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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2017-000066

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

Respondents,

v.

Pickens County, Appellant.

RESPONDENTS' PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rules 221(a) and 240, SCACR, Respondent MRR Pickens, LLC ("MRR") petitions this Court for rehearing of the Court's decision in Pickens County v. South Carolina Department of Health and Environmental Control and MRR Pickens, LLC, Opinion No. 5707 (S.C. Ct. App. filed January 8, 2020). The Court went outside the allowable standard of review, misapprehends the law, and overlooks evidence in the record in its reversal and remand of the decision of the Administrative Law Court ("ALC").

The Opinion includes serious procedural and substantive errors. The Court impermissibly acts as the finder of fact, and in so doing, reaches conclusions of law based on alleged facts not in the record nor examined by the ALC, while ignoring findings reached by the ALC. The Court fails to give deference to the South Carolina Department of Health & Environmental Control ("SCDHEC" or "Agency"), and yet remands to the ALC "for further proceedings", despite already reaching conclusions on the merits itself. Finally, the Court's failure to give weight to the exhaustion of administrative remedies doctrine reverses established precedent from the South Carolina Supreme Court and is in violation of the procedural requirements of the Administrative Procedure Act ("APA"). For these reasons, the Opinion is flawed.

For the reasons stated herein, Respondents MRR and the South Carolina Department of Health and Environmental Control (together, MRR and SCDHEC are "Respondents") respectfully request the Court reconsider its decision and grant this Petition for Rehearing.

ARGUMENT

I. The Opinion is Procedurally Flawed and Outside the Scope of its Authority.

A. The Court Disregarded the Substantial Evidence Standard of Review.

The Court disregarded the substantial evidence standard of review A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 201, 833 S.E.2d 451, 458 (Ct. App. 2019). "The review of the ALC's order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." "When reviewing a decision of the ALC in [permitting] cases, this court's standard of review is governed by section 1-23-610 of the South Carolina Code." Id. at 200. As provided in Section 1-23-610, the court may only reverse or remand if it finds the 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 abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-610(B)(Supp. 2018)(emphasis added). This is a very limited standard. "Substantial evidence" is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached" and is "more than a mere scintilla of evidence." A.O. Smith Corp., 428 S.C. at 201, 833 S.E.2d at 457 (internal quotation omitted). In proceedings before the appellate court, the burden is on the appellants "to prove convincingly that the agency's decision is unsupported by the evidence." Waters v. S.C. Land Res. Conservation Comm'n, 321, S.C. 219, 226, 467 S.E.2d 913, 917 (1995) (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1990)).

Here, the Court went outside the record and substituted its judgment for that of the ALC.

1. The Administrative Law Court, not the Court of Appeals, acts as the finder of fact.

South Carolina law mandates the Court of Appeals' review of the decision of the ALC is limited to the ALC's findings of fact, which can only be based on the administrative record. "The review of the [Administrative Law Judge's ("ALJ")] order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALJ] as to the weight of the evidence on questions of fact." S.C. Code Ann. 1-23-610(B) (emphasis added).

The ALC reviews the final agency decision in a contested case hearing *de novo* and serves as the finder of fact, with the standard of proof being a preponderance of the evidence. See S.C. Code Ann. § 1-23-600(B) (Supp. 2019); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). As the trier of fact, the ALC may give testimony the weight it determines it deserves. Florence Cnty. Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). As fact finder, the ALC must also give consideration to the experience, technical competence, and specialized knowledge of SCDHEC and its staff in evaluating the evidence. S.C. Code Ann. §§ 1-23-330(4); 44-1-60(F)(2).

The ALC Order appealed was a grant of a motion to dismiss. Therefore, the ALC explicitly ordered the parties not to present evidence to be weighed by it on the issues that go to the merits. [R. pp. 3-4; 126:8-10, 127:13-22]. Right or wrong in the Court of Appeal's view of the case, these were the instructions to the parties. Id. Respondents abided by these instructions, Pickens County did not, stating unsupported facts in their pleadings and attaching very limited portions of documents, transcripts, and other incomplete evidence from a different case in Pickens County. [See R. p. 603-608]. The ALC instructed Pickens County numerous times to discontinue presenting any testimony on issues outside the single issue before the ALC on Respondents' Motion to Dismiss; that being, did Pickens County have actual notice of the permit modification

in December 2014 and January 2015 and, if so, why did it wait until March to file its appeal? [R. p. 2: "Issue"].

