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 REPLY BRIEF OF APPELLANTS

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I. REPLY ARGUMENT

A. Appellants properly preserved their arguments for appellate review

1. *Appellants' claim that the ALC erred in failing to admit the AgraMetrics report was properly preserved for appellate review*

Respondents' argue the ALC's decision not to admit the AgraMetrics report at trial is not preserved for appellate review. (Resp. Br. at 39-40). This is incorrect, as this issue was raised to and ruled upon by the ALC during trial. Specifically, 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 Comprehensive Nutrient Management Plan ("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" (the AgraMetrics report). (R. p. 154/Tr. pp. 305-07). On appeal 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). This issue was properly preserved for appellate review.

During trial DHEC objected to admission of Dr. Parkhurst's testimony regarding AgraMetrics. Both parties were given an opportunity to argue their respective positions on the issue. (R. p. 154/Tr. pp. 305-307). DHEC counsel made a specific argument on

the record against admission. (R. p. 154/Tr. pp. 305-06). The ALC then gave Appellants an opportunity to make a specific argument for inclusion of the AgraMetrics testimony. (R. p. 154/Tr. p. 306:13-25). After consideration of those arguments, the lower court chose to exclude the AgraMetrics evidence. (R. p. 154/Tr. p. 307:1-6). Thus, the issue being raised to and ruled upon by the trial court properly preserved it for appellate review. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (Ct. App. 2000).[1]

Respondents go on to argue that "[t]he ALC did not deny Dr. Parkhurst the right to base his opinion of [*sic*] the report because of the type of document [*sic*], but because Dr. Parkhurst had unilaterally decided not to disclose the report prior to trial, which prejudiced the Department." (Resp. Br. at 40). DHEC claims it "objected to Dr. Parkhurst basing any of his testimony on this document since he admitted that he chose not to provide the document to his attorney...." (Resp. Br. at 40). Respondents made a similar assertion in their Response to [Appellants'] Motion to Reconsider. (R. pp. 55-57). In that filing the Department also failed to cite any portions of the transcript or record to support its position. (R. pp. 55-57). In response, Appellants were forced to submit a reply to this accusation to the ALC, with Judge McLeod determining that this "assertion as an advocate should be disregarded as overcome by the record." (R. pp. 72-75; R. p. 76). The Department's more recent claim is also completely unsupported by the record. As noted both parties argued their respective positions on this issue, with DHEC counsel not once saying the report (or testimony concerning it) should be excluded

[1] Following issuance of the Final Order, Appellants' Motion for Reconsideration and Memorandum in Support again raised the issue. (*See* R. pp. 37-49).

because it was not provided prior to trial. (R. p. 154/Tr. pp. 305-06).[2] Following both counsels' arguments, the lower court sustained DHEC's objection "in respect to the third-party studies...." (R. p. 154/Tr. p. 307:1-6). Thus, the record clearly reflects the parties' positions and the ALC's ruling on this issue at trial. The record remains unchanged and unsupportive of Respondents' position on this issue.

2. *Appellants' properly preserved their objection to the ALC's reliance upon Joy Shealy's testimony regarding exit weight*

Respondents claim that because Appellants did not make a contemporaneous objection to Joy Shealy's testimony regarding exit weight, the issue of it constituting inadmissible double hearsay was not properly preserved for appellate review. (Resp. Br. at 37). At trial, Ms. Shealy was questioned by both parties about where she obtained the 8.75 figure. (R. p. 190/Tr. pp. 449-50; R. p. 194/Tr. pp. 466-68). Respondents asked her where she got the 8.75 figure, to which she replied Columbia Farms. (R. p. 190/Tr. pp. 449-50). On cross, Ms. Shealy contradicted her earlier testimony stating that she could not identify the origin of the 8.75 figure beyond presuming Mr. Sumerel obtained it from Columbia Farms.

> Q: So at the time, you got this number from Columbia for the Sumerel site?
>
> A: Well, I got it from Mr. Sumerel or my – Leon got it from Mr. Sumerel, but they get that information from their desired integrator.

(R. p. 194/Tr. pp. 467-68). It was only when Ms. Shealy testified on cross examination that she got the 8.75 figure from Leon Fulmer who received it from Mr. Sumerel (who presumably got it from Columbia Farms) would her testimony constitute double hearsay

[2] During the Department's questioning of Dr. Parkhurst DHEC requested an off the record sidebar to discuss this issue. After this sidebar the parties put their respective objections on the record.

if it were being offered for the truth of the matter asserted concerning the exit weight figure. However, it was not offered for that purpose. Appellants elicited and offered this testimony to show that the professional engineer who signed off on the CNMP could not identify with particularity where she obtained the incredibly important exit weight figure and to challenge her earlier statement. Therefore no objection was, or should have been, made at the time.

