THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod, Administrative Law Judge

Case No. 13-ALJ-07-0395-CC
Appellant Case No. 2015-000700

Rick Still, Donice Still, Christine Orr and Terry Orr.....Appellants,

v.

South Carolina Department of Health and Environmental Control and
Lisa Sumerel and Sumerel Poultry Farm .....Respondents.

FINAL BRIEF OF APPELLANTS

ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
jsmith@roecassidy.com
Attorneys for Appellants

November 25, 2015
Greenville, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

I. STATEMENT OF THE ISSUES ON APPEAL

1. Is the ALC's conclusion that the preponderance of the evidence established that the 8.75 lbs. average exit weight figure utilized in the Sumerel Comprehensive Nutrient Management Plan is accurate and the proposed facility correctly permitted as a "small animal facility" not supported by the substantial evidence presented at trial and affected by one or more error of law?

2. Did the ALC err in finding that DHEC conducted a full and adequate evaluation of the proposed concentrated poultry operation as required under the applicable statutes and regulations, including S.C. Reg. 61-43 Part 200.70(F)(7)?

II. STATEMENT OF THE CASE

This matter came before the Administrative Law Court pursuant to S.C. Code Ann. § 1-23-310 *et seq*. and the S.C. Code Ann. § 44-1-60, for a contested case hearing regarding the South Carolina Department of Health and Environmental Control's ("DHEC" or "Department") decision to issue Bureau of Water Agricultural Permit No. 19647-AG (the "Permit") dated June 2, 2013 to Lisa Sumerel for the operation of Sumerel Poultry Farm – a proposed broiler animal feeding operation off Poole Town Rd. in Laurens, South Carolina. A hearing was held before the ALC in this matter on August 25 and 26, 2014, in Columbia, South Carolina.

The Appellants, Rick and Donice Still and Christine and Terry Orr were the Petitioners in the case below. Appellants presented the testimony of two experts witness - Dr. David Hargett, Ph. D., who the Court qualified as an expert environmental science consultant and on water impacts and Dr. Carmen Parkhurst, Ph. D., a Professor Emeritus of Poultry Science at North Carolina State University who the Court qualified as an expert in animal feeding operations, poultry science, and waste management. Appellants also called several DHEC personnel who took part in evaluating the Sumerel Permit application and Management Plans and decision to approve the Permit. Those witnesses included Chrissy Matthews, who performed the two preliminary site inspections at the proposed site, Stephen Smutz from the Bureau of Air Modeling section who evaluated potential harmful emissions of regulated airborne pollutants, and the Section Manager over Agricultural Permitting William Chaplin who oversaw the entire permit review, performed the final review of the Sumerel application and approved the Permit. Appellants also called the permit applicant Lisa Sumerel and designated operator Mike

Sumerel as witnesses in their case. Finally, Appellants Terry Orr, Christine Orr, and Rick Still testified on their own behalf.

Respondents Lisa and Mike Sumerel presented the testimony of Leon Fulmer and Joy Shealy, both of Shealy Engineering, LLC, the firm that drafted both the Comprehensive Nutrient Management Plan (*hereinafter* the "Management Plan" or "CNMP") and the Dead Animal Disposal Plan (*hereinafter* "DAD Plan") for the Sumerel facility.

The Department presented no witnesses, relying on cross examination of those called by Appellants and the Sumerel Respondents. The Department also did not put up a case in chief.

At the conclusion of trial, the ALC requested the parties each provide proposed orders to the Court. Per the ALC's instructions, the Appellants submitted their proposed order on October 21, 2014. Respondents then submitted a proposed order on December 4, 2014. The lower court asked Appellants to offer comments on/responses to the Respondents proposed order, which were submitted on December 22, 2014.

The ALC issued its Final Order and Decision on January 12, 2015 (the "Order") upholding DHEC's decision to issue the Sumerel Permit. On January 22nd Appellants filed a Motion to Reconsider the Court's January 12th Order. (R. pp. 37-49). DHEC filed a Reply to that motion on February 5th. (R. pp. 50-71).[1] The ALC did not issue a ruling on Appellants Motion to Reconsider, and therefore, upon the passage of thirty days, effectively denied the Motion. Appellants filed a Notice of Appeal on April 6, 2015.

[1] Appellants filed a letter in response to a particular portion of the Department's Reply. (R. pp. 72-75). On February 11th, the ALC emailed all counsel to address the AgraMetrics issue. (R. p. 76).

III. STATEMENT OF THE FACTS

On April 23, 2012 the Department received a Preliminary Site Inspection Request from the Sumerels for a proposed animal feeding operation on Poole Town Rd. in Laurens, South Carolina. On April 23rd, Chrissy Matthews from DHEC's regional office in Greenwood conducted a preliminary site inspection. (*See* R. pp. 377-78). Ms. Matthews performs inspections for agricultural facilities, including routine, compliance, and preliminary site inspections. (R. p. 82/Tr. p. 19). During her inspection, Ms. Matthews completed a Preliminary Site Inspection Checklist reflecting her evaluation of the property. By letter dated April 27, 2012, DHEC notified the Sumerels that it preliminarily approved the site for a broiler facility and instructed them to proceed with obtaining and submitting the proper permit application materials. The Sumerels obtained Joy Shealy, of Shealy Engineering to prepare and submit the plan and application materials to DHEC.

On October 11, 2012 the Department received an application and Comprehensive Nutrient Management Plan ("CNMP") for Sumerel Poultry Farm. The Management Plan and application called for the construction and operation of four poultry houses, each housing 27,400 broilers for a total facility capacity of 109,600 birds. The Sumerels sent out notices to several of their nearby neighbors as required by the regulations, including the Rick and Donice Still and Terry and Christine Orr. (R. pp. 269-300).

On October 11, 2012 the Department began and completed its Administrative Review of the Sumerel application. (R. pp. 377-78). That same day William Chaplin sent review documents to the Bureau of Air Quality and Division of On-Site Wastewater Management in the Bureau of Environmental Health. (R. pp. 377-78; R. pp. 393-95). On

October 16, 2012 Chaplin received a memorandum from the Bureau of Air Quality reviewing the impact on "down-wind receptors." (R. pp. 396-97). The memorandum concluded that the proposed Sumerel facility will "be in attainment with all applicable ambient air quality standards [and] [i]n consideration of the relevant standards under state and federal laws, an increase in air pollution is not expected from the proposed operation." (R. p. 397). On October 22, 2012 Chaplin received a memorandum from the On-Site Wastewater Management Division indicating fieldwork was performed to determine if the proposed mortality burial site was suitable. It was determined that the proposed burial site was not suitable for mortality disposal. (R. p. 125/Tr. p. 191).

The Department posted numerous public notice signs as required in the nearby area noting it would accept comments on the Sumerel facility. (R. pp. 377-78). A petition with the names of 77 individuals opposed to the Sumerel operation was submitted to the Department on October 25, 2012. (R. pp. 377-78).

DHEC began its technical review of the Sumerel application and CNMP on February 2, 2013. (R. pp. 377-78). On February 25, 2013 the Department sent out letters to the 77 individuals on the petition and those who wrote letters in opposition to the Sumerel facility notifying them of a public meeting to be held on March 11, 2013. (R. pp. 377-78). During that public meeting citizens voiced their concerns relating to the Sumerel facility's detrimental impacts on the community.

On March 23, 2013 the Sumerels submitted amendments to their CNMP. (R. pp. 206-337; R. pp. 338-373). The March 23rd amendments included submission of a new Dead Animal Disposal Plan changing the mortality disposal method from burial to hay bale composting and incineration. (R. pp. 338-373). On March 28th and 29th additional

amendments to the CNMP were submitted to the Department, which included incorporation of the new mortality disposal methods. (R. pp. 217-18, 228, 234-35, 237-38, 240-41, 243-44, 305). On June 10, 2013 DHEC completed its technical review of the Sumerel application. (R. p. 378).

