommend any additional setbacks on David Coggins' facility. DHEC_001075 – DHEC_001077. No additional setbacks were applied to David Coggins' facility because "down-wind receptor" was interpreted by DHEC to mean a receptor of pollutants. Hrg. Tr. p. 854, lines 3-14. Because odor is not a pollutant, DHEC reasoned that no additional setback was necessary. Hrg. Tr. p. 854, lines 13-17.

115. Yet David Coggins' CNMP states that "potential sources of odors in and around the poultry houses may include: wet letter from leaky waterers, … dust from feeders, bedding and animals, exhaust ventilation air, gaseous emissions of ammonia or hydrogen sulfide, uncovered manure piles, … [and] poorly managed or located covered manure piles, …." DHEC_001008. "These sources may cause poor air quality in and around the facility and potentially impact the health of the farm workers, animals, and the surrounding community." Id. The CNMP goes on to explain that "odor problems can be prevented or reduced through "adequate drainage" and "runoff management," and avoiding "sites where

radical shifts in air movement occur between day and night, such as those near large bodies of water or steep topography."

116. Mr. Chaplin found the odor abatement plan to be "using best management practices ... to eliminate odor ..., to limit the amount of odors leaving the facility ...." Hrg. Tr. p. 833, lines 15-24. However, the odor abatement plan does not require Jim Young Broilers to undertake any odor abatement measures except to install ventilation fans. DHEC_001008. The remaining practices use permissive language. See DHEC_001012 ("Many of the sources of odor can be minimized by implementing some of the following best management practices ...." (emphasis added); DHEC_001012 (..."[t]he following items may be considered when addressing Air Quality ...." (emphasis added).

REGULATION 61-43 PART 200

S.C. Code Reg. 61-43 Part 200 governs the permitting of poultry growing facilities ("Regulation"). The Regulation was promulgated pursuant to the South Carolina Pollution Control Act ("PCA") and is administered by the South Carolina Department of Health and Environmental Control ("DHEC") or "Department"). Vol. 26 S.C. REG. 109 (June 28, 2002). A purpose of Part 200 is "to establish standards for the growing or confining of animals, processing of animal manure and other animal by-products, and land application of animal manure and other animal by-products in such a manner as to protect the environment, and the health and welfare of citizens of The State from pollutants generated by this process." S.C. Code Regs. 61-43 Part 200.10(A)(1). Another purpose of the Regulation is to "establish criteria" for the location of animal facilities "as they relate to protection of the environment and public health." Id. at (A)(5). Agricultural animal permits are described in S.C. Code Reg. 61-43 Part 200.20(B) as "no-discharge permits."

Although the term "no-discharge" is not defined in S.C. Code Reg. 61-43, "no-discharge" is further described as "no discharge of pollutants." S.C. Code Ann. 61-43, Part 200.140(A). The words "pollutant" or "pollution" is not defined in S.C. Code Reg. 61-43. The definition of "pollution" within the PCA may serve as useful guidance in defining the term. E.g. Sloan v. DOT, 379 S.C. 160, 173, 666 S.E.2d 236, 242 (2008) (stating that a definition within a related regulation "provide useful guidance" to defining a term within a statute). Under the PCA, the term "pollution" is broadly defined as:

> (1) the presence in the environment of any substance, including, but not limited to, sewage, industrial waste, other waste, air contaminant, or any combination thereof in such quantity and of such characteristics and duration as may cause, or tend to cause the environment of the State to be contaminated, unclean, noxious, odorous, impure or degraded, or which is, or tends to be injurious to human health or welfare; or which damages property, plant, animal or marine life or use of property; or (2) the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water. S.C. Code Ann. 48-1-10(7).

Applying the ordinary meaning of the word "pollutant" or "pollution," the term means contamination of water, air or a place with harmful or poisonous substances;" "the presence in or introduction into the environment of a substance or thing that has harmful or poisonous effects." OXFORD AMERICAN DICTIONARY, p. 1354 (3rd ed. 2010); Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) (interpreting an undefined term in a regulation according to its dictionary definition). Under either definition, the term "pollution" is broadly defined. The word "no" obviously means "no." And "discharge" is ordinarily defined as "to allow (a liquid, gas, or other substance) to flow out from where it has been confined." OXFORD AMERICAN DICTIONARY, p. 494 (3rd ed. 2010). Thus, a "no-discharge" permit is a permit that is intended to prevent or eliminate any release of harmful substances into the environment. There are no exceptions to this requirement.

The Regulation sets forth mandatory, minimum standards for the content of an application and the Department's decision-making process. The Regulation goes on, however, to repeatedly authorize, and even mandate in some provisions, DHEC to exercise authority to go beyond these minimum standards in its evaluation and review of permit applications. For example, an animal facility management plan submitted as part of an application must, at a minimum, contain certain specified information. Part 200.50(B)(2). However, the Department is authorized to request "any additional information deemed necessary to complete or correct deficiencies" in the application. Part 200.50(C). Further, even if an application is complete, the Department is authorized to request "any additional information" to help determine whether a permit should be issued or denied. Part 200.70(A) and (C).

Another example concerns setbacks. S.C. Code Regs. 61-43 Part 200.80(A) sets forth minimum separation distances (or setbacks) from an animal facility:

...

> 2. The minimum separation distance between an animal facility and waters of the State (including ephemeral and intermittent streams) located down slope from the facility is 100 feet. The setbacks required from ephemeral and intermittent streams may be reduced by the Department, if a permanent vegetative water quality buffer, that meets NRCS standards at a minimum, is installed and maintained.
>
> 3. Except for site drainage, the minimum separation distance required between an animal facility and a ditch or swale located down slope from the facility is 50 feet. The setbacks required from ditches may be reduced by the Department, if a permanent vegetative water quality buffer, that meets NRCS standards at a minimum, is installed and maintained.
>
> 4. A new animal facility or an expansion of an established animal facility shall not be located in the 100-year floodplain.
>
> ...
>
> 6. The separation distance required between the animal facility or growing areas (pens or barns not including range areas) and the lot line of real

property owned by another person is 400 feet or 1000 feet from the nearest residence, whichever is greater, when the normal production animal live weight at any time is greater than 500,000 pounds.

These setback limits "are minimum siting requirements (with exception to those that are not labeled as minimum requirements, which are absolutes)." S.C. Code Regs. 61-43 Part 200.70(F). "On a case-by-case basis the Department may require additional separation distances applicable to animal facilities, lagoons, treatment systems, manure storage ponds, and manure utilization areas." Id. "The Department shall evaluate the proposed site including, but not limited to, the following factors when determining if additional distances are necessary:

1. Proximity to 100-year floodplain;
2. Geography and soil types on the site;
3. Location in a watershed;
4. Classification or impairment of adjacent waters;
5. Proximity to a State Designated Focus Area; Outstanding Resource Water; Heritage Corridor; Historic Preservation District; State Approved Source Water Protection Area; state or national park or forest; state or federal research area; and privately-owned wildlife refuge, park, or trust property;
6. Proximity to other known point source discharges and potential nonpoint sources;
7. Slope of the land;
8. Animal manure application method and aerosols;
9. Runoff prevention;
10. Adjacent groundwater usage;
11. Down-wind receptors; and
12. Aquifer vulnerability.

In addition, the Department, on a case-by-case basis, "may impose additional or more stringent requirements for the management, handling, treatment, storage, or utilization of animal manure and other animal by-products." Part 200.140(B). Certain situations trigger mandatory evaluation by DHEC for additional or more stringent requirements, such as facilities proposed to be located upstream of an impaired waterbody. Part 200.140(C).

Pursuant to S.C. Code Regs. 61-43 Part 200.70(E), "[t]he Department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from any new or enlarged sources. "New or enlarged sources" is not defined in S.C. Code Regs. 61-43; however, Part 200.10(B) explains that a "new animal facility" is one that has been permitted after the regulations were promulgated in 2002. Mr. Bill Chaplin, program manager for agricultural permitting at the Department, confirmed this reading. Hrg. Tr. p. 859, lines 1-11. Part 200.70(E) constitutes a mandatory obligation upon the Department.

Finally, even if a permit application meets all applicable requirements of the Regulation, the Regulation does not require DHEC to issue a permit; instead, DHEC "may" issue the permit. Part 200.70(C).

CONCLUSIONS OF LAW

The Administrative Law Court (the "Court" or "ALC") has jurisdiction over this contested case matter pursuant to S.C. Code Ann. §§ 1-23-600(A) and S.C. Code Ann. § 44-1-60(F)(2). In reviewing this matter, the Court serves as the finder of fact and makes a de novo determination regarding the matters in controversy. S.C. Code Ann. § 1-23-600(A); Brown v. S.C. Dept. of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). When undertaking contested case review, the ALC is the ultimate fact finder, and is not restricted by the findings of

the administrative agency. Risher v. S.C. Dep't of Health and Envtl. Control, 393 S.C. 198, 207-08, 712 S.E.2d 428, 433 (2011). The standard of proof to be used by the Court in weighing the evidence and rendering a decision on the merits is the preponderance of the evidence. S.C. Code Ann. § 1-23-600(A)(5).

STANDING

A private person does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001). Such imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public. Id. When an organization is involved, the organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act. Id. The "irreducible constitutional minimum of standing," requires a showing of the following elements: 1) the plaintiff must have suffered an actual or imminent injury of a legally protected interest; 2) the injury is "fairly traceable" to the challenged action; and 3) it must be likely that the injury will be redressed by a favorable decision. Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

Mr. Charles Blackmon, as President of an unincorporated association called South Carolinians for Responsible Agricultural Practices ("SCRAP"), along with other members of SCRAP, have asserted imminent, particularized injuries to their legally cognizable interests that are "fairly traceable" to the Department's permitting decisions. Mr. Blackmon, owns property near the Coggins Property. The Little River flows across his property. He uses his property for recreation such as hunting, fishing, hiking and camping. Mr. Blackmon also hunts on the Belfast

Wildlife Management Area below the Coggins Property. He holds a contractual right to hunt on property adjacent to the Coggins Property. The proposed facilities would impair his recreational and aesthetic interests. See Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001) (recognizing recreational and aesthetic interests as a cognizable injury); S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988) (same). Ms. Sparrow and Ms. Basel own properties located adjacent to the Coggins Property. They articulated injury to the use and enjoyment of their property if the proposed facilities are permitted, including their interests in hunting, recreating in and enjoying the tributaries of the Little River flowing across their property, and leasing their property for hunting purposes. Similarly, Mr. Stewart owns property adjacent to and below the Coggins Property. The Little River flows through Mr. Stewart's property. His interests in recreation, aesthetics, aquatic life, water quality, and leasing his property for hunting purposes would be impaired by the permitting of the proposed facilities.

All of the members of SCRAP made a sufficient showing of injury to the interests that are "fairly traceable" to the proposed facilities. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000 (Injury in fact is alleged adequately by environmental plaintiffs when they aver that they use the affected area and have a reasonable concern that the aesthetic and recreational values of the area will be lessened by the permit violations); Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007) (stating that averments of recreating in and viewing nature is sufficient to show injury). And it is likely that the injuries raised will be redressed by this Court. Because members of SCRAP have shown the requisite elements of standing and SCRAP was formed for the purpose of contesting poultry permits, SCRAP has standing to bring these contested cases.

Even if none of the members of SCRAP lack the requisite showing of injury, this Court may consider whether the "public importance" exception to standing is appropriate. See Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, 404 S.C. 515, 528 n.11, 745 S.E.2d 385, 392 (Ct. App. 2013) (appellate court noting that ALC could have considered "public importance" exception). Under the public importance exception, standing may be conferred "when an issue is of such public importance as to require its resolution for future guidance." ATC South, Inc. v. Charleston County, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). Here, the issues presented in these cases raise important questions about the interpretation and application of S.C. Code Regs. 61-43 Part 200 that require future guidance. DHEC has an obligation to fulfill the purpose of this regulation, comply with its mandates and provide a level of permit review consistent with the regulation's stringent no-discharge standard. Once the Department issues these animal agricultural permits, there are no term limits to the permit, leaving the Mountville community with eighteen (18) additional barns that could operate in perpetuity in a manner that harms the environment and public health. See Baird v. Charleston Cty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (finding public importance exception applied when contested action impacts the "profound public interest" in "public health and welfare."). Future guidance is needed concerning proper interpretation of the regulation and proper review of animal agricultural permits. The public importance exception to standing is met in these cases.

THE CONTESTED CASES

Petitioner asserts that DHEC erred in its evaluation of the permits at issue in several respects. First, Petitioner asserts that the Department impermissibly avoided evaluation of the proposed sites or facilities under certain provisions of S.C. Regs. 61-43 Part 200 by employing a

circular, flawed logic in contravention of the purpose and intent of the Regulation. Second, Petitioner asserts that the Department failed to properly exercise its duty to act on the permits to prevent an increase in air pollution. Third, the Department failed to evaluate at all or properly evaluate certain mandated factors to determine whether additional setbacks are needed. Fourth, the Department failed to consider S.C. Code Ann. § 50-11-356 as a relevant factor under Part 200.70(F) as it pertains to David Coggins Broilers and Jim Young Broilers. Taken together, and in light of the purpose of S.C. Code Regs. 61-43 Part 200, Petitioner contends that all three permits must be denied, or in the alternative, remanded for further evaluation by the Department.

Lastly, this Court revisits its oral ruling that granted the motion for partial summary judgment by Jim Young Broilers, Heath Coggins Broilers and David Coggins Broilers. See First Union Nat'l Bank v. Hitman, 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991) ("No order is final until it is written and entered."); Brailsford v. Brailsford, 380 S.C. 443, 452, 669 S.E.2d 342, 346 (Ct. App. 2008) (stating that an oral order of the court is not final and binding until reduced to writing, signed by the judge and delivered for recordation).

1. **THE DEPARTMENT'S AVOIDANCE OF CERTAIN PERMIT EVALUATIONS**

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control, 407 S.C. 583, 597-98, 757 S.E.2d 408, 416 (2014). As explained above, the Department must evaluate certain factors or situations to determine if the proposed facilities warrant additional requirements or setbacks above and beyond the minimum criteria. Such an evaluation is intended to fulfill the Regulation's intended purpose of assuring that "no-discharge" occurs. The heightened evaluation mandated by the Regulation may lead to permit denial. See

Part 200.70(C) (stating that DHEC may issue a permit if the application package meets all applicable requirements). Throughout the Department's review of the permit applications, DHEC has taken the position that because the permit prohibits any discharges, then no additional requirements or setbacks are needed.

Under Part 200.140(B) and (C)(2), the Department is required to evaluate permit applications for additional or more stringent requirements when the facilities are located upstream from an impaired waterbody. DHEC's permit checklists state that the proposed facilities are located in a watershed that is the subject of a Total Maximum Daily Load ("TMDL") due to water quality impairment within the Little River watershed. DHEC_003174; DHEC_2052; DHEC_000903; see also Hrg. Tr. p. 828, line 20 – p. 829, line 23. More specifically, the checklist states that the facilities are located upstream from an impaired site, S-305. Id. This fact triggers mandatory evaluation of the permit applications pursuant to Part 200.140(C) for any additional or more stringent permit requirements. Yet DHEC's permit reviewer, Mr. Chaplin, stated in the permit checklists that no additional setback was required because "ag facilities are not considered as contributors to the TMDL." Id. The reasoning for DHEC's conclusion is that the permits are "no-discharge" permits. Hrg. Tr. 847, lines 1-15. In other words, DHEC rejected consideration of additional requirements or setbacks because the permit is a no-discharge permit; thus, no additional setbacks or requirements are warranted.

Again, in considering its mandate that the "Department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an increase in pollution of the waters and air of the State from any new or enlarged sources," the Department summarily concludes that there is no increase in water pollution because "being a no-discharge facility, they don't - we don't consider them contributing to pollution to waters and the

air of South Carolina." Hrg. Tr. p. 860, line 14 – p. 861, line 3. DHEC's permit checklists are consistent with this position. DHEC_000901 – 000904; DHEC_002050 – DHEC_002053; DHEC_003172 – DHEC_003176 (concluding on numerous factors that "as this facility is classified as a no-discharge facility, no additional setbacks are required.").

Further, under Part 200.70(F), the Department "shall evaluate the proposed site" under certain mandated factors, and any other relevant factor, "when determining if additional distances are necessary." Addressing the mandated factor of proximity to "other known point source discharges," DHEC simply states that "as this facility is classified as a no-discharge facility, no additional setbacks are required." DHEC_003173; DHEC_002051; DHEC_000902. Addressing the factor of impairment of adjacent waters, DHEC merely concludes that "since Ag facilities are not considered contributors to the TMDL, no additional setbacks are required." DHEC_000903; DHEC_002052; DHEC_000903.

DHEC's application of the Regulation is flawed. "The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly." Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control, 407 S.C. 583, 597-98, 757 S.E.2d 408, 416 (2014). "The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." Id. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Id. Reading the Regulation as a whole, the permitting scheme imposes a stringent standard of "no-discharge" which is accomplished by not only adhering to minimum standards, but to actually examine on a case-by-case basis whether additional requirements or setbacks are needed. The Department mechanically puts forth a rote

response essentially stating that the permit imposes a no-discharge standard; therefore, no evaluation of additional requirements or setbacks is necessary. DHEC's circular reasoning leads to an absurd interpretation of the Regulation, for it allows the Department to avoid the plain intent of the Regulation for heightened review of permit applications and imposing additional requirements if necessary to assure that no discharge occurs. See Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 63, 744 S.E.2d 547, 550-51 (2013) (rejecting a reading of a statute that enables a party to circumvent the intent of the law). The terms of the Regulation are clear – DHEC must undertake a meaningful evaluation of the mandated factors, standards or criteria under Part 200.70(E), 200.70(F) and 200.140(C) to make a determination as to whether additional requirements or setbacks are needed in order to assure that no discharge occurs. Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) ("where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). Although this Court generally gives deference to an agency interpretation of a regulation it administers, if the plain language of the regulation is contrary to the agency's interpretation, this Court will reject the agency's interpretation. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envt'l Control, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014).

2. THE DEPARTMENT FAILED TO PROPERLY EXERCISE ITS DUTY TO ACT ON THE PERMITS TO PREVENT AN INCREASE IN AIR POLLUTION

The Department's permit review as it relates to air pollution, DHEC interpretation of Part 200.70(E) seems calculated to avoid meaningful review. Part 200.70(E) states that DHEC "shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal law, an increase in [air] pollution." The Department's Bureau of Air Quality (BAA) issued a memorandum which defined "increase in air pollution" as "an emissions increase that would cause an exceedance of an ambient air quality standard." The BAA used the term

"down-wind receptors" in its analysis, which BAA defined as "virtual three-dimensional coordinates placed offsite where concentration of emissions would be measured for comparison to air quality standards." Nothing in Part 200.70(E) refers to "down-wind receptors," and BAA's definition of "down-wind receptors" removes from its analysis any reference to air pollution potentially affecting human beings. The intent of the Regulation is "to protect the health and welfare of citizens of the State from pollutants," not a "virtual three-dimensional coordinate" that measures concentrations of emissions. S.C. Code Regs. 61-43 Part 200.10(A)(1).

While the BAA recognized that ammonia, nitrous oxide, methane, and hydrogen sulfide are potential air pollutants generated from poultry manure, the BAA noted that only hydrogen sulfide is regulated by an air quality standard. The BAA explained that hydrogen sulfide can only be emitted through manure decomposing under anaerobic conditions, and that anaerobic conditions occur only in a wet manure system. Because poultry operations use a dry manure system, the BAA concluded rather inconclusively that hydrogen sulfide "should not be present in poultry farms ...." Therefore, under DHEC's reading of Part 200.70(E), there is no increase in pollution to be prevented.

Despite BAA's characterization of poultry waste management as a "dry" manure system, poultry manure contains moisture, and routinely comes into contact with water. Mr. David Coggins testified that the litter in poultry barns becomes saturated with chicken excretion. Throughout the poultry growing process, water can and does come into contact with poultry manure within the barns. Unlike the BAA, the CNMPs in these cases acknowledge that hydrogen sulfide may be emitted from poultry operations. The CNMPs all state that odor in and around poultry houses may be caused by "wet litter from leaky waterers, poultry bedding that is overloaded with manure, ... exhaust ventilation air, gaseous emissions of ammonia or hydrogen sulfide, [and] uncovered

manure piles ...." S.C. Code Regs. 61-43 Part 200.150(E) recognizes that poultry manure become odorous if wet. See Part 200.150(E)(2)(a) (stating that drying manure to a moisture content below 50% can minimize emissions); Part 200.150(E)(2)(c)(stating that aerating manure can minimize emissions); Part 200.150(E)(3) (stating that keeping feeding areas dry is a standard to reduce emissions). Evidence was presented showing manure piles outside of poultry barns that were exposed to and in contact with rain and snow. The BAA's analysis impermissibly avoids the Department's mandate to prevent an increase in pollution from emissions of hydrogen sulfide by wishing away the presence of hydrogen sulfide as a pollutant that "should not be present in poultry farms."

3. **THE DEPARTMENT FAILED TO EVALUATE AT ALL OR PROPERLY EVALUATE CERTAIN MANDATED FACTORS TO DETERMINE WHETHER ADDITIONAL SETBACKS ARE NEEDED.**

In other aspects of DHEC's permit review, the Department simply failed to conduct mandated review of certain factors. Under S.C. Code Regs. 61-43 Part 200.70(F), the Department shall the proposed site's proximity to the 100-year floodplain. DHEC's permit checklists merely state that the proposed sites are not located within the 100-year floodplain. DHEC_000904, DHEC_002053, DHEC_003175. Although the proposed sites are located near the Little River floodplain, the Department failed to take the proximity of the Little River into consideration, as it was required to do. DHEC_000960, DHEC_002093; DHEC_003175. Part 200.70(F)(7) requires the Department to evaluate the slope of the proposed sites to determine whether additional setbacks are needed. DHEC's permit checklists identify slope percentages, but make no evaluation of the slopes, nor any conclusion as to whether additional setbacks are needed. DHEC_000906, DHEC_002055, DHEC_003177. The Department cannot avoid the law; it must apply it.

Part 200.70(F)(3) requires the Department to evaluate the proposed sites' location in a watershed to determine whether additional setbacks are necessary. The Coggins Property is

situated within the Little River watershed with numerous interconnected waterbodies on the Property. On the proposed site for Jim Young Broilers, there are three streams and an area of wetlands. On the proposed site for Heath Coggins Broilers, there are three streams and a nearby wetland. On the proposed site for David Coggins Broilers, there are two streams and an area of wetlands. There is no evidence in the record showing that the Department fulfilled its mandate to evaluate the Property's location in the watershed.

Another factor that the Department failed to evaluate is runoff prevention. S.C. Code Ann. 61-43 Part 200.70(F)(9); Hrg. Tr. p. 517, line 21 – p. 524, line 6. The Department asserts that stormwater prevention is addressed by a section within the CNMPs requiring planting of vegetation on approximately 1.5 acres on the proposed sites with soils having a high potential for erosion. Hrg. Tr. 836, lines 2-20; DHEC_000996 – DHEC_000997; DHEC_002157 – DHEC_002158; DHEC_003223 – DHEC_003224. This section says nothing about the need for setbacks to prevent runoff prevention. The Department further argues that stormwater will be addressed after the animal agricultural permits are issued through compliance with the State's general stormwater permit for large construction activities. S.C. Code Regs. 61-9 Part 122.26(a)(1) (ii) (requiring a stormwater NPDES permit for industrial activities); S.C. Code Regs. 61-9 Part 122.26(b)(14)(x) (defining industrial activities to include construction activities disturbing more than 5 acres of land). 40 C.F.R. 122.26(B)(14(x) (defining "large construction activity as "[c]onstruction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area."); S.C. Code Regs. 61-9.122.2(a) ("Terms not defined in this section have the meaning given by the Clean Water Act (CWA) or the Pollution Control Act (PCA)"). The stormwater permit for construction activities applies only to the construction phase of poultry facilities. Hrg. Tr. p. 851, line 13 – p. 852, line

19. The permit terminates upon completion of construction. Id. Permanent, post construction stormwater management and sediment reduction are required under S.C. Code Regs. 72-300 et seq. See S.C. Code Regs. 72-307(B)(1) (stating that stormwater management plans must contain details of temporary and permanent erosion and sediment control measures). However, poultry facilities are exempt from compliance with S.C. Code Regs. 72-300 et seq. S.C. Code Regs. 72-302(A)(1).

The factor of "runoff prevention" within Part 200.70(F) does not limit itself to a construction phase. To interpret "runoff prevention" to mean only the construction phase of poultry growing operations would render the "no-discharge" permit standard meaningless, for it ignores prevention of runoff during the term of the permit. "In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect." Anderson v. S.C. Election Comm'n, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012) "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplus age, or superfluous . . . ." State v. Smith (In re Decker), 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). Given that the plain language of Part 200.70(F) requires DHEC to evaluate whether additional setbacks are needed to prevent runoff, the Department is not entitled to deference to the agency's interpretation of its obligations under the Regulation. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envt'l Control, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014).

4. THE DEPARTMENT FAILED TO CONSIDER S.C. CODE ANN. § 50-11-356 AS A RELEVANT FACTOR UNDER PART 200.70(F) AS IT PERTAINS TO DAVID COGGINS BROILERS AND JIM YOUNG BROILERS.

S.C. Code Regs. 61-43 Part 200.70(F) does not limit DHEC to the factors specified in determining whether additional setbacks are needed. Petitioner argues that the Department should

have evaluated the proposed sites for David Coggins and Jim Young in light of S.C. Code Ann. § 50-11-356 which states:

> It is unlawful to discharge a gun or weapon within three hundred yards of a poultry layer or broiler house containing live poultry without permission of the owner. Anyone knowingly violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned not more than thirty days. The provisions of this section do not apply to a landowner discharging a gun or weapon on his own land.

Mr. Chaplin testified that Part 200.70(F) provides DHEC with the authority to evaluate S.C. Code Ann. § 50-11-356 to determine whether additional setbacks are necessary. Hrg. Tr. p. 855, lines 4-13.

"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The purpose and intent of S.C. Code Ann. 50-11-356 is clearly to protect the chickens inside barns from injury or death caused by the discharge of firearms. It is relevant and appropriate to include the statute as part of the Department's review of the proposed permits because it establishes a setback requirement that affects Mr. Blackmon, Ms. Sparrow, Ms. Basel and Mr. Stewart's interests in either hunting on leased land or leasing their land for hunting purposes. Mr. Stewart's property is located within 300 yards (or 900 feet) from Jim Young Broilers' proposed barns. He leases his property to others for hunting purposes. Likewise, one parcel of the Basel/Sparrow Property is located within 900 feet of the western boundary of the Coggins Property, and another parcel of the Basel/Sparrow Property is within 900 feet of the southern boundary at Lisbon Road. Ms. Basel and Sparrow also lease this property for hunting purposes. Mr. Blackmon is a lessee of the Basel/Sparrow hunting lease.

Counsel for Jim Young Broilers, David Coggins Broilers and Heath Coggins Broilers offered to stipulate and accept a permit condition requiring the permittees to give permission to hunt with a firearm within 900 feet of their barns. Hrg. Tr. p. 151, line 23 – p. 152, line 10. The testifying members of SCRAP did not accept the offer. A stipulation is not binding upon parties who do not agree to it. See Bodkin v. Bodkin, 388 S.C. 203, 228, 694 S.E.2d 230, 243-44 (Ct. App. 2010) ("A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties or their attorneys and is binding upon those who make them."). The Department did not respond to the offered stipulation. Members of SCRAP did not accept the offered stipulation. See e.g. Hrg. Tr. p. 153, lines 14-18.

Consent by the owners exposes the poultry to potential death or injury, posing a threat to the environment and public health and safety. See e.g. DHEC_000999; DHEC_001013. It is contrary to the intent of S.C. Code Regs. 61-43 Part 200 to authorize a situation that poses a danger to the environment and public health. See Part 200.10(A)(1) and (5) (stating purpose of regulation is to protect the environment and public health).

5. WHETHER THE PERMITTEES CONSTITUTE LARGE CONCENTRATED ANIMAL FEEDING OPERATIONS

S.C. Code Reg. 61-43 expressly references the State's NPDES permitting regulations as applicable to "concentrated animal feeding operations as defined by Regulation 61-9." S.C. Code Regs. 61-43 Part 200.40(D). Under S.C. Code Regs. 61-43 Part 200.70, which address the decision-making process of the South Carolina Department of Health and Environmental Control ("DHEC"), "[i]f a facility is classified as a 'concentrated animal feeding operation] under the NPDES Regulation 61-9, the expiration date [of the permit] shall be no more than five years after the issue date." S.C. Code Regs. 61-43 Part 200.70(I). The State's NPDES regulation would also

be triggered by the regulation's charge that DHEC act on all permits "to prevent, as far as reasonable possible under state and federal laws, an increase in pollution of the waters ... of the State." S.C. Code Regs. 61-43 Part 200.70(E). DHEC's internal permit review checklist for animal agricultural facilities states that the applicant must submit a fee for a NPDES CAFO general permit if the facility is a Large CAFO. See DHEC_003179.

To be deemed a CAFO as defined within S.C. Code Regs. 61-9 Part 122.23, the definition of an "animal feeding operation" ("AFO") must first be met, followed by tiered categories of AFOs triggered by the size of the operation. S.C. Code Regs. 61-9 Part 122.23(b)(1) and (2). An "animal feeding operation" is "a lot or facility (other than an aquatic animal production facility) ... where the following conditions are met:

> (A) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and
> (B) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. S.C. Code Regs. 61-9 Part 122.23(b)(1).

Each of the Respondents' proposed operations will confine and feed or maintain chickens for 45 days or more in any 12-month period. DHEC_000920 (David Coggins Broilers' Comprehensive Nutrient Plan stating that the operation would confine 162,000 birds in any twelve month period, with 27,000 in each of the six proposed barns; approximately 4.5 flocks will be raised per year, each flock grown for 8-9 weeks); DHEC_002065 (Heath Coggins Broilers' Comprehensive Nutrient Plan stating that the operation would confine 237,000 birds in any twelve month period, with 35,000 in each of the six proposed barns; approximately 4.5 flocks will be raised each year, each grown for 8-9 weeks); DHEC_003187 (Jim Young Broilers' Comprehensive Nutrient Plan stating that the operation would confine 237,600 birds in any twelve month period,

with 39,600 in each of the six proposed barns; approximately 4.5 flocks will be raised each year, each grown for 8-9 weeks).

Whether an "animal feeding operation" is a CAFO then turns on whether the operations meet any of the following definitions: 1) a Large CAFO; 2) a Medium CAFO; or 3) a Small CAFO. An "animal feeding operation" for production of broilers is a Large CAFO if it confines 125,000 or more birds per year. S.C. Code Regs. 61-9 Part 122.23(b)(4)(x). Each proposed facility seeks to confine over 125,000 animals annually. An "animal feeding operation" deemed to be a Large, Medium or Small CAFO "are point sources that require NPDES permits for discharges or potential discharges." S.C. Code Regs. 61-9.122(a). Therefore, Respondents must apply for a NPDES Permit or demonstrate "no potential to discharge under any circumstance or climactic condition." "Once an operation is defined as a CAFO, the NPDES requirements for CAFO apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal." S.C. Code Regs. 61-9 Part 122.23(a). The NPDES permit requirements apply to the production area[11] of a CAFO as well as land under the control of the CAFO owner or operator on which manure is applied.[12] S.C. Code Ann. 61-9 Part 122.23(a) and (e).

In Waterkeeper Alliance Inc. v. U.S. E.P.A., 399 F.3d 486 (2nd Cir. 2005) the Court of Appeals for the Second Circuit invalidated the U.S. Environmental Protection Agency's ("EPA") 2003 Rule requiring a NPDES permit for "potential discharges" as exceeding the EPA's authority under the Clean Water Act. The Second Circuit is not controlling precedent. The Clean Water Act does not prevent states from promulgating water quality regulations that are different than

[11] "Production area" is defined in part as the animal confinement area, manure storage area, raw materials storage area, and waste containment area. S.C. Code Regs. 61-9 Part 122.23(b)(8). In the case of broiler production areas, the definition includes "confinement houses," "runoff ponds," "storage sheds," "stockpiles," and "composting piles." *Id.*
[12] An exception to NPDES coverage of land application of manure exists at S.C. Code Regs. 61-9 Part 122.23(e).

federal requirements so long as state regulations meet the minimum requirements of the Act. 33 U.S.C. § 1370. Indeed, "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...." 33 U.S.C. § 1251 (emphasis added); see Mich. Farm Bureau v. Dep't of Envtl. Quality, 292 Mich. App. 106, 130-31, 807 N.W.2d 866, 884 (2011) (stating that a state which administers its own NPDES program may adopt discharge standards and effluent limitations that are more stringent than the federal standards and limitations).

In Mich. Farm Bureau v. Dep't of Envtl. Quality, the Michigan Court of Appeals addresses the same issue as here, and the Court's reasoning is persuasive. 292 Mich. App. 106, 807 N.W.2d 866 (2011). Michigan had adopted the 2003 CAFO Rule, which was challenged as invalid under the Clean Water Act. Id. After disposing of Waterkeeper Alliance as inapposite, the court centered its analysis on whether state enabling law supported the CAFO Rule. Id. at 130-132; 885-887. Michigan's enabling statute for its NPDES program provided broad powers to its environmental protection agency "protect and conserve the water resources of the state ... and to take all appropriate steps to prevent any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions in any . . . waters of the state ...." Id. at 134-35, 866, 886. The court concluded that "the duty to take all appropriate steps to *prevent* any pollution the [DEQ] considers to be unreasonable and against public interest," *id.* (emphasis added), clearly grants the DEQ authority to forestall potential pollution *even before* any discharge of pollutants ever occurs." (emphasis in original).

Like Michigan, the State of South Carolina administers its own NPDES program. S.C. Code Reg. 61-9. The State's NPDES regulations were promulgated under both the Clean Water

Act and the South Carolina Pollution Control Act. S.C. Code Regs. 61-9 Part 122.1(a). The Pollution Control Act provides broad discretion to DHEC to prevent pollution under permit programs. Pursuant to S.C. Code Ann. 48-1-20, "the Department of Health and Environmental Control shall have authority to abate, control and prevent pollution." (emphasis added). Under S.C. Code Ann. § 48-1-50(5), DHEC is authorized to "develop a general comprehensive program for the abatement, control and prevention of air and water pollution." (emphasis added). "Pollution" is defined broadly as "the presence in the environment of any substance, including, but not limited to, sewage, industrial waste, other waste, air contaminant, or any combination thereof in such quantity and of such characteristics and duration as may cause, or tend to cause the environment of the State to be contaminated, unclean, noxious, odorous, impure or degraded, or which is, or tends to be injurious to human health or welfare; or which damages property, plant, animal or marine life or use of property ...." S.C. Code Ann. § 48-1- 10(7) (emphasis added). The Department possesses the authority to require Large CAFOs to obtain an NPDES permit.

CONCLUSION

Because DHEC failed to make critical findings, legal error controls its decision to grant animal agricultural permits to Jim Young Broilers, Heath Coggins Broilers and David Coggins Broilers. Adams v. S.C. Dep't of Health & Envtl. Control, 303 S.C. 251, 255, 399 S.E.2d 788, 790 (Ct. App. 1990); S.C. Code Ann. 1-23-380(5)(d) and (f). IT IS HEREBY ORDERED that the Department's decisions to issue permits to Jim Young Broilers, Heath Coggins Broilers and David Coggins Broilers are reversed.

AND IT IS SO ORDERED.

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Ralph King Anderson, III
Chief Administrative Law Judge

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Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

FINAL ORDER AND DECISION

APPEARANCES:

For Petitioners Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices:	M. McMullen Taylor, Esquire and Robert Guild, Esquire
For Respondent South Carolina Department of Health and Environmental Control:	Stephen P. Hightower, Esquire
For Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers:	Benjamin P. Mustian, Esquire

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) following requests for contested case hearings filed by Charles S. Blackmon (Blackmon) and South Carolinians for Responsible Practices (SCRAP). Petitioners challenge the decision of Respondent South Carolina Department of Health and Environmental Control (DHEC or the Department) to issue, pursuant to 4 S.C. Code Ann. Regs. 61-43 (2011), Bureau of Water Agricultural Permit Nos. 19,886-AG, 19,876-AG, and 19,889-AG (Permits) to Respondents David Coggins Broilers (D.C. Broilers), Heath Coggins Broilers (H.C. Broilers), and Jim Young Broilers (J.Y. Broilers) (collectively, Broilers), respectively. The Court has jurisdiction over these cases pursuant to S.C. Code Ann. § 1-23-600 (Supp. 2016), S.C. Code Ann. § 44-1-60 (Supp. 2016), and 4 S.C. Code Ann. Regs. 61-43, Part 200.70(G). Pursuant to Rule 19(D) of the Rules of Procedure for the ALC (SCALC Rules) and by order dated March 29, 2017, the Court consolidated these cases for hearing purposes. Notice of a

contested case hearing was given to all parties and a hearing on the merits was held on August 15-17, 2017 at the ALC in Columbia, South Carolina.

SUMMARY JUDGMENT

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

Standard of Review

Rule 68 of the SCALC Rules provides that "[t]he South Carolina Rules of Civil Procedure ... in contested cases ... may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." Summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *see also Wiedermann v. Town of Hilton Head*, 330 S.C. 532, 536, 500 S.E.2d 783, 285 (1998). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ,

summary judgment should be granted. *ERIE Ins. Co. v. Winter Const. Co.*, 393 S.C. 455, 459, 713 S.E.2d 318, 320 (Ct. App. 2011); *see also Bloom v. Raviora*, 339 S.C. 417, 424-25, 539 S.E.2d 710, 713-14 (2000) (holding that summary judgment is appropriate even when matters of fact are at issue, when those facts do not rise, as a matter of law, to the level of being "material" to the claims at issue.).

Background and Undisputed Facts

D.C. Broilers, H.C. Broilers, and J.Y. Broilers filed applications with DHEC for agricultural permits to construct and operate new poultry farms in Laurens County, South Carolina, each consisting of six poultry barns housing between 162,000 and 237,600 broilers, and to dispose of the generated manure (Projects). Pet'rs' Pet. for Contested Case Hr'g, Docket No. 17-ALJ-07-0041-CC (Pet'rs' D.C. Broilers Pet.), at 1; Pet'rs' Pet. for Contested Case Hr'g, Docket No. 17-ALJ-07-0042-CC (Pet'rs' H.C. Broilers Pet.), at 1; Pet'rs' Pet. for Contested Case Hr'g, Docket No. 17-ALJ-07-0039-CC (Pet'rs' J.Y. Broilers Pet.), at 1. After reviewing the applications, DHEC issued the Permits as "no-discharge" permits in which DHEC prohibited the "discharge of pollutants from the operation into surface waters of the State (including ephemeral and intermittent streams)" and the "discharge of pollutants into groundwater." Mot. for Partial Summ. J. at Exs. A, B, and C; 4 S.C. Code Ann. Regs. 61-43 Part 200.140(A). *See also* 4 S.C. Code Ann. Regs. 61-43 Part 200.20(B) ("Permits issued under this regulation are no-discharge permits").

Although the Permits and DHEC's regulations specifically prohibit Broilers from discharging pollutants into waters of the State or groundwater, Petitioners contend that the Projects are required to obtain NPDES permits prior to operating in

South Carolina. Specifically, Petitioners assert that, based on the number of broilers to be housed in the barns, the Projects are considered large concentrated animal feeding operations (CAFOs) as defined by 3 S.C. Code Ann. Regs. 61-9 Part 122.23(b)(4)(x) (defining an animal feeding operation as a large CAFO if it stables or confines 125,000 chickens) and under federal regulations implementing the Clean Water Act (CWA), 33 U.S.C.A. § 1251 *et seq. See* 40 C.F.R. 122.23(b)(2). Petitioners argue that, as large CAFOs, Broilers are considered "point sources that require NPDES permits for discharges or potential discharges." Pet'rs' Memo in Opp. To Mot. for Part. Summ. J. at 3 *citing* 3 S.C. Code Regs. 61-9 Part 122.23(a). Petitioners therefore assert that the Projects must obtain an NPDES permit "for discharges or potential discharges" unless DHEC determines that they have "no potential to discharge manure, litter, or process wastewater." 3 S.C. Code Ann. Regs. 61-9 Part 122.23(a), (d)(2), (f)(1). Petitioners further assert that DHEC, in issuing the Permits to Broilers, failed to follow the procedure for determining whether the Projects have "no potential to discharge."

Analysis

NPDES permits are issued by DHEC pursuant to the provisions of the CWA, which authorizes permitting authorities, such as South Carolina,[1] to regulate, through the NPDES permitting system, the discharge of pollutants. Under the CWA and DHEC regulations governing Water Pollution Control Permits, 3 S.C. Code Ann. Regs. 61-9, persons or facilities are required to obtain an NPDES permit in order to

[1] *See* 33 U.S.C.A. § 1342(b) (authorizing states to administer permit programs for "discharges into navigable waters").

discharge pollutants into waters of the State or the United States. *See* 33 U.S.C.A. § 1342(a)(1), (b); 3 S.C. Code Ann. Regs. 61-9 Parts 122.1(b)(1), 122.2(b). Consistent with these requirements, DHEC has promulgated effluent limitations for the discharge of pollutants, which are "restriction[s] imposed by the Department on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into waters of the State...." 3 S.C. Code Ann. Regs. 61-9 Part 122.2(b).

DHEC regulations therefore prohibit the discharge of a pollutant by any person from any point source to navigable waters unless authorized by an NPDES permit. *See* 33 U.S.C.A. §§ 1311(a), 1342; 3 S.C. Code Ann. Regs. 61-9 Parts 122.1(b)(1); *see also* 3 S.C. Code Ann. Regs. 61-9 Part 122.2(b) (defining the term "discharge of a pollutant" to mean "[a]ny addition of pollutant ... to waters of the State from any point source."). Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge for DHEC to regulate, no obligation of point sources to comply with regulations for point source discharges, and no obligation of point sources to seek or obtain an NPDES permit in the first instance. *Cf. Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2d Cir. 2005).[2] Consequently, if a point source does not discharge pollutants into waters of

[2] Although not binding, the Court is persuaded by the analysis applied by the United States Court of Appeals for the Second Circuit in *Waterkeeper*. There, the court rejected an EPA rule which required all CAFO owners or operators to apply for individual NPDES permits, unless they "secure[d] a determination ... that the Large CAFO has 'no potential to discharge." *Waterkeeper*, 395 F.3d. at 495. The basis for the court's decision was that the CWA only gives permitting authorities the jurisdiction "to regulate and control only actual discharges—not potential discharges, and certainly not point sources themselves." *Id.* at 505.

the State or the United States, there is no violation of the CWA or DHEC's NPDES regulations and the point source is not obligated to seek or obtain an NPDES permit.

Here, DHEC has mandated—both by the plain language of the Permits and by regulation—that animal facilities like the Projects are prohibited from discharging pollutants. *See* 4 S.C. Code Ann. Regs. 61-43 Parts 200.140(A) and 200.20(B); Mot. for Partial Summ. J. at Exs. A, B, and C. Consequently, requiring animal facilities that do not discharge to obtain NPDES permits or requiring DHEC to determine whether facilities prohibited from discharging have "no potential to discharge" would be wholly inconsistent with the regulatory scheme enacted by Congress, the South Carolina General Assembly, and DHEC, all of which give the permitting authorities the jurisdiction to regulate and control only actual discharges—not potential discharges.[3] As a matter of law, because the Projects specifically are prohibited from

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The United States Court of Appeals for the Fifth Circuit reached a similar conclusion in reviewing a subsequent EPA regulation that required a CAFO owner or operator to apply for an NPDES permit only if the CAFO "discharges or **proposes to discharge** pollutants." 40 C.F.R. § 122.23(d)(1) (2008) (emphasis added). In *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 750 (5th Cir. 2011), the court struck down the requirement that CAFOs which "propose to discharge" must apply for an NPDES permit holding that the regulation "required CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of *Waterkeeper*, as well as Supreme Court and other well-established precedent." *Id.* at 750.

The language in the EPA rule at issue in *Waterkeeper* was substantially similar to 3 S.C. Code Ann. Regs. 61-9 Part 122.23(d). As well, the questions presented in *Nat'l Pork Producers Council* are relevant to the Court's consideration of the Motion. Accordingly, the Court finds that the reasoning set forth in *Waterkeeper* and *Nat'l Pork Producers Council* is reasonable and appropriate for consideration in this matter.

[3] Petitioners argue that the Pollution Control Act, S.C. Code Ann. § 48-1-10, *et seq.* (PCA), gives DHEC broad discretion to prevent pollution under permit programs and that they are empowered "to issue, deny, revoke, suspend or modify permits, under such conditions as it may prescribe for the **discharge** of sewage, industrial waste or other waste." Pet'rs' Memo in Opp. To Mot. for Part. Summ. J. at 8 *quoting* S.C. Code Ann. § 40-1-50(5) (emphasis added). For the same reasons discussed above, because the PCA only gives DHEC the authority to establish conditions for actual discharges and the Projects are prohibited from doing so, DHEC does not have the authority to regulate the Projects under the State's NPDES program.

discharging pollutants into waters of the State, they do not meet the threshold criteria of 3 S.C. Code Ann. Regs. 61-9 Part 122.1(b)(1) and therefore are not obligated to seek or obtain an NPDES permit for their operations.

Similarly, DHEC was not required to determine whether the Projects have "no potential to discharge." By regulation, DHEC has specifically prohibited agricultural facilities from discharging and, if they do discharge, they will be in violation of their permit and DHEC regulations and subject to sanctions. In recognition of this permitting scheme, the Department has interpreted its regulations to mean that animal facilities do not require NPDES permits because no discharge should occur. "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Development Partners, II v. S.C. Dept. of Health & Environmental Control*, 411 S.C. 16, 33, 766 S.E.2d 707,717 (2014) (*citing Chevron. U.S.A.. Inc. v. Natural Res. Def. Council, Inc.*, 67 U.S. 4 837, 843 (1984) & *Brown v. Bi-Lo*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)). Because animal facilities are prohibited from discharging and, therefore, do not fall under the regulatory scheme of 3 S.C. Code Ann. Regs. 61-9 Part 122, the Court finds that the Department's interpretation is reasonable and is not contrary to the plain language of the regulation or relevant statutes. *See also Waterkeeper*, 395 F.3d. at 505. Accordingly, DHEC was not required to determine whether the Projects have no potential to discharge.[4] *See Brown*, 354 S.C. at 440, 581

[4] The Court also notes that 3 S.C. Code Ann. Regs. 61-9 Part 122.23(g) requires "[n]ew sources [of discharges of pollutants into waters of the State] ... to obtain coverage under a[n NPDES] permit

S.E.2d at 838 (courts generally give deference to an administrative agency's interpretation of an applicable statute or its own regulation unless the plain language of the statute is contrary to the agency's interpretation).

Furthermore, 3 S.C. Code Ann. Regs. 61-9 Part 122.23(e) provides:

> The discharge of manure, litter, or process wastewater to waters of the State from a CAFO as a result of the application of that manure, litter, or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, **except where it is an agricultural storm water discharge** as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in section 122.42(e)(1)(vi) through (ix), a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO is an agricultural storm water discharge.

(Emphasis added). 3 S.C. Code Ann. Regs. 61-9 Part 122.2(a) also defines "discharge of a pollutant" to mean "any addition of any pollutants ... to waters of the State from any point source" including "surface runoff which is collected or channeled by man; [and] discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." Reading these two regulations *in pari materia*, agricultural facilities only "discharge" pollutants into

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at least 180 days prior to the time that the CAFO commences operation." Given that the Permits are being challenged in this proceeding, none of the Projects have begun operation or even been constructed. 4 S.C. Code Ann. Regs. 61-43 Part 200.70(K) ("The animal facility ... can be built only when the permit is effective with no appeals pending."). Although no NPDES permits are required for the Projects for the reasons stated herein, even if such a permit was required, Petitioners have not shown that the Projects will begin operations within 180 days. 3 S.C. Code Ann. Regs. 61-9 Part 122.23(g). Therefore, Broilers are not presently required to apply for an NPDES permit.

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. None of the Projects propose to discharge pollutants through a conveyance directly into waters of the State, nor do they propose to deliberately channel runoff into waters of the State. Accordingly, as a matter of law, they are not considered to be "dischargers" of pollutants that would require an NPDES permit.

For these reasons, the Court found at the hearing in this matter that, because the Projects are prohibited from discharging pollutants into waters of the State and Broilers are not seeking to discharge pollutants into waters of the State, they are not required to apply for or obtain an NPDES permit as a matter of law. Similarly, the Court determined that DHEC was not required to determine whether or not the Projects had "no potential to discharge." Accordingly, the Court granted Broilers' Motion for Partial Summary Judgment.

FINDINGS OF FACT

At the hearing, the Court heard testimony from witnesses and admitted into evidence several exhibits. Petitioners called Petitioner Blackmon, Margaret Sparrow, Mary Basel, Eugene Ross Stewart, and Kathy Lowman, each of whom are members of SCRAP. Tr. at 61, ll.14-17; 207, ll.21-22; 223, ll.21-23; 262, ll.8-9; 323, ll.18-21. Petitioners also called David Coggins, proposed operator for D.C. Broilers, and David Hargett, Ph.D., who was qualified as an expert in soil and water resource management.[5] Tr. at 489, ll.5-17. Broilers called Chris Mosley, a South Carolina

[5] In voir dire, Dr. Hargett acknowledged that he was not presenting expert testimony on air quality, human health, epidemiology, respiratory health, health conditions of workers in poultry

registered professional engineer who prepared the application and Comprehensive Nutrient Management Plan (CNMP) reviewed by DHEC. The Department called William P. Chaplin, DHEC's permit reviewer.

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, the Court makes the following findings of fact by a preponderance of the evidence:

Background

D.C. Broilers, H.C. Broilers, and J.Y. Broilers separately filed applications with DHEC for agricultural permits to construct and build new poultry farms off Lisbon Road in Laurens County, South Carolina, each consisting of six poultry houses. Ex. 1B at DHEC_003187; Ex. 2C at DHEC_000920; Ex. 3B at DHEC_002065. D.C. Broilers' facility will be designed to hold 162,000 broilers with a normal live production weight[6] of 737,100 pounds and will generate an estimated 988 tons of manure, or "litter," per year. Ex. 2C at DHEC_000920. H.C. Broilers' facility and J.Y. Broilers' facility each will be designed to hold 237,600 broilers with a normal live production weight of 1,081,080 pounds and will each generate an estimated 1,449 tons of manure per year. Ex. 1B at DHEC_003187; Ex. 3B at DHEC_002065.

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farms, entomology, appraisals or the impact of animal facilities on property values, or the health of animals. Tr. at 479, l.8 – 483, l.12. Dr. Hargett also acknowledged that he is not an attorney and that he would not testify about groundwater impacts. Tr. at 482, ll.12-14; 488, ll.8-11.

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

Each of the applications is for a no-discharge permit, which does not allow wastewater discharges associated with the operation of the Projects and the handling of the manure. Ex. 1B at DHEC_003167, 003173; Ex. 2C at DHEC_000895, 000902; Ex. 3B at DHEC_002042, 002051; 4 S.C. Code Ann. Regs. 61-43 Part 200.20(B). Therefore, Broilers have contracted with L&M Litter Brokers (L&M), a manure broker licensed by DHEC pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 400.10 *et seq.*, to dispose of the generated manure off-site. Ex. 1B at DHEC_003187, 003321; Ex. 2C at DHEC_000920; Ex. 3B at DHEC_002065, 002184; Resp't-Permittees Ex. No. 22; Tr. p.425, ll.5-12. L&M will remove the manure from the facilities and accept all waste utilization responsibilities, ensuring the waste is handled, transported, stored, and/or applied in a manner consistent with DHEC regulations, thus relieving Broilers of this responsibility. Ex. 1B at DHEC_003321; Ex. 3B at DHEC_002184; Respondent-Permittees Ex. No. 22; Tr. at 830, ll.9-14.

In addition to using a manure broker, J.Y. Broilers proposes to dispose of a portion of the litter generated at that facility by land applying it using a pull-behind spreader onto 192.7 spreadable acres. Ex. 1B at DHEC_003187. The land-application areas are not on the Project property, but off-site on parcels located in the Bush River watershed. Tr. at 534, ll.22-24. As part of its application, J.Y. Broilers provided numerous maps of the land application sites, a crop management plan, land treatment conservation practices, soil and risk assessment analyses, nutrient management plans, and manure utilization area information. Ex. 1B at DHEC_003242-3252; DHEC_003287-003318. The application also included signed statements informing the owners of the land application areas that they are

responsible for spreading and utilizing the manure in accordance with the requirements of DHEC and 4 S.C. Code Ann. Regs. 61-43 Part 200. Ex. 1B at DHEC_003348-3352.

Accompanying the applications are CNMPs that set forth odor abatement plans, vector control and abatement plans, mortality disposal plans, public notification documentation, and setback waivers. Ex. 1B at DHEC_003226-3228, 003234-3240, 003333-3346; Ex. 2C at DHEC_000999-1001, 001007-1013, 001022-1033; Ex. 3B at DHEC_002160-2162, 002168-2174, 002195-2221. In addition, the CNMPs set forth a list and description of the planned and existing conservation practices to be applied as part of a conservation management system in order to decrease non-point source pollution of surface and groundwater resources, and establish vegetation to reduce soil erosion on the site, among other things. Ex. 1B at DHEC_003223-3224; Ex. 2C at DHEC_000996-997; Ex. 3B at DHEC_002157-2158. Under DHEC regulations, the operators of the proposed facilities also must take a certified confined animal manure management (CAMM) class at Clemson University. 4 S.C. Code Ann. Regs. 61-43 Part 200.190(A).

Petitioner Blackmon owns land near the Projects, which he uses for hunting and recreation. Pet'rs' Prehr'g Stmt., Docket No. 17-ALJ-07-0041-CC (Pet'rs' D.C. Broilers Stmt.), at 2-3; Pet'rs' Prehr'g Stmt., Docket No. 17-ALJ-07-0042-CC (Pet'rs' H.C. Broilers Stmt.), at 2-3; Pet'rs' Prehr'g Stmt., Docket No. 17-ALJ-07-0039-CC (Pet'rs' J.Y. Broilers Stmt.), at 2-3; Exhibit 4T; Tr. at 64, ll.18-22. Petitioner SCRAP is an unincorporated association of citizens and property owners in the Mountville area of Laurens County who advocate for poultry farming practices and permitting

to be compatible with the use and enjoyment of non-poultry farming property owners, and in a manner that does not impair air and water quality, emit noxious odors, or otherwise cause the quality of life in the Mountville area to deteriorate. Pet'rs' D.C. Broilers Stmt. at 3; Pet'rs' H.C. Broilers Stmt. at 3; Pet'rs' J.Y. Broilers Stmt. at 3. Petitioners object to the permitting of the Projects and allege that the facilities allegedly will prohibit adjacent landowners from discharging weapons within 900 feet of the poultry houses, create offensive odors, harm their health and safety, and increase pollution of the air and waters of the State. Pet'rs' D.C. Broilers Stmt. at 3-4; Pet'rs' H.C. Broilers Stmt. at 3-4; Pet'rs' J.Y. Broilers Stmt. at 3-4.

Permitting Process

On April 13, 2016, Ms. Chrissy Matthews conducted a Preliminary Site Inspection (PSI) for the poultry facilities proposed by Broilers. Ex. 1B at DHEC_003402; Ex. 2C at DHEC_001089; Ex. 3B at DHEC_002083. By letter dated April 13, 2016, Ms. Matthews notified Broilers that the proposed Project sites "appear[] to be suitable for this type of operation" and granted permission for Broilers to plan and design the proposed animal facilities for DHEC review. *Id.*

Broilers engaged Chris Mosley, a Senior Project Manager with Agri-Waste Technologies (AWT) and a registered professional engineer in South Carolina, to develop the applications and CNMPs for the Projects. Tr. at 419, ll.4-16; 705, l.14 – 706, l.5; 715, ll.4-16. In doing so, AWT used GPS information, which was subsequently verified by on-site investigations, to site the proposed facilities so as to meet or exceed all the setback requirements of 4 S.C. Code Ann. Regs. 61-43 Part 200.10 *et seq.* Tr. at 763, l.22- 765, l.6; 745, ll.14-19.

Specifically, D.C. Broilers' proposed barns were originally sited to so as to comply with the following setback distances:

1) Potable wells (required 200 feet, actual, 2,391 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required 100 feet, actual 2,238 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required 100 feet, actual 26,702 feet);
4) Ephemeral or intermittent streams located downslope (required 100 feet, actual 448 feet);
5) Ditches or swales located downslope (required 50 feet, actual 204 feet);
6) Occupied permanent residence (required 1,000 feet, actual 2,391 feet).

Ex. 2C at DHEC_000925. In addition, D.C. Broilers originally proposed to locate its barns within less than the minimum setback requirement of 400 feet from the property line of H.C. Broilers. *Id.* However, H.C. Broilers granted a waiver of a reduction of this setback pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(11). Ex. 2C at DHEC_001033. With this exception, D.C. Broilers' barns, as originally proposed, were sited at least 400 feet from all other property lines. Ex. 2C at DHEC_00948.

H.C. Broilers' proposed barns also were sited to so as to comply with the following setback distances:

1) Potable wells (required 200 feet, actual, 2,812 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required 100 feet, actual 834 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required 100 feet, actual 26,859 feet);
4) Ephemeral or intermittent streams located downslope (required 100 feet, actual 278 feet);
5) Ditches or swales located downslope (required 50 feet, actual 135 feet);
6) Occupied permanent residence (required 1,000 feet, actual 2,812 feet).