More to the point, the issue presented on appeal arose out of the ALC's reliance on that testimony as a basis for concluding the 8.75 lb. figure in the CNMP was accurate. (R. pp. 19, 33). It was only then that admission and utilization of this testimony became objectionable on double hearsay grounds. Under the circumstances, the Appellants had to address the issue in their Motion to Reconsider and Memo in Support as it first arose in the ALC's Final Order. The issue was therefore raised to and ruled upon by the lower court and preserved for appellate review.

3. *Admission of Joint Exhibit 1 does not bar a challenge to its contents*

Respondents summarily claim that Appellants' agreement to admit Joint Exhibit 1 (the CNMP) bars them from challenging the accuracy of its contents; namely the exit weight figure. (Resp. Br. at 38-39). Admission of a joint exhibit is not a concession to the truth or accuracy of its contents. The heart of this controversy lies in the accuracy and adequacy of the Sumerel CNMP and DHEC's review of it. All parties recognized the CNMP needed to be admitted into evidence as one of the, if not the, most important document at trial. Appellants' pre-trial agreement to admit Joint Exhibit 1/the CNMP was merely done to get this seminal document into evidence and before the ALC. If Appellants agreed with its content then they would not have gone through a two day trial

challenging it. Respondents' cited authority, *Holroyd v. Requa*, 361 S.C. 43, 59-60, 603 S.E.2d 471, 426-26 (Ct. App. 2004), in support of their argument is distinguishable and inapplicable to this case. In *Requa* this Court held that a party who testified concerning evidence he previously argued should be excluded cannot then challenge admission of that evidence on appeal. *Id.* Here, pursuant to the ALC's pre-trial order, the parties cooperated and agreed upon joint exhibits prior to trial. Joint Exhibit 1/the CNMP was admitted as a practical necessity. Appellants' did not "elicit" or offer testimony or evidence that all of its contents were true and accurate. In fact, they offered the opposite, including expert testimony of Dr. Parkhurst that the 8.75 lb. exit weight figure in the CNMP was inaccurate. Appellants agreed to admission of Joint Exhibit 1/the CNMP as an accurate depiction of the plan submitted to and evaluated by DHEC in this case and nothing more.

B. The ALC erred in finding DHEC conducted a full and adequate evaluation of the proposed Sumerel operation as required under applicable statutes and regulations, including S.C. Reg. 61-43 Part 200.70(E)

1. DHEC did not complete all reviews and evaluations before issuing the Sumerel Permit

Respondents assert that "[o]n June 12, 2013, after all reviews had been completed and the information evaluated by applicable Department staff and Mr. Chaplin...the Department issued the Permit...." (Resp. Br. at 14). All inspections and evaluations had not in fact been completed when DHEC issued the Sumerel Permit on June 12, 2013. As noted in Appellants' Initial Brief, the uncontroverted evidence at trial established that 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).

2. *The Department did not adequately evaluate the proposed site and its operational impacts*

On brief, DHEC concedes it did not consider the slope of the land or runoff prevention in evaluating the Sumerel facility despite the clear mandate of S.C. Reg. 61-43 Part 200.70(F) to do so. (Resp. Br. at. 19-28). Respondents attempt to justify these failures by an appeal for deference and insertion of conditions precedent not found in the regulations.

First, Respondents argue that "since there were no manure utilization fields, the Department did not have to consider the slope of the land...." (Resp. Br. at 19). Respondents also claim that

> [A]pplying [the] mandate [of 200.70(E)] to the criteria of runoff protection and slope of the land, the Department considers whether the new or expanded facility has or will have manure utilization areas. If the facility will not have any manure utilization areas, then as explained by Mr. Chaplin, the Department does not consider runoff as part of the method of disposing manure on site.

(Resp. Br. at 26-27). To reach this conclusion, DHEC contends that it interprets "runoff protection" [*sic*] to apply only when a plan calls for manure utilization areas. (Resp. Br. at 26-28). Specifically, Respondents note that "runoff protection" [*sic*] is not defined under the applicable regulations but "runoff" is as "rainwater or other liquid that drains over land on any part of a land surface and runs off the land surface." (Resp. Br. at 27

citing 4 S.C. Code Ann. Reg. 61-43 Part 50(FFF)). They go on to say that "these regulations together with the definition of manure utilization area" led to the Department determining it only need evaluate runoff prevention for proposed poultry operations when manure utilization areas are in a plan. (Resp. Br. at 27-28).