On June 12, 2013 the Department issued Permit No. 19647-AG to Lisa Sumerel for the operation of a broiler poultry feeding operation. (R. pp. 374-76). The Permit allows for the construction of 4 new poultry broiler houses, each housing 27,400 birds, for a total of 109,600 birds at any one time. (R. pp. 374-76). The Permit allows for 4.5 flock turns per year making the total number of birds per year on the Sumerel site 493,200. (R. pp. 374-76). Utilizing the numbers from the CNMP, the Permit indicates that the average animal live weight of those birds will be 493,200 lbs. and they will generate 669 tons of waste per year. (R. pp. 374-76). The Permit allows use of a hay bale composting system and incinerators for mortality disposal. (R. pp. 374-75). The Permit's Special Conditions section requires that drinking water wells installed on the property for animal or human consumption meet certain regulatory setbacks. (R. p. 375). Under that section the operator Mike Sumerel is required to obtain CAMM Certification from Clemson University within a year of the Permit's effective date. (R. p. 376).

Twelve days after receiving the Permit the Sumerels submitted a request to DHEC for a preliminary site inspection to be conducted in order to evaluate the feasibility of composting and incineration for mortality disposal, including the siting of the composter and incinerator(s) on their facility. (R. p. 398). On June 24th Chrissy Mathews went to the Sumerel property to conduct this preliminary site inspection for the new mortality disposal methods. (R. p. 399). Over two weeks after issuing the Permit, on June 27,

2013 DHEC sent the Sumerels a letter preliminarily approving the proposed composting system and incineration for mortality disposal. (R. p. 399).

On July 1, 2013 Appellants appealed the issuance of Permit No. 19647-AG to the Department requesting Board review. (R. p. 378). By letter dated July 18, 2013 the DHEC Board denied Appellants' request, making the permitting decision a "final agency decision." On August 12, 2013 Appellants filed a contested case with the ALC challenging the issuance of the Sumerel Permit.

Appellants challenged the Sumerel Permit on several grounds contending that DHEC's decision to issue it violated constitutional or statutory provisions; was made upon unlawful procedure; affected by error of law; clearly erroneous in view of the reliable, probative, and substantial evidence; arbitrary and capricious and an abuse of discretion. Specifically, Appellants contended that due to the true average exit or "process" weight of the birds and/or under applicable regulatory definitions, the Sumerel operation was a "large animal facility" subject to 400 ft. property line setbacks. These increased setbacks, all agreed, rendered the Sumerel operation impossible due to the size and shape of the land upon which it is slated to operate. Appellants also argued that DHEC failed to perform a full or adequate evaluation of the permit application package as required under the regulations. To that end, Appellants offered evidence that the Department issued the Permit upon an incomplete application and failed to adequately consider and evaluate the potential environmental impacts of the Sumerel operation, including those to the waters of the State.

The ALC found that Appellants did not offer sufficient evidence warranting reversal of the Department's decision to issue the Permit. The lower court accepted the

all-important 8.75 lbs. average process weight figure utilized in the Sumerel CNMP and concluded that the Sumerel operation was correctly classified as a "small animal feeding operation" subject to the lesser setback distances. The ALC also found that DHEC took all the necessary actions to evaluate and proposed operation prior to issuing the Permit.

IV. LEGAL ARGUMENTS AND AUTHORITIES

A. The ALC's conclusion that the Sumerel Poultry Farm is a "small animal feeding operation" subject to the lesser 200 foot property line setback is not supported by the substantial evidence presented at trial and affected by errors of law

The standard of proof used by the ALC 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. §§ 1-23-330(1), 600(A)(5) (Supp. 2008). Appellants have the burden of proving their assertions that the Department's decisions were in error under the statutory and regulatory standards. *See Leventis v. South Carolina Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000). "Findings of fact based upon a 'preponderance' of the evidence are those reflected by the greatest 'weight, amount, credibility or truth' as reflected by the whole of the evidence before the court." *South Carolina Coastal Conservation League v. South Carolina Dept. Health and Envt'l Control*, 2003 WL 22873168 at *18 (Jan. 9, 2013) *quoting Frazier v. Frazier*, 228 S.C. 149, 89 S.E.2d 225, 235 (1955). The preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." BLACK'S LAW DICTIONARY (9th ed. 2009). "The preponderance of the

evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in the mind the belief that what is sought to be proved is more likely true than not true." SANDERS § 9.5 *Quantum of Evidence in Civil Cases* (1999) *citing Frazier v. Frazier*, 228 S.C. 149 (1955). In general, "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence . . . the triers of fact cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding to the contrary of the opinion." 32A C.J.S. EVIDENCE § 727, at 82-83 (1996).

A party who has exhausted all administrative remedies available within an agency and who is aggrieved by an ALC's final decision in a contested case is entitled to judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2012). In an appeal from a decision by the ALC, the Administrative Procedures Act (APA) provides the appropriate standard of review. *See* S.C. Code Ann. § 1-23-610(B)(Supp. 2012). An appellate court may reverse the ALC's decision if that decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B)(Supp. 2012).

Thus, the appellate court reviews the ALC's findings to determine if they were supported by substantial evidence or were controlled by an error of law. *Hill v. S.C. Dep't Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010). A reviewing court may reverse or modify an administrative decision if the findings of fact are not supported by substantial evidence. "Substantial evidence is 'evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.'" *Risher v. South Carolina Dep't of Health and Envtl. Control*, 393 S.C. 198, 211, 712 S.E.2d 428, 434 (2011)(*internal citations omitted*).

1. ***The preponderance of reliable evidence presented at trial established that the average exit weight for the Sumerel facility would be at least 9 pounds making it a "large animal feeding operation"***

S.C. Reg. 61-43 Part 200.80 specifies the siting requirements (setback distances) for animal facilities other than swine. The applicable setback distances for a particular facility are determined by the birds' "normal production animal live weight" which "means the maximum number of animals at the facility at any one time multiplied by the average live weight of those animals." S.C. Reg. 61-43 Part 50(WW). The average animal live weight is "the sum of the average exit weight from the facility and the average entry weight divided by two...: Average animal live weight = (Average Exit Weight + Average Entry Weight)/2." S.C. Reg. 61-43 Part 50(K). A "small animal facility means an animal facility that has a capacity for 5000,000 pounds of normal production animal live weight or less at any one time." S.C. Reg. 61-43 Part 50(HHH). A "large animal facility" is "an animal facility that has capacity for more than 500,000 pounds of normal production animal live weight at any one time." S.C. Reg. 61-43 Part

50(NN). The regulations require a 200 foot property line setback from the lot line of real property owned by another person when the normal production animal live weight at any time is 500,000 pounds or less. S.C. Reg. 61-43 Part 200.80(A)(5). For a large facility, where the normal production animal live weight at any one time is greater than 500,000 pounds, the property line setback increases to 400 feet. S.C. Reg. 61-43 Part 200.80(A)(6).

At trial Appellants contended that the Sumerel poultry operation is actually a "large animal facility" subject to the 400 foot property setback under 200.80(A)(6) which cannot be accommodated by the proposed site. Appellants' claimed that the Sumerel CNMP utilizes an outdated average exit weight of 8.75 lbs. to arrive at an incorrectly calculated normal production animal live weight of 493,200 lbs. for the facility.