Ex. 3B at DHEC_02069. In addition, H.C. Broilers proposed to locate its barns within less than the minimum setback requirement of 400 feet from the property lines of

D.C. Broilers and J.Y. Broilers. *Id.* However, D.C. Broilers and J.Y. Broilers granted waivers of a reduction of this setback pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(11). Ex. 3B at DHEC_02220-2221. With these exceptions, H.C. Broilers' barns were sited at least 400 feet from all other property lines. Ex. 3B at DHEC_002091.

Similarly, J.Y. Broilers' proposed barns also were originally sited to so as to comply with the following setback distances:

1) Potable wells (required 200 feet, actual, 1,768 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required 100 feet, actual 1,672 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required 100 feet, actual 27,020 feet);
4) Ephemeral or intermittent streams located downslope (required 100 feet, actual 538 feet);
5) Ditches or swales located downslope (required 50 feet, actual 127 feet);
6) Occupied permanent residence (required 1,000 feet, actual 1,768 feet).

Ex. 1B at DHEC_003191, 3447. In addition, J.Y. Broilers originally proposed to locate its barns within less than the minimum setback requirement of 400 feet from the property line of H.C. Broilers. *Id.* However, H.C. Broilers granted a waiver of a reduction of this setback pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.50(B)(11). Ex. 1B at DHEC_003346. With this exception, J.Y. Broilers' barns, as originally proposed, were sited at least 400 feet from all other property lines. Ex. 1B at DHEC_003218.

Pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A), applications for new animal facilities must be published to give notice to the public. In particular, the regulation provides that the applicant must notify all property owners within 1,320 feet of the facility and that DHEC must post up to four notices along the boundary of

the proposed facility. The record reflects that all property owners within 1,320 feet of the Projects were notified by the mailing of a Notice of Intent form by certified mail to each owner. Ex. 1B at DHEC_003393-3395; Ex. 2C at DHEC_001081-1084; Ex. 3B at DHEC_002194-2218. The record also establishes that DHEC staff posted the required notices. Ex. 1B at DHEC_003332-3344; Ex. 2C at DHEC_001022-1031; Ex. 3B at DHEC_002248-2250.[7]

DHEC staff member, Mr. William Chaplin, reviewed the applications pursuant to the requirements of 4 S.C. Code Ann. Regs. 61-43 Part 200.70. As part of his review, Mr. Chaplin verified the setback distances and conducted a water resources review that ascertained the location of point sources of discharges, water quality monitoring stations, State Approved Source Water Protection Areas, impaired water bodies, Historic Preservation Districts, Heritage Corridors, and State and National Parks and Forests. Ex. 1B at DHEC_003171-3182; Ex. 2C at DHEC_000899-910; Ex. 3B at DHEC_002049-2059.

Mr. Chaplin also requested that DHEC's Bureau of Air Quality evaluate whether or not the proposed facilities would have an impact on air quality. Ex. 1B at DHEC_003398-3400; Ex. 2C at DHEC_001075-1077; Ex. 3B at DHEC_002244-2246. In each instance, the Bureau of Air Quality determined that:

1) An increase in air pollution will not occur, i.e., emissions will comply with all applicable air quality standards.
2) The Bureau of Air Quality does not recommend additional requirements or setbacks for the facilities.

[7] At the hearing, Ms. Sparrow expressed concerns about the public notices, specifically regarding the size and literacy level of the signs. Tr. at 212, ll.9-20. However, no evidence was presented that the notices or the signs did not comply with regulatory or statutory requirements.

3) The location of the facilities is in attainment for the emissions of concern, and operation of the facility will not cause any area to go out of attainment for any pollutant.

Ex. 1B at DHEC_003400; Ex. 2C at DHEC_001077; Ex. 3B at DHEC_002246.

During the review process and pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D), DHEC also held public meetings on September 15, 2016, and October 11, 2016, for the purposes of discussing the applications, explaining the permitting process, collecting comments, and answering questions. Ex. 1B at DHEC_003416-3446; Ex. 2C at DHEC_001119-1154; Ex. 3B at DHEC_002285-2322. In that meeting, the Department provided an overview of the Projects and answered questions of the public in attendance. *Id.* In addition, DHEC received a number of written public comments concerning the Projects. Ex. 1B at DHEC_003479-3613; Ex. 2C at DHEC_001155-1344; Ex. 3B at DHEC_002345-2489.

Among other things, Ms. Basel complained to DHEC that her family had secured a building permit for a residence and DHEC approval for a septic tank on her family's property located across Lisbon Road from the Projects. Ex. 2C at DHEC_001338. Ms. Basel asked that DHEC respect those Permits and have the barns moved so that they would meet the 1,000-foot setback residential requirement from the proposed residence. Ex. 2C at DHEC_001161; Tr. at 239, ll.14-21; 838, ll.6-10. She also asked that DHEC require tree buffers along Lisbon Road to minimize dust and odor from the facilities. *Id.*

In an effort to accommodate Ms. Basel's request, Mr. Chaplin required that D.C. Broilers' and J.Y. Young's proposed facilities be moved further away from her property and Lisbon Road. Ex. 2C at DHEC_001190; Tr. 838, ll.6-10. In addition, Mr.

Chaplin required the Projects to keep the 400-foot property line setback along Lisbon Road and along the eastern side of J.Y. Broilers' parcel vegetated as requested by Ms. Basel. *Id.*; Ex. 1B at DHEC_003169. Broilers complied with these requirements and amended D.C. Broilers and J.Y. Broilers' CNMPs to relocate the proposed facilities approximately 150-200 feet further from Lisbon Road so that the 400-foot property setback would remain vegetated as requested by Ms. Basel and DHEC. Ex. 2C at DHEC_001190, 1192; Tr. at 429, l.10 – 430, l.3; 841, l.22 – 843, l.1.[8]

As a result of the amendment, D.C. Broilers' proposed barns comply with the following setback distances:

1) Potable wells (required 200 feet, actual, 2,084 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required 100 feet, actual 1,975 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required 100 feet, actual 27,129 feet);
4) Ephemeral or intermittent streams located downslope (required 100 feet, actual 428 feet);
5) Ditches or swales located downslope (required 50 feet, actual 164 feet);
6) Occupied permanent residence (required 1,000 feet, actual 2084 feet).

Ex. 2C at DHEC_000924. With the exception of the H.C. Broilers' property, which is subject to a waiver, D.C. Broiler's barns also comply with the 400-foot setback distance from all property lines. *Id.*

[8] All three Projects are designed to have a load-out area extending approximately 150 feet in front of the barns. Tr. at 429, ll.21-23; 841, l.22 – 843, l.1. For the purposes of meeting the setback requirements, distances are not measured from the load out area, but from the barns themselves. Tr. at 429, ll.18-23; 842, ll.16-22. Although the barns as originally proposed were 400 feet from Lisbon Road and therefore met the setback requirement, DHEC required the entire Project be moved so that not only the barns but also the load-out area was 400 feet away from Lisbon Road. Making this modification was necessary to keep the 400-foot property setback in a vegetated state. Tr. at 842, l.22 – 843, l.1.

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

1) Potable wells (required 200 feet, actual, 1,786 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required 100 feet, actual 1,760 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required 100 feet, actual 27,498 feet);
4) Ephemeral or intermittent streams located downslope (required 100 feet, actual 426 feet);
5) Ditches or swales located downslope (required 50 feet, actual 113 feet);
6) Occupied permanent residence (required 1,000 feet, actual 1,786 feet).

Ex. 1B at DHEC_003189. With the exception of the H.C. Broilers' property, which is subject to a waiver, J.Y. Broiler's barns also comply with the 400-foot setback distance from all property lines. *Id.* Accordingly, the Projects each meet or exceed all of the setback requirements set forth in 4 S.C. Code Ann. Regs. 61-43 Part 200.

At the conclusion of its review, DHEC issued the Permits to H.C. Broilers, D.C. Broilers, and J.Y. Broilers on November 30, December 14, and December 21, 2016, respectively. Ex. 3B at DHEC_002042-2043; Ex. 2C at DHEC_000895-896; Ex. 1B at DHEC_003167-3168. The Permits authorize the construction of the Projects, as amended, and contain Special Conditions, including requirements that Broilers 1) operate and maintain the waste system in accordance with the Waste Management Plan developed by Mr. Mosley and with State and Federal law so as to prevent discharges to the environment; 2) obtain any other local permits that may be required for the Projects, including building permits and stormwater permits; 3) obtain CAMM Certification from Clemson University within a year of the Permit's effective date; and 4) maintain the vegetation within the 400-foot property line setback along Lisbon Road and the property line on the eastern side of the parcel of J.Y. Broilers' parcel.

Ex. 1B at DHEC_003167-3168; Ex. 2C at DHEC_000895-896; Ex. 3B at DHEC_002042-2043.

Petitioners' Objections to the Permits

Based on the testimony presented at trial, Petitioners' object to the issuance of the Permits to Broilers on the following grounds:

A. The Projects will restrict Petitioners' ability to discharge weapons on portions of their property or on property on which they have hunting rights;

B. The Projects will create offensive odors;

C. The Projects will injure and adversely affect Petitioners' health and safety;

D. DHEC failed to adequately consider and evaluate the potential impacts of the Projects to the waters of the State.

E. The Projects will adversely impact air quality.

F. The Projects generally will harm their quality of life and constitute a nuisance.

A. Restriction of Ability to Discharge Weapons on Adjacent Property

Under South Carolina law, "it is unlawful to discharge a gun or weapon within three hundred yards of a poultry layer or broiler house containing live poultry without permission of the owner." S.C. Code Ann. § 50-11-356 (Rev. 2008). Although the barns are sited so as to be set back from the property line 400 feet as required by 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(6), Petitioners assert that the provisions of S.C. Code Ann. § 50-11-356 will have the effect of restricting adjacent property owners from using a swath of land 500 feet wide along their property line for hunting purposes or from discharging weapons on that portion of land. Tr. at 149, l.19 – 151,

l.16; Pet'rs' D.C. Broilers Stmt. at 3, 8; Pet'rs' H.C. Broilers Stmt. at 3, 8; Pet'rs' J.Y. Broilers Stmt. at 3, 8. Petitioners also assert that certain adjacent property owners lease their property for hunting purposes and, for the same reasons, those property owners will incur a pecuniary loss because the Projects will effectively limit hunting on those portions of property. *Id.*

At trial, Broilers stipulated and requested that the Permits be modified to include an additional Special Condition that would require them to grant permission to landowners who own land within 900 feet of the poultry houses, as well as their guests, permittees, and lessees, to discharge guns or weapons within 900 feet of the poultry houses. Tr. at 151, l.17 – 152, l.10; 433, l.7 – 434, l.13; 808, ll.3-18. Under the terms of this stipulation, Broilers, and any person to whom the Permit may be subsequently transferred, would be required to grant permission to those persons in order for them to operate the poultry facilities. Therefore, if Broilers or subsequent holders of the Permits ever revoked such permission, they would be in violation of their Permits and, thus no longer be able to operate the poultry facilities. *Id.*; Tr. at 153, ll.11-13; 433, l.12 - 13. Broilers also stipulated to release landowners who own land within 900 feet of the poultry houses, as well as their guests, permittees, and lessees, from any liability if the birds perished as a result of shots being fired within 900 feet. *Id.* Tr. at 387, ll.6-11; 435, ll.2-13.

B. Odor

Petitioners also object to the Projects on the grounds that they will create offensive odors. Petitioner Blackmon testified that he has experienced odors associated with the operation of poultry facilities and is concerned that the smell will

affect his use and enjoyment of his property for hunting. Tr. at 160, ll.9-14; 230, ll.7-12. Ms. Kathy Lowman also testified on behalf of Petitioners that she has observed odors from nearby poultry facilities, which has affected her ability to ride her bicycle in the area. Tr. at 325, ll.24-25; 330, ll.14-16.

Odor abatement is one of the issues required to be addressed by DHEC regulations. Specifically, 4 S.C. Code Ann. Regs. 61-43 Part 200.150(A) provides that a CNMP:

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

Producers also are required to "utilize Best Management Practices normally associated with the proper operation and maintenance of an animal facility ... to ensure an undesirable level of odor does not exist." 4 S.C. Code Ann. Regs. 61-43 Part 200.150(B).

Each of the CNMPs set forth in the application includes an odor abatement plan. Ex. 1B at DHEC_003235-3236, 003239; Ex. 2C at DHEC_001008-1009, 001012; Ex. 3B at DHEC_002169-2170, 002173; Tr. at 740, l.20 – 741, l.1. Among other things, the CNMPs provide that:

> Many of the potential sources of odor can be minimized by implementing some of the following best management

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

Ex. 1B at DHEC_003235; Ex. 2C at DHEC_001008; Ex. 3B at DHEC_002169. *See also* Ex. 1B at DHEC_003167; Ex. 2C at DHEC_000895; Ex. 3B at DHEC_002042 (specifying that, as a requirement of the Permits, Broilers must operate the facilities "in accordance with the ... animal facility management plan ... prepared by" AWT).

While generally complaining about odor concerns, Petitioners offered no testimony or documentary evidence establishing that the plans will not be effective. The record also reflects that, as required by 4 S.C. Code Ann. Regs. 61-43 Part 200.150(A), the CNMPs contain operation and maintenance practices which are used to eliminate or minimize undesirable odor levels and treatment processes for the reduction of undesirable odor levels. Accordingly, the Court finds the record does not establish that the Odor Abatement Plans in the CNMP are inadequate, that

additional setbacks are necessary,[9] or that the Projects need to have further precautions implemented to prevent excessive discharge of an undesirable odor. The Court also finds that the Odor Abatement Plans proposed by Broilers are reasonable and in compliance with the requirements of DHEC's regulations.

C. **Effects on Health and Safety**

Petitioners expressed general concerns that the Projects would affect their health and safety. Petitioner Blackmon testified that, after chicken litter was applied to his property, he would experience upper respiratory infections. Tr. at 143, ll.1-6. Ms. Lowman also testified that odors from nearby poultry facilities caused her to experience migraines. Tr. at 326, ll.10-13.

On cross-examination, Petitioner Blackmon admitted that his physician was unable to conclude that the chicken litter was the cause of his upper-respiratory infection. Tr. at 196, ll.7-10. Petitioners also did not introduce any written diagnoses or supporting documents into evidence to support Petitioner Blackmon's or Ms. Lowman's health claims or to demonstrate the effect of poultry facilities on human health. In addition, the record reflects that, although DHEC mailed Petitioner Blackmon and Ms. Lowman Medical Evaluation Instruction letters, neither responded nor provided information during the review process to allow DHEC to evaluate their medical concerns. Ex. 2C at DHEC_001105-1110.

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

Based upon the record in this case, the Court finds that there is no evidence to support Petitioners' claims that the Projects will have negative impacts on the health of the residents surrounding the proposed facilities. The Court also finds that the evidence does not demonstrate that additional requirements for the Projects are necessary to address any human health concerns.

D. Potential Impacts to Waters of the State

Petitioners also contend that DHEC failed to adequately consider the potential impacts of the Projects to the waters of the State. Specifically, Petitioners assert that other poultry facilities in the Mountville area leave manure stockpiles uncovered for more than three days and, therefore, do not operate in compliance with their permits or with DHEC regulations governing animal facilities. *See* Tr. at 332, ll.3-14; 4 S.C. Code Ann. Regs. 61-43 Part 200.100(B)(21). Petitioners also assert that other poultry facilities and manure brokers do not comply with DHEC regulations because they improperly apply manure to land application sites. *See* Tr. at 257, l.11 – 258, l.3. On this basis, Petitioners assert that poultry facilities, in general, contribute to the pollution of waters of the State. In addition, Petitioners assert that DHEC should have considered the grading of the Projects and stormwater runoff from the sites as part of the permitting process.

To support their argument, Petitioner Blackmon testified that an existing poultry operator (not Broilers) applied manure to his property but that Mr. Blackmon did not submit soil tests to the operator for reporting to DHEC or inclusion in the operator's records. Tr. at 138, ll.16-22; 142, ll.7-10. Ms. Lowman also testified that in 2013, she observed manure piles at an existing poultry facility (not operated by

Broilers) being left uncovered for more than three days. Tr. at 332, ll.3-17. Mr. Stewart testified that a manure broker delivered several loads of manure to Mr. Stewart's property in 2008 but did not request copies of a soil test or maps from him. Tr. at 257, l.11 – 258, l.3; 307, ll.5-7. Mr. Stewart also testified that he observed manure brokers delivering litter but did not observe any paperwork being exchanged between the broker and the owner of the field in which the manure was being applied. Tr. at 259, ll.5-6; 260, l.20 – 261, l.1.

Dr. Hargett opined that if rainwater falls on uncovered manure stockpiles, fecal bacteria and other contaminants of concern will run into waters of the State. Tr. at 546, ll.2-15. In addition, he opined that, in handling the manure at poultry facilities including clean outs of the barns, manure would be spilled onto the ground and rainwater would wash the manure into waters of the State. Tr. at 548, ll.3-17. He further testified that, according to a total maximum daily load (TMDL) development for the Little River watershed, the Little River is impaired which raises concerns as far as permitting additional animal agricultural facilities within that impaired watershed. Tr. at 530, ll.18-23.

Petitioners also challenge DHEC's water quality review of the applications on the basis that the site location of the Projects will require significant grading to prepare the sites for construction and stormwater runoff. According to Dr. Hargett, grading of the Project sites will create large areas of impermeable surface, thereby increasing runoff at the site. Tr. at 505, l.23 – 506, l.3; 507, ll.7-9. He also expressed concerns that no calculation has been performed of the final slope or of how much runoff will occur following the construction of the Projects. Tr. at 517, l.21 – 518, l.2.

As an initial matter, the Court affords little weight to Dr. Hargett's testimony as to his concerns regarding the impacts of the Projects on waters of the State. *Florence*, 310 S.C. at 72-73, 425 S.E. 2d at 63 (the trier of fact may give an expert's testimony the weight he or she determines it deserves.). On cross-examination, Dr. Hargett revealed that he developed a number of his opinions after his deposition. Tr. at 553, ll.19-20. Specifically, Dr. Hargett testified that he had developed his opinions regarding the location of ephemeral streams, flood plains, soils, the amount of "cut and fill" that would be on the site, and whether additional setbacks were needed on the site. Tr. at 557, l.17 – 558, l.6; 559, ll.4-10; 561, ll.4-12; 580, ll.15-19. Because Respondents were not timely advised of Dr. Hargett's opinions in this regard, the Court therefore finds it appropriate to afford his testimony little weight in considering these issues.

Nevertheless, the Court finds that Petitioners did not present any evidence demonstrating that the events addressed by Petitioners' witnesses actually resulted in fecal bacteria or pollutants reaching waters of the State through a discharge, runoff, or otherwise.[10] With respect to Petitioners' reliance upon the Little River TMDL, Dr. Hargett testified that the TMDL states that agricultural facilities "may be" a source of contamination and, therefore, that these facilities also "may not be" a potential source. Tr. at 556, l.25 – 557, l.8. Dr. Hargett also testified that riparian

[10] The lack of any evidence in the record that poultry facilities actually add pollution to waters of the State further supports the Court's determination on Broilers' Motion for Partial Summary Judgment. Because Petitioners failed to establish that pollution does, in fact, issue from these facilities and reach waters of the State, they have failed to demonstrate that these facilities "discharge" pollutants as defined by 3 S.C. Code Ann. Regs. 61-9 Part 122.2(a) ("'discharge of a pollutant' means any addition of any pollutant or combination of pollutants to waters of the State....")

and vegetative buffers can be very effective in reducing sediment, nutrients, and other constituents of concern. Tr. at 574, ll.7-13. He also testified that before he could render an opinion on whether or not a release of water from a manure pile would pollute waters of the State he would need to know whether or not there are riparian and vegetative buffers between the pile and waters of the State. Tr. at 648, ll.12-20. *But see* Exhibit 1B at DHEC_003224; Exhibit 2C at DHEC_000997; Exhibit 3B at DHEC_002158 (requiring the Projects to establish vegetation around the buildings and storage structures to reduce soil erosion, offsite nutrients, and pathogen transport); Tr. at 836, l.2 – 837, 20 (failure to plant vegetation would be a violation of the Permits). However, Petitioners failed to present any evidence addressing whether or not the vegetative or riparian buffers existed between the manure piles and waters of the State. For these reasons, the record does not support a finding that runoff from these facilities resulted in increased pollution to waters of the State.

The record also reflects that DHEC properly considered the impact of the Projects to impaired bodies of water as required by 4 S.C. Code Ann. Regs. 61-43 Part 200.140(C). As Mr. Chaplin testified, the Department considered the Little River TMDL in its review of the Projects and concluded that agricultural facilities are not contributors to the TMDL. Tr. at 829, ll.8-13. As part of this analysis, Mr. Chaplin recognized that D.C. Broilers, H.C. Broilers, and J.Y. Broilers do not propose to dispose of manure on the Project sites, but each propose to use a manure broker in its operations. Tr. at 830, ll.3-8. Manure brokers become responsible for the proper disposal of manure once it is taken out of the barns and those brokers thereafter apply the manure offsite from the Projects. Tr. at 540, ll.1-7; 830, ll.6-14. Manure brokers

also are required to obtain separate permits from DHEC, subject to enforcement by DHEC, and required to submit annual reports to DHEC regarding their operations pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 400. Tr. at 830, l.15 – 831, l.1. Because manure will not be disposed of or discharged from the proposed Project sites and Petitioners did not present substantial evidence that would suggest otherwise, the record reflects that DHEC properly concluded the Projects will have no impact on the Little River as an impaired water body.

Petitioners also did not present any evidence demonstrating that J.Y. Broilers' proposal to land apply a portion of its generated manure on other property offsite from the Project would result in an increase of pollution to waters of the State. As well, Dr. Hargett testified that J.Y. Broilers land application sites appeared to be "well-suited sites." Tr. at 536, ll.12-14. The Court therefore finds that there is no evidence to suggest that the land-application sites proposed by J.Y. Broilers will increase pollution to waters of the State.

With respect to Petitioners' stormwater concerns, in evaluating an agricultural facility permit application, DHEC is required to consider the non-exclusive list of considerations set forth in 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F), which are as follows:

> The setback limits given in this part are minimum siting requirements .... On a case-by-case basis the Department may require additional separation distances applicable to animal facilities .... The Department shall evaluate the proposed site including, but not limited to, the following factors when determining if additional distances are necessary:

1. Proximity to 100-year floodplain;
2. Geography and soil types on the site;
3. Location in a watershed;
4. Classification or impairment of adjacent waters;
5. Proximity to a State Designated Focus Area; Outstanding Resource Water; Heritage Corridor; Historic Preservation District; State Approved Source Water Protection Area; state or national park or forest; state or federal research area; and privately-owned wildlife refuge, park, or trust property;
6. Proximity to other known point source discharges and potential nonpoint sources;
7. Slope of the land;
8. Animal manure application method and aerosols;
9. Runoff prevention;
10. Adjacent groundwater usage;
11. Down-wind receptors; and
12. Aquifer vulnerability.

Further, DHEC regulations mandate that the Department evaluate the following particularly sensitive areas for more stringent requirements: 1) source water protection; 2) 303(d) Impaired Waterbodies List; 3) Proximity to Outstanding Resource Waters; and 4) Aquifer Vulnerability Area. 4 S.C. Code Ann. Regs. 61-43 Part 200.140(C). The Court finds that the record in this case demonstrates the Department fulfilled its obligations under the regulations.

In reviewing the applications, Mr. Chaplin prepared an Agricultural Permitting Review Checklist Summary (Summary). Tr. at 814, ll.11-13; 820, ll.3-13; Ex. 1B at DHEC_003171-3182; Exhibit 2C at DHEC_000899-910; Exhibit 3B at DHEC_002049-2059. The Summaries set forth each of the 12 criteria contained in Part 200.70(F) and reflects that as part of his review Mr. Chaplin obtained the relevant information to determine whether "additional requirements or setbacks" were required. Neither the form nor Mr. Chaplin's testimony on this fact was

challenged by Petitioners. The record therefore reflects that the Department complied with the requirements contained in S.C. Code Ann. 61-43 Part 200.70.

In response to Petitioners' challenge that DHEC did not consider the grading necessary to prepare the Project sites for construction and stormwater runoff, Mr. Chaplin testified that 4 S.C. Code Ann. Regs. 61-43 does not address stormwater. Rather, the Department presented evidence establishing that these issues are considered and reviewed by DHEC in a separate permitting process conducted by the stormwater permitting section. Tr. at 834, l.17 – 835, l.22; Respondent-DHEC Exhibit No. 1 (advising animal facilities that they must obtain a stormwater permit from DHEC "in addition to the Agricultural Permit, which is separate"). Acknowledging this fact, Dr. Hargett testified that the stormwater permitting process was separate from the agricultural permit process and that stormwater issues could be addressed at that time. Tr. at 508, ll.7-10; 563, ll.3-10. In particular, Dr. Hargett admitted that the stormwater permitting requirements are rigorous and could control issues regarding grading and erosion. Tr. at 603, l. 25 – 604, l. 24. He also testified that it is logical for the Department to bifurcate these different types of permitting decisions. Tr. at 606, ll.13-18.

Regarding the slope and potential grading and runoff issues on the site, the record reflects that Broilers can employ various stormwater control practices to address these issues. For example, Mr. Stewart testified that various methods, such as terracing, pipe drops, rock drops, and high velocity fabric, can be used to address soil erosion control issues. Tr. p. 308, l.21 – 310, l.4. Dr. Hargett admitted that Broilers can address site specific stormwater issues when they apply for a stormwater

permit, that there are a number of best management practices that can be engaged to address stormwater and runoff issues, and that he trusts Broilers will employ those practices. Tr. at 563, ll.3-25. Mr. Chaplin also testified that the CNMPs require Broilers to establish permanent vegetation on the sites if there is an expectation of high erosion rates. Tr. at 836, ll.2-20. He further testified that, if Broilers do not comply with this requirement, DHEC would consider them to be in violation of their permit and could take enforcement action. Tr. at 837, ll.1-20. Mr. Coggins testified that, if there are issues with soil erosion on the site, they will take whatever steps are required by DHEC including installing terraces, pipe drops, or high velocity fabric. Tr. at 426, l.7 – 427, l.3.

After considering the evidence of record, the Court finds the testimony of Petitioners' witnesses on the issue of whether the Projects will increase pollution to waters of the State to be unpersuasive. The evidence presented does not demonstrate that pollution actually reached waters of the State from existing poultry facilities or that runoff from these facilities was not controlled through the use of vegetative or riparian buffers. Petitioners' testimony regarding the operations at other facilities therefore 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 Broilers' applications.[11] Thus, the record reflects that DHEC

[11] The record reflects, when advised of these issues, DHEC responded by sending an enforcement officer to investigate the complaints. Tr. at 305, ll.7-10; 333, ll.1-25; 334, l.24 – 335, l.3. *But see* Tr. at 197, ll.19-21 (Petitioner Blackmon did not report to DHEC that he did not provide soil samples to poultry grower); 304; ll.18-21 (Mr. Stewart did not report to DHEC concerns about manure allegedly being left on farmers' properties).

properly evaluated whether the Projects would cause an increase in pollution to the waters of the State as required under the applicable regulations.

The Court also is not persuaded that DHEC failed to properly consider grading and stormwater concerns in reviewing the applications. The record demonstrates that the Projects will be required to apply for and obtain construction stormwater permits, at which time DHEC will address these issues. The record also reflects that a number of best management practices are available to minimize runoff and erosion concerns and that Broilers have agreed to employ whatever such methods DHEC may require. Accordingly, the Court finds that Petitioners' concerns regarding the slope and potential grading of the sites are not supported by the evidence.

E. Air Quality

Petitioners raised general concerns regarding the impacts of air quality on the surrounding area; however, they failed to present any expert testimony or other evidence demonstrating that such an impact would occur. To the contrary, the record reflects that DHEC considered the impact of the Projects on air quality and concluded that "[b]ased on the information reviewed and relevant SC and EPA air quality standards," 1) "[a]n increase in air pollution will not occur;" 2) "additional requirements or setbacks for this facility" are not recommended; and 3) "[t]he location of the facility is in attainment for the emissions of concern, and operation of the facility will not cause any area to go out of attainment for any pollutant." Ex. 1B at DHEC_003400; Ex. 2C at DHEC_001077; Ex. 3B at DHEC_002246. Accordingly, the Court finds that the evidence of record demonstrates the Projects will not negatively impact the air quality of the surrounding area.

F. Harm to Quality of Life and Nuisance

Finally, Petitioners generally complain that the Projects will harm their quality of life and constitute a nuisance. These claims are unspecified and are cumulative to the specific issues presented above. The Court finds that these claims are, at best, speculative as the facilities have not been constructed or placed in operation. Further, the Court notes that the legislative purpose for the promulgation of the Standards for Permitting of Agricultural Animal Facilities is to set objective criteria for the Department and for courts reviewing Department permitting decisions to balance the competing interests of the public and the farming community. *Still v. S.C. Dep't of Health & Envtl. Control*, No. 13-ALJ-07-0395-CC (Jan. 12, 2015) (McLeod, J.) *aff'd per curiam*, 2017 WL 563333 (Ct.App. 2017) (not reported). The Court therefore finds that there is no evidence to demonstrate the Projects will have detrimental effects upon Petitioners' quality of life or the enjoyment of their property.

CONCLUSIONS OF LAW

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

Standard of Review

The ALC has jurisdiction over this contested case matter pursuant to S.C. Code Ann. § 1-23-380 (Supp. 2016), S.C. Code Ann. § 1-23-600 (Supp. 2016), S.C. Code Ann. § 44-1-60 (Supp. 2016), and 4 S.C. Code Ann. Regs. 61-43, Part 200.70. In reviewing this matter, the Court serves as the finder of fact and makes a de novo determination regarding the matters in controversy. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010) (citing *Brown v. S.C. Dep't of Health & Envtl.*

Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002)). The standard of proof to be used by the Court in weighing the evidence and making a decision on the merits during a contested case proceeding is the preponderance of the evidence. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2016); *CarMax Auto Superstores W. Coast. Inc. v. S.C. Dep't of Revenue*, 397 S.C. 604, 609, 725 S.E.2d 711, 713-14 (Ct. App. 2012) (citations removed). In addition, Petitioners bear the burden of proof proving their case by the preponderance of the evidence. *Young v. S.C. Dep't of Health & Envtl. Control*, 383 S.C. 452, 459, 680 S.E.2d 784, 759 (Ct. App. 2009). Further, it is appropriate for the Court, while evaluating the evidence, to give due consideration to an "agency's expertise, technical competence and specialized knowledge." S.C. Code Ann. § 1-23-330(4) (Rev. 2008) ("The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.").

Pursuant to the Administrative Procedures Act, the South Carolina Rules of Evidence are applicable to this hearing. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2016). Under Rule 702, SCRE, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." An expert is granted wide latitude in determining the basis of his or her opinion, and where an expert's testimony is based upon facts sufficient to form an opinion, the trier of fact must weigh its probative value. *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997). The trier of fact may give an expert's testimony the weight he or she determines it deserves. *Florence County Dep't of Soc. Servs. v. Ward*, 310

S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). However, expert testimony is limited to issues of fact as issues of law is generally inadmissible. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 207, 662 S.E.2d 444, 450 (Ct. App. 2008).

"Regulations are interpreted using the same rules of constructions as statutes." *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). "In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 32S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "When interpreting a regulation, [a Court looks] for the plain, ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation." *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002). "The true guide to statutory construction is not the phraseology of an isolated section of provision, but the language of the statute as a whole considered in light of the manifest purpose." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). "The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

Permitting Process for Animal Facilities

All animal facilities in South Carolina are governed by the regulations governing the Standards for the Permitting of Agricultural Animals Facilities. These regulations, which are codified at 4 S.C. Code Ann. Regs. 61-43, were promulgated by

the Department pursuant to the Pollution Control Act. *See* 4 S.C. Code Ann. Regs. 61-43 Parts 100.200, 200.200, 400.130, & Part 500.60. Under this comprehensive regulatory scheme, the regulations governing the permitting of poultry facilities are found in Part 200, Animal Facilities other than Swine. 4 S.C. Code Ann. Regs. 61-43 Part 200. All permits issued under this Part are no-discharge permits. S.C. Code Ann. 4 Regs. 61-43 Part 200.20(B). As a no-discharge permit, manure generated by the facility is not discharged into the environment. Pursuant to Part 200, an applicant is required to first have a PSI inspected by the Department. 4 S.C. Code Ann. Regs. 61-43 Part 200.50(A); Part 200.70(D). The purpose of the PSI is to determine if a new animal facility or an addition to an existing facility is capable of being placed at the location. If the proposed site is approved, the applicant is notified in writing and the applicant is able to finalize facility plans and the application. Part 200.50 sets forth the requirements for the submission of Animal Facility Management Plan to the Department for review.

Prior to submission of the application package, the applicant is required under the regulation to notify "all property owners within 1320 feet of the proposed location of the facility (footprint of construction) of the applicant's intent to build an animal facility." 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A). Once the Department receives the application, the Department shall "post up to four notices on the perimeter of the property or in close proximity to the property, in visible locations as determined by the Department." 4 S.C. Code Ann. Regs. 61-43 Part 200.60(A). The Department reviews all comments received regarding the application and may hold a public meeting to discuss and seek resolution of public concerns about an application if

twenty or more comments are received from different people. 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D).

Part 200.70 contains the decision-making requirements for the Department. 4 S.C. Code Ann. Regs. 61-43, Part 200.70. In addition, the facility must meet all the applicable siting criteria contained in 4 S.C. Code Ann. Regs. 61-43 Part 200.80, which are minimum distances that the Department may, on a case-by-case basis, increase. S.C. Code Ann. § 46-45-80 (Supp. 2013); *see* 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F).

Petitioners' Objections to Permits

A. Restriction of Ability to Discharge Weapons on Adjacent Property

The plain language of S.C. Code Ann. § 50-11-356 provides that owners of poultry houses can grant permission for persons to discharge guns or weapons within 900 feet of the houses. Broilers have stipulated and agreed that they are willing to grant such permission to all adjoining landowners and their guests, permittees, and lessees; to release them from liability if the birds perished should they shoot within 900 feet; and to modify their Permits so as to require such permission and release as an additional condition to operate the facilities. Accordingly, the Court finds that the Permits should be modified to contain this additional Special Condition and that, therefore, this issue and concern has been rendered moot.

B. Odor

Petitioners did not present any evidence demonstrating the proposed odor abatement plans contained in the CNMPs would not abate odor from the proposed facilities. Mr. Chaplin also testified that he reviewed the odor abatement plans and

found them to be using best management practices to eliminate odors. Tr. at 833, ll.15-24. Furthermore, the Court finds that the odor abatement plans are reasonable and comply with the requirements of 4 S.C. Code Ann. Regs. 61-43 Part 200.150(A). Accordingly, Petitioners have failed to establish that the odor abatement plans contained in the CNMPs are inadequate to control odors at the Projects.

C. Effects on Health and Safety

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

D. Potential Impacts to Waters of the State

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

As discussed previously, the Court concludes that the evidence presented by Petitioners concerning the alleged improper operations of existing facilities did not demonstrate that poultry facilities actually increase pollution to waters of the State. Even so, DHEC's responsibility in reviewing an animal facility permit application is to determine whether or not the permit application package meets all applicable regulatory requirements. 4 S.C. Code Ann. Regs. 61-43 Part 200.70(C). Therefore,

alleged violations of other existing poultry facilities are not relevant to DHEC's consideration of whether the applications filed by Broilers comply with applicable regulations.

To the extent 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F) requires the Department to consider runoff as part of an agricultural facility permit application, the Court notes that the regulation only requires DHEC to consider runoff in the context of whether additional setbacks are needed. As discussed previously, each of the Projects is sited so as to well exceed the minimum setback requirements. While Petitioners raised concerns about runoff on the site, their witnesses acknowledged that these issues could be addressed as part of a comprehensive stormwater plan and did not doubt that Petitioners would undertake the necessary steps to control stormwater runoff. Tr. at 308, l.21 – 310, 4; 563, l.3 – 564, l.3. The Court therefore finds that no additional setbacks are required to address runoff issues and that it is appropriate for DHEC to address those specific issues in the context of a construction stormwater plan. Furthermore, the Court finds that DHEC did, in fact, consider runoff as part of its review in requiring, as part of the Permits, that Broilers would be required to obtain stormwater permits in order to operate the facilities. Ex. 1B at DHEC_003168; Ex. 2C at DHEC_000896; Ex. 3B at DHEC_002043.

The Court also finds that DHEC's interpretation of its regulations in this regard is reasonable. As previously recognized by this Court, when runoff is referred to in 4 S.C. Code Ann. Regs. 61-43 Part 200, it is in the context of discharge of manure into the environment. *Still v. S.C. Dep't of Health & Envtl. Control*, No. 13-ALJ-07-0395-CC (Jan. 12, 2015) (McLeod, J.) *aff'd per curiam*, 2017 WL 563333 (Ct.App.

2017) (not reported). "Nothing in the regulations indicate that grading and general stormwater runoff is considered [and] information on these issues is not required to be included in the Animal Facility Management Plan." *Id.* at 32 (*citing* 4 S.C. Code Ann. Regs. 61-43 Part 200.50). The Court therefore concludes that DHEC's construction of its regulations so as to require stormwater issues to be addressed in a separate permitting process is entitled to respectful consideration and no compelling reasons exist to overrule its interpretation. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.").

Notwithstanding these conclusions, the Court notes that a number of Petitioners' concerns regarding runoff, erosion, stormwater control, and related impacts to waters of the State arise out of the location of the barns as presently proposed. As previously recognized, during the review process, DHEC requested that D.C. Broilers and J.Y. Broilers move their houses closer to the Little River and away from Lisbon Road so as to increase the distance between the facilities and the location of Ms. Basel's proposed house and to allow a 400-foot vegetative buffer. Ex. 1B at DHEC_003169; Ex. 2C at DHEC_001190, 1192; Tr. at 429, l.10 – 430, l.3; 838, ll.6-10; 841, l.22 – 843, l.1. However, neither of these restrictions or modifications is required by the applicable regulations.

First, DHEC regulations do not require animal facilities to be set back from permitted, but unconstructed, residences. *See* 4 S.C. Code Ann. Regs. 61-43 Part

200.80(A)(6) (setback requirement is "1000 feet from the nearest residence"); 4 S.C. Code Ann. Regs. 61-43 Part 50(EEE) (defining residence to mean "routinely occupied by the same person or persons more than twelve hours per day or by the same person or persons under the age of eighteen for more than two hours per day."). Because the proposed house has yet to be constructed on Ms. Basel's property, it, therefore, is not necessary to consider the proposed house in the context of siting the location of the proposed facilities. Second, with respect to the vegetative buffer, DHEC regulations only require that animal facilities be setback 400 feet from the property lines and there is no regulatory requirement that this buffer be maintained in a vegetative state. 4 S.C. Code Ann. Regs. 61-43 Part 200.80(A)(6).

While these accommodations were made to resolve some of the concerns of Ms. Basel, they appear to have increased the concerns of Petitioners inasmuch as moving D.C. Broilers and J.Y. Broilers' houses to satisfy these requirements located them closer to the Little River and to certain ditches or swales existing on the property. *Compare* Ex. 1B at DHEC_003209 *with* DHEC_003210; *compare* Ex. 2C at DHEC_000958 with DHEC_000959. In fact, Dr. Hargett testified that, if the houses were moved closer to Lisbon Road and away from Little River, it would alleviate some of his concerns regarding the amount of cutting and filling needed, would provide a larger buffer area, would be more attractive in terms of the potential for impact to water resources, stormwater, and lessened slopes, and would provide additional conservatism in protecting the water resources. Tr. at 619, ll.1-25.

The record reflects that the D.C. Broilers and J.Y. Broilers barns can be placed on the site as originally proposed, thereby moving them further away from the Little

River and alleviating concerns about water impacts. The Court therefore finds that, to alleviate Petitioners' concerns regarding the alleged impacts to waters of the State, the D.C. Broilers and J.Y. Broilers Permits should be amended to require them to move the houses closer to Lisbon Road and away from the Little River as originally proposed. Similarly, the Court finds that H.C. Broilers' Permit should be amended to require those houses to move away from the Little River and towards Lisbon Road a distance equal to the average distance that the D.C. Broilers and J.Y. Broilers houses will move, subject to the condition that and to the extent that moving the H.C. Broilers houses will continue to permit them to comply with all necessary setbacks.[12] By necessity, amending the Permits in this manner also requires that the 400-foot vegetative buffer along Lisbon Road, which is a Special Condition of the Permits, be reduced by a commensurate amount so as to permit D.C. Broilers and J.Y. Broilers to construct the load-out areas of the houses within the 400-foot property setback.

E. Air Quality

As discussed in the Findings of Fact, Petitioners raised general issues concerning the impacts of air quality on the surrounding area but failed to present any expert testimony or other evidence demonstrating that such an impact would occur. To the contrary, the record reflects that DHEC properly considered the impact of the Projects on air quality and determined that the facilities would not cause an

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

increase of regulated air pollutants. Accordingly, the Court finds that the Projects will not negatively impact the air quality of the surrounding area.

F. Harm to Quality of Life and Nuisance

Finally, Petitioners generally complain that the Projects will harm their quality of life and constitute a nuisance. These claims are unspecified and are cumulative to the specific issues presented above. The Court therefore concludes that the Projects will not have detrimental effects upon Petitioners' quality of life or the enjoyment of their property.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Court finds that Petitioners have failed to meet their burden of proof and have not shown by a preponderance of the evidence that DHEC issued the Permits in violation of 4 S.C. Code Ann. Regs. 61-43 Part 200 or that the Department's decision: 1) constituted a violation of constitutional or statutory provisions; 2) was made upon unlawful procedure; 3) was affected by error of law; 4) is clearly erroneous in view of the reliable, probative, and substantial evidence; and/or 5) was arbitrary and capricious and an abuse of discretion; and 6) prejudiced Petitioners' substantial rights.

The Court further finds and concludes that the Department has fully, correctly and completely complied with all statutory and regulatory prerequisites to the issuance of the subject Permits.

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

of Broilers discussed herein, the Court further orders that the Permits be modified as follows:

1. The Permits shall include an additional Special Condition requiring Broilers to grant permission to landowners who own land within 900 feet of the poultry houses, as well as their guests, permittees, and lessees, to discharge guns or weapons within 900 feet of the poultry houses.
2. The Permits shall include an additional Special Condition requiring Broilers to release landowners who own land within 900 feet of the poultry houses, as well as their guests, permittees, and lessees, from any liability if the birds perish should those persons shoot within 900 feet.
3. D.C. Broilers and J.Y. Broilers shall move their houses closer to Lisbon Road and away from the Little River to the sites proposed in their original applications.
4. H.C. Broilers shall move its houses away from the Little River and towards Lisbon Road a distance equal to the average distance that the D.C. Broilers and J.Y. Broilers houses will move, subject to the condition that and to the extent that moving the H.C. Broilers houses will continue to permit them to comply with all necessary setbacks.
5. The 400-foot vegetative buffer along Lisbon Road, which currently is a Special Condition of the Permits, shall be reduced by an amount commensurate with the distance the D.C. Broilers and J.Y. Broilers' houses will move so as to permit D.C. Broilers and J.Y. Broilers to construct the

load-out areas of the houses within the 400-foot property line setback requirement.

Therefore, based upon the foregoing,

IT IS HEREBY ORDERED that the issuance of Bureau of Water Agricultural Permit Nos. 19,886-AG, 19,876-AG, and 19,889-AG to Respondents D.C. Broilers, H.C. Broilers, and J.Y Broilers, respectively, by the South Carolina Department of Health and Environmental Control is **AFFIRMED AS MODIFIED**.

AND IT IS SO ORDERED.

_____
The Honorable Ralph King Anderson, III

Columbia, South Carolina

_____ ___, 2017

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

MOTION FOR PARTIAL SUMMARY JUDGMENT

Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers (collectively, the Respondents) are entitled to summary judgment on the claim by Petitioners that

FILED
AUG 04 2017
SC ADMIN LAW COURT

Respondents must obtain a National Pollutant Discharge Elimination System (NPDES) permit in order to build and operate new poultry farms, each consisting of six broiler houses, and to dispose of the manure (Projects). The Projects are not subject to regulation under the Clean Water Act and do not require an NPDES permit because they will not discharge pollutants into waters of the State and, pursuant to the requirements of the agricultural permits (Permits)[1] issued by DHEC and its regulations, are prohibited from doing so. Thus, contrary to Petitioners' assertions, the Projects do not require NPDES permits and DHEC, in issuing the Permits, was not required to follow the procedure for determining whether the Projects have "no potential to discharge" pursuant to S.C. Code Ann. Regs. 61-9 Part 122.23(d)(2). *See* Petition for Contested Case Hearing, Docket No. 17-ALJ-07-0041-CC, at ¶24; Petitioners' Prehearing Statement, Docket No. 17-ALJ-07-0041-CC, at 6-7.[2] Respondents therefore are entitled to summary judgment on these claims as a matter of law pursuant to Rules 19 and 68 of the Rules of Procedure of the Administrative Law Court and Rule 56 of the South Carolina Rules of Civil Procedure.

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Wiedermann v. Town of Hilton Head*, 330 S.C. 532, 536, 500 S.E.2d 783, 285 (1998). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *ERIE Ins. Co. v. Winter Const. Co.*, 393 S.C. 455, 459, 713 S.E.2d 318, 320 (Ct. App. 2011); *see also Bloom v. Raviora*, 339 S.C. 417, 424-25, 539 S.E.2d 710, 713-14 (2000) (holding

[1] Copies of the Permits are attached as Exhibits A, B, and C.

[2] For the sake of brevity, Respondents cite only to those documents filed in Docket No. 17-ALJ-07-0041-CC. Similar, if not identical, claims are raised in Petitioners' Petitions for Contested Case Hearing and Prehearing Statements filed in Docket Nos. 17-ALJ-07-0042-CC and 17-ALJ-07-0039-CC.

that summary judgment is appropriate even when matters of fact are at issue, when those facts do not rise, as a matter of law, to the level of being "material" to the claims at issue.).

BACKGROUND AND FACTS

This is a *de novo* contested case proceeding brought by Petitioners challenging a decision by DHEC to issue Permits authorizing Respondents to build the Projects. Each of the Permits at issue in this matter is a "no-discharge" permit in which DHEC has prohibited the "discharge of pollutants from the operation into surface waters of the State (including ephemeral and intermittent streams)" and the "discharge of pollutants into groundwater." S.C. Code Ann. Regs. 61-43 Part 200.140(A). *See also* S.C. Code Ann. Regs. 61-43 Part 200.20(B) ("Permits issued under this regulation are no-discharge permits"); *Still v. S.C. Dep't of Health & Envtl. Control*, No. 13-ALJ-07-0395-CC (Jan. 12, 2015) (McLeod, J.) ("As a no-discharge permit, manure generated by the [poultry] facility is not discharged into the environment."). Respondents will comply with the "no-discharge" requirement by contracting with a manure broker, permitted by DHEC pursuant to S.C. Code Ann. Regs. 61-43 Part 400, who will take the manure generated at the facilities off-site for disposal. *See* Exhibits A, B, and C. By definition, the Projects therefore will not discharge pollutants into the surface waters of the State or into groundwater.

ARGUMENT

Based on the undisputed facts, Respondents are entitled to summary judgment as a matter of law on Petitioners' claims that Respondents are required to obtain an NPDES permit for the Projects and that DHEC, in issuing the Permits, was required to follow the procedure for determining whether the Projects have "no potential to discharge."

Petitioners assert in their Prehearing Statements that, "[u]nder the Clean Water Act, an animal feeding operation that constitutes a 'concentrated animal feeding operation' are point

sources of discharges of water pollution subject to the NPDES permitting requirements if such operation meets the regulatory definition of a 'large concentrated animal feeding operation.'" Prehearing Statement, Docket No. 17-ALJ-07-0041-CC, at 6 *citing* 40 C.F.R. § 122.23(b)(2) and S.C. Code Ann. Regs. 61-9 Part 122.23(b)(4). Petitioners therefore assert that, as large concentrated animal feeding operations (CAFOs), the Projects are "point sources" which must obtain an NPDES permit unless DHEC determines that they have "no *potential* to discharge manure, litter, or process wastewater." S.C. Code Ann. Regs. 61-9 Part 122.23(d)(2), (f)(1) (emphasis added).

However, NPDES permits are issued by DHEC pursuant to the provisions of the Clean Water Act, 33 U.S.C.A. §§ 1251 *et seq.*, which prohibits the discharge of a pollutant by any person from any point source to navigable waters unless authorized by an NPDES permit. *See* 33 U.S.C.A. §§ 1311(a), 1342; S.C. Code Ann. Regs. 61-9 Parts 122.1(a)(1), (b)(1).[3] Under the Clean Water Act and DHEC regulations governing Water Pollution Control Permits, S.C. Code Ann. Regs. 61-9, persons or facilities are required to obtain an NPDES permit if they seek to discharge pollutants, such as agricultural waste, into waters of the State or the United States. *See* 33 U.S.C.A. § 1342(a)(1); (b); S.C. Code Ann. Regs. 61-9 Parts 122.1(b)(1), 122.2(b). Therefore, "unless there is a 'discharge of any pollutant,' there is no violation of the [Clean Water] Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 504 (2d Cir. 2005). Because the Projects will not discharge pollutants and, in fact, are specifically prohibited from doing so by both DHEC regulations and the Permits, *see* S.C. Code Ann. Regs. 61-43 Parts 200.140(A) and 200.20(B) and Exhibits A, B,

[3] The Environmental Protection Agency (EPA) has delegated to South Carolina the authority to issue these permits for discharges into waters within its jurisdiction. *See* 33 U.S.C.A. § 1342(b).

and C, Respondents are not subject to the Clean Water Act or the NPDES permit program requirements and are not obligated to seek or obtain an NPDES permit for their operations. As well, DHEC, in issuing the Permits, was not required to follow the procedure for determining whether the Projects have "no potential to discharge."

This exact issue was directly addressed by United States Court of Appeals for the Second Circuit in *Waterkeeper*. There, the court reviewed an EPA rule, promulgated in 2003,[4] which required all CAFO owners or operators to apply for an individual NPDES permit, unless they "secure[d] a determination from the director of the relevant permitting authority that the Large CAFO has 'no potential to discharge.'" *Id.* at 495 *citing* 40 C.F.R. § 122.23(d)(2), (f) (2003). *Compare* S.C. Code Ann. Regs. 61-9 Part 122.23(d)(2). In rejecting this language, the court concluded that the rule "contravene[d] the regulatory scheme enacted by Congress," which gives the permitting authorities the jurisdiction "to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." *Id.* at 505 (emphasis in original) *citing Natural Resources Defense Council v. U.S. E.P.A.*, 859 F.2d 156, 170 (D.C. Cir. 1988) (noting that "the [Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants").

In response to the *Waterkeeper* decision, the EPA revised its regulations in 2008 to require that a CAFO owner or operator apply for a permit only if the CAFO "discharges or proposes to discharge pollutants." 40 C.F.R. § 122.23(d)(1) (2008) (also providing that "[a] CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will

[4] In compliance with federal requirements and "to maintain consistency with federal regulations," DHEC in 2003 amended S.C. Code Ann. Regs. 61-9 Part 122.23 in order to conform with the then-existing version of 40 C.F.R. 122.23. S.C. State Register Volume 27, Issue No. 12 at 50, eff. December 26, 2003. *See* 40 C.F.R. §§ 123.25(a) (state programs must be administered in conformance with the EPA provisions governing CAFOs, among other provisions), 123.25(b) (states shall assure that the approved planning process is at all times consistent with the Clean Water Act).

occur."). In 2011, the United States Court of Appeals for the Fifth Circuit in *Nat'l Pork Producers Council v. U.S. E.P.A.* similarly struck down the requirement that CAFOs which "propose to discharge" must apply for an NPDES permit. 635 F.3d 738, 750 (5th Cir. 2011). There, the court held that the regulation at issue "required CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of *Waterkeeper*, as well as Supreme Court and other well-established precedent." *Id.* at 750 (*citing S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 380–81 ("[T]he National Pollutant Discharge Elimination System [requires] a permit for the 'discharge of any pollutant' into the navigable waters of the United States, 33 U.S.C.A. § 1342(a)). The triggering statutory term here is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water."). *Compare* S.C. Code Ann. Regs. Part 122.2(b) (defining "discharge of a pollutant" to mean "[a]ny addition of any pollutant ... to waters of the State"); *see also Service Oil, Inc. v. U.S. E.P.A.*, 590 F.3d 545, 550 (8th Cir.2009) (reiterating the scope of the EPA's regulatory authority and concluding that "[b]efore any discharge, there is no point source" and the EPA does not have any authority over a CAFO).

In recognition of these decisions, the EPA further amended its regulations in 2012 to provide that "[a] CAFO must not *discharge* unless the discharge is authorized by an NPDES permit." 40 C.F.R. § 122.23(d)(1) (emphasis added). Although DHEC regulations have not since been amended to conform to this new language, the same analyses set forth in *Waterkeeper*, *Nat'l Pork Producers Council*, and *Service Oil* applies here. *See* 77 Fed. Reg. 44494-01 (providing that the revised rule "applies to CAFOs as ... defined in the NPDES regulations at 40 C.F.R. 122.23" and "applies to States ... with authorized NPDES Programs"); *cf.* S.C. Code Ann. § 1-23-

120(H)(1) ("General Assembly review is not required for regulations promulgated to maintain compliance with federal law.").

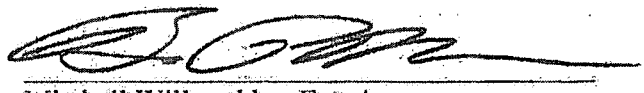
Because Respondents will not discharge wastewater from their facilities and, by law, are prohibited from doing so, they are not subject to regulation under the Clean Water Act and, accordingly, are not required to obtain an NPDES permit under S.C. Code Ann. Regs. 61-9 Part 122.23(d). Similarly, requiring DHEC, in issuing the Permits, to follow the procedure for determining whether the Projects have "no potential to discharge" when it has mandated, by regulation and the terms of the Permits themselves, that the Projects not discharge demonstrates the *reductio ad absurdum* of Petitioners' claims. Thus, Respondents are entitled to summary judgment on these issues.

CONCLUSION

The Projects do not require NPDES permits and are not subject to regulation under the Clean Water Act because they will not discharge pollutants into the waters of the State and are prohibited from doing so pursuant to the Permits and DHEC regulations. For these and the other reasons set forth herein, this Court therefore should grant summary judgment in favor of Respondents on Petitioners' claims that Respondents are required to obtain an NPDES permit and that DHEC was required to follow the procedure for determining whether the Projects have "no potential to discharge."

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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Attorneys for David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers

Columbia, South Carolina
August 4, 2017

EXHIBIT A

229

dhec
Healthy People. Healthy Communities

December 14, 2016

David Coggins
1094 Lisbon Road
Mountville, SC 29370

RE: Permit No. 19,886-AG, David Coggins Broilers, ND0089338 - Laurens County

Dear Mr. Coggins,

Enclosed is a State Agricultural Permit for the above-referenced facility. Construction and operation is to be performed in accordance with this permit and the supporting agricultural facility management plan approved by this Office. Once the construction permit is issued, any person(s) can request a review of the issuance of that permit, as outlined in the enclosed document "Request for Board Review." If you have any questions regarding these review procedures, you may contact the Legal Office, Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201 or by calling (803)-898-3350.

Upon completion of construction, a letter must be submitted to the Environmental Affairs (EA) Region office from the agricultural facility management plan preparer certifying that the construction has been completed in accordance with the approved plan. A final inspection may then be scheduled. The EA Region office will grant authorization to begin operation upon successful completion of the project.

In addition, Regulation 61-43 requires an operator of an animal facility or manure utilization area to attend CAMM training, created by Clemson University, on the operation of animal manure management systems. As the operator of this facility you are required to complete this training program within one year of the effective date of this permit, if you do not already have CAMM training certification. Please contact Bryan Smith with the Clemson Extension Service to inquire about future CAMM training classes for manure handling at (864) 984-2514.

If you have any questions regarding the permit, please contact William Chaplin at (803) 898-3532. Please note that this system cannot be placed into operation until final approval is granted by the appropriate Environmental Affairs (EA) Region office. Your region contact is Chrissy Matthews, 1736 S. Main Street, Greenwood, SC 29646, (864)-227-5915 or matthecs@dhec.sc.gov. The BEHS Region office should be notified when construction begins.

Sincerely,

Charles J. Williams, Manager
Groundwater Protection and Agricultural Permitting
Bureau of Water

CJW/WPC/el

cc: Chrissy Matthews, Upstate BEHS, Greenwood EA
Chris Mosley, P.E., Agri-Waste Technology, Inc, Apex, NC

S.C. Department of Health and Environmental Control

BUREAU OF WATER
Agricultural Permit
ND0089338

Permission is hereby granted to:

David Coggins
1094 Lisbon Road
Mountville, SC 29370

for construction and operation of a **NO-DISCHARGE** agricultural manure and animal by-products treatment and storage system in accordance with the construction plans, specifications, engineering report, animal facility management plan and construction permit application prepared by Chris Mosley, P.E., Agri-Waste Technology, Inc.

COUNTY: Laurens

Project Description:
1. Construction of six (6) new poultry broiler houses.
2. Housed broilers raised on earthen floor - covered with wood shavings.
3. Contract disposal of the manure with a permitted manure broker per plans and specifications.
4. Other conditions as stated in animal facility management plan.
5. Treat 988 tons of manure generated as follows:

6 houses X 27,000 birds/house X 4.5 flocks/year	= 729,000 birds per year
162,000 broilers X 4.55 lbs. Av. Live Wt.	= 737,100 lbs normal live weight
162,000 broilers X 6.1 tons/year/1000 bird spaces	= 988 tons/year waste production

Special Conditions: (See attachments).

