THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2020-000448

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S.C. SUPREME COURT

Pickens County, ...Respondent,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner MRR Pickens, LLC hereby certifies that a timely Petition for Rehearing was made to the Court of Appeals on January 23, 2020, which the Court of Appeals finally ruled upon and denied on February 14, 2020.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err as a matter of law and in contravention of the doctrine of exhaustion of remedies in concluding that the County's request for review was timely under S.C. Code Ann. § 44-1-60(E)(2) when the County indisputably filed its request 99 days after it received actual notice of the permit modification?

II. Did the Court of Appeals exceed the scope of its review by invading the province of the fact finder, substituting its contrary view of the unappealed findings of the ALC, and making *de novo* findings of fact and conclusions of law beyond the narrow, threshold question of the timeliness of the County's action, all without factual basis in the record or based on an incomplete record, regarding issues that were neither raised to and nor ruled upon by the ALC, and which pertain to the merits of the underlying dispute?

III. Assuming that the ancillary factual and legal questions reached *de novo* by the Court of Appeals are relevant to the sole question of timeliness, did the Court of Appeals err as a matter of law in not remanding this matter to the ALC?

IV. Assuming that the ancillary factual and legal questions reached *de novo* by the Court of Appeals are relevant to the sole question of timeliness, in making its *de novo* findings of fact and conclusions of law, did the Court of Appeals further err in failing to defer to the interpretation by DHEC of its regulations with respect to an issue that is inherently discretionary in nature?

V. Does the Court of Appeals misapprehend the practice and procedure in the ALC with respect to what constitutes "pleadings" of the parties available for consideration in a deciding a motion to dismiss?

INTRODUCTION

This petition concerns the ability of courts sitting in appellate review to disturb the finality of the agency decision-making process by giving imprimatur to untimely, post hoc reviews of final decisions. The opinion of the Court of Appeals (Opinion No. 5707, filed January 8, 2020, "Opinion") does substantial damage to this Court's precedent on, and elevates form over substance in the review of cases involving, actual notice, exhaustion of remedies, and agency deference and discretion. The Opinion represents an extraordinary departure from established practices and procedures for a court sitting in appellate review of a final agency decision and therefore warrants this Court's review under Rule 242, of the South Carolina Appellate Court Rules (SCACR).

The sole issue before the Court of Appeals was whether substantial evidence supported the dismissal of a contested case based on the discrete issue of the timeliness of the challenge to the minor modification of a permit, which challenge was instituted well beyond the statutorily-defined timeline and procedures for doing so. However, the Opinion neither cited to nor applied the appropriate standard of review to this administrative challenge. Rather than adhere to its appellate role, the Court of Appeals disregarded undisputed and unchallenged findings of fact by the Administrative Law Court ("ALC") in favor of making *de novo* findings of fact and law regarding issues the ALC expressly declined to reach. These *de novo* findings went well beyond the limited timeliness issue before the court and instead reached the merits of the case on an incomplete and undeveloped record. The Opinion erred in failing to apply the appropriate standard of review, it erred in making *de novo* findings of fact, it erred in reaching the merits of issues not properly before it, it erred in its application of the law and this Court's precedent, and it erred in failing to defer to the interpretation and discretion of the agency charged with implementing the applicable regulations. For all of these reasons, certiorari of the Opinion by this Court is warranted.

STATEMENT OF THE CASE

Petitioner South Carolina Department of Health and Environmental Control ("DHEC") issued Permit LF2-00003 ("Permit") to Petitioner MRR Pickens, LLC ("MRR") (collectively, "Petitioners") for the construction of a Class 2 landfill on November 3, 2008. **(R. pp. 381-86)** The landfill remains unconstructed to this day. **(R. pp. 100-101)** On March 30, 2015, MRR sought a minor modification to the landfill permit to allow it the option of installing a liner and associated leachate collection system. **(R. pp. 32-38, 465)** DHEC staff thereafter issued a minor modification of the Permit on August 10, 2015 ("Minor Modification"). **(R. pp. 32-38)** No timely challenge to the Minor Modification was instituted and 226 days after the Minor Modification was issued, on March 23, 2016, Respondent Pickens County ("County") filed a request for final review of the Minor Modification with the DHEC Board. **(R. pp. 162-73)** The DHEC Board denied the request for review as untimely on April 21, 2016. **(R. pp. 160-61)**

The County then filed a Request for Contested Case Hearing before the ALC on May 19, 2016. **(R. p. 159)** At the direction of the ALC, each of the parties filed and served prehearing statements on July 5, 2016. **(R. pp. 14-46)** Thereafter, MRR and DHEC each filed motions to dismiss the contested case on July 28 and July 29, 2016, respectively. **(R. pp. 174-91, 447-598)** The primary basis for dismissal was that the County's request for review to the DHEC Board was untimely, and thus the County had failed to exhaust its administrative remedies and the ALC lacked jurisdiction to hear the contested case. The ALC held a hearing on these motions on December 2, 2016. **(R. pp. 47-158)** By written order dated December 12, 2016, the ALC granted Petitioners' motions, holding the County failed to timely fulfill the procedural requirements for bringing a contested case before the ALC. **(R. pp. 1-5)**