The Sumerel CNMP calculates the normal production animal live weight for the facility to be 493,200 pounds. (R. p. 215). This calculation is based upon a .25 lb. entry weight and 8.75 lb. exit or "process" weight yielding a 4.5 lb. average animal live weight: (8.75 exit weight + .25 entry weight)/2 = 4.5 average live weight). (R. p. 215). The Management Plan specifies that there will be 109,600 birds on site at any one time thus yielding the 493,200 lb. normal production animal live weight: (109,600 x 4.5 normal production animal live weight) = 493,2000 lbs. (R. p. 215). Based upon this calculation the Sumerel facility was designated a "small" operation under the regulations subject to the 200 foot property line setback.

According to the maps submitted with the Management Plan, the barns as sited meet that 200 foot setback distance. (R. p. 302). The testimony of all that were asked at trial, including Mike Sumerel, Lisa Sumerel, William Chaplin, Dr. Hargett and Dr.

Parkhurst was uniform in agreeing that the Sumerel site could not accommodate a "large animal feeding facility" as it lacked the space to account for a 400 foot property line setback required for that size operation. (R. p. 88/Tr. p. 41:18-23; R. pp. 92-93/Tr. pp. 60-61; R. p. 128/Tr. p. 203:1-25). The maps included in the Management Plan also show that the proposed facility fits closely within the 200 foot property line setbacks for small facilities. (R. p. 302).

Appellants presented the testimony of Dr. Carmen Parkhurst, Ph. D., a Professor Emeritus of Poultry Science at North Carolina State University. Dr. Parkhurst has dedicated his nearly 50 year long career to agriculture, primarily in the area of poultry science. He holds both a master's degree and Ph. D. in Poultry Science from Ohio State University. Dr. Parkhurst has been with North Carolina State University since 1971 as a professor. Following a brief retirement in 2008, he returned to N.C. State and now acts as Manager of the University's Animal & Poultry Waste Management Center. The Court qualified Dr. Parkhurst as an expert in animal feeding operations, poultry science and waste management. (R. p. 146/Tr. pp. 274-76.).

Dr. Parkhurst testified that the exit weight of broilers is determined by the length of the grow cycle. (R. p. 159/Tr. p. 326:15-23). He opined that the 8.75 exit weight utilized in the Sumerel CNMP was a dated and inaccurate number. (R. p. 150/Tr. pp. 290-91). Dr. Parkhurst testified that chickens tend to get bigger over time through genetic selection. (R. p. 150/Tr. p. 291:20-21). He opined that the average exit weight has and will continue to rise with genetic selection, new houses and other advancements in the grow process. (R. pp. 150-51/Tr. pp. 290-94). Dr. Parkhurst pointed to his own recent study completed on March 1, 2014 in which he grew 80,000 birds over a 60 day

cycle. (R. p. 150/Tr. pp. 291-92). The average exit weight of the birds in his study was 9.37 lbs. (R. pp. 150-51/Tr. pp. 292-93). Dr. Parkhurst testified that over the course of the designated 63 day grow cycle the average exit weight of the birds grown at the Sumerel facility would likely be over nine pounds rather than the 8.75 lb. average utilized in the CNMP. (R. pp. 150/Tr. pp. 291-94; R. p. 158-59/Tr. pp. 324-26; R. pp. 159-60/Tr. pp. 328-30). Based on what he considered the more accurate exit weight number, Dr. Parkhurst testified that the Sumerel operation would yield over 500,000 pounds of live production weight making it a "large animal facility." (R. p. 150/Tr. p. 292:12-15). On cross examination the Department pushed extensively on the issue of exit weight. Dr. Parkhurst reiterated that 9 lbs. average process weight was a minimum making the weight difference per bird at least .25 lbs. While the Department tried to downplay the significance of what in isolation may be viewed as a nominal weight difference, it is more than significant when multiplied by 109,600 per flock or 493,200 birds per year. (R. pp. 159-60/Tr. pp. 328-30). During DHEC examination, Dr. Parkhurst affirmed that the integrators each set their own process weight, which is influenced by market and internal corporate forces. (R. p. 156/Tr. p. 316). Dr. Parkhurst noted however that ***all integrators*** produce birds that are nearly the same weight, only varying by a few hundredths of a point - "what one integrator has the other ones within a few hundredths of a point of being the same." (R. p. 160/Tr. p. 329:1-4). That slight variation does not come close to bridging the gap between the 9 lb. plus average exit weight identified by Dr. Parkhurst as the more accurate and current figure and the 8.75 lb. exit weight relied upon in the Sumerel CNMP.

The Sumerels offered the testimony of Leon Fulmer of Shealy Engineering, LLC. Mr. Fulmer is an agricultural engineer who works with Joy Shealy at Shealy Engineering, LLC. Mr. Fulmer has a B.S. from Clemson University and worked in the Department's agricultural permitting program for approximately nine years until coming to work for Shealy Engineering in 2006. (R. p. 178/Tr. p. 402). He worked with Joy Shealy on the Sumerel CNMP and DAD Plans. All parties questioned Mr. Fulmer on the average exit weight issue. During direct examination Mr. Fulmer was directed to pg. 1 of the Management Plan that contains certain pertinent information regarding the Sumerel facility such as the owner's name and address. (R. p. 179/Tr. p. 408; R. p. 207). Page 1 has a "Basic Operation Description" which provides a summary type overview of the Sumerel operation including a sentence that reads "[t]he birds will be brought into the houses as chicks and are confined for a period of 63 days or until they reach an exit weight of eight and three quarter (8.75) pounds." (R. p. 207). On cross examination Appellants explored the issue with Mr. Fulmer. Under questioning, Mr. Fulmer testified that "the [the integrator] *don't necessarily dictate the exact weight*, but they will determine *exactly when* they want the birds pulled from the farm, which normally will then dictate the live weight coming out." (R. p. 181/Tr. p. 416:3-10)(*emphasis added*). On cross examination Appellants' attorney pressed Mr. Fulmer on the issue, asking for details on how an integrator would determine when the average weight of a flock had reached the 8.75 mark and whether and how they would pull the birds before the end of the scheduled grow cycle. (R. pp. 181-82/Tr. pp. 416-420). Mr. Fulmer provided little to no detail or explanation of how this would be the case in general or for the Sumerel facility. All indications in the CNMP, and Permit itself, indicate, call for and allow a 63

day flock cycle (or 4.5 "turns" per year) for the Sumerel facility. (R. pp. 206-337; R. pp. 374-76). There is nothing within the Plan or Permit calling for or specifying weight monitoring, record keeping or reporting so that Columbia Farms as the integrator would come out before the end of the scheduled 63 days cycle to haul off the birds because they reached the 8.75 lbs. exit weight average. Mr. Fulmer was definitive that the integrator specifies the duration of the grow cycle, which in turn dictates the average exit weight. (R. p. 181/Tr. p. 416:3-10). He was much less sure and specific on how an integrator would pull birds prior to the end of a specific grow cycle.

Respondents Mike and Lisa Sumerel also offered the testimony of Joy Shealy, the professional engineer who drafted and signed off on the Sumerel Management and DAD Plans. Ms. Shealy is a licensed professional engineer in South and North Carolina. She received a B.S. in Agricultural Engineering from Clemson University and worked for the Department in the agricultural permitting section for several years prior to establishing Shealy Engineering, LLC in 2004. Ms. Shealy testified that the integrator determines the average exit weight of the birds and informs the grower. (R. p. 190/Tr. pp. 449-50). According to Ms. Shealy she and Mr. Fulmer get the average exit weight figure from the grower and in this case she believed Mr. Sumerel got the figure from Columbia Farms. (R. p. 194/Tr. pp. 466-67). Neither Ms. Shealy, Mr. Fulmer, or the Respondents could say how up to date the 8.75 average exit weight was. Such an important and impactful piece of information needs to come from a reliable and identifiable source. Ms. Shealy did not testify that 8.75 lbs. exit weight was Columbia Farm's number. Rather, she only said either her or Mr. Fulmer obtained it from Mr. Sumerel.

