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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

Pickens County,

Appellant,

vs.

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

Respondents.

FINAL BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

This matter is before the Court on appeal from an order of the South Carolina Administrative Law Court ("ALC") dismissing challenges to the permit modification issued to MRR Pickens, LLC ("MRR") by the South Carolina Department of Health and Environmental Control ("DHEC"). On August 10, 2015, DHEC issued the permit modification to MRR to allow certain class three landfill features to be installed in its previously permitted class two landfill, on which construction had not begun (the "Permit Modification"). DHEC decided to issue the Permit Modification for MRR's class two landfill in Pickens County ("the County") as a "minor" modification under DHEC's regulations, rather than a "major" modification, a decision which holds significant implications for public notice and public involvement in DHEC's regulatory process.

On March 23, 2016, the County filed a request for review before the DHEC Board. On April 21, 2016, the DHEC Board denied review. On May 19, 2016, Pickens County filed a request for contested case hearing in the ALC. On July 28, 2016, DHEC filed a motion to dismiss. On July 29, 2016, MRR filed a motion to dismiss and a motion to stay discovery. On August 18, 2016, Robert L. Traber, Matthew S. Stone, Randolph E. Revis, Sr. by P.R. Randy Martin, Tony Charping and Randall King, (collectively "Neighboring Property Owners"), filed a motion to intervene. On September 7, 2016, Judge Robinson held a conference call with the parties and decided, among other things, to grant MRR's motion to stay discovery and to hold the motion to intervene in abeyance pending the court's decision on the motions to dismiss. Judge Robinson held a hearing on the motions to dismiss on December 2, 2016. On December 12, 2016, the ALC dismissed the case by order, for failure to exhaust administrative remedies, based on the purported untimeliness of Pickens County's request for review before the DHEC Board. On January

11, 2017, Pickens County filed a notice of appeal in this Court. On March 29, 2017, Neighboring Property Owners filed a motion to be included as parties to this appeal. This Court denied that motion on the basis that the Neighboring Property Owners were not aggrieved by an order, because the ALC had never ruled on their motion to intervene.

II. ARGUMENT

As will be explained fully herein, Appellant has a number of independent bases for relief upon which this Court should reverse the ALC's order of dismissal and remand this case for consideration on the merits.

SUMMARY OF ARGUMENT

On the whole, this case can be conveniently thought of as encompassing three main questions: (1) whether the modifications DHEC authorized to MRR's landfill are "minor" or "major" under DHEC's regulations; (2) whether the challenges to those modifications brought by Pickens County and the Neighboring Property Owners are administratively barred on the basis of timeliness; and (3) whether the modifications are justifiable under DHEC's landfill regulations (the merits). A major part of this appeal relates to the order in which these questions should have been considered by the ALC.

The ALC's order of dismissal is the proverbial example of putting the cart before the horse. First of all, under the circumstances presented here, it is a logical impossibility to properly assess timeliness prior to addressing whether DHEC's authorized modifications are actually "minor." Yet, the ALC does exactly that, determining the County's challenge to be untimely under a statute (S.C. Code § 44-1-60) that is predicated on proper notice and process being provided by DHEC, while declining to consider persuasive argument and evidence that DHEC failed significantly in its public notice obligations. Issuance of a landfill

permit modification under the "minor" designation effectively takes place outside of public knowledge and view. On the other hand, "major" modifications require multiple levels of direct public notice, which would have included notice to the County and the other individuals who sought to be admitted as parties in this appeal. In treating this landfill modification as "minor," seemingly for the very purpose of shielding the action from the public, DHEC denied the County proper notice and procedure, and such action therefore cannot trigger the time limitations applied by the ALC. In this regard, the ALC failed by not taking up the "minor" versus "major" distinction before granting dismissal. Making matters worse, the ALC also granted dismissal prior to considering intervention of the Neighboring Property Owners. The logic of the ALC's dismissal of Pickens County, which is based on informal notice provided to the County, falls apart completely when applied to the Neighboring Property Owners. The ALC offered no explanation in its dismissal order or otherwise for simply never addressing the status of these individuals with the largest personal stake in DHEC's decision.

On top of ignoring necessary components of the timeliness analysis, the ALC improperly applied legal principles upon which the timeliness requirement is inapplicable in this instance. When DHEC acts outside the scope of its authority and impedes public notice and participation, the agency cannot then lean upon the concepts of timeliness and administrative exhaustion to protect its action. The underlying permit decision at issue in this case was issued through an improper process and for an improper purpose, and state precedent strongly reflects that such decision is not then shielded by the requirement of administrative exhaustion, nor the filing deadlines that would apply for a validly issued administrative decision. Further, even counting from DHEC's dubious issuance of the "minor" modification, courts retain the inherent ability

to equitably toll the administrative deadlines at play in this case, but the ALC's consideration of its authority in this regard was fundamentally flawed.

Finally, the ALC relied on outside evidence submitted by the Respondents in support of their motions to dismiss, while denying Pickens County the opportunity to conduct the discovery necessary to counter that evidence or to support its own contentions. The ALC's conclusions on dismissal necessarily required the weighing of disputed evidence, and that weighing did not land in favor of Pickens County. The ALC effectively converted the proceedings to summary judgment, while artificially limiting the scope of analysis and misapplying the standard of review, all to Pickens County's significant detriment.

On the independent basis of any of these arguments, as explained and expounded upon herein, reversal is appropriate.

STATEMENT OF FACTS

The Initial Plan for the Landfill:

By at least 2007, MRR was pursuing construction of a landfill at 2180 Greenville Highway in Liberty, Pickens County, South Carolina. (R. p. 303, ¶ 3). This pursuit included discussions and negotiations with Pickens County, in order to accomplish compliance with the County's development standards and comprehensive plan. These discussions led to the parties executing a Development Agreement and Host Agreement for the landfill. (See R. pp. 361-80). These agreements specify that MRR will develop and operate a "Construction and Demolition ('C&D') and Land Clearing Debris ('LCD') landfill" and that Pickens County will serve as the Host Local Government for such operation. (R. pp. 362-63). The Host Agreement requires MRR to comply with DHEC's applicable rules and requirements and to simultaneously submit to Pickens County all reports submitted to DHEC. (Id. ("All reports required to

be submitted to DHEC by MRR Pickens, LLC must be simultaneously submitted to the County Administrator.")) In both Agreements, waste disposal is limited to the types of materials designated in the DHEC regulations as "Class Two," such as C&D, LCD, and yard trash. (R. pp. 364, 372).

Following execution of these agreements with the County, DHEC issued MRR a Class 2 C&D landfill permit, Permit No. LF2-00003 ("2008 Permit"), on November 3, 2008. (R. p. 164). The 2008 Permit contained the following special condition as to the nature of waste authorized for disposal: "This permit is limited solely to the disposal of items listed in Appendix I of R.61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill." (Id.). Regulatory Appendix I, as referenced in the special condition, lists "acceptable waste for class two landfills" and contains materials typically associated with land clearing, yard work, and construction, such as: brush and limbs, logs, rock, masonry, paint cans, glass, pipes, and plaster. R. 61-107.19, Appendix I. Certainly no materials akin to coal ash are listed; indeed, less hazardous materials like tar are specifically excluded. See Id. at note 3. The Host Agreement, Development Agreement, and 2008 Permit are consistent in terms of the nature of waste authorized for disposal.