For this reason, the ALC makes very few findings of fact in its Order:

1. MRR Pickens received a Class 2 Landfill Permit from SCDHEC in 2008 for a landfill in Pickens County [R. p. 1];

2. In March and August of 2015, MRR applied for a permit modification and revised permit modification [R. p. 2];

3. SCDHEC determined the modification applied for was minor and therefore did not need engage in the public notice and comment period requirements set forth in Regulation 61-107.19, Part I for a major modification [Id.](emphasis added);

4. SCDHEC mailed the staff decision to MRR on August 10, 2015 approving the requested modification [Id.];

5. On December 15, 2015, SCDHEC informed Appellant Pickens County of the permit modification decision in a meeting [Id.];

6. On January 11, 2016, SCDHEC emailed the permit modification decision ("Modification Decision") to Appellant Pickens County [Id.]; and

7. Appellant filed a Request for Final Review ("RFR") with the SCDHEC Board on March 23, 2016. [Id.]

These findings of fact were used by the ALC to find Pickens County had actual notice and conclude actual notice of a SCDHEC permitting decision begins the fifteen-day deadline to file a Request for Final Review.

In its Opinion, the Court of Appeals ignores the statutory limitations on its "fact-finding" authority and goes outside the facts considered by the ALC, which made no findings of fact regarding the type of modification or landfill. [R. pp 1-5] The following facts included in the Opinion illustrate the Court's procedural error as they were specifically not accepted into evidence, discussed, or ruled on by the ALC and are often cited from Pickens County's pleadings with limited or no evidentiary support:

1. Facts relating to 2007 Host and Development Agreement between MRR and Pickens County [Opinion, Facts and Procedural History, para. 1, p. 2];

2. Facts relating to the types of waste allowed under the 2008 Permit and the 2015 modified permit [Id. at para. 2, p. 3];

3. Facts relating to the County Solid Waste Management Plan [Id. at para. 3, p. 3];

4. Facts relating to meetings in 2014 and 2015 between MRR and SCDHEC regarding "modifications to the landfill design approved in the 2008 Permit" [Id. at para. 4, pp. 3-4];

5. Facts relating to Pickens County Planning Commission Meeting in January of 2015 and any statements made by MRR at that meeting [Id. at pp. 3-4];

6. Facts relating to permit extensions requested by MRR from 2008-2014 [Id. at fn. 7];

7. Facts relating to the 2016 lawsuit filed by MRR against Pickens County *et al.* and very limited portions of the cross-examination deposition testimony of SCDHEC's Kent Coleman early in that case [Id. at pp. 5-7][1];

8. Facts relating to what permit changes SCDHEC considers major verses minor under SCDHEC regulation 61-107.19 [Id. at para 10, pp. 5-7][2];

9. Fact relating to what wastes SCDHEC would allow MRR to take under the 2008 Permit verses the 2015 Modification Decision [Id. at p. 7];

10. Facts relating to the specific changes authorized in the August 10, 2015 permit modification as compared to the 2008 permit modification [Id. at para. 6, bullet points 1-4, pp.*4-5[3]];

11. Facts relating to MRR's permit modification application to SCDHEC and associated engineering reports [Id. at pp. 5-6]; and,

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[1] Notably, as discussed in Section I.B., *infra*, this "evidence" is not even from the case before the ALC or the Court of Appeals, but from a different case entirely.

[2] In fact, the Court makes this *de novo* finding of fact, and others, by quoting directly from the County's Memorandum in Opposition to MRR's Motion to Dismiss – the attorney's conclusory statements of its version of the facts. However, additional excerpts in the record offered by the County also contain the exact opposite statements from DHEC and other DHEC witnesses who have testified to the contrary in the case in Pickens County. [R. p. 261:13-18]

[3] These findings are direct quotes from the County's attorneys' view of what the 2015 Modification Decision changed in the 2008 permit – citing to portions of incomplete reports. [R. 126;8-10, 127:13-22].