Despite the evidence presented at trial the ALC erroneously concluded that "the preponderance of reliable evidence established that the 8.75 lbs. average exit weight figure utilized for the Sumerel CNMP is accurate and the proposed facility is correctly permitted as a small facility." (R. p. 33). As a "small animal feeding operation" the ALC found it was rightly subject to the 200 foot property line setback proscribed under Part 200.80(A)(5), rather than the 400 foot property line setback mandated under Part 200.80(A)(6). (R. p. 18). The overwhelmingly greater weight of reliable evidence presented at trial established that the 8.75 figure utilized in the Sumerel CNMP was inaccurate and the facility should be deemed a "large animal feeding operation" subject to 400 foot property line setbacks under Part 200.80(A)(6).

At trial the Appellants provided expert testimony of Dr. Carmen Parkhurst who testified that the 8.75 average live weight figure utilized in the Sumerel CNMP was inaccurately low. (R. p. 150/Tr. pp. 290-92). As noted above, Dr. Parkhurst's expert opinion on this seminal issue was based upon his vast knowledge and experience in the industry as well as his own recently completed study in which 80,000 birds grown over a 60 day period weighed an average 9.37 lbs. He offered his expert opinion that the average process weight across *all integrators* is at least 9 pounds and that *all integrators* (which necessarily includes Columbia Farms) grow birds weighing within hundredths of a pound of each other. (R. pp. 159-60/Tr. pp. 328-29). Respondents did not provide expert testimony or any reliable evidence to contradict Dr. Parkhurst's expert opinion on this issue. Rather they provided double hearsay testimony from Joy Shealy who could not testify as to the source of the 8.75 figure other than stating that she got it from her associate Leon Fulmer who obtained it from Mr. Sumerel who "she believed" got it from

Columbia Farms. Ms. Shealy's assumption based upon double hearsay testimony pales in comparison to Dr. Parkhurst's detailed expert opinion on the issue. In issuing its ruling, the ALC also relied upon the CNMP's "Basic Operation" page which states the birds would be pulled from the facility after a 63 day grow cycle or when they reach an average weight of 8.75 lbs. No witness, including Joy Shealy or Leon Fulmer, could provide any detailed information on how the Sumerels would take on this onerous and daunting task. In fact, Mr. Fulmer's testimony on cross examination undermined this position when he admitted that the integrators "don't necessarily dictate the exact weight, but they will determine exactly when they want the birds pulled from the farm, which normally will then dictate the live weight coming out." (R. p. 181/Tr. p. 416:3-10).

The ALC's Order found that Appellants failed to show the 8.75 average live weight figure utilized in the CNMP was inaccurate surmising:

> Dr. Parkhurst's testimony established that each integrator, the company that owns the birds grown by the farmer, sets their own exit weight for the farms' flocks, and that the exit weight depends on the market and internal corporate factors for each integrator....Since it is the Appellants' burden to establish that the calculations in the CNMP are incorrect, the Court finds that Appellants' failure to ascertain from the integrator what exit weight they are requiring for the Sumerel facility is fatal to their claim.

(R. p. 19).

The ALC's finding that Appellants' position is fatally undermined because they did not ask Columbia Farms what exit weight it requires and presumably offer that figure to the Court was in err. (R. p. 19). The Court's conclusion regarding exit weight and the basis for it ignores the greater weight of reliable probative evidence and the record as a whole. The Court's reasoning that Dr. Parkhurst testified the integrator sets the exit weight and he did not ask Columbia Farms what it required for its process/exit weight

ignores his testimony as a whole. Namely, Dr. Parkhurst testified that the average process weight across *all integrators* is at least 9 pounds and that *all integrators* grow birds weighing within hundredths of a pound of each other. (R. pp. 159-60/Tr. pp. 328-29)("What one integrator has the other ones within a few hundredths of a point of being the same."). Therefore Appellants did in fact offer testimony on Columbia Farms exit weight via the expert testimony of Dr. Parkhurst which was based upon reliable and identifiable sources rather than double hearsay testimony offered by Respondents. The lower court's findings on this issue rely on a portion of Dr. Parkhurst's testimony in which he agreed that market and internal corporate factors impact exit weight. (*See* R. pp. 19, 33). Therefore, according to the ALC, evidence needed to be presented as to what Columbia Farms, as the integrator, requires as an exit weight. There being none in the Court's view negated Appellants' position on the issue. The ALC's ultimate conclusion depends upon the absence of evidence as to what Columbia Farms requires as an average process weight. However, Dr. Parkhurst's testimony provided this purportedly absent evidence.

In addition, Appellants contend that not submitting what would have been blatant hearsay testimony to the ALC leaves Dr. Parkhurst's expert opinion unscratched. His expert opinion that the process weight of the birds would be at least 9 lbs. was based upon clearly articulated facts and his knowledge and experience from decades in poultry science; including the results of his own recently completed study. (R. pp. 150-51/Tr. pp. 290-94; R. pp. 158-59/Tr. pp. 324-26; R. pp. 159-60/Tr. pp. 328-30). Dr. Parkhurst had no need to speak with Columbia Farms about this issue as he is more than equipped with the knowledge to offer an expert opinion on process weight. His testimony concerning

process weight is much more reliable and probative evidence than a statement from Columbia Farms, who as the integrator has an interest in the permit being issued. Even if Dr. Parkhurst had asked and been given a response from Columbia Farms President his testifying to that figure would have been inadmissible hearsay testimony. The ALC erred in discounting Dr. Parkhurst's testimony on this seminal issue because he did not speak with the Columbia Farms President.

Furthermore, a Columbia Farms representative's statement of what exit weight it requires would be inconsequential because Dr. Parkhurst (as Appellants' expert) opined that the 8.75 average exit weight in the Sumerel CNMP was inaccurately low. That expert opinion was based upon extensive experience in and knowledge of the industry developed over a long career. Dr. Parkhurst testified that a 63 day flock cycle would yield at least a 9 lbs. bird. He also testified that the average process weight across *all integrators* is at least 9 pounds and that *all integrators* grow birds weighing within hundredths of a pound of each other. (R. pp. 159-60/Tr. pp. 328-29)("What one integrator has the other ones within a few hundredths of a point of being the same."). "All integrators" necessarily includes Columbia Farms. That aside, assuming Columbia Farms told Dr. Parkhurst that it requires an 8.75 lbs. exit weight, his expert opinion would remain unchanged. The conclusion that Appellants' choosing not to ascertain what Columbia Farms representatives say its required exit weight is fatally undermines scientific evidence based expert testimony was in err. It is not Appellants' obligation to seek out and obtain statements from the integrator, who has an interest in the permit being upheld, that would potentially rebut their expert's testimony.

2. *The ALC's conclusion on the average exit weight issue relies upon double hearsay testimony*

Furthermore, it was not shown that Columbia Farms actually provided the 8.75 process weight figure utilized in the Sumerel CNMP. Joy Shealy was the professional engineer who, per regulatory requirements, signed off on the Sumerel CNMP. When questioned at trial Ms. Shealy could not identify the origin of the 8.75 figure beyond presuming Mr. Sumerel obtained it from Columbia Farms. (R. p. 194/Tr. pp. 467-68).