The 2008 Permit was also in accord with the Pickens County's Solid Waste Management Plan ("SWMP"), which is a local planning document required by state law. See S.C. Code § 44-96-80. Consistency with the SWMP is a necessary prerequisite to obtaining a landfill permit. S.C. Reg. 61-107.19, Part I, D(2). Pickens County's SWMP prohibits "Special Waste" from being deposited in Pickens County and excludes all Class Three landfills (designed to accept more dangerous and undesirable wastes) from being located in the County. (R. p. 359). The SWMP contrasts Class Two Landfills with Class Three Landfills, which are designed to receive wastes such as sludge and incinerator ash. (Id.).

For the years from 2008 to 2014, MRR delayed proceeding with development of the landfill for which it had received approval, informing DHEC each year that the economic downturn warranted postponement of development, and requesting and obtaining permit extensions. (R. p. 389, ¶ 11).

The Modification Process Between MRR & DHEC:

In 2014 and 2015, MRR and DHEC conducted a series of meetings and discussions regarding modifications to the landfill design in the 2008 Permit. (R. p. 166). At no time during these meetings and interactions was notification provided to Pickens County, Neighboring Property Owners, the public, or anyone outside of MRR, it's consultant, and DHEC. (R. p. 163). Neither MRR nor DHEC sought to verify with Pickens County whether the design modifications under discussion would conform with the Pickens County SWMP, Host Agreement, or Development Agreement. (Id.). During this period, MRR's engineering consultant submitted several engineering drawings and reports to DHEC that reflect a plan to effectively convert the Class 2 landfill reflected in the 2008 Permit into a Class 3 landfill.[1] (R. p. 166). Those reports reflect the following observation from MRR's consultant: "**During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of Regulation R.61.107.19 Part V Class Three Landfills would require a minor permit modification.**" (Id. (emphasis added)). In other words, DHEC communicated to MRR during these surreptitious meetings that MRR could modify the design of its landfill that had been presented

[1]In layman's terms, Class Three landfills are the most hazardous and obtrusive of the classes provided in DHEC's landfill regulations. As a consequence, these landfills require more stringent design specifications, larger buffers between environmental resources and neighboring property, and larger buffers between each other. See R.61.107.19, Part V. Class Three landfills must have liners because the facilities can be used for disposal of municipal solid waste, industrial solid waste, sewage sludge, and incinerator ash. Id.

to Pickens County and the public, so as to accept significantly more hazardous materials, while satisfying only the substantially diminished public notice and review requirements for a "minor permit modification."

The purpose of the course of action between MRR and DHEC, including DHEC's "confirmation" that this would be a "minor modification," was to bypass notifying Pickens County and the public of this landfill design change that was certain to be highly controversial. (R. p. 170). DHEC's "minor" label on MRR's modification substantially reduced the Respondents' public notice obligations and prevented affected parties, such as Pickens County and Neighboring Property Owners, from participating in the agency process. DHEC's regulations require "major" permit modifications to go through the same permitting process as new landfills, including the requirements for public notification and participation. See S.C. Reg. 61-107.19, Part IV, I.2; S.C. Reg. 61-107.19, Part I, D(2). The public notice requirements for new landfills / major modifications include five separate local newspaper publications and five separate instances of direct notice by mail to adjoining landowners and affected parties, occurring at all stages of the permitting process from pre-application to final decision. See S.C. Reg. 61-107.19, Part I, D(2)(a)-(g). The culmination of these required notifications would have been DHEC's notice of department decision on the permit, published and mailed to affected persons along with "instructions on how to request a final review conference and the time frame for filing such a request." Id. at D(2)(g); (R. pp. 490-92). None of these notice requirements were followed in relation to the Permit Modification. Instead, acting under the "minor modification" moniker, DHEC and MRR did not provide contemporaneous notice in any form

to any member of the public and did not provide any form of notice to Pickens County until months after the Permit Modification had been issued. (R. p. 163).[2]

In reality, the modifications from the 2008 Permit can only be reasonably interpreted as "major," per DHEC's regulatory definition, and DHEC's agreement with MRR to characterize these modifications as "minor" was erroneous. "Modification," under DHEC's landfill regulations, includes any "changes to a solid waste landfill." S.C. Reg.61-107.19, Part I, B(48). The modification is then categorized as either "minor" or "major" by definition as follows:

> a. "Minor modification" means a change that keeps the permit current with **routine changes to the facility or its operations, or an administrative change**; and,
> b. "Major modification" means a change that **substantially alters the facility or its operations**, e.g., tonnage increase above 25%, any volumetric capacity increase, **alternate designs** that vary from the design prescribed in this regulation.

Id. (emphasis added). Under no conception of the words could the changes authorized by the Permit Modification be considered "routine" or "administrative."

Rather, on August 10, 2015, when DHEC issued the Permit Modification to MRR, it authorized significant changes from the 2008 Permit, including: the addition of a landfill liner, which is a characteristic of Class Three landfills and is not present in any other Class Two landfill in the state, (R. pp. 164, 285-87); other design changes from Class Two to Class Three characteristics, including changes in the final landfill

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[2]Even with the "minor" label on the modification, the regulations still require MRR to publish a public notice in the newspaper and provide DHEC with adjacent landowners' contact information. S.C. Reg. 61-107.19, Part IV, H.2e. & H.3. No such publication or adjacent landowner information was provided in relation to the Permit Modification. Minor modifications also require DHEC and MRR to demonstrate or determine consistency with the Pickens County SWMP and other local ordinances. Id. at Part IV.H.1.b. No consistency demonstration or determination was undertaken by DHEC or MRR. If this had been done, it may have provided the County with some opportunity for notice and involvement during the application process.

cover, (R. p. 164-65); elimination of language prohibiting "all other wastes" and replacement of that language with an allowance for "any other waste approved by the Department," (R. p. 468); and allowance for disposal of "special wastes", which are defined as "nonresidential or commercial solid wastes, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at municipal solid waste landfills," (S.C. Code § 44-96-390; R. p. 229).[3]

Both the 2008 Permit and the 2015 Permit Modification were issued and signed by Kent Coleman, then director of the Division of Mining and Solid Waste Management at DHEC. In a related case pending in Common Pleas Court, MRR Pickens, LLC v. Pickens County, et al., Mr. Coleman was deposed on March 8, 2016, with counsel for MRR and DHEC present. Mr. Coleman provided sworn testimony as to the "major" / "minor" distinction as follows:

- Coleman admitted that the definition of "major modification" in the relevant regulation includes "alternate designs." (R. p. 242, line 11-p.243, line 6; p. 243, lines 20-21).
- Coleman admitted that the definition of "minor modification" does not include "alternate designs." (R. p. 243, lines 7-10).
- Coleman admitted that he previously, in a letter signed by him on August 10, 2015, accompanying the Permit Modification, characterized the Permit Modification as an "alternate liner design" and as a "design change." (R. p. 243, line 20-p. 245, line 2).

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[3]MRR's application for the Permit Modification asks for approval to accept "certain special wastes" into its landfill. (R. p. 276). Further, the August 2015 engineering report from MRR's consultant included disposal of "special wastes" and was incorporated into the Permit Modification. (R. p. 468-69). Finally, the 2008 Permit contained a clause prohibiting all other wastes, and the Permit Modification contained no such clause, instead allowing any other wastes approved by DHEC. (R. p. 468).