12. Facts relating to whether DHEC actually believes coal ash requires "special handling" or qualifies as "special waste." [Id. at p. 7, fn. 11].

The Court improperly makes these and other findings of fact, accepting portions of transcripts and other documents and conclusory statements in pleadings not in the administrative record, and not weighed by the ALC, as reliable and probative facts that should be given weight – without allowing Respondents any opportunity to present evidence.[4] This alone is grounds for rehearing because it is not statutorily allowed.

Moreover, the Opinion gives credence to all facts pled by Pickens County and ignores record evidence of Respondents—facts which conflict with the unrelated evidence improperly relied upon by the Court. The Court of Appeals cannot, as an appellant body, make *de novo* findings of fact. If there is conflicting evidence in the administrative record, the Court of Appeals must defer to the ALC findings on that issue. See A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 200, 833 S.E.2d 451, 457 (Ct. App. 2019)(emphasis added) ("When the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder") (quoting Be Mi, Inc. v. S.C. Dep't of Revenue, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014)).

To illustrate the Court's error, Respondents respectfully refer the Court to the following evidence which Respondents would present to the ALC during a hearing on the merits, but was correctly not reviewed or relied upon by the ALC in its Order[5]:

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[4] Respondents were not given the opportunity to refute these alleged facts as the parties were instructed by the ALC not to, because such facts were not relevant to the timeliness decision. [R. p. 126:8-10, 127:13-22]

[5] Contradictory evidence to Pickens County's version of the facts was intentionally not presented by Respondents because it was outside the administrative record and thus not properly before the Court; however, such evidence would have been presented at the ALC had it held a hearing on the merits. Respondents were not permitted to submit factual evidence into the record as to these issues by the ALC because such facts were not relevant to the decision to be made. [R. p. 126:8-10, 127:13-22]. There are multiple documents and deposition transcripts in the case in Pickens

1. The Host and Development Agreements: The 2007 Agreements referred to what is now a Class 2 Landfill; a Class 2 Landfill is not limited to construction and demolition or land-clearing debris; [R. p. 694-96]

2. Types of waste allowed under the 2008 Permit and the 2015 modified permit: DHEC testified the 2008 and 2015 Permits do not differ in the types of waste that can be allowed in the landfill and any Class 2 waste that meet the requirements of SCDHEC regulations would be allowed in the landfill under either permit [R. p. 385-86, 694-95, 780:9-782:8-11];

3. The County Solid Waste Management Plan: SCDHEC, not Pickens County, determines if a waste or landfill meets the County's Solid Waste Management Plan [R. p. 239:15-25; 476-77];

4. Pickens County Planning Commission Meeting in January of 2015 and any statements made by MRR at that meeting regarding a liner[6]: There is a full transcript of the meeting and submittals whereby MRR mentions a liner. A liner, even if not required for a Class II landfill, is more protective of the environment and therefore, not something that DHEC would expect would garner opposition [R. p. 693-94]; The addition of a liner does not change the waste allowed under the permit and does not make a Class 2 landfill a Class 3 Landfill able to take Class 3 waste [R. p. 476-78]

5. The 2016 lawsuit filed by MRR against Pickens County et al. and the deposition testimony of SCDHEC's Kent Coleman early in that case: MRR, not the County, noticed the deposition of Kent Coleman in order to bring the true facts to light.[7] The Court did not consider all portions of the testimony in which Mr. Coleman stated:

    a. Alternate designs are listed as one example of a "major modification" and do not refer to liners, but to changing the size and shape of the landfill [R. p. 696, 782:17-18];

County. MRR and DHEC have not had the opportunity to present conflicting evidence on the "facts" now improperly given weight by the Court of Appeals.

[6] Additional evidence in the Pickens County case which reflect the facts in the Opinion include the following: the transcript of the hearing whereby it is clear MRR put in the cover letter to its application to the County for a land use permit that it was requesting permission to build a "lined landfill"; MRR's only statement during the public meeting with the County on its application was that a liner is not required for the portion of the landfill that takes asbestos waste.