Ms. Shealy's testimony regarding Columbia Farms exit weight constitutes double hearsay making it patently unreliable and an inappropriate basis for findings of the Court. S.C. R. Evid. 805, 802-804. The Court's Order states that "Ms. Shealy testified that the integrator determines the average exit weight of the birds and informs the grower. Ms. Shealy stated that she and Mr. Fulmer got the average exit weight figure from the grower, and in this case, she believed Mr. Sumerel got the figure from Columbia Farms." (R. p. 19);(R. p. 194/Tr. pp. 466-67)("I do not get it specifically and directly from Columbia Farms...I got it from Mr. Sumerel or my – Leon got it from Mr. Sumerel, but they get that information from their desired integrator."). Ms. Shealy, Mr. Fulmer, nor the Respondents could say how up to date the 8.75 exit weight figure was. Such an important and impactful piece of information needs to come from a reliable and identifiable source. Third hand/double hearsay testimony is the poster child of unreliableness and should not form the basis for any of the Court's findings; certainly not on this seminal and determinative issue. This is especially true when Ms. Shealy's testimony is weighed against Dr. Parkhurst's. Ms. Shealy's testimony on average process weight constitutes double hearsay based upon her assumption that Mr. Sumerel got the figure from Columbia Farms. In contrast, Dr. Parkhurst's testimony that the average process weight across *all integrators* is at least 9 pounds and that *all integrators* grow

birds weighing within hundredths of a pound of each other is based upon reliable and identifiable sources, including his decades of experience and own recently completed study.

Therefore, the ALC erred in concluding that "the preponderance of reliable evidence established that the 8.75 lbs. average exit weight figure utilized for the Sumerel CNMP is accurate and the proposed facility is correctly permitted as a small facility." (R. p. 33). The most reliable evidence of average live weight was Dr. Parkhurst's expert testimony which stated the 8.75 figure utilized was inaccurately low. Respondents provided essentially nothing on this issue to adequately contradict Petitioners' position offering merely Ms. Shealy's presumption that Mr. Sumerel obtained the figure from Columbia Farms and a reference to an operational summary that was contradicted by Respondent's own witness, Mr. Fulmer. (*See* R. p. 181/Tr. p. 416).

3. *The ALC erred in excluding Dr. Parkhurst's testimony regarding the AgraMetrics Report*

In addition, the Court's exclusion of Dr. Parkhurst's testimony regarding the AgraMetrics report was in err and prejudicial to the Petitioners as that testimony provided further evidence of the inaccuracy of the 8.75 lbs. process weight figure utilized in the CNMP. (R. p. 154/Tr. pp. 305-07). On cross examination DHEC counsel questioned Dr. Parkhurst extensively on the average live weight issue including asking if there was some "readily available source" reflecting the current average live weight of broiler chickens in 2014. (R. p. 153/Tr. pp. 302-303). In response, Dr. Parkhurst cited to an industry report from AgraMetrics "that gets the data from literally every company in the US and generates a weekly average body weight of poultry [report]." (R. p. 153/Tr. pp. 303-04). He testified that this AgraMetrics report reflected an average live weight above the 8.75

lb. figure utilized in the Sumerel CNMP. (R. p. 153/Tr. pp. 303-04). The ALC sustained DHEC's objection to admission of Dr. Parkhurst's testimony concerning "information from a third party", namely the AgraMetrics report. (R. p. 154/Tr. pp. 305-07). Appellants contend exclusion of this testimony was in err and Dr. Parkhurst, as a qualified expert in poultry science, could rely upon and cite to third party materials in support of his expert opinion. *State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432, 436 (1997).[2]

As detailed above, based on the evidence presented to the ALC, the Sumerel Poultry Farm will produce chickens with an average live weight in excess of 500,000 lbs. making it a "large animal feeding operation" subject to the 400 foot property line setback. The uniform testimony at trial was that the parcel upon which the operation is to be located cannot accommodate a "large" facility and therefore DHEC wrongly approved the CNMP and issued the Sumerel Permit.

4. *The applicable regulatory definitions make the Sumerel Poultry Farm a "large animal feeding operation"*

As noted above, the ALC's conclusion that the Sumerel will yield birds with an average process weight of 8.75 lbs. and resultant discounting of Dr. Parkhurst's testimony to the contrary relies upon one sentence in the "Basic Operation Description" that states "[t]he birds will be brought into the houses as chicks and are confined for a period of 63 days or until they reach an exit weight of eight and three quarter (8.75) pounds." (R. p. 207). Assuming *arguendo* that the birds will be removed when they

[2] "The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." *Hutto* 481 S.E.2d at 436(*internal citations omitted*).

reach an average of 8.75 lbs., the *capacity* of a facility determines whether it is a "small" or "large" animal facility per the regulatory definitions. "'Large Animal Facility' means an animal facility that has a capacity for more than 500,000 pounds of normal production animal live weight at any one time." S.C. Reg. 61-43 Part 50(NN). "'Small Animal Facility' means an animal facility that has a capacity for 500,000 pounds of normal production animal live weight or less at any one time." S.C. Reg. 61-43 Part 50(HHH). According to the CNMP and Permit, the Sumerel facility will house 109,600 birds at any one time. (R. p. 215; R. pp. 374-76). Dr. Parkhurst uncontroverted expert testimony was that birds grown over a 63 day grow cycle will average over 9 lbs. rather than the 8.75 lbs. average utilized in the CNMP. (R. pp. 150-51/Tr. pp. 291-94; R. pp. 158-59/Tr. pp. 324-26; R. pp. 159-60/Tr. pp. 328-30). Therefore, whether the Sumerels actually have the birds hauled off when they reach 8.75 lbs. is inconsequential. The Permit allows the Sumerels to house 109,600 birds at one time for a 63 day grow cycle. Thus, the proposed facility necessarily has the capacity to produce a flock with an average live weight in excess of 500,000 lbs. making it a "large animal facility" per the definition of that term under Part 50(NN).

B. The ALC erred in finding that DHEC conducted a full and adequate evaluation of the proposed animal feeding operation as required under the applicable statutes and regulations

S.C. Reg. 61-43 Part 200 sets forth a comprehensive scheme for the licensing and operation of facilities for animals other than swine. Under the permitting scheme, an applicant is required to first have a proposed site inspected by the Department. S.C. Reg. 61-43 Parts 200.50(A), 200.70(D). If the proposed site is approved, the applicant will be notified in writing and is free to finalize facility plans and other permit application

materials. Before submitting the application, an applicant must notify "all property owners within 1320 feet of the proposed location of the facility (footprint of construction) with the applicant's intent to build an animal facility." S.C. Reg. 61-43 Part 200.60(A). DHEC reviews all comments received regarding the application and holds a public meeting to discuss and seek resolution of public concerns about the proposed facility if twenty (20) or more public comments are received. S.C. Reg. 61-43 Part 200.60(D).

The decision-making process for animal facility permits is set forth in S.C. Reg. 61-43 Part 200.70. The regulations mandate that "[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 new or enlarged sources." S.C. Reg. 61-43 Part 200.70(E). The reviewer will determine whether the facility meets all the applicable siting requirements contained in Part 200.70. Subpart (F) notes that those setback distances are minimum siting requirements and "[t]he Department shall evaluate the proposed site including but not limited to" consideration of the following non-exclusive factors:

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 water;

5) Proximity to 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 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.

S.C. Reg. 61-43 Part 200.70(F).

The permit decision-making process requires the reviewer to seek and receive input from the Bureau of Air and the Bureau of Environmental Health's Wastewater Management section to determine whether the proposed facility will harm the air or waters of the State. Further, the reviewer must consider all relevant comments received by the Department. S.C. Reg. 61-43 Part 200.60(F). The Department's reviewer completes a checklist that contains some of the relevant regulatory requirements and provides space to note if certain actions were taken and the rationale for them. The regulations mandate that a permit cannot be issued unless the Department receives a complete permit application package. S.C. Reg. 61-43 Parts 200.70(A) and (C).

At trial Appellants argued that DHEC conducted an inadequate evaluation of the proposed Sumerel operation, failing to fully consider the proposed operation's impact on the surrounding environment, including upon the nearby receiving waters, in violation of the regulatory mandate that "[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." S.C. Reg. 61-43 Part 200.70(E).