Permit Number: 19,886-AG

Date of Issue: December 14, 2016 **Effective Date:** December 29, 2016

Expiration Dates: Unless construction begins prior to December 27, 2018, and is completed prior to December 26, 2019, this permit will expire. In accepting this permit, the owner agrees to the admission of properly authorized persons at all reasonable hours for the purpose of sampling and inspection.

Treatment Plant Classification: Group 0

WRITTEN AUTHORIZATION TO PLACE THIS SYSTEM INTO OPERATION MUST BE OBTAINED FROM THE DEPARTMENT PRIOR TO PLACING ANIMALS IN THE FACILITY.

Charles J. Williams, Manager
Groundwater Protection and Agricultural Permitting

CJW/WPC/el

cc: Chrissy Matthews, Upstate BEHS, Greenwood, Environmental Affairs office
Chris Mosley, P.E., Agri-Waste Technology, Inc, Apex, NC

David Coggins, Permit # 19,886-AG
Page Two

SPECIAL CONDITIONS
(Poultry)

1. Operate and maintain the waste system, including all special conditions in accordance with Waste Management Plan developed by Chris Mosley, P.E., Agri-Waste Technology, Inc. Operate and maintain this waste management system in accordance with State and Federal law so as to prevent discharges to the environment. Should this waste management plan fail to function as intended, additional control or treatment of the wastes may be required.

2. Disposal of daily mortality will be burial and emergency mortality will be burial in the approved DHEC burial sites, unless an alternate method is selected and approved by the Department. If a massive die-off occurs, notify your local inspector immediately, Chrissy Matthews at (864) 227-5915. If you are calling after-hours, please call the Department's twenty four hour number (888) 481-0125 or (803) 253-6488. If you plan to bury the dead animals from a massive die-off, a DHEC representative must approve the site prior to burial. The Department recommends that you develop an emergency plan for a massive die-off situation prior to the occurrence and submit this plan to your local inspector for approval. If a plan and/or site are pre-approved, then you would only be required to notify the Department of the massive die-off, and then implement the pre-approved plan for disposal.

3. If you have mortality on the farm that may be attributed to disease or toxin exposure, please contact Dr. Julie Helm of the State Veterinarian office at (803) 788-2260 for additional assistance in the handling and disposal of infected birds. The State Veterinarian office recommends that the diagnostic lab evaluate samples for deaths in excess of 1% of a house population. This action can help identify disease outbreaks on the farm. The State Veterinarian Office can also provide guidance in preventing the spread of diseases.

4. You are responsible for obtaining any other local permits that may be required for this project, including a building permit and **stormwater permit**. Please contact your local county offices to inquire about required permits.

5. Drinking water wells installed on this site to provide water for animal or human consumption must be installed with at least the following minimum setbacks required in regulation 61-71 (Well Standards & Regulations):

   (a) Sewer lines ..... 20 feet
   (b) Lakes, streams, surface-water bodies ..... 50 feet
   (c) Septic tanks/tile fields ..... 50 feet
   (d) Animal feedlots, barns, stables ..... 50 feet
   (e) Waste disposal - land application sites ..... 100 feet
   (f) Waste treatment lagoons ..... 100 feet
   (g) Herbicide, pesticide & petroleum handling/storage sites ..... 100 feet

   A permit for private wells must be obtained from the Department prior to installation. Enclosed is a copy of the application for a well permit. If you have any questions on well permitting, please contact Well Permitting at (803) 898-4174.

SPECIAL CONDITIONS (continued)
(Poultry)

6. Annual reporting is required for this permit.
   An annual report is due by January 1st of each year (starting in 2018) and must include the following:

   (a) Waste sampling results for the last year, if applicable, and the latest rolling average.
   (b) Soil monitoring results, if applicable.
   (c) Groundwater monitoring results, if applicable.
   (d) Calculated application rates for all waste utilization areas, if applicable.
   (e) The adjusted application rates, if applicable, based on the most recent animal waste sampling and soil samples. The application rate change could also be due to a change in field use, crop grown or other factors.

**Annual Reports should be sent to the following address:*
SC Department of Health & Environmental Control
Bureau of Water
Compliance Assurance Division
2600 Bull Street
Columbia, SC 29201

7. **CAMM Certification is required within one year from the effective date of this permit.**

8. **The 400 foot property line setback along Lisbon Road shall remain vegetated as it currently exists for as long as the facility is in operation.**

EXHIBIT B

234

dhec
Healthy People. Healthy Communities.

November 30, 2016

Heath Coggins
113 Moreland Avenue
Laurens, SC 29360

RE: Permit No. 19,876-AG, Heath Coggins Broilers, ND0089362 - Laurens County

Dear Mr. Coggins,

Enclosed is a State Agricultural Permit for the above-referenced facility. Construction and operation is to be performed in accordance with this permit and the supporting agricultural facility management plan approved by this Office. Once the construction permit is issued, any person(s) can request a review of the issuance of that permit, as outlined in the enclosed document "Request for Board Review." If you have any questions regarding these review procedures, you may contact the Legal Office, Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201 or by calling (803)-898-3350.

Upon completion of construction, a letter must be submitted to the Environmental Affairs (EA) Region office from the agricultural facility management plan preparer certifying that the construction has been completed in accordance with the approved plan. A final inspection may then be scheduled. The EA Region office will grant authorization to begin operation upon successful completion of the project.

In addition, Regulation 61-43 requires an operator of an animal facility or manure utilization area to attend CAMM training, created by Clemson University, on the operation of animal manure management systems. As the operator of this facility you are required to complete this training program within one year of the effective date of this permit, if you do not already have CAMM training certification. Please contact Bryan Smith with the Clemson Extension Service to inquire about future CAMM training classes for manure handling at (864) 984-2514.

If you have any questions regarding the permit, please contact William Chaplin at (803) 898-3532. Please note that this system cannot be placed into operation until final approval is granted by the appropriate Environmental Affairs (EA) Region office. Your region contact is Chrissy Matthews, 1736 S. Main Street, Greenwood, SC 29646, (864)-227-5915 or matthecs@dhec.sc.gov. The BEHS Region office should be notified when construction begins.

Sincerely,

Charles Williams, Manager
Groundwater Protection and Agricultural Permitting
Bureau of Water

CJW/WPC/el

cc: Chrissy Matthews, Upstate BEHS, Greenwood EA, Upstate Region
Chris Mosley, P.E., Agri-Waste Technology, Inc, Apex, NC

S.C. Department of Health and Environmental Control

BUREAU OF WATER
Agricultural Permit
ND0089362

Permission is hereby granted to:

Heath Coggins
113 Moreland Avenue
Laurens, SC 29360

for construction and operation of a **NO-DISCHARGE** agricultural manure and animal by-products treatment and storage system in accordance with the construction plans, specifications, engineering report, animal facility management plan and construction permit application prepared by Chris Mosley, P.E., Agri-Waste Technology, Inc.

COUNTY: Laurens

Project Description:
1. Construction of six (6) new poultry broiler houses.
2. Housed broilers raised on earthen floor - covered with wood shavings.
3. Contract disposal of the manure with a permitted manure broker per plans and specifications.
4. Other conditions as stated in animal facility management plan.
5. Treat 1449 tons of manure generated as follows:

6 houses X 39,600 birds/house X 4.5 flocks/year	= 1,069,200 birds per year
237,600 broilers X 4.55 lbs. Av. Live Wt.	= 1,081,080 lbs normal live weight
237,600 broilers X 6.1 tons/year/1000 bird spaces	= 1449 tons/year waste production

Special Conditions: (See attachments).

Permit Number: 19,876-AG

Date of Issue: November 30, 2016 **Effective Date:** December 15, 2016

Expiration Dates: Unless construction begins prior to December 13, 2018, and is completed prior to December 12, 2019, this permit will expire. In accepting this permit, the owner agrees to the admission of properly authorized persons at all reasonable hours for the purpose of sampling and inspection.

Treatment Plant Classification: Group 0

WRITTEN AUTHORIZATION TO PLACE THIS SYSTEM INTO OPERATION MUST BE OBTAINED FROM THE DEPARTMENT PRIOR TO PLACING ANIMALS IN THE FACILITY.

Charles Williams, Manager
Groundwater Protection and Agricultural Permitting

CJW/WPC/el

cc: Chrissy Matthews, Upstate BEHS, Greenwood, Environmental Affairs office
Chris Mosley, P.E., Agri-Waste Technology, Inc, Apex, NC

Heath Coggins, Permit # 19,876-AG
Page Two

SPECIAL CONDITIONS
(Poultry)

1. Operate and maintain the waste system, including all special conditions in accordance with Waste Management Plan developed by Chris Mosley, P.E., Agri-Waste Technology, Inc. Operate and maintain this waste management system in accordance with State and Federal law so as to prevent discharges to the environment. Should this waste management plan fail to function as intended, additional control or treatment of the wastes may be required.

2. Disposal of daily mortality will be burial and emergency mortality will be burial in the approved DHEC burial sites, unless an alternate method is selected and approved by the Department. If a massive die-off occurs, notify your local inspector immediately, Chrissy Matthews at (864) 227-5915. If you are calling after-hours, please call the Department's twenty four hour number (888) 481-0125 or (803) 253-6488. If you plan to bury the dead animals from a massive die-off, a DHEC representative must approve the site prior to burial. The Department recommends that you develop an emergency plan for a massive die-off situation prior to the occurrence and submit this plan to your local inspector for approval. If a plan and/or site are pre-approved, then you would only be required to notify the Department of the massive die-off, and then implement the pre-approved plan for disposal.

3. If you have mortality on the farm that may be attributed to disease or toxin exposure, please contact Dr. Julie Helm of the State Veterinarian office at (803) 788-2260 for additional assistance in the handling and disposal of infected birds. The State Veterinarian office recommends that the diagnostic lab evaluate samples for deaths in excess of 1% of a house population. This action can help identify disease outbreaks on the farm. The State Veterinarian Office can also provide guidance in preventing the spread of diseases.

4. You are responsible for obtaining any other local permits that may be required for this project, including a building permit and **stormwater permit**. Please contact your local county offices to inquire about required permits.

5. Drinking water wells installed on this site to provide water for animal or human consumption must be installed with at least the following minimum setbacks required in regulation 61-71 (Well Standards & Regulations):

   (a) Sewer lines ..... 20 feet
   (b) Lakes, streams, surface-water bodies ..... 50 feet
   (c) Septic tanks/tile fields ..... 50 feet
   (d) Animal feedlots, barns, stables ..... 50 feet
   (e) Waste disposal - land application sites ..... 100 feet
   (f) Waste treatment lagoons ..... 100 feet
   (g) Herbicide, pesticide & petroleum handling/storage sites ..... 100 feet

A permit for private wells must be obtained from the Department prior to installation. Enclosed is a copy of the application for a well permit. If you have any questions on well permitting, please contact Well Permitting at (803) 898-4174.

SPECIAL CONDITIONS (continued)
(Poultry)

6. Annual reporting is required for this permit.
   An annual report is due by January 1st of each year (starting in 2018) and must include the following:

   (a) Waste sampling results for the last year, if applicable, and the latest rolling average.
   (b) Soil monitoring results, if applicable.
   (c) Groundwater monitoring results, if applicable.
   (d) Calculated application rates for all waste utilization areas, if applicable.
   (e) The adjusted application rates, if applicable, based on the most recent animal waste sampling and soil samples. The application rate change could also be due to a change in field use, crop grown or other factors.

   **Annual Reports should be sent to the following address:*
   SC Department of Health & Environmental Control
   Bureau of Water
   Compliance Assurance Division
   2600 Bull Street
   Columbia, SC 29201

7. **CAMM Certification is required within one year from the effective date of this permit.**

8. **The 400 foot property line setback along Lisbon Road shall remain vegetated as it currently exists for as long as the facility is in operation.**

EXHIBIT C

239

dhec
Healthy People. Healthy Communities.

December 21, 2016

Jim Young
107 Batteaux Place
Blythewood, SC 29016

RE: Permit No. 19,889-AG, Jim Young Broilers, ND0089354 - Laurens County

Dear Mr. Young,

Enclosed is a State Agricultural Permit for the above-referenced facility. Construction and operation is to be performed in accordance with this permit and the supporting agricultural facility management plan approved by this Office. Once the construction permit is issued, any person(s) can request a review of the issuance of that permit, as outlined in the enclosed document "Request for Board Review." If you have any questions regarding these review procedures, you may contact the Legal Office, Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201 or by calling (803)-898-3350.

Upon completion of construction, a letter must be submitted to the Environmental Affairs (EA) Region office from the agricultural facility management plan preparer certifying that the construction has been completed in accordance with the approved plan. A final inspection may then be scheduled. The EA Region office will grant authorization to begin operation upon successful completion of the project.

In addition, Regulation 61-43 requires an operator of an animal facility or manure utilization area to attend CAMM training, created by Clemson University, on the operation of animal manure management systems. As the operator of this facility you are required to complete this training program within one year of the effective date of this permit, if you do not already have CAMM training certification. Please contact Bryan Smith with the Clemson Extension Service to inquire about future CAMM training classes for manure handling at (864) 984-2514.

If you have any questions regarding the permit, please contact William Chaplin at (803) 898-3532. Please note that this system cannot be placed into operation until final approval is granted by the appropriate Environmental Affairs (EA) Region office. Your region contact is Chrissy Matthews, 1736 S. Main Street, Greenwood, SC 29646, (864)-227-5915 or matthecs@dhec.sc.gov. The BEHS Region office should be notified when construction begins.

Sincerely,

Charles J. Williams, Manager
Groundwater Protection and Agricultural Permitting
Bureau of Water

CJW/WPC/el

cc: Chrissy Matthews, Upstate BEHS, Greenwood EA Office
Chris Mosley, P.E., Agri-Waste Technology, Inc, Apex, NC

S.C. Department of Health and Environmental Control

BUREAU OF WATER
Agricultural Permit
ND0089354

Permission is hereby granted to:

Jim Young
107 Batteaux Place
Blythewood, SC 29016

for construction and operation of a **NO-DISCHARGE** agricultural manure and animal by-products treatment and storage system in accordance with the construction plans, specifications, engineering report, animal facility management plan and construction permit application prepared by Chris Mosley, P.E., Agri-Waste Technology, Inc.

COUNTY: Laurens

Project Description:
1. Construction of six (6) new poultry broiler houses.
2. Housed broilers raised on earthen floor - covered with wood shavings.
3. Contract disposal of the manure on 192.7 acres and with a permitted manure broker per plans and specifications.
4. Other conditions as stated in animal facility management plan.
5. Treat 1449 tons of manure generated as follows:

6 houses X 39,600 birds/house X 4.5 flocks/year	= 1,069,200 birds per year
237,600 broilers X 4.55 lbs. Av. Live Wt.	= 1,081,080 lbs normal live weight
237,600 broilers X 6.1 tons/year/1000 bird spaces	= 1449 tons/year waste production

Special Conditions: (See attachments).

Permit Number: 19,889-AG

Date of Issue: December 21, 2016 **Effective Date:** January 5, 2017.

Expiration Dates: Unless construction begins prior to January 3, 2019, and is completed prior to January 2, 2020, this permit will expire. In accepting this permit, the owner agrees to the admission of properly authorized persons at all reasonable hours for the purpose of sampling and inspection.

Treatment Plant Classification: Group 0

WRITTEN AUTHORIZATION TO PLACE THIS SYSTEM INTO OPERATION MUST BE OBTAINED FROM THE DEPARTMENT PRIOR TO PLACING ANIMALS IN THE FACILITY.

Charles J. Williams, Manager
Groundwater Protection and Agricultural Permitting

CJW/WPC/el

cc: Chrissy Matthews, Upstate BEHS, Greenwood, Environmental Affairs office
Chris Mosley, P.E., Agri-Waste Technology, Inc, Apex, NC

Jim Young, Permit # 19889-AG
Page Two

SPECIAL CONDITIONS
(Poultry)

1. Operate and maintain the waste system, including all special conditions in accordance with Waste Management Plan developed by Chris Mosley, P.E., Agri-Waste Technology, Inc. Operate and maintain this waste management system in accordance with State and Federal law so as to prevent discharges to the environment. Should this waste management plan fail to function as intended, additional control or treatment of the wastes may be required.

2. Disposal of daily mortality will be burial and emergency mortality will be burial in the approved DHEC burial sites, unless an alternate method is selected and approved by the Department. If a massive die-off occurs, notify your local inspector immediately, Chrissy Matthews at (864) 227-5915. If you are calling after-hours, please call the Department's twenty four hour number (888) 481-0125 or (803) 253-6488. If you plan to bury the dead animals from a massive die-off, a DHEC representative must approve the site prior to burial. The Department recommends that you develop an emergency plan for a massive die-off situation prior to the occurrence and submit this plan to your local inspector for approval. If a plan and/or site are pre-approved, then you would only be required to notify the Department of the massive die-off, and then implement the pre-approved plan for disposal.

3. If you have mortality on the farm that may be attributed to disease or toxin exposure, please contact Dr. Julie Helm of the State Veterinarian office at (803) 788-2260 for additional assistance in the handling and disposal of infected birds. The State Veterinarian office recommends that the diagnostic lab evaluate samples for deaths in excess of 1% of a house population. This action can help identify disease outbreaks on the farm. The State Veterinarian Office can also provide guidance in preventing the spread of diseases.

4. You are responsible for obtaining any other local permits that may be required for this project, including a building permit and **stormwater permit**. Please contact your local county offices to inquire about required permits.

5. Drinking water wells installed on this site to provide water for animal or human consumption must be installed with at least the following minimum setbacks required in regulation 61-71 (Well Standards & Regulations):

   (a) Sewer lines ..... 20 feet
   (b) Lakes, streams, surface-water bodies ..... 50 feet
   (c) Septic tanks/tile fields ..... 50 feet
   (d) Animal feedlots, barns, stables ..... 50 feet
   (e) Waste disposal - land application sites ..... 100 feet
   (f) Waste treatment lagoons ..... 100 feet
   (g) Herbicide, pesticide & petroleum handling/storage sites ..... 100 feet

   A permit for private wells must be obtained from the Department prior to installation. Enclosed is a copy of the application for a well permit. If you have any questions on well permitting, please contact Well Permitting at (803) 898-4174.

SPECIAL CONDITIONS (continued)
(Poultry)

6. Annual reporting is required for this permit.
   An annual report is due by January 1st of each year (starting in 2018) and must include the following:

   (a) Waste sampling results for the last year, if applicable, and the latest rolling average.
   (b) Soil monitoring results, if applicable.
   (c) Groundwater monitoring results, if applicable.
   (d) Calculated application rates for all waste utilization areas, if applicable.
   (e) The adjusted application rates, if applicable, based on the most recent animal waste sampling and soil samples. The application rate change could also be due to a change in field use, crop grown or other factors.

**Annual Reports should be sent to the following address:*
SC Department of Health & Environmental Control
Bureau of Water
Compliance Assurance Division
2600 Bull Street
Columbia, SC 29201

7. **CAMM Certification is required within one year from the effective date of this permit.**

8. **The 400 foot property line setback along Lisbon Road and the property line on the eastern side of the parcel shall remain vegetated as it currently exists for as long as the facility is in operation.**

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

CERTIFICATE OF SERVICE

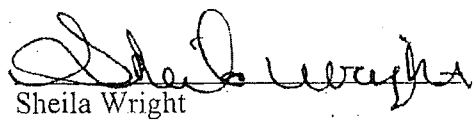
FILED
AUG 04 2017
SC ADMIN LAW COURT

This is to certify that I, a legal assistant with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of a **Motion for Partial Summary Judgment** on behalf of Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers, via electronic mail and U.S. Mail as follows:

Stephen P. Hightower, Esquire
S.C. Department of Health and Environmental Control
Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201
(hightosp@dhec.sc.gov)

M. McMullen Taylor, Esquire
Mullen Taylor, LLC
P.O. Box 8567
Columbia, South Carolina 29202
(mmt@MullenTaylorLLC.com)

Robert Guild, Esquire
314 Pall Mall Street
Columbia, South Carolina 29201
(bguild@mindspring.com)


Sheila Wright

Columbia, South Carolina
This 4th day of August, 2017.

FILED
AUG 04 2017
SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

FILED
AUG 10 2017
SC ADMIN LAW COURT

PETITIONERS' MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT BY RESPONDENTS DAVID COGGINS BROILERS, HEATH COGGINS BROILERS, AND JIM YOUNG BROILERS

Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers ("Respondents") moved for partial summary judgment ("Motion") concerning the issue of whether, as a matter of law, they must obtain a National Pollutant Discharge Elimination Permit ("NPDES") for the operation of their poultry production areas and, as applicable, land application for manure generated by their poultry production. Respondents meet the regulatory definition of a large concentrated feeding operation ("CAFO") within the State's NPDES regulations and thus, must obtain a NPDES permit for their proposed operations. In their Motion, Respondents ask this Court to ignore State NPDES regulations that were lawfully promulgated in 2003 and remain in force and effect. Respectfully, this Court should deny Respondents' Motion.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015).

ARGUMENT

To be deemed a CAFO as defined within S.C. Code Regs. 61-9 Part 122.23, the definition of an "animal feeding operation" ("AFO") must first be met, followed by tiered categories of AFOs triggered by the size of the operation. S.C. Code Regs. 61-9 Part 122.23(b)(1) and (2). An "animal feeding operation" is "a lot or facility (other than an aquatic animal production facility) ... where the following conditions are met:

> (A) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and

(B) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. S.C. Code Regs. 61-9 Part 122.23(b)(1).

Each of the Respondents' proposed operations will confine and feed or maintain chickens for 45 days or more in any 12-month period. Exh. A at DHEC_000920 (David Coggins Broilers' Comprehensive Nutrient Plan stating that the operation would confine 162,000 birds annually with 27,000 in each of the six proposed barns; approximately 4.5 flocks will be raised per year, each flock grown for 8-9 weeks); Exh. A at DHEC_002065 (Heath Coggins Broilers' Comprehensive Nutrient Plan stating that the operation would confine 237,000 birds annually with 35,000 in each of the six proposed barns; approximately 4.5 flocks will be raised each year, each grown for 8-9 weeks); Exh. A at DHEC_003187 (Jim Young Broilers' Comprehensive Nutrient Plan stating that the operation would confine 237,600 birds annually with 39,600 in each of the six proposed barns; approximately 4.5 flocks will be raised each year, each grown for 8-9 weeks); *see also* Exh. B (Deposition of DHEC permit reviewer William Chaplin, p. 24, line 2 – p. 27, line 1, in which he states that each proposed facility meets the definition of an "animal feeding operation" as defined under S.C. Code Regs. 61-9 Part 122.23(b)(1)).

Whether an "animal feeding operation" is a CAFO then turns on whether the operations meet any of the following definitions: 1) a Large CAFO; 2) a Medium CAFO; or 3) a Small CAFO. An "animal feeding operation" for production of broilers is a Large CAFO if it confines 125,000 or more birds per year. S.C. Code Regs. 61-9 Part 122.23(b)(4)(x). An "animal feeding operation" for production of broilers is a Medium CAFO if it confines 9,000 to 29,999 birds annually <u>and</u> pollutants are either discharged into waters of the State through a man-made conveyance or discharged directly into waters of the State. S.C. Code Regs. 61-9 Part 122.23(b)(6)(i)(I) and (ii) (emphasis added). A Small CAFO is an "animal feeding operation" that is not a Medium CAFO <u>and</u> is designated as a CAFO "upon determining that it is a significant contributor of pollutants to waters of the State. S.C. Code Regs. 61-9 Part 122.23(b)(9) and (c) (emphasis added). An "animal feeding operation" deemed to be a Large, Medium or Small CAFO "are point sources that require NPDES permits for discharges or potential discharges." S.C. Code Regs. 61-9.122(a).

There is no question that the Respondents meet the definition of a Large CAFO. David Coggins Broilers proposes to confine and grow 162,000 birds annually. Exh. A at DHEC_000920.

Heath Coggins Broilers proposes to confine and grow 237,000 birds annually. Exh. A at DHEC_003187. Jim Young Broilers proposes to confine and grow 237,600 birds annually. Exh. A at DHEC_003187. Each proposed facility seeks to confine over 125,000 animals annually. Therefore, Respondents must apply for a NPDES Permit or demonstrate "no potential to discharge under any circumstance or climactic condition." "Once an operation is defined as a CAFO, the NPDES requirements for CAFO apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal." S.C. Code Regs. 61-9 Part 122.23(a). The NPDES permit requirements apply to the production area[1] of a CAFO as well as land under the control of the CAFO owner or operator on which manure is applied.[2] S.C. Code Ann. 61-9 Part 122.23(a) and (e).

Respondents claim that their proposed facilities are not required to obtain an NPDES Permit because their proposed facilities would be operating under the State's animal agricultural regulations, S.C. Code Regs. 61-43, which state that permits for animal agricultural facilities are "no-discharge." S.C. Code Regs. 61-43 Part 200.20. In spite of the "no-discharge" language within S.C. Code Reg. 61-43, this regulation expressly references the State's NPDES permitting regulations as applicable to "concentrated animal feeding operations as defined by Regulation 61-9." S.C. Code Regs. 61-43 Part 200.40(D). Under S.C. Code Regs. 61-43 Part 200.70, which address the decision-making process of the South Carolina Department of Health and Environmental Control ("DHEC"), "[i]f a facility is classified as a 'concentrated animal feeding operation] under the NPDES Regulation 61-9, the expiration date [of the permit] shall be no more than five years after the issue date." S.C. Code Regs. 61-43 Part 200.70(I). The State's NPDES regulation would also be triggered by the regulation's charge that DHEC act on all permits "to prevent, as far as reasonable possible under state and federal laws, an increase in pollution of the waters ... of the State." S.C. Code Regs. 61-43 Part 200.70(E). DHEC's internal permit review checklist for animal agricultural facilities states that the applicant must submit a fee for a NPDES

[1] "Production area" is defined in part as the animal confinement area, manure storage area, raw materials storage area, and waste containment area. S.C. Code Regs. 61-9 Part 122.23(b)(8). In the case of broiler production areas, the definition includes "confinement houses," "runoff ponds," "storage sheds," "stockpiles," and "composting piles." *Id.*

[2] An exception to NPDES coverage of land application of manure exists at S.C. Code Regs. 61-9 Part 122.23(e).

CAFO general permit if the facility is a Large CAFO. Exh. C, p. 8. To the extent that Respondents are asserting that the "no-discharge" standard within S.C. Code Regs. 61-43 Part 200 shields them from the requirement to obtain a NPDES permit, these references to CAFO NPDES regulations within Part 200 strongly suggest otherwise.

In addition, Respondents suggest that South Carolina's NPDES regulations do not apply to them because they flatly state that they will not discharge any pollutants. Without the discharge of a pollutant, Respondents argue that they "are not statutorily obligated to seek or obtain an NPDES Permit" under the Clean Water Act and South Carolina's CAFO NPDES regulations. Resp. Mot. Partial Summary Judgment, p. 4. Yet the State's CAFO NPDES regulations clearly and unambiguously require Large CAFOs to obtain a NPDES permit for "discharges or potential discharges." S.C. Code Regs. 61-9 Part 122.23(a). Large CAFOs may avoid the NPDES permit requirement only if they demonstrate "that there is no potential for any CAFO manure, litter, or process wastewater to be added to waters of the State under any circumstance or climatic condition." S.C. Code Regs. 61-9 Part 122.23(f)(1). Moreover, in spite of its declaration that the animal agricultural permits are no-discharge permits, S.C. Code Regs. 61-43 Part 200 lacks any provisions comparable to the Clean Water Act requiring applicants to demonstrate that no discharge of waste will occur. *See* 33 U.S.C. § 1342(a)(2) (stating that the EPA "shall prescribe conditions for such permits to <u>assure compliance</u> with [all applicable] requirements, including effluent limitations].; 33 U.S.C. § 1342(b) (stating that state permitting programs must "apply, and <u>insure compliance with</u>, any applicable [effluent limitations and standards]." 33 U.S.C. § 1342(b) (emphasis added).

Under a NPDES permit, a Large CAFO must demonstrate that no-discharge will occur through effluent limitations applicable to CAFOs. S.C. Code Regs. 61-9 Part 125.3(c)(1) ("Technology-based treatment requirements may be imposed by [a]pplication of EPA-promulgated effluent limitations developed under section 304 of the CWA to dischargers by category or subcategory."); 40 C.F.R. § 412 .31 and 40 C.F.R. § 412.46; *see also* S.C. State Register, Vol. 27, Issue 12 (Dec. 26, 2003)(... " references in regulations promulgated in South Carolina would require compliance by S.C. CAFO with the U.S. EPA Effluent Limitations Guidelines."). In contrast with the State's animal agricultural permitting regulations, NPDES effluent limitations

require engineering and design of containment systems to capture process wastewater[3] from the production area, require tighter and more detailed management plans, and impose robust reporting requirements. *See* 40 C.F.R. 412, Subpart B.

S.C. Code Regs. 61-43 does not and cannot replace the State's CAFO NPDES regulations. The two regulatory schemes work together. As explained by the EPA, the CAFO NPDES regulations "establish binding legal requirements for Large CAFOs and maintains substantial flexibility for States to set other site specific requirements for CAFOs as needed to achieve State program objectives." 68 FED. REG. 7232 (Feb. 12, 2003) (excerpt attached as Exh. D). "EPA encourages States to maximize use of voluntary and other non-NPDES programs to support efforts by medium and small operations to implement appropriate measures and correct problems that might otherwise cause them to be defined or designated as a CAFO." *Id.* Thus, in South Carolina, Large CAFOs must obtain an animal agricultural permit and a NPDES permit. The State's animal agricultural regulations comprise a program that provides environmental review of medium and small animal feeding operations that may not meet the definition of a CAFO under the NPDES regulations, but serve "to implement appropriate measures and correct problems that might otherwise cause [medium and small CAFOs] to be defined or designated as a CAFO." *Id.*

Respondents are Large CAFOs seeking to avoid South Carolina's CAFO NPDES Regulation by arguing that the ruling in *Waterkeeper Alliance Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2nd Cir. 2005) that invalidated the EPA's 2003 Rule requiring a NPDES permit for "potential discharges" somehow nullifies South Carolina's CAFO NPDES regulation that promulgated the EPA's 2003 Rule. The Clean Water Act does not prevent states from promulgating water quality regulations that are different than federal requirements so long as state regulations meet the minimum requirements of the Act. Under 33 U.S.C. § 1370, nothing in the Clean Water Act:

> "shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent

[3] Process wastewater includes leaking watering systems within poultry barns and runoff from water coming into contact with uncovered manure stockpiles. 40 C.F.R. § 412.2(d); S.C. Code Regs. 61-9 Part 122.23(b)(8).

> standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Indeed, "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...." 33 U.S.C. § 1251 (emphasis added). The Second Circuit's invalidation of the 2003 EPA CAFO Rule's duty to apply does not touch a State's CAFO NPDES regulations, including higher standards such as a duty for Large CAFOs to apply for a permit for potential discharges. Although the State of South Carolina has had ample opportunity to revise its CAFO NPDES Regulation over the past 12 years since *Waterkeeper* was decided, the State has chosen not to revise its Regulations.[4]

Further, the State's NPDES regulations were promulgated under both the Clean Water Act and the South Carolina Pollution Control Act. S.C. Code Regs. 61-9 Part 122.1(a). The Pollution Control Act provides broad discretion to DHEC to prevent pollution under permit programs. Under S.C. Code Ann. § 48-1-50(5), DHEC is authorized to "develop a general comprehensive program for the abatement, control and prevention of air and water pollution." (emphasis added). "Pollution" is defined broadly as "the presence in the environment of any substance, including, but not limited to, sewage, industrial waste, other waste, air contaminant, or any combination thereof in such quantity and of such characteristics and duration as may cause, or tend to cause the environment of the State to be contaminated, unclean, noxious, odorous, impure or degraded, or which is, or tends to be injurious to human health or welfare; or which damages property, plant, animal or marine life or use of property ...." S.C. Code Ann. §

[4] In *Waterkeeper*, the Court gave credence to the idea that legislation providing the power to impose a duty for Large CAFOs to apply for a NPDES permit would be justifiable. 399 F.3d 486 at 524, n. 22. "EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process." *Id.*

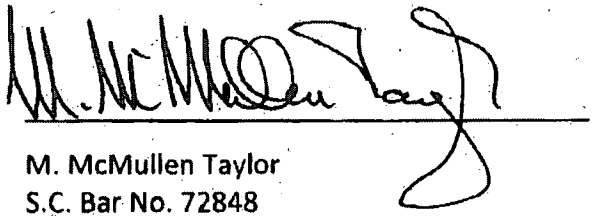
48-1- 10(7) (emphasis added). DHEC is empowered to "Issue, deny, revoke, suspend or modify permits, under such conditions as it may prescribe for the discharge of sewage, Industrial waste or other waste." S.C. Code Ann. § 48-1-50(5) (emphasis added). In addition to the Clean Water Act, the State is entitled to promulgate its CAFO NPDES regulation in the manner it did under the separate authority of the Pollution Control Act.

CONCLUSION

At bottom, Respondents ask this Court to ignore South Carolina's CAFO NPDES regulations. However, this Court cannot ignore the law. It must follow the law as written. *Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). The State's CAFO NPDES regulations are in force and effect, and nothing within the State's animal agricultural permitting regulations shield Respondents from their application to Large CAFOs. Respectfully, for the reasons set forth herein and any other grounds verbally expressed at the outset of the hearing of these contested cases, Respondents' Motion for Partial Summary Judgment should be denied.

{SIGNATURE PAGE FOLLOWS}

Respectfully Submitted,



M. McMullen Taylor
S.C. Bar No. 72848
MULLEN TAYLOR LLC
1230 Richland Street
Columbia, South Carolina 29201
Phone: 803-254-1344
Email: mmt@MullenTaylorLLC.com

Robert Guild
S.C. Bar No. 2358
314 Pall Mall Street
Columbia, South Carolina 29201
Phone: 803-917-5738
Email: bguild@mindspring.com

Attorneys for Petitioners

August 10, 2017

EXHIBIT A

255

SOUTH CAROLINA
AGRI-WASTE TECHNOLOGY INC.
No. 3399
CERTIFICATE OF AUTHORIZATION

Engineers and Soil Scientists

Agri-Waste Technology, Inc.
501 N. Salem Street, Suite 203
Apex, North Carolina 27502
919-859-0669
www.agriwaste.com

SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25556
CHRISTOPHER T. MOSLEY

Christopher T. Mosley
6/2/16

Comprehensive Nutrient Management Plan (CNMP)
(Version 2, 9/14/2011 Format)

The Comprehensive Nutrient Management Plan (CNMP) is an important part of the conservation management system (CMS) for your Animal Feeding Operation (AFO). This CNMP documents the planning decisions and operation and maintenance for the animal feeding operation. It includes background information and provides guidance, reference information and Web-based sites where up-to-date information can be obtained. Refer to the Producer Activity Document (PAD) for information about day-to-day management activities and recordkeeping. Both this CNMP document and the PAD document shall remain in the possession of the producer/landowner.

Farm/Facility: David Coggins Broilers

Farm Address:	Mailing Address:
Lisbon Rd. Near Hwy 72 Mountville, SC 29370 864-981-5604	1094 Lisbon Rd. Mountville, SC 29370

Owner/ Operator: David Coggins

Driving Directions: (From Mountville P.O.) Head E on Mountville Rd. and turn left onto SC-72 E, drive 1.8 miles. Turn left onto Lisbon Rd. drive 0.3 miles the farm is on the right.

County or Local Zoning Restrictions: There are no county or local zoning restrictions that impact this CNMP.

Hydrologic Unit Code (Facility): 030501090905

Flood Plain: The facility is located outside the 100-yr floodplain according to FEMA Maps FEMA FIRM Map 45059 C0365C.

Farm Headquarters Latitude/Longitude: 34° 23' 40.095" N 81° 57' 35.845" W

RECEIVED
JUL 06 2016
Stormwater, Construction & Agricultural Permitting Division

check paid

RECEIVED
JUN 13 2016
Stormwater, Construction & Agricultural Permitting Division

Owner

Owner/Operator: David Coggins	Phone: 864-981-5604
Address: 1094 Lisbon Rd. Mountville, SC 29370	

The following people have assisted with the development of the CNMP and certify that their element meets all applicable NRCS standards.

Manure Handling and Storage

Signature: Chris Mosley	Date: 6/2/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Nutrient Management

Signature: Chris Mosley	Date: 6/2/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Land Treatment Practices

Signature: Chris Mosley	Date: 6/2/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Comprehensive Nutrient Management Plan

I certify that I have reviewed this plan for technical adequacy and that the elements of the CNMP are compatible, reasonable, and able to be implemented. All elements meet NRCS standards and specifications as well as requirements set forth by the South Carolina Department of Health and Environmental Controls.	
Signature: Chris Mosley	Date: 6/2/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Owner

As the owner/operator, I certify that I, as the decision-maker, have been involved in the planning process and agree the items/practices listed in each element are needed. I understand that I am responsible for complying with SCDHEC Regulation 61-43 and for keeping all necessary records associated with the implementation of this CNMP. It is my intent to implement /accomplish this CNMP in a timely manner as described in the plan.	
Signature:	Date: 6/2/16

Table of Contents

Section 1. Background and Site Information
- 1.1. General Description of Operation
- 1.2. SC Permit Applications
- 1.3. Preliminary Site Approval
- 1.4. Litter Sampling
- 1.5. Existing Waste Management or Nutrient management Plans
- 1.6. Operator or manager Certifications
- 1.7. Notice(s) of Public Intent
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- 1.10. Natural Resource Concerns

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- 2.1. Map(s) of Production Area
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- 3.7. Catastrophic Animal Mortality Management
- 3.8. Chemical Handling

Section 4. Land Treatment

Section 5. Soil and Risk Assessment Analyses

Section 6. Nutrient Management
- 6.1. Manure Nutrient Analyses
- 6.2. Manure Inventory Annual Summary
- 6.3. Plan Nutrient Balance

Section 7. Feed Management

Section 8. Other Utilization Options

Section 9. Recordkeeping Forms (see Producer Activity Document)

Section 10. Manure Storage Facility Design and Specifications

Section 11. References
- 11.1. Publications
- 11.2. Software and Data Sources

Section 12. SC Regulation 61-34: Animal Facility Management Plan Cross-Reference

Section 13. Attachments

Section 1. Background and Site Information

1.1. General Description of Operation

David Coggins Broilers is a planned six barn (45' X 600') broiler facility in Mountville, SC. The planned population is 162,000 broilers with 27,000 birds in each house. Broilers will be raised on compacted clay floors covered with shavings. The exhaust fans for the barns will be on the NE ends and the barns will be spaced 60' apart. Approximately 4.5 flocks will be raised each year from 0.1 lbs. to 9 lbs. Each flock will be raised for 8-9 weeks with 2-3 weeks between flocks. The normal production live weight is approximately 737,100 lbs. Each year a full cleanout will occur in the spring. Between all other flocks crusting and windrowing will be alternated. The annual litter production is estimated at 988 tons per year.

All litter will be exported by L & M Litter Brokers (19,463-AG). Two planned 40' X 184' stacking sheds will hold litter until it is exported. Both stacking sheds will be built at a later date once DHEC has approved the plans and specs. Until stacking sheds are constructed litter must be exported immediately or placed on a DHEC approved pad for no more than three days.

Normal mortalities will be handled through burial until a planned 22' X 70' composter is built. The composter will be built at a later date once the plans and specs have been approved by DHEC. Emergency mortalities will be handled through burial.

1.2. South Carolina Agricultural Facilities Permit, Stacking Shed, and Composter Application Form

RECEIVED

SEP 2 2 2016

Stormwater, Construction &
Agricultural Permitting Division

SOUTH CAROLINA
AGRI-WASTE TECHNOLOGY INC.
No. 3399
CERTIFICATE OF AUTHORIZATION

Engineers and Soil Scientists

Agri-Waste Technology, Inc.
501 N. Salem Street, Suite 203
Apex, North Carolina 27502
919-859-0669
www.agriwaste.com

SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25556
CHRISTOPHER T. MOSLEY

Christopher T. Mosley
7/22/16

Comprehensive Nutrient Management Plan (CNMP)
(Version 2, 9/14/2011 Format)

The Comprehensive Nutrient Management Plan (CNMP) is an important part of the conservation management system (CMS) for your Animal Feeding Operation (AFO). This CNMP documents the planning decisions and operation and maintenance for the animal feeding operation. It includes background information and provides guidance, reference information and Web-based sites where up-to-date information can be obtained. Refer to the Producer Activity Document (PAD) for information about day-to-day management activities and recordkeeping. Both this CNMP document and the PAD document shall remain in the possession of the producer/landowner.

Farm/Facility: Heath Coggins Broilers

Farm Address:
Lisbon Rd. Near Hwy 72
Mountville, SC 29370
864-872-4098

Mailing Address:
113 Moreland Ave.
Laurens, SC 29360

Owner/Operator: Heath Coggins

Driving Directions: (From Mountville P.O.) Head E on Mountville Rd. and turn left onto SC-72 E, drive 1.8 miles. Turn left onto Lisbon Rd. drive 0.3 miles the farm is on the right.

County or Local Zoning Restrictions: There are no county or local zoning restrictions that impact this CNMP.

Hydrologic Unit Code (Facility): 030501090905

Flood Plain: The facility is located outside the 100-yr floodplain according to FEMA Maps FEMA FIRM Map 45059 C0365C.

Farm Headquarters Latitude/Longitude: 34° 23' 43.202" N 81° 57' 18.477" W
34.39533 -81.95513

RECEIVED
JUL 29 2016
Stormwater, Construction & Agricultural Permitting Division

Owner

Owner/Operator: Heath Coggins	Phone: 864-872-4098
Address: 113 Moreland Ave Greenwood SC 29360	

The following people have assisted with the development of the CNMP and certify that their element meets all applicable NRCS standards.

Manure Handling and Storage

Signature: Chris J Mosley	Date: 7/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Nutrient Management

Signature: Chris J Mosley	Date: 7/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Land Treatment Practices

Signature: Chris J Mosley	Date: 7/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Comprehensive Nutrient Management Plan

I certify that I have reviewed this plan for technical adequacy and that the elements of the CNMP are compatible, reasonable, and able to be implemented. All elements meet NRCS standards and specifications as well as requirements set forth by the South Carolina Department of Health and Environmental Controls.	
Signature: Chris J Mosley	Date: 7/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Owner

As the owner/operator, I certify that I, as the decision-maker, have been involved in the planning process and agree the items/practices listed in each element are needed. I understand that I am responsible for complying with SCDHEC Regulation 61-43 and for keeping all necessary records associated with the implementation of this CNMP. It is my intent to implement /accomplish this CNMP in a timely manner as described in the plan.	
Signature:	Date: 6/2/16

RECEIVED
JUL 29 2016
Stormwater, Construction & Agricultural Permitting Division

Table of Contents

Section 1. Background and Site Information
- 1.1. General Description of Operation
- 1.2. SC Permit Applications
- 1.3. Preliminary Site Approval
- 1.4. Litter Sampling
- 1.5. Existing Waste Management or Nutrient management Plans
- 1.6. Operator or manager Certifications
- 1.7. Notice(s) of Public Intent
- 1.8. Waivers (Neighboring Landowners)
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- 3.7. Catastrophic Animal Mortality Management
- 3.8. Chemical Handling

Section 4. Land Treatment

Section 5. Soil and Risk Assessment Analyses

Section 6. Nutrient Management
- 6.1. Manure Nutrient Analyses
- 6.2. Manure Inventory Annual Summary
- 6.3. Plan Nutrient Balance

Section 7. Feed Management

Section 8. Other Utilization Options

Section 9. Recordkeeping Forms (see Producer Activity Document)

Section 10. Manure Storage Facility Design and Specifications

Section 11. References
- 11.1. Publications
- 11.2. Software and Data Sources

Section 12. SC Regulation 61-34: Animal Facility Management Plan Cross-Reference

Section 13. Attachments

RECEIVED

NOV 07 2016

Stormwater, Construction & Agricultural Permitting Division

Section 1. Background and Site Information

1.1. General Description of Operation

Heath Coggins Broilers is a planned six barn (66' X 600') broiler facility in Mountville, SC. The planned population is 237,600 broilers with 39,600 birds in each house. Broilers will be raised on compacted clay floors covered with shavings. The exhaust fans for the barns will be on the NE ends and the barns will be spaced 60' apart. Approximately 4.5 flocks will be raised each year from 0.1 lbs. to 9 lbs. Each flock will be raised for 8-9 weeks with 2-3 weeks between flocks. The normal production live weight is approximately 1,081,080 lbs. Each year a full cleanout will occur in the spring. Between all other flocks crusting and windrowing will be alternated. The annual litter production is estimated at 1,449 tons per year.

All litter will be exported by L & M Litter Brokers (19,463-AG). Two planned 40' X 200' stacking sheds will hold litter until it is exported. Both stacking sheds will be built at a later date once DHEC has approved the plans and specs. Until stacking sheds are constructed litter must be spread immediately, exported immediately, or placed on a DHEC approved pad for no more than three days.

Normal mortalities will be handled through burial until a planned 22' X 90' composter is built. The composter will be built at a later date once the plans and specs have been approved by DHEC. Emergency mortalities will be handled through burial.

1.2. South Carolina Agricultural Facilities Permit Application, Stacking Shed Application, and Composter Application

SOUTH CAROLINA
AGRI-WASTE TECHNOLOGY INC.
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CERTIFICATE OF AUTHORIZATION

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SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25556
CHRISTOPHER T. MOSLEY

6/22/16

Comprehensive Nutrient Management Plan (CNMP)
(Version 2, 9/14/2011 Format)

The Comprehensive Nutrient Management Plan (CNMP) is an important part of the conservation management system (CMS) for your Animal Feeding Operation (AFO). This CNMP documents the planning decisions and operation and maintenance for the animal feeding operation. It includes background information and provides guidance, reference information and Web-based sites where up-to-date information can be obtained. Refer to the Producer Activity Document (PAD) for information about day-to-day management activities and recordkeeping. Both this CNMP document and the PAD document shall remain in the possession of the producer/landowner.

Farm/Facility: Jim Young Broilers

Farm Address:
Lisbon Rd near Hwy 72
Mountville, SC 29370
803-479-1363

Mailing Address:
107 Batteaux Pl.
Blythewood, SC 29016

Owner/Operator: James Young Jr.

Driving Directions: (From Mountville P.O.) Head E on Mountville Rd. and turn left onto SC-72 E, drive 1.8 miles. Turn left onto Lisbon Rd. drive 0.3 miles the farm is on the right.

County or Local Zoning Restrictions: There are no county or local zoning restrictions that impact this CNMP.

Hydrologic Unit Code (Facility): 030501090905

Flood Plain: The facility is located outside the 100-yr floodplain according to FEMA Maps FEMA FIRM Map 45059 C0365C.

Farm Headquarters Latitude/Longitude: 34° 23' 24.193" N 81° 57' 19.432" W
34.39005 -81.95539

Owner

Owner/Operator: James Young Jr.	Phone: 803-479-1363
Address: 107 Batteaux Pl. Blythewood, SC 29016	

The following people have assisted with the development of the CNMP and certify that their element meets all applicable NRCS standards.

Manure Handling and Storage

Signature: Chris J Mosley	Date: 6/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Nutrient Management

Signature: Chris J Mosley	Date: 6/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Land Treatment Practices

Signature: Chris J Mosley	Date: 6/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Comprehensive Nutrient Management Plan

I certify that I have reviewed this plan for technical adequacy and that the elements of the CNMP are compatible, reasonable, and able to be implemented. All elements meet NRCS standards and specifications as well as requirements set forth by the South Carolina Department of Health and Environmental Controls.	
Signature: Chris J Mosley	Date: 6/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Owner

As the owner/operator, I certify that I, as the decision-maker, have been involved in the planning process and agree the items/practices listed in each element are needed. I understand that I am responsible for complying with SCDHEC Regulation 61-43 and for keeping all necessary records associated with the implementation of this CNMP. It is my intent to implement /accomplish this CNMP in a timely manner as described in the plan.	
Signature:	Date: 6/2/16

Table of Contents

Section 1. Background and Site Information
- 1.1. General Description of Operation
- 1.2. SC Permit and Expansion Application
- 1.3. Preliminary Site Approval
- 1.4. Litter Sampling
- 1.5. Existing Waste Management or Nutrient management Plans
- 1.6. Operator or manager Certifications
- 1.7. Notice(s) of Public Intent
- 1.8. Waivers (Neighboring Landowners)
- 1.9. Manure Application Agreements
- 1.10. Natural Resource Concerns

Section 2. Manure and Wastewater Handling and Storage
- 2.1. Map(s) of Production Area
- 2.2. Production Area Conservation Practices
- 2.3. Manure Storage
- 2.4. Animal Inventory
- 2.5. Normal Animal Mortality Management
- 2.6. Planned Manure Exports off the Farm
- 2.7. Planned Manure Imports onto the Farm
- 2.8. Planned Internal Transfers of Manure

Section 3. Farmstead Safety and Security
- 3.1. Emergency Response Plan
- 3.2. Biosecurity Measures
- 3.3. Emergency Contact Information
- 3.4. Vector and Odor Abatement Plan
- 3.5. Vector Control and Abatement
- 3.6. Air Quality
- 3.7. Catastrophic Animal Mortality Management
- 3.8. Chemical Handling

Section 4. Land Treatment
- 4.1. Map(s) of Fields and Conservation Practices
- 4.2. Land Treatment Conservation Practices

Section 5. Soil and Risk Assessment Analyses
- 5.1. Soil Information
- 5.2. Predicted Soil Erosion
- 5.3. Nitrogen and Phosphorus Risk Analyses
- 5.4. Additional Field Data Required by Risk Assessment Procedure(s)

Section 6. Nutrient Management
- 6.1. Field Information
- 6.2. Manure Application Setback Distances
- 6.3. Soil Test Data
- 6.4. Manure Nutrient Analyses
- 6.5. Planned Crops and Fertilizer Recommendations
- 6.6. Manure Application Planning Calendar
- 6.7. Planned Nutrient Applications
- 6.8. Field Nutrient Balance
- 6.9. Projected Field Phosphorous Change
- 6.10. Manure Inventory Annual Summary
- 6.11. Fertilizer Material Annual Summary
- 6.12. Plan Nutrient Balance

Section 7. Feed Management

Section 8. Other Utilization Options

Section 9. Recordkeeping Forms (see Producer Activity Document)

Section 10. Manure Storage Facility Design and Specifications
- 10.1. Monthly Volumes Entering Storage System
- 10.2. Composter Design

Section 11. References
- 11.1. Publications
- 11.2. Software and Data Sources

Section 12. SC Regulation 61-43: Animal Facility Management Plan Cross-Reference

Section 13. Attachments

Section 1. Background and Site Information

1.1. General Description of Operation

Jim Young Broilers is a planned six barn (66' X 600' Facility in Mountville, SC. The planned population is 237,600 broilers with 39,600 in each house. Broilers will be raised on compacted clay floors covered with shavings. The exhaust fans for each barn will be on the NE ends and the barns will be spaced 60' apart. Approximately 4.5 flocks will be raised from 0.1 lbs. to 9 lbs. Each flock will be raised 8-9 weeks with 2-3 weeks between flocks. The normal production live weight is approximately 1,081,080 lbs. Barns will be windrowed and have 1/3 of the litter removed every other flock and have crusting for all other flocks. Approximately 1,449 tons of litter will be produced each year.

Litter will be spread using a pull behind spreader onto 192.7 spreadable acres. All fields are in a corn, wheat, soybean rotation and are no-till planted. Litter will be spread pull behind solid spreader. Excess litter will be exported by L & M Litter Brokers (19,463-AG). Two planned 40' X 200' stacking shed will hold litter from cleanouts. Both stacking shed will be built at a later date once DHEC has approved the plans and specs.

Normal mortalities will be handled through burial and a planned 22' 90' composter. The composter will be built at a later date once the plans and specs have been approved by DHEC. Emergency mortalities will be buried.

1.2. South Carolina Agricultural Facilities Permit, Stacking Shed, and Composter Application Form

EXHIBIT B

268

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and Jim Young Broilers, Respondents.	Docket No. 17-ALJ-07-0039-CC **DEPOSITION OF WILLIAM CHAPLIN**
Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and David Coggins Broilers, Respondents.	Docket No. 17-ALJ-07-0041-CC
Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and Heath Coggins Broilers, Respondents.	Docket No. 17-ALJ-07-0042-CC

DEPOSITION OF

WILLIAM CHAPLIN

****

Wednesday, June 21, 2017
10:06 a.m. - 1:49 p.m.

The deposition of William Chaplin, taken on behalf of the Petitioners at the offices of Creel Court Reporting, Inc., 1230 Richland Street, Columbia, South Carolina, on the 21st day of June, 2017 before Donna Currey, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

APPEARANCES

M. McMullen Taylor, Esquire
Mullen Taylor, LLC
1230 Richland Street
Post Office Box 8567
Columbia, South Carolina 29202
Attorney for the Petitioners

Benjamin P. Mustian, Esquire
Willoughby & Hoefer, P.A.
930 Richland Street
Post Office Box 8416
Columbia, South Carolina 29202
Attorney for the Respondents

Stephen P. Hightower, Esquire
Department of Health and Environmental Control
Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201
Attorney for DHEC

1 **time.)**
2 Q: Okay, we're referring back to Petitioner's
3 Exhibit Number Four from yesterday's deposition
4 which is the State of South Carolina's CAFO
5 Regulations 1.22 -- no, 122.23. Can you tell
6 me if each of these permittee meet the
7 definition under B1 of animal feeding
8 operation?
9 **MR. HIGHTOWER:** Objection.
10 **MR. MUSTIAN:** Mullen, while he's looking at that
11 just for the record, since I don't have a copy
12 and since I wasn't in the deposition yesterday,
13 could we just clarify that this is Bates Number
14 PET-1826 through 1831?
15 **MS. TAYLOR:** Certainly, thank you.
16 A: You said B1?
17 Q: Correct.
18 A: Animal feeding operation means a lot or
19 facility other than aquatic animal production
20 where the following are met. Now, do I need to
21 read this or you just want to ask me a question
22 about it?
23 Q: Well, does David Coggins permit application
24 meet the definition of animal feeding
25 operation?

1 **MR. MUSTIAN:** Object to the form.
2 A: Yes.
3 Q: If you look down at B2, concentrated animal
4 feeding operation means an animal feeding
5 operation that is defined as a large CAFO or as
6 a medium CAFO by the terms of this paragraph.
7 And if you drop down to section four, a large
8 CAFO is defined if it's stables or confined as
9 many as or more than the numbers of animals
10 classified in any of the following categories,
11 and if you turn to the next page, Subsection X,
12 it's got 125,000 chickens other than laying
13 hens if the AFO uses other than a liquid manure
14 handing system. Does David Coggins facility
15 meet the definition of a large CAFO?
16 **MR. MUSTIAN:** Object to the form.
17 **MR. HIGHTOWER:** Objection as to form.
18 A: Based on the animal numbers, it does. But a
19 CAFO by definition is allowed to discharge and
20 again as I'll state again, South Carolina
21 regulations do not allow discharges.
22 Q: And let's move to Mr. Heath Coggins. Does
23 Heath Coggins' permit application meet the
24 definition of animal feeding operation as
25 contained in Subsection B1?

1 A: Yes.
2 **MR. MUSTIAN:** Object to the form.
3 **MR. HIGHTOWER:** Objection to form.
4 Q: Does Mr. Heath Coggins application meet the
5 definition of large CAFO under Subsection 4X.
6 **MR. MUSTIAN:** Object to the form.
7 **MR. HIGHTOWER:** Objection to form.
8 A: Again, the number of animals is defined by the
9 EPA as a large CAFO at a 125,000 animals,
10 chickens in this case. It does meet that
11 number of animals but again, once I said, South
12 Carolina regulations are no discharge. So, we
13 don't consider our facilities CAFOs as much as
14 we consider them animal feeding operations.
15 Q: But we are looking at this 122.23. This is the
16 South Carolina Regulation, correct?
17 A: This is 61-9, I think.
18 Q: The South Carolina Regulation?
19 A: Yes.
20 Q: Moving to Mr. Young, the same question. Does
21 Mr. Young's permit application meet the
22 definition of animal feeding operation under
23 122.23 B1?
24 **MR. MUSTIAN:** Object to the form.
25 **MR. HIGHTOWER:** Objection to form.

1 A: Yes.
2 Q: Does Mr. Young's permit application meet the
3 definition of a large CAFO under B4X?
4 **MR. MUSTIAN:** Object to the form.
5 **MR. HIGHTOWER:** Objection to form.
6 A: Yes. Again, as I stated, the number of animals
7 meets the definition of a CAFO, but we don't
8 allow discharges, so we don't meet that
9 definition in South Carolina.
10 Q: Okay. Back to the no discharge aspect of the
11 61-43. I just want to make sure I understand
12 your explanation here. Are you saying that
13 there is never a situation in which a discharge
14 could occur if these regs are complied with?
15 A: Correct.
16 Q: All right. Are manure piles allowed to be
17 temporarily stored outdoors uncovered for three
18 days?
19 A: They are.
20 Q: So, are you saying that there's no possibility
21 that a discharge could occur while an exposed
22 manure pile is outdoors for three days?
23 A: It depends on the location and the situation.
24 Q: But could that present a situation in which a
25 discharge would occur?