[7] Kent Coleman's testimony should not have been considered part of the record on appeal as it was not relied upon by SCDHEC in making the permit modification decision or by the ALC in making its decision; with that said, the Court should let the ALC consider all statements made by Mr. Coleman (not portions) and allow him to be called as a witness to explain his answers – this is the job of the ALC.

b. The only similarity between the design of the MRR Class 2 Landfill and a Class 3 Landfill is that MRR's Class 2 Landfill will have a liner, which is more protective of the environment [R. p. 691-93];

6. What wastes SCDHEC would allow MRR to take under the 2008 Permit versus the 2015 Permit Modification Decision: SCDHEC would allow MRR to take any Class 2 Waste but would not allow MRR to take Class 3 wastes that do not meet Class 2 waste requirements - therefore the option to install a liner does not make MRR's landfill a Class 3 Landfill [R. p. 697, 783:20];

7. Whether DHEC actually testified the option to install a liner and verbiage change to Special Condition 2 was major not minor under the regulations: Additional excerpts in the record offered by the County also contain the following statement on cross-examination: "Q: All right. And it's still—as you sit here today, it's still the opinion of Kent Coleman that the changes we just discussed from the '08 permit to what you call a minor modification in 2015 is a minor modification? A: Yes." [R. p. 261:13-18]

8. The specific changes authorized in the August 10, 2015 permit modification as compared to the 2008 permit modification: The only substantive changes made to the 2008 permit by the August 10, 2015 modification is "the option to install a liner." The change to the wording in Special Condition 2 did not change the waste allowed under the permit – both permits allowed any Class 2 waste that MRR proves meet the requirements of the SCDHEC Class 2 landfill regulations. [R. p. 694-97] The changes in Special Condition 2 were made to reflect the language in the Pickens County Public Class 2 Landfill and all other class 2 landfills - it is standard language now used in all Class 2 permits [R. p. 694-95, 780:9-781:23]; and,

9. How coal ash should be handled and whether it requires "special handling": SCDHEC does not consider coal ash as "special waste" as that term is defined in the SC Solid Waste Policy and Management Act and regulations. [Coleman Dep. 168:7-20] The United States EPA has defined coal combustion residuals as a solid waste, not a hazardous waste at 80 Fed. Reg. 21301 (April 17, 2015);

Here, the ALC purposely determined it would not make findings of fact on the issues now addressed by the Court of Appeals because they were not relevant to the issue of timeliness and exhaustion of administrative remedies. See Gamble v. Int'l Paper Realty Corp. of South Carolina, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) ("The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal") (citing Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 439 S.E.2d 838 (1994)). If the Court of Appeals believed the ALC should have taken evidence on the issues of major verses

minor, alleged misrepresentations, and what makes a landfill a Class 3 landfill, its only remedy was to remand the case back to the ALC as the sole fact finder on these issues. See Timms v. Timms, 286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985) (holding it inappropriate for the Court of Appeals to address points or issues not decided on the merits by the lower court). However, the ALC correctly determined that fact-finding on these issues would not affect her conclusion that where a person has actual notice and misses its 15-day window, public notice or no public notice does not change the outcome.

The Court of Appeals has acted outside its statutory authority and has become the trier of fact. Id. at 293-94, 333 S.E.2d at 75 ("Where a point has not been decided by the lower court, we will not consider the point on appeal...[the Court of Appeals] is confined to the record in deciding issues on appeal") (citing Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311 (1980), then Masters v. Rodgers Dev. Group, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984)). The Court disregarded the substantial evidence standard of review by making impermissible *de novo* findings of fact based on evidence outside the record, while ignoring facts found by the ALC based on evidence in the record. The Court goes so far as to rely on alleged facts from an entirely different case. The Court used portions of cross-examination testimony from the deposition of Kent Coleman, SCDHEC's witness in a separate case, to support its *de novo* finding the Permit modification was "major" rather than "minor," as SCDHEC maintains. But see fn. 2. The Court has acted outside the scope of its statutory authority and the Opinion must be reheard.