Part 200.80 sets out applicable setback distances for animal feeding operations and requires that an animal facility be at least 100 feet from waters of the State, including ephemeral and intermittent streams located down slope from the facility. R. 61-43 Part 200.80(A)(2). That subsection also requires a 100 foot setback between dry animal manure and other animal by-product treatment or storage facility and waters of the State, including ephemeral and intermittent streams located down slope. S.C. Reg. 61-43 Part 200.80(C)(3).

Appellants contend that the Department failed to adequately consider and evaluate the potential impacts of the Sumerel operation to the waters of the State and whether additional setbacks were warranted in light of the mandatory considerations listed in Part 200.70(F).

The Sumerel CNMP contains several aerial maps which show the barn placement, property line setback distances, nearby water bodies and applicable water-based setbacks. (R. pp. 302-303). The first two aerial maps show multiple waters of the State located to the east and northeast of the Sumerel facility broiler houses. (R. pp. 302-303). All witnesses who testified on the subject agreed that these waters are located down slope of the Sumerel site. (*See e.g.* R. p. 164/Tr. p. 347:12-18). One of the larger, if not largest, down slope water bodies shown on the maps is a lake to the northeast which is owned by Terry and Christine Orr. (R. p. 163/Tr. pp. 341-42). According to Terry Orr this is an approximately 10 acre lake on the Orrs' land which he utilizes nearly every day hiking with his dogs and fishing in the lake among other things. (R. pp. 161-62/Tr. pp. 336-39). The maps show that these water bodies are interconnected by a stream flowing from the water body nearest the operation to those downslope of it to the north-northeast;

including the Orr's lake. (R. pp. 302-303). At trial, all parties recognized and agreed that operation of the Sumerel broiler facility requires the disturbance and grading of multiple acres of the land on the proposed site. (R. p. 98/Tr. pp. 82-83; R. p. 101/Tr. p. 95; R. pp. 112-13/Tr. pp. 140-44; R. p. 147/Tr. p. 277:17-24).

The undisputed evidence presented in this case showed that the Department's water impact evaluation focused upon the proposed burial site and whether it would be feasible for mortality disposal. The CNMP for Sumerel Poultry Farm initially called for burial as the mortality disposal method. (R. p. 219). In the Department's evaluation process, William Chaplin, sent the Bureau of Environmental Health a Memorandum requesting that the Sumerel site be evaluated for potential water impacts. (R. pp. 393-95). That Memorandum specifically stated that "[t]he Department shall evaluate the proposed site including, but not limited to, the following factors when determining if additional setbacks are necessary: (1) Geography and soil types on the site; (2) adjacent groundwater usage; [and] aquifer vulnerability." (R. p. 393). That document expressly asked if additional setbacks were necessary "taking into consideration the geography, soil types on the site, adjacent groundwater usage, and aquifer vulnerability." (R. p. 393). It also asked for recommendations on groundwater monitoring for the proposed facility or manure utilization areas and whether the proposed burial site was feasible. (R. pp. 394-95). According to the testimony of Mr. Chaplin the Department sent William Burriss to the Sumerel property in order to evaluate the proposed burial site. (R. pp. 125-26/Tr. pp. 192-93). Chaplin testified that Mr. Burriss' water review was exclusively an evaluation of the proposed burial site, and he took nothing else into consideration. (R. pp. 125-

26/Tr. pp. 192-93). Mr. Burriss found the burial site unsuitable, causing the Department to require the Sumerels plan for an alternative disposal method.

In his review process, Mr. Chaplin filled out a Department form entitled "Agricultural Permitting Review Checklist" which contains a section labeled "Water Resources Review." (R. pp. 380-81). The checklist shows what water related considerations DHEC took into account beyond Mr. Burriss' burial site evaluation in evaluating the Sumerel plans. Specifically, the Checklist indicates Mr. Chaplin looked at public supply wells and impaired water body list, neither of which in his opinion warranted additional setbacks. (R. pp. 380-81). The final water resource item in the Checklist instructs the reviewer to pull the stream classification overlay and note the classifications for the water bodies in the drainage route. (R. p. 381). Mr. Chaplin noted those were "freshwater" and found no additional setbacks necessary. (R. p. 381).[3] There was no other evidence presented below indicating that the Department undertook any further water impact review or considerations beyond the items detailed above, including siting of the manure storage area and determination of whether it met the appropriate setbacks.

Appellants presented Dr. David Hargett, Ph. D. who was qualified as an expert environmental science consultant and in water impacts. (R. pp. 109-10/Tr. pp. 128-29). Dr. Hargett has a master's degree in Soil Science from N.C. State and a Ph. D. in Land Resources, with a Soil Sciences minor, from the University of Wisconsin. Dr. Hargett has experience in these fields and working on a wide variety of environmental

[3] Throughout the Checklist Mr. Chaplin noted that any questions involving a proposed manure treatment or storage area was not applicable. (R. pp. 379-84). Testimony in the course of trial indicated that due to the change in dead animal disposal method to composting, the Sumerels would have to have a manure storage area as litter was a necessary component of that process. (R. p. 98/Tr. p. 82:1-15; R. pp. 130-31/Tr. pp. 212-14).

consultation and evaluation matters for many years. He took issue with several facets of the Department's review and approval of the Sumerel Permit; most prominently the agency's water impact evaluation.

Dr. Hargett testified that looking only at the feasibility of the proposed burial site was inadequate to determine that there would be no detrimental impacts to the waters of the State from the Sumerel operation. (R. p. 112/Tr. p. 138:9-25). He also testified at length about the necessity of a grading plan to be in place and considered by the Department in its water impact evaluation process if it is to be considered adequate and reliable. (R. pp. 112-13/Tr. pp. 140-44). Specifically, Dr. Hargett noted that the necessary grading for the Sumerel facility would result in approximately 300,000 or more square feet (or some 6 acres) of land on the site disturbed and graded. (R. p. 113/Tr. p. 141:6-10). Dr. Hargett testified that this massive grading endeavor will create "an industrial footprint with a high degree of imperviousness, a high degree of runoff." (R. p. 113/Tr. p. 141:9-14). He went on to testify that this runoff would go downslope where there are multiple waters of the State and waters of the United States that are at risk from this operational runoff. (R. p. 114/Tr. pp. 145-46). Dr. Hargett opined that it was within the Department's purview to ensure these waters could handle the additional stresses presented by the Sumerel operation including manure contaminated runoff, ammonia emissions and other water transported and airborne emissions from the facility. (R. p. 117/Tr. pp. 157-58). Dr. Hargett characterized the grading and stormwater management plan as "overwhelmingly relevant" information necessary for the proper evaluation of potential impacts to the waters of the State. (R. p. 113/Tr. pp. 142-43). Without this

information, Dr. Hargett opined DHEC did not adequately evaluate potential water impacts:

> A: The major – the most major concern that I have is the general absence of recognizing where's the stormwater management activity going to go...There may also be additional waters of the state, wetlands, perennial streams, intermittent streams or ephemeral streams that are not shown on the resource maps...[When] we viewed the large pond on the Orr property...I observed personally that there were extensive waters of the state that were not mapped in similar fashion...And so you have these hydrologic influences upstream. There are certainly some of those upstream of the upper pond and the lower pond that are not indicated in the resource maps which were used by the engineer and by DHEC to access the site. So their information is incomplete. That's one major body of concern.... My experience in working with similar sites is that it's well documented that ammonia from concentrated animal feeding operations does affect water quality in surrounding receiving waters. And those issues haven't been addressed.
>
> ***
>
> Q: So your overall assessment of this particular permit and the Department's evaluation of it, do you believe their assessment was adequate?
>
> A: No, sir. I think it's more fair to fay it was incomplete. It was based upon incomplete information that there are still numerous aspects, I'll call them moving targets, in the operations of this facility.... It's a very incomplete program that I think is what DHEC has reviewed.