- Coleman admitted that the Permit Modification was a "design change." (R. p. 245, lines 3-16).
- Coleman admitted that when DHEC determines a proposed landfill change to be a "major modification," that "we would have followed our normal process, which would include [notice to] adjacent owners, concerned parties, local governments." (R. p. 246, lines 13-22).

Mr. Coleman also engaged in the following exchange, which Appellant takes as equivalent to a direct admission that the Permit Modification is "major":

Q. In answers to Ms. King's questions one time today, you said this was a "new design for the landfill." Is that a fair statement?

A. Yeah, I mean it is.

Q. Okay.

A. It was a new design.

Q. And I wrote down also a quote earlier today when your answer to Ms. King's questions that this was "essentially the same design as a Class Three."

A. Yes, I recall saying that, yes.

Q. Alright. And that is basically the change from the '08 to the 2015 modification was essentially the same design as a Class Three. Is that right?

A. Yes, uh-huh.

Q. So in other words, what we're doing is changing a Class Two by adding Class Three features. It became essentially the same design as a Class Three.

(objection)

A. The design became very similar to a Class Three, yes.

(R. p. 249, line 25-p. 251, line 7).

In addition to his testimony bearing on DHEC's misclassification of the Permit Modification, Coleman offered testimony regarding the waste that would now be disposed in MRR's landfill. Such

testimony illuminates the purpose behind DHEC and MRR's actions and explains why issuance of the Permit Modification without any notice to the public was an egregious breach:

- Coleman admitted that C&D landfills are not required to have liners. (R. p. 251).
- Coleman admitted that MRR's landfill would be the first commercial Class Two landfill in South Carolina to have a liner. (R. p. 286).
- Coleman admitted that he knew MRR was considering placing coal ash into this landfill when it applied for the Permit Modification. (R. p. 282).
- Coleman admitted that coal ash would not have been allowed or accepted under the 2008 Permit. (R. p. 288).
- Coleman admitted that MRR's Permit Modification application asks to accept "certain special wastes" into this landfill, even though such wastes, by statute, must be placed in Class Three landfills. (R. p. 276-78).
- Coleman admitted that MRR submitted stability calculations that would be appropriate for coal ash, in addition to stability calculations for C&D waste, so it was clear to DHEC that MRR was planning to put both types of waste in the modified landfill. (R. p. 282).

In short, the purpose of MRR seeking the Permit Modification was to redesign the landfill to accept coal ash, and such objective was accomplished in a manner intended to deny such information to Pickens County and the public.

Disposal of coal ash (a/k/a coal combustion residuals or CCR) has been extraordinarily controversial in recent years, especially in South Carolina. Coal ash requires special handling due to its propensity to create dust, its propensity to contain toxic substances, and its propensity to contaminate

groundwater and surface water. (R. p. 167). It is on this basis that coal ash qualifies as a "special waste" under South Carolina law, unsuitable for disposal in a Class Two landfill. (Id.). Coal ash contains toxic chemicals, such as mercury, lead, and arsenic. (R. p. 308). Coal ash is also a known carcinogen and is highly soluble in water, which causes leaching and water contamination issues for the environment when not properly protected. (R. p. 309-10). Leaching of toxic elements of coal ash would be especially problematic for a Class Two landfill because it contains domestic materials that induce low pH and low dissolved oxygen. (R. p. 310). This creates a mixture that "would inevitably generate leaching process of CCR and mobilization of toxic contaminants to landfill effluents that could be leaked to the environment." (Id.) Even the addition of a liner would not be sufficient prevent the release of coal ash into the environment from a Class Two landfill. (Id.) In addition to surface water and groundwater contamination, disposal of coal ash can also lead to tiny coal ash particles blowing up into the atmosphere, which transports to nearby populations where it can be respirated into human lungs. (R. p. 311).

In short, there are ample reasons for Pickens County and the public to have serious concern about the disposal of such waste in their community and ample reasons why the addition of such waste to a landfill originally designed to accept construction material should never have been authorized in a manner that is hidden from the public. Yet that is what DHEC accomplished in issuing the Permit Modification as "minor." Despite the fact that the Neighboring Property Owners live adjacent to, or in immediate proximity of, the landfill, and despite the fact that Pickens County owns adjacent property and has many bases upon which to be deemed an "affected party," DHEC only sent the Permit Modification to MRR and its consultants. (See R. pp. 162-63, 406-07).

Pickens County's Involvement with the Landfill Modification:

During the time that MRR was designing its modification and communicating with DHEC, MRR made direct willful misrepresentations to Pickens County and the Pickens County Planning Commission regarding the nature of the landfill facility and its operation. (R. p. 168). Mr. Dan Moore of MRR appeared before the Pickens County Planning Commission in 2015, for the purpose of securing a land use approval, and indicated that there were "no changes" from the Class Two landfill design approved in 2008. (R. p. 298). He made no mention of MRR's ongoing meetings with DHEC, the engineering reports for the Permit Modification that had already been submitted to DHEC, nor coal ash. (R. p. 298-99). Mr. Moore stated, when directly questioned about a liner, that there would be no liner required. (R. p. 299). Thus, in addition to receiving no contemporaneous notice of DHEC's permitting process, the County was prevented from learning of the Permit Modification through active misrepresentation.

Months after the Permit Modification had been issued, Pickens County finally heard that MRR might be changing the landfill design to accept coal ash. (R. p. 304, ¶6). Pickens County officials then submitted a Freedom of Information Act request and sought a meeting with DHEC in an attempt to learn what was going on with the landfill. (R. p. 304-05). On December 15, 2015, DHEC met with County officials, including Gerald Wilson, the Director of Public Works, and orally informed them that the permit had been modified four months ago. (Id.). It was after this meeting that Pickens County was provided a copy of the Permit Modification for the first time, by email. (R. p. 394, ¶21). However, Pickens County was informed directly by DHEC personnel that, because the Permit Modification was months old, there was nothing they could do and no right to appeal, because the modification decision process was already a done deal. (R. p. 121, line 16-p. 122, line 2, p. 152, lines 6-22). Further, the copy of the Permit Modification conveyed to Pickens County was incomplete in relation to the public notice requirements

dictated by DHEC's regulations, as it did not include any right to appeal language. See S.C. Reg. 61-107.19 Part I.D.2.g ("The Department's notice will include instructions on how to request a final review conference and the time frame for filing such a request.").

As Pickens County representatives were reading through the boxes of materials DHEC eventually produced through FOIA, MRR filed a lawsuit in the Court of Common Pleas against Pickens County and members of the Pickens County Planning Commission on February 1, 2016.[4] This Circuit Court case provided Pickens County with the opportunity to learn, through the deposition of Kent Coleman on March 8, 2016, that the Permit Modification was issued in violation of the law. This deposition was an important revelation for the County because DHEC admitted that the modification was actually a major modification pursuant to the laws, although it was classified as a minor modification, and that multiple levels of notice and opportunities for participation in the process would have been afforded to Pickens County if the modification were properly classified. (See R. p. 300, ¶ 10). Pickens County then sought the due process that it had been denied through the secretive and illegal process that led to the issuance of the Permit Modification, by filing a request for final review with the DHEC Board on March 23, 2016. The ALC's conclusion on the timeliness of that request is what spawned this appeal.