On January 11, 2017, the County filed a Notice of Appeal with the Court of Appeals. The

Court of Appeals held oral argument on May 6, 2019, and by published opinion, reversed the ALC's dismissal on January 8, 2020. Petitioners filed a timely Petition for Rehearing on January 23, 2020, which the Court of Appeals denied on February 14, 2020. Petitioners thereafter filed this timely Petition for Writ of Certiorari with this Court.[1]

STATEMENT OF FACTS

I. MRR's Permit and Minor Modification to the Permit for the Highway 93 Landfill.

On November 3, 2008, DHEC issued the Permit to MRR to construct and operate a Class 2 landfill on property located at 2180 Greenville Highway, Liberty, South Carolina, Pickens County (the "Highway 93 Landfill"). **(R. pp. 381-86)** Prior to issuing the Permit, DHEC publicly noticed the agency decision and sent written notice to neighboring landowners and the County. **(R. pp. 653-67)** The County did not object or otherwise contest the Permit, and, importantly, did not request DHEC provide notification of any subsequent modifications to the Permit or to otherwise be treated as an "affected party." **(R. pp. 472-73, 501 ¶ 4)**

On March 30, 2015, MRR applied for a modification to the Permit for the option to install a liner and associated leachate collection system. **(R. pp. 32-38, 465)** These modifications would add greater environmental protection for the Highway 93 Landfill, once constructed. **(R. pp. 696, line 17-p. 697, line 23)** The faux controversy surrounding this Minor Modification stems directly from the County's abject misrepresentation to the ALC and the Court of Appeals that this permit modification would allow MRR to accept coal ash at the Highway 93 Landfill. In all likelihood, the Court of Appeals' misapprehension of the coal ash issue resulted in the Opinion's disregard of

[1] Under Order No. 2020-03-20-01 regarding the Operation of the Appellate Court During the Coronavirus Emergency, this Court suspended the normal procedure for compiling and filing an Appendix under Rule 242, SCACR. Where necessary to refer to documents that would ordinarily be included in the Appendix, *e.g.* the Opinion, the Petition for Rehearing, or the parties' briefs, this Petition will list the name of the document and specific page number(s) for reference.

the applicable standard of review in order to reach *de novo* determinations on the merits the underlying contested case. **Therefore, it is important that the Court understands at the outset the Minor Modification of the Permit has nothing to do with coal ash.** The Permit, as originally issued in 2008, and which the County concedes is still valid, would allow for the receipt of coal ash, *if MRR obtains separate approval from DHEC*. **(R. p. 695, line 24-696, line 16)** MRR would need this same approval even with the Minor Modification is affirmed. **(R. p. 478; p. 698, line 25-p. 699, line 6)** To date, MRR has neither sought nor obtained that approval. **(R. p. 698, lines 18-24)** Critically, construction of the landfill has not even started, so the misleading suggestions by the County—accepted by the Court of Appeals—that this as-of-yet unconstructed landfill is "on the verge of receiving thousands of tons of coal ash," **(R. p. 124, lines 1-4; p. 153, lines 7-11)**, are simply false, and constitute a transparent attempt to make this case controversial, when it is not.

The modifications sought by MRR do not, in and of themselves, allow the landfill to accept additional categories of waste or an increased volume of waste, including coal ash. **(R. p. 696, line 21-p. 697, line 18)** The modifications sought by MRR do not change the Highway 93 Landfill from a Class 2 to a Class 3 landfill. **(R. p. 476)** The liner simply is a voluntary upgrade. **(R. p. 476)** Perhaps unsurprisingly, DHEC did not identify a reason why a request to add greater environmental protection to a Class 2 landfill, which again has not been constructed, would be controversial or warrant denial. **(R. p. 693, lines 13-22)**

On August 10, 2015, after determining the modification to install a liner to be minor, DHEC staff issued the Minor Modification. **(R. pp. 32-38)** It mailed the Minor Modification to MRR the same day. **(R. p. 32)** Prior to issuing its decision, DHEC did not publicly notice or provide a comment period on its decision because DHEC interpreted its regulations in its discretion, as it is charged by law to do, to provide that MRR's requested modification qualified as "minor" within

S.C. Code Reg. 61-107.19, Part I, B. 48a. **(R. p. 472)** DHEC explained that the addition of a liner and associated leachate collection system under these circumstances qualified as a minor modification because it was an environmental upgrade, it would not substantially change the operations of the landfill (once constructed), it would not allow the facility to accept non-Class 2 (*i.e.*, Class 3) waste, it would not allow the facility to accept additional quantities of waste, and the landfill remains a Class 2 facility. **(R. p. 476)** As the County did not request any further notifications regarding the Permit and be treated as an "affected party," DHEC did not mail a copy of the Minor Modification to the County on August 10, 2015.