(R. pp. 116-17/Tr. pp. 155-57). In Dr. Hargett's expert opinion, DHEC could not determine that the Sumerel operation would not cause an increase in pollution in the waters of the State. (R. p. 112/Tr. p. 138; R. p. 117/Tr. p. 157).

DHEC made much of the stormwater permitting process being a separate application and permit. No one disagreed with the Department in that regard. The only two witnesses to testify as to what that process entails, Dr. Hargett and Leon Fulmer, both said that the stormwater permitting process does not take into consideration emissions or runoff from the proposed agricultural operation site that is to be graded. (R. p. 123/Tr.

pp. 183-84; R. p. 184/Tr. pp. 425-28). In Dr. Hargett's opinion these two evaluations are necessarily linked, and the grading and stormwater plan information is "highly relevant information and without that the package is incomplete." (R. p. 123/Tr. p. 184:2-9; *See also* R. p. 119/Tr. p. 166). Mr. Chaplin recognized that runoff and stormwater are variables greatly affecting the health of downslope waters and the ambient air around the facility:

> Q: Now, the regulation at hand, 61-43, and it's cited several times, Part 270(E) requires the Department determine that there's going to be no increase to the waters and air of the state [of] pollutants; is that not accurate?
>
> A: That's true.
>
> Q: Now, runoff and stormwater are going to greatly affect the health of downslope waters and the ambient air and around the facility?
>
> A: That's true.

(R. p. 142/Tr. p. 260:5-10). He also testified that the agency did not know where the runoff from the Sumerel operation would flow because the site would be graded prior to construction:

> Q: In doing your evaluation, does the Department know where the water runoff is going to go from this operation?
>
> A: There are topo maps included with the plan, but as far as where the water's going to run off, it's difficult to tell because the site's going to be graded at some point prior to them building these houses.

(R. p. 129/Tr. p. 207:10-17). Importantly, Mr. Chaplin testified that the Sumerel facility met the applicable setback distances under S.C. Reg. 61-43 in regards to waters of the State; rather than testifying that those waters would not suffer detrimental environmental impacts from the Sumerel operation. (R. p. 133/Tr. pp. 222-23).

DHEC did not produce any witnesses whatsoever on the issue of the Department's water evaluation, including William Burriss. The only testimony on this issue from the Department was its cross examination of Mr. Chaplin who did not challenge Dr. Hargett's opinions on the necessity of knowing grading and stormwater information to make the determination that the Sumerel operation would not cause an increase in pollution to waters of the State. In fact, Mr. Chaplin agreed that runoff had substantial effects on downslope waters and the Department did not know where runoff from the Sumerel operation would flow because the site would be graded prior to operation. Thus, the evidence established that the Department lacked relevant information, including the Sumerel's grading and stormwater plans, necessary to adequately evaluate potential impacts to the waters of the State posed by the Sumerel operation. The evidence is undisputed that DHEC did not have this information when evaluating the Sumerel application and concluding the permit should issue.

1. ***Dr. Hargett's expert opinion on water impacts is not undermined by Appellants' poultry science expert***

The lower court's Order attempts to undermine Dr. Hargett's unchallenged expert testimony concerning detrimental water impacts by citing a singular response of Appellant's poultry science expert, Dr. Parkhurst. Specifically, the ALC found that Dr. Parkhurst's testimony that the proposed site could be a "safe and functioning poultry facility" if the Sumerels were willing to spend the money on adequate grading plans completely undermined Dr. Hargett's lengthy and in depth expert testimony on detrimental water impacts and the need for grading plan information to properly evaluate them. (R. pp. 15-16). Dr. Hargett was the only witness qualified as expert on water impacts by the ALC. (R. pp. 109-10/Tr. pp. 128-29). His testimony is determinative on

the issue of water impacts. Dr. Parkhurst was qualified as expert in animal feeding operations, poultry science and waste management. (R. p. 146/Tr. pp. 274-76). The testimony cited in the Order is Dr. Parkhurst opining that if the Sumerels are willing to spend the money on grading then the site could be a "safe and functioning poultry farm." (R. pp. 16-17; R. p. 150/Tr. pp. 311-12). This testimony was not an opinion that grading would or would not have impacts on the receiving waters surrounding the operation but rather that grading could provide for a functioning poultry facility. Dr. Parkhurst is eminently qualified to opine as to the later, and not the former. His testimony therefore did not undermine Dr. Hargett's as to the potential water impacts of the Sumerel operation and DHEC's failure to adequately evaluate them, and the ALC's finding to the contrary was in err.

2. ***DHEC failed to consider the "slope of the land" as required under S.C. Reg. 61-43 Part 200.70(F)(7)***

The applicable regulations list mandated factors the Department must consider in evaluating a proposed animal feeding operation site including taking into account the "slope of the land." S.C. Reg. 61-43 Part 200.70(F)(7). The Court ruled that Petitioners' failed to show DHEC did not consider mandated factors under 200.70(F). The Court based this conclusion by reasoning that the Department's Review Checklist shows DHEC considered each of the regulatory required water quality impacts and determined no additional setbacks were necessary. (R. pp. 17, 29-30). The Department's Review Checklist does not show it considered the mandated "slope of the land" factor listed under 200.70(F)(7) as a required consideration. (R. pp. 379-84). This is an impactful factor that, as Appellants' water impact expert testified, is necessarily altered by the

extensive grading required for the facility and therefore grading plans are necessary to take into account in order to adequately evaluate water impacts.

3. *The ALC erred that finding "runoff prevention" only applies to control of manure discharge*

At trial, Appellants argued DHEC must know the details of the proposed operation's grading plans in order to fulfil its obligations under Part 200.70(F)(9) which require consideration of "runoff prevention." In Appellants' view, "runoff prevention" includes consideration and evaluation of any runoff that may occur from or due to the proposed operation and its impact on the surrounding environment- namely nearby receiving waters. The operation's physical characteristics, including slope of the land once graded necessarily have direct impacts on runoff dynamics. At trial Respondents attempted to combat this position by establishing the stormwater permitting process was a separate permit process taken on at a later date. In its Order, the ALC takes great pains to confine "runoff prevention" to "discharge of manure into the environment" concluding that "[n]othing in the regulations indicates that grading and general stormwater runoff is considered." (R. pp. 30-32).

This position was not taken in any respect during trial and therefore should leave the ALC without a basis upon which to make such a conclusion. The testimony and evidence presented to the ALC did not include any discussion or evidence concerning DHEC's interpretation of "runoff prevention" as that term is used in 200.70(F)(9). It certainly did not address, much less indicate, that the Department interpreted the term in the narrow context of preventing manure discharge. This argument/position was offered for the first time in Respondents' Proposed Order and therefore it is inappropriate for the lower court's utilization in the Order.

Regardless, the ALC ignores the definition of "runoff prevention" which does not confine it to manure discharge. "Runoff prevention" is "rainwater or other liquid that drains overland on any part of a land surface and runs off of the land surface." 61-43 S.C. Reg. Part 50(FFF). The ALC erroneously accepted Respondents' post trial argument on this issue and wrongly concluded the Department fulfilled its obligation to evaluate all of the factors listed under Part 200.70(F).

4. *The CNMP's Odor and Vector Abatement provisions are insufficient*

A complete application contains certain site specific provisions including odor and vector abatement plans and a dead animal disposal plan for the particular animal facility. S.C. Reg. 61-43 Part 200.50(B)(4)-(6).