STANDARD OF REVIEW

Under the APA, conclusions of law are reviewed *de novo* and "the Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). In

[4] In order to defend against this lawsuit, the County hired Counsel, Gary Poliakoff, who also represented the County subsequently in the ALC.

this case, the ALC order was issued without any findings of fact because it was decided as a matter of law before discovery was conducted. Thus, this Court should review the ALC's findings *de novo*.

When considering a motion to dismiss, the burden is on the party seeking dismissal. The court must view the facts, and make all reasonable inferences, in the light most favorable to the nonmoving party. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).

A. The ALC Erred in Dismissing the County's Challenge Prior to Addressing Adequacy of Notice Provided to the County.

The ALC's dismissal of this case is based on Pickens County's purported non-compliance with the filing limitations set forth in § 44-1-60. That section covers the process and procedure through which DHEC staff decisions can be appealed through the DHEC Board and to the ALC in the form of a contested case. The ALC concluded: that Pickens County did not appeal DHEC Staff's decision on the minor permit modification to the DHEC Board within fifteen days, as required by § 44-1-60; that Pickens County's appeal to the DHEC Board was therefore invalid; and that Pickens County had therefore failed to exhaust its administrative remedies, necessitating dismissal. (R. p. 3). This rationale has numerous problems, the first of which is that the ALC failed to undertake the prerequisite analysis of whether such time limitations are applicable in this case.

The time limitations set forth in § 44-1-60 are contingent on DHEC's compliance with the preceding procedural and notice requirements in that section. In other words, DHEC must satisfy its obligations in issuing and noticing a decision under § 44-1-60, before the time limitations for challenging that decision are implicated. Our Supreme Court held exactly that, unequivocally, in S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 702 S.E.2d 246 (2010),

where the Coastal Conservation League filed for DHEC Board review under § 44-1-60 more than fifteen days after the DHEC staff decision. The Supreme Court determined that DHEC had failed to notify the Coastal Conservation League in the manner required under § 44-1-60 and that the time limitations in that section did not start to run until DHEC corrected its error.[5] Id. at 430, 702 S.E.2d at 253. The plain language of § 44-1-60 also supports such conclusion, starting with the very first provision: "**All department decisions** involving the issuance, denial, renewal, suspension, or revocation of permits ... **shall be made using the procedures set forth in this section**." (emphasis added). The procedures in § 44-1-60 particularly emphasize public notification, as reflected by the section's second provision: "The department staff **shall comply with all requirements for public notice**, receipt of public comments and public hearings **before making a department decision**." (emphasis added). S.C. Code § 44-1-60(B). Only after DHEC issues a staff decision in compliance with procedural and public notice requirements does subsection (E) dictate that the appeal of such decision to the DHEC Board must be filed within fifteen days. See § 44-1-60(E)(2).

It follows as a matter of precedent and statutory interpretation, and indeed as a matter of practical and logical necessity, that a DHEC decision issued without the appropriate public notice or procedure cannot be shielded from public challenge by the time limitation in § 44-1-60(E). To conclude otherwise

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[5] Particularly, the Supreme Court stated as follows:

> Section 44–1–60(E) requires DHEC to simultaneously send notice of its decision to the applicant, permittee, licensee, and affected persons requesting to be notified by certified mail, and the decision becomes final fifteen days after the decision has been mailed. In this case, we find that because the League was an affected person who asked to be notified, the decision did not become final until fifteen days after DHEC mailed the decision to the League.

would set up the type of perverse incentives that are implicated in this case: that is, controversial agency decisions could be protected from legal challenge through the conscious decision to provide deficient or contorted public notice. This Court has previously rejected such possibility, holding that DHEC's failure to provide proper public notice of an action supersedes and excuses a related procedural failure in challenging such action. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 143, 530 S.E.2d 643, 657 (Ct. App. 2000) ("DHEC's failure to provide adequate notice that the financial assurance regulations were still being considered excused Sierra Club from requesting a hearing [on those regulations].").

If the allegations central to Appellant's case are taken as true, then the time limitations in § 44-1-60, upon which this case was dismissed, do not apply and should not have been applied by the ALC. As explained in detail above, the public notice requirements for major landfill permit modifications differ substantially from the requirements for minor modifications. If the DHEC decision at issue in this case had been treated as a major modification, Appellant would have been entitled to multiple instances of direct written notice. Even the regulations for minor modifications, though, require some form of public notice to be published. Pickens County has alleged and submitted evidence (to the extent it could while being denied discovery) of the following: that this permit modification was actually "major"; that DHEC's decision not to treat the permit modification as "major" was clearly erroneous and was the result of questionable private meetings with MRR; that Pickens county did not receive the notifications due for a major modification; that even the notifications required for a minor modification were not followed by DHEC; and that Pickens County did not receive any notice until long after the time limitations provided in § 44-1-60 had passed. (See Statement of Facts section above). If the ALC

had applied the proper standard of review to these allegations, it would have necessarily concluded that the adequacy of public notice provided under § 44-1-60 was in dispute, so application of the time limitations in § 44-1-60 could not be resolved. In short, the ALC could not, especially at this stage, resolve timeliness under § 44-1-60 without resolving adequacy of public notice under § 44-1-60. Such conclusion is dictated by the precedent of S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control.

The ALC attempts to avoid this conclusion by relying on the fact that the County received some form of notice (the details of which are disputed) of the permit modification months after it was issued, but did not take action on that notice within the fifteen-day period prescribed by § 44-1-60. (R. p. 3). However, nothing in § 44-1-60 suggests that the fifteen-day period for appealing a DHEC staff decision begins to run upon just any form of actual notice of the decision. On the contrary, such period begins to run only after DHEC issues a staff decision in compliance with the procedural and public notice requirements of that section. See S.C. Coastal Conservation League, 390 S.C. at 430, 702 S.E.2d at 253 (starting time limitation in § 44-1-60 upon DHEC's compliance with public notice requirements).[6] If DHEC failed in its public notice obligations in relation to the permit modification, as the County has alleged and argued, it is no answer to say that the County should have known to appeal within fifteen days of getting some level of actual notice months after the improperly issued decision. The ALC explicitly concludes that regardless of whether Pickens County was "never given the notice required by regulation" and regardless of whether "DHEC improperly classified the matter as a minor

[6]Effectively, the fifteen-day window under § 44-1-60 is statutorily tolled, to begin running upon DHEC's correction of its failures in relation to public notice.

permit modification," this case is rendered untimely based on the fact that the County eventually received actual notice of the permit decision and did not take action with fifteen days. See (R. pp. 3-4). Such rationale represents a fundamental error of law.

B. The ALC Erred in Requiring Administrative Exhaustion, when Exceptions to that Doctrine Clearly Applied.

The ALC dismissed this case under the doctrine of exhaustion of administrative remedies, based on the purported untimeliness of Pickens County's request for review before the DHEC Board. As discussed thus far, the ALC made several errors in concluding that Pickens County's challenge was untimely. However, even if the ALC had rightfully determined that Pickens County's case was flawed on the basis of the exhaustion requirement, the ALC erred in failing to apply established exceptions to that requirement that are readily implicated under the circumstances at hand.

The doctrine of exhaustion of administrative remedies generally requires a person seeking relief from the action of an administrative agency to pursue all available administrative review options before seeking relief from the courts. Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994); Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000) (noting that "[e]xhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.").