2. The Court makes legal conclusions not requested by the Appellant and prejudicial to any future proceedings.

Pickens County is appealing a narrow decision by the ALC. The appeal can only be on those items covered by the ALC Order. The ALC Order simply concluded:

1. S.C. Code Ann. § 44-1-60 requires a timely request for Board Review to be filed within 15 days of mailing of the decision to the permittee and affected parties [R. p. 3];

2. S.C. Code Ann. § 44-1-60 is the exclusive process for appeals of SCDHEC permitting decisions and is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies [Id.];

3. Statutorily imposed exhaustion of administrative remedy requirements have few exceptions [Id.];

4. Dismissal is proper where there is a requirement for exhaustion of administrative remedies as a matter of law and it has not been performed [Id.];

5. Failure to file a Request for Final Review to the Board in a timely matter forecloses a contested case action at the ALC [Id.];

6. There must be a compelling reason for granting equitable tolling to suspend the timeframe set by statute and the doctrine should be used sparingly [R. p. 4]; and

7. Pickens County failed to timely exhaust its administrative remedies prescribed by law as prerequisite to filing a contested case at the ALC and, waiting 99 days after the meeting where the decision of SCDHEC was discussed with the County and 72 days after the decision was emailed to the County, thus the case must be dismissed pursuant to S.C. Code 44-1-60 and SCALC Rule 23(B). [R. pp. 3-5]

Here, instead, the Court makes legal conclusions not requested by Pickens County on appeal which are prejudicial to any further proceedings. Pickens County only appealed six (6) issues, as follows:

1. Did the ALC err in dismissing Appellant's challenge to the SCDHEC permitting decision as untimely prior to resolving whether SCDHEC complied with proper notice decisions for that decision?

2. Did the ALC err in dismissing the appeal on basis of administrative exhaustion if SCDHEC acted outside scope of authority when issuing such decision and where there is public interest issues?

3. Did the ALC err in denying Appellant's right to discovery while granting Respondents' motions to dismiss?

4. May Respondents' plead and win on the basis of failure to exhaust administrative remedies when any such failure on the Appellant is "directly attributable to Respondents' misrepresentations and misinformation"?

5. Should a SCDHEC decision based on improper process and for improper purpose be protected by filing deadlines and the doctrine of administrative exhaustion?

6. Did the ALC err in dismissing this case on the bases of timeliness prior to resolving the status of proposed intervenors?

Even Pickens County understood it can only ask the Court of Appeals to rule on the findings and legal conclusions of the ALC. And yet, the Court, *sua sponte*, made conclusions of law on issues not properly before it.. The Court of Appeals acting outside its statutory authority and procedure concludes:

- SCDHEC has permitted a Class III landfill for MRR in Pickens County by classifying the modification as minor;
- All coal ash is special waste under SC Code Ann. 58-27-255 and is generally unsuitable for a Class 2 Landfill; and
- The modification was major, not minor.

These issues were not before and not ruled on by the ALC and thus are improperly included in the Opinion. The ALC Order did not need to rule on the issue of whether the modification was major or minor if Pickens County failed to meet the timeliness requirements for an appeal despite having actual and constructive notice.[8] The Court of Appeals, in ruling the modification was "major," misapprehended the law in that it reached this conclusion based on erroneous findings of fact as explained in Section I.A.1, *supra.*

Just like the Court cannot make *de novo* findings of fact, it does not have the authority to go outside the ALC Order and make its own *de novo* conclusions of law based on limited and

[8] Again, if the Court of Appeals disagreed with this conclusion, its only remedy is to remand for fact finding on the issue of whether the modification was major versus minor; however, here, the matter on appeal is one of procedure, not the substantive decision. See R. p. 126:8-10, 127:13-22.

unsubstantiated facts from the pleadings, witnesses, testimony, or documentary evidence not considered by the ALC. *See Timms*, 286 S.C. at 293, 333 S.E.2d at 75 (holding it inappropriate for the Court of Appeals to address points or issues not decided on the merits by the lower court); *Gamble*, 323 S.C. at 373, 474 S.E.2d at 441 (holding the admission of facts and evidence wholly within the discretion of the trial court, not to be revised on appeal absent clear abuse).[9]

The Court has disregarded the substantial evidence standard of review which it is to afford the ALC Order. Accordingly, the Court should reconsider its Opinion.