EXHIBIT C

275

dhec
Healthy People. Healthy Communities

Agricultural Permitting
Review Checklist Summary
Cover Page

Review Start Date 7-6-16 Review Completed Date 12-9-16

Facility Name David Coggins Broilers ND00 89338

Applicant's Name David Coggins Phone Number 864-981-5604

Type of Facility Poultry Broilers (6 barns) Integrator Amick Farms

County Laurens EQC Regional Rep. Chrissy Matthews

Plan Preparer Chris Mosley PE, AWT

Public Notice Date (Issue Date) Dec 14, 2016
deadlines: Wed = Mon 5pm Sat = Wed 5pm.

Newspaper for Public Notice Laurens County Advertiser - pub Wed & Sat.

Effective Date Dec 29, 2016

Permit Number 19,886-AG

Plan Reviewed by (print) William Chaplin

Web PN: App Rec'd 7-21-16 BM Permitting Decision 12-12-16 wpc

Dams and Agricultural Permitting Section
Outreach, Stormwater, Agricultural and Dams Permitting Division
Bureau of Water

DHEC 2518 (8/2016)

8-17-16 Medical eval delivered to Dr. Bell. Clock stopped.

PET-00108

Facility Name: David Coggins Broilers Permit No.: ND00 89338

Task Complete	Review Checklist Summary (Animal)
ADMINISTRATIVE REVIEW:	
✓	Verify the application form is complete.
✓	Enter the application into EFIS.
✓	Check processed and sent to Finance. *How much was the check made out for?* $ 240.00 *Check #:* 286
✓	Create a facility file folder.
✓	Check Preliminary File for any previously received correspondence.
✓	Comments reviewed and counted. *Number of Comments:* > 50
✓	Determine if a public meeting must be held. (YES) or NO Schedule the public meeting, if required. *Date & Time of Meeting:* 9-15-16 5:30p.m. *Location:* Mountville Fire Dept
	Send a letter to the person(s) submitting health concerns requesting that they submit a physician's statement for review. Letter sent to Barbara Zeger
✓	Send a copy of the application, facility map and cover memo to Bureau of Air Quality. *Date Sent:* 7-14-16
✓	Set up Public Notice of Application Received. *Date went on notice:* 7-29-16 *Date goes off notice:* 8-28-16
✓	Send invitation for the Public Meeting to all persons who submitted a written comment or asked to be notified. *Date Sent:* Sept 1, 2016
✓	Send a copy of the application, animal facility management plan and cover memo to BEHS in Groundwater for review and recommendations. *Date Sent:* 7-14-16
✓	Send a copy of the application and Animal Facility Management Plan to the District office. *Date Sent:* 7-12-16
✓	Verify that a preliminary site inspection was performed on the proposed site submitted in this applica *PSI Date:* April 13, 2016

WATER RESOURCES REVIEW:

For this review:

- ***"proposed animal facility" refers to the houses, stacking shed, and/or composter.***
- ***"site" refers to the "proposed animal facility", burial locations, and manure utilization areas.***

Enter the proposed animal facility, burial locations, and manure utilization areas into the Arcview database.

Barn Length: Feet: 600 = Meters: 182.88
Barn Width: Feet: 45 = Meters: 13.716
Barn Spacing: Feet: 60 = Meters: 18.288

Fan Location (Blowing towards): North East

Lat: 81° 57' 35.845 W ↑ 34.394471
Long: 34° 23' 40.095 N ↓ -81.959956

Public Notices Signs Posted by Chrissy Mathews on Date: 7-29-16

PET-00110

Pull the permitted point source discharge (NPDES) overlay and determine where the nearest upstream and downstream locations of any discharge are located and the distance from each station to the proposed site.

Point Source Discharges:

Upstream - Specialty Vermiculite / Hudgens Mine - SCG730030-1BA, located NNW, ~~4.46~~ miles by land, 4.23 miles

Downstream - Newberry Water Treatment Plant - SCG646047, Located SE ~~19.48~~ miles by land. 19.69 miles.

Additional requirements or setbacks? As this facility is classified as a no discharge facility, no additional setbacks are required.

Pull the water quality monitoring stations overlay and determine where the nearest upstream and downstream monitoring stations are located and the distance from each station to the proposed site.

Water Quality Monitoring Stations:

Upstream - None

Downstream - S-305 - Little River @ SC 34, Located SE, ~~16.98~~ miles by land. 17.00 miles

Pull the overlay for the drinking water intakes (Surface Water Intakes) and determine if any intakes are located downstream of the proposed site?

YES or **NO**

If yes, list the intakes, locations, and distance downstream:

City of Newberry - System 3610001, Well - S36101, located SE, ~~19.46~~ miles by land. 19.47 miles

Is the proposed facility a no-discharge facility? **YES** or **NO**

Additional requirements or setbacks? no additional setbacks are required.

Pull the State Approved Source Water Protection Area overlay and review the proposed site in reference to these areas.

Is the facility located in a State Approved Source Water Protection Area?

YES or **NO**

Are any of the manure utilization areas located in a State Approved Source Water Protection Area?

YES **NO** **N/A Manure Broker**

If the proposed site is in the vicinity of the State Approved Source Water Protection Area, then note the separation distance? The nearest downstream SWPA is located SE, ~~7.55~~ miles by land. 7.62 miles

Additional requirements or setbacks? no additional setbacks are required.

Pull the ground water public supply well (Source Water Protection → Public Water Supply Wells) overlay and determine if any public water supply wells are located adjacent to the proposed site? YES or NO

If yes, what is the name of the water supply well and distance between the site and the public water supply well? The nearest public water supply well is: Michelin Laurens Proving Grounds System 3030005, well G3017B, Located West, ~~3.79~~ miles by land, 3.76 miles.

Additional requirements or setbacks? As per R61-58, the minimum separation distance should be at least 100 feet, therefore no additional setbacks are required.

Pull the 303(d) (2014 303D List) impaired water body list overlay and list any impairment and the distance to the impairment from the proposed site.

Proposed Facility:

The nearest downstream 303D site is S-305, Little River @ SC34, located SE, ~~16.98~~ miles by land. 17.00 miles. This proposed site is located in a TMDL Shed.

Proposed Manure Treatment/Storage Structure:

n/a -

Manure Utilization Areas: N/A: Broker

Additional requirements or setbacks? As Ag Facilities are not considered as contributors to the TMDL, no additional setback are required.

Pull the stream classification overlay and note the classifications for the water bodies in the drainage route.

Proposed Facility:

Freshwater

Proposed Manure Treatment/Storage Structure:

n/a

Manure Utilization Areas: N/A: Broker

Where the classification is not Freshwater, what additional requirements or setbacks are recommended? The nearest waters of the state is an intermittent stream located N, ~~482~~ feet by land. 428 feet

PET-00112

Pull the FEMA floodplain (Flood Zones) overlays or look at FEMA maps provided in the Animal Facility Management Plan and identify if the facility and manure utilization areas are located in the floodplain or the distance from the floodplain:

Proposed Facility: not within the 100 year floodplain.

Proposed Manure Treatment/Storage Structure: n/a

Manure Utilization Areas: N/A: Broker

Additional requirements or setbacks? no additional setbacks are required.

Pull the watershed overlays (12 Digit Hydro Unit) and identify the watershed in which the facility and manure utilization areas are located. Record the 12 Digit Hydro Unit under the section for agricultural facility overlay.

Proposed Facility: HUC 12 = 030501090905

Proposed Manure Treatment/Storage Structure: n/a

Manure Utilization Areas: N/A: Broker

Pull the Historic Preservation District overlay and review the proposed site in reference to the Historic Preservation District.

Is the facility located in a Historic Preservation District? YES or NO

Are any of the manure utilization areas located in a Historic Preservation District? YES NO N/A Manure Broker

If the proposed site is in the vicinity of the Historic Preservation District, then note the separation distance? Nickels - Milam House, S of Laurens off US 221 - located NW, ~~4.09~~ 3.08 miles by land.

Additional requirements or setbacks? Given the Air Quality memo and the by land distance, no additional setbacks are required.

PET-00113

Pull the Heritage Corridor overlay and review the proposed site in reference to the Heritage Corridor.

Is the facility located in the Heritage Corridor? **YES** or **NO**

Are any of the manure utilization areas located in the Heritage Corridor? **YES** **NO**

N/A Manure Broker

If the proposed site is in the vicinity of the Heritage Corridor, then note the separation distance?

The Greenwood section of the Heritage Corridor is located SW, ~~9.70~~ mile by land.
9.72 miles.

Additional requirements or setbacks? Given the Air Quality memo and by land distance, no additional setbacks are required.

Pull the State and National Parks and Forests (Forestry) overlay and review the proposed site in reference to them.

Is the facility located in a State or National Park or Forest? **YES** or **NO**

Is any of the manure utilization areas located in a State or National Park or Forest?

YES **NO** **N/A Manure Broker**

If the proposed site is in the vicinity of a State or National Park or Forest, then note the separation distance? The Sumter Nation Forest is located E, ~~9.40~~ miles
by land. 8.27 miles

Additional requirements or setbacks? Given the by land distance, no additional setbacks are required.

Evaluate the agricultural facility overlay and evaluate the presence of any other nonpoint sources located in the watershed. Do a query for buildings, active status, and the 10 Digit Hydro Unit recorded below. Do a query for fields, active status, and the 10 Digit Hydro Unit recorded below.

10 Digit Hydro Unit:

HUC 10 = 0305010909

Non Point Sources:

There are 25 permitted Ag Facilities. 20 poultry, 3 Dairy, 1 Swine ; 1 Turkey

There are 299 permitted land application sites.

Additional requirements or setbacks? no additional setbacks are required.

PET-00114

Insert the Topo Map layer after locating the USGS Quad for the application and determine the drainage routes and slope for the proposed site. You may also use DeLORME map.

Proposed Facility Drainage Route: Little River, Saluda River, Lake Murray, Saluda River, Broad River, Congaree River, Lake Marion, Santee River, Atlantic Ocean

Site Slope: ≥ 3%

Proposed Manure Treatment/Storage Structure Drainage Route:
N/A -

Manure Utilization Areas Drainage Route: **N/A: Broker**

Manure Utilization Area Slope: N/A - Broker.

Check the maps for locations of State Designated Focus Areas in Appendix E of the Agricultural Permit Application Review Procedures Manual.

Is the facility located in a State Designated Focus Area?
YES or NO

Are any of the manure utilization areas located in a State Designated Focus Area? **YES NO N/A Manure Broker**

If the proposed site is in the vicinity of a State Designated Focus Area, then note the separation distance?
not within 50 miles from the proposed site.

Additional requirements or setbacks? no additional setbacks are required

Check the maps for locations of State and Federal Research Areas in Appendix C of the Agricultural Permit Application Review Procedures Manual or GIS.

Is the facility located in a State or Federal Research Area? **YES or NO**

Are any of the manure utilization areas located in a State or Federal Research Area?
YES NO N/A Manure Broker

If the proposed site is in the vicinity of the State and Federal Research Areas, then note the separation distance? USDA - Cotton Quality Research Station - is located WNW, ~~53.00~~ 53.87 miles by land

Additional requirements or setbacks? no additional setbacks are required

PET-00115

Review the land use information within ¼ mile of the proposed site and determine if the site is located in the vicinity of a privately owned wildlife refuge, park, or trust property (WMP or GIS)? YES or NO

List the land use information. mixed woods planted Pines.

If yes, what is the distance between the proposed facility and the privately owned wildlife refuge, park, or trust property? Upstate Forever - located NW, ~~30.93~~ miles by land. 30.92 miles

Additional requirements or setbacks? no additional setbacks are required

TECHNICAL REVIEW:

→→→	**EVERY PLAN:**
✓	Facility location description and the zoning restrictions in the area.
p.4	Facility capacity, animal count, animal type, and normal production animal live weight at any one time.
p.4	Amount of animal manure and other animal by-products generated each year.
N/A	Amount of any scraped/separated solid animal manure generated each year.
N/A	Description of animal manure storage and storage capacity.
N/A	Description of animal manure treatment and capacity.
✓	Animal Manure Nutrient Concentrations or Analysis (DRY and/or WET).
p.6	Animal manure sampling frequency.
✓	Names, addresses, phone numbers of person(s) applying the manure, if different from applicant.
✓	Topography maps for the facility, structures, and manure utilization areas.
✓	Adjacent land use within ¼ mile of the property line.
✓	Location of inhabited dwellings and public places within ¼ mile of the property line.
✓	Locations of all water supply wells on the property and within 200 feet of the property line, or within 200 feet of the manure utilization areas.
✓	Maps showing the facility and manure utilization area boundaries and buffer zones.
✓	Right – of – ways (Utilities, roads, etc…) on the proposed site.
✓	Soils maps indicating the soil types for the facility and manure utilization areas.
✓	Description of soil types.
✓	Map showing the property boundaries and tax map numbers of the proposed site and all properties within ¼ mile of the property line.
✓	Information (map or verification) showing the location of the 100 – year floodplain in reference to the proposed site and the manure utilization areas.
✓	Setbacks verified. *Note any waivers or reductions of setbacks:* does At present, Applicant ~~doesn't~~ own property - A waiver is included for Heath Cuggins, proposed to build poultry facility on Adjacent property - Waiver will be required after both permits are issued, become effective -
✓	Distance between the ground surface and the seasonal high water table. *Is the separation distance less than 1.5 feet at the proposed site or manure utilization areas?* YES or NO

Bought property since relocation of barns - hasn't surveyed it into 3 parcels yet!

waivers will eventually be needed if permits become effective

PET-00116

N/A	Groundwater monitoring well details and proposed groundwater monitoring program (if required by Groundwater).
	Odor Abatement Plan which *may* include the following: ***Best Management Plan for Odor Control.*** (YES) or NO ***Description of treatment processes for the reduction of undesirable odor levels:*** Odor problems can be prevented or reduced through adequate drainage, runoff management, proper care to keep animals, facility clean, dry, and appropriate animal by-product removal, handling, transport. ***Additional setbacks from the property lines beyond the minimum setbacks:*** None ***Other methods or combination of these methods:*** Artificial breaking walls, trees, other vegetation to help filter & disperse dust, odor.
✓	
	Vector Abatement Plan which *shall* consist of the following: ***Normal Management Practices.*** (YES) or NO ***List of specific actions to be taken if vectors are identified as a problem?*** Remove excess building materials, remove excess feed from around houses, bins, keep grass, weeds mowed, keep all buildings free of trash, debris, proper use & servicing of bait stations, proper, timely disposal of dead animals, keep temporarily stored manure dry, covered.
✓	
	Dead Animal Disposal Plan. ***Primary Method:*** Burial & Composting ***Alternate Method:*** Burial
✓	
✓	Signed NOI forms and tax map labeled with property owner names for properties within 1320 feet of the proposed facility.
✓	Emergency Action Plan.
N/A	Written consent for reduction of setbacks, if applicable.
✓	Application Fee of $165.
✓	First year's annual operating fee of $75 for DRY and $150 for WET.
N/A	NPDES CAFO General Permit Coverage Fee of $100 if large CAFO.
	Manure Treatment and/or Storage Pond Design (if applicable): ***Freeboard:*** ____ ***Liner type:*** ____ ***Liner thickness:*** ____ ***Initial Specific Discharge:*** ____ ***Separation distance between the lowest point of the structure and the seasonal high water table:*** ____ ***Volume (must be less than 1 million cubic feet):*** ____
→ → →	**FOR FACILITIES THAT LAND APPLY MANURE**
	Crop Management Plan (crop type, application times) ***Adequate land available?*** YES or NO ***Crop schedule is consistent with manure storage period?*** YES or NO
✓	Type of equipment used to transport and/or spread the animal manure.
	Spray Application System plans and specifications.

PET-00117

N/A	Landowner information provided for each manure utilization area.
	List previous calendar years that animal manure was applied and amounts.
	Phosphorus Index results for each manure utilization area.
	Application Rates for each field.
	Signed land application agreements (including all required information) for manure utilization areas not owned by the applicant.
	Identify if the manure utilization areas are located in multiple AFMP? YES or NO *Adequate land available for all manure applied?* YES or NO
	Calibration methods for each piece of manure application equipment.
	Soil Monitoring Plan.
	Plans and specifications for all manure treatment or storage structures.

SECONDARY REVIEWS:

	Evaluate potential for increase in pollution of the water of the State. ***Is the proposed facility a No-Discharge operation?*** (YES) or NO ***Is the manure handled by contract disposal with a broker?*** (YES) or NO ***Is the manure handled by utilization on cropland as an alternative fertilizer?*** (YES) or NO ***Is the manure applied at agronomic rates?*** (YES) or NO ***Are the manure application sites and application methods proposed in accordance with the Best Management Practices designed to prevent runoff to surface and ground waters?*** (YES) or NO ***Determination:*** Given the water resources review and the Comprehensive Nutrient Management Plan states best management practices will be utilized, no anticipated increase in pollution to the waters of the state is expected.
	Bureau of Air Quality Review of the Potential for an increase in pollution of the air of the State and down-wind receptors. ***Recommendations or Response:*** As per memo dated July 19, 2016 from the Bureau of Air Quality (BAQ) an increase in pollution is not expected from this operation for this permit.
	Groundwater Review of the proposed burial sites, manure utilization areas, geography, soil types on the site, aquifer vulnerability and manure storage/treatment structures. ***Recommendations or Response:*** As per memo dated October 3, 2016 from the Bureau of Environmental Services, no zone of saturation was noted at a depth of 60 inches, therefore the site is approved for burial.
	Bureau of Disease Control. Send health concerns/physician statements to Department's Medical Staff for review and recommendations, if applicable. ***Recommendations or Response:*** four individuals were given medical packets to have their medical conditions evaluated, however only one was submitted to the Department. This persons health care provider did not indicate that she had a condition that would be exacerbated by the exposure to the poultry facilities, but did note that she continues to work on a farm.

The barns have been relocated further away from Lisbon Road and the applicant will be required to leave the 800 ft property line setback to remain

PET00118

PERMIT DECISIONS:

✓	Determine if Reporting should be required for those small animal facilities with less than 500,000 pounds normal production live weight. (Large facilities are automatically required to report annually) ***Determination:*** Annual reporting will be required for this permit. *If required, Create a date event in EFIS for the annual reports.*
✓	Determine if the facility should be required to submit a comprehensive report every five years. ***Determination:*** NO *If required, Create a date event in EFIS for the comprehensive report.*
✓	Send a letter to the applicant and each person who submitted written comments or asked to be notified of the permit decision.
	Publish a notice of decision in a local newspaper of general circulation. ***Date of Notice:*** Dec 14, 2016
	Determine if the permit will contain an expiration date? YES or (NO) ***If yes, Expiration Date:*** *Enter into EFIS date events.*
	Determine if the applicant has obtained the Manure Manager's Training/Certification required by regulation? YES or (NO) *If no, training/certification must be obtained within 1 year of the effective date of the permit. Ensure EFIS record contains a date event for this requirement.*

EXHIBIT D

288

Federal Register

Wednesday,
February 12, 2003

Part II

Environmental Protection Agency

40 CFR Parts 9, 122, 123, and 412
National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs); Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123 and 412

[FRL-7424-7]

RIN 2040-AD19

National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Today's final rule revises and clarifies the Environmental Protection Agency's (EPA) regulatory requirements for concentrated animal feeding operations (CAFOs) under the Clean Water Act. This final rule will ensure that CAFOs take appropriate actions to manage manure effectively in order to protect the nation's water quality.

Despite substantial improvements in the nation's water quality since the inception of the Clean Water Act, nearly 40 percent of the Nation's assessed waters show impairments from a wide range of sources. Improper management of manure from CAFOs is among the many contributors to remaining water quality problems. Improperly managed manure has caused serious acute and chronic water quality problems throughout the United States.

Today's action strengthens the existing regulatory program for CAFOs. The rule revises two sections of the Code of Federal Regulations (CFR), the National Pollutant Discharge Elimination System (NPDES) permitting requirements for CAFOs (Sec. 122) and the Effluent Limitations Guidelines and Standards (ELGs) for CAFOs (Sec. 412).

The rule establishes a mandatory duty for all CAFOs to apply for an NPDES permit and to develop and implement a nutrient management plan. The effluent guidelines being finalized today establish performance expectations for existing and new sources to ensure appropriate storage of manure, as well as expectations for proper land application practices at the CAFO. The required nutrient management plan would identify the site-specific actions to be taken by the CAFO to ensure proper and effective manure and wastewater management, including compliance with the Effluent Limitation Guidelines. Both sections of the rule also contain new regulatory requirements for dry-litter chicken operations.

This improved regulatory program is also designed to support and complement the array of voluntary and other programs implemented by the United States Department of Agriculture (USDA), EPA and the States that help the vast majority of smaller animal feeding operations not addressed by this rule. This rule is an integral part of an overall federal strategy to support a vibrant agriculture economy while at the same time taking important steps to ensure that all animal feeding operations manage their manure properly and protect water quality.

EPA believes that these regulations will substantially benefit human health and the environment by assuring that an estimated 15,500 CAFOs effectively manage the 300 million tons of manure that they produce annually. The rule also acknowledges the States' flexibility and range of tools to assist small and medium-size AFOs.

DATES: These final regulations are effective on April 14, 2003.

ADDRESSES: The administrative record is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/DC) in the basement of the EPA West Building, Room B-102, at 1301 Constitution Ave., NW., Washington, DC. The administrative record is also available via EPA Dockets (Edocket) at *http://www.epa.gov/edocket* under Edocket number OW-2002-0025. The rule and key supporting materials are also electronically available on the Internet at *http://www.epa.gov/npdes/caforule*.

FOR FURTHER INFORMATION CONTACT: Gregory Beatty, U.S. EPA, Office of Water, Office of Wastewater Management (4203M), 1200 Pennsylvania Avenue NW., Washington, DC 20460, 202-564-0724, for information pertaining to the NPDES Regulations (Part 122) or Paul Shriner, U.S. EPA, Office of Water, Office of Science and Technology (4303T), 1200 Pennsylvania Avenue NW., Washington, DC 20460, 202-566-1076, for information pertaining to the Effluent Guideline (Part 412).

SUPPLEMENTARY INFORMATION:

A. General Information
1. What entities are potentially regulated by this final rule?
2. How Can I Get Copies of This Document and Other Related Information?
B. Under what legal authority is this final rule issued?
C. How is this preamble organized?
D. What is the Comment Response Document?
E. What other information is available to support this final rule?
I. Background Information
A. What is the context for this rule?
B. Why is EPA revising the existing effluent guidelines and NPDES regulations for CAFOs?
C. What are the environmental and human health concerns associated with improper management of manure and wastewater at CAFOs?
1. How do the amounts of animal manure compare to human waste?
2. What are "excess manure nutrients" and why are they an indication of environmental concern?
3. What pollutants are present in animal manure and wastewater?
4. How do these pollutants reach surface water?
5. How is water quality impaired by animal manure and wastewater?
6. What ecological and human health impacts have been caused by CAFO manure and wastewater?
D. What are the roles of the key entities involved in the final rule?
1. CAFOs.
2. States.
3. EPA.
4. USDA.
5. Other stakeholders.
6. The public.
E. What principles have guided EPA's decisions embodied in this rule?
F. What are the major elements of this final rule? Where do I find the specific requirements?
1. NPDES Regulations for CAFOs.
2. Effluent Limitations Guidelines requirements for CAFOs.
II. What Events Have Led to This Rule?
A. The Clean Water Act
1. The National Pollutant Discharge Elimination System (NPDES) permit program
2. Effluent limitations guidelines and standards
3. Effluent guidelines planning process—Section 304(m) requirements
B. Existing Clean Water Act requirements applicable to CAFOs
1. Scope and requirements of the 1976 NPDES regulations for CAFOs
2. Scope and requirements of the 1974 feedlot effluent guidelines
C. USDA-EPA Unified National Strategy for Animal Feeding Operations
III. How Was This Final Rule Developed?
A. Small Business Advocacy Review (SBAR) Panel
B. Proposed Rule
C. 2001 Notice of Data Availability
D. 2002 Notice of Data Availability
E. Public Comments
F. Public outreach
1. Pre-proposal activities
2. Post-proposal activities
IV. CAFO Roles and Responsibilities
A. Who is affected by this rule?
1. What is an AFO?
2. What is a CAFO?
3. What types of animals are covered by today's rule?
4. Is my AFO a CAFO if it discharges only during large storm events?
5. How are land application discharges of manure and process wastewaters at CAFOs covered by this rule?
6. How is EPA applying the Agricultural Storm Water Exemption with respect to Land Application of CAFO Manure and Process Wastewaters?

described in section V.C of this preamble.

D. When Must States Issue New CAFO NPDES Permits?

EPA does not typically establish requirements for when States must develop and issue NPDES permits. However, today's regulations require CAFOs to seek NPDES permit coverage under general permits within certain time frames, and CAFOs may not discharge any pollutants to waters of the United States without a permit. Thus, it is in States' interests to issue new or revised NPDES permits in a timely manner. It is EPA's expectation that new general permits will be available no later than the date on which CAFOs have a duty to apply for an NPDES permit. *See* section IV.B.3 for a full description of when CAFOs must seek permit coverage.

E. What Types of NPDES Permits Are Appropriate for CAFOs?

The NPDES regulations provide the permitting authority with the discretion to determine the most appropriate type of permit for a CAFO. The two basic types of NPDES permits are individual and general permits. An individual permit is a permit specifically tailored for a specific facility, while a general permit is developed and issued by a permitting authority to cover multiple facilities with similar characteristics.

EPA recognizes that most CAFOs will likely be covered by NPDES general permits; however, there are some circumstances where an individual permit might be appropriate (*e.g.*, exceptionally large facilities, facilities that have a history of noncompliance, or facilities applying for approval to use an alternative performance standard in lieu of baseline technology-based effluent guidelines). The decision whether to issue a general or individual permit lies with the NPDES permitting authority. Section VI of the preamble discusses opportunity for public involvement in the NPDES permitting process.

As permit authorities explore innovative permitting approaches, the use of "watershed-based NPDES permits" might become more prevalent. For example, a watershed-based permit could be issued to CAFOs within a specific watershed. EPA is currently promoting pilot projects to help evaluate the benefits of watershed-based permitting and encourages States to use such a flexible tool to address the varied needs of specific watersheds.

F. What Flexibility Exists for States To Use Other Programs To Support the Achievement of the Goals of This Regulation?

In designing this final rule, EPA has striven to maximize the flexibility for States to implement appropriate and effective programs to protect water quality and public health by ensuring proper management of manure and related wastewater. This rule establishes binding legal requirements for Large CAFOs and maintains substantial flexibility for States to set other site-specific requirements for CAFOs as needed to achieve State program objectives. EPA encourages States to maximize use of voluntary and other non-NPDES programs to support efforts by medium and small operations to implement appropriate measures and correct problems that might otherwise cause them to be defined or designated as a CAFO. EPA encourages States to use the flexibility available under the rule so that their State non-NPDES programs complement the required regulatory program. The following examples can illustrate opportunities for this State flexibility:

- States are encouraged to work with State agriculture agencies, conservation districts, USDA and other stakeholders to create proactive programs to fix the problems of small and medium operations in advance of compelling the facilities to apply for NPDES permits.
- Where a small or medium facility has been covered by an NPDES permit, the permitting authority may allow the facility to exit the permit program at the end of the 5-year permit term if the problems that caused the facility to be defined or designated as a CAFO have been corrected to the satisfaction of the permitting authority.
- A small or medium AFO might be taking early voluntary action in good faith to develop and implement a comprehensive nutrient management plan, yet might have an unexpected situation that could be the basis for the facility's being defined or designated as a CAFO. EPA encourages the permitting authority to provide an opportunity to address the cause of the discharge before defining or designating the operation a CAFO.

These examples are intended to illustrate the flexibility that EPA is promoting with regard to medium and small operations. They are not applicable to Large CAFOs.

What did EPA propose? EPA's proposed rule included an option to expand substantially the criteria for when medium and small AFOs could be defined or designated as CAFOs. The effect of these proposed changes to the structure and definition of a CAFO was to require a substantially larger number of medium and small operations to be brought into the NPDES regulatory program. EPA estimated that as many as 30,000 medium and small AFOs could be brought into the regulatory program under this option. Another option presented in the proposal was to structure the permitting requirements to build in inherent flexibility for the medium facilities. In addition, the proposal and the subsequent 2001 Notice introduced a variety of more specific options for State flexibility, including one under which a State with an effective non-NPDES program could request to operate under a simplified permitting structure.

What were the key comments? The proposed expansion of the NPDES program for medium and small operations caused great concern, particularly among the States. Many comments from both States and facility operators centered on the desire that EPA recognize the effectiveness of existing State CAFO programs. More specifically, many States wanted EPA to allow effective State non-NPDES programs to operate in lieu of a State-run NPDES program, particularly in the event that EPA in the final rule expanded the criteria for defining medium facilities as CAFOs.

In general, comments from environmental groups expressed opposition to most types of flexibility because of concerns regarding potential loss of accountability at facilities and reduced public participation. Industry commenters generally supported State flexibility as necessary to address factors such as soil, climate, and site and regional characteristics that vary within and among States. Commenters maintained that State flexibility promotes those program elements States have found to be most effective and allows States and industry to achieve workable solutions to water quality issues. States also supported maintaining a high degree of flexibility both to accommodate State-specific characteristics and priorities and to preserve their investment in existing good quality programs. Some State and industry commenters asserted that EPA's options for flexibility were too limited.

Rationale. EPA recognizes that EPA's proposed expansion of the criteria for when medium and small AFOs would be defined or designated as CAFOs would have had the effect of eliminating the flexibility for States to use voluntary and other programs. EPA is also aware that many of the States authorized to

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

PROOF OF SERVICE

I hereby certify that, on behalf of the Petitioners, I have served Petitioners' Memorandum in Opposition to Respondents David Coggins, Heath Coggins, and Jim Young's Motion for Partial Summary Judgment in the above-captioned matter on August 10, 2017 by electronic mail and U.S. Postal Service to the below-named attorneys of record:

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FILED
AUG 10 2017
SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

FILED
AUG 10 2017
SC ADMIN LAW COURT

PETITIONERS' MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT BY RESPONDENTS DAVID COGGINS BROILERS, HEATH COGGINS BROILERS, AND JIM YOUNG BROILERS

Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers ("Respondents") moved for partial summary judgment ("Motion") concerning the issue of whether, as a matter of law, they must obtain a National Pollutant Discharge Elimination Permit ("NPDES") for the operation of their poultry production areas and, as applicable, land application for manure generated by their poultry production. Respondents meet the regulatory definition of a large concentrated feeding operation ("CAFO") within the State's NPDES regulations and thus, must obtain a NPDES permit for their proposed operations. In their Motion, Respondents ask this Court to ignore State NPDES regulations that were lawfully promulgated in 2003 and remain in force and effect. Respectfully, this Court should deny Respondents' Motion.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015).

ARGUMENT

To be deemed a CAFO as defined within S.C. Code Regs. 61-9 Part 122.23, the definition of an "animal feeding operation" ("AFO") must first be met, followed by tiered categories of AFOs triggered by the size of the operation. S.C. Code Regs. 61-9 Part 122.23(b)(1) and (2). An "animal feeding operation" is "a lot or facility (other than an aquatic animal production facility) ... where the following conditions are met:

> (A) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and

(B) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. S.C. Code Regs. 61-9 Part 122.23(b)(1).

Each of the Respondents' proposed operations will confine and feed or maintain chickens for 45 days or more in any 12-month period. Exh. A at DHEC_000920 (David Coggins Broilers' Comprehensive Nutrient Plan stating that the operation would confine 162,000 birds annually with 27,000 in each of the six proposed barns; approximately 4.5 flocks will be raised per year, each flock grown for 8-9 weeks); Exh. A at DHEC_002065 (Heath Coggins Broilers' Comprehensive Nutrient Plan stating that the operation would confine 237,000 birds annually with 35,000 in each of the six proposed barns; approximately 4.5 flocks will be raised each year, each grown for 8-9 weeks); Exh. A at DHEC_003187 (Jim Young Broilers' Comprehensive Nutrient Plan stating that the operation would confine 237,600 birds annually with 39,600 in each of the six proposed barns; approximately 4.5 flocks will be raised each year, each grown for 8-9 weeks); *see also* Exh. B (Deposition of DHEC permit reviewer William Chaplin, p. 24, line 2 – p. 27, line 1, in which he states that each proposed facility meets the definition of an "animal feeding operation" as defined under S.C. Code Regs. 61-9 Part 122.23(b)(1)).

Whether an "animal feeding operation" is a CAFO then turns on whether the operations meet any of the following definitions: 1) a Large CAFO; 2) a Medium CAFO; or 3) a Small CAFO. An "animal feeding operation" for production of broilers is a Large CAFO if it confines 125,000 or more birds per year. S.C. Code Regs. 61-9 Part 122.23(b)(4)(x). An "animal feeding operation" for production of broilers is a Medium CAFO if it confines 9,000 to 29,999 birds annually <u>and</u> pollutants are either discharged into waters of the State through a man-made conveyance or discharged directly into waters of the State. S.C. Code Regs. 61-9 Part 122.23(b)(6)(i)(I) and (ii) (emphasis added). A Small CAFO is an "animal feeding operation" that is not a Medium CAFO <u>and</u> is designated as a CAFO "upon determining that it is a significant contributor of pollutants to waters of the State. S.C. Code Regs. 61-9 Part 122.23(b)(9) and (c) (emphasis added). An "animal feeding operation" deemed to be a Large, Medium or Small CAFO "are point sources that require NPDES permits for discharges or potential discharges." S.C. Code Regs. 61-9.122(a).

There is no question that the Respondents meet the definition of a Large CAFO. David Coggins Broilers proposes to confine and grow 162,000 birds annually. Exh. A at DHEC_000920.

Heath Coggins Broilers proposes to confine and grow 237,000 birds annually. Exh. A at DHEC_003187. Jim Young Broilers proposes to confine and grow 237,600 birds annually. Exh. A at DHEC_003187. Each proposed facility seeks to confine over 125,000 animals annually. Therefore, Respondents must apply for a NPDES Permit or demonstrate "no potential to discharge under any circumstance or climactic condition." "Once an operation is defined as a CAFO, the NPDES requirements for CAFO apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal." S.C. Code Regs. 61-9 Part 122.23(a). The NPDES permit requirements apply to the production area[1] of a CAFO as well as land under the control of the CAFO owner or operator on which manure is applied.[2] S.C. Code Ann. 61-9 Part 122.23(a) and (e).

Respondents claim that their proposed facilities are not required to obtain an NPDES Permit because their proposed facilities would be operating under the State's animal agricultural regulations, S.C. Code Regs. 61-43, which state that permits for animal agricultural facilities are "no-discharge." S.C. Code Regs. 61-43 Part 200.20. In spite of the "no-discharge" language within S.C. Code Reg. 61-43, this regulation expressly references the State's NPDES permitting regulations as applicable to "concentrated animal feeding operations as defined by Regulation 61-9." S.C. Code Regs. 61-43 Part 200.40(D). Under S.C. Code Regs. 61-43 Part 200.70, which address the decision-making process of the South Carolina Department of Health and Environmental Control ("DHEC"), "[i]f a facility is classified as a 'concentrated animal feeding operation] under the NPDES Regulation 61-9, the expiration date [of the permit] shall be no more than five years after the issue date." S.C. Code Regs. 61-43 Part 200.70(I). The State's NPDES regulation would also be triggered by the regulation's charge that DHEC act on all permits "to prevent, as far as reasonable possible under state and federal laws, an increase in pollution of the waters ... of the State." S.C. Code Regs. 61-43 Part 200.70(E). DHEC's internal permit review checklist for animal agricultural facilities states that the applicant must submit a fee for a NPDES

[1] "Production area" is defined in part as the animal confinement area, manure storage area, raw materials storage area, and waste containment area. S.C. Code Regs. 61-9 Part 122.23(b)(8). In the case of broiler production areas, the definition includes "confinement houses," "runoff ponds," "storage sheds," "stockpiles," and "composting piles." *Id.*

[2] An exception to NPDES coverage of land application of manure exists at S.C. Code Regs. 61-9 Part 122.23(e).

CAFO general permit if the facility is a Large CAFO. Exh. C, p. 8. To the extent that Respondents are asserting that the "no-discharge" standard within S.C. Code Regs. 61-43 Part 200 shields them from the requirement to obtain a NPDES permit, these references to CAFO NPDES regulations within Part 200 strongly suggest otherwise.

In addition, Respondents suggest that South Carolina's NPDES regulations do not apply to them because they flatly state that they will not discharge any pollutants. Without the discharge of a pollutant, Respondents argue that they "are not statutorily obligated to seek or obtain an NPDES Permit" under the Clean Water Act and South Carolina's CAFO NPDES regulations. Resp. Mot. Partial Summary Judgment, p. 4. Yet the State's CAFO NPDES regulations clearly and unambiguously require Large CAFOs to obtain a NPDES permit for "discharges or potential discharges." S.C. Code Regs. 61-9 Part 122.23(a). Large CAFOs may avoid the NPDES permit requirement only if they demonstrate "that there is no potential for any CAFO manure, litter, or process wastewater to be added to waters of the State under any circumstance or climatic condition." S.C. Code Regs. 61-9 Part 122.23(f)(1). Moreover, in spite of its declaration that the animal agricultural permits are no-discharge permits, S.C. Code Regs. 61-43 Part 200 lacks any provisions comparable to the Clean Water Act requiring applicants to demonstrate that no discharge of waste will occur. *See* 33 U.S.C. § 1342(a)(2) (stating that the EPA "shall prescribe conditions for such permits to <u>assure compliance</u> with [all applicable] requirements, including effluent limitations].; 33 U.S.C. § 1342(b) (stating that state permitting programs must "apply, and <u>insure compliance with</u>, any applicable [effluent limitations and standards]." 33 U.S.C. § 1342(b) (emphasis added).

Under a NPDES permit, a Large CAFO must demonstrate that no-discharge will occur through effluent limitations applicable to CAFOs. S.C. Code Regs. 61-9 Part 125.3(c)(1) ("Technology-based treatment requirements may be imposed by [a]pplication of EPA-promulgated effluent limitations developed under section 304 of the CWA to dischargers by category or subcategory."); 40 C.F.R. § 412 .31 and 40 C.F.R. § 412.46; *see also* S.C. State Register, Vol. 27, Issue 12 (Dec. 26, 2003)(... " references in regulations promulgated in South Carolina would require compliance by S.C. CAFO with the U.S. EPA Effluent Limitations Guidelines."). In contrast with the State's animal agricultural permitting regulations, NPDES effluent limitations

require engineering and design of containment systems to capture process wastewater[3] from the production area, require tighter and more detailed management plans, and impose robust reporting requirements. *See* 40 C.F.R. 412, Subpart B.

S.C. Code Regs. 61-43 does not and cannot replace the State's CAFO NPDES regulations. The two regulatory schemes work together. As explained by the EPA, the CAFO NPDES regulations "establish binding legal requirements for Large CAFOs and maintains substantial flexibility for States to set other site specific requirements for CAFOs as needed to achieve State program objectives." 68 FED. REG. 7232 (Feb. 12, 2003) (excerpt attached as Exh. D). "EPA encourages States to maximize use of voluntary and other non-NPDES programs to support efforts by medium and small operations to implement appropriate measures and correct problems that might otherwise cause them to be defined or designated as a CAFO." *Id.* Thus, in South Carolina, Large CAFOs must obtain an animal agricultural permit and a NPDES permit. The State's animal agricultural regulations comprise a program that provides environmental review of medium and small animal feeding operations that may not meet the definition of a CAFO under the NPDES regulations, but serve "to implement appropriate measures and correct problems that might otherwise cause [medium and small CAFOs] to be defined or designated as a CAFO." *Id.*

Respondents are Large CAFOs seeking to avoid South Carolina's CAFO NPDES Regulation by arguing that the ruling in *Waterkeeper Alliance Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2nd Cir. 2005) that invalidated the EPA's 2003 Rule requiring a NPDES permit for "potential discharges" somehow nullifies South Carolina's CAFO NPDES regulation that promulgated the EPA's 2003 Rule. The Clean Water Act does not prevent states from promulgating water quality regulations that are different than federal requirements so long as state regulations meet the minimum requirements of the Act. Under 33 U.S.C. § 1370, nothing in the Clean Water Act:

> "shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent

[3] Process wastewater includes leaking watering systems within poultry barns and runoff from water coming into contact with uncovered manure stockpiles. 40 C.F.R. § 412.2(d); S.C. Code Regs. 61-9 Part 122.23(b)(8).

> standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Indeed, "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...." 33 U.S.C. § 1251 (emphasis added). The Second Circuit's invalidation of the 2003 EPA CAFO Rule's duty to apply does not touch a State's CAFO NPDES regulations, including higher standards such as a duty for Large CAFOs to apply for a permit for potential discharges. Although the State of South Carolina has had ample opportunity to revise its CAFO NPDES Regulation over the past 12 years since *Waterkeeper* was decided, the State has chosen not to revise its Regulations.[4]

Further, the State's NPDES regulations were promulgated under both the Clean Water Act and the South Carolina Pollution Control Act. S.C. Code Regs. 61-9 Part 122.1(a). The Pollution Control Act provides broad discretion to DHEC to prevent pollution under permit programs. Under S.C. Code Ann. § 48-1-50(5), DHEC is authorized to "develop a general comprehensive program for the abatement, control and prevention of air and water pollution." (emphasis added). "Pollution" is defined broadly as "the presence in the environment of any substance, including, but not limited to, sewage, industrial waste, other waste, air contaminant, or any combination thereof in such quantity and of such characteristics and duration as may cause, or tend to cause the environment of the State to be contaminated, unclean, noxious, odorous, impure or degraded, or which is, or tends to be injurious to human health or welfare; or which damages property, plant, animal or marine life or use of property ...." S.C. Code Ann. §

[4] In *Waterkeeper*, the Court gave credence to the idea that legislation providing the power to impose a duty for Large CAFOs to apply for a NPDES permit would be justifiable. 399 F.3d 486 at 524, n. 22. "EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process." *Id.*

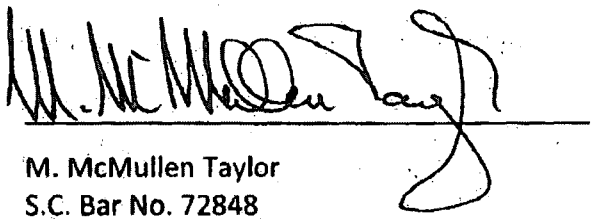
48-1- 10(7) (emphasis added). DHEC is empowered to "issue, deny, revoke, suspend or modify permits, under such conditions as it may prescribe for the discharge of sewage, industrial waste or other waste." S.C. Code Ann. § 48-1-50(5) (emphasis added). In addition to the Clean Water Act, the State is entitled to promulgate its CAFO NPDES regulation in the manner it did under the separate authority of the Pollution Control Act.

CONCLUSION

At bottom, Respondents ask this Court to ignore South Carolina's CAFO NPDES regulations. However, this Court cannot ignore the law. It must follow the law as written. *Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). The State's CAFO NPDES regulations are in force and effect, and nothing within the State's animal agricultural permitting regulations shield Respondents from their application to Large CAFOs. Respectfully, for the reasons set forth herein and any other grounds verbally expressed at the outset of the hearing of these contested cases, Respondents' Motion for Partial Summary Judgment should be denied.

{SIGNATURE PAGE FOLLOWS}

Respectfully Submitted,



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Attorneys for Petitioners

August 10, 2017

EXHIBIT A

303

SOUTH CAROLINA
AGRI-WASTE TECHNOLOGY INC.
No. 3399
CERTIFICATE OF AUTHORIZATION

AWT
Engineers and Soil Scientists

Agri-Waste Technology, Inc.
501 N. Salem Street, Suite 203
Apex, North Carolina 27502
919-859-0669
www.agriwaste.com

SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25556
CHRISTOPHER T. MOSLEY

Christopher T. Mosley
6/2/16

Comprehensive Nutrient Management Plan (CNMP)
(Version 2, 9/14/2011 Format)

The Comprehensive Nutrient Management Plan (CNMP) is an important part of the conservation management system (CMS) for your Animal Feeding Operation (AFO). This CNMP documents the planning decisions and operation and maintenance for the animal feeding operation. It includes background information and provides guidance, reference information and Web-based sites where up-to-date information can be obtained. Refer to the Producer Activity Document (PAD) for information about day-to-day management activities and recordkeeping. Both this CNMP document and the PAD document shall remain in the possession of the producer/landowner.

Farm/Facility: David Coggins Broilers

Farm Address:
Lisbon Rd. Near Hwy 72
Mountville, SC 29370
864-981-5604

Mailing Address:
1094 Lisbon Rd.
Mountville, SC 29370

Owner/ Operator: David Coggins

Driving Directions: (From Mountville P.O.) Head E on Mountville Rd. and turn left onto SC-72 E, drive 1.8 miles. Turn left onto Lisbon Rd. drive 0.3 miles the farm is on the right.

County or Local Zoning Restrictions: There are no county or local zoning restrictions that impact this CNMP.

Hydrologic Unit Code (Facility): 030501090905

Flood Plain: The facility is located outside the 100-yr floodplain according to FEMA Maps FEMA FIRM Map 45059 C0365C.

Farm Headquarters Latitude/Longitude: 34° 23' 40.095" N 81° 57' 35.845" W

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check Rec'd

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JUN 13 2016
Stormwater, Construction & Agricultural Permitting Division

DHEC_000917

Owner

Owner/Operator: David Coggins	Phone: 864-981-5604
Address: 1094 Lisbon Rd. Mountville, SC 29370	

The following people have assisted with the development of the CNMP and certify that their element meets all applicable NRCS standards.

Manure Handling and Storage

Signature: Chris Mosley	Date: 6/2/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Nutrient Management

Signature: Chris Mosley	Date: 6/2/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Land Treatment Practices

Signature: Chris Mosley	Date: 6/2/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Comprehensive Nutrient Management Plan

I certify that I have reviewed this plan for technical adequacy and that the elements of the CNMP are compatible, reasonable, and able to be implemented. All elements meet NRCS standards and specifications as well as requirements set forth by the South Carolina Department of Health and Environmental Controls.	
Signature: Chris Mosley	Date: 6/2/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Owner

As the owner/operator, I certify that I, as the decision-maker, have been involved in the planning process and agree the items/practices listed in each element are needed. I understand that I am responsible for complying with SCDHEC Regulation 61-43 and for keeping all necessary records associated with the implementation of this CNMP. It is my intent to implement /accomplish this CNMP in a timely manner as described in the plan.	
Signature:	Date: 6/2/16

DHEC_000918

Table of Contents

Section 1. Background and Site Information
- 1.1. General Description of Operation
- 1.2. SC Permit Applications
- 1.3. Preliminary Site Approval
- 1.4. Litter Sampling
- 1.5. Existing Waste Management or Nutrient management Plans
- 1.6. Operator or manager Certifications
- 1.7. Notice(s) of Public Intent
- 1.8. Waivers (Neighboring Landowners)
- 1.9. Manure Application Agreements
- 1.10. Natural Resource Concerns

Section 2. Manure Handling and Storage
- 2.1. Map(s) of Production Area
- 2.2. Production Area Conservation Practices
- 2.3. Manure Storage
- 2.4. Animal Inventory
- 2.5. Normal Animal Mortality Management
- 2.6. Planned Manure Exports off the Farm
- 2.7. Planned Manure Imports onto the Farm
- 2.8. Planned Internal Transfers of Manure

Section 3. Farmstead Safety and Security
- 3.1. Emergency Action Plan
- 3.2. Biosecurity Measures
- 3.3. Emergency Contact Information
- 3.4. Vector and Odor Abatement Plan
- 3.5. Vector Control and Abatement
- 3.6. Air Quality
- 3.7. Catastrophic Animal Mortality Management
- 3.8. Chemical Handling

Section 4. Land Treatment

Section 5. Soil and Risk Assessment Analyses

Section 6. Nutrient Management
- 6.1. Manure Nutrient Analyses
- 6.2. Manure Inventory Annual Summary
- 6.3. Plan Nutrient Balance

Section 7. Feed Management

Section 8. Other Utilization Options

Section 9. Recordkeeping Forms (see Producer Activity Document)

Section 10. Manure Storage Facility Design and Specifications

Section 11. References
- 11.1. Publications
- 11.2. Software and Data Sources

Section 12. SC Regulation 61-34: Animal Facility Management Plan Cross-Reference

Section 13. Attachments

Section 1. Background and Site Information

1.1. General Description of Operation

David Coggins Brollers is a planned six barn (45' X 600') broiler facility in Mountville, SC. The planned population is 162,000 brollers with 27,000 birds in each house. Brollers will be raised on compacted clay floors covered with shavings. The exhaust fans for the barns will be on the NE ends and the barns will be spaced 60' apart. Approximately 4.5 flocks will be raised each year from 0.1 lbs. to 9 lbs. Each flock will be raised for 8-9 weeks with 2-3 weeks between flocks. The normal production live weight is approximately 737,100 lbs. Each year a full cleanout will occur in the spring. Between all other flocks crusting and windrowing will be alternated. The annual litter production is estimated at 988 tons per year.

All litter will be exported by L & M Litter Brokers (19,463-AG). Two planned 40' X 184' stacking sheds will hold litter until it is exported. Both stacking sheds will be built at a later date once DHEC has approved the plans and specs. Until stacking sheds are constructed litter must be exported immediately or placed on a DHEC approved pad for no more than three days.

Normal mortalities will be handled through burial until a planned 22' X 70' composter is built. The composter will be built at a later date once the plans and specs have been approved by DHEC. Emergency mortalities will be handled through burial.

1.2. South Carolina Agricultural Facilities Permit, Stacking Shed, and Composter Application Form

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Agricultural Permitting Division

SOUTH CAROLINA
AGRI-WASTE TECHNOLOGY INC.
No. 3399
CERTIFICATE OF AUTHORIZATION

Engineers and Soil Scientists

Agri-Waste Technology, Inc.
501 N. Salem Street, Suite 203
Apex, North Carolina 27502
919-859-0669
www.agriwaste.com

SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25956
CHRISTOPHER T. MOSLEY

Christopher T. Mosley
7/22/16

Comprehensive Nutrient Management Plan (CNMP)
(Version 2, 9/14/2011 Format)

The Comprehensive Nutrient Management Plan (CNMP) is an important part of the conservation management system (CMS) for your Animal Feeding Operation (AFO). This CNMP documents the planning decisions and operation and maintenance for the animal feeding operation. It includes background information and provides guidance, reference information and Web-based sites where up-to-date information can be obtained. Refer to the Producer Activity Document (PAD) for information about day-to-day management activities and recordkeeping. Both this CNMP document and the PAD document shall remain in the possession of the producer/landowner.

Farm/Facility: Heath Coggins Broilers

Farm Address:
Lisbon Rd. Near Hwy 72
Mountville, SC 29370
864-872-4098

Mailing Address:
113 Moreland Ave.
Laurens, SC 29360

Owner/Operator: Heath Coggins

Driving Directions: (From Mountville P.O.) Head E on Mountville Rd. and turn left onto SC-72 E, drive 1.8 miles. Turn left onto Lisbon Rd. drive 0.3 miles the farm is on the right.

County or Local Zoning Restrictions: There are no county or local zoning restrictions that impact this CNMP.

Hydrologic Unit Code (Facility): 030501090905

Flood Plain: The facility is located outside the 100-yr floodplain according to FEMA Maps FEMA FIRM Map 45059 C0365C.

Farm Headquarters Latitude/Longitude: 34° 23' 43.202" N 81° 57' 18.477" W
34.39533 -81.9553

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Stormwater, Construction & Agricultural Permitting Division

Owner

Owner/Operator: Heath Coggins	Phone: 864-872-4098
Address: 113 Moreland Ave Greenville SC 29360	

The following people have assisted with the development of the CNMP and certify that their element meets all applicable NRCS standards.

Manure Handling and Storage

Signature: Chris J Mosley	Date: 7/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Nutrient Management

Signature: Chris J Mosley	Date: 7/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Land Treatment Practices

Signature: Chris J Mosley	Date: 7/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Comprehensive Nutrient Management Plan

I certify that I have reviewed this plan for technical adequacy and that the elements of the CNMP are compatible, reasonable, and able to be implemented. All elements meet NRCS standards and specifications as well as requirements set forth by the South Carolina Department of Health and Environmental Controls.	
Signature: Chris J Mosley	Date: 7/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Owner

As the owner/operator, I certify that I, as the decision-maker, have been involved in the planning process and agree the items/practices listed in each element are needed. I understand that I am responsible for complying with SCDHEC Regulation 61-43 and for keeping all necessary records associated with the implementation of this CNMP. It is my intent to implement /accomplish this CNMP in a timely manner as described in the plan.	
Signature:	Date: 6/2/16

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Table of Contents

Section 1. Background and Site Information
- 1.1. General Description of Operation
- 1.2. SC Permit Applications
- 1.3. Preliminary Site Approval
- 1.4. Litter Sampling
- 1.5. Existing Waste Management or Nutrient management Plans
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Section 1. Background and Site Information

1.1. General Description of Operation

Heath Coggins Broilers is a planned six barn (66' X 600') broiler facility in Mountville, SC. The planned population is 237,600 broilers with 39,600 birds in each house. Broilers will be raised on compacted clay floors covered with shavings. The exhaust fans for the barns will be on the NE ends and the barns will be spaced 60' apart. Approximately 4.5 flocks will be raised each year from 0.1 lbs. to 9 lbs. Each flock will be raised for 8-9 weeks with 2-3 weeks between flocks. The normal production live weight is approximately 1,081,080 lbs. Each year a full cleanout will occur in the spring. Between all other flocks crusting and windrowing will be alternated. The annual litter production is estimated at 1,449 tons per year.

All litter will be exported by L & M Litter Brokers (19,463-AG). Two planned 40' X 200' stacking sheds will hold litter until it is exported. Both stacking sheds will be built at a later date once DHEC has approved the plans and specs. Until stacking sheds are constructed litter must be spread immediately, exported immediately, or placed on a DHEC approved pad for no more than three days.

Normal mortalities will be handled through burial until a planned 22' X 90' composter is built. The composter will be built at a later date once the plans and specs have been approved by DHEC. Emergency mortalities will be handled through burial.

1.2. South Carolina Agricultural Facilities Permit Application, Stacking Shed Application, and Composter Application

SOUTH CAROLINA
AGRI-WASTE TECHNOLOGY INC.
No. 3399
CERTIFICATE OF AUTHORIZATION

Engineers and Soil Scientists
Agri-Waste Technology, Inc.
501 N. Salem Street, Suite 203
Apex, North Carolina 27502
919-859-0869
www.agriwaste.com

SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25556
CHRISTOPHER T. MOSLEY

6/22/16

Comprehensive Nutrient Management Plan (CNMP)
(Version 2, 9/14/2011 Format)

The Comprehensive Nutrient Management Plan (CNMP) is an important part of the conservation management system (CMS) for your Animal Feeding Operation (AFO). This CNMP documents the planning decisions and operation and maintenance for the animal feeding operation. It includes background information and provides guidance, reference information and Web-based sites where up-to-date information can be obtained. Refer to the Producer Activity Document (PAD) for information about day-to-day management activities and recordkeeping. Both this CNMP document and the PAD document shall remain in the possession of the producer/landowner.

Farm/Facility: Jim Young Broilers

Farm Address:
Lisbon Rd near Hwy 72
Mountville, SC 29370
803-479-1363

Mailing Address:
107 Batteaux Pl.
Blythewood, SC 29016

Owner/Operator: James Young Jr.

Driving Directions: (From Mountville P.O.) Head E on Mountville Rd. and turn left onto SC-72 E, drive 1.8 miles. Turn left onto Lisbon Rd. drive 0.3 miles the farm is on the right.

County or Local Zoning Restrictions: There are no county or local zoning restrictions that impact this CNMP.

Hydrologic Unit Code (Facility): 030501090905

Flood Plain: The facility is located outside the 100-yr floodplain according to FEMA Maps FEMA FIRM Map 45059 C0365C.

Farm Headquarters Latitude/Longitude: 34° 23' 24.193" N 81° 57' 19.432" W
34.39005 -81.95539

Owner

Owner/Operator: James Young Jr.	Phone: 803-479-1363
Address: 107 Betteaux Pl. Blythewood, SC 29016	

The following people have assisted with the development of the CNMP and certify that their element meets all applicable NRCS standards.