However, "South Carolina, like most jurisdictions, recognizes exceptions to the exhaustion of administrative remedies requirement." Brown v. James, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct.

App. 2010). In other words, "[t]he general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." Id. One of those exceptions is when an agency is acting outside the scope of its legally defined authority. Id. ("[An] exception to the exhaustion requirement is recognized when an agency has acted outside of its authority."). Another exception is when a a case presents issues of important public interest and resolution of those issues, despite failure to exhaust administrative remedies, would promote judicial economy. Storm M.H. ex rel. McSwain v. Charleston Cty. Bd. of Trustees, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012). Both of these exceptions should have been applied under the circumstances.

i. Exhaustion is not Required Because DHEC Acted Outside the Scope of its Authority.

As creatures of statute, administrative bodies like DHEC have only the authority granted them by the legislature. See, e.g., Med. Soc'y of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 275, 513 S.E.2d 352, 355 (1999); City of Columbia v. Bd. of Health & Envtl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987). Therefore, "[a]ny action taken by DHEC outside the bounds of its statutory and regulatory authority is null and void." Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). Applying that rule to the context here, when DHEC takes action outside the scope of its legal authority, the action is invalid, and exhaustion of administrative remedies doctrine cannot serve as an obstacle to challenging such action. See Brown, 389 S.C. at 56, 697 S.E.2d at 611-12.

The provision of due process is central to a valid exercise of DHEC's legal authority. Indeed, the South Carolina Constitution mandates that administrative agencies must provide due process of law

in their permitting decisions. S.C. Constit. Art. I, Sec. 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ... and he shall have in all such instances the right to judicial review."). The core requirements of due process in this context are "**notice and an opportunity to be heard in a meaningful way**, and judicial review." Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 562 (1998). See also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)(recognizing that the due process clause requires "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). Our Supreme Court has previously held in relation to environmental groups seeking to challenge a DHEC permitting decision that: "constitutional due process provisions, apart from the APA, are sufficient to confer the rights to notice and for an opportunity to be heard." Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). In the SREPA case, the Supreme Court reversed a DHEC decision on the basis that it was issued through a process from which the environmental groups were entirely excluded, despite the groups having demonstrated a keen interest in the outcome. Id.[7]

In this case, DHEC acted outside the scope of its legal authority in denying fundamental due process to the public (particularly members of the public residing in close proximity to the landfill), the

[7]As it relates specifically to landfill permitting, the legislature has created and approved a body of laws governing DHEC that includes explicit due process and notice requirements. See South Carolina Solid Waste Policy and Management Act, S.C. Code § 44-96-10 et seq.; § 44-96-300(E) ("In making a determination under this section, the department shall comply with the notice and public hearing requirements for administrative proceedings pursuant to the South Carolina Administrative Procedures Act and with public notice requirements for permit decisions required pursuant to this chapter.").

Neighboring Property Owners, and Pickens County, none of whom received notice, newspaper publication, mailings, or any opportunity to comment or participate in DHEC's permitting process. It is undisputed that neither Pickens County nor the Neighboring Property Owners received any form of notice contemporaneous with DHEC's permitting process and that no forms of notice were provided by DHEC during that period. Under the circumstances, such absolute denial of notice and participation to parties with a history of involvement in this landfill's permitting and with a direct health and safety interest in the subject of the permit modification necessarily constitutes a denial of due process. See SREPA, 305 S.C. at 94, 406 S.E.2d at 342.

Further, DHEC's failures in complying with its own standards for notice and opportunity to be heard both accentuate the absence of due process and constitute direct instances of the agency exceeding its legal authority. The chief example in this regard is of course DHEC's classifying of the permit modification as "minor," when it is "major" by regulatory definition, and then using that classification as a basis not to follow the public notification and participation procedures in S.C. Reg. 61-107.19, Part I, D.2. It is undisputed that DHEC and MRR did not follow these procedures in considering and issuing the Permit Modification. (R. p. 113, line 12-p. 114, line 24). DHEC would have been required to follow those procedures if the Permit Modification was classified as "major." See S.C. Reg. 61-107.19, Part I, D.2.c. ("Notice of all applications submitted to the Department for the initial construction **and major modifications** of Class Two and Class Three landfills shall be published... ." (emphasis added)). DHEC has admitted that the Permit Modification meets the regulatory definition of major. (See citations to testimony of Ken Coleman, *supra*). Thus, DHEC's labeling of the Permit Modification as minor denied contemporaneous notice and participation

opportunities that were due to Pickens County and the Neighboring Property Owners by due process and by regulation, and such action was taken outside the scope of DHEC's legal authority.

Additionally, all permit modifications, whether major or minor, must meet the application requirements of S.C. Reg. 61-107.19, Part IV, H. The requirements in this section were not enforced by DHEC, including the requirement of publishing notice of the permit application. See S.C. Reg. 61-107.19, Part IV, H.3; (R. p. 408, ¶¶ 9-11). The requirements in that section for a determination of need and a consistency determination were also abandoned entirely. See S.C. Reg. 61-107.19, Part IV, H.1; (R. p. 294-95). Thus, even if the Permit Modification was properly considered a minor modification, DHEC acted outside the scope of its authority when it issued that modification without due process and without complying with its own regulatory requirements.

As lies at the root of most of the arguments in this brief, the main point here is again that DHEC cannot attempt to shield a decision that it knew would be extremely controversial by selectively applying its regulations, including those regulations on notice and opportunity to be heard. Such actions fall outside the scope of DHEC's legal authority, constitute a violation of due process, and are excepted from the requirement of administrative exhaustion.

ii. Exhaustion is not Required Because DHEC's Actions Implicate Important Public Interests of Consequence to Future Conduct.

Courts have declined to apply administrative exhaustion when the rationale for such doctrine is outweighed by the important public interests at stake in the case. In other words, when a "case presents issues of important public interest and a resolution would promote judicial economy," it is appropriate for a court to consider the case, regardless of whether all foregoing administrative remedies

have been pursued. Storm M.H. ex rel. McSwain, 400 S.C. at 487, 735 S.E.2d at 497. See also, Cabiness v. Town of James Island, 393 S.C. 176, 712 S.E.2d 416 (2011) (addressing issues in the interest of judicial economy to supply a sufficient analytical framework for future cases); Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001) (recognizing that an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest).

This case presents a classic example of the circumstances under which important public interests should not be lost to a flexible rule of policy. See Ward v. State, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000) ("The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional."). The important public interests at stake in this case are based first on the nature of waste that can now be disposed of in MRR's landfill. The 2008 landfill permit was strictly limited to construction and demolition and land-clearing debris wastes. The changes authorized by the permit modification allow "special wastes," defined by S.C. Code § 44-96-390, which are disallowed under the Pickens County Solid Waste Management Plan. "Special waste" includes coal ash (coal combustion residuals), which is significantly more dangerous and problematic for adjoining landowners, the public, and the County than the waste previously authorized for this landfill. See (R. p. 307, Report of Avner Vengosh, Ph.D.; R. p. 350, Affidavit of Shelley H. Robbins). The newly authorized waste has the potential to create serious and toxic effects from dust and ash, which can be carried by wind from transport trucks and from the landfill area to neighboring properties, and contaminate soil, surface water and groundwater, and create other problems, including property devaluation. (Id.). Under the

circumstances, the County's interests in protecting the health, safety, and overall well-being of it citizens, as well as its interests in preserving its own public authority over waste planning and land use in the county, are superior to the interests promoted by the doctrine of administrative exhaustion.