B. The Court gave no deference to the Agency.

The Court exceeded its authority in deciding the permit modification was "major," overturning SCDHEC's decision it was "minor." The Court of Appeals is to give substantial deference to the ALC as to questions of fact, and both courts are required to give substantial deference to the Agency – SCDHEC - when the Agency interprets its own regulation. See Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 352 U.S. 410 (1945); see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (reemphasizing the deference doctrine in South Carolina provides that courts defer to an administrative agency's interpretations with respect to its own regulations "unless there is a compelling reason to differ") (quoting S.C. Coastal Conservation League, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)). Not only did the Court fail to give deference to the Agency, the issue of whether the permit modification was major or minor was not even before the Court. If the Court remanded the case, the ALC would properly decide what level of deference to give the Agency

[9] Moreover, the Court of Appeals erred in finding the ALC considered evidence outside the pleadings. The ALC only made findings of fact regarding notice and timeliness of the appeal, which is all that was required. The Court cites to no area where the ALC Order considered evidence outside the pleadings.

based on the facts it found to be relevant and probative. This is a misapprehension of the law and should be reversed.

II. The Court Misapprehends the Law and Could be Creating Troublesome Precedent, Negating the Timeliness Requirements for Appealing an Agency Decision.

In addition to the procedural errors set forth above, the Court's Opinion misapprehends the ruling of our Supreme Court in S.C. Coastal Conservation League v. S.C. Dept. of Health & Envtl. Control regarding notice of an agency decision under S.C. Code Ann. § 44-1-60(E), which provides:

> The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person.

In S.C. Coastal Conservation League, the South Carolina Supreme Court interpreted Section § 44-1-60(E) to mean that the agency decision becomes final fifteen days after notice of the decision is mailed, and the agency is required to send notice of the decision simultaneously to the applicant, permittee licensee and affected persons who have asked to be notified. S.C. Coastal Conservation League v. S.C. Dept. of Health & Envt'l Control, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010). In situations where the agency fails to simultaneously notify the applicant and any affected persons asking to be notified, the latest date of mailing controls when the fifteen-day period begins to run. Id.

Here, SCDHEC provided actual notice to Pickens County on December 15, 2014, and at the very latest, on January 11, 2015. [R. p. 190, 394]. Therefore, the fifteen-day appeal period ran at the latest on January 26, 2015, and Pickens County's appeal was untimely under the clear precedent set by the South Carolina Supreme Court. The proper issue before the Court is whether the ALC relied upon substantial evidence in holding the County, fifteen days after it received actual notice, failed to appeal the decision. It did.

Moreover, the Opinion also incorrectly concludes that failure to provide public notice cannot be cured by actual notice. The Court excuses Pickens County's failure to timely appeal by ruling that because SCDHEC failed to provide the alleged required public notice under S.C. Code Ann. Regs. § 61-107.19, the time period for an appeal for actual notice under Section 44-1-60(E) cannot run and the failure cannot be cured. In so ruling, the Court again misapprehends the law as the Supreme Court already addressed this issue in A.O. Smith Corp. v. S.C. Dept. of Health & Envt'l Control, 428 S.C. 189, 833 S.E.2d 451 (2019) and Bursey v. S.C. Dept. of Health & Envt'l Control, 369 S.C. 176, 631 S.E.2d 899 (2006), overruled on other grounds by Allison v. W.L. Gore & Assocs., 392 S.C. 185, 714 S.E.2d 547 (2011) (clarifying the question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction rather than subject matter jurisdiction).

Similar to A.O. Smith, the triggering occurrence as to whether public notice was required was a non-determinative event. In A.O. Smith, the non-determinative event was a water supply operating permit; here, it is a minor permit modification. The Supreme Court in A.O. Smith held that because A.O. Smith had actual notice of the Board decision, it did not matter that the operating permit decision was not publicly noticed, and thus, its appeal outside the time limit set by Section 44-1-60(E) was untimely. A.O. Smith Corp., 428 S.C. at 204-05, 833 S.E.2d at 460. Here, the ALC correctly made no decision as to whether the permit modification was "major" or "minor," which if "major" would have triggered a public notice requirement, because Pickens County had actual notice of the permit modification and sat on its rights. For the Court of Appeals to overturn the ALC's decision and conclude, contrary to established precedent and substantial evidence, that the timeline did not begin to run because public notice was required is error of law.