Manure Handling and Storage

Signature: Chris J Mosley	Date: 6/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Nutrient Management

Signature: Chris J Mosley	Date: 6/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Land Treatment Practices

Signature: Chris J Mosley	Date: 6/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Comprehensive Nutrient Management Plan

I certify that I have reviewed this plan for technical adequacy and that the elements of the CNMP are compatible, reasonable, and able to be implemented. All elements meet NRCS standards and specifications as well as requirements set forth by the South Carolina Department of Health and Environmental Controls.	
Signature: Chris J Mosley	Date: 6/22/16
Name: Chris Mosley, P.E.	
Title: Vice President, Senior Project Engineer	

Owner

As the owner/operator, I certify that I, as the decision-maker, have been involved in the planning process and agree the items/practices listed in each element are needed. I understand that I am responsible for complying with SCDHEC Regulation 61-43 and for keeping all necessary records associated with the implementation of this CNMP. It is my intent to implement /accomplish this CNMP in a timely manner as described in the plan.	
Signature:	Date: 6/2/16

Table of Contents

Section 1. Background and Site Information
- 1.1. General Description of Operation
- 1.2. SC Permit and Expansion Application
- 1.3. Preliminary Site Approval
- 1.4. Litter Sampling
- 1.5. Existing Waste Management or Nutrient management Plans
- 1.6. Operator or manager Certifications
- 1.7. Notice(s) of Public Intent
- 1.8. Waivers (Neighboring Landowners)
- 1.9. Manure Application Agreements
- 1.10. Natural Resource Concerns

Section 2. Manure and Wastewater Handling and Storage
- 2.1. Map(s) of Production Area
- 2.2. Production Area Conservation Practices
- 2.3. Manure Storage
- 2.4. Animal Inventory
- 2.5. Normal Animal Mortality Management
- 2.6. Planned Manure Exports off the Farm
- 2.7. Planned Manure Imports onto the Farm
- 2.8. Planned Internal Transfers of Manure

Section 3. Farmstead Safety and Security
- 3.1. Emergency Response Plan
- 3.2. Biosecurity Measures
- 3.3. Emergency Contact Information
- 3.4. Vector and Odor Abatement Plan
- 3.5. Vector Control and Abatement
- 3.6. Air Quality
- 3.7. Catastrophic Animal Mortality Management
- 3.8. Chemical Handling

Section 4. Land Treatment
- 4.1. Map(s) of Fields and Conservation Practices
- 4.2. Land Treatment Conservation Practices

Section 5. Soil and Risk Assessment Analyses
- 5.1. Soil Information
- 5.2. Predicted Soil Erosion
- 5.3. Nitrogen and Phosphorus Risk Analyses
- 5.4. Additional Field Data Required by Risk Assessment Procedure(s)

Section 6. Nutrient Management
- 6.1. Field Information
- 6.2. Manure Application Setback Distances
- 6.3. Soil Test Data
- 6.4. Manure Nutrient Analyses
- 6.5. Planned Crops and Fertilizer Recommendations
- 6.6. Manure Application Planning Calendar
- 6.7. Planned Nutrient Applications
- 6.8. Field Nutrient Balance
- 6.9. Projected Field Phosphorous Change
- 6.10. Manure Inventory Annual Summary
- 6.11. Fertilizer/Material Annual Summary
- 6.12. Plan Nutrient Balance

Section 7. Feed Management

Section 8. Other Utilization Options

Section 9. Recordkeeping Forms (see Producer Activity Document)

Section 10. Manure Storage Facility Design and Specifications
- 10.1. Monthly Volumes Entering Storage System
- 10.2. Composter Design

Section 11. References
- 11.1. Publications
- 11.2. Software and Data Sources

Section 12. SC Regulation 61-43: Animal Facility Management Plan Cross-Reference

Section 13. Attachments

Section 1. Background and Site Information

1.1. General Description of Operation

Jim Young Broilers is a planned six barn (66' X 600' Facility in Mountville, SC. The planned population is 237,600 broilers with 39,600 in each house. Broilers will be raised on compacted clay floors covered with shavings. The exhaust fans for each barn will be on the NE ends and the barns will be spaced 60' apart. Approximately 4.5 flocks will be raised from 0.1 lbs. to 9 lbs. Each flock will be raised 8-9 weeks with 2-3 weeks between flocks. The normal production live weight is approximately 1,081,080 lbs. Barns will be windrowed and have 1/3 of the litter removed every other flock and have crusting for all other flocks. Approximately 1,449 tons of litter will be produced each year.

Litter will be spread using a pull behind spreader onto 192.7 spreadable acres. All fields are in a corn, wheat, soybean rotation and are no-till planted. Litter will be spread pull behind solid spreader. Excess litter will be exported by L & M Litter Brokers (19,463-AG). Two planned 40' X 200' stacking shed will hold litter from cleanouts. Both stacking shed will be built at a later date once DHEC has approved the plans and specs.

Normal mortalities will be handled through burial and a planned 22' 90' composter. The composter will be built at a later date once the plans and specs have been approved by DHEC. Emergency mortalities will be buried.

1.2. South Carolina Agricultural Facilities Permit, Stacking Shed, and Composter Application Form

EXHIBIT B

316

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and Jim Young Broilers, Respondents.	Docket No. 17-ALJ-07-0039-CC **DEPOSITION OF WILLIAM CHAPLIN**
Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and David Coggins Broilers, Respondents.	Docket No. 17-ALJ-07-0041-CC
Charles S. Blackmon, and South Carolinians for Responsible Agricultural Practices, Petitioners, v. South Carolina Department of Health & Environmental Control, and Heath Coggins Broilers, Respondents.	Docket No. 17-ALJ-07-0042-CC

DEPOSITION OF

WILLIAM CHAPLIN

****

Wednesday, June 21, 2017
10:06 a.m. - 1:49 p.m.

The deposition of William Chaplin, taken on behalf of the Petitioners at the offices of Creel Court Reporting, Inc., 1230 Richland Street, Columbia, South Carolina, on the 21st day of June, 2017 before Donna Currey, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

APPEARANCES

M. McMullen Taylor, Esquire
Mullen Taylor, LLC
1230 Richland Street
Post Office Box 8567
Columbia, South Carolina 29202
Attorney for the Petitioners

Benjamin P. Mustian, Esquire
Willoughby & Hoefer, P.A.
930 Richland Street
Post Office Box 8416
Columbia, South Carolina 29202
Attorney for the Respondents

Stephen P. Hightower, Esquire
Department of Health and Environmental Control
Office of General Counsel
2600 Bull Street
Columbia, South Carolina 29201
Attorney for DHEC

1 **time.)**
2 Q: Okay, we're referring back to Petitioner's
3 Exhibit Number Four from yesterday's deposition
4 which is the State of South Carolina's CAFO
5 Regulations 1.22 -- no, 122.23. Can you tell
6 me if each of these permittee meet the
7 definition under B1 of animal feeding
8 operation?
9 **MR. HIGHTOWER:** Objection.
10 **MR. MUSTIAN:** Mullen, while he's looking at that
11 just for the record, since I don't have a copy
12 and since I wasn't in the deposition yesterday,
13 could we just clarify that this is Bates Number
14 PET-1826 through 1831?
15 **MS. TAYLOR:** Certainly, thank you.
16 A: You said B1?
17 Q: Correct.
18 A: Animal feeding operation means a lot or
19 facility other than aquatic animal production
20 where the following are met. Now, do I need to
21 read this or you just want to ask me a question
22 about it?
23 Q: Well, does David Coggins permit application
24 meet the definition of animal feeding
25 operation?

1 **MR. MUSTIAN:** Object to the form.
2 A: Yes.
3 Q: If you look down at B2, concentrated animal
4 feeding operation means an animal feeding
5 operation that is defined as a large CAFO or as
6 a medium CAFO by the terms of this paragraph.
7 And if you drop down to section four, a large
8 CAFO is defined if it's stables or confined as
9 many as or more than the numbers of animals
10 classified in any of the following categories,
11 and if you turn to the next page, Subsection X,
12 it's got 125,000 chickens other than laying
13 hens if the AFO uses other than a liquid manure
14 handing system. Does David Coggins facility
15 meet the definition of a large CAFO?
16 **MR. MUSTIAN:** Object to the form.
17 **MR. HIGHTOWER:** Objection as to form.
18 A: Based on the animal numbers, it does. But a
19 CAFO by definition is allowed to discharge and
20 again as I'll state again, South Carolina
21 regulations do not allow discharges.
22 Q: And let's move to Mr. Heath Coggins. Does
23 Heath Coggins' permit application meet the
24 definition of animal feeding operation as
25 contained in Subsection B1?

1 A: Yes.
2 **MR. MUSTIAN:** Object to the form.
3 **MR. HIGHTOWER:** Objection to form.
4 Q: Does Mr. Heath Coggins application meet the
5 definition of large CAFO under Subsection 4X.
6 **MR. MUSTIAN:** Object to the form.
7 **MR. HIGHTOWER:** Objection to form.
8 A: Again, the number of animals is defined by the
9 EPA as a large CAFO at a 125,000 animals,
10 chickens in this case. It does meet that
11 number of animals but again, once I said, South
12 Carolina regulations are no discharge. So, we
13 don't consider our facilities CAFOs as much as
14 we consider them animal feeding operations.
15 Q: But we are looking at this 122.23. This is the
16 South Carolina Regulation, correct?
17 A: This is 61-9, I think.
18 Q: The South Carolina Regulation?
19 A: Yes.
20 Q: Moving to Mr. Young, the same question. Does
21 Mr. Young's permit application meet the
22 definition of animal feeding operation under
23 122.23 B1?
24 **MR. MUSTIAN:** Object to the form.
25 **MR. HIGHTOWER:** Objection to form.

1 A: Yes.
2 Q: Does Mr. Young's permit application meet the
3 definition of a large CAFO under B4X?
4 **MR. MUSTIAN:** Object to the form.
5 **MR. HIGHTOWER:** Objection to form.
6 A: Yes. Again, as I stated, the number of animals
7 meets the definition of a CAFO, but we don't
8 allow discharges, so we don't meet that
9 definition in South Carolina.
10 Q: Okay. Back to the no discharge aspect of the
11 61-43. I just want to make sure I understand
12 your explanation here. Are you saying that
13 there is never a situation in which a discharge
14 could occur if these regs are complied with?
15 A: Correct.
16 Q: All right. Are manure piles allowed to be
17 temporarily stored outdoors uncovered for three
18 days?
19 A: They are.
20 Q: So, are you saying that there's no possibility
21 that a discharge could occur while an exposed
22 manure pile is outdoors for three days?
23 A: It depends on the location and the situation.
24 Q: But could that present a situation in which a
25 discharge would occur?

EXHIBIT C

323

dhec

Healthy People. Healthy Communities.

Agricultural Permitting
Review Checklist Summary
Cover Page

Review Start Date 7-6-16 Review Completed Date 12-9-16

Facility Name David Coggins Broilers ND00 89338

Applicant's Name David Coggins Phone Number 864-981-5604

Type of Facility Poultry Broilers (6 houses) Integrator Amick Farms

County Laurens EQC Regional Rep. Chrissy Matthews

Plan Preparer Chris Mosley PE, AWT

Public Notice Date (Issue Date) Dec 14, 2016
deadline: Wed = Mon 5pm Sat = Wed 5pm

Newspaper for Public Notice Laurens County Advertiser - pub Wed & Sat

Effective Date Dec 29, 2016

Permit Number 19,886-AG

Plan Reviewed by (print) William Chaplin

Web PN: App Rec'd 7-21-16 BM Permitting Decision 12-12-16 wpc

Dams and Agricultural Permitting Section
Outreach, Stormwater, Agricultural and Dams Permitting Division
Bureau of Water

DHEC 2518 (8/2016)

8-17-16 Medical eval delivered to Dr Bell. Clock stopped.

PET-00108

Facility Name: David Coggins Broilers **Permit No.:** ND00 89338

Task Complete	Review Checklist Summary (Animal)
ADMINISTRATIVE REVIEW:	
✓	Verify the application form is complete.
✓	Enter the application into EFIS.
✓	Check processed and sent to Finance. *How much was the check made out for?* $240.00 *Check #:* 286
✓	Create a facility file folder.
✓	Check Preliminary File for any previously received correspondence.
✓	Comments reviewed and counted. *Number of Comments:* >50
✓	Determine if a public meeting must be held. (YES) or NO Schedule the public meeting, if required. *Date & Time of Meeting:* 9-15-16 5:30pm *Location:* Mountville Fire Dept
	Send a letter to the person(s) submitting health concerns requesting that they submit a physician's statement for review. Letter sent to Barbara Zeger
✓	Send a copy of the application, facility map and cover memo to Bureau of Air Quality. *Date Sent:* 7-14-16
✓	Set up Public Notice of Application Received. *Date went on notice:* 7-29-16 *Date goes off notice:* 8-28-16
✓	Send invitation for the Public Meeting to all persons who submitted a written comment or asked to be notified. *Date Sent:* Sept 1 2016
✓	Send a copy of the application, animal facility management plan and cover memo to BEHS in Groundwater for review and recommendations. *Date Sent:* 7-14-16
✓	Send a copy of the application and Animal Facility Management Plan to the District office. *Date Sent:* 7-12-16
✓	Verify that a preliminary site inspection was performed on the proposed site submitted in this applica *PSI Date:* April 13, 2016

WATER RESOURCES REVIEW:

For this review:

- ***"proposed animal facility" refers to the houses, stacking shed, and/or composter.***
- ***"site" refers to the "proposed animal facility", burial locations, and manure utilization areas.***

Enter the proposed animal facility, burial locations, and manure utilization areas into the Arcview database.

Barn Length: Feet: 600 = Meters: 182.88
Barn Width: Feet: 45 = Meters: 13.716
Barn Spacing: Feet: 60 = Meters: 18.288

Fan Location (Blowing towards): North East

Lat: 81° 57' 35.845 W 34.394471
Long: 34° 23' 40.095 N -81.959956

Public Notices Signs Posted by Chrissy Mathews on Date: 7-29-16

PET-00110

Pull the permitted point source discharge (NPDES) overlay and determine where the nearest upstream and downstream locations of any discharge are located and the distance from each station to the proposed site.

Point Source Discharges:

Upstream - Specialty Vermiculite / Hodges Mine - SCG730030-1BA, located NNW, ~~4.76~~ miles by land, 4.23 miles

Downstream - Newberry Water Treatment Plant - SCG646047, Located SE ~~17.68~~ miles by land. 19.69 miles.

Additional requirements or setbacks? As this facility is classified as a no discharge facility, no additional setbacks are required.

Pull the water quality monitoring stations overlay and determine where the nearest upstream and downstream monitoring stations are located and the distance from each station to the proposed site.

Water Quality Monitoring Stations:

Upstream - None

Downstream - S-305 - Little River @ SC 34, Located SE, ~~16.98~~ miles by land. 17.00 miles

Pull the overlay for the drinking water intakes (Surface Water Intakes) and determine if any intakes are located downstream of the proposed site?

YES or **NO**

If yes, list the intakes, locations, and distance downstream:

City of Newberry - System 3610001, Well - S36101, located SE, ~~19.46~~ miles by land. 19.47 miles

Is the proposed facility a no-discharge facility? **YES** or **NO**

Additional requirements or setbacks? no additional setbacks are required.

Pull the State Approved Source Water Protection Area overlay and review the proposed site in reference to these areas.

Is the facility located in a State Approved Source Water Protection Area?

YES or **NO**

Are any of the manure utilization areas located in a State Approved Source Water Protection Area?

YES **NO** **N/A Manure Broker**

If the proposed site is in the vicinity of the State Approved Source Water Protection Area, then note the separation distance? The nearest downstream SWPA is located SE, ~~7.55~~ miles by land. 7.62 miles

Additional requirements or setbacks? no additional setbacks are required.

Pull the ground water public supply well (Source Water Protection → Public Water Supply Wells) overlay and determine if any public water supply wells are located adjacent to the proposed site? YES or NO

If yes, what is the name of the water supply well and distance between the site and the public water supply well? The nearest public water supply well is: Michelin Laurens Proving Grounds, System 3030005, well G 3017B, Located West, ~~3.79~~ miles by land, 3.76 miles.

Additional requirements or setbacks? As per R61-58, the minimum separation distance should be at least 100 feet, therefore no additional setbacks are required.

Pull the 303(d) (2014 303D List) impaired water body list overlay and list any impairment and the distance to the impairment from the proposed site.

Proposed Facility:

The nearest downstream 303D site is S-305, Little River @ SC34, located SE, ~~16.98~~ miles by land. 17.00 miles. This proposed site is located in a TMDL Shed.

Proposed Manure Treatment/Storage Structure:

n/a –

Manure Utilization Areas: N/A: Broker

Additional requirements or setbacks? As Ag Facilities are not considered as contributors to the TMDL, no additional setback are required.

Pull the stream classification overlay and note the classifications for the water bodies in the drainage route.

Proposed Facility:

Fresh water

Proposed Manure Treatment/Storage Structure:

n/a

Manure Utilization Areas: N/A: Broker

Where the classification is not Freshwater, what additional requirements or setbacks are recommended? The nearest waters of the state is an intermittent stream located N, ~~482~~ feet by land. 428 feet

PET-00112

Pull the FEMA floodplain (Flood Zones) overlays or look at FEMA maps provided in the Animal Facility Management Plan and identify if the facility and manure utilization areas are located in the floodplain or the distance from the floodplain:

Proposed Facility: not within the 100 year floodplain.

Proposed Manure Treatment/Storage Structure: n/a

Manure Utilization Areas: N/A: Broker

Additional requirements or setbacks? no additional setbacks are required.

Pull the watershed overlays (12 Digit Hydro Unit) and identify the watershed in which the facility and manure utilization areas are located. Record the 12 Digit Hydro Unit under the section for agricultural facility overlay.

Proposed Facility: HUC 12 = 030501090905

Proposed Manure Treatment/Storage Structure: n/a

Manure Utilization Areas: N/A: Broker

Pull the Historic Preservation District overlay and review the proposed site in reference to the Historic Preservation District.

Is the facility located in a Historic Preservation District? YES or NO

Are any of the manure utilization areas located in a Historic Preservation District? YES NO N/A Manure Broker

If the proposed site is in the vicinity of the Historic Preservation District, then note the separation distance? Nickels - Milan House, S of Laurens off US 221 - located NW, ~~3.09~~ 3.08 miles by land.

Additional requirements or setbacks? Given the Air Quality memo and the by land distance, no additional setbacks are required.

PET-00113

Pull the Heritage Corridor overlay and review the proposed site in reference to the Heritage Corridor.

Is the facility located in the Heritage Corridor? **YES** or **NO**

Are any of the manure utilization areas located in the Heritage Corridor? **YES** **NO** **N/A Manure Broker**

If the proposed site is in the vicinity of the Heritage Corridor, then note the separation distance? The Greenwood Section of the Heritage Corridor is located SW, ~~9.90~~ mile by land. 9.72 miles.

Additional requirements or setbacks? Given the Air Quality memo and by land distance, no additional setbacks are required.

Pull the State and National Parks and Forests (Forestry) overlay and review the proposed site in reference to them.

Is the facility located in a State or National Park or Forest? **YES** or **NO**

Is any of the manure utilization areas located in a State or National Park or Forest? **YES** **NO** **N/A Manure Broker**

If the proposed site is in the vicinity of a State or National Park or Forest, then note the separation distance? The Sumter Nation Forest is located E, ~~8.40~~ miles by land. 8.27 miles

Additional requirements or setbacks? Given the by land distance, no additional setbacks are required.

Evaluate the agricultural facility overlay and evaluate the presence of any other nonpoint sources located in the watershed. Do a query for buildings, active status, and the 10 Digit Hydro Unit recorded below. Do a query for fields, active status, and the 10 Digit Hydro Unit recorded below.

10 Digit Hydro Unit: HUC 10 = 0305010909

Non Point Sources:

There are 25 permitted Ag Facilities. 20 poultry, 3 Dairy, 1 Swine, 1 Turkey

There are 299 permitted land application sites.

Additional requirements or setbacks? no additional setbacks are required.

PET-00114

Insert the Topo Map layer after locating the USGS Quad for the application and determine the drainage routes and slope for the proposed site. You may also use DeLORME map.

Proposed Facility Drainage Route: Little River, Saluda River, Lake Murray, Saluda River, Broad River, Congaree River, Lake Marion, Santee River, Atlantic Ocean

Site Slope: ≈ 3%

Proposed Manure Treatment/Storage Structure Drainage Route:
N/A -

Manure Utilization Areas Drainage Route: N/A: Broker

Manure Utilization Area Slope: N/A - Broker

Check the maps for locations of State Designated Focus Areas in Appendix E of the Agricultural Permit Application Review Procedures Manual.

Is the facility located in a State Designated Focus Area?
YES or NO

Are any of the manure utilization areas located in a State Designated Focus Area? YES NO N/A Manure Broker

If the proposed site is in the vicinity of a State Designated Focus Area, then note the separation distance?
not within 50 miles from the proposed site.

Additional requirements or setbacks? no additional setbacks are required

Check the maps for locations of State and Federal Research Areas in Appendix C of the Agricultural Permit Application Review Procedures Manual or GIS.

Is the facility located in a State or Federal Research Area? YES or NO

Are any of the manure utilization areas located in a State or Federal Research Area?
YES NO N/A Manure Broker

If the proposed site is in the vicinity of the State and Federal Research Areas, then note the separation distance? USDA - Cotton Quality Research Station - is located WNW, ~~53.00~~ 53.87 miles by land

Additional requirements or setbacks? no additional setbacks are required

PET-00115

Review the land use information within ¼ mile of the proposed site and determine if the site is located in the vicinity of a privately owned wildlife refuge, park, or trust property (WMP or GIS)? YES or NO

List the land use information. mixed woods planted Pines.

If yes, what is the distance between the proposed facility and the privately owned wildlife refuge, park, or trust property? Upstate Forever - located NW, ~~3093~~ miles by land - 3092 miles

Additional requirements or setbacks? no additional setbacks are required

TECHNICAL REVIEW:

→ → →	**EVERY PLAN:**
✓	Facility location description and the zoning restrictions in the area.
p.4	Facility capacity, animal count, animal type, and normal production animal live weight at any one time.
p.4	Amount of animal manure and other animal by-products generated each year.
N/A	Amount of any scraped/separated solid animal manure generated each year.
N/A	Description of animal manure storage and storage capacity.
N/A	Description of animal manure treatment and capacity.
✓	Animal Manure Nutrient Concentrations or Analysis (DRY and/or WET).
p.6	Animal manure sampling frequency.
✓	Names, addresses, phone numbers of person(s) applying the manure, if different from applicant.
✓	Topography maps for the facility, structures, and manure utilization areas.
✓	Adjacent land use within ¼ mile of the property line.
✓	Location of inhabited dwellings and public places within ¼ mile of the property line.
✓	Locations of all water supply wells on the property and within 200 feet of the property line, or within 200 feet of the manure utilization areas.
✓	Maps showing the facility and manure utilization area boundaries and buffer zones.
✓	Right – of – ways (Utilities, roads, etc…) on the proposed site.
✓	Soils maps indicating the soil types for the facility and manure utilization areas.
✓	Description of soil types.
✓	Map showing the property boundaries and tax map numbers of the proposed site and all properties within ¼ mile of the property line.
✓	Information (map or verification) showing the location of the 100 – year floodplain in reference to the proposed site and the manure utilization areas.
✓	Setbacks verified. *Note any waivers or reductions of setbacks:* does At present Applicant ~~doesn't~~ own property - A waiver is included for Heath Cuggins, proposed to build poultry facility on Adjacent property - Waiver will be required after both permits are issued, become effective -
✓	Distance between the ground surface and the seasonal high water table. *Is the separation distance less than 1.5 feet at the proposed site or manure utilization areas?* YES or NO

Bought property since relocation of barns - hasn't surveyed it into 3 parcels yet!

Waivers will eventually be needed if permits become effective

PET-00116

N/A	Groundwater monitoring well details and proposed groundwater monitoring program (if required by Groundwater).
	Odor Abatement Plan which *may* include the following: ***Best Management Plan for Odor Control.*** (YES) or NO ***Description of treatment processes for the reduction of undesirable odor levels:*** Odor problems can be prevented or reduced through adequate drainage, runoff management, proper care to keep animals, facility clean, dry, and appropriate animal by-product removal, handling, & transport. ***Additional setbacks from the property lines beyond the minimum setbacks:*** None ***Other methods or combination of these methods:*** Artificial breaking walls, trees, other vegetation to help filter & disperse dust, odor.
✓	
	Vector Abatement Plan which *shall* consist of the following: ***Normal Management Practices.*** (YES) or NO ***List of specific actions to be taken if vectors are identified as a problem?*** Remove excess building materials, remove excess feed from around houses, barns, keep grass, weeds mowed, keep all buildings free of trash, debris, proper use & servicing of bait stations, proper, timely disposal of dead animals, keep temporarily stored manure dry, covered.
✓	
	Dead Animal Disposal Plan. ***Primary Method:*** Burial, Composting ***Alternate Method:*** Burial
✓	
✓	Signed NOI forms and tax map labeled with property owner names for properties within 1320 feet of the proposed facility.
✓	Emergency Action Plan.
N/A	Written consent for reduction of setbacks, if applicable.
✓	Application Fee of $165.
✓	First year's annual operating fee of $75 for DRY and $150 for WET.
N/A	NPDES CAFO General Permit Coverage Fee of $100 if large CAFO.
	Manure Treatment and/or Storage Pond Design (if applicable): ***Freeboard:*** _____ ***Liner type:*** _____ ***Liner thickness:*** _____ ***Initial Specific Discharge:*** _____ ***Separation distance between the lowest point of the structure and the seasonal high water table:*** _____ ***Volume (must be less than 1 million cubic feet):*** _____
→ → →	**FOR FACILITIES THAT LAND APPLY MANURE**
	Crop Management Plan (crop type, application times) ***Adequate land available?*** YES or NO ***Crop schedule is consistent with manure storage period?*** YES or NO
✓	Type of equipment used to transport and/or spread the animal manure.
	Spray Application System plans and specifications.

PET-00117

N/A	Landowner information provided for each manure utilization area.
	List previous calendar years that animal manure was applied and amounts.
	Phosphorus Index results for each manure utilization area.
	Application Rates for each field.
	Signed land application agreements (including all required information) for manure utilization areas not owned by the applicant.
	Identify if the manure utilization areas are located in multiple AFMP? YES or NO *Adequate land available for all manure applied?* YES or NO
	Calibration methods for each piece of manure application equipment.
	Soil Monitoring Plan.
	Plans and specifications for all manure treatment or storage structures.

SECONDARY REVIEWS:

	Evaluate potential for increase in pollution of the water of the State. ***Is the proposed facility a No-Discharge operation?*** (YES) or NO ***Is the manure handled by contract disposal with a broker?*** (YES) or NO ***Is the manure handled by utilization on cropland as an alternative fertilizer?*** (YES) or NO ***Is the manure applied at agronomic rates?*** (YES) or NO ***Are the manure application sites and application methods proposed in accordance with the Best Management Practices designed to prevent runoff to surface and ground waters?*** (YES) or NO ***Determination:*** Given the water resources review and the Comprehensive Nutrient Management Plan states best management practices will be utilized, no anticipated increase in pollution to the waters of the state is expected.
	Bureau of Air Quality Review of the Potential for an increase in pollution of the air of the State and down-wind receptors. ***Recommendations or Response:*** As per memo dated July 19, 2016 from the Bureau of Air Quality (BAQ) an increase in pollution is not expected from this operation for this permit.
	Groundwater Review of the proposed burial sites, manure utilization areas, geography, soil types on the site, aquifer vulnerability and manure storage/treatment structures. ***Recommendations or Response:*** As per memo dated October 3, 2016 from the Bureau of Environmental Services, no zone of saturation was noted at a depth of 60 inches, therefore the site is approved for burial.
	Bureau of Disease Control. Send health concerns/physician statements to Department's Medical Staff for review and recommendations, if applicable. ***Recommendations or Response:*** Four individuals were given medical packets to have their medical conditions evaluated, however only one was submitted to the Department. This persons health care provider did not indicate that she had a condition that would be exacerbated by the exposure to the poultry facilities, but did note that she continues to work on a farm.

The barns have been relocated further away from Lisbon Road and the applicant will be required to leave the 3400 ft property line setback to remain

PET00118

PERMIT DECISIONS:

✓	Determine if Reporting should be required for those small animal facilities with less than 500,000 pounds normal production live weight. (Large facilities are automatically required to report annually) ***Determination:*** Annual reporting will be required for this permit. *If required, Create a date event in EFIS for the annual reports.*
✓	Determine if the facility should be required to submit a comprehensive report every five years. ***Determination:*** NO *If required, Create a date event in EFIS for the comprehensive report.*
✓	Send a letter to the applicant and each person who submitted written comments or asked to be notified of the permit decision.
	Publish a notice of decision in a local newspaper of general circulation. ***Date of Notice:*** Dec 14, 2016
	Determine if the permit will contain an expiration date? **YES** or **NO** ***If yes, Expiration Date:*** *Enter into EFIS date events.*
	Determine if the applicant has obtained the Manure Manager's Training/Certification required by regulation? **YES** or **NO** *If no, training/certification must be obtained within 1 year of the effective date of the permit. Ensure EFIS record contains a date event for this requirement.*

EXHIBIT D

336

Federal Register

Wednesday,
February 12, 2003

Part II

Environmental Protection Agency

40 CFR Parts 9, 122, 123, and 412
National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs); Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123 and 412

[FRL–7424–7]

RIN 2040–AD19

National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Today's final rule revises and clarifies the Environmental Protection Agency's (EPA) regulatory requirements for concentrated animal feeding operations (CAFOs) under the Clean Water Act. This final rule will ensure that CAFOs take appropriate actions to manage manure effectively in order to protect the nation's water quality.

Despite substantial improvements in the nation's water quality since the inception of the Clean Water Act, nearly 40 percent of the Nation's assessed waters show impairments from a wide range of sources. Improper management of manure from CAFOs is among the many contributors to remaining water quality problems. Improperly managed manure has caused serious acute and chronic water quality problems throughout the United States.

Today's action strengthens the existing regulatory program for CAFOs. The rule revises two sections of the Code of Federal Regulations (CFR), the National Pollutant Discharge Elimination System (NPDES) permitting requirements for CAFOs (Sec. 122) and the Effluent Limitations Guidelines and Standards (ELGs) for CAFOs (Sec. 412).

The rule establishes a mandatory duty for all CAFOs to apply for an NPDES permit and to develop and implement a nutrient management plan. The effluent guidelines being finalized today establish performance expectations for existing and new sources to ensure appropriate storage of manure, as well as expectations for proper land application practices at the CAFO. The required nutrient management plan would identify the site-specific actions to be taken by the CAFO to ensure proper and effective manure and wastewater management, including compliance with the Effluent Limitation Guidelines. Both sections of the rule also contain new regulatory requirements for dry-litter chicken operations.

This improved regulatory program is also designed to support and complement the array of voluntary and other programs implemented by the United States Department of Agriculture (USDA), EPA and the States that help the vast majority of smaller animal feeding operations not addressed by this rule. This rule is an integral part of an overall federal strategy to support a vibrant agriculture economy while at the same time taking important steps to ensure that all animal feeding operations manage their manure properly and protect water quality.

EPA believes that these regulations will substantially benefit human health and the environment by assuring that an estimated 15,500 CAFOs effectively manage the 300 million tons of manure that they produce annually. The rule also acknowledges the States' flexibility and range of tools to assist small and medium-size AFOs.

DATES: These final regulations are effective on April 14, 2003.

ADDRESSES: The administrative record is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/DC) in the basement of the EPA West Building, Room B–102, at 1301 Constitution Ave., NW., Washington, DC. The administrative record is also available via EPA Dockets (Edocket) at *http://www.epa.gov/edocket* under Edocket number OW–2002–0025. The rule and key supporting materials are also electronically available on the Internet at *http://www.epa.gov/npdes/caforule.*

FOR FURTHER INFORMATION CONTACT: Gregory Beatty, U.S. EPA, Office of Water, Office of Wastewater Management (4203M), 1200 Pennsylvania Avenue NW., Washington, DC 20460, 202–564–0724, for information pertaining to the NPDES Regulations (Part 122) or Paul Shriner, U.S. EPA, Office of Water, Office of Science and Technology (4303T), 1200 Pennsylvania Avenue NW., Washington, DC 20460, 202–566–1076, for information pertaining to the Effluent Guideline (Part 412).

SUPPLEMENTARY INFORMATION:

A. General Information
1. What entities are potentially regulated by this final rule?
2. How Can I Get Copies of This Document and Other Related Information?
B. Under what legal authority is this final rule issued?
C. How is this preamble organized?
D. What is the Comment Response Document?
E. What other information is available to support this final rule?
I. Background Information
A. What is the context for this rule?
B. Why is EPA revising the existing effluent guidelines and NPDES regulations for CAFOs?
C. What are the environmental and human health concerns associated with improper management of manure and wastewater at CAFOs?
1. How do the amounts of animal manure compare to human waste?
2. What are "excess manure nutrients" and why are they an indication of environmental concern?
3. What pollutants are present in animal manure and wastewater?
4. How do these pollutants reach surface water?
5. How is water quality impaired by animal manure and wastewater?
6. What ecological and human health impacts have been caused by CAFO manure and wastewater?
D. What are the roles of the key entities involved in the final rule?
1. CAFOs.
2. States.
3. EPA.
4. USDA.
5. Other stakeholders.
6. The public.
E. What principles have guided EPA's decisions embodied in this rule?
F. What are the major elements of this final rule? Where do I find the specific requirements?
1. NPDES Regulations for CAFOs.
2. Effluent Limitations Guidelines requirements for CAFOs.
II. What Events Have Led to This Rule?
A. The Clean Water Act
1. The National Pollutant Discharge Elimination System (NPDES) permit program
2. Effluent limitations guidelines and standards
3. Effluent guidelines planning process—Section 304(m) requirements
B. Existing Clean Water Act requirements applicable to CAFOs
1. Scope and requirements of the 1976 NPDES regulations for CAFOs
2. Scope and requirements of the 1974 feedlot effluent guidelines
C. USDA–EPA Unified National Strategy for Animal Feeding Operations
III. How Was This Final Rule Developed?
A. Small Business Advocacy Review (SBAR) Panel
B. Proposed Rule
C. 2001 Notice of Data Availability
D. 2002 Notice of Data Availability
E. Public Comments
F. Public outreach
1. Pre-proposal activities
2. Post-proposal activities
IV. CAFO Roles and Responsibilities
A. Who is affected by this rule?
1. What is an AFO?
2. What is a CAFO?
3. What types of animals are covered by today's rule?
4. Is my AFO a CAFO if it discharges only during large storm events?
5. How are land application discharges of manure and process wastewaters at CAFOs covered by this rule?
6. How is EPA applying the Agricultural Storm Water Exemption with respect to Land Application of CAFO Manure and Process Wastewaters?

described in section V.C of this preamble.

D. When Must States Issue New CAFO NPDES Permits?

EPA does not typically establish requirements for when States must develop and issue NPDES permits. However, today's regulations require CAFOs to seek NPDES permit coverage under general permits within certain time frames, and CAFOs may not discharge any pollutants to waters of the United States without a permit. Thus, it is in States' interests to issue new or revised NPDES permits in a timely manner. It is EPA's expectation that new general permits will be available no later than the date on which CAFOs have a duty to apply for an NPDES permit. *See* section IV.B.3 for a full description of when CAFOs must seek permit coverage.

E. What Types of NPDES Permits Are Appropriate for CAFOs?

The NPDES regulations provide the permitting authority with the discretion to determine the most appropriate type of permit for a CAFO. The two basic types of NPDES permits are individual and general permits. An individual permit is a permit specifically tailored for a specific facility, while a general permit is developed and issued by a permitting authority to cover multiple facilities with similar characteristics.

EPA recognizes that most CAFOs will likely be covered by NPDES general permits; however, there are some circumstances where an individual permit might be appropriate (*e.g.*, exceptionally large facilities, facilities that have a history of noncompliance, or facilities applying for approval to use an alternative performance standard in lieu of baseline technology-based effluent guidelines). The decision whether to issue a general or individual permit lies with the NPDES permitting authority. Section VI of the preamble discusses opportunity for public involvement in the NPDES permitting process.

As permit authorities explore innovative permitting approaches, the use of "watershed-based NPDES permits" might become more prevalent. For example, a watershed-based permit could be issued to CAFOs within a specific watershed. EPA is currently promoting pilot projects to help evaluate the benefits of watershed-based permitting and encourages States to use such a flexible tool to address the varied needs of specific watersheds.

F. What Flexibility Exists for States To Use Other Programs To Support the Achievement of the Goals of This Regulation?

In designing this final rule, EPA has striven to maximize the flexibility for States to implement appropriate and effective programs to protect water quality and public health by ensuring proper management of manure and related wastewater. This rule establishes binding legal requirements for Large CAFOs and maintains substantial flexibility for States to set other site-specific requirements for CAFOs as needed to achieve State program objectives. EPA encourages States to maximize use of voluntary and other non-NPDES programs to support efforts by medium and small operations to implement appropriate measures and correct problems that might otherwise cause them to be defined or designated as a CAFO. EPA encourages States to use the flexibility available under the rule so that their State non-NPDES programs complement the required regulatory program. The following examples can illustrate opportunities for this State flexibility:

- States are encouraged to work with State agriculture agencies, conservation districts, USDA and other stakeholders to create proactive programs to fix the problems of small and medium operations in advance of compelling the facilities to apply for NPDES permits.
- Where a small or medium facility has been covered by an NPDES permit, the permitting authority may allow the facility to exit the permit program at the end of the 5-year permit term if the problems that caused the facility to be defined or designated as a CAFO have been corrected to the satisfaction of the permitting authority.
- A small or medium AFO might be taking early voluntary action in good faith to develop and implement a comprehensive nutrient management plan, yet might have an unexpected situation that could be the basis for the facility's being defined or designated as a CAFO. EPA encourages the permitting authority to provide an opportunity to address the cause of the discharge before defining or designating the operation a CAFO.

These examples are intended to illustrate the flexibility that EPA is promoting with regard to medium and small operations. They are not applicable to Large CAFOs.

What did EPA propose? EPA's proposed rule included an option to expand substantially the criteria for when medium and small AFOs could be defined or designated as CAFOs. The effect of these proposed changes to the structure and definition of a CAFO was to require a substantially larger number of medium and small operations to be brought into the NPDES regulatory program. EPA estimated that as many as 30,000 medium and small AFOs could be brought into the regulatory program under this option. Another option presented in the proposal was to structure the permitting requirements to build in inherent flexibility for the medium facilities. In addition, the proposal and the subsequent 2001 Notice introduced a variety of more specific options for State flexibility, including one under which a State with an effective non-NPDES program could request to operate under a simplified permitting structure.

What were the key comments? The proposed expansion of the NPDES program for medium and small operations caused great concern, particularly among the States. Many comments from both States and facility operators centered on the desire that EPA recognize the effectiveness of existing State CAFO programs. More specifically, many States wanted EPA to allow effective State non-NPDES programs to operate in lieu of a State-run NPDES program, particularly in the event that EPA in the final rule expanded the criteria for defining medium facilities as CAFOs.

In general, comments from environmental groups expressed opposition to most types of flexibility because of concerns regarding potential loss of accountability at facilities and reduced public participation. Industry commenters generally supported State flexibility as necessary to address factors such as soil, climate, and site and regional characteristics that vary within and among States. Commenters maintained that State flexibility promotes those program elements States have found to be most effective and allows States and industry to achieve workable solutions to water quality issues. States also supported maintaining a high degree of flexibility both to accommodate State-specific characteristics and priorities and to preserve their investment in existing good quality programs. Some State and industry commenters asserted that EPA's options for flexibility were too limited.

Rationale. EPA recognizes that EPA's proposed expansion of the criteria for when medium and small AFOs would be defined or designated as CAFOs would have had the effect of eliminating the flexibility for States to use voluntary and other programs. EPA is also aware that many of the States authorized to

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

ADMINISTRATIVE HEARING

****

Tuesday, August 15, 2017
10:00 a.m. - 6:26 p.m.
Wednesday, August 16, 2017
9:31 a.m. - 5:31 p.m.
Thursday, August 17, 2017
9:03 a.m. - 5:19 p.m.

ADMINISTRATIVE HEARING

****

Tuesday, August 15, 2017

10:00 a.m. - 6:26 p.m.

Wednesday, August 16, 2017

9:31 a.m. - 5:31 p.m.

Thursday, August 17, 2017

9:03 a.m. - 5:19 p.m.

The hearing before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 15th, 16th, and 17th day of August, 2017 before Nadine A. Garrett, Court Reporter and Notary Public in and for the State of South Carolina.

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INDEX

		PAGE
PRELIMINARY MATTERS		4
CHARLES BLACKMON:		
MR. GUILD	DIRECT EXAMINATION	61
MR. MUSTIAN	CROSS EXAMINATION	192
MR. HIGHTOWER	CROSS EXAMINATION	196
MR. GUILD	RE-DIRECT EXAMINATION	201
MARGARET SPARROW:		
MR. GUILD	DIRECT EXAMINATION	203
MR. MUSTIAN	CROSS EXAMINATION	217
MR. HIGHTOWER	CROSS EXAMINATION	218
MR. GUILD	RE-DIRECT EXAMINATION	222
MARY BASEL:		
MR. GUILD	DIRECT EXAMINATION	223
MR. MUSTIAN	CROSS EXAMINATION	239
MR. HIGHTOWER	CROSS EXAMINATION	240

EUGENE ROSS STEWART:
MS. TAYLOR . . DIRECT EXAMINATION 245
MR. MUSTIAN . . CROSS EXAMINATION 299
MR. HIGHTOWER . CROSS EXAMINATION 310
MS. TAYLOR . RE-DIRECT EXAMINATION . . . 320

KATHY LOWMAN:
MR. GUILD . . . DIRECT EXAMINATION 323
MR. MUSTIAN . . CROSS EXAMINATION 349
MR. HIGHTOWER . CROSS EXAMINATION 352

DAVID RICHARD COGGINS:
MS. TAYLOR . . DIRECT EXAMINATION 354
MR. MUSTIAN . . CROSS EXAMINATION 404
MR. HIGHTOWER . CROSS EXAMINATION 436
MS. TAYLOR . RE-DIRECT EXAMINATION . . . 440

DAVID HARGETT, Ph.D.:
MS. TAYLOR . . DIRECT EXAMINATION 450
VOIR DIRE:
MR. MUSTIAN . . . . EXAMINATION 479
MR. HIGHTOWER . . . EXAMINATION 484
MS. TAYLOR CONTINUE DIRECT EXAMINATION . 489
MR. MUSTIAN . . CROSS EXAMINATION 552
MR. HIGHTOWER . CROSS EXAMINATION 585
MS. TAYLOR . RE-DIRECT EXAMINATION . . . 622
MR. MUSTIAN . . RE-CROSS EXAMINATION . . . 644
MR. HIGHTOWER . RE-CROSS EXAMINATION . . . 652

CHRISTOPHER MOSLEY:
MR. MUSTIAN . . DIRECT EXAMINATION 705
MR. HIGHTOWER . CROSS EXAMINATION 764
MR. GUILD . . . CROSS EXAMINATION 770
MR. MUSTIAN . RE-DIRECT EXAMINATION . . . 801
MR. HIGHTOWER . RE-CROSS EXAMINATION . . . 806

WILLIAM CHAPLIN:
MR. HIGHTOWER . DIRECT EXAMINATION 810
MS. TAYLOR . . CROSS EXAMINATION 844
MR. HIGHTOWER RE-DIRECT EXAMINATION . . . 866

Certificate 875

EXHIBITS

(All exhibits were marked prior to the hearing and admitted as follows:)

Petitioners' Exhibit Number 1A 58
(DHEC Map, J. Young - PET-01672)
Petitioners' Exhibit Number 1B 56
(DHEC Permit File, J. Young - DHEC_003145-DHEC_003613)
Petitioners' Exhibit Number 2A 58
(DHEC Map, D. Coggins - PET-01670)
Petitioners' Exhibit Number 2C 56
(DHEC Permit File, D. Coggins - DHEC_00869-DHEC_001344)
Petitioners' Exhibit Number 2D 148
(Hunt Club/Hunting Leases - PET-02271-PET-02276)
Petitioners' Exhibit Number 3A 59
(DHEC Map, H. Coggins - PET-01671)
Petitioners' Exhibit Number 3B 56
(DHEC Permit File, H. Coggins - DHEC_002021-DHEC_002489)
Petitioners' Exhibit Number 4T 74
(Laurens GIS - PET-02189)
Petitioners' Exhibit Number 4U 116
(Existing and Proposed Facility Map)
Petitioners' Exhibit Number 4V 123
(Mountville Poultry Facilities on Little River - PET-02258)
Petitioners' Exhibit Number W 128
(Blackmon's Pond and Proposal Facilities - PET-02190)
Petitioners' Exhibit Number 4X 130
(AWT Map of Proposed Facilities)
Petitioners' Exhibit Number 4Z 348
(Photos of Alexander Farm)

Respondents-Permittees' Exhibit Number 22 . 428
(Contract for Purchase of Waste)
Respondents-Permittees' Exhibit Number 23 . 717
(Section 12 SC Reg 61-43)

Respondent-DHEC Exhibit Number 1 844
(New Compliance Requirements for SC DHEC Stormwater)

(The original exhibits were retained by The Court.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.

1 **(All exhibits were marked prior to the hearing and**
2 **admitted as follows:)**
3 **PRELIMINARY MATTERS:**
4 **THE COURT:** This is a hearing in the matter of
5 Charles S. Blackmon and South Carolinians for
6 Responsible Agricultural Practices, Petitioner,
7 versus, do the acronym, DHEC and David Coggins
8 Broilers. And there's four -- three cases.
9 The Docket Numbers are 17-ALJ-07-041, 42, and
10 39-CC.
11 All right. Normally I would ask whether
12 there are any motions or stipulations the
13 parties wish to make. Are we missing somebody?
14 Is somebody missing? Mr. Guild, is an attorney
15 missing or ...
16 **MR. GUILD:** I think we're all here, Your Honor.
17 **MS. TAYLOR:** We're all here, yes.
18 **THE COURT:** There's two empty chairs. Through me
19 off.
20 Normally I'd ask if there's any motions or
21 stipulations. I doubt there's stipulations,
22 but I know there are motions. There's a motion
23 by DHEC to dismiss and a motion by the
24 Respondent, Young Broilers, to also for summary
25 judgment, correct?

1 **MR. MUSTIAN:** Yes, Your Honor.
2 **THE COURT:** All right. I've read all the pleadings.
3 From my evaluation, I am inclined to grant the
4 summary judgment motion, but deny the motion to
5 dismiss. However, the motion to dismiss is a
6 little more -- a little closer, so I want to
7 hear -- what I'm going to do on the summary
8 judgment motion is, since I'm inclined to grant
9 that, I'd just rather than hear arguments from
10 you, I'm already inclined there. So, I would
11 rather Mr. Guild or -- who's going to be the
12 primary attorney that I would be referring to,
13 Ms. Mullen or Mr. Guild?
14 **MS. TAYLOR:** Ms. Taylor.
15 **THE COURT:** Ms. Taylor.
16 **MS. TAYLOR:** Yes.
17 **THE COURT:** All right.
18 **MS. TAYLOR:** Mr. Guild will be arguing the motion
19 for -- to dismiss from DHEC.
20 **THE COURT:** Okay. Well, I want to hear from y'all
21 on the summary judgment motion. And I'm going
22 to hear briefly from DHEC on the motion to
23 dismiss and then hear your response on that.
24 I will say, it saddens me your response
25 concerning unauthorized practice of law. Mr.

1 Guild, in making that response, did you
2 research the law concerning unauthorized
3 practice of law?
4 **MR. GUILD:** No, sir. I think that's completely in
5 opposite to the issue with respect to the
6 motion to dismiss. The ---
7 **THE COURT:** Well, I'll get there later then.
8 **MR. GUILD:** Thank you.
9 **THE COURT:** Because you took a position in there
10 that -- but I'm not really -- I say that, but
11 I'm really not sure -- I think I agree with
12 you, maybe that it's in opposite, I don't know
13 if it's relevant or pertinent.
14 **MR. GUILD:** Better way of putting it, Your Honor,
15 pertinent.
16 **THE COURT:** But I will tell you, I don't know who
17 Mr. Blackmon is, but if you go and read the law
18 concerning unauthorized practice of law,
19 there's a case I can refer you to that was
20 before the Supreme Court. There's also -- I
21 may even have it up here on my computer. I
22 have to look it up on Westlaw. 40-3-320. It
23 sets forth that volunteer associations cannot
24 practice law and further says that it's a
25 crime. But, see, I don't know what happened

1 below. I'm just responding to what you said in
2 your pleadings. And that's the -- so, that's
3 my secondary point when I say, I've read it, it
4 concerns me. But then on the other hand --
5 what you said concerned me. But then on the
6 other hand, I don't -- I mean, it hadn't been
7 laid out what happened below, so I really don't
8 plan to get into that so much. But I've spend
9 a lot of time running my mouth about something
10 that I don't think is pertinent, but I would
11 like y'all to know that for the future.
12 **MR. GUILD:** Yes, Your Honor. You know, we're fully
13 prepared to address any factual concerns the
14 Court has.
15 **THE COURT:** I'm talking about for the future.
16 **MR. GUILD:** Yes, sir. Indeed.
17 **THE COURT:** All right.
18 **MR. GUILD:** Thank you.
19 **THE COURT:** All right. So, how about Mr. Hightower.
20 **MR. HIGHTOWER:** Good morning, Your Honor. The
21 Department has moved to dismiss South
22 Carolina -- excuse me South Carolinians for
23 Responsible Agricultural Practices as a party
24 because it failed to comply with the statutory
25 requirement that a party -- in order to become

1 a party in an ALC proceeding challenging a
2 Department's permitting decision must comply
3 with section 44-1-60, which codifies the
4 appellate procedures for challenging Department
5 decisions.
6 44-1-60 specifically states that each
7 party must file a Request for a Final Review
8 along with a filing fee. The Department
9 received one request from Charles Blackmon with
10 one filing fee. And the Department noted in
11 its staff response to the Board as its first
12 argument as -- stated as a threshold issue that
13 the Department only considered there to be one
14 party who properly complied with 44-1-60. And
15 that being Mr. Blackmon. It is true that the
16 Request for Final Review in each of these cases
17 was also signed by other people. But -- and
18 that's where we had gotten into the fact that
19 Mr. Blackmon is not an attorney. And based on
20 that, he cannot represent all these other
21 people. He's trying to say that his signature
22 is sufficient to allow these other persons to
23 be parties to the action. And that's not what
24 the state of the law is. And the Department
25 cited in it's memorandum of law several cases

1 from the Administrative Law Court in which the
2 Administrative Law Court acknowledged that, if
3 a party fails to file a timely Request for
4 Final Review with a filing fee, that that is a
5 jurisdictional bar from them to be a party ---
6 **THE COURT:** That's a jurisdictional bar if no
7 party -- it's 40 dash what?
8 **MR. HIGHTOWER:** 40-1-60.
9 **THE COURT:** I know it. I'm very familiar with it,
10 but I'm going to still pull it up. It's a
11 jurisdictional bar for anyone.
12 **MR. HIGHTOWER:** Yes.
13 **THE COURT:** But the issue is, is it a jurisdictional
14 bar for the entire case? You said 40-1-60.
15 **MR. HIGHTOWER:** Yes, Your Honor.
16 **THE COURT:** That's not it.
17 **MR. HIGHTOWER:** 44. I misspoke if I said 40. I'm
18 sorry, Your Honor. I meant to say Section
19 44-1-60.
20 **THE COURT:** When I interpret the statute and the
21 meaning of the statute, I can't interpret that
22 statute on just a case-specific basis as far as
23 the right to appeal. I do have to interpret it
24 in keeping with all potential ramifications of
25 the statute; would I not?

1 **MR. HIGHTOWER:** Yes, Your Honor.
2 **THE COURT:** That said, then let's go with if there
3 was an affected person, because you don't deny
4 that the individuals in SCRAP -- is that what
5 y'all call it?
6 **MR. HIGHTOWER:** That's what they've called it.
7 That's the acronym they use.
8 **THE COURT:** Okay. The individuals in SCRAP are
9 affected individuals.
10 **MR. HIGHTOWER:** Well, Your Honor, actually some of
11 them are not.
12 **THE COURT:** Okay. Well, then ---
13 **MR. HIGHTOWER:** Because ---
14 **THE COURT:** --- let's just go with the ones that
15 are. Maybe there are some other affected
16 individuals, I'll deal with that down the road.
17 But if those -- if I had a case where there was
18 an affected individual A and an affected
19 individual B and B was quite happy with the
20 decision that the Department had rendered, but
21 A was unhappy. So, A filed a request for
22 review. Thereafter the Board modified the
23 decision -- or can they modify the decision?
24 Can the Board modify the decision -- when a
25 Request for Review comes to the board, can they

1 modify the decision?
2 **MR. HIGHTOWER:** Yes.
3 **THE COURT:** Okay. All right.
4 **MR. HIGHTOWER:** The Board has the power to overrule
5 staff's decision.
6 **THE COURT:** All right. So, the Board modifies the
7 decision in keeping with the request of
8 affected person A. But then the modification
9 harms affected -- at least probably affected
10 person B. Even though affected person B did
11 not file a Request for Review, would you not
12 say that they would be entitled to appeal to
13 this Court because they were harmed or you're
14 going to take the position that they would be
15 out just because they hadn't requested a
16 Request for Review in and instance where it
17 didn't even harm them?
18 **MR. HIGHTOWER:** No, Your Honor. In fact, the
19 Department has had a situation like that happen
20 in a case dealing with the 401 licensing for
21 the Catawba-Wateree project. In that case the
22 -- I believe it was American Rivers and the
23 South Carolina Coastal Conservation League
24 filed timely Requests for a Final Review for
25 the 401 Water Quality Certification of the FERC

1 license for the Catawba-Wateree projects. And
2 the Board heard that case. And the Board
3 overruled staff. After that, Duke, which was
4 the Applicant, then filed a timely request
5 before this Court for a contested case hearing.
6 And American Rivers and the Coastal
7 Conservation League were petitioned and Your
8 Honor was the judge on that case and you
9 allowed them to come in as affected parties in
10 that action. And they were parties in that
11 action.
12 Now, that's not the situation here. Here
13 we don't have a situation where the Board took
14 a ruling adverse to the other parties. The
15 Board declined to hear the case. That meant
16 that Mr. Blackmon was the only party that
17 properly filed a Request for Final Review and
18 filing fee, could then petition this Court for
19 a contested case hearing. The other parties
20 were not harmed because there was no adverse
21 ruling to them. It wasn't like they had a
22 different position than Mr. Blackmon and
23 therefore somehow the Department -- the Board's
24 action harmed them.
25 **THE COURT:** Let me stop you there.

1 **MR. HIGHTOWER:** Yes.
2 **THE COURT:** Because my point is not that point. My
3 point is that there are instances in which a
4 person, who did not file a Request for Review,
5 has been allowed to appeal to this Court. So,
6 that door's open that you do not necessarily
7 have to require -- or file a Request for Review
8 to file an appeal here as long as you are an
9 affected party.
10 **MR. HIGHTOWER:** Well, no, Your Honor, it wasn't
11 because they were an affected party. Because,
12 as I stated, in that case, which the only time
13 I know that that has happened was the Duke
14 Case. And in that case, the reason why
15 American Rivers and the Coastal Conservation
16 League were made parties were they had filed
17 below before the Board and had received the
18 verdict that -- if you will, that they wanted.
19 The Department's 401 Water Quality
20 Certification staff decision was overruled by
21 the Board, so they got what they wanted. So,
22 they had no interest to go any further. Duke,
23 as the Applicant, had an interest, and
24 therefore they filed. And once they filed,
25 American Rivers and Coastal Conservation League

1 wanted to become parties. The Department
2 supported that. The Department did not argue
3 that they could not be parties. In fact, we
4 stipulated that they should be parties because
5 they had prevailed below before the Board and
6 now there was going to be a contested case
7 hearing that was going to challenge the
8 favorable ruling that they received. But
9 that's not the case here.
10 **THE COURT:** I get the point that it's not the case
11 here. But I've got to determine the
12 implications of that.
13 Let me move on to another issue. And that
14 is, you -- in this instance, there's no dispute
15 that Mr. Blackmon and all the other individuals
16 signed the Request for Review. Do you have a
17 rule or is there a statute that says that a
18 group of individuals cannot collectively make a
19 Request for Review?
20 **MR. HIGHTOWER:** Well, Your Honor, groups of
21 individuals that have filed -- that wanted to
22 file before the Board have come before the
23 Board -- well, in this case if SCRAP had been
24 a party that had filed the RFR and the filing
25 fee, then the Department would not be here

1 making this motion. It's because Mr. Blackmon
2 was that party. And as we noted in our moving
3 papers, nowhere in the RFR does it even say
4 there's an organization called SCRAP. What it
5 says is Mr. Blackmon has done all this and then
6 he got other people to sign, sort of like a
7 petition. The Department has universally held
8 that you can't file a petition. If you want,
9 you can do what has happened in other cases ---
10 **THE COURT:** When you say the Department has
11 universally held that ---
12 **MR. HIGHTOWER:** Yes.
13 **THE COURT:** --- is that a rule or a judgment by the
14 Department's Board that that cannot be done?
15 **MR. HIGHTOWER:** The Board has never ruled on this
16 issue.
17 **THE COURT:** How about for this case?
18 **MR. HIGHTOWER:** And in this case what the Department
19 did argue before the Board, we put in our staff
20 response and it's attached.
21 **THE COURT:** I read that. But you argued it before
22 the Board.
23 **MR. HIGHTOWER:** Yes.
24 **THE COURT:** Did that Board make a determination
25 regarding that issue?