Specifically, Part 200.50(B) requires:

> A producer who proposes to build a new animal facility or expand an existing animal facility shall make application for a permit under this part using an application form as designated by the Department. The following information shall be included in the application package.
>
> 1. A completed application form.
>
> 2. An Animal Facility Management Plan prepared by qualified Natural Resources Conservation Service personnel or a SC registered professional engineer....
>
> ***
>
> 4. The Animal Facility Management Plan shall contain an odor abatement plan for the animal facility, lagoon, treatment system, manure storage pond, and manure utilization areas. For more specific details, see Section 200.150 (Odor Control Requirements).
>
> 5. A Vector Abatement Plan shall be included for the animal facility, lagoon, treatment system or manure storage pond, and manure utilization areas. For more specific details see Section 200.160 (Vector Control Requirements).

> 6. Dead Animal Disposal Plan. The plan shall include written details for handling and disposal of dead animals. Plans should detail method of disposal, any construction specifications necessary, and management practices. See Section 200.130 (Dead Animal Disposal Requirements) for specific requirements on dead animal disposal.

S.C. Reg. 61-43 Part 200.50(B).

Part 200.150(A) requires a site specific odor abatement plan mandating that "[t]he Animal Facility Management Plan *shall* contain an odor abatement plan *for the animal facility*, lagoon, treatment system, manure storage pond, and manure utilization areas...." S.C. Reg. 61-43 Part 200.150(A)(*emphasis added*).

Part 200.160(A) contains vector control requirements for animal feeding operations and requires a permit applicant to submit a site specific vector abatement plan:

> The Vector Abatement Plan *shall at a minimum* consist of the following:
>
> 1. Normal management practices *used at the animal facility*, lagoon, treatment system, manure storage pond, *and manure utilization areas* to ensure there is no accumulation of organic or inorganic materials to the extent and in such a manner as to create a harborage for rodents or other vectors that may be dangerous to public health.
>
> 2. A list of *specific actions to be taken* by the producer if vectors are identified as a problem at the animal facility, lagoon, treatment system, manure storage pond, or any manure utilization area. These actions should be listed for each vector problem, e.g., actions to be taken for fly problems, actions to be taken for rodent problems, etc.

S.C. Reg. 61-43 Part 200.160(A)(*emphasis added*).

The Sumerel Management Plan contains two sections addressing odor and vector abatement. (R. pp. 217, 221). Section 7.2 labeled "Vector Control and Abatement" provides a list of potential actions the Sumerels may take to address certain vector issues. (R. pp. 217-18). While inclusive of specific vector problems, Section 7.2 does not provide site specific plans for the Sumerel facility but rather is a list or guide for some

potential best management practices. (R. p. 129/Tr. pp. 205-06; R. p. 141/Tr. pp. 254-55; R. pp. 151-52/Tr. pp. 295-97). Section 7.6 of the Sumerel Plan is labeled "Site Specific Vector and Odor Abatement Plan." (R. p. 242). Under that heading lies a sub heading of sorts entitled "Odor & Vector Abatement Plan Columbia Farms." (R. p. 242). Section 7.6 states that "Columbia Farms has approved" a litter disinfectant to abate odors and a couple sprays, powder treatment and rodent bait traps for the control of vectors. (R. p. 242).

At trial the Appellants contended that the CNMP was deficient because it failed to provide site specific odor and vector abatement plans for the Sumerel facility. The ALC found that "[b]y providing that the odor plan may consist of certain criteria and that the vector plan shall consist of a list of specific action to be taken, the regulations do not mandate 'site specific' criteria limited in application to only the proposed facility and no other facility. Rather, they require plans that are capable of controlling odor and vectors." (R. pp. 12-13). Thus, the lower court found the Sumerel CNMP's odor and vector abatement sections in compliance with the applicable regulations. (R. pp. 8-13, 25-28).

In direct contravention of the ALC's finding on this issue, the Department's permit reviewer, William Chaplin acknowledged that the vector control requirements in the regulations do in fact require a site specific vector abatement plan. (R. p. 144/Tr. pp. 266-67). It is clear that the purpose of these provisions within a proposed facility plan is to ensure that undesirable odors and vectors, both of which may constitute a nuisance, are appropriately planed for and controlled in the proposed animal facility. *See* S.C. Reg. 61-43 Part 200.10. Chaplin acknowledged that the Vector Control and Abatement

provisions in 7.2 are a list of possible best management practices and not specifics as to what the Sumerels will do at their facility to control for vectors. (R. p. 141/Tr. p. 255:13-22).

Joy Shealy, the professional engineer and drafter of the Sumerel Management Plan, was questioned in detail on both sections 7.2 and 7.6. Ms. Shealy testified that section 7.2 was not a site-specific plan but rather general best management practices an operator may use in the event a particular issue listed arose. (R. p. 190/Tr. pp. 450-51). During direct examination Ms. Shealy testified that section 7.6 of the Management Plan met the regulation's site specific odor and vector abatement plan requirements. (R. p. 190/Tr. p. 452:4-9). In other words, her initial contention was that 7.6 detailed what the Sumerels were going to do in order to control vectors and odors at their facility. On cross examination Ms. Shealy admitted that Section 7.6 labeled "Site Specific Vector and Odor Plan" was *integrator* rather than *site* specific and would be the same for any facility in which Columbia Farms acted as the integrator. (R. p. 192/Tr. pp. 458-59).

Therefore Section 7.2, while inclusive of specific vector issues, does not provide site specific plans for the Sumerel facility. Rather it is a list or guide for some potential best management practices. Similarly, as the evidence at trial showed, Section 7.6 is integrator and not site specific for the Sumerel facility. Thus, these important provisions of the Sumerel CNMP were lacking and the ALC's determination to the contrary was in err.

V. Conclusion

The ALC's finding that the Sumerel operation is a "small animal feeding operation" subject to the lesser 200 ft. property line setbacks is not based upon the

substantial evidence presented at trial and affected by one or more error of law. First, the preponderance of reliable evidence presented at trial, including the expert testimony of Dr. Parkhurst, established that the proposed operation would yield birds with an average process weight of at least 9 lbs. making it a "large animal feeding operation" subject to 400 ft. property line setbacks. The uniform testimony at trial and evidence before the ALC indisputably established that the land upon which the Sumerels intend to operate cannot accommodate a "large" facility due to the increased setbacks. Therefore, the ALC erred in upholding the Department's decision to issue the Permit.

Second, the ALC's findings concerning average process weight rely upon double hearsay testimony of the professional engineer who signed off on the CNMP, Joy Shealy. Ms. Shealy could not offer any testimony as to the accuracy of the 8.75 lbs. average process weight figure beyond saying she obtained it from her associate who she believed got it from Mr. Sumerel who assumedly got it from Columbia Farms. This patently unreliable evidence should not be sufficient to overcome the scientifically based expert opinion of Dr. Parkhurst on this issue.

Third, the pursuant to the applicable regulatory definitions the Sumerel facility is a "large animal facility" as it has the capacity to house over 500,000 lbs. of normal animal production weight, regardless of whether they birds are taken off before the end of a 63 day growth cycle.

Finally, the ALC erred in finding that DHEC conducted a full and adequate evaluation of the proposed Sumerel operation in compliance with applicable statutes and regulations, including considering the mandated factors in Part 200.70(F). The evidence presented at trial showed the Department failed to undertake all of the mandated

considerations, including runoff prevention and slope of the land. Therefore, DHEC's evaluation was substantially lacking and not in accord with its duties under the law.

For the reasons set forth above, the Administrative Law Court's Order of January 12, 2015 should be reversed.

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
jsmith@roecassidy.com
Attorneys for the Appellants.

November 25, 2015
Greenville, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of the Appellants complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
jsmith@roecassidy.com
Attorney for the Appellants

November 25, 2015
Greenville, South Carolina