This is not a regulatory interpretation issue, but rather an attempt to insert a condition precedent to adherence to the regulatory mandates of 200.70(E) & (F). Such a condition is not found within the regulations. Even if were an interpretation issue, the plain language of 200.70(F) says "[t]he Department *shall* evaluate the proposed site including, but not limited to, the following factors when determining if additional distances are necessary:...(7) slope of the land...and (9) runoff prevention." S.C. Code Ann. Reg. 61-43 Part 200.70(F)(*emphasis added*). It does not say the Department shall consider runoff prevention and the slope of the land only when the plan calls for manure utilization areas. In short, this is a phantom condition that cannot excuse DHEC's failure to conduct an adequate evaluation of the Sumerel Plan in accordance with Part 200.70(F)(7) & (8) by evaluating runoff prevention and the slope of the land.

As argued in Appellants' Initial Brief, consideration of the slope of the land as it will be when the facility is operational (after it is graded) is necessary to ensure the proposed operation will not detrimentally impact waters of the State. (*See* Ap. In. Br. at 33-35). More to the point, Respondents fail to cite any authority allowing them to forego this mandatory consideration when the plan does not call for manure utilization fields. This is a mandated consideration under 200.70(F) that is not conditioned upon whether the facility has manure utilizations areas. DHEC flatly recognizes on brief it failed to consider the slope of the land once graded. Its excuses for not doing so are inadequate.

Dr. Hargett, as the only qualified water expert at trial, testified that this is a necessary consideration to determine whether a proposed operation will detrimentally impact receiving waters. (R. pp. 112-13/Tr. pp. 140-44; R. p. 114/Tr. pp. 145-46; R. p. 119/Tr. p. 165).

Second, Respondents attempt to excuse noncompliance with 200.70(E) and (F) claiming that DHEC evaluates stormwater runoff prevention "from the grading of the land for agricultural purposes...as part of a separate permitting program." (Resp. Br. at 24). Appellants recognize and never challenged the fact that DHEC has a separate stormwater permit one must obtain before grading land. This evaluation however, contrary to Respondents' claims, does not evaluate agricultural runoff. The testimony at trial showed that DHEC's stormwater runoff evaluation does not consider the impact of agricultural operations or runoff. Specifically, Dr. Hargett testified DHEC "customarily would not look at pollutants being emitted from the chicken house" in evaluating a stormwater pollution prevention plan. (R. p. 123/Tr. p. 183:12-22). Likewise, Respondents' witness, Leon Fulmer, testified:

> *Q:* *Now, based on your experience with stormwater permitting, when the Department evaluates that permit, do they take into consideration any of the emissions from the poultry or ag operation that's going to be on that site?*
>
> *A:* *Not from a stormwater standpoint, no.*

(R. p. 184/Tr. p. 425:6-11). Review and consideration of runoff prevention in another permitting program does not excuse nonadherence to the mandates of Part 200.70(F); especially when that separate evaluation does not consider emissions from the proposed agricultural operation.

Finally, DHEC attempts to bypass the mandated considerations under Part 200.70(F) by claiming it only need evaluate whether a proposed operation will likely violate state or federal pollution standards. (Resp. Br. at 28). 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." 4 S.C. Code Ann. Reg. 61-43 Part 200.70(E). The regulation does not confine DHEC's evaluation to determining whether state or federal pollutant standards will be violated by operation of the proposed facility. An "increase in pollution" is not akin to "an increase in pollution to a level that violates state or federal standards." Thus, to abide by the mandate of Part 200.70(E) DHEC need consider an increase in pollutants to the waters of the State caused by the proposed Sumerel facility, and not simply if it will pollute receiving waters to such a degree it violates state or federal pollution standards.

II. Conclusion

Appellants adequately addressed the remaining issues in their Initial Brief and do not believe it necessary to burden the Court with additional briefing on those issues.

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

(signature page to follow)

Respectfully Submitted,

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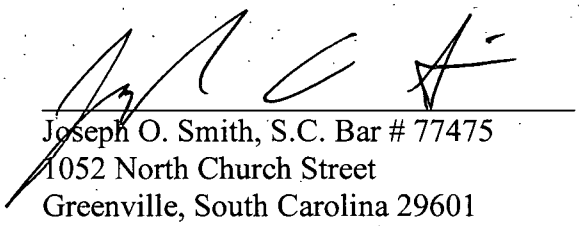

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CERTIFICATE OF COUNSEL

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

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