Such conclusion is apparent by comparison to the Storm M.H. ex rel. McSwain case, where the Supreme Court also applied the "public interest" exception to administrative exhaustion. That case involved a student's efforts to gain admission to a public magnet school, which served students only within Charleston County. 400 S.C. at 483, 735 S.E.2d at 494. Though the student had filed directly in circuit court, rather than pursuing the administrative steps that were available, the Supreme Court took up the case on the strength of the public interest involved. Id. at 486, 735 S.E.2d at 497. The public health and safety interests as stake in this case are akin to the public education interests implicated in Storm M.H. ex rel. McSwain. Certainly the fact that both cases involve attempted exercises of control by county entities (Pickens County and the county school board) is significant, as is the fact that the subject matter of the cases implicates areas of traditional county authority (education and land planning / waste management). In short, if the rule from Storm M.H. ex rel. McSwain is to be applied to any other set of facts, it would be difficult to find a scenario more fitting than in the case at hand.

A strong public interest is also implicated by the manner in which DHEC has carried out its decision making, so as to shield from public view and review a decision with significant public implications and interest. In this way, it is of critical importance that the lower court render a decision in this case on whether DHEC acted properly in characterizing this permit modification as "minor," so as to censure or endorse similar conduct going forward. In other words, unless it is determined as part of

this case that DHEC erred in failing to notify the public that a landfill approved for relatively innocuous waste was being modified to accept toxic coal ash, DHEC and landfill companies will remain free going forward to authorize such modifications without public knowledge and opportunity for challenge. Because other instances of such permit modifications would likely evade review, the public interest in considering the merits of this case is strong.

Pickens County and the Neighboring Property Owners did not fail to exhaust administrative remedies, because no such remedies were available at the point in time when they finally received notice of the permit modification. However, even applying administrative exhaustion as the ALC did, exceptions to such doctrine clearly apply.

C. The ALC Erred in its Application of the Appropriate Standard of Review.

Where the ALC based its dismissal on evidence outside of the pleadings; effectively converted the proceedings to summary judgment, without fair apprisal; denied Pickens County the discovery it needed to defend against evidence outside of the pleadings; and resolved contested evidence outside of the pleadings in favor of Respondents: the ALC's order cannot stand.

Based on the nature of the ALC's analysis, its ruling cannot rightfully be considered as one under Rule 12.[8] In considering a motion to dismiss under Rule 12(b)(6), "the trial court must base its

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[8]While the Respondents classified their motions to dismiss as based on lack of subject matter jurisdiction under Rule 12(b)(1), Appellant has previously explained (and the ALC confirmed) that such classification was inaccurate. See Ward, 343 S.C. at 17 n. 5, 538 S.E.2d at 246 n. 5 ("The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional."(citations omitted)); Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 100, 674 S.E.2d 524, 529 (Ct. App. 2009) ("a failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction."). The motions to dismiss are properly considered as having been brought under Rule 12(b)(6). See Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 101, 674 S.E.2d 524, 529 (Ct. App. 2009) ("The South

ruling solely on allegations set forth in the complaint." Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Id. The ALC plainly did not apply a Rule 12(b)(6) standard of review. If it had, it would have necessarily accepted Pickens County's allegations that the permit modification is "major," that the County did not receive notice due for a "major" modification, and that the purpose of mischaracterizing the modification was to avoid such public notice. See (R. pp. 162-73, Pickens County's Request for Final Review). Pickens County's pleadings say nothing of the subsequent "actual notice," received months after the Permit Modification, upon which the ALC relied in finding failure to exhaust administrative remedies. All such information came from extra-pleading evidence submitted by the Respondents, and the ALC weighed that evidence against the aforementioned allegations submitted by Pickens County. In doing so, the ALC converted the Respondents' motions to dismiss into summary judgment proceedings. See, e.g., Brown, 389 S.C. at 47, 697 S.E.2d at 607 (The court "effectively treated James' Rule 12(b)(6) motion to dismiss as a Rule 56 motion for summary judgment as it based its ruling on allegations and information set forth outside the complaint."); Baird v. Charleston Cty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) ("the trial court ruled that it must convert them to motions for summary judgment since matters outside the pleadings were submitted by both parties and not excluded by it at the hearing.").

Carolina Supreme Court has indicated that dismissal may be proper under Rule 12(b)(6), SCRP, for failure to state a claim where the opposing party is required to exhaust its administrative remedies as a matter of law, but failed to do so.").

The ALC's consideration of evidence beyond the pleadings and conversion of the proceedings to summary judgment were improper under the circumstances, especially given that Pickens County was simultaneously denied the right to undertake discovery. After Pickens County served discovery requests and deposition notices, MRR moved to stay all discovery during the pendency of the motions to dismiss. Pickens County opposed such motion on the basis that the County "does require some discovery related to issues in the pending Motions to Dismiss." (R. p. 835). The County pointed to specific issues upon which discovery was necessary for the ALC to properly resolve the question of administrative exhaustion, including: whether the permit modification was minor or major, the nature of notice required for such modification, and the nature of notice provided for such modification. (R. p. 836). Basically, the County previewed all the same arguments made herein as to why timeliness and exhaustion could not be decided without resolution of those preceding issues. However, the ALC agreed to stay discovery, and Pickens County had to defend the Respondents' motions without any discovery. (R. p. 615-16).

The ALC erred in undertaking summary judgment proceedings before allowing Pickens County to conduct discovery. "**[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.**" Doe ex rel. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). See also Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) ("Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'"). The ALC's actions fly in the face of this unequivocal, well-established precedent, in that the court ignored Pickens County's explicit pleas that if evidence beyond the pleadings were to be considered, discovery was

necessary. The ALC also failed in alerting the parties that it would consider affidavits and extra-pleading evidence, hearing the 12(b)(6) motions as motions for summary judgment. Our appellate courts have held repeatedly that a trial court's failure to "fairly apprise" a plaintiff that the court would consider material outside the pleadings in resolving a motion to dismiss is grounds for reversal. See, e.g., Baird, 333 S.C. at 528, 511 S.E.2d at 74 ("The first indication that County's 12(b)(6) motions would be converted to summary judgment motions was the trial court's order of dismissal. Under these facts, the trial court erred in converting County's 12(b)(6) motions into motions for summary judgment."); Higgins v. MUSC, 326 S.C. 592, 486 S.E.2d 269 (Ct.App.1997) (holding that the plaintiffs had not been "fairly apprised" that the trial court would consider material outside the pleadings in support of the defendant's 12(b)(6) motion).[9]

Pickens County has been significantly prejudiced by the manner in which the ALC considered evidence in relation to the motions to dismiss, including in that: the ALC considered evidence outside of the pleadings, as submitted by Respondents; the ALC simultaneously denied the County the discovery they needed to counter Respondents' evidence; and the ALC found in favor of Respondents' evidence over the County's contradictory allegations.