In Bursey, the issue before the court was whether a decision by SCDHEC to not require a mining permit which was appealed to the South Carolina Mining Council ("Council") was timely

and whether the decision of the Council (the agency) was supported by substantial evidence—having held the APA to be the proper standard of review of final agency decisions before higher courts on appeal. The Court held it proper for the appellate courts (Circuit Court and Court of Appeals) to leave undisturbed the factual findings of the lower tribunal as to the date the parties had notice because the findings of fact were supported by substantial evidence. The Supreme Court held "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence... Rather, the appellate court need only find, considering the record as a whole, evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached." Bursey, 369 S.C. at 188, 631 S.E.2d at 906.

The relevant governing statute in Bursey is substantively the same as the current case, requiring the appeal of SCDHEC's decision to the reviewing body to occur within a certain number of days (30 in Bursey, 15 here) of notice of the decision by the agency. The Council, acting as the fact finder in reviewing the agency decision, found the appeal timely by choosing the date of written explanation of the decision despite testimony of numerous times prior where Bursey was informed of the agency's permit decision. The Court held the Council's election of this date as proper due to the conflicting evidence in the record as to whether there was a sufficient "final" decision or what substantive information Bursey had in the months prior to the written decision.

Here, the ALC as the fact-finder concluded the following after review of the complete record as to timeliness: "The County's request was filed 226 days after the staff decision was issued, 99 days after the meeting where the decision was discussed with the County, and 72 days after the written decision was emailed to the County." [R. p. 2]. The findings of the ALC are to be taken as true and this Court cannot disturb these findings without evidence it is "clearly

erroneous" or "an abuse of discretion." See Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The Court found neither.

Finally, it is important to consider what precedent this Opinion arguably may create. The Opinion, as written, could be interpreted by some to allow appeals to be filed long after a non-public noticed SCDHEC decision is made, notwithstanding whether or not the appellant had actual or constructive notice of the decision. Respondents believe this is not what the South Carolina General Assembly nor the Supreme Court intended in enacting and interpreting S.C. Code Ann. § 44-1-60 and the APA. See S.C. Coastal Conservation League, 390 S.C. at 429, 702 S.E.2d at 252 (citing Act No. 387, § 53 ("This Act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies.")). To find that actual notice is not relevant is to do away with the doctrine of exhaustion of administrative remedies in the permitting arena.

CONCLUSION

WHEREFORE, due to the Court's misapprehension of the law and disregard for the substantial evidence standard of review, Respondents respectfully request the Court grant its request for rehearing to reconsider Opinion No. 5707 and rule in favor of Respondents.

This the 23rd day of January, 2020.

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2017-000066

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

Respondents,

v.

Pickens County, Appellant.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on opposing counsel by depositing a copy of it in the United States Mail, postage prepaid on January 23, 2020, addressed to Gary W. Poliakoff, Esq. of Poliakoff & Associates, PA, 215 Magnolia Street, Spartanburg SC 29306 and Amy Armstrong, Esq., Amelia Thompson, Esq., and Michael Corley, Esq. of South Carolina Environmental Law Project, P.O. Box 1380, Pawleys Island, SC 29585.

January 23, 2020.

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January 23, 2020

VIA HAND DELIVERY

The Honorable Jenny Abbot Kitchings
Clerk of Court, SC Court of Appeals
P.O. Box11629
Columbia, SC 29211

Re: South Carolina Department of Health and Environmental Control and MRR Pickens, LLC, v. Pickens County
Appellate Case No.: 2017-000066

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of a Petition for Rehearing for rehearing in the above action together with a Certificate of Service on opposing counsel, Gary W. Poliakoff, Esquire; as well as Amy Armstrong, Esquire; Amelia Thompson, Esquire; and Michael Corley, Esquire of South Carolina Environmental Law Project; and a filing fee in the amount of $50.00.

With kindest regards, I am

Very truly yours,

WILLIAMS MULLEN

Kristi L. Love

:kll
Enclosures
cc: Gary W. Poliakoff, Esq.
Amy Armstrong, Esq.
Amelia Thompson, Esq.
Michael Corley, Esq.