1 **MR. HIGHTOWER:** No. The Board decided that it did
2 not want to hear the case.
3 **THE COURT:** Okay.
4 **MR. HIGHTOWER:** And the Department's view is is that
5 it doesn't take the Board to have to make a
6 decision on that, because there is -- nothing
7 would have prevented -- in fact, this is,
8 unlike in most cases -- most of the time these
9 cases come up when parties act pro se, they
10 have no knowledge, legal knowledge, anything
11 else. But in this case through discovery, we
12 know that Mr. Blackmon was aware or should have
13 been aware that this is how the Department
14 handles these situations. Michael Corley is an
15 attorney. He works with the South Carolina
16 Environmental Law Project. He has handled
17 several cases before the Department and is well
18 aware or should have been well aware that the
19 Department would require the group to -- if you
20 wanted to have the group as a party, that the
21 group should have filed the RFR and it should
22 have been filed by an attorney. In fact, in
23 this -- not in this case, but in another case
24 that's pending before Your Honor concerning
25 Vulcan Materials, mine, in that case there is

1 a group. And that group had an attorney that
2 filed. In fact, it's Mr. Guild who filed on
3 behalf of the group. And the Department has
4 not taken any position on that. We acknowledge
5 that, yes, groups, environmental groups, or
6 community groups, if you will, can be parties,
7 but they have to file an RFR with a filing fee.
8 And that's not what occurred here.
9 **THE COURT:** They have to put their name ---
10 **MR. HIGHTOWER:** They have to put their name down
11 acknowledging that that's the situation. If
12 they don't, Your Honor, then you have a
13 situation where Mr. Blackmon could even have
14 not put anything down, none of the names,
15 nobody signed anything and say, well, I
16 represent this group and all these other people
17 are now parties. And ---
18 **THE COURT:** Well, I would agree with you in that
19 instance. But in this instance you -- all the
20 individuals signed the document. You say it's
21 a petition. Under what theory do you espouse
22 that it became a petition, rather than simply
23 a -- because the documents -- well, the letter
24 said the -- I'd have to look it up. The group.
25 So, it referred to a group, so. And it kept

1 referring to we over and over, we. Mr.
2 Blackmon is not a we.
3 **MR. HIGHTOWER:** Well, that may be true, Your Honor.
4 He's not a we. But the Department has always
5 held that, if he is not acting overtly on
6 behalf of a named group, unless he's an
7 attorney, he can't be representing these other
8 parties. And that's why we mentioned it in our
9 ---
10 **THE COURT:** I agree with ---
11 **MR. HIGHTOWER:** --- thing, that he is acting as an
12 attorney in that situation. Had it been -- had
13 this been filed, SCRAP and an attorney put in
14 the paperwork and put down SCRAP as the party
15 and didn't even put down Mr. Blackmon's name,
16 the Department would not have made its motion.
17 **THE COURT:** Okay. Anything else?
18 **MR. HIGHTOWER:** But in this case, it did. Well, in
19 their defense ---
20 **THE COURT:** You mean in the response or the ---
21 **MR. HIGHTOWER:** The response. Excuse me, Your
22 Honor.
23 **THE COURT:** You was going to start defending, I want
24 to be clear on this.
25 **MR. HIGHTOWER:** No. In their response, Petitioners

1 sort of concede the fact that they should have
2 done this. They argue that the Department's
3 position is form over substance. And we don't
4 consider that form over substance. We consider
5 it a proper application. Otherwise, as I
6 stated, you could get one person who says that
7 they -- and write we down and could make the
8 same arguments and say, well, I represent this
9 group. And that would just make it unruly for
10 the Department. We would have all these
11 different parties. Each one of them could
12 individually decide to pursue a contested case
13 or further pursue it to the Court of Appeals.
14 And that would just make it unruly for the
15 Department. What we are asking for is just,
16 they have to comply. Each party -- each
17 affected party must comply. It's not a
18 universal, if one affected party files, that's
19 good for everybody else.
20 **THE COURT:** I don't want to cut you off too much,
21 but I get all that because I read everything
22 you said.
23 **MR. HIGHTOWER:** Okay.
24 **THE COURT:** But the final question, there aren't any
25 additional rules or statutes that apply to this

1 issue that you haven't told me about?
2 **MR. HIGHTOWER:** No, Your Honor, there aren't. The
3 Board has never taken up the case -- taken up
4 a case specifically to rule on that issue.
5 **THE COURT:** All right. Mr. Mustian.
6 **MR. MUSTIAN:** Your Honor, other than generally
7 supporting DHEC in the motion, we really have
8 no response. The only thing I would point out
9 is two things. One is, as Mr. Hightower points
10 out in his motion, SCRAP did come into
11 existence, based on the deposition of Mr.
12 Blackmon, which he attached, it came into
13 existence December 7th, which was before the
14 Request for Final Review was filed is my
15 understanding. And so ---
16 **THE COURT:** Well, that seems to help their point to
17 me.
18 **MR. MUSTIAN:** Well, but I think that it goes to show
19 that the group was in existence and yet they
20 still did not avail themselves of the revenue
21 that was there.
22 **THE COURT:** All right.
23 **MR. MUSTIAN:** And then the second thing that I would
24 point out is back to your point under 44-1-60
25 as far as affected person, is whether or not

1 SCRAP, as an unincorporated entity, whether or
2 not it is considered an affected person and it
3 meets those requirements. While the underlying
4 people may meet that requirement, it's not
5 clear whether or not SCRAP does. Those are the
6 only things ---
7 **THE COURT:** That's going to be an -- down the road
8 that's going to be in interesting issue, in
9 that unincorporated associations are not a
10 legal entity. In fact, there's a case of
11 LaShip (phonetic) that discusses the filing of
12 a case, but -- let me pull that up. But then
13 there's also the Graham case that Mr. Guild
14 cited that states that, in the eye of the
15 common law, the association itself is an,
16 quote, airy nothing, end quote, a, quote,
17 nonexistent legal ghost having no capacity to
18 enjoy legal rights or suffering legal wrongs,
19 end quote. So, it's an interesting approach to
20 bring a case before the Court, but I'll address
21 that now.
22 **MR. GUILD:** Good morning, Your Honor. If it please
23 the Court, Bob Guild, responding on this
24 motion. When we say that the Department's
25 motion honors form over substance, we mean a

1 variety of things. But first, Your Honor, to
2 your point. If you look at the request for
3 Board review that was filed by the 31 citizens,
4 the first line of their request says the
5 undersigned citizens of Mountville, South
6 Carolina.
7 **THE COURT:** That's the point I was making.
8 **MR. GUILD:** And we could name them the undersigned
9 citizens of Mountville, South Carolina instead
10 of SCRAP and DHEC concedes that it would have
11 been appropriate to have the $100 filing fee in
12 hand and they would have processed the request
13 for Board review precisely the way they did in
14 this case, which is to give the citizens
15 nothing. They got no hearing. There was not
16 Board review. And if Mr. Hightower found a
17 case were citizens got a Board review, it is
18 ancient history as far as I'm concerned because
19 they never grant Board reviews. So, they pay
20 their hundred dollars and his argument should
21 be that there should be $3,100 paid to DHEC for
22 precisely the same outcome.
23 **THE COURT:** I don't think he's making that.
24 **MR. GUILD:** He says everyone should pay, Judge.
25 **THE COURT:** He's saying that if they filed

1 individually, but they can file as a corporate
2 association.
3 **MR. GUILD:** Yes, sir. And as Your Honor pointed
4 out, it's we the undersigned. That's the
5 second paragraph. We request, we have sought,
6 we submit. And I could go through the entire
7 document.
8 **THE COURT:** I read it.
9 **MR. GUILD:** It's we. And why ---
10 **THE COURT:** I already made your point, so you don't
11 ---
12 **MR. GUILD:** Yes, sir. Why is Mr. Blackmon selected
13 out as the only one that should prevail here?
14 Because he's first on the list and has an
15 address by his name? In point of fact, Your
16 Honor, there are significant facts in dispute
17 about this. And we dispute many of what
18 Mr. Hightower assumes about the relationship
19 among members of the group. But I'll represent
20 to you that we'll demonstrate that Mr. Blackmon
21 didn't act as an attorney at all, he acted as
22 president of the group. And when contacted by
23 the DHEC Board clerk who receives the fee, she
24 asked, are you the contact person for the
25 group? He said, yes. And that's his status.

1 **THE COURT:** He didn't appear before the Board to
2 make any argument?
3 **MR. GUILD:** No, sir, because they denied Board
4 review, as they customarily do in these citizen
5 cases.
6 **THE COURT:** That's what I was getting at. That
7 would have concerned me.
8 **MR. GUILD:** No. He wouldn't have done that. And he
9 would have done that or each one would have
10 appeared and they would have been recognized
11 individually, but not in a representational
12 capacity. So, I mean, I get your point about
13 the unauthorized practice of law. But under no
14 circumstances was Mr. Blackmon representing
15 himself in that fashion. And they were acting
16 pro se at the time. And this is a disputed
17 fact. I mean, there's representations made
18 about them getting legal advice. We
19 acknowledge that Michael Corley, who's a lawyer
20 practicing, grew up in Mountville, South
21 Carolina. These were neighbors and friends of
22 his growing up as a child. And he gave them
23 what amounted to informal advice, but
24 consciously told them he could not and did not
25 represent them. And they will testify to that.

1 So, they appeared before the DHEC Board as an
2 unincorporated association, we, the citizens of
3 Mountville, South Carolina.
4 Now, I submit to you, Judge, that, as
5 Mr. Hightower concedes, there is no DHEC rule
6 that says to these citizens, the only way you
7 get your access to the DHEC Board for the
8 non-hearing or the non-review as a precondition
9 to coming before Your Honor is by every single
10 member of the group filing a filing fee. It
11 doesn't say that. And, in fact, the statute
12 that they have, that they have not interpreted
13 otherwise, simply refers, and I'm quoting here,
14 unless a written request for final review
15 accompanied by a filing fee is filed with the
16 Department by the applicant, permittee,
17 licensee or affected person. A filing fee.
18 Now, the statute doesn't contemplate or mention
19 unincorporated associations. It does mention,
20 as I just read, permittee, which oftentimes are
21 partnerships or a corporation. They are not
22 single individuals often. We know that. We
23 see in this case that -- and maybe they're
24 LLCs, they're some business organization that
25 represents a body that's more than one person.

1 And so, as Mr. Hightower concedes, if they had
2 called themselves SCRAP at this point, there
3 wouldn't have been any issue, one filing fee,
4 you can list all the members of SCRAP or the 30
5 odd -- those who signed the petition, one fee
6 would have been sufficient.
7 **THE COURT:** I'm holding my hand up. You're ahead at
8 this point, so how about sum it up.
9 **MR. GUILD:** I just want to say that, to the extent
10 Your Honor's concerned about the factual
11 questions that underlay the DHEC process, we're
12 prepared to address those from the witness
13 stand. But we believe, as a matter of law, the
14 Court simply cannot say that it would have been
15 a necessity ---
16 **THE COURT:** The motion to dismiss doesn't it address
17 underlying factors. The motion to dismiss is
18 based on the law, so.
19 **MR. GUILD:** Indeed. One cannot say as a matter of
20 law that 31 filing fees were required and that
21 only Mr. Blackmon should be treated. Why not
22 Ms. Basel? Why not Ms. Sparrow? Why not any
23 number of the others that were on the list?
24 Pick them out of the batch and say they're the
25 one that gets to go forward. Just because he

1 was the first on the list. So, Your Honor, we
2 oppose the motion to dismiss. Believe that an
3 alternative motion for summary judgment should
4 not be granted. There are facts in dispute.
5 And the law does not support the relief that
6 they ask for.
7 **THE COURT:** Any response on new legal issues raised?
8 **MR. HIGHTOWER:** One moment, Your Honor. Your Honor,
9 I'm looking at the DHEC website where it
10 specifically has information showing the filing
11 for a request. And nowhere does it talk about
12 groups can file, you know, just by themselves.
13 It says that a requestor must do it. And
14 Charles Blackmon was the requestor. He was the
15 one who mailed it to the Board. He was the one
16 that received the response back. And it says
17 to just Charles Blackmon. It does not say
18 Charles Blackmon, citizens, or whatever else.
19 Mr. Guild was trying to argue that they can --
20 that it's unfair for them to have to
21 individually do this. Well, that is how the
22 legislature intended. The legislature did not
23 say that you could not join a group, form a
24 group, or something like that. But what it
25 does require is that you must do it correctly.

1 And the problem with the unincorporated
2 associations is that that is really dealing
3 with situations -- and the cases don't deal
4 with any type of situation with whether or not
5 they can get before an administrative body.
6 They are dealing with situations where how do
7 you serve such a party. And usually they say
8 that you can serve and -- the individuals as
9 well as the group itself, but that is not ---
10 **THE COURT:** LaShip went a little further than that.
11 If you're familiar with that case. It
12 addressed the issue of serve and to be served,
13 so. Because it -- in my perspective, it
14 addresses an equal protection standpoint.
15 **MR. HIGHTOWER:** Well, Your Honor, we believe that
16 nothing prevented this group of citizens from
17 hiring an attorney, to have that attorney file
18 on behalf of SCRAP. And ---
19 **THE COURT:** You already argued that, now.
20 **MR. HIGHTOWER:** Yes. And that they knew this. The
21 fact that they said that -- well, they --
22 Mr. Corley gave them just free advice, well,
23 that's nice, they got free advice. But nothing
24 prevented them from hiring an attorney, who
25 would have known the proper way to practice and

1 to get the group before. Indeed they ended up
2 hiring Mr. Guild and Ms. Taylor. And Mr. Guild
3 has done several of these. And I note that he
4 has never filed on one persons name alone and
5 then said everybody else is covered. He's
6 always filed in the name of a specific group.
7 And that's not what is here. And I understand
8 that there may -- it may seem unfair in this
9 situation, but the group had access to legal
10 advice.
11 **THE COURT:** Okay.
12 **MR. HIGHTOWER:** And they chose not to ---
13 **THE COURT:** I've already heard that. As
14 respectfully as I can say, I just don't want to
15 hear everything over and over.
16 **MR. HIGHTOWER:** Right. No, I understand that, Your
17 Honor. But it is important that Mr. Blackmon
18 cannot represent other parties.
19 **THE COURT:** Okay. Thank you.
20 **MR. HIGHTOWER:** And that's what this RFR would
21 purport to be if the Petitioners view of it is
22 credited.
23 **THE COURT:** At this point in time that motion is
24 denied. Ms. Taylor, you're up on the summary
25 judgment.

1 **MS. TAYLOR:** May it please the Court. I'm
2 responding in opposition to Respondent
3 Coggins', Coggins', and Young's motion for
4 personal summary judgment. And they're asking
5 that this Court strike or not apply the NPDES
6 regulations of South Carolina pertaining to ---
7 **THE COURT:** I don't think they're asking to do that.
8 They're just saying that you don't have the
9 right -- that's not an issue before the Court.
10 So, I'm not striking anything. I'm just
11 addressing whether that's an issue before the
12 Court. And from what I have read, I don't
13 think -- this is a summary judgment motion.
14 You never set forth a single disputed issue of
15 fact. Your whole argument was on the law,
16 correct?
17 **MS. TAYLOR:** Well, I do think there are some
18 disputed issues of fact.
19 **THE COURT:** Did you set that forth in your
20 pleadings?
21 **MS. TAYLOR:** The -- in my opposition to ---
22 **THE COURT:** Yeah.
23 **MS. TAYLOR:** I said if there were other issues to be
24 brought forward to this Court at the day of the
25 hearing. Yes, Your Honor.

1 **THE COURT:** Did you say in the pleadings what -- set
2 forth in the pleadings any genuine issues of
3 disputed facts?
4 **MS. TAYLOR:** I'm not sure at this point. I mean, I
5 intended to be able to raise additional
6 arguments, including any arguments that there
7 are material issues of fact in terms of
8 discharges by CAFOs.
9 **THE COURT:** Well, it's a non-discharge permit. So,
10 do you have any evidence to support the fact
11 that the Permittee would be discharging into
12 the waters of this state?
13 **MS. TAYLOR:** I think that we will present evidence
14 showing that large CAFOs or animal feeding
15 operations certainly have the potential. And
16 if not the potential, that they do discharge.
17 **THE COURT:** Yeah. Certainly there are -- there are
18 instances where those facilities have come
19 here. But I think anyone with experience in
20 this area would find that response -- I'm not
21 going to go so far as to say absurd, but it is
22 extremely weak in that, yes, there could be a
23 -- there are swine facilities that come here
24 that discharge into lagoons. There are many
25 instances -- I mean, there's instances where

1 facilities discharge into the waters of the
2 state. But this permit is not in that regard.
3 And I notice that you cited various provisions
4 regarding the regulations in which there may be
5 regulations that address discharges into the
6 waters of the state, but those regulations
7 address instances that are not before this
8 Court. So, I'm seeking to find how, in you
9 making your argument, that that is a legal
10 issue before this Court today.
11 **MS. TAYLOR:** The South Carolina CAFO NPDES regs,
12 which is section 6-9 (sic) Part 122.23(a).
13 **THE COURT:** Hold on. Let me get there because I
14 have read off every one of them and read them
15 all concerning this issue and I haven't been
16 able to figure out your argument at this point,
17 so maybe I'll be educated. Give it to me
18 again.
19 **MS. TAYLOR:** It's within the 61-9, Part 122.23(a).
20 **THE COURT:** I'm there. (a). I'm there.
21 **MS. TAYLOR:** Yes, Your Honor. It says that,
22 concentrated animal feeding operations, as
23 defined in paragraph (b) of this section, are
24 point sources that require NPDES permits for
25 discharges or potential discharges.

1 And if you look at the definition of CAFO,
2 AFO, Animal Feeding Operation, all three of
3 these proposed facilities meet that. We have
4 testimony from a DHEC staff person that
5 concedes that point. Large concentrated ---
6 **THE COURT:** Is there testimony from a DHEC
7 individual that concedes the point that, under
8 the facts of this case, they will be
9 discharging or that they just meet that
10 definition of a CAFO?
11 **MS. TAYLOR:** Not only do they meet the definition of
12 a CAFO, but we presented evidence to the DHEC
13 permit reviewer imagery and testimony in a
14 deposition in which he stated that that would
15 constitute a discharge, what he saw and what he
16 read.
17 **THE COURT:** Well, that's not before me.
18 **MS. TAYLOR:** It is a fact that we'd like to be able
19 to put before you, Your Honor.
20 **THE COURT:** It wasn't in your motion -- or your
21 response, was it? That's what I'm asking. I'm
22 ruling on the motion today as submitted to me.
23 **MS. TAYLOR:** I understood that. But my intent was
24 to be able to make other arguments. And
25 whether or not there's a genuine issue of

1 material fact was what I considered to be
2 another argument, with all due respect.
3 **THE COURT:** Did you make that point in your ---
4 **MS. TAYLOR:** I just made a just a general statement,
5 Your Honor.
6 **THE COURT:** --- in your motion -- I mean, in your
7 response?
8 **MS. TAYLOR:** Yes, Your Honor.
9 **THE COURT:** Where was that in your response?
10 **MS. TAYLOR:** The last sentence of my conclusion
11 says, for the reasons set forth herein and any
12 other grounds verbally expressed at the outset
13 of the hearing of these contested cases, we ask
14 that the motion for partial summary judgment be
15 denied.
16 **THE COURT:** I'm trying to pull that up.
17 **MS. TAYLOR:** Also included, I believe, in my
18 opposition the motion for -- I mean, the
19 standard of review, which also talks about --
20 summary judgment proper where there is no
21 genuine issue of material fact in dispute.
22 **THE COURT:** Say that again.
23 **MS. TAYLOR:** I'm just also noting that on page two
24 of my opposition ---
25 **THE COURT:** Yes.

1 **MS. TAYLOR:** --- when I described the standard of
2 review ---
3 **THE COURT:** Yeah. I understand that's the standard.
4 **MS. TAYLOR:** But not only are we talking about ---
5 **THE COURT:** Hold on. Let me get your last point.
6 Or any other grounds. Okay. Go ahead.
7 **MS. TAYLOR:** Can I continue my argument?
8 **THE COURT:** Yeah.
9 **MS. TAYLOR:** Thank you, sir. So, the state NPDES
10 regulations that I mentioned to you that I just
11 -- that I wrote out -- that I stated out loud,
12 says that CAFOs, and in particularly here large
13 CAFOs, are point sources that require NPDES
14 permits for discharges or potential discharges.
15 As I said before, these proposed facilities are
16 defined as large CAFOs. I don't think there's
17 any question as far as the facts that these
18 facilities are large CAFOs, concentrated animal
19 feeding operations. If you don't mind, I'll
20 just use the acronym because it's shorter. If
21 you look at the animal agricultural
22 regulations, Section 61-43, Part 200.170 ---
23 **THE COURT:** Hold on the second. All right.
24 Regulations. All right. 61 dash what?
25 **MS. TAYLOR:** 61-43, Part 200.40.

1 **THE COURT:** I don't have that one in front of me.
2 Go ahead.
3 **MS. TAYLOR:** The provision deals with relationship
4 to other regulations, Your Honor. And it
5 states that the following regulations are
6 referenced throughout this part and may apply
7 to facilities covered under this regulation.
8 And then D, under 200 Part 40 (sic) says
9 permitting requirements for concentrated animal
10 feeding operations as defined by Regulation 6.9
11 (sic) are contained in Regulation 6.9 (sic).
12 There's also other references within 61.43
13 (sic), which is the animal agricultural ---
14 **THE COURT:** I understand there's references
15 throughout the regulations concerning instances
16 which some CAFOs may discharge into the waters
17 if that is the facts of that case in which
18 they're doing it. But that's not this case.
19 So, the fact that you keep coming up with laws
20 that address facts that are not before us,
21 doesn't -- would it not be meaningless?
22 **MS. TAYLOR:** I'd respectfully disagree, Your Honor,
23 because ---
24 **THE COURT:** Tell me why. I'd like to understand.
25 **MS. TAYLOR:** Because if the animal ag regulations

1 contemplate, as I read it, there's more than
2 one provision in here that, to me, expressly
3 contemplate that NPDES regulations pertaining
4 to CAFOs are part and parcel of this
5 decision-making process in order to issue the
6 ag -- the animal ag permit. And when you look
7 as ---
8 **THE COURT:** They may be part and parcel of the
9 decision-making process if that's the facts
10 before the Court, but it's not a part of the
11 decision-making process if that's not what they
12 intend to do whatsoever.
13 **MS. TAYLOR:** But the state's NPDES regulations
14 require as a duty for large CAFOs to apply for
15 an NPDES permit for their operations, not just
16 construction of their barns, for discharges or
17 potential discharges. My argument rests in
18 large part on the regulations are what they
19 are. They're based -- the NPDES regulations
20 are based not only on the Clean Water Act, but
21 they're also based upon the national Pollution
22 Control Act, which gives broad language in
23 terms of preventing pollution. I think the
24 state regulations speak for themselves that,
25 you know, while the animal agricultural permit

1 says no discharge, we'd like to bring evidence
2 to this case that shows that that is, in all
3 due respect, magical thinking on the part of
4 DHEC, that these facilities do discharge in
5 spite of the fact that they may meet all the
6 regulations for no discharge. And beyond that,
7 I think that the language here of the
8 regulation, the NPDES regulation states
9 potential discharges. DHEC could have revised
10 that rule some time ago, but it is still on the
11 books, it's still in full force and effect, and
12 should apply. What I see how these schemes
13 working together is they're clearly related, is
14 that the permittee, much like what is suggested
15 in, hang on just a minute, 200.70I ---
16 **THE COURT:** I have that.
17 **MS. TAYLOR:** --- that, if they receive an
18 agricultural animal permit, then they must
19 consider it in relation to the CAFO regulations
20 under the NPDES regulation because it requires
21 an expiration date if it's a large CAFO.
22 **THE COURT:** Okay. Anything else?
23 **MS. TAYLOR:** Just one point of clarification in
24 terms of what a large CAFO is. The NPDES
25 regulations here define a large CAFO basically

1 by the number of chickens, number of birds
2 within each barn. We're talking here in my
3 memo, in which I included part of each proposed
4 facility's general description of the
5 operation, that, you know, for a large CAFO by
6 definition, you must have more than 125,000
7 birds per any point in a time during the year.
8 I'm paraphrasing if I've got one word off. You
9 know, but these particular facilities, you
10 know, Heath Coggins is looking at 237,600 birds
11 at any one time during the year.
12 **THE COURT:** You made that point in your pleadings.
13 **MS. TAYLOR:** Yes. These are large ---
14 **THE COURT:** I read all that.
15 **MS. TAYLOR:** Yes. And also, point of clarification.
16 I had a shortcut in there. That's just at any
17 one point. There's actually more than a
18 million birds in each facility that's at issue
19 in this his case. And there is lots of
20 literature and documentation. As a matter of
21 fact, the Waterkeeper Alliance case that is
22 referenced by the Respondents talk about how
23 there is good justification to require a duty
24 to apply to large CAFOs because they have a
25 tendency to violate any other permit they have

1 and they ---
2 **THE COURT:** Under that theory, I mean, if you're
3 going to go on violation, think about this: I
4 mean, I can look at every potential permit out
5 there, every action that anyone could do in the
6 state of South Carolina and they could
7 potentially, you know, violate the law and so
8 I'm going to go and just say everyone should
9 get a NPDES permit. The logic of that I find
10 missing.
11 **MS. TAYLOR:** I understand your logic. I think there
12 is evidence, there's -- the EPA has studied
13 this extensively, has established that these
14 violations for this particular group occurs
15 quite often. And it's not just the violation
16 issue, Your Honor. There is literature
17 abounding that has certainly not been rebutted,
18 to my knowledge, that large CAFOs generate
19 pollution. And even if there's so-called no
20 discharge, they are large sources of pollution
21 in the United States and certainly here in
22 South Carolina.
23 **THE COURT:** Okay. That's not before me at the
24 point, those facts.
25 **MS. TAYLOR:** I just had computing ...

1 **THE COURT:** I'm very sorry, if you want to say
2 something else, but I'm -- you want to argue
3 anything else?
4 **MS. TAYLOR:** Well, one other point as far as the
5 regulation is, if I can find the -- here it is.
6 The only way by which a CAFO can escape the
7 potential discharge duty if they potentially
8 discharge is to establish that they have no
9 potential of discharge.
10 **THE COURT:** The only way they can escape the
11 potential discharge duty if they discharge is
12 to say that they have no discharge ---
13 **MS. TAYLOR:** Well, my words -- let me just repeat
14 the exact language of the ---
15 **THE COURT:** I can't follow that one.
16 **MS. TAYLOR:** Okay. My apologies. It says CAFOs, as
17 defined by the section, are point sources that
18 require NPDES permits for discharges or
19 potential discharges. And so, it goes through
20 the definition. And on 122.23(f), which deals
21 with no potential discharge, it describes how
22 the Department may determine if there is no
23 discharge.
24 **THE COURT:** Yep.
25 **MS. TAYLOR:** Which is a very broad test for no

1 potential discharge. And it also states that
2 in no case may the CAFO be determined to have
3 no discharge if it has had a discharge within
4 the past few years prior to the date. And we
5 do have some facts that show that there has
6 been a discharge by one of these proposed
7 facilities.
8 **THE COURT:** Thank you very much.
9 **MR. MUSTIAN:** Your Honor, I'm going to take that
10 last one first. I don't know how there can be
11 evidence that there has been a discharge at a
12 facility that has not yet been built. And in
13 fact, that's the whole reason we're here, is to
14 permit these facilities. So, that's my point
15 on that issue.
16 **THE COURT:** The whole reason we're here is to decide
17 whether the facilities are permitable.
18 **MR. MUSTIAN:** Fair enough. But I still don't know
19 how they can have discharge when they don't
20 exist, but.
21 And, Your Honor, I don't want to belabor
22 the point. I know you've read the motions and
23 I know you've read our arguments. Part of what
24 I would like to respond to is, one, it's
25 confusing to me whether or not the Petitioners

1 are relying upon EPA guidance or whether or not
2 this is a state regulation issue.
3 To the extent that this is an EPA related
4 issue and they're relying on the EPA guidance,
5 those issues have been squarely addressed by
6 Waterkeeper and by National Pork Producers.
7 And in both of those cases they have come to
8 the conclusion that under the Clean Water Act,
9 that's where you start. And before there can
10 be any question of potential to discharge or
11 proposed to discharge, you have to look at the
12 actual discharge. Those cases stem from the
13 proposition that the Clean Water Act does not
14 regulate the actual entities, it regulates the
15 discharge itself. So, if there is no
16 discharge, there is nothing to regulate, and
17 therefore CAFOs don't have to go and get an
18 NPDES permit. So, to the extent they're
19 relying on EPA regulations and guidance, then
20 that issue has been squarely addressed.
21 Now, to the extent that they're relying on
22 state regulations and only state regulations,
23 first of all, I note that EPA guidance is
24 irrelevant, but to the extent that it is, I
25 think Waterkeeper and National Pork Procurers

1 still provides guidance to this Court. When
2 you look at what the regulations require under
3 61-9 -- and if we can pull up 61-9 122.1
4 Subsection 4 (sic) (b)(1). Sorry, that's a
5 mouthful, but it starts with the proposition
6 that -- beg the Court's indulgence. It starts
7 with the language that says -- hold on a
8 second. Sorry, Your Honor. The program
9 requires permits for the discharge of
10 pollutants into waters of the state. The
11 program, the NPDES program, requires a permit
12 to discharge. DHEC's told us we can't
13 discharge. The regulations tell us we can't
14 discharge. So, just like in Waterkeeper, just
15 like in National Pork Producers, that
16 triggering statute of do we fall under 61-9, it
17 does not occur. We don't fall under it. If we
18 do discharge, if there is a discharge, that's
19 a violation. Not only of our agricultural
20 permit, but it's also a violation of the NPDES
21 permit -- or NPDES program, excuse me. So,
22 under that basis, we believe that this issue is
23 not properly before the Court because there is
24 no question of whether or not we require an
25 NPDES permit.

1 As a secondary argument, Your Honor, I
2 would she say this. She's referenced this.
3 She says that we need to get a permit as a
4 condition of us beginning to operate. Well,
5 Your Honor, if you look at 122.23 Subsection
6 (g), that regulation it specifically says,
7 quote, when does a CAFO need to get an NPDES
8 permit?
9 **THE COURT:** I read that.
10 **MR. MUSTIAN:** And it specifically says that we don't
11 have to apply for an NPDES permit until 180
12 days before we begin operation. So, even if
13 you accept her argument, which we do not agree
14 with for all the reasons we've stated in our
15 motion, but even if you agree with it, that
16 issue's not ripe because we haven't begun
17 operations, we're not going to begin operations
18 for at least 180 days because we're going to
19 have to construct the facility. And so,
20 therefore, the trigger moment for us to get an
21 NPDES permit under the regulations she cites,
22 to the extent that it's required, that hasn't
23 occurred yet. So, this entire argument is not
24 ripe.
25 **THE COURT:** Okay. Mr. Hightower, anything?

1 **MR. HIGHTOWER:** At this time the Department will --
2 I won't say join in the motion, but we agree
3 with the analysis that's been set forth by
4 Mr. Mustian as to the program itself. We do
5 not believe that these facilities are
6 discharging. The CAFO regs don't apply to
7 these type of facilities. And if the Court
8 does rule against the motion, the Department is
9 prepared to address this issue before the Court
10 and will provide evidence as to how the
11 Department interprets the regulations and the
12 interplay between 61-9 and 61-43.
13 **THE COURT:** All right. Any argument on new matter
14 raised in their arguments?
15 **MS. TAYLOR:** Mr. Mustian raised the issue of the
16 Waterkeeper Alliance case. And I do want to
17 make clear that I'm referring to state NPDES
18 regulations. They are -- they were adopted
19 pursuant to the EPA's rule in 2003. But
20 nonetheless, these are within 61-9 of South
21 Carolina's NPDES regulations. So, part of my
22 argument here was the EPA was challenged --
23 their 2003 CAFO rule was challenged, but that
24 is not an effect on states unless and until
25 they choose to revise their NPDES regulations.

1 Our NPDES regulations in the state of South
2 Carolina is enacted pursuant, not only to the
3 Clean Water Act, the federal law, but the state
4 Pollution Control Act. And I contend that the
5 language within the state Pollution Act refers
6 to prevention of air and water pollution and as
7 may cause or tend to cause the environment to
8 be contaminated, unclean, noxious, odorous,
9 impure or degraded, et cetera, which is Section
10 48-1-10(7). And they're also empowered under
11 the Clean Water Act to issue, deny, revoke,
12 suspend or modify permits, under such
13 conditions as it may prescribe. So, Mr.
14 Mustian tends to think that Waterkeeper
15 controls. And I argue that it does not. And
16 the remedy for the Department here, if they
17 want to avoid the potential ---
18 **THE COURT:** I would find that Waterkeeper does not
19 control. So, you're right on that. But that
20 it's reasoning is certainly a point of
21 consideration for the Court.
22 **MS. TAYLOR:** Well, the reasoning there -- I
23 recognize that it may be persuasive authority
24 to you, Your Honor. But I also ask that you
25 pause and look at that. I think the EPA

1 certainly had some strong arguments. I'd like
2 to be able to make those arguments in a
3 proposed order, you know, to continue this
4 argument. It's not binding on this Court, but
5 I understand, you know, Second Circuit is
6 nothing to be ignored. I get that completely,
7 Your Honor. But it's not that -- it's the ---
8 **THE COURT:** Let's stay on arguments that they ---
9 **MS. TAYLOR:** I understand. I guess, to finish, this
10 is -- the Pollution Control Act is a lot
11 broader in its authority. And as I understand,
12 the Waterkeeper Alliance, they were looking
13 solely at the Clean Water Act's authority. And
14 the Pollution Control Act I believe provides
15 language that supports the state regulation's
16 requirement that large CAFOs or CAFOs, but in
17 this situation they are large CAFOs, require
18 NPDES permits for discharges or potential
19 discharges, Your Honor.
20 **THE COURT:** All right. Well, based on the facts
21 that are put forth -- and argument put forth
22 before me, I grant the summary judgment motion.
23 **MR. MUSTIAN:** Thank you, Your Honor.
24 **THE COURT:** Now, are we ready for opening arguments?
25 **MR. MUSTIAN:** Your Honor, I think the only other

1 issue, and I don't know how Your Honor wants to
2 take this up, we did have -- we had filed
3 objections to exhibits. I don't know if you
4 want to take those up as they come ...
5 **THE COURT:** I'm going to take those up as they come
6 because I read it and it doesn't specifically
7 set forth a legal basis or factual argument for
8 me to make a determination based on those. So,
9 I will take that as a notice to the Court of
10 what you intend to do, but nothing I'm going to
11 rule on at the point in time.
12 **MR. MUSTIAN:** Fair enough. Just want to make sure
13 ---
14 **THE COURT:** Anything else?
15 **MR. MUSTIAN:** No, sir.
16 **THE COURT:** Mr. Hightower?
17 **MR. HIGHTOWER:** Nothing, Your Honor.
18 **THE COURT:** Guild/Taylor?
19 **MS. TAYLOR:** Nothing, Your Honor.
20 **THE COURT:** All right. All right. Opening
21 statements. Oh, sorry. Wrong way.
22 **MS. TAYLOR:** If you prefer, just in the sake of
23 efficiency ---
24 **THE COURT:** I love efficiency.
25 **MS. TAYLOR:** Well, I do too, Your Honor. So, I

1 would ask that I be able to just waive my
2 opening statement and then have the opportunity
3 in the proposed order to elaborate upon and
4 provide legal arguments and issues of law and
5 fact.
6 **THE COURT:** You can do that in the discussion
7 section then. That's what I normally allow.
8 **MS. TAYLOR:** Thank you, Your Honor.
9 **MR. MUSTIAN:** I'm sorry. Just to make sure I
10 understand. Is Ms. Taylor suggesting that we
11 file proposed orders at the close of the case
12 in lieu of opening and closing statements or
13 ---
14 **THE COURT:** Well, opening -- I mean, really opening
15 is only to education the Court as to what you
16 intend to offer anyway.
17 **MR. MUSTIAN:** Fair enough.
18 **THE COURT:** So, after the case is over, I think it
19 is more pertinent, again to use that phrase, to
20 allow closing argument maybe to be in the
21 discussion section. So -- and I think --
22 hopefully Ms. Taylor has recognized that I have
23 read everything that y'all have presented to me
24 and I got a pretty good idea of what this
25 hearing's about.

1 **MR. MUSTIAN:** Yes, Your Honor. We certainly have no
2 problem waiving openings either.
3 **MR. HIGHTOWER:** Your Honor, the Department waives
4 its opening.
5 **THE COURT:** All right. Y'all want to take a break?
6 Do y'all want to take a break or are you ready
7 to go?
8 **MS. TAYLOR:** A break is fine, Your Honor.
9 **MR. HIGHTOWER:** Thank you, Your Honor.
10 **MR. MUSTIAN:** Thank you, Your Honor.
11 **THE COURT:** How long, five minutes?
12 **MR. MUSTIAN:** Five minutes.
13 **(Off the Record)**
14 **THE COURT:** All right. Who's up lawyer wise?
15 **MS. TAYLOR:** Your Honor, I have had some
16 conversation with the Respondents' counsel, Mr.
17 Mustian, about some of these exhibits. And I
18 think it would be in the interest of efficiency
19 in order to introduce into evidence by
20 stipulation Petitioners' hearing Exhibits 1B,
21 2C, and 3B. And theirs constitute DHEC's --
22 what I call ---
23 **THE COURT:** 1B?
24 **MS. TAYLOR:** 1B, 2C, and 3B.
25 **THE COURT:** Okay.

1 **MS. TAYLOR:** And those documents constitute what I
2 call DHEC's permit file. And I believe there's
3 no opposition to that, if I'm correct.
4 **MR. MUSTIAN:** Your Honor, I believe she's right.
5 Now, the way that they were produced as part
6 of her exhibit list to the Court, I don't know
7 that they were identified as 1A, 1B, 1C. We
8 understood them to be by Bates number, which is
9 fine ---
10 **THE COURT:** Well, she didn't say. She said, 1A, 2C,
11 and 3B, I think.
12 **MR. MUSTIAN:** Could you just identify those by Bates
13 number, so that I'm ---
14 **THE COURT:** Certainly.
15 **MR. MUSTIAN:** --- clear on that, I'm sorry.
16 **MS. TAYLOR:** Certainly. On the -- Petitioners'
17 Exhibit 1 constitutes document specific to Jim
18 Young Broilers. And so, B is DHEC_003145
19 through DHEC_003613.
20 **MR. MUSTIAN:** Yes, Your Honor. We stipulate to
21 that. And just for clarity of the other ones,
22 869 to 1340 -- 1344 and 2021 to 2489?
23 **MS. TAYLOR:** You've gotten ahead of me here.
24 **MR. MUSTIAN:** Oh, I'm sorry.
25 **MS. TAYLOR:** Let me get to that.

1 **MR. MUSTIAN:** I apologize.
2 **THE COURT:** All right. Well, I can -- those three
3 are admitted.
4 **MR. MUSTIAN:** Thank you, Your Honor.
5 **(Petitioners' Exhibit Numbers 1B, 2C, and 3B were**
6 **admitted into the record.)**
7 **THE COURT:** Now, we'll move to the next.
8 **MS. TAYLOR:** Thank you. We'd also like, as a matter
9 of efficiency, to move into as Petitioners'
10 exhibits, which are found in -- I'm going to
11 try and start in numerical, start with 1, 2, 3,
12 just to make everybody less confused. There is
13 a map, a DHEC map, of each facility that I
14 think is helpful in terms of understanding the
15 facts surrounding this. These are DHEC
16 documents produced by DHEC. And they have a
17 Petitioners' Bates number on them because I
18 received them pursuant to a Freedom of
19 Information Act request.
20 **THE COURT:** Can I stop you just for a moment?
21 **MS. TAYLOR:** Yes, Your Honor.
22 **THE COURT:** I didn't ask you, Mr. Hightower. You
23 were being real quiet. Any objection to ---
24 **MR. HIGHTOWER:** But I had discussed it with Ms.
25 Mustian and we were in agreement on it.

1 **THE COURT:** Okay. All right. I just skipped over
2 him. So, go ahead. Proceed.
3 **MS. TAYLOR:** So, yes, I'm talking about three --
4 that the photos prepared or the radials, the
5 aerial maps of each facility: Jim Young
6 Broilers will be PET-01672; David Coggins
7 Broilers, PET-01670. Also, with David Coggins
8 there is a DHEC map showing the proposed
9 facility within a 5.5 mile radius. And that
10 number -- DHEC Bates number DHEC_00379. And
11 then PET-01671, which is the DHEC map
12 concerning Heath Coggins Broilers. It's in our
13 Exhibit 3A. Now, if I've confused anyone, I'm
14 ---
15 **COURT REPORTER:** May I, Your Honor? The other Bates
16 numbers that you identified, what exhibit
17 numbers are those?
18 **MS. TAYLOR:** Would you like for me to repeat the
19 whole or just ...
20 **COURT REPORTER:** All I've gotten was 3A. I didn't
21 get the exhibit numbers ---
22 **MS. TAYLOR:** Okay.
23 **THE COURT:** You just gave me the Bates number.
24 **MS. TAYLOR:** Okay. Petitioners' Exhibit 1A, which
25 is Jim Young, DHEC map, Bates number PET-01672.

1 Petitioners' Exhibit 2A, which is PET-01670.
2 Petitioners' Exhibit 2B, which is DHEC_00379.
3 Petitioners' Exhibit 3A, which is Bates number
4 PET-01671, Your Honor.
5 **THE COURT:** There you go.
6 **MS. TAYLOR:** We are labeling them as Petitioners'
7 Exhibit 3B and that is Heath Coggins Broilers
8 DHEC map with the Bates number of PET-01671.
9 **THE COURT:** Did you catch that?
10 **MR. MUSTIAN:** I think so, Your Honor. With respect
11 to -- I have 1A as PET-1672 and we would
12 stipulate that. For 2A I have as PET-1670 and
13 we would stipulate to that.
14 **THE COURT:** All right. Those two are admitted.
15 Mr. Hightower?
16 **MR. HIGHTOWER:** We stipulate to those.
17 **THE COURT:** Okay.
18 **(Petitioners' Exhibit Numbers 1A and 2A were admitted**
19 **into the record.)**
20 **MR. MUSTIAN:** 3A is PET-1671. We would stipulate to
21 that. Regarding 2B -- I'm trying to just
22 identify that if you can give me just a second.
23 **THE COURT:** All right. So, the last one you just
24 stipulated to, Mr. Hightower, any objection?
25 **MR. HIGHTOWER:** No objection to -- the last one I

1 think was 3A, 1671.
2 **THE COURT:** Okay.
3 **MS. TAYLOR:** 1673 -- no, I'm sorry, 3A, yes. 1671,
4 correct.
5 **MR. HIGHTOWER:** Okay.
6 **THE COURT:** All right. It's admitted.
7 **(Petitioners' Exhibit Number 3A was admitted into the**
8 **record.)**
9 **MS. TAYLOR:** So the last -- do I have one last
10 exhibit, which is Petitioners' 2B, Bates number
11 DHEC_000379.
12 **MR. MUSTIAN:** Your Honor, we object to that on the
13 grounds of relevancy and based on the
14 information that's shown on that document, so
15 ---
16 **THE COURT:** That's fine.
17 **THE MUSTIAN:** --- we're not going to stipulate to
18 that one.
19 **THE COURT:** I'll address that at a later point. You
20 don't really need to explain it at this point
21 in time because we were trying to do it for
22 efficiency is what -- all right.
23 **MS. TAYLOR:** In terms of relevancy of this document,
24 Your Honor, it is a DHEC document that shows
25 the respondent, David Coggins' proposed broiler

1 facility. And it shows additional ---
2 **THE COURT:** Well, are you under oath? In other
3 words, you're not a witness.
4 **MS. TAYLOR:** That's correct.
5 **THE COURT:** So, let's just hash ---
6 **MS. TAYLOR:** I'm just trying to ---
7 **THE COURT:** I know, I know. But you started off by
8 saying we were going to do this for efficiency.
9 He's objected ---
10 **MS. TAYLOR:** I understand. Okay. I was just
11 attempting to demonstrate that there is
12 relevancy.
13 **THE COURT:** I understand. I understand what you're
14 trying to do, but ---
15 **MS. TAYLOR:** Okay. Thank you, Your Honor.
16 **THE COURT:** Unless you're going to persuade him with
17 that. And apparently there's no indication
18 that's going to happen.
19 **MS. TAYLOR:** No. I agree with you, Your Honor.
20 **THE COURT:** All right. Anything else? Well, let's
21 start down this road.
22 **MR. GUILD:** Your Honor, please the Court. We call
23 Charles Blackmon. Mr. Blackmon.
24 **THE COURT:** Sure.
25 **CHARLES BLACKMON**, having been duly sworn, testifies

1 as follows:
2 **COURT REPORTER:** Please state your full name for the
3 record.
4 **THE WITNESS:** Charles S. Blackmon.
5 **COURT REPORTER:** Thank you.
6 **MR. BLACKMON - DIRECT EXAMINATION BY MR. GUILD:**
7 Q: Mr. Blackmon, would you tell us where you live
8 please?
9 A: I live near Clinton, just outside of Clinton on
10 a farm.
11 Q: How about give us an address please for the
12 record.
13 A: It's 3771 Highway 56 South.
14 Q: And are you a member of a group that's been
15 identified as SCRAP, South Carolinians for
16 Responsible Agricultural Practices?
17 A: I am.
18 Q: And are you an officer of that group?
19 A: I am.
20 Q: And what office are you -- what office do you
21 hold?
22 A: I'm a president.
23 Q: All right, sir. And do you own property in the
24 vicinity of any of the propose facilities that
25 are the subject of this case today?

1 A: I do.
2 Q: And how long have you and your family lived in
3 Laurens County, Mr. Blackmon?
4 A: Well, my family -- my great grandfather came
5 there to the farm in Mountville, came there in
6 1894 and bought land. And we've been there
7 ever since and expanded from it. I think he
8 had 250 acres originally. And we've expanded
9 it to a thousand.
10 Q: All right. And what kind of work did your
11 family do in the Mountville community?
12 A: I'm a retired highway and bridge construction
13 contractor.
14 Q: Talk about your -- when you mentioned your
15 forbears buying property there, what work did
16 they do?
17 A: They were farmers.
18 Q: Farmers. All right. And what kind of farming
19 did they do in the Mountain community?
20 A: Grow crop. And they had some livestock, of
21 course.
22 Q: All right. Now, you jumped ahead again a
23 little bit to your own personal background.
24 Tell the Court a little bit about yourself and
25 what work you've done.

1 A: Well, as I said, I have been primarily a road
2 and bridge construction contractor for 30
3 years. But along -- during that time, I also
4 served in the South Carolina National Guard as
5 a warrant officer for 20 years. And I also
6 hold presently and have held for 39 years a
7 South Carolina law enforcement commission.
8 Q: All right. And in that regard, tell the Court
9 what you did in law enforcement area please.
10 A: The first -- well, the 15 years was State
11 Constable. The remaining years have been as a
12 conservation officer or a law enforcement
13 officer with South Carolina DNR.
14 Q: Tell us a little bit about what your duties
15 were in that capacity, DNR.
16 A: Well, we've got requirements, like you have to
17 serve with other full-time officers 120 hours
18 a year minimum. And we have qualify with
19 weapons every year. We have to updated legal
20 training each year.
21 Q: All right. I've heard you refer to it as a
22 game warden. Is that essentially what you did?
23 A: That's it. Rabbit share, possum, police, you
24 know, whatever.
25 Q: And what are the duties of that as a volunteer

1 game warden with DNR?
2 A: Well, to assist primarily the full-time
3 officers. But I also have statewide authority
4 and can operate on my own. But we don't carry
5 ticket books and we don't -- we're not allowed
6 to use blue light sirens, that type of thing.
7 Q: You enforce the game and hunting laws?
8 A: As best we can.
9 Q: All right. And does that cause you to be on
10 hunting lands in the vicinity of the Mountville
11 community?
12 A: All over the state, but frequently all over
13 Laurens County and then the lands of Mountville
14 especially.
15 Q: All right. And you hunt yourself?
16 A: I do.
17 Q: All right. And where do you hunt?
18 A: Well I hunt primarily in Laurens County on my
19 property and on the property of some of the
20 members of SCRAP. But I have hunted in other
21 areas of the world. I have hunted in Africa
22 and South America as well.
23 Q: And do you hunt at all on wildlife management
24 areas that are in the Little River watershed in
25 Laurens County?

1 A: I do. I can.
2 Q: And can you tell us what areas those are
3 please?
4 A: Well, I have been on the, of course, Sumter
5 National Forest. But right now one of the key
6 places is the new acquisition down Little River
7 from our farm is the Belfast Wildlife
8 Management Area.
9 Q: And that's operated by the State Department of
10 Natural Resources?
11 A: It is. And we -- I've had to perform duties
12 down there and I've also helped with the
13 mobility impaired hunt that's sponsored down
14 there.
15 Q: Okay. I want to show you a few documents. I'm
16 going to put them up on the machine here. Mr.
17 Blackmon, I ask you to tell us a little bit
18 about your community. I want to show what's
19 been identified as a Petitioners' Exhibit 4T as
20 in Tom.
21 **MR. GUILD:** Your Honor, I'm going to try to make the
22 machine work here.
23 **MR. MUSTIAN:** Your Honor, if I could, we don't have
24 a list of the exhibits -- their exhibit
25 numbers. So, it would be helpful to us if he

1 could also identify them by Bates number or
2 otherwise, because I don't know how else we ---
3 **MR. GUILD:** Sure.
4 **MR. MUSTIAN:** --- for efficiency.
5 **MR. GUILD:** And I don't know whether there's a Bates
6 number on that. Let me see.
7 **MS. TAYLOR:** There is. PET-02189. You want me to
8 repeat that?
9 **MR. MUSTIAN:** Yes.
10 **MS. TAYLOR:** PET-02189.
11 **(Off the Record)**
12 Q: All right. Mr. Blackmon, I'm showing you a map
13 that's been identified as Petitioners' Exhibit
14 4T with the Bates number that counsel just
15 recited. Do you recognize this map, this
16 depiction?
17 A: I do.
18 Q: Can you tell us what it show generally? What
19 area of the world it shows?
20 A: Well, it shows a large part of the Mountville
21 community, according to the Laurens County GIS
22 site, with the -- roughly the plat borders for
23 each of the landowners.
24 Q: All right. And are you familiar with the
25 source of this map?

1 A: I am.
2 Q: And where did it come from?
3 A: The Laurens County GIS site ---
4 Q: Laurens County GIS. Thank you. All right.
5 Now, do you -- can you identify on this map the
6 site of the proposed three facilities?
7 A: I do.
8 Q: Now, I'm told that you can --
9 **MR. GUILD:** Let's see if we can make this work,
10 Judge.
11 Q: I'm told that you can -- now, if you use your
12 finger on the map, just your finger, can you
13 identify what you understand to be the site of
14 proposed three facilities?
15 A: Okay. I believe this here is the Jim Young
16 proposed site.
17 Q: Okay. Can you -- touch the screen now and you
18 should be able to draw on it.
19 A: Oh, okay.
20 Q: All right. I see that.
21 A: Right there.
22 Q: Is that the site of the three facilities?
23 A: That's correct.
24 Q: Now, it's identify as Coggins. That's the
25 property owed or at least to the time the GIS

1 map was prepared; is that right?
2 A: That's my understanding. It's under the
3 Coggins name on the Laurens County property
4 map.
5 Q: And the three facilities are on subdivision of
6 that tract. Is that your understanding?
7 A: They're all located on that tract. I don't
8 know about divisions, but they're all on that
9 tract.
10 Q: Okay. Now, help me -- let's help orient a
11 little bit more. I see a red line that's
12 running from the bottom up toward the top of
13 the map. What is that red line? Can you see
14 that?
15 A: Yes, I can. That's Highway 72.
16 Q: Okay. Highway 72, that is to the -- close to
17 the west -- I'm sorry, the east proposed site,
18 the Coggins property, right?
19 A: That's correct.
20 Q: All right. Now, I see a blue line to the ---
21 **THE COURT:** Wait a second. You said Highway 72?
22 **MR. GUILD:** Yes, sir. Highway 72 is the red line to
23 the right.
24 **THE COURT:** Okay.
25 Q: And then I'm just going to just indicate

1 roughly -- I made a green line there.
2 A: Uh-huh.
3 Q: Is there a river near the site of proposed
4 facilities?
5 A: Yes. That's the Litter River.
6 Q: All right. And so, Little River is adjacent to
7 the Coggins property; is that correct?
8 A: My understanding it borders it, yes.
9 Q: Borders the Coggins property. All right. And
10 where does Little River flow?
11 A: Well, it flow from Laurens, South Carolina to
12 Saluda River eventually.
13 Q: All right. Lake Murray?
14 A: Eventually.
15 Q: All right. And the flow direction is from
16 where to where in relation to this map; from
17 the top of the map down?
18 A: Yeah. This -- well, let me touch it again.
19 This is north. Can you see up there?
20 Q: Yes, sir.
21 A: And then it flows from north to south.
22 Q: All right. Now, adjacent and to the northwest
23 of the Coggins property is a piece of property
24 with the names, Basel/Sparrow.
25 A: Correct.

1 Q: Whose property is that, if you know?
2 A: I do know. That's Mary Basel's and Margaret
3 Sparrow's.
4 Q: All right. And are they members of SCRAP?
5 A: They are.
6 Q: There own property that is adjacent to the
7 Coggins property, correct?
8 A: Immediately adjacent.
9 Q: All right. And are they present in the
10 courtroom today?
11 A: They are.
12 Q: In the front row. All right. And then moving
13 to the northwest of the Basel/Sparrow property,
14 I see a tract of land that has the word
15 Blackmon on it. Do you recognize that?
16 A: If you're talking about the one with the two
17 blue ponds on it, yes.
18 Q: Yes, sir. I'm going to try to clear this. And
19 why don't you just -- if you would, indicate
20 where -- well, first of all, tell me, do you
21 recognize that tract? Whose land is that? It
22 says Blackmon.
23 A: That -- I'm a 50 percent owner in that
24 property.
25 Q: All right. And who else owns the property with

1 you?
2 A: My sister Jean Revis and also my younger, Keith
3 Blackmon.
4 Q: Okay. That's family land?
5 A: It is.
6 Q: All right. And would you just indicate the
7 Court where that land is? Just draw a outline
8 around it please.
9 A: Okay.
10 Q: Use your finger.
11 A: You mean just that one tract that we got ---
12 Q: Yes, sir. Just that one tract for now.
13 A: We got several tracts, but I'll just do that
14 one right now.
15 **THE COURT:** Wow, Mr. Blackmon, you're pretty good at
16 this.
17 **MR. BLACKMON:** Yeah. We'll see.
18 Q: And where's your property then in relation to
19 the Little River?
20 A: Well, Little River runs through it.
21 Q: Okay. You told me there were a couple ponds on
22 the property. Is that what's indicated in
23 blue?
24 A: Well, that's two of them. There's actually
25 four.