D. DHEC and MRR are Estopped from Reliance Upon the Administrative Exhaustion Requirement.

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[9]Proper application of the standard of review in these circumstances is reflected in this Court's opinion in Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010). In that case, the defendant filed "a motion to dismiss **under Rule 12(b)(6)**, SCRCP, or in the alternative, a motion for summary judgment under Rule 56, SCRCP," on the basis that the plaintiff had not exhausted her administrative remedies. 389 S.C. 41, 46, 697 S.E.2d 604, 607 (emphasis added). After that motion was filed, "[Plaintiff] filed a request for production of documents and requests to admit ... [and Defendant] answered the requests." Id. This Court then applied the standard of review for summary judgment. Id. at 47, 697 S.E.2d at 608.

Where Pickens County's purported failure to exhaust administrative remedies is based upon misrepresentations and misinformation provided by DHEC and MRR, those parties are estopped from invoking exhaustion as a basis for dismissal.

Equitable estoppel acts a bar to a party asserting a legal claim or defense that is contrary or inconsistent with his or her prior conduct. The essential elements of equitable estoppel are as follows:

> (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts.

Strickland v. Strickland, 375 S.C. 76, 84–85, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must also show a prejudicial change of position in reliance on the conduct of the party being estopped. Id. If equitable estoppel is established, a party is estopped from asserting any claim or defense inconsistent with the false representation.

Here, DHEC made false representations to Pickens County as to the availability of administrative review and is estopped from defending this case on the basis that the County relied upon such representations. When Pickens County finally heard, months after issuance of the permit modification, that MRR might be changing its landfill design to accept coal ash, the County sought a meeting with DHEC. (R. p. 304-05). During this meeting, DHEC staff told County officials that the Permit Modification had already been issued months ago and that the administrative review process was therefore a done deal, and there was nothing the County could do about it. (R. p. 121, line 16-p. 122, line 2, p. 152, lines 6-22). Pickens County relied on that false representation and did not file an

administrative appeal upon actual notice of the permit modification. Instead, it hired counsel to defend itself against a lawsuit initiated by MRR in circuit court, and it was during discovery in that lawsuit that DHEC's misrepresentation was reevaluated. As has been covered above, DHEC has a legal obligation to accurately notify the public of its administrative processes. Here, DHEC fell well short of that obligation, actually misrepresenting the availability of administrative review, and the agency must be estopped from benefitting by such misrepresentation.

DHEC's conduct in this regard is comparable to that of the administrative agency in the Ainsworth case, in which the court rejected application of administrative exhaustion, based on the agency's misrepresentation of the availability of administrative review:

> With respect to defendant's argument that plaintiff failed to exhaust his administrative remedies before the Civil Service Commission, we think the circumstances of this case justify plaintiff's failure so that he will not be barred here. The Agency clearly defaulted in its obligation to plaintiff. **It not only failed to inform him of his appeal rights, it affirmatively misled him into believing that he had no rights by so stating in the separation notice.**

Ainsworth v. United States, 180 Ct. Cl. 166, 172 (1967) (emphasis added) (citing Cuiffo v. United States, 131 Ct. Cl. 60, 64, 137 F. Supp. 944, 946 (1955); Morelli v. United States, 161 Ct. Cl. 44 (1963)). The circumstances here are effectively identical, as should be the outcome.

For Pickens County, the false representations of DHEC were compounded by MRR, who misrepresented the fact that it was seeking to modify the landfill permit, even while it was meeting privately with DHEC for that very purpose, and despite its obligation to inform the County of such activities. As described above, during the time that MRR was designing its modification and communicating with DHEC to get approval, MRR made direct misrepresentations concerning the

landfill to Pickens County officials, for the purpose of obtaining a land use permit. MRR's representative told Pickens County Planning Commission in 2015 that there were "no changes" from the previous landfill design, that the landfill required no liner, and that any such changes would require immediate notice to the County. These representations prevented Pickens County from learning of the permit modification at issue in this case, and reliance on such representations thereby prevented the County from timely pursuing its administrative remedies. MRR is likewise estopped from benefitting by its misrepresentations. Thus, the actions of Respondents in this case are more than sufficient to trigger equitable estoppel in relation to the administrative exhaustion requirement.

F. The Fifteen-day Limitation Period for Appealing the Permit Modification is Equitably Tolled.

Equitable principles also dictate that the fifteen-day time limitation for challenging the permit modification to the DHEC Board under § 44-1-60 has been tolled since issuance of such decision. Tolling of a statute of limitations or similar deadline "is analogous to a clock stopping, then restarting. [It] may either temporarily suspend the running of the limitations period or delay the start of the limitations period." Hooper v. Ebenezer Senior Services & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). The doctrine of equitable tolling provides an independent basis upon which the ALC should have concluded that Pickens County's appeal to the DHEC Board was timely and that the County had therefore fully exhausted its administrative remedies.

"Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." Id. "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period **to ensure**

fundamental practicality and fairness." Id. (internal quotation marks omitted) (emphasis added). In other words, equitable tolling is applied "in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." Id. (internal citations and quotation marks omitted). This equitable power of the courts is well-recognized in South Carolina to "provide relief when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of another." Id. at 117, 687 S.E.2d at 33.

There exists no exclusive list of the circumstances under which equitable tolling is appropriate. Id. at 116, 687 S.E.2d at 33. However, two of the circumstances often listed as a basis for such tolling are strongly implicated here: (1) "where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim" and (2) "where extraordinary circumstances outside the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim." Id. (internal quotation marks omitted).

At this point, the circumstances that justify equitable tolling have been stated repeatedly, and Appellant will not restate then again here in full. Suffice it to say that without tolling, or the application of an exception to exhaustion of remedies as discussed above, Pickens County will not get a hearing of this case on the merits challenging the issuance of the permit modification. That would be an unjust result because Appellant was purposely and improperly kept out of the process and then misled about the nature of such process. Appellant relied on DHEC's rules and regulations to protect its rights, expecting to be notified of any significant changes to the landfill, in the same way it had been notified for the issuance of the 2008 Permit. Appellant also relied on the statements of DHEC and MRR, which caused delay in learning of the permit modification and in filing the request for DHEC Board review.

Appellant is merely seeking due process on a permit decision that has the potential to impact its property, health, environment, and community significantly. Therefore, to the extent the deadline in § 44-1-60 applies in light of all of the preceding arguments, in should be equitably tolled in the interest of justice, only to begin running upon DHEC's provision of proper notification of the permit modification and the administrative appeal process.[10]

G. The ALC Erred in Dismissing the County's Challenge Prior to Addressing Intervention.

Without addressing the Neighboring Property Owners' motion to intervene, the ALC dismissed this case under a rationale that would not have applied to those individuals. Just like Pickens County, the Neighboring Property Owners were provided no notice as a part of DHEC's permitting process.[11] Additionally, the only evidence before the ALC suggested that the Neighboring Property Owners acted promptly upon receiving first actual notice, moving to intervene in Pickens County's case that was then pending at the ALC. Nevertheless, the Neighboring Property Owners now too have effectively been

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[10]Our Supreme Court effectively applied equitable tolling, though it did not use that terminology, in S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, under circumstances comparable to those at hand. The Supreme Court determined that DHEC had failed to notify the Coastal Conservation League in the manner required under § 44-1-60 and that the time limitations in that section did not start to run until DHEC corrected its error. 390 S.C. 418, 702 S.E.2d 246 (2010).

[11]All of the Neighboring Property Owners are adjoining landowners owning real property in extremely close proximity to the landfill in question. (R. pp. 397-417, Affidavits of Neighboring Property Owners). Just like Pickens County, the Neighboring Property Owners, by virtue of their proximity, would have been entitled to multiple direct notifications, had DHEC treated this permit modification as "major." However, the Neighboring Property Owners were never provided notice related to the Permit Modification from DHEC or MRR. See, e.g., (R. pp. 415-16, Affidavit of Randall King, ¶¶ 7-11)

dismissed on the basis of timeliness. The ALC erred in failing to take up intervention of these individuals who were independently entitled to review of DHEC's permitting decision.

As an initial matter, the ALC had no legal basis to simply decline action on the Neighboring Property Owners' motion to intervene. "While a court has some discretion in the manner in which it rules on motions, the court commits a clear abuse of discretion when it refuses to rule on pending motions." State ex rel. Rodriguez, 196 S.W.3d 454, 459 (Tex. App. 2006). On top of this general principle, the plain language of the Administrative Law Court Rules also strongly suggests that a court must take up and must grant intervention whenever a qualified intervenor so moves. Indeed, ALC Rule 2(H) provides that a person "properly seeking and entitled to be admitted as a party" is already a "party" to the contested case. The ALC rule on intervention provides that "[a]ny **person may intervene** in any pending contested case hearing **upon a showing**" of certain qualification. SCALCR Rule 20(B) (emphasis added). Nothing about these rules suggests that a group of people with a significant personal stake in litigation, and properly moving to intervene in that litigation, can be deferred or ignored as persona non grata. Indeed, South Carolina courts have found that movants are entitled to have intervention considered (and granted) even after completion of trial. See, e.g., Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). The ALC's failure to issue any decision on intervention is a serious legal error.

Such error is prejudicial in this context because the Neighboring Property Owners have a different basis for asserting timeliness than does Pickens County. In other words, even if the ALC was correct in its rationale for dismissing Pickens County on timeliness (it was not), the Neighboring Property Owners' claims could not have dismissed been under that rationale. In dismissing Pickens

County, the ALC essentially holds that any failure on the part of DHEC to provide the required notice of its Permit Modification is irrelevant because "Pickens County received actual notice on multiple occasions and still failed to take prompt action." (R. p. 4). The "actual notice" referred to by the ALC occurred in a meeting between Pickens County officials and DHEC, four months after the permit modification was issued, wherein DHEC gave oral information about the modification, and then in a subsequent email from DHEC to one of those officials, which contained the permit modification. Of course, the Neighboring Property Owners did not receive either of these forms of notice, nor any other "actual notice" that the ALC might have (improperly) found to trigger the time limitations in § 44-1-60. See, e.g., (R. p. 402, Affidavit of Matthew Stone, ¶ 14 ("[T]o this day, [I have] never been furnished with any Notice by mail, nor any newspaper Notice, nor any information by DHEC or MRR apprising [me] of the proposed Modification, nor any action having been taken thereon, nor any opportunity for review, comment, Public Hearing, appeal or request for review.")). The ALC had no basis to conclude that the Neighboring Property Owners' challenges to the permit modification were untimely, even under the flawed logic applied to Pickens County. In failing to even get to that question, the ALC neglected an inquiry that was necessary and material to its dismissal analysis.

i. Pickens County is Entitled to Advance this Argument on Appeal.

Under the circumstances presented, Pickens County is entitled to argue that the Neighboring Property Owners' motion to intervene should have been considered, even though the Neighboring Property Owners, by order of this Court, are not parties to this appeal.

First of all, unless Pickens County is allowed to advance this argument, this significant oversight and error by the ALC will evade review completely. By issuing no decision on the Neighboring

Property Owners' motion whatsoever, not only did the ALC thwart continuation of this underlying case on the merits, but it also frustrated the Neighboring Property Owners' appeal rights. The Neighboring Property Owners were never formally denied intervention, so they have no denial order to independently appeal. This Court previously held exactly that in response to the Neighboring Property Owners' efforts to join this appeal. Yet, the Neighboring Property Owners' ability to challenge this project in which they have a significant personal stake has been totally eliminated based on the actions and inactions of the ALC, and this appeal is the sole opportunity for that error to be remedied. Under the circumstances, if Pickens County is not allowed to advance the argument that intervention should have been decided, that issue will entirely evade review, and the ALC's decision to simply ignore the question of intervention will receive the Court's implied imprimatur.

The relationship between the County, as Appellant, and the Neighboring Property Owners, as residents of the County, also counsels in favor of the County's ability to advance this argument. The County argued repeatedly before the ALC that it was appearing on behalf of the citizens of Pickens County and particularly on behalf of landowners adjoining the proposed landfill. (R. p. 619). The County advanced arguments specific to the Neighboring Property Owners on their behalf, noting that "[a]ll of these parties wish to have Pickens County appear and advocate on their behalf." Id. The County likewise argued that it "has standing to bring this action on behalf of the Public, all adjoining landowners, and the County itself." (R. p. 625). Further, and perhaps most significantly, when the Neighboring Property Owners moved to intervene in the ALC proceedings, that motion was termed as a request "to have Pickens County appear in their behalf and represent and advance their interests in this matter. (R. p. 709). The Motion was filed by the attorneys for Pickens County. (R. pp. 710-11).

Pickens County had a direct stake and direct involvement in the Neighboring Property Owners' efforts to intervene, as well as a proxy relationship as the municipal body in which the Neighboring Property Owners reside, and the County is therefore entitled to argue that intervention should have at least been addressed prior to dismissal.

ii. ALC's Error is not Saved by Jurisdictional Issues in the Underlying Case.

Respondents have previously argued that the Neighboring Property Owners' motion to intervene was moot, because the ALC lacked subject matter jurisdiction over the case. However, the ALC is quite clear that it does have subject matter jurisdiction over the case and that its dismissal is based on the particularities of Pickens County's compliance (or non-compliance, as the ALC concludes) with the procedural requirements of § 44-1-60.[12] The ALC's holding in this regard is consistent with well-established state precedent. See Ward v. State, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000) ("The doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional."(citations omitted)). As explained herein, the basis upon which the ALC determined that

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[12]The Order specifically states:

> Both respondents have framed portions of their arguments using the term subject-matter jurisdiction. As a preliminary matter, **the Court notes that it has subject-matter jurisdiction over this case**. ... Section 44-1-60 provides that the ALC hears contested cases stemming from final DHEC decisions relating to permits. Thus, the Court has the power to hear this type of case. In addition to providing subject-matter jurisdiction over the case, section 44-1-60 also sets forth the procedural requirements for bringing a case contesting a DHEC agency decision.

(R. p. 1 (emphasis added)). It is Pickens County's failure of the procedural requirements, not the jurisdictional requirements, upon which the ALC bases dismissal.

Pickens County failed to comply with the procedural requirements of § 44-1-60 does not apply to the Neighboring Property Owners. Had the ALC taken up intervention before dismissal, the purported procedural failings of Pickens County would not have been a basis for dismissal of the entire case, much less a basis for loss of jurisdiction over the entire case.

III. CONCLUSION

For all of these reasons, the Appellant asks this Court to overturn the order of the ALC dismissing this case. Appellant seeks remand to the ALC for full discovery and a hearing on the merits of the Permit Modification for this project.

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Respectfully submitted,

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