1 Q: All right. All on that same tract?
2 A: No; three of them are.
3 Q: Three on the tract. And then is there other
4 Blackmon family property in the vicinity?
5 A: Oh, yeah. I have it marked Blackmon.
6 Q: Okay. And where's that please?
7 A: Well, the one that's got the other pond on it
8 is right here.
9 Q: Yes, sir. And it's across a road it appears to
10 be from your other tract that had the two
11 larger ponds on it. What's that road please?
12 A: That's Lisbon Road.
13 Q: Okay. And that Lisbon Road is that dark white
14 line that runs from the upper left to the lower
15 right, correct?
16 A: That's correct. Do you want to mark the other
17 property?
18 Q: Yes, sir. And is there other Blackmon family
19 property in the area?
20 A: Yes. Up Little River we own this tract. We
21 also own this tract. Across the river, we own
22 this tract. I own tract alone. And then we
23 own together, with my siblings, this 200-area
24 tract that borders Beaver Dam Creek.
25 Q: All right. And where is Beaver Dam Creek on

1 this map?
2 A: It's this blue line. Can I mark it?
3 Q: Sure. Mark with ---
4 A: It's this blue line that goes this way.
5 Q: And where does Beaver Dam Creek flow? Is it --
6 -
7 A: Eventually into Little River.
8 Q: It's a tributary of Little River?
9 A: It is.
10 Q: Okay. And are there other surface waters on
11 the map here, shown the map that you can
12 identify? You've told me about ponds, you've
13 told me that Little River and Beaver Dam Creek.
14 Is there another stream?
15 A: Oh, yes. Ginger Creek borders my property.
16 And I'll mark it. To the far bottom of this
17 page ---
18 Q: Yes, sir.
19 A: Ginger Creek runs along through there.
20 Q: And where does Ginger Creek flow?
21 A: It flows into Beaver dam before flowing in the
22 -- Little River.
23 Q: Okay. How many acres, all the total, do you or
24 your family own in whole or in part that you
25 just identified in the vicinity of the proposed

1 facilities?
2 A: In the Mountville area it's a thousand acres.
3 **MR. GUILD:** I'm going to clear that. Your Honor, we
4 moved the admission of what's been identified
5 as Petitioners' Exhibit 4T as in Tom. The map
6 that's being described.
7 **THE COURT:** Bates number 2 ---
8 **MR. MUSTIAN:** Without objection.
9 **MR. HIGHTOWER:** No objection.
10 **THE COURT:** It's admitted.
11 **(Petitioners' Exhibit Number 4T was admitted into the**
12 **record.)**
13 Q: Mr. Blackmon, how did you come to learn of the
14 proposed facilities that are at issued in this
15 case? How did you find about this?
16 A: Initially I think Mary Basel and Margaret
17 Sparrow indicated to me there was a rumor that
18 the property across Lisbon Road from them would
19 be sold and one of the perspective buyer may
20 have a chicken facility in mind. That was back
21 in 2015 I think.
22 Q: And what action, if any, did you take after
23 having that information shared with you?
24 A: There was not really any action to take at that
25 point. The -- other than I may have counseled

1 them on -- they were going to build a couple of
2 recreational houses on that place for their
3 children. I knew that was in their future.
4 And I may have told them at time, well, you
5 better go ahead and construct those so that
6 DHEC will then be able to know to set back a
7 thousand feet from those residences. And I
8 think they went ahead and -- well, I know they
9 did. They went ahead and got septic tank
10 permits for that area in 2015.
11 Q: All right. And what happened then, if
12 anything, with regard to these three proposed
13 facilities?
14 A: Well, eventually we saw the DHEC notifications
15 go up, you know, on the property letting us
16 know that they were being considered for
17 permitting.
18 Q: All right.
19 A: So, at least 20 citizens contacted DHEC and
20 requested a public meeting. And those were
21 held in September and October 2016.
22 Q: All right. So, we have these three facilities
23 in this consolidated case. Are you aware of
24 other proposed poultry facilities that you and
25 others in the communities have express concerns

1 about as well?
2 **MR. MUSTIAN:** Your Honor, we'd object on the grounds
3 of relevancy related to other facilities that
4 are not at issue in this proceeding.
5 **MR. GUILD:** And we are talking about the impact of a
6 number of poultry facilities in the area, Your
7 Honor, with regard to the question that you --
8 the Court had concerns about, which is the
9 potential to discharge from what is magically
10 presumed to be a no-discharge facility. The
11 concentration of facilities in the area is the
12 central issue in this case, Your Honor. And it
13 bears on whether DHEC followed it's own
14 regulations in considering the potential impact
15 of water quality as well as the impact on
16 neighbors from the operation of multiple
17 facilities. But Your Honor certainly can take
18 judicial notice of the fact that there are two
19 additional cases that are pending before Your
20 Honor that aren't consolidated with these
21 three. That's simply what I'm trying to
22 establish at this point.
23 **MR. MUSTIAN:** Your Honor, if I could just quickly
24 respond. I have a feeling that we're going to
25 be visiting this issue a lot over the next

1 couple days. But the issues that Petitioners
2 raising, a significant portion of them, as we
3 understand it, relates to other permits and
4 other facilities that exist in the area. DHEC
5 regulations do not address -- they're not like
6 CON regulations where there are limitations on
7 the number of facilities other than do they
8 meet the setback requirements. And so, our
9 position throughout this trial is going to be
10 the discussion of other facilities and other
11 pending permits is irrelevant these proceeding,
12 which is whether or not the permits at issue
13 meet the DHEC regulations and whether or not
14 DHEC properly reviewed those applications in
15 compliance with the regulations when they issue
16 the permits.
17 **MR. GUILD:** And, Your Honor, that's precisely what
18 we intend to focus on as well, is DHEC
19 regulatory requirements, we maintain, were not
20 complied with in this case with respect to the
21 technical review of these individual permits in
22 the context of their impact on water quality
23 given the other potential and existing non-
24 point and point sources in the community.
25 There's a DHEC regulation, and I'm

1 paraphrasing, that affirmatively obligates DHEC
2 to consider, with regard to each of these
3 permits, assuring that water quality will be
4 protected in the operation of this facility
5 considering the existing sources of water
6 pollution in the community. We represent, Your
7 Honor, and argued in our -- set forth in our
8 pre-hearing statement that we will demonstrate
9 that there is already impairment of the Little
10 River listed on the DHEC and EPA 303(d) list of
11 impaired waters for fecal coliform bacteria,
12 which is identified potentially as coming from
13 land application of poultry manure, animal
14 waste. That's what fecal bacteria comes from
15 among other sources.
16 **THE COURT:** But is there a consideration for me in
17 this instance or for this facility to consider
18 the land application?
19 **MR. GUILD:** Absolutely, Your Honor. What ---
20 **THE COURT:** What -- let me finish.
21 **MR. GUILD:** Yes, sir.
22 **THE COURT:** I know I cut you off some. This ---
23 **MR. GUILD:** I want to answer your question, Judge,
24 so ...
25 **THE COURT:** But on this one, I'm -- the land

1 application requires a separate permit. So,
2 that is a different permitting process. So,
3 here I'm just addressing the facilities. The
4 land application being another issue. So, can
5 you respond to that?
6 **MR. GUILD:** Sure. Well, first of all, there are
7 actually
8 different practices proposed for one or more of
9 these three facilities. Two of the facilities
10 proposed to use a manure broker to take the
11 waste and, you know, land apply it or deliver
12 it to some place where they presume it's going
13 to be land applied. Though that waste is,
14 nonetheless, waste that DHEC must take into
15 account in complying with 61-43 to assure that
16 water quality will be protected,
17 notwithstanding the fact that there is this
18 additional actor or actors that are going to
19 take the waste and do something with it. With
20 regard to one of the three facilities, and I
21 believe it's Jim Young, if I got that one
22 right, that has its own waste management plant,
23 Mr. Young has his own animal waste management
24 plan or he has actually specified the fields
25 where he will land apply. And as to him, part

1 of this very permit is his action in properly
2 managing the animal waste on fields that he's
3 designated. So, for him it's absolutely his
4 personal responsibility. But the DHEC
5 regulation, Judge, is much more appropriately -
6 - an appropriate is so comprehensive because it
7 says essentially that they've got to assure,
8 given the existence other point and non-point
9 sources of pollution, that water quality
10 standards will be met in each permit that it
11 issues. And that's where its precisely
12 critical in this case for Your Honor to
13 recognize how concentrated the numbers of
14 facilities are in this very small watershed.
15 Again, as I said, a watershed that's already
16 identified as impaired for fecal bacteria and
17 one for which, as federal and state law
18 requires, a TMDL or a total maximum daily load
19 a plan to clean up the fecal contamination of
20 the Little River has been promulgated by DHEC.
21 And this is a scientific document that purports
22 to address the sources of fecal bacteria and
23 how we're going to reduce the fecal bacteria
24 that gets into the Little River. Here you have
25 an agency that's permitting additional

1 facilities, and we'll demonstrate just how
2 extraordinarily concentrated they are in this
3 Little River at watershed, without regard to
4 remedying the existing impairment or
5 implementing the TMDL that DHEC themselves have
6 promulgated, EPA's accepted, for clean up of
7 fecal bacteria contamination in Little River.
8 So, Your Honor has a very specific case here of
9 too many animal waste generators in a small
10 watershed already impaired where DHEC, we will
11 contend, failed to assure that the waste being
12 generated by these new facilities wasn't simply
13 going to make matters worse. Now, I'm
14 paraphrasing, but that's the essence of why
15 it's pertinent how many other facilities there
16 are.
17 **THE COURT:** All right.
18 **MR. MUSTIAN:** Your Honor, with all due respect to
19 Mr. Guild, I think we got into some testimony
20 there for a moment, but that's okay.
21 **THE COURT:** Well, I'm okay with that because that's
22 the evidence he's going to present to support
23 this theory of this case. So, I've got to
24 evaluate the fact that that's the path he's
25 going to take in order to support his theory.

1 **MR. MUSTIAN:** Fair enough, Your Honor. But I think
2 we've gotten away from what the question that
3 he asked and my objection, which was, as I
4 recall ---
5 **MR. GUILD:** Yeah, I think I forgot it.
6 **MR. MUSTIAN:** As I recall, his objection was is he -
7 - has Mr. Blackmon -- and maybe I'm not
8 remembering correctly, but something to the
9 effect of do they have concerns about other
10 applicants. So, we're not talking about
11 existing facilities with the respect to this
12 question. We're talking about facilities that
13 have not been permitted, that went through the
14 process just like we're going through the
15 process. So, what the difference is is did
16 DHEC look at the environment based on the
17 existing conditions versus do they have to take
18 into consideration every other applicant that
19 is or may be pending down the road. And my
20 point is that, with respect to objections or
21 complaints that they may have with respect to
22 other applicants, that is irrelevant as to our
23 applications, to our permits, and to our
24 facilities.
25 **MR. GUILD:** And, Your Honor, we're not going to try

1 those other cases today. That's not my point.
2 My point really is only to ---
3 **THE COURT:** Well, let me hear from Mr. Hightower.
4 **MR. GUILD:** I'm sorry.
5 **THE COURT:** And I've got to -- when you say that's
6 not the issue before the Court, do you take the
7 position that it's not the issue before this
8 Court as to the total impact and the -- whether
9 or not I should not consider the total impact
10 to water quality Is that an issue before me?
11 **MR. MUSTIAN:** I think in order for that issue to be
12 -- well, first of all, I think the answer is
13 no. I don't think that's an issue before you.
14 I think the issue before you is is do the
15 permits, as they were applied and as they were
16 approved, did they comply with the DHEC
17 regulations. Did DHEC properly analyze those
18 regulation, those ---
19 **THE COURT:** Do those regulations require a
20 consideration of water quality?
21 **MR. MUSTIAN:** They do consider them to -- they do
22 take into consideration water quality as a
23 whole. What, my point is is I think to the
24 extend that we start getting into individual
25 applications and individual entities, I believe

1 that that is irrelevant. To the extent that
2 they want to attempt to demonstrate evidence
3 that they collectively -- the existing
4 facilities that are there contributes, you
5 know, X amount fecal coliform bacteria to the
6 Little River, okay, then fine. But otherwise,
7 we're getting into a debate about how much does
8 each facility contribute. What is the impact
9 of each facility. And I don't think that's
10 within DHEC's purview. I think they look at it
11 from a global respective. And so, to get into
12 a specific of each facility I think goes beyond
13 their scope. In additional, to the extent
14 we're talking about future facilities, I don't
15 know how they can take into consideration
16 future facilities about pollutants that they
17 may or may or may not introduce. I would point
18 out though to that point though, that each of
19 these facilities that Mr. Guild is addressing,
20 they are all no discharge facilities. So, by
21 definition, they are precluded from discharging
22 pollutants into waters of the state. And to
23 the extent, he was referencing the TMDL ---
24 **THE COURT:** The only thing he could be -- you were
25 already granted summary judgment on the

1 discharge.
2 **MR. MUSTIAN:** Yes, sir.
3 **THE COURT:** But what he's -- and, Mr. Guild, I don't
4 want to get into a whole lot of argument, but
5 if you can just yes or no on this. But it
6 appears to me that his argument is that the
7 land application resulting from the permits for
8 these facilities will affect water quality
9 because of the fecal coliform, impact. Is that
10 correct, Mr. Guild?
11 **MR. GUILD:** Yes, sir.
12 **THE COURT:** All right.
13 **MR. MUSTIAN:** Your Honor, the thing that I will
14 point out with that -- with respect to that is
15 as far as land application is there is not just
16 limitation -- and this will come out in
17 evidence, I'm sure. But land application is
18 not limit to the Little River watershed. It
19 can be all over. In fact, Mr. Young's land
20 application permit is not in the Little River
21 watershed. So, to the extent that that's the
22 issue, that's irrelevant to Mr. Young's permit.
23 **THE COURT:** All right. Mr. Hightower.
24 **MR. HIGHTOWER:** Well, Your Honor, addressing the
25 last issue that Mr. Mustian had brought up.

1 The land application permit aspect only effects
2 Jim Young. It does not effect David Coggins or
3 Health Coggins. They're no-discharges permits.
4 And contrary to what Mr. Guild has tried to
5 argue, a manure broker -- once that manure
6 broker takes possession of the manure, that is
7 a separate permitted entity and the farmer's no
8 longer responsible for that manure. And
9 despite what Mr. Guild has tried to argue, if
10 I understood his argument correctly, that is
11 not something that is properly before this
12 Court.
13 With regard to Mr. Young's land
14 application fields, as Mr. Mustian stated, they
15 are not in the Little River watershed. So,
16 they would have no impact upon fecal coliform
17 that is in the Little River water bodies
18 itself.
19 Further, and I'm sure that the evidence
20 will show, the TMDL does not state that
21 agricultural ---
22 **THE COURT:** TMDL is ...
23 **MR. HIGHTOWER:** Total mass ---
24 **THE COURT:** Okay.
25 **MR. HIGHTOWER:** --- daily load. That's the document

1 that the department developed and was approved
2 by the EPA for -- it identifies that a water
3 body is impaired and then what steps are going
4 to be taken to clean up and repair the damage
5 done by that.
6 **THE COURT:** Does DHEC take into account, in
7 permitting fields for land application, the
8 TMDL?
9 **MR. HIGHTOWER:** We take it into account if it is --
10 if the field is in a particular watershed that
11 is impaired for fecal coliform, yes, we would
12 take it into account. We also have to take
13 into account the setbacks from waters of the
14 state and other issues, such as scope of the
15 land, you have to make sure that the proper
16 economic weight for the application of the land
17 ---
18 **THE COURT:** I get it.
19 **MR. HIGHTOWER:** --- of the manure and everything
20 else is in there.
21 **THE COURT:** All right. Mr. Guild.
22 **MR. GUILD:** Yes, sir.
23 **THE COURT:** It appears to me that, if your concern
24 is the impact to the Little River watershed,
25 that I will allow you to present evidence as to

1 the facilities before me today, that their land
2 application in that watershed -- so, if you
3 could relate to whether Mr. Young or any of the
4 brothers have already been permitted to apply
5 in that watershed, that is something I think is
6 in consideration for me. But I need to have
7 that addressed down the road.
8 **MR. GUILD:** Yes, sir.
9 **THE COURT:** But as to, you know, the question you
10 asked Mr. Blackmon, I sustain the objection as
11 to him because his concerns are not -- unless
12 your going to set forth that he has expertise
13 to develop ---
14 **MR. GUILD:** We'll try to tie it together, Judge.
15 **THE COURT:** That's just simply a concern.
16 **MR. GUILD:** We'll try to tie it together.
17 **THE COURT:** That's more speculation.
18 **MR. GUILD:** Yes, sir. And may I just draw the
19 Court's attention, please, just to -- I was
20 trying to paraphrase, but I have it before me
21 now the 61-43 provisions I had in mind. Just
22 for Your Honor some aid in following this
23 argument ---
24 **THE COURT:** Hold one second. Give me a second.
25 **MR. GUILD:** Yes, sir.

1 **THE COURT:** All right. If you give me the number,
2 while you're talking, I'll get into.
3 **MR. GUILD:** Yes, sir. 61-43, 200.70. 200.70E, as in
4 Edgar.
5 **THE COURT:** Hold on a second. I didn't quite get
6 there fast enough. All right. 61 -- go ahead.
7 **MR. GUILD:** 43, .200.70 (sic). Subjection E as in
8 Edgar, Judge.
9 **THE COURT:** Okay.
10 **MR. GUILD:** I'll just read it. The Department shall
11 act on all permits to prevent, so far as
12 reasonably possible considering relevant
13 standards under state and federal laws, an
14 increase in pollution of the waters and air of
15 the state from any new or expanded sources.
16 So, there's a mandate to DHEC, on its own
17 regulations, to consider the impact from any
18 new facility on increased potential for water
19 and air pollution. And then F, Your Honor, is
20 the one Mr. Hightower had just alluded to. You
21 are well familiar with this, the setback
22 evaluation that the reviewers go through,
23 requiring that they consider, among the
24 enumerated factors, any other relevant factors.
25 But they include numerous factors that are

1 pertinent to protection of water quality. I'm
2 reading among them, number one, proximity to
3 100-year floodplain; two, geography and sail
4 types on the site; six, proximity to other
5 known point source discharges and potential
6 non-point sources. There's your issue about
7 existing other facilities that are potential
8 non-point sources, Your Honor, that might be --
9 might, on concert with the proposed new
10 facility, caused that requirement to be --
11 cause the impact water quality or cause the
12 need to expand setbacks to protect water
13 quality, because this is the authority that had
14 setbacks. Slope of the land, run-off
15 prevention, that's clearly associated with a
16 notion of fecal bacteria and manure running off
17 and getting into the water of the state and
18 adjacent groundwater usage. And so, Your
19 Honor, taking those two provision together, I
20 submit that's precisely what DHEC purports to
21 do in their review and we believe inadequately
22 performed in this case.
23 **THE COURT:** All right. So, under that reasoning,
24 they certainly consider Mr. Coggins' property,
25 because he's going to do his own land

1 application.
2 **MR. GUILD:** Yes, sir.
3 **THE COURT:** Or considered his permit in that regard.
4 Regarding the other facilities that do broker
5 related or application, under your theory DHEC
6 should, I guess, generally consider the impact
7 to the state overall? Because we don't know
8 where it's going to be applied, so how would
9 that be -- consideration be made?
10 **MR. GUILD:** Well, let's just take an example.
11 Hypothetically, Your Honor, you have an
12 impaired watershed. And let's take this case,
13 we have the Little River watershed. We have a
14 concentration of facilities in the area. The
15 evidence will indicate that they are a large
16 number of existing facilities already that
17 generating manure. What DHEC could do, is they
18 could impose on the newer brokers a permanent
19 condition that says, while we have this TMDL
20 trying to clean up the Little River from fecal
21 bacteria, land applied your manure outside of
22 this delineated watershed. There's an HUC
23 code, HUC, hydrological unit something or other
24 that is a multi-digit number that is well
25 defined geographically this watershed.

1 **THE COURT:** But wouldn't they not do that at the
2 time that the brokers are approved for
3 application?
4 **MR. GUILD:** They could. But they could all -- and I
5 submit that don't. But what they could also do
6 is they could impose a permanent condition on
7 these new facilities. And they could say
8 specifically, you must contract with somebody,
9 a manure broker or yourself do it, as part of
10 your waste management plan to assure that waste
11 is not deposited, land applied, in the Little
12 River watershed. That's a part of our cleanup
13 plan. So, they could do that.
14 **THE COURT:** I'm going to stop you.
15 **MR. GUILD:** Yes, sir.
16 **THE COURT:** Someone told me that -- one of you said
17 that it would not be applied -- the brokers
18 will not be applying that in the, I think it
19 was Mr. Hightower, in the Little River
20 watershed?
21 **MR. HIGHTOWER:** Yes. Actually, Mr. Mustian had
22 first stated that.
23 **THE COURT:** Okay.
24 **MR. HIGHTOWER:** But, yes, the -- my understanding is
25 the land applications fields for the Jim

1 Young's facilities are not located in the
2 Little River watershed.
3 **THE COURT:** But the broker -- would you stipulate
4 that the -- I'm just asking. I'm not pushing
5 you. This is what I can understand how to
6 proceed in this case. Would you stipulate as
7 a part of your permit that it would not be
8 applied to the Little River watershed or not?
9 **MR. MUSTIAN:** I guess with respect the land
10 application on Jim Young's land as part of his
11 permit ---
12 **THE COURT:** Right.
13 **MR. MUSTIAN:** And I understand ---
14 **THE COURT:** His is already set forth, so.
15 **MR. MUSTIAN:** And I'm just trying to make a ---
16 **THE COURT:** I don't need to go with that one.
17 **MR. MUSTIAN:** Correct. Now, to the respect that
18 it's the brokers, now, I would have to,
19 obviously, discuss that with my client as to
20 something that ---
21 **THE COURT:** Well, we can address that down the road.
22 **MR. MUSTIAN:** Because that would be -- in my mind,
23 that would be a condition of a contract that
24 they would have to enter into with their
25 proposed broker.

1 **THE COURT:** Yeah.
2 **MR. MUSTIAN:** And I don't know that that's an issue,
3 but I -- that's something I'd need to talk with
4 him about.
5 **THE COURT:** Okay.
6 **MR. HIGHTOWER:** Your Honor ---
7 **THE COURT:** At this point in time, I sustain the
8 objection as to Mr. Blackmon and let's just
9 move on.
10 **MR. GUILD:** Your Honor, just ask the Court to take
11 notice of the fact you have two other cases
12 pending in front of you. That's where they all
13 ---
14 **THE COURT:** Yes, sir.
15 Q: Mr. Blackmon, let's move on a little bit. We
16 got you to the point basically where you've
17 said that you learned that were these permit
18 applications. I think you volunteered that at
19 some point, you -- there was a DHEC public
20 meeting in the community?
21 A: In September and October for the Coggins and
22 the other -- and others.
23 Q: Just state how many facilities were the subject
24 of the DHEC public hearing?
25 A: Five.

1 Q: Five.
2 A: For September and October.
3 Q: So, there were these three and they were two
4 others?
5 A: Two others.
6 Q: All part of the same public hearing that --
7 public meeting that DHEC conducted?
8 A: Correct.
9 Q: All right. And did you and other members of
10 the community express concerns about those
11 permits?
12 A: Certainly.
13 Q: All right. And what were those concerns?
14 A: Oh, multiple. Concerns primarily, the people
15 who were closest to the issue there in
16 Mountville, was odor.
17 **MR. MUSTIAN:** Objection, Your Honor. Hearsay.
18 **THE COURT:** You can state his concerns.
19 Q: All right. What -- would you state what your
20 concerns were and we'll get other people to
21 state about their concerns were.
22 A: Of course. With me, was also odor. And I had
23 experienced that myself firsthand, I lived
24 there for many, many years, from preexisting,
25 you know, facilities, of course. That's were

1 my experience came from. Evidence exposed
2 manure piles.
3 Q: What do you mean by exposed manure piles?
4 A: Well, they were supposed to be in stacking
5 sheds or either covered, you know, with a tarp
6 and a screen over the top. And some of the
7 manure piles that we had evidenced from
8 satellite images ---
9 **MR. MUSTIAN:** Objection, Your Honor, on the same
10 grounds as relevancy as to other facilities.
11 **THE COURT:** By him stating forth his concerns. So,
12 I think he can -- in setting forth his
13 concerns, he can state the history that he
14 knows. Now, I don't believe he can state that
15 which he has not observed himself on some
16 facilities. But I'll let you respond to that.
17 **MR. GUILD:** All right, sir. Let me rephrase the
18 question.
19 Q: So, in preparing to communicate your concerns
20 to DHEC, did you undertake any research or
21 investigation of Mr. Blackmon?
22 A: I did.
23 Q: And describe that. How did you seek to inform
24 yourself about the proposals?
25 A: Well, it was in response to some photographic

1 evidence that have been submitted by someone
2 else. And a subsequent conversation with one
3 of the DHEC representatives led me to believe
4 we needed, you know, some further evidence to
5 back up the photos.
6 Q: All right.
7 A: So, I pulled satellite images from three
8 different servers and presented that at the
9 second DHEC meeting. It was refused because
10 they said they already had that.
11 Q: All right. Now let's back up a second. So,
12 you had a conversation with a DHEC
13 representative. Who was that?
14 A: Mr. Bill Chaplin.
15 Q: All right. Is Mr. Chaplin present in the
16 hearing room today?
17 A: He is.
18 Q: All right. And what role, if any, did Mr.
19 Chaplin have in the matter as you understood?
20 A: Well, he was at both of the public meetings in
21 September and October.
22 Q: All right. What responsibility did you
23 understand Mr. Chaplin to have for these
24 permits?
25 A: I understood he was kind of the overall head of

1 the group that came to the public meetings.
2 Q: All right. And he was going to review this
3 permit applications?
4 A: That's my understanding.
5 Q: All right. So, you had a conversation with Mr.
6 Chaplin. And would you relay that please? You
7 just got done saying to us that Mr. Chaplin
8 told you you needed to do something, so what
9 was the conversation?
10 A: Right. Well, the conversation was in the
11 context that we had mentioned that one avenue
12 would be litigation. And he called me or
13 contacted me about an effort or an attempt to
14 avoid that, of course, understandably. And I
15 couldn't speak for the members of the community
16 that were concerned about these things, so I
17 told him I couldn't do that. Couldn't agree
18 to, you know, some kind of negotiation, that I
19 could only speak for myself. And he mentioned
20 -- and I said, but in light of the photographic
21 evidence, you know, there's a lot deep-rooted
22 feeling there. And he said he had had a
23 conversation with the grower. And the grower
24 said that was only -- those photos we made only
25 ---

1 **MR. MUSTIAN:** Objection. It's hearsay.
2 **THE COURT:** I'll sustain that.
3 **THE WITNESS:** Sorry.
4 **MR. GUILD:** He's relaying to conversation from a
5 party opponent, Your Honor. That's the DHEC
6 agent, Mr. Chaplin. He's certainly -- it's an
7 exception to hearsay rule that he can recount
8 a statement made out of court by an agent of
9 the ---
10 **THE COURT:** It's hearsay on hearsay, isn't it,
11 because it's Mr. Chaplin relaying a statement
12 of another individual, who is not in the
13 courtroom.
14 **MR. GUILD:** Yes, sir. And it's true as to that
15 second source. That's not established, but the
16 hearsay statement that -- the out-of-court
17 statement made by Mr. Chaplin is admissible and
18 is pertinent and we would asked that the
19 witness be allowed to relate what Mr. Chaplin
20 told him.
21 **THE COURT:** So you're saying Mr. Chaplin's statement
22 is an admission by party opponent, right?
23 **MR. GUILD:** It is.
24 **MR. MUSTIAN:** Your Honor, I don't know how an
25 alleged conversation between Mr. Chaplin and my

1 client is an admission when it's hearsay as to
2 what my client said. So, I don't believe it
3 meets that. And even to the extent that it
4 does, I think it's objectionable under Rule 403
5 in that the probative value is outweighed by
6 the prejudicial impact.
7 **MR. GUILD:** No. Mr. Mustian misunderstands. It's
8 not the statement of his client that I'm trying
9 to get admitted. It's statement of Mr. Chaplin
10 that is an admission of a party opponent,
11 that's DHEC.
12 **THE COURT:** All right. I'm going to allow -- I'm
13 overruling the objection. I'm going to allow
14 it to come into evidence. Not for the truth of
15 the matter of certain though. But as simply
16 for the admission by Mr. Chaplin.
17 Q: So there was photographic evidence that was the
18 subject of this discussion with Mr. Chaplin,
19 correct?
20 A: Yes.
21 Q: And what was in the photo, just the subject of
22 the photo?
23 A: Well, it was several years of piles of
24 uncovered chicken litter with rain and snow on
25 it and with date stamped photos.

1 Q: All right. So, Mr. Chaplin had these photos
2 and you were discussing them. Was that the
3 case?
4 A: They had been submitted at the September public
5 meeting.
6 Q: All right. And what did then Mr. Chaplin say
7 to you with regard to these matters?
8 A: Said the grower had said those were only made
9 during the three days that they're permitted to
10 stockpile manure without covering it. And --
11 you want my reply?
12 Q: Yes.
13 A: And I said that -- well, that was not there
14 when the photos were made. But that that was
15 not the testimony of the person who supplied
16 the photos and that some photos had a sequence
17 of ---
18 **THE COURT:** Well, you can't go into what the person
19 who supplied the photo ---
20 **MR. GUILD:** Again, Your Honor, if Your Honor's
21 ruling is that Mr. Chaplin's statement's
22 admissible, but not for the truth of the matter
23 asserted from the third party, gather that.
24 But that's ---
25 **THE COURT:** But he's going -- it sounds to me like

1 he's stating his own observation at this point.
2 I'm missing the ---
3 **MR. GUILD:** I think not, Your Honor. I think he's
4 just recounting what the photos depicted.
5 Again, this was before him and Mr. Chaplin and
6 what Mr. Chaplin then told him with regard to
7 that photographic evidence in terms of its
8 bearing on the pending permits that were the
9 subject of the public meeting.
10 **THE COURT:** All right.
11 Q: So, my point really here, and I'll rephrase the
12 question, is that -- is Mr. Chaplin told you
13 what needed to be done to address the question
14 of what was depicted in these photos. What did
15 he tell you?
16 **MR. MUSTIAN:** Your Honor, if I could. I don't
17 believe the proper foundation had been laid.
18 I have not -- I don't believe Mr. Guild has
19 asking him specifically who these photos --
20 what facilities this photos were of and what
21 facilities that he was discussing with Mr.
22 Blackmon ---
23 **THE COURT:** Well, I'll sustain that.
24 **MR. GUILD:** Well, I'll be happy to lay the
25 foundation.

1 Q: So, were the facilities -- what facility was
2 depicted that had the uncovered piles of manure
3 with water and snow around them that you just
4 described, what facility?
5 A: It's the existing Alexander facilities in
6 Mountville.
7 Q: In Mountville, South Carolina ---
8 **MR. MUSTIAN:** Objection again. This is about an
9 Alexander facility. This has nothing to do
10 with my clients' facility.
11 **MR. GUILD:** Well, again, Your Honor, you're talking
12 about existing non-point source or potential
13 non-point sources of pollution in the Little
14 River watershed in the Mountville community.
15 And, again, we're talking now about how we go
16 about having a citizen's concerns addressed by
17 DHEC with regard to now we have a pile of
18 manure ---
19 **THE COURT:** This isn't offered for the truth of the
20 matter asserted. It's only offered for Mr.
21 Chaplin's admissions regarding his thought
22 process, I assume, in permitting the case.
23 **MR. GUILD:** Yes, sir. Let's do that. Let's do
24 that. That's my focus.
25 **MR. MUSTIAN:** But, Your Honor, if I could just go

1 back. This all began with this was an
2 admission of a party opponent against my
3 client.
4 **MR. GUILD:** No, sir. I never say that. I never
5 said that. A party opponent DHEC, Mr. Chaplin.
6 **THE COURT:** I never treated -- my ruling was ---
7 **MR. MUSTIAN:** Right. I would just like the record
8 to be clear that what Mr. Blackmon is now
9 talking about is not a facility that is owned
10 by clients. This is a facility that is owned
11 by another permittee that is not the subject of
12 this ---
13 **MR. GUILD:** I stipulate to that, Mr. Mustian.
14 And ---
15 **MR. HIGHTOWER:** With regard to the Department, it's
16 not relevant because this is not the Alexander
17 -- the Alexander permit is not before the Court
18 at this time. So ---
19 **THE COURT:** Well, if it's not relevant, I got to
20 figure out where it's -- where is it going?
21 **MR. GUILD:** Where it's going is you got an uncovered
22 pile of manure at an existing facility in the
23 TMDL watershed impaired for fecal coliform
24 bacteria. You got water standing around it
25 depicted in an aerial photograph, Your Honor.

1 Mr. Chaplin, the DHEC permit reviewer, who's
2 supposed to file under 61-43 to prevent water
3 pollution from the new facilities, is
4 confronted by the community with evidence of
5 unrecovered manure piles with water standing
6 all around them available for stormwater runoff
7 to the waters of the state that's in violation
8 potentially of DHEC regulations. That is an
9 open question about how many days that the
10 piles stood uncovered. The regs allow three
11 days before you have to cover it. But that the
12 rainstorm can come on day number one or day
13 number two, doesn't have to wait for day number
14 three. This is a potential non-point source
15 discharge of fecal coliform bacteria to the
16 waters of the state. And this community has
17 direct, you know, photographic evidence of this
18 potential discharge. They bring it to the
19 attention of DHEC. And I'm still waiting now,
20 having asked question, now objected to by both
21 these guys, from DHEC's prospective. Not to
22 prove the truth of the matter depicted.
23 **THE COURT:** What are you offering this to prove?
24 **MR. GUILD:** To prove that DHEC failed in their duty
25 to assure that waters -- the water pollution

1 would not be exacerbated by the grant of these
2 three permits. That's -- the five permits that
3 were at issue.
4 **MR. HIGHTOWER:** The problem with that is, we're
5 talking about the Alexander facility, which is
6 not one of the facilities. We're talking about
7 three new facilities that don't exist. And if
8 I'm understanding Mr. Guild, he's arguing
9 really about the enforcement and such. Mr.
10 Chaplin is not an enforcement officer. He is
11 a permitting officer. This is about a
12 permitting. What Mr. Guild was just talking
13 about, he said about an existing facility and
14 we have this observation of manure and that it
15 may have been out there longer than three days
16 and such. That's an enforcement issue. That
17 is not a permitting issue and therefore it's
18 not relevant to the matters before this Court.
19 This is not an enforcement action. And
20 therefore ---
21 **THE COURT:** Is it relevant to the matters before
22 this Court as to whether ---
23 **MR. HIGHTOWER:** That's saying that any farmer in --
24 and we don't know how far you want to go.
25 **THE COURT:** Okay.

1 **MR. HIGHTOWER:** If they happen to do something that
2 may or may not be correct, that somehow that
3 affects the permitting decision of the
4 Department as to whether or not another
5 facility can be permitted in that general area
6 ---
7 **THE COURT:** I would agree.
8 **MR. HIGHTOWER:** --- and that's just not proper.
9 **THE COURT:** I would agree with you that that's not
10 relevant. So ---
11 **MR. HIGHTOWER:** But that's what my understanding is
12 that we have here because it is the Alexander
13 facility. It is not these three facilities
14 here. These are proposed facilities. They
15 don't exist.
16 **THE COURT:** Okay.
17 **MR. GUILD:** Your Honor, may I please? It's in the
18 DHEC regulation they got to prevent additional
19 water pollution when they permit new
20 facilities. And they have a whole list of
21 things we enumerated in 60-43, 200.70F that are
22 all water related. They could have required --
23 and we'll submit that they didn't and that they
24 should've. They could have required these guys
25 to be set way far back from Little River. The

1 evidence will show they are right on top of
2 Little River with an 80-foot gradient between
3 where the top of the hill is and the river just
4 below. They could easily have required, which
5 your argument alluding to this, a whole series
6 of stormwater management permit conditions ---
7 **MR. HIGHTOWER:** Your Honor, stormwater permit ---
8 **THE COURT:** Stop.
9 **MR. HIGHTOWER:** I'm sorry.
10 **THE COURT:** His testimony relates to his reasons why
11 he was concerned as present -- in presenting
12 this case. None of this is offered for the
13 truth of the matter asserted.
14 **MR. GUILD:** The DHEC admission is, Your Honor. Not
15 the second or third hand subject matter. We'll
16 prove that otherwise.
17 **THE COURT:** Now it's been shown though that this
18 individual was only a permitting coordinator or
19 ---
20 **MR. HIGHTOWER:** Yes.
21 **THE COURT:** --- and not an enforcement coordinator.
22 **MR. GUILD:** Doesn't matter, Your Honor. The permit
23 -- 61-43 requires Mr. Chaplin, or whoever is
24 approving this permit, to consider the factors
25 that I've just alluded to.

1 **MR. HIGHTOWER:** Your Honor, that's with regard to
2 that new facility, whether or not that new
3 facility will add to pollution in the area, not
4 whether or not some other facility is operating
5 outside of the parameters of 61-43.
6 **THE COURT:** Okay.
7 **MR. HIGHTOWER:** And Mr. Guild is conflating the two
8 and putting them together and saying it's a
9 party admission when Mr. Chaplin is not the
10 enforcement person. He cannot make decisions
11 on that.
12 **MR. GUILD:** Your Honor ---
13 **THE COURT:** Hold on. My ruling at this point is
14 that in this stage of the case regarding Mr.
15 Blackmon's testimony, that it is not sufficient
16 nexus in regard to this evidence to go into it,
17 so I sustain the objection.
18 **MR. MUSTIAN:** Thank you, Your Honor.
19 **MR. GUILD:** Your Honor, the pending question is what
20 did Mr. Chaplin say to Mr. Blackmon. May I
21 have that for an offer of proof stated for the
22 record?
23 **THE COURT:** Well, can you -- before I overrule -- or
24 deny that one, the pending question was what
25 did Mr. Chaplin state to Mr. Blackmon regarding

1 what?
2 **MR. GUILD:** Regarding the evidence of uncovered
3 manure piles at facilities in the Mountville
4 community that potentially impact the
5 discharges to the Little River watershed. So,
6 we've got a potential discharge of uncovered
7 manure pile with water around it, the subject
8 of concern by Mr. Blackmon and others in the
9 community. They're discussing it with DHEC,
10 the DHEC permit writer who's going to decide --
11 -
12 **THE COURT:** We're repeating.
13 **MR. GUILD:** Yes, sir. We are just trying to now get
14 either as evidence or an offer of proof what
15 the admission was. And I can't state it
16 without ---
17 **THE COURT:** I wasn't going to let you go into the
18 violation. But as far as the statement ---
19 **MR. GUILD:** That's all I want right now.
20 **MR. HIGHTOWER:** Well, I believe the statement would
21 be about another facility, not a facility owned
22 or operated by any of three Applicants in this
23 case. Therefore, it's not relevant.
24 **MR. GUILD:** Your Honor, if I may. If DHEC really
25 insist on this, we've got a clear error of law.

1 61-43, 70F says they must consider six
2 proximity to other known point source
3 discharges and potential non-point sources.
4 Now, if they insist that they don't have to
5 follow their own regulation with regard to a
6 potential non-point source discharge in the
7 area, in Mountville, then we've got a case
8 we're going to go all the up with. And so,
9 let's have DHEC make that stipulation that Mr.
10 Chaplin did not consider the factor in their
11 own regulations and will save us an awful lot
12 of time.
13 **MR. HIGHTOWER:** Well, Your Honor, just -- and I
14 understand that this has been belabored, but --
15 --
16 **THE COURT:** It has
17 **MR. HIGHTOWER:** --- when it talks about proximity,
18 first of all, even with Mr. Guild's argument he
19 hasn't established where the Alexander facility
20 is in relation to any of these.
21 **MR. GUILD:** I'm going to do that, Your Honor, if I'm
22 allowed to.
23 **(Multiple Voices at Once)**
24 **MR. HIGHTOWER:** --- next to each other and I will
25 state, they are not next to each other. They

1 are thousands of feet, in fact they may be
2 miles from each other.
3 **THE COURT:** Under the facts of this case at this
4 point, I'll sustain the objection.
5 **MR. GUILD:** May I have the answer as an offer of
6 proof, Your Honor.
7 Q: What did Mr. Chaplin say? Will you state that
8 please?
9 A: They responded to me that, in talking with the
10 poultry grower, that those manure piles were
11 exposed because they were only done so less
12 than three days at a time. I responded that
13 that's not what the testimony in the pictures
14 show.
15 **THE COURT:** Wait a second. He can't ---
16 Q: And what did Mr. Chaplin say?
17 **MR. GUILD:** I want to have his statement complete.
18 **THE COURT:** --- offer of proof.
19 A: His returned to me on that was, he threw me
20 under the bus.
21 Q: Who's he?
22 A: Well, Mike Alexander he said.
23 Q: Okay.
24 **THE COURT:** And that ends the offer of proof,
25 correct?

1 MR. GUILD: It does.
2 Q: I'm going to show you a document that
3 identified Mr. Blackmon as Petitioners' Exhibit
4 4U as in union. And I'll put this up on the
5 map again. This is a -- can you identify this
6 document, Mr. Blackmon?
7 A: Yes. This is a document I created from Laurens
8 County map I had.
9 Q: All right. And can you just walk us through
10 what it shows? First of all, where's
11 Mountville in the -- on the map depicted?
12 A: You want me to mark it?
13 Q: Yes, sir. Please.
14 A: It's that big black circle right there.
15 Q: All right. And what else is depicted on the
16 map? And I see the Little River is shown. Is
17 that -- can you point where that is?
18 A: That's correct.
19 Q: Okay. And what's the road that runs through
20 Mountville basically north and south there?
21 A: That's highway 72.
22 Q: All right. Okay. And then you have other
23 features depicted on the map. And would you
24 just tell the Judge what those are?
25 A: What did you say? Pardon?

1 Q: Other features are shown on the map. What are
2 they, please?
3 A: The gold stars, if you can tell the color, are
4 the existing poultry house in the -- within a
5 two and a half mile radius. And the red stars
6 are the proposed 30 new houses. The gold stars
7 indicate about 50 existing houses.
8 Q: All right. With 30 more proposed?
9 **THE COURT:** 15 or 50?
10 **THE WITNESS:** 50.
11 Q: Five Oh?
12 A: Five Oh, yes. Some -- one star, for example,
13 has got one building. The next one maybe had
14 two buildings. Most have six to eight
15 building.
16 Q: All right. And now you have a legend at the
17 bottom of the map and there are a series of
18 names and letters. What do those indicate?
19 A: Those are the operators or the proposed
20 operators as well with alphabetical letters
21 next to them that you can then coordinate that
22 with the star to tell where they're located.
23 But you'll find they're all located on
24 tributaries of Little River.
25 Q: Now, are the Heath and David Coggins and Young

1 facilities, the three that are consolidated
2 before the Court today, are they depicted on
3 this map?
4 A: They are. As O, P, and Q.
5 Q: O, P, and Q. That's the cluster of three
6 facilities that's just south of the Little
7 River and west of Highway 72; is that right?
8 A: That's correct.
9 **MR. GUILD:** Your Honor, move in evidence
10 Petitioners' Exhibit 4U as in union.
11 **THE COURT:** Any objections?
12 **MR. MUSTIAN:** Your Honor and Bob, just for clarity,
13 this is PET-1836; is that correct?
14 **THE COURT:** I don't have a Bates number. Let me
15 look. 1836, it is.
16 **MR. MUSTIAN:** Thank you. Your Honor, we object to
17 the exhibit on the basis of relevancy for the
18 same reasons we articulated previously
19 regarding other existing and proposed
20 facilities.
21 **THE COURT:** Well, that's interesting because he's
22 already testified to it just now, so I overrule
23 that objection. Mr. Hightower? Well, you
24 didn't object, so I guess I was -- I'll move
25 on. Okay. It's admitted.

1 **(Petitioners' Exhibit Number 4U was admitted into the**
2 **record.)**
3 Q: Mr. Blackmon, can you identify this?
4 **MR. GUILD:** This is PET-02258, Mr. Mustian.
5 A: I do. That's another document I created using
6 Google Earth.
7 **MR. MUSTIAN:** Your Honor, I'm anticipating. I will
8 go ahead and object ---
9 **MR. HIGHTOWER:** Object.
10 **MR. MUSTIAN:** --- on the same basis that this
11 relates to other existing and proposed
12 facilities.
13 **MR. HIGHTOWER:** And the Department also makes such
14 an objection.
15 **THE COURT:** All right. Mr. Guild, what's your
16 response?
17 **MR. GUILD:** Your Honor, this depicts -- can I just
18 get -- I would say it would state that it
19 represents a topographic map of the area around
20 Mountville showing, as the witness said,
21 existing facilities. And it reflects the
22 topographic relationship between these
23 facilities and the impaired Little River
24 watershed. And it's precisely the conditions
25 that DHEC, under their regulation 61-43,

1 200.70F, are obligated to consider, proximity
2 to 100-year floodplain ---
3 **THE COURT:** I want to get to that. 200 -- 61-43,
4 200 ...
5 **MR. GUILD:** 70, Your Honor.
6 **THE COURT:** I'm there, 70.
7 **MR. GUILD:** F. The setback siting criteria that are
8 minimum, that set forth the criteria ---
9 **THE COURT:** Hold on a second. I'm at 61-43, 400.
10 You said ...
11 **MR. GUILD:** 200, Your Honor.
12 **THE COURT:** Let me back up.
13 **MR. GUILD:** You're doing -- I think that's hogs,
14 Your Honor, but 200's the poultry ---
15 **THE COURT:** That was the manure operation.
16 **MR. GUILD:** I'm sorry. Manure ---
17 **THE COURT:** You set forth earlier. 200 what?
18 **MR. GUILD:** 200.70.
19 **THE COURT:** Okay.
20 **MR. GUILD:** F as in Frank. And the following
21 criteria that are not exclusive, but expressly
22 require the Department to consider, as I
23 stated, the proximity to other known point
24 source discharges and potential non-point
25 sources. Six, slope of the land, runoff

1 prevention, proximity to 100-year floodplain,
2 geography, and soil types of the site, those
3 are criteria that I would represent are
4 demonstrated or reflected in a topographic map
5 showing nearby facilities in the watershed.
6 **THE COURT:** Okay. I get it.
7 **MR. GUILD:** Yes, sir.
8 **THE COURT:** That's a consideration -- says not just
9 point source, but potential non-point source.
10 I don't know how you consider a potential
11 non-point source, but ...
12 **MR. MUSTIAN:** Well, Your Honor, I think that in
13 order to demonstrate that, think that he would
14 have to actually show that there is a
15 discharge. And there is -- they discharge of
16 a pollutant to a water in the state, which is
17 what 61-9, 122, what that does. He has to lay
18 a foundation for that. He's talking about a
19 manure pile and he's given the supposition that
20 that would relate to a non-point discharge, but
21 he hasn't demonstrated anything about -- first,
22 he hasn't shown the photograph of what this
23 alleged manure pile is, he hasn't identified
24 where it is, he hasn't shown that there was an
25 actual discharge, he hasn't shown that it is a

1 non-point discharge. And so, all of this, Your
2 Honor, is irrelevant to the question of my
3 Applicants.
4 I would also point out that under E it
5 talks about the impact of new and enlarged
6 sources. Well, we're not an enlargement, we
7 would be a new source. So, they're looking at
8 what is the impact of us as a new permittee.
9 That's separate from whether or not there's an
10 alleged uncovered manure pile that's on another
11 facility that's down the road.
12 **MR. GUILD:** Your Honor, I mean, if we're going to
13 make ---
14 **THE COURT:** Let me read the rest of this. So, the
15 points that you're offering are under F, which
16 sets forth the setback limits. So, are you
17 contending that the setback limits in this
18 facility are not sufficient?
19 **MR. GUILD:** Absolutely. We contend that the sites
20 are inappropriate to protect water quality,
21 period. On a steep slope with an 80-foot drop
22 from the top of the hill to the bottom -- to
23 Little River bottoms, direct pathways, gullies
24 shown on topographic maps between the ponds ---
25 **THE COURT:** I'm going to overrule your objection.

1 I'm going to allow him to lay the foundation of
2 other facilities. Whether we get to the point
3 of him ever proving this is not before me at
4 this time. But he's laying the foundation,
5 under Mr. Guild's supposition, that he will --
6 of the potential non-point sources.
7 **MR. GUILD:** Precisely, Your Honor. Thank you.
8 **THE COURT:** So, what is the error there. I'll give
9 you one more shot in what's the error there.
10 **MR. MUSTIAN:** Well, I mean, I think, Your Honor, in
11 order to show that it is a non-point source,
12 he's got to be able to demonstrate that it is
13 a discharge. So ---
14 **THE COURT:** Down the road he does.
15 **MR. MUSTIAN:** Down the road to the extent that he
16 does, but -- and I understand Your Honor's
17 ruling and I respect it, obviously. One point
18 that Mr. Guild points out, and I would just
19 like the opportunity to respond to this,
20 regarding the slope of the land and all that,
21 two things. One is, that's stormwater related
22 issues because there is no discharge pursuant
23 to the rule of the permit. In addition, any
24 manure that's generated in the facilities will
25 not be distributed on that site.

1 **THE COURT:** I'm going to let him go into this only
2 to the -- under this ground that he's laying
3 the groundwork for that, which we'll find out
4 if he sets forth evidence.
5 **MR. GUILD:** Yes, sir.
6 **MR. MUSTIAN:** Thank you, Your Honor.
7 **MR. GUILD:** Move -- I just, with laying the
8 foundation with the admission of this, but I
9 guess we've got an anticipatory objection, move
10 that submission in evidence, Your Honor. And
11 that is 4V as in Victor.
12 **THE COURT:** Has he laid the groundwork or ...
13 **MR. GUILD:** I'll finish, if Your Honor please.
14 Q: So, Mr. Blackmon, you prepared this topographic
15 map?
16 A: I did.
17 Q: And what is depicted on the topographic map?
18 A: Primarily it's terrain with the contour lines.
19 Q: Yes, sir.
20 A: But it also depicts, as little houses, place
21 those where the existing and proposed poultry
22 facilities are now and, you know, in an attempt
23 to show my concern about all of them being on
24 high ground above tributaries to or on Little
25 River.

1 Q: All right, sir. And would you indicate again
2 where the three proposed facilities that are at
3 issue in this case? Can you draw us a little
4 circle around them, please.
5 A: Okay. There's already a circle around two of
6 the others, but right there.
7 Q: All right, sir. And that's the two Coggins and
8 the Young facility proposed?
9 A: That's correct.
10 **MR. HIGHTOWER:** Your Honor, I'm going to object on
11 -- also on the -- in addition to the grounds
12 that Mr. Mustian had raised, that this map is
13 supposed to be a topographical map. There is
14 no scale showing what is the distance between
15 the contour lines. You know, this -- I believe
16 that this should not be admitted under 403
17 because the probative value outweighs the --
18 excuse me, the prejudicial value outweighs the
19 probative value. There is no way of knowing,
20 you know, what is the elevations here, what is
21 the distances between these facilities. And
22 all of that ---
23 **THE COURT:** I think he's only offering it to show
24 the location of the facilities. Not for any
25 other purposes. And so I ---

1 **MR. HIGHTOWER:** If it's limited to the that, then
2 the Department won't -- but I don't want Mr.
3 Guild to then argue, well, these -- the contour
4 lines here somehow show slope and show that
5 it's excessive slope or something like that.
6 **THE COURT:** When it gets to that admission, I'll
7 recognize that objection.
8 **MR. HIGHTOWER:** Thank you.
9 **THE COURT:** Are you offering it now?
10 **MR. GUILD:** Yes, sir.
11 **THE COURT:** It's offered solely for demonstrative
12 purposes to show Mr. Blackmon's reference to
13 the facilities in the area.
14 **(Petitioners' Exhibit Number 4V was admitted into the**
15 **record.)**
16 Q: Mr. Blackmon, moving along. I'm going to show
17 you what's been marked as 4W, a proposed
18 exhibit, Petitioners' 4W. Petitioners' Bates
19 number PET-02190. Do you recognize this
20 document, Mr. Blackmon?
21 A: I do. That's another terrain feature map I
22 created using Google Earth and a software that
23 downloads the contour lines.
24 Q: All right, sir.
25 A: Which are marked.

1 Q: And what does it depict?
2 A: It depicts the three poultry houses along
3 Lisbon Road that we're covering today. And it
4 also shows that the edge of the bottom land of
5 Little River, the floodplain is 500 feet. And
6 where the proposed -- for example Jim Young
7 facility's about 80 feet above that and 900
8 some odd feet away.
9 **MR. HIGHTOWER:** Your Honor, I'm objecting. There's
10 nothing on that map that shows any legend
11 showing what is the elevations or any of the
12 testimony that ---
13 **THE COURT:** Well, he just said floodplains too.
14 **MR. HIGHTOWER:** And a floodplain, so.
15 **THE COURT:** Mr. Guild, he doesn't -- I don't see any
16 expertise for him to be able to speculate ---
17 **MR. GUILD:** He can read a map, Your Honor. And the
18 map says ---
19 **MR. HIGHTOWER:** The map doesn't show ---
20 **MR. GUILD:** Excuse me, Mr. Hightower. The map says
21 500 by a contour line. I can read a map, you
22 can read a map, Mr. Blackmon can read a map.
23 I assume Mr. Hightower can read a map as well.
24 It says 500 on a contour line.
25 **THE COURT:** I sustain his objections to any

1 implications that he makes concerning this
2 exhibit. So, he doesn't have expertise. He
3 can testify that it says 500, but any
4 implication from that ---
5 Q: Mr. Blackmon, are you familiar with reading
6 topographic maps?
7 A: I've had many hours in the military reading
8 topographic maps.
9 Q: You employ topographic maps as a DNR game
10 warden?
11 A: Not often, but we look at it if we have to go
12 in an area we're not familiar with. We kind of
13 want to know what we're going to run into when
14 we get -- before we get there.
15 Q: Are you familiar with the depiction of contours
16 on the land by using contour lines that list
17 elevations and numbers on the contour line?
18 A: Extremely familiar.
19 Q: And are you able to interpret a contour map to
20 offer an observation about the drop in
21 topography, the slope between two points on a
22 topographic map?
23 A: In that particular map?
24 Q: Yes, sir.
25 A: I can tell you the topography, but I have other

1 information -- would have to have other
2 information as far as the distance from the top
3 of the hill down to the Little River bottoms.
4 Q: Yes, sir.
5 A: And that would go to figuring the slope and the
6 ...
7 Q: But when you read the drop from the top of the
8 hill to the bottom of the hill, was that based
9 on reading the contours on this map?
10 A: Yes. It doesn't show that, but with Goggle
11 Earth you just click on the measuring tool and
12 measure that's 900 ---
13 **THE COURT:** All right.
14 **MR. MUSTIAN:** Objection.
15 **THE COURT:** You can't go into that now.
16 **THE WITNESS:** Sorry.
17 **THE COURT:** I sustain the objection based on what he
18 just testified to, utilizing Google Earth and
19 some tool that's not before me.
20 **MR. GUILD:** All right, sir. But he's identified
21 that he's familiar with contour maps, used
22 contour maps in the military, used them on
23 occasion as a DNR game warden ---
24 **THE COURT:** Just ask him another question.
25 **MR. GUILD:** Yes, sir. I'm going to move the

1 admission in evidence of what's been identified
2 as Petitioners' Exhibit 4W, a contour map,
3 according to the witness, depicting the
4 location of the three barns at issue in this
5 case and their proximity to the Little River.
6 **MR. MUSTIAN:** Based on the objections that we've
7 discussed earlier, we object to the
8 introduction of the exhibit.
9 **MR. HIGHTOWER:** Same with the Department. Also, I
10 note that it only shows generally where there
11 may be a facility. It doesn't show what is the
12 actual elevations for the facilities, i.e, are
13 the houses themselves on a slope or are they
14 flat, what is the distance between the edge of
15 the house and wherever the topographical line
16 shows that there would be some type of slope.
17 None of that has been testified to and is not
18 apparent from the mop.
19 **MR. GUILD:** Your Honor, those are all issues of
20 cross-examination. But giving distances ---
21 **THE COURT:** I admit the exhibit to reflect the
22 location of the barns. It does reflect contour
23 lines. But there isn't -- it's not admitted
24 for the purposes of the accuracy of those
25 contour lines or the implications thereof

because, as testimony was set forth, this is Google Earth. I don't know the accuracy of Google Earth, I've not heard any testimony to support the accuracy of Google Earth from an expert witness nor -- he set forth the tools that are not before the Court. So, it's admitted for those purposes.

(Petitioners' Exhibit Number 4W was admitted into the record.)

Q: Mr. Blackmon, moving ahead. I want to show you what's been identified -- marked for identification as Petitioners' 4X as in x-ray. This is a DHEC document, 001093. Mr. Blackmon, do you recognize this document?

A: I do.

Q: What does it show?

A: It -- of course, it shows the proposed 18 buildings along Lisbon Road. And it shows --

Q: The two Coggins and the Young facility that are at issue in this case?

A: That's correct.

Q: All right.

A: It appears to show -- I don't know if I could use this term. But I call it the bottom land that comes down Little River.

1 Q: Does it depict in blue what the legend
2 identifies as waters of the state?
3 A: Yes.
4 Q: And does it appear to be an aerial photograph
5 as the base?
6 A: Yes. It appears to be a satellite image.
7 Q: And, again, Lisbon Road is the white line
8 running from left to -- from upper left to
9 lower right, correct?
10 A: Correct.
11 Q: And Little River is the channel that's within
12 the blue diagonal to the north and east of the
13 facilities that's identified as waters of the
14 state, correct?
15 A: The current channel of Little River seems to be
16 depicted there.
17 Q: All right.
18 **MR. GUILD:** And this, again, Your Honor, is from the
19 waste management plan of one of the three
20 facilities, but it's a DHEC document and we
21 move its admission.
22 **THE COURT:** Any objection?
23 **MR. MUSTIAN:** Well, Your Honor, just for clarity
24 sake, I believe this is part of the documents
25 that we stipulated to in -- I can't remember

1 now which document it was. I'm sorry that you
2 went through all that. But the only thing I
3 would note for the record is, Your Honor, is
4 this is a document that is from David Coggins
5 Broilers' exhibits -- application. And the
6 reflection of the Heath Coggins and Jim Young
7 facilities shows eight houses. That was
8 amended during the process. So, just to the
9 point that it's being offered for -- to address
10 issues related to those two facilities, we
11 would just like it to be clear that the maps
12 that are reflected in those parts of the DHEC
13 record and Heath Coggins' and Jim Young's DHEC
14 record would be more accurate.
15 **MR. GUILD:** That's helpful. Thank you.
16 **THE COURT:** It is admitted with the caveat. The
17 accuracy is not necessarily -- well, it's not
18 necessarily accurate regarding those two
19 facilities.
20 **MR. MUSTIAN:** Yes.
21 **THE COURT:** All right.
22 **(Petitioners' Exhibit Number 4X was admitted into the**
23 **record.)**
24 Q: All right. Let's turn now, Mr. Blackmon to
25 your own properties that you previously

1 described. Tell us a little bit how you use
2 your properties in the Mountville community
3 area that are in the vicinity of these proposed
4 facilities.
5 A: Well, for income we grow pine timber and
6 hardwood timber. And, of course, equally we
7 use it for recreational activities such as
8 fishing, hunting, hiking, camping.
9 Q: You have ponds on the property. How do you use
10 your ponds, if you do?
11 A: Fishing.
12 Q: All right. Do you have other family members
13 use the property aside from yourself?
14 A: Yes.
15 Q: And who are those?
16 A: Well, the owners are, of course, my sister and
17 her family, Jean Revis; my younger brother,
18 Keith Blackmon and his family; and me and my
19 grandchildren and my children. And we also
20 allow other family members who don't own the
21 property to utilize it.
22 Q: All right. And do any of your family members
23 ever -- have they ever used the ponds for
24 contact recreation; wading in them, swimming in
25 them, boating in them?

A: Not recently because of the algae situation.
Q: And what is the algae situation referring to?
A: Well, it's covered about 40 percent in lyngbya algae according to ---
Q: Can you spell that for the record, please?
A: L-I-N-G-B-Y-A (sic). I've learned a lot about it too myself in the last three weeks.
Q: All right. Has the pond always had this algae associated with it?
A: No.
Q: And when did it start having the problem with algae?
A: Four to five years ago. And just not long after the upstream neighbor clear cut his property. He also applies chicken litter.
Q: And applied chicken litter on that property?
A: (Nods head affirmatively).
Q: All right. And have you investigated the cause of the algae bloom?
A: I have. After the deposition I was urged to do so at my deposition. And I did contact DNR and they said they no ---
MR. MUSTIAN: Objection, Your Honor, hearsay.
MR. HIGHTOWER: Objection, Your Honor.
Q: What did you learn from your investigation,

1 without stating ---
2 A: DNR does not regulate private ponds and lakes
3 anymore. They did furnish leaks to ponds
4 managers and lake managers. And one of those
5 was Mr. Mack Watson out of Columbia. He and
6 his son operate a pond and lake on consulting
7 firm. He's a retired DNR biologies, fishers
8 biologist.
9 Q: All right. And did they identify the species
10 of algae on the pond?
11 A: He did.
12 Q: And did they characterize to you what that
13 algae was?
14 **MR. MUSTIAN:** Objection, Your Honor. He's calling
15 for hearsay.
16 **THE COURT:** I sustain that, unless you've got an
17 exception.
18 Q: Did you understand there was any connection
19 between the algae and the poultry litter
20 applied to land upstream from the pond?
21 **MR. MUSTIAN:** Objection, Your Honor.
22 **MR. HIGHTOWER:** Objection, Your Honor.
23 **MR. MUSTIAN:** He's asking for what he learned based
24 on ---
25 **THE COURT:** I'll sustain that. Any exception?

1 **MR. GUILD:** Without proving the truth of the matter,
2 appreciating the limits of what a witness can
3 tell you about what someone else told him, I
4 want to establish what the witness'
5 understanding was -- again, without proving the
6 truth of the matter, what his understand was so
7 the Court will be informed about the basis for
8 his concerns. Now, again, as Your Honor has
9 appreciated, saying he has a concern doesn't
10 prove the validity of the concern. I
11 appreciate that. We'll tie that up. But I
12 really just want to establish as a foundation
13 for action that the witness and others in the
14 community took, what their understanding was of
15 the basis for their concern. Again, not to
16 prove the truth of those matters through their
17 testimony.
18 **MR. MUSTIAN:** Your Honor, he's offering this --
19 these are statements that were made --
20 presumably made by a pond management person to
21 him. He's offering it to prove the truth of
22 the matter asserted, which is that there's
23 algae on the pond and what the source of the
24 algae was and what the cause of the algae was.
25 **MR. GUILD:** No, sir. I just said otherwise. Your

1 Honor, he's mis-characterizing directly what I
2 said. Not to prove the truth of the matter,
3 just the witness' understanding on the basis of
4 which he's taken certain actions.
5 **MR. MUSTIAN:** But, Your Honor, to the extent that he
6 has taken actions with respect to his pond,
7 that's irrelevant to these proceedings, which
8 is, again, whether or not the permit should be
9 issued. How he deals with any algae issues on
10 his pond allegedly is irrelevant to these
11 proceedings. So, under 402 it should be ---
12 **THE COURT:** I understand.
13 **MR. GUILD:** It's not irrelevant to why he acted,
14 Your Honor, to understanding what the group
15 did, what Mr. Blackmon did. It's simply a
16 foundation for his action.
17 **THE COURT:** On this one, I sustain the objection,
18 Mr. Guild.
19 Q: Does your family use the pond for contact
20 recreation since the algae growth?
21 A: No.
22 Q: Why not?
23 A: Well, for -- had a good one about this. I was
24 further directed to Clemson. And a team came
25 and took water samples. And they advised me

1 ...
2 **MR. MUSTIAN:** Your Honor, same objection.
3 **MR. HIGHTOWER:** Objection.
4 **MR. GUILD:** He can certainly say what he was
5 advised, Your Honor, without proving the truth
6 of the matter. If your pond is contaminated
7 and you take action based on being told your
8 pond is contaminated, that's certainly
9 something you should understand from this
10 witness why he's acting.
11 **THE COURT:** He can testify to his concerns, but he
12 cannot testify as to what Clemson told him
13 about why the pond was contaminated.
14 **MR. GUILD:** Again, Your Honor, I'm not trying to
15 prove the truth of what he was told through his
16 words. I'm just trying to lay a foundation for
17 what he did.
18 **THE COURT:** I think he can testify to his concerns,
19 just not the derivation of -- from these
20 particular other sources.
21 **MR. GUILD:** Understood, Your Honor. All right, sir.
22 Q: What was the basis for your concerns about
23 using your pond, Mr. Blackmon?
24 A: Well, the primary basis, two years ago I found
25 three dead animals in it, three dead deer. And

1 I wrote it off at the time to some type of deer
2 disease. But in the -- in learning and
3 discovering about this particular type of
4 algae, I learned, not only through the test
5 reports, but also through other information I
6 got and after identified the algae that this is
7 toxic to mammals.
8 **MR. MUSTIAN:** Your Honor, just for the record, I
9 object again. I mean, he hasn't identified
10 what sources he got this from, what he learned,
11 any of this. And, again, either -- if it's not
12 hearsay, then it's either ---
13 **THE COURT:** I'm going to let that in -- I won't let
14 it in for the truth of the matter asserted.
15 I'm going to go with Mr. Guild's framework on
16 that. He's stating forth his concerns. I
17 don't know -- I think we're far-field from the
18 permit right now.
19 **MR. MUSTIAN:** Yes, Your Honor.
20 **THE COURT:** But he's relating this to why he
21 objected to the permit, so I'm going to let it
22 in only for his reasons, but not for the truth
23 of the matter asserted that algae is toxic to
24 mammals.
25 Q: Based on that understanding, Mr. Blackmon, that

1 you just related, what action, if any, have you
2 taken with regard to use of your pond?
3 A: Well, we don't fish it because it's difficult
4 to fish with all that fibrous material in
5 there. And we certainly don't swim in it
6 because we know that particular type of algae,
7 the people can have skin sensitivity to it.
8 But it heightens my concerns, you know, for the
9 rest of my waterways as well.
10 Q: All right, sir. Mr. Blackmon, have you ever
11 had a poultry litter, a poultry manure land
12 applied on any of your property?
13 A: Yes, I have.
14 Q: And would you describe what that experience has
15 been?
16 A: I have not had in the last three years. But
17 prior to that probably once, sometimes maybe
18 twice a year, usually one time a year I would
19 have a poultry grower bring me a substantial
20 amount, probably six eight or nine-ton
21 truckloads and place it on my wildlife food
22 plots.
23 Q: Say that one more time. Six or nine
24 truckloads?
25 A: Six or nine -- eight or nine-ton truckloads.

1 Q: So, the truck capacity is eight or nine tons
2 and you had six of those or more?
3 A: Uh-huh (affirmative response).
4 Q: Thank you. And placed on your wildlife food
5 plots?
6 A: Correct.
7 Q: All right. And what kind of acreage do you
8 have in wildlife food plots when you were doing
9 this land application?
10 A: Up to 40 acres.
11 Q: Okay. And what kind of cover crop were you
12 growing on the food plots?
13 A: Oats, wheat, clover.
14 Q: All right. And who was providing the poultry
15 litter or poultry manure?
16 A: My cousin, Debo Jacks.
17 Q: Okay. And does he have a poultry facility?
18 A: He does.
19 Q: A permit poultry facility? And were those food
20 plots, to your knowledge, in a waste management
21 plan for that poultry facility?
22 **MR. MUSTIAN:** Objection, Your Honor.
23 **MR. HIGHTOWER:** Objection.
24 **MR. MUSTIAN:** Irrelevant to these proceedings.
25 **MR. HIGHTOWER:** And it's also hearsay.

1 **THE COURT:** Mr. Guild, any response?
2 **MR. GUILD:** It's absolutely relevant. How was
3 poultry litter being managed on this actual
4 individual's property. Is it being managed
5 according to regulations, is it being managed
6 ---
7 **THE COURT:** How many years ago?
8 **MR. HIGHTOWER:** The last time was three years ago.
9 **MR. GUILD:** Three years ago. That's not very far
10 back, Your Honor. We're talking about specific
11 knowledge of a witness before the Court on how
12 poultry is land applied in this community.
13 **MR. HIGHTOWER:** But, Your Honor, it's his cousin.
14 And he also didn't establish whether or not it
15 was done properly. He just said he gave him
16 truckloads of manure, I think it was six
17 nine-ton truckloads of manure for 40 acres.
18 **MR. GUILD:** Well, I hadn't gotten that far because
19 I've been objected to. I'm simply trying to
20 move through that, Your Honor.
21 **MR. MUSTIAN:** But, again, Your Honor, I mean, he's
22 asking the question -- was he listed in
23 Mr. Debo Jacks' wastewater -- waste management
24 plan. That is an issue related to another
25 facility that's subject to enforcement by DHEC,

1 has nothing to do with this ---
2 **MR. GUILD:** How many times, Your Honor? It's a
3 potential non-point source in the watershed.
4 **THE COURT:** If it's a current -- if it's currently
5 listed as a area of application in a waste
6 management plan, if there's evidence to the
7 that effect, then I would allow you to pursue
8 it. So, you'll have to lay the groundwork for
9 that.
10 **MR. GUILD:** Yes, sir.
11 **THE COURT:** But you are potentially offering
12 evidence that your witness is complicit in
13 violating state law.
14 **MR. GUILD:** Your Honor, we just need to get down to
15 it because the fact of the matter is you're
16 being asked to permit facilities that are
17 uphill from a contaminated river and you ought
18 to know whether or not this stuff's being done
19 properly, Your Honor.
20 **THE COURT:** I was just letting your know. Go ahead.
21 Q: So, would you answer the question? Were you in
22 that farmer's waste management plan?
23 A: I have no knowledge if I am or not. I don't
24 think so.
25 Q: Did he ask you whether you wanted to be in his

1 waste management plan?
2 A: No.
3 **MR. MUSTIAN:** Object, Your Honor. Calls for
4 hearsay.
5 **MR. HIGHTOWER:** Same.
6 **THE COURT:** I sustain that one.
7 Q: Did you submit soil tests for your wildlife
8 food plot for reporting to DHEC or inclusion in
9 his records?
10 A: No.
11 Q: Did you have him land apply the manure?
12 A: I did.
13 Q: In the food plots? All right. And what device
14 did he use to do that with?
15 A: He used a eight or nine-ton truck with a
16 distributor on the back.
17 Q: All right. To spread the manure?
18 A: To spread it.
19 Q: Do you know what application rate he made?
20 A: No.
21 Q: All right. And what experience then did you
22 have with the land application of manure that
23 you just described?
24 A: The reason I stopped was, when I went in, I
25 noticed every time I went in and worked that

1 ground -- of course I would plow it in
2 immediately, because it was all plowed ground,
3 unlike pastures where you don't, you know, work
4 it in. I would experience upper respiratory
5 infections and almost invariably and really
6 bad. Developed pneumonia a couple of times.
7 And I'm very sensitive to that type of thing
8 because -- well, tracheotomy on my throat came
9 from that. When I was a boy, my airways were
10 blocked by an upper respiratory infection. I
11 had to have a tracheotomy. And it's -- I seem
12 to have been susceptible, that type of thing,
13 all my life. So, I quit using it for that
14 purpose. Plus I also noticed some detrimental
15 aspects on my crops.
16 Q: What were those?
17 A: Well, it was almost like there was too much --
18 been salt put on it or even like roundup maybe.
19 The grain crop I was trying to grow was not
20 ever, you know, maturing and seeding out. Now,
21 weeds went crazy and I also had an introduction
22 of thistle and pigweed. And so, for all those
23 reasons, I stopped using it.
24 Q: So, you said that you hunt your property
25 earlier in answer to questions. And I believe

1 you said you hunt other property in the
2 Mountville community. Is that right?
3 A: I do. I have permission or a lease agreement
4 with Mary Basel and Margaret Sparrow.
5 Q: All right. And for what property is that lease
6 for you to hunt?
7 A: Well, it's a property right adjacent to the
8 three sites for poultry houses, which you show
9 up there. It borders on the north side and
10 also on the western side along Lisbon Road with
11 those -- with that property.
12 Q: All right. So, we've got a map before us here
13 that's in evidence, Petitioners' Exhibit 4X.
14 Would you just indicate on that map where the
15 hunt property is in which you hold a hunting
16 license?
17 A: Yes. Not all of it's on this map, but
18 something like that.
19 Q: All right, sir. So, on the other side of
20 Lisbon Road and then to the north and east on
21 the Basel/Sparrow property, correct?
22 A: (Nods head affirmatively).
23 Q: And do you have a written hunt lease for that
24 property?
25 A: I do.

1 Q: I'm going to show you a document that's got a
2 Bates number PET-02271.
3 **MR. GUILD:** Excuse me, Your Honor. One second.
4 Q: So, again, let me show you what's been
5 identified as Petitioners' Exhibit 2D. And
6 it's 02271 and following pages. And ask if you
7 recognize that document.
8 A: I do. That's another hunting lease that came
9 later that includes some other people.
10 Q: All right. And that reflects hunting rights
11 that you have on a piece of property?
12 A: Actually this one does.
13 Q: Okay. All right. Let's turn then --
14 **MR. GUILD:** Excuse me, Your Honor.
15 A: This one was generated from the desire of the
16 parents ---
17 Q: Hold on one second please. Let me show you
18 PET-02276.
19 **MR. GUILD:** Again, Your Honor, it's part of
20 Petitioners' Exhibit 2D.
21 Q: And do you recognize that document?
22 A: That's the same one I have in my hand.
23 Q: Yes, sir.
24 A: Yes, I do.
25 Q: And can you tell us what that is please?

1 A: That the hunting lease that I'm talking about.
2 Q: All right. That allows you to hunt the
3 Basel/Sparrow property that you identified?
4 A: Correct.
5 Q: Now, identify the document that's the
6 proceeding pages. Can you tell us what that
7 is?
8 **THE COURT:** When was that hunting lease entered
9 into? When was that hunting lease entered
10 into?
11 **THE WITNESS:** Pardon me. I ---
12 Q: When was it entered into is the question. Do
13 you know when the ---
14 A: 2002 this one, mine.
15 Q: All right. And is that a current lease? You
16 still hold that lease?
17 A: That's lifetime.
18 Q: Lifetime lease. All right. Now, the document
19 that proceeds that, multi-page document 02271,
20 can you tell us what that is?
21 A: That is another lease that the Dunlap family
22 holds with, I think, three other hunters.
23 Q: All right. Not ---
24 A: To give them additional -- it doesn't impact my
25 --

1 Q: Doesn't apply to you. Thank you. Well, let me
2 draw your attention to that first page, Mr.
3 Blackmon. Are you that Charles Blackmon that's
4 listed on the first page of that document?
5 A: Yes, I am. I didn't know I was carried in
6 that.
7 Q: All right.
8 **MR. GUILD:** So, the documents, Your Honor that --
9 02271 and following pages and then including
10 02276, we move in evidence. That's
11 Petitioners' 2D hunting leases.
12 **THE COURT:** So, 2271 all the way to 2276. Is that
13 what you're saying or are you saying 2271 and
14 2276?
15 **MR. GUILD:** Let's go 2271, Your Honor, through the
16 document itself is 2284, which includes the 76
17 number. So, that -- those pages inclusive of
18 Petitioners' 2D.
19 **COURT REPORTER:** I need to clarify one thing, Your
20 Honor, if I may. Mr. Guild, the two -- this is
21 Exhibit 2D, correct?
22 **MR. GUILD:** Yes.
23 **COURT REPORTER:** And the Bates numbers that you're
24 referring to, is it all of 2D that is in or do
25 I need to take pages out of 2D?

1 **MR. GUILD:** We move all of 2D in. He's now
2 identified the entire document. 2D, Your
3 Honor.
4 **MR. MUSTIAN:** Your Honor, what he -- I believe what
5 he has identified, unless I missed it, was the
6 documents in 2271 through 2276. That consists
7 of two hunting leases that pertain to him. The
8 rest of the document, as I understand it -- I'm
9 sorry, that also would apply to 2277 ---
10 **THE COURT:** Originally it was 2271 to 76.
11 **MR. MUSTIAN:** Your Honor, I stand corrected. Thank
12 you, Mr. Mustian. Let's just make it this way.
13 Your Honor, we move at this time that portion
14 of Petitioners' 2D that's 02271 through 02276.
15 **THE COURT:** All right. Mr. Mustian. He's already
16 testified to it. Just giving you the hint.
17 **MR. MUSTIAN:** I understand. I'm just trying to make
18 sure I'm clear. Yes, Your Honor. No
19 objection.
20 **MR. HIGHTOWER:** No objection, Your Honor.
21 **COURT REPORTER:** I think I need to take pages out,
22 but that's fine. I wrote it down and I'll take
23 the other pages out later. Thank you.
24 **(Petitioners' Exhibit Number 2D was admitted into the**
25 **record.)**

1 Q: All right. Mr. Blackmon, with regard to
2 hunting in particular, how, if at all ---
3 **THE COURT:** How much longer you going to be on this
4 witness?
5 **MR. GUILD:** I'd say probably 45 minutes at this
6 pace, Your Honor.
7 **THE COURT:** Do y'all want to take a break now or
8 finish him up?
9 **MR. GUILD:** It's your pleasure, Your Honor.
10 **THE COURT:** I'm asking y'all.
11 **MR. HIGHTOWER:** I need a break.
12 **MR. MUSTIAN:** I think a break might be a good idea.
13 **THE COURT:** Okay. Well, then -- well, do you need
14 to go just a little bit further before we take
15 a break or you ---
16 **MR. GUILD:** If I could just finish this line of
17 questioning.
18 **THE COURT:** Certainly.
19 Q: All right. Mr. Blackmon, with regard to
20 hunting in particular, how, if at all, will the
21 permitting of these three facilities impact
22 your use of your hunting rights on these
23 properties?
24 A: Well, in a couple of ways that I can think of.
25 Of course, one is part of our contest in this

1 was, if -- I believe it's in conflict with a
2 DNR law, 50-11-356 I believe is the code, that
3 prohibits the discharge of firearms within 900
4 feet of a poultry house that is stocked with
5 chickens. And except this does not apply to
6 the person on the deed, the adjacent landowner
7 cannot be denied that right. But I can as one
8 who has, you know, hunting rights on there.
9 So, it would impact anyone that leases from the
10 property owner if the poultry house is closer
11 than 900 feet to their property line.
12 Q: And will any of these facilities be closer than
13 900 feet to that Sparrow/Basel property line in
14 which you hold a lease?
15 A: Certainly. At least two of these sites.
16 Q: All right. And so, how will that restrict your
17 hunting rights, if at all?
18 A: Well, everything -- if they're set back -- for
19 example, say Jim Young sat back 600 feet from
20 Lisbon Road, then 300 feet on the south -- on
21 the west side of Lisbon Road, under the
22 statute, DNR statute would be you could not
23 discharge a firearm there.
24 Q: All right. And how about the tract to the west
25 and north of the nearest facility?

A: To the north, yes, they're probably closer to the -- you know, to the property line than 900 feet, but the parties that own that land on the other side are not part of this action.

Q: All right, sir. What I'm looking at is the property -- the Basel --

A: Okay. Over there. Okay. Yes, it would extend over into about where you see the white -- let me draw a circle. See that?

Q: Yes, sir.

A: It would extent something like this. They could not legally hunt with a firearm or discharge a firearm in that portion of their land.

Q: And when you say they, how about you?

A: I couldn't either.

MR. MUSTIAN: Your Honor, if I could. I think I could maybe assist this along a little bit. Your Honor, as Mr. Blackmon has testified, 50-11-56 (sic) says that you can't discharge a firearm within 900 feet of a poultry facility without the permission of the property owners. My clients are willing to stipulate and willing to request that their permit be modified with an additional special condition that will

1 require, in order for them to operate these
2 permit -- operate these houses and as a
3 specific special condition of their permit,
4 that they would have to provide permission, not
5 only to the adjoining landowners, but also any
6 of their guests or permittees or lessees that,
7 to the extent that if they ever withdrew that
8 permission, they would then be in violation of
9 their permit and could no longer operate
10 poultry houses.
11 **THE COURT:** All right. Okay. Would that ---
12 Q: Is that a permit condition at present to your
13 understanding, Mr. Blackmon?
14 **MR. MUSTIAN:** Your Honor, as a contested case, they
15 Administrative Law Court, as you've pointed out
16 earlier this morning, you're able to make
17 additional special ---
18 Q: I just want to establish, that is not a current
19 permit condition of these permits; is it not?
20 **THE COURT:** You can ask that.
21 Q: Are you aware of that being a condition on
22 these permits at present?
23 A: I'm not aware of that being a condition of the
24 permits.
25 Q: All right. And have you had suggestions from

1 Mr. Mustian or the Applicants for such a waiver
2 of that restriction in the past? Have you had
3 that suggestion offered to you?
4 A: No, nor would I be comfortable with it.
5 Q: And why wouldn't you be comfortable with it?
6 A: Because I've known of three operations that
7 changed hands and -- you know, changed hands to
8 other ownership or sub-leasers. And I'm not
9 sure of such a granting of a waiver could
10 transfer necessarily every time.
11 **MR. MUSTIAN:** Your Honor, once it's a condition of
12 the permit any transfer ---
13 **THE COURT:** I'll recognize that law.
14 Q: Would you be satisfied with that stipulation,
15 Mr. Blackmon? Does that settle your concern
16 about your hunting rights?
17 A: I wouldn't, especially if I was a property
18 owner.
19 Q: How else, if at all, will the approval of these
20 permit applications affect you, Mr. Blackmon?
21 A: Well, as far as the hunting, you know, they
22 said it was a complex thing. I think it'll
23 impact the actually quality of the hunt. I
24 think ---
25 **MR. MUSTIAN:** Your Honor, objection. Calls for

1 opinion, speculations.
2 **THE COURT:** Well, he's speculating -- he's talking
3 about his concerns, so.
4 Q: I mean, you're a hunter, yes?
5 A: Very much so.
6 Q: All right. And do you have an opinion or a
7 concern about how these facilities ---
8 **THE COURT:** Which one are you asking, opinion or a
9 concern?
10 **MR. GUILD:** All right, sir.
11 Q: Let's just stand with the question that's
12 pending. Would you answer the question then,
13 please?
14 **THE COURT:** What was that question?
15 **THE WITNESS:** Yeah.
16 **MR. GUILD:** Which question would you like, Your
17 Honor? I'm asking you. You seem to have a
18 problem with it.
19 **THE COURT:** No, I don't have a problem with it. I'm
20 trying to figure out what the question is.
21 **MR. GUILD:** All right, sir. I apologize. I'll go
22 back to it.
23 Q: What concern, if any, do you have about the
24 impact of these proposed facilities' permits on
25 your hunting?

1 A: Well, I think -- I believe, from my experience
2 as a hunter, for all my life, I'm nearly 70
3 years old, that once the odor becomes an issue,
4 that it will serve as a cover scent. I just
5 ---
6 Q: As a?
7 A: Cover scent.
8 Q: Cover scent. What does that mean ---
9 **MR. MUSTIAN:** Your Honor, I object on that based --
10 I mean, now we're getting into the opinion of
11 what the facilities will do. To the extent
12 that he's saying this is his concern, then
13 that's fine and it's offered for that purpose.
14 **THE COURT:** That's what's offered ---
15 **MR. MUSTIAN:** But to the extent that he's offering
16 for the truth of the matter asserted, we object
17 ---
18 **THE COURT:** No, he hasn't. He's only said a
19 concern.
20 **MR. MUSTIAN:** Fair enough.
21 Q: And what is a cover scent and how would that
22 harm you in any way if it would?
23 A: It will -- a deer has basically three ways to
24 detect danger; eyes, ears, and nose.
25 **MR. MUSTIAN:** Your Honor, he's not established

1 expertise to say what a deer can smell. And
2 he's also not being offered as an expert.
3 **MR. GUILD:** Your Honor, I guess he's a hunter and
4 can he explain as a hunter what his own
5 experience is?
6 **THE COURT:** Well, he hasn't laid a foundation for
7 his experience of the -- of deer's ability to
8 detect ---
9 Q: Have you hunted deer for a while, Mr. Blackmon?
10 A: All my life almost.
11 Q: Are you experienced in understanding what it
12 takes to successfully hunt a deer?
13 A: My friends would say that I know what a deer's
14 going to do before it does.
15 Q: All right.
16 A: I've been very ---
17 Q: What is your understanding of what impact
18 potentially that these facilities would have on
19 your ability to hunt deer on this property?
20 A: I think it will make it difficult for the deer
21 to use its nose in the most effective manner.
22 And that is -- because one sense that you
23 cannot fool with a deer. You can fool their
24 eyes, you can fool their ears, but you ---
25 **MR. MUSTIAN:** Your Honor, same objection. He's not

1 offered him as an expert, he hasn't identified
2 him as an expert in discovery. He's now gone
3 beyond what his concerns are as to what impact
4 they will have and now he's testifying as to
5 deer physiology and biology and that's outside
6 the scope of these proceeding and his ability
7 to testify.
8 **THE COURT:** I sustain as to that.
9 **MR. GUILD:** He's already answered the question, so I
10 have nothing further on that line. And I guess
11 it's an appropriate time for a lunch break,
12 Your Honor.
13 **MR. HIGHTOWER:** Your Honor, we would ask that
14 question be stricken because when the question
15 was asked ---
16 **THE COURT:** Well, I'm not going to strike the
17 question, I'm not even going to strike the
18 answer. I'll strike that which he's testified
19 to, as Mr. Mustian put, as the deer physiology
20 concerning scent, but not the rest of it.
21 **MR. HIGHTOWER:** That's fine, Your Honor. Thank you.
22 **THE COURT:** All right. With that fun ruling, we'll
23 break for lunch.
24 **(Lunch Break)**
25 **THE COURT:** You're still under oath. Hold on a

1 second, Mr. Guild.
2 (Off the Record)
3 **THE COURT:** All right.
4 **MR. GUILD:** Thank you, Your Honor.
5 Q: Mr. Blackmon, we were talking about, before the
6 lunch break, the community's response to the
7 notice that these proposed facilities have
8 sought DHEC permits for the subject facilities.
9 And I think you said that at some point you --
10 the community, more than -- 20 or more people
11 requested a DHEC public meeting and one was
12 conducted. Is that right?
13 A: Two were conducted.
14 Q: Okay. And when was the first of those
15 conducted, if you recall?
16 A: It was early September. Had it September the
17 8th, maybe a guess.
18 Q: And where did that take place?
19 A: Mountville Fire Department.
20 Q: At the fire department. Okay. And where's
21 that in relation to the rest of the community?
22 Is it the center of town?
23 A: Well, the center of town. Right.
24 Q: On what road?
25 A: I believe -- I don't know the name. Right off

1 Highway 70. The old route that used to be
2 Highway 72 going through there.
3 Q: Okay. And what was the subject of that first
4 meeting? Which facilities were the subject of
5 that first meeting in September, if you recall?
6 A: There was some confusion about that. There was
7 some shifting around, I think. I'm not sure
8 which -- I think we were dealing with three,
9 but it was a mixture the best I can recall.
10 Q: Okay. And then there was a subsequent or later
11 DHEC public meeting. And when did that take
12 place?
13 A: That was in October. I believe early October.
14 Q: All right. And do you recall which facilities
15 were the subject of that one?
16 A: No, but it was the remaining two, if I recall
17 correctly.
18 Q: All right. So, between those two meetings,
19 five facilities were covered, including the
20 three that are at issue in this case; is that
21 right?
22 A: That's correct.
23 Q: All right. And were those meetings attended by
24 members of the local community?
25 A: Very well attended and poultry growers as well.

1 Q: All right. And in terms of folks expressing
2 concerns about the permit, how many people
3 would you estimate attended?
4 A: I guess it's a matter of record, but I would
5 estimate 40.
6 Q: Okay. And did people make statements, express
7 concerns?
8 A: They did.
9 Q: And those concerns -- strike that. Have you,
10 yourself, experienced odors in the Mountville
11 community itself, the town of Mountville, that
12 you associate with the operate of poultry
13 facilities?
14 A: Yes.
15 Q: And how common or uncommon is that, that you've
16 that experience of receiving odors downtown?
17 A: Assuming I visit that community three times a
18 month, maybe once out of those three trips I
19 might've experienced an odor.
20 Q: Okay. And where's the nearest facility to the
21 center of town, say the fire department we'll
22 say?
23 A: By name?
24 Q: Yes.
25 A: Who operates it?

1 Q: Yeah.
2 A: Well, Alexander would be right downtown.
3 Q: All right. And you're looking over. Is Mr.
4 Alexander present?
5 A: He is present today, I think. Yeah.
6 Q: Okay. And where is that facility located?
7 A: It's -- I'm guessing about 800 yards, 600 yards
8 in front of the Mountville Fire Department.
9 Q: Okay. And is there road frontage or a road
10 nearby?
11 A: There is. It's the old Highway 72 passing by
12 there.
13 Q: Old Highway 72?
14 A: Uh-huh (affirmative response).
15 Q: Now, have you had experience of perceiving
16 odors at a church that you attend?
17 A: I have.
18 Q: What church is that?
19 A: Lisbon Presbyterian Church.
20 Q: All right. And where is it located?
21 A: About four miles up Lisbon Road from where the
22 three proposed chicken houses are going.
23 Q: And have you ever had an occasion to make a
24 complaint to DHEC about odors at the -- during
25 church service?

1 A: I did. On Christmas morning it was so
2 overpowering that I had several members -- I'm
3 the clerk there. Several members came up to me
4 and complained. So I waited until mid-week and
5 then notified them, hoping it would clear up,
6 but it didn't. And they visited and, you know,
7 cited the grower behind the church with
8 uncovered chickens, dead chickens, and
9 uncovered a manure pile.
10 **MR. MUSTIAN:** Your Honor, I'm going to renew my
11 objection to this line of questioning on the
12 grounds that it's irrelevant to the permits at
13 issue and relates to his experience with other
14 growers.
15 **MR. HIGHTOWER:** And the department also is raising
16 that issue, plus the fact that there's no
17 evidence as to who this grower is. And even it
18 is, that's an enforcement matter and not ---
19 **THE COURT:** It sounds like they -- it is an
20 enforcement matter and they enforced it. I
21 don't get your objection, but Mr. Guild it
22 doesn't relate to water quality. It relates to
23 ---
24 **MR. GUILD:** It relates to a nuisance impact of these
25 facilities. And Your Honor knows that in

1 200.70F one of the criteria is down wind
2 receptors that the department is to consider
3 with regard to setbacks for facilities.
4 **THE COURT:** I'll certainly consider that for this
5 facility.
6 **MR. HIGHTOWER:** Your Honor, first of all, downwind
7 receptors is not defined as a person or
8 anything like that. Second of all, these odors
9 or anything like that, if I understood the
10 testimony, it was at Christmastime. I don't
11 know Christmas of what year when this happened.
12 **THE COURT:** Well, I'll just sustain the objection.
13 **MR. HIGHTOWER:** Thank you, Your Honor.
14 Q: What facility was it that was the subject of
15 your complaint?
16 A: It was the Jay Culbertson facility and it is
17 documented with DHEC.
18 Q: All right. Now, when you had one of these
19 public meetings at the fire station -- first of
20 all, is the fire station, is it an open-air
21 facility? How is it ---
22 A: The front door is open for the public.
23 Q: Yes. And were they open on the occasion of
24 these DHEC hearings, public meetings?
25 A: They were. They were.

1 Q: Okay. And did people make complaints to DHEC
2 in your presence about odors perceived during
3 the DHEC public meetings that DHEC attended?
4 **MR. MUSTIAN:** Objection, Your Honor. Hearsay.
5 Calls for hearsay.
6 Q: Did you observe complaints made to DHEC while
7 you there during any of -- either of those
8 public meetings?
9 A: Not over odors.
10 Q: Were there flies present at the meeting?
11 A: Yeah, there was a complaint about the flies.
12 They said the flies were complements of the ---
13 **MR. MUSTIAN:** Objection, Your Honor. Hearsay.
14 Q: Who said it?
15 A: I don't know. Somebody in the crowd.
16 **MR. MUSTIAN:** Same objection.
17 **THE COURT:** Well, he never answered it, but.
18 Q: And was DHEC asked to investigate the complaint
19 about flies associated with the nearby
20 facility?
21 **MR. MUSTIAN:** Objection. Hearsay. He's asking if
22 DHEC was asked.
23 **THE COURT:** Mr. Guild ---
24 Q: Are you aware of that DHEC investigated a
25 complaint about flies present during the public

1 hearing on these facilities?
2 A: No.
3 Q: You just don't know?
4 A: No. I mean, no. I didn't see any obvious
5 reaction.
6 Q: In your work preparing for commenting on these
7 facilities, you alluded earlier to doing some
8 investigation and research. Did you attempt to
9 identify whether or not facilities -- existing
10 facilities in the community had been properly
11 managing their stockpile of manure at the barn
12 sites?
13 **MR. MUSTIAN:** Your Honor, whether or not existing
14 facilities are properly managing their
15 stockpile of manure is irrelevant to these
16 proceedings.
17 **MR. GUILD:** Your Honor, it's a potential non-point
18 source of pollution that the Department is
19 affirmatively obligated to consider. And if
20 Your Honor dared us to demonstrate that there
21 was a potential to discharge, then I believe I
22 should at least be allowed offer this proof.
23 **MR. MUSTIAN:** Your Honor, first of all, he has not -
24 --
25 **THE COURT:** If I dared you to ---

1 **MR. GUILD:** Your Honor said essentially I'm going
2 let you talk about this, but now your job is to
3 prove that there's a potential to discharge.
4 And I'm attempting to make proof.
5 **THE COURT:** Well, I don't think I dared it, I just
6 said I ---
7 **MR. GUILD:** I apologize. If I put it that way, but
8 it was put to me that I needed to that, so I'm
9 trying to do that.
10 **THE COURT:** Well, you've got to prove your case, you
11 have to ---
12 **MR. GUILD:** Yes, sir.
13 **MR. MUSTIAN:** Your Honor, objection. I would also
14 state he has not demonstrated or not laid any
15 foundation that a manure pile in and of itself
16 is a non-point source for discharge.
17 **THE COURT:** Well, you haven't laid the groundwork.
18 And, Mr. Guild, I don't remember the question
19 again. Last time I asked you this, you said I
20 was -- I didn't like your question. And I'll
21 say the same thing again. I don't remember
22 your question. Doesn't mean I don't like it.
23 **MR. GUILD:** I'll try again, Your Honor.
24 Q: So, Mr. Blackmon, at the occasion of either of
25 the DHEC public meetings -- strike that. In

1 your investigation to prepare to make comments,
2 did you have occasion to investigate whether
3 the manure was properly being stored with
4 accordance with DHEC regulations at existing
5 facilities in the community?
6 **MR. MUSTIAN:** Your Honor, ---
7 **THE COURT:** I sustain that you have to lay ground
8 work for that.
9 **MR. GUILD:** Well, I just did, Your Honor. And so,
10 now I'm going to ask ---
11 **THE COURT:** What's your objection?
12 **MR. MUSTIAN:** Well, in addition to the objection I
13 previous raised, now he is asking him to
14 provide a legal opinion as to whether or not
15 a manure pile is in compliance with DHEC
16 regulations. The witness is not qualified to
17 make that determination.
18 **MR. GUILD:** We're really picking hats here.
19 Q: The regulation I ask you to presume, because
20 you've read them, requires you to cover manure
21 if you stockpile outside for more than 72
22 hours. Isn't that right? Three days.
23 A: Correct. That's my understanding.
24 Q: All right. And have you had occasion to
25 investigate whether or not existing facilities

1 in the community are stockpiling their manure
2 without covering it out in the open for a
3 lengthy period of time, perhaps over three
4 days?
5 A: I have.
6 Q: And how have you gone about doing that
7 investigation, Mr. Blackmon?
8 A: I reviewed TerraServer images, satellite
9 images, and I reviewed Google Earth satellite
10 images, and I reviewed Laurens County GIS
11 images.
12 Q: All right.
13 A: They can be done today for that matter.
14 They're still there. There's historic image is
15 on there.
16 Q: And you can tell what date the images are
17 taken; is that right?
18 A: They do. And I found at least -- I found five
19 operating facilities that every time for the
20 past several years that I looked, I could find
21 an exposed pile of colored material that led me
22 to believe ---
23 **MR. MUSTIAN:** Your Honor, Objection. He's basing
24 this opinion on what he has testified that he
25 saw on other documents; Terraserver, Google

1 Earth, these things like that. They haven't
2 laid a basis or a foundation for that. It's
3 hearsay without, you know, any applicable
4 exception and he's not qualified to render an
5 opinion about what he can view on a website and
6 whether or not a facility's out of compliance.
7 Q: So, Mr. Blackmon --
8 **MR. GUILD:** I mean, I don't know whether that stands
9 -- he's testified. I have another question
10 now, but is there -- he's answered the
11 question, Your Honor. He told us what he saw.
12 I have another question. May I ask it?
13 **THE COURT:** They're objecting, I assume.
14 **MR. GUILD:** To what?
15 **MR. MUSTIAN:** I mean, I'm objecting to his answer as
16 to the question. I mean, to the extent that I
17 didn't catch it at the minute he said it, I'm
18 asking to move to strike. But the point of
19 this is that he is testifying on things that he
20 has looked at, databases that he has looked at.
21 There's been nothing in the record that
22 reflects this. And it's hearsay without an
23 exception that Mr. Guild -- at least none that
24 I can see. In addition, he's saying in his
25 opinion that these are not in compliance. He's

1 not an expert with respect to this, hasn't been
2 offered as such.
3 **THE COURT:** I don't know if he's testified to his
4 compliance. if he has, I strike that. He's
5 testified to his observation that I do
6 recognize. I don't think the Court can take
7 judicial notice of the accuracy of Google
8 Earth. I mean, I don't even know how it
9 operates.
10 **MR. GUILD:** Well, Your Honor, let me follow this
11 line and we'll just -- may I?
12 **THE COURT:** I'll strike his testimony and allow you
13 to ---
14 **MR. GUILD:** Well, I've got -- as foundation. I just
15 got to have that as a foundation, but.
16 Q: Did you bring these images to the attention of
17 DHEC asking them to determine whether or not
18 these facilities that you observed through this
19 device had in fact failed to manage their
20 manure properly?
21 A: I did at the October meeting.
22 Q: All right.
23 **THE COURT:** I'll allow his testimony in. You didn't
24 object to that, so I'll allow his testimony in
25 not for the truth of the matter to asserted,

1 but to lay the foundation for Mr. Guild's
2 subsequent question.
3 Q: So, what did you do at that October meeting?
4 Now, you made this research, you obtained
5 images. Did you present printed pictures of
6 this to DHEC?
7 A: I presented them to the crowd as well as DHEC
8 and offered them. Then after I made some
9 comments about what I had seen, I also
10 commented about the facilities that I'd seen
11 that were doing it correctly.
12 Q: All right.
13 A: And said, Boys, we can do this right.
14 Q: All right.
15 A: And I was trying to do it in an instructive
16 way, then offered the pictures to DHEC, the
17 representatives, and they said, We do not need
18 them, we've already got them.
19 Q: So, DHEC declined to take your photographic
20 evidence saying, as you just testified, they
21 already have it.
22 A: Correct.
23 Q: For which facilities did you obtain images that
24 to you indicated improper storage of manure?
25 A: Well, Mr. David Coggins was one of the images.

1 Q: All right. His existing facility?
2 A: Right.
3 Q: Okay.
4 A: Mr. William Garrett, of course the Alexander
5 facility, a Faulkner facility over on Milam
6 Road. I also had an image Jay Culbertson that
7 had exposed manure.
8 Q: All right. And you say there were facilities
9 that you observed that over time appeared to be
10 properly managed and you didn't see the piles
11 of manure, correct? You said there were
12 facilities that were properly managing at your
13 ---
14 A: Oh, yeah. There were certainly other
15 facilities in that community that I -- you
16 could not see those typical aerial views of the
17 material.
18 Q: All right. And you communicated that
19 observation to DHEC at the same time?
20 A: They were at the meeting when I communicated it
21 to the crowd that was present.
22 Q: Okay. As part of the comments you made to
23 DHEC?
24 A: Correct.
25 Q: All right, sir. I'll show you a document

1 that's been marked as Petitioners' 4Z, as in
2 zebra. Page -- Petitioners' Bates number
3 02222-02225, and ask if you can identify these.
4 I'm going to put them up on the Elmo here.
5 That is page 2222. Can you identify that
6 photograph, Mr. Blackmon?
7 A: I can.
8 Q: Okay. What does it depict?
9 A: There's actually three photographs.
10 Q: Yes, sir. Three photos.
11 A: It's depicts a pile of material there at the
12 Alexander farm, taken from -- it appears to be
13 taken from the overhead bridge on the old
14 Highway 72.
15 **MR. MUSTIAN:** Your Honor, again, object on
16 relevance. This is related to another
17 facility.
18 **THE COURT:** At this point in time I sustain that
19 objection. Well, Mr. Guild, if I'm inclined
20 to, can you explain ---
21 **MR. GUILD:** Yes, sir. It's a picture that purports
22 to be uncovered manure at an existing facility,
23 the closest one to downtown Mountville, the
24 Alexander facility. And it's one that presents
25 -- we'll represent -- I have a series of other

1 photos I want to have identified as well, for
2 the same facility over a period of time,
3 uncovered manure that is a -- demonstrates a
4 potential to discharge. Therefore, it's manure
5 that is not being covered, as DHEC regulations
6 require, over a period of time, which is
7 therefore exposed to the weather, rainfall,
8 which then can run off into adjacent and
9 surface water and cause a discharge. With that
10 is -- you know, we can talk about what DHEC did
11 or didn't do with this, but I submit that what
12 I intend do, have the witness identify these,
13 establish that they were provided to DHEC as
14 part of the public comment process, and we'll
15 find out what DHEC did with them, if anything.
16 **THE COURT:** Do you have -- are you going to link up
17 any evidence, A, that it did -- there was a
18 discharge as a result of that into the
19 waterways or is this all potentiality
20 speculation that it creates a potential for ---
21 **MR. GUILD:** It violates DHEC regulations.
22 Hypothetically, it violates DHEC regulations.
23 The regulations are designed to prevent a
24 discharge.
25 **THE COURT:** Well, this is picture. You're going to

1 show it over three days, I assume.
2 **MR. GUILD:** Over period of time. Yes, sir. And
3 then provided to DHEC. But it goes to the
4 sections of the animal reg that we've been
5 talking about, act in each permit to prevent an
6 increase in pollution of the waters of the
7 state, consider the factors of setback, and
8 prevent waters of the state from being
9 polluted, the TMDL and appeared classification
10 of Little River where all these barns are being
11 proposed in the watershed, and information
12 provided to DHEC that was given to them in the
13 permitting process that they had an obligation
14 to consider. That's the point. And then we'll
15 offer expert testimony. We have an expert
16 witness that is going to present you with
17 expert testimony about the proper management
18 techniques that should address these kinds of
19 issues that are not included in this permit.
20 That's the proffer.
21 **THE COURT:** Okay.
22 **MR. MUSTIAN:** Your Honor, the only thing I would say
23 -- I mean, in addition to the objections I've
24 already raised, and I won't ---
25 **THE COURT:** Well, give them to be again, so I ---

1 **MR. MUSTIAN:** I mean, Your Honor, first of all ---
2 **THE COURT:** In summary.
3 **MR. MUSTIAN:** First of all, I don't think he's laid
4 a foundation. He hasn't -- these are
5 photographs. He asked Mr. Blackmon if he took
6 them, if they fairly and accurately represent
7 ---
8 **THE COURT:** Okay.
9 **MR. MUSTIAN:** --- as they exist at the time. He
10 hasn't laid that foundation, number one.
11 Number two is, I don't believe that these
12 photographs in this line of questioning is
13 relevant because it relates to another
14 facility. And whether or not a facility in --
15 according to the date stamp, in 2013, whether
16 or not a -- one of those facilities may or may
17 not have left a manure pile uncovered is
18 unrelated to my clients' permits. So, I hate
19 to keep making this same objection over and
20 over again, and -- but I think this entire line
21 of questioning related to, you know, somebody
22 else who may have had odors or somebody else
23 who may have had an uncovered manure pile, how
24 that impacts DHEC's analysis with respect to my
25 clients. I mean, it's -- in my mind it's the

1 same thing as saying that I can't go and get a
2 driver's license because Mr. Hightower's sped
3 and got a speeding ticket while he was on his
4 way over here. Well, I mean, just because of
5 something that he may or may not do, doesn't
6 mean that the DMV can deny me a driver's
7 license as long as I meet the requirements.
8 **THE COURT:** I would respond to that as, it could
9 potentially relate to water quality of the --
10 but it would have to be nexus to the water
11 quality.
12 **MR. MUSTIAN:** Your Honor, I would say that this
13 entire line of questioning is we keep talking
14 about whether or not there's going to be a
15 nexus. And there's no -- Mr. Guild hasn't
16 suggested anything that he's going to be able
17 to show that, yes, this did have a discharge
18 or, yes, this did impact the Little River or,
19 yes, this did create fecal coliform bacteria.
20 And I think that, because that foundation has
21 not been laid, this entire line of questioning
22 is not only irrelevant under 402, but also is
23 -- any probative value it would have is
24 outweighed by the prejudicial effect.
25 **MR. HIGHTOWER:** Your Honor, I -- not to belabor what

1 Mr. Mustian has stated, I do note that there's
2 been no foundation that shows when -- I see
3 that there is a date stamp, but there's no
4 foundation as to how do these different
5 purported satellite imaging software, whether
6 or not they are consistent photographs taken
7 over -- you know, each day they take a
8 photograph or is it -- or are these time stamps
9 just, you took it on a different day, you went
10 on the site, and everything else. So, without
11 all this and for all the other reasons that
12 have been raised, we believe that this line of
13 questioning should be ended.
14 **THE COURT:** I sustain the objection.
15 **MR. GUILD:** May I be heard? I thought you were
16 letting me do this, Judge, so I'm just --
17 thought you already understood that there's a
18 need to ---
19 **THE COURT:** Well, on this -- I'm ruling on each
20 objection as they come along. I think that's
21 what I'm paid to do. So, on this objection I
22 sustain the objection.
23 **MR. GUILD:** Your Honor, may I be heard?
24 **THE COURT:** Yes, sir.
25 **MR. GUILD:** I mean ---

1 **THE COURT:** I normally don't like ---
2 **MR. GUILD:** You didn't hear from me at all. You
3 didn't hear from me.
4 **THE COURT:** I heard at length from you and then they
5 made their argument, but I'll hear back from
6 you a little bit more. But I've heard it at
7 length your reasons for offering the evidence,
8 but go ahead.
9 **MR. GUILD:** Yes, sir. I intend to show that this
10 witness knows -- can identify these
11 photographs. I didn't ask him whether he took
12 them, because he didn't. Can identify these
13 photographs because he knows that they were
14 given to DHEC as part of the public comment
15 process at the DHEC public meetings in the
16 Mountville community. Now, I will lay a
17 foundation to demonstrate -- respond to every
18 one of these concerns about the validity or
19 reliability of these photos because the person
20 who took the pictures will take the stand and
21 will testify about the circumstances that the
22 photos were taken, when they taken, and that
23 they accurately depict what's shown in the
24 photographs. But the point for this witness is
25 that these documents, these photographs were

1 given to DHEC as part of the permit review
2 process on behalf of SCRAP. And then we'll
3 find out from DHEC what they did or did not do
4 with them. Because, Your Honor, as we -- as I
5 submitted, they reflect a potential for
6 discharge. They reflect -- we will
7 demonstrate, if you allow us to tie this
8 together -- I just got to lay the foundation
9 with one witness who can say that they were
10 given to DHEC.
11 **THE COURT:** That's not your questioning. Your
12 questioning went further than that.
13 **MR. GUILD:** Say again.
14 **THE COURT:** Your question went further than that.
15 Did it not?
16 **MR. GUILD:** No, sir. I don't thing so. I just
17 asked him if he could identify them. He did.
18 And I'm going through -- there's a series of --
19 -
20 **THE COURT:** You were asking him about the exhibit.
21 **MR. GUILD:** I asked him if he could identify the
22 exhibits, he told me what they were. And now
23 I'm going to ask him whether ---
24 **THE COURT:** Any objection to what he's saying now?
25 That all he's going to ask is do you identify

1 these exhibits, were they given to DHEC at the
2 public meeting?
3 **MR. MUSTIAN:** I mean, Your Honor, I -- the problem
4 that I'm having with it is that I think that
5 the photographs are hearsay in the fact that he
6 didn't take them. Mr. Guild just acknowledged
7 that. He can't identify whether or not they
8 accurately depict the situation at the time.
9 **THE COURT:** Well, I'll tell you what, I'll allow ---
10 **MR. MUSTIAN:** To the extent they are ---
11 **THE COURT:** Whoa, whoa. I'll allow him to ask those
12 two questions. But you're right, the
13 foundation hasn't been laid. I'm not going to
14 admit. So, the issue is these two questions.
15 Can he ask them? And then we'll move on.
16 **MR. MUSTIAN:** If it's limited to those issues.
17 **THE COURT:** Okay.
18 **MR. GUILD:** All right.
19 Q: I'm going to walk through really quickly the
20 remaining pages here and ask if you can
21 identify them. This is 0221 (sic). Can you
22 identify that as a photograph that was ---
23 A: I can. They're photographs that were submitted
24 at the second DHEC meeting.
25 Q: Okay. 0223 (sic)?

1 A: I can. They were photographs that were
2 submitted at the DHEC public meeting.
3 Q: Also, apparently of the Alexander facility. Is
4 that right?
5 A: Oh, yes. All of these are of the Alexander
6 facility.
7 Q: 02239, can you identify that?
8 A: Yes. That's also part of the album -- picture
9 album that was submitted as evidence at the
10 public meeting.
11 Q: 02225, can you identify that?
12 A: Yes. Those were pictures in the picture album
13 submitted at the DHEC public meeting.
14 Q: And finally, 02228, can you identify that
15 please?
16 A: Yes. Those are three pictures in the picture
17 album submitted at the public meeting.
18 Q: All right. And who identified -- who presented
19 those pictures, if you know, to DHEC at the
20 pubic meeting?
21 A: Kathy Lowman.
22 Q: Is Kathy Lowman a member of SCRAP?
23 A: She is.
24 Q: All right.
25 **MR. GUILD:** And, Your Honor, understanding your

1 other ruling, we move to admit in evidence what
2 have been identified as Petitioners' 4Z, as in
3 zebra. And we intend to have them fully
4 authenticated by another witness.
5 **MR. MUSTIAN:** Based on the same objection ---
6 **THE COURT:** I deny that at this point in time until
7 they are authenticated.
8 **MR. GUILD:** Thank you, Your Honor.
9 **THE COURT:** Then I'll address the issue -- other
10 issues then.
11 **MR. GUILD:** Thank you, Your Honor.
12 Q: Now, walking back through this. So, you had
13 the two public meetings, you communicated your
14 comments as you described. Public meetings
15 invited members of the community to speak, they
16 did. And DHEC thereafter notified you that
17 these permits had been issued; is that correct?
18 A: Well, we also submitted written comments ---
19 Q: All right.
20 A: --- to DHEC and received responses to those.
21 Q: And how did you go about submitting written
22 comments?
23 A: I think I emailed mine.
24 Q: Okay. And did those in the community submit
25 written comments?

1 A: I assume.
2 Q: Okay. Written comments, then you were told
3 DHEC had issued the permits?
4 A: Correct.
5 Q: All right. And what action, if any, did you
6 take after you learned that the permits had
7 been issued?
8 A: I'm trying to think of the time line. In
9 November, I believe we went to Laurens County
10 Council and I spoke to Laurens County Council
11 about the issue about the need to establish
12 some type of zoning or some type of regulation
13 where we could whereby monitor the growth of
14 such industries.
15 Q: All right.
16 A: To no avail.
17 Q: And when did SCRAP get organized?
18 A: That was in -- we met on December -- I remember
19 because it was Pearl Harbor Day, on December
20 the 7th.
21 Q: Of what year?
22 A: 2016.
23 Q: Last year, all right. And why was SCRAP
24 organized?
25 **THE COURT:** Mr. Guild, wait a second. Somebody's

1 phone is going off. Here's the rule. The next
2 phone that goes off, it belongs to the Court.
3 You can get it back, but you'll probably have
4 to pay a fine. So, I would suggest that
5 everyone in this courtroom put it on vibrate.
6 If vibrating irritates me, I'll have to let you
7 know -- or disrupts the court room. You okay,
8 Mr. Guild -- checking yours?
9 **MR. GUILD:** Yes, sir. Well, and Your Honor I have
10 been admonished in the past because I know
11 somebody who lost their phone.
12 **THE COURT:** I have taken a few, so.
13 **MR. GUILD:** I know you have, Your Honor. I counsel
14 my clients accordingly. They might just lose
15 that phone.
16 **THE COURT:** Yeah, please do that because I get no
17 joy out of taking somebody's phone. Follow the
18 rules. All right.
19 **MR. GUILD:** May I proceed, Your Honor?
20 **THE COURT:** Go ahead.
21 Q: Mr. Blackmon, and so, I asked you about
22 formation of SCRAP and you said it was Pearl
23 Harbor Day of last year, December 7.
24 A: Right.
25 Q: All right. You had a meeting on that day? Is

1 that what happened?
2 A: We did.
3 Q: All right. And for what purpose? What did you
4 get together for?
5 A: Well, I guess the primary purpose was to
6 investigate the process of filing, you know, a
7 request for a review, knowing that in
8 subsequent -- the request for, you know, action
9 at the Administrative Law Court level.
10 Q: So, at that point had the permits been issued
11 for three subject facilities?
12 A: I believe they had.
13 Q: Okay. So, you anticipated taking the case up
14 and going first to request for DHEC a Board
15 review?
16 A: Correct. We had to go -- it had been explained
17 to us we'd have to go through that, although it
18 was highly unlikely we would receive one and
19 would not get our money back, but we would have
20 to go through that hurdle first.
21 Q: All right. And did you prepare the DHEC Board
22 review request, the document that was submitted
23 to DHEC?
24 A: I did.
25 Q: All right. And did you circulate that amongst

1 other members of SCRAP for their signature?
2 A: As we got the signatures, yes.
3 Q: And approximately how many people signed the
4 document in addition to yourself?
5 A: Thirty-one.
6 Q: All right.
7 A: We were limited at the 31, because they needed
8 to live within two miles of where the proposed
9 facilities are.
10 Q: Okay. You understood two miles was a limit
11 that was being proposed in a piece of
12 legislation; is that right?
13 A: No. It was an existing law at the time.
14 Q: All right.
15 A: That you had to have property within two miles
16 of a proposed facility.
17 Q: That's what you understood. All right. So,
18 you had 31 people that fit that description and
19 they were all -- were they all members of
20 SCRAP? Were they members of SCRAP?
21 A: Oh, yeah. When they signed they were.
22 Q: And you signed as well and gave your address;
23 is that right?
24 A: I gave the address because I understood that
25 they needed a contact person.

1 Q: All right.
2 A: In fact the clerk told me that.
3 Q: And you listed yourself as contact person?
4 A: Yes.
5 Q: All right. And when you say the clerk told you
6 that, the clerk of DHEC is Lisa Longshore. Did
7 you have a conversation with Ms. Longshore
8 about the matter?
9 A: Several times.
10 Q: All right. And did she ask you whether you
11 would be the contact person for SCRAP?
12 A: She did.
13 Q: And you say yes or did you ---
14 A: Yes.
15 Q: So, you were the president of SCRAP and you
16 agreed to be the contact person; is that right?
17 A: Of course.
18 Q: Now, were you represented -- was SCRAP
19 represented by an attorney at the time you
20 filed your request for DHEC Board review?
21 A: No.
22 Q: Had you -- are you familiar with Mr. Michael
23 Corley? Do you know Mr. Corley?
24 A: Uh-huh (positive response). We were.
25 Q: All right. And did Mr. Corley have family

1 connection or personal connection to the
2 Mountville community independent of his
3 professional responsibilities?
4 A: He was born and raised in Clinton.
5 Q: In Clinton.
6 A: And I think his wife and my wife are friends.
7 Q: All right. And did he go to school there or
8 something?
9 A: His mother and my wife.
10 Q: Okay.
11 A: Yeah, he went to school in Clinton.
12 Q: All right. And so, as a former resident and
13 friend, was Mr. Corley helpful to you in
14 preparing to -- for this process?
15 A: Somewhat.
16 Q: Yeah. And what, if anything, did Mr. Corley
17 say to you about his ability or willingness to
18 actually serve as your lawyer, to represent
19 you?
20 A: Well, he made it clear that he could not do
21 that without permission from his superiors in
22 Charleston, I believe, and he never could get
23 that.
24 Q: Okay. So, he was not your lawyers at the time?
25 A: No. He made that clear.

1 Q: Now, in the courtroom are a couple of other
2 SCRAP members. But I see two, Mary and
3 Margaret. Are they members of SCRAP?
4 A: They are.
5 Q: Okay. And who actually went to Columbia and
6 paid the filing fees?
7 A: Well, a portion of the filing fees were paid by
8 Mary and Margaret.
9 Q: Okay. And who paid the other portion of it?
10 A: I paid a portion.
11 Q: All right. So, you split it up amongst you?
12 A: We did.
13 Q: But they paid some of it too?
14 A: They did. And plus we had contributions from
15 two other people.
16 Q: Okay. And when you filed the request for DHEC
17 Board review, did you intend to file it as an
18 organization and -- or a group or as
19 individuals?
20 A: I'm not sure what you mean by that question.
21 Q: Well, I mean, was it a group effort or was it
22 an individual effort?
23 A: Of course it was a group effort. Everybody
24 signed, they knew what we were doing.
25 Q: Okay. And do other members of SCRAP own

1 property or live in the vicinity of the
2 proposed three facilities that are in this
3 case?
4 A: We tried to adhere to that. There are several
5 that wanted to sign, but, you know, I
6 prohibited that. I said, no, let's stay within
7 the -- what my understanding of what the
8 requirement would be.
9 Q: Mary Basel and Margaret Sparrow you already
10 identified own property immediately adjacent to
11 the proposed sites, correct?
12 A: We only have three that I was questioning the
13 distance. It's hard to say because their land
14 extends down Lisbon Road. But there's maybe
15 three that would be questioned if their
16 property is within exactly two miles or less of
17 the facilities.
18 Q: But to the best of your ability, did the 31 all
19 have property within two miles of the facility?
20 A: Correct.
21 **MR. GUILD:** Your Honor, may I take just a moment and
22 confer?
23 **THE COURT:** I'm always happy for a lawyer to confer.
24 **MR. GUILD:** I bet. Your Honor, that's all I have.
25 And Mr. Blackmon, if you would be kind enough