II. The County's knowledge of and belated challenge to the Minor Modification.

The County nevertheless obtained actual knowledge of the Minor Modification as early as December 2015 and, at the latest, in January of 2016, and used the Minor Modification against MRR in separate litigation in February 2016. These facts are not in dispute:

- On December 15, 2015, DHEC staff met with representatives from the County and discussed the Minor Modification "at length" **(R. pp. 501-02 ¶ 5; 505 ¶ 6)**;
- On January 11, 2016, DHEC e-mailed the County a copy of the Minor Modification **(R. p. 509)**;
- On January 11, 2016, the County issued a Land Use Approval Termination Letter to MRR confirming its knowledge and receipt of the Minor Modification **(R. pp. 511-12)**;
- On February 17, 2016, Gerald Wilson, an employee of the County, signed an affidavit attesting that he was aware of the Minor Modification **(R. pp. 504-07)**; and
- On February 18, 2016, the County attached a copy of the Minor Modification as an exhibit to a brief submitted to the circuit court in litigation stemming from the County's Land Use Approval Terminal Letter **(R. p. 525)**.

III. The County's failure to exhaust its administrative remedies before commencing an untimely and improper contested case proceeding.

Despite its actual knowledge and use of the Minor Modification, the County did not file its request for review with the DHEC Board until March 23, 2016. **(R. pp. 162-73)** This was 226 days after DHEC staff issued the Minor Modification, 99 days after the County received actual

notice of it, 72 days after it received a copy of it, 72 days after it used the modification to terminate MRR's ability to begin construction on the landfill, 35 days after former County Administrator signed an affidavit admitting the County's knowledge of the Minor Modification, and 34 days after the County submitted the Minor Modification in other court proceedings.

DHEC staff issued a recommendation that the Department deny the request for review as untimely because the County did not file it within the 15-day window imposed by § 44-1-60(E)(2). **(R. pp. 472-502)** The staff memorandum explained that "the Department determined that the application met the regulatory definition of a minor permit modification" and as a result "a public notice and comment period was not required prior to issuance of the permit modification by the Department." **(R. p. 472)** The DHEC Board denied the request for review on April 21, 2016. **(R. pp. 160-61)** The County thereafter commenced this contested case nearly four years ago on May 19, 2016. **(R. p. 159)** Petitioners each moved to dismiss the County's Request for Contested Case Proceeding on the narrow ground that the County's request for review was untimely, meaning both that the County failed to exhaust its administrative remedies and that the ALC was deprived of jurisdiction to hear the matter. **(R. pp. 174-91, 447-598)** During the hearing on Petitioners' motions, the ALC admonished the parties against presenting evidence and arguments related to the merits of the County's underlying claim that the modification was major and thus, notice was required. **(R. p. 127, lines 13-22)**

Following oral argument, the ALC granted Petitioners' motions. The ALC's order was appropriately limited to the discrete issues presented. In pertinent part, the ALC held as follows:

- "[The County] was given various forms of notice over a period of months. However, [the County] still waited months before filing a request for review." **(R. p. 3)**
- "In part, the County argues that it did not have the opportunity to take action because DHEC improperly classified the matter as a minor permit modification, which exempted the Department from the public notice and comment procedure followed for major

modifications and new constructions. Whether the Department improperly classified the modification, and whether it should have granted the modification, is a matter that can only be decided in a hearing on the merits of this case. However, the matter currently before the Court is [Petitioners'] motions to dismiss this case on procedural grounds." **(R. pp. 3-4)**

- "[The County] also argues that DHEC's failure to comply with the notice requirements in the regulation is the reason it filed the request for review months late. However, this argument is foreclosed by the fact that Petitioner received actual notice on multiple occasions and still failed to take prompt action." **(R. p. 4)**
- "Using the last possible date of notice still renders [the County's] request untimely." **(R. p. 4)**
- Equitable tolling is inapplicable because "the County had actual notice of the decision made by DHEC, but failed to pursue the available administrative remedies in a timely fashion, and has not stated a legally valid or compelling reason for its failure." **(R. p. 4)**

The ALC emphasized both at hearing and in its resulting Order the fact the County gave no legitimate reason for not filing its request for final review with the DHEC Board within 15-days of receiving actual notice of the Minor Modification. **(R. pp. 4, 122, 133-35, 140)** It made no other findings of fact. The ALC consequently dismissed the contested case because the County failed to file its request for review within 15 days as required by S.C. Code Ann. § 44-1-60(E)(2). **(R. p. 4)**

IV. *De novo* findings of fact and other errors of law in the Opinion.

The County thereafter appealed the ALC's dismissal to the Court of Appeals. The Court of Appeals reversed primarily based on its conclusion that the time to file a request for review does not begin running "upon a party's simply learning of a permit action,"[2] but instead "begins to run only after DHEC issues a staff decision in compliance with applicable statutory and regulatory notice safeguards." Opinion at 13.

According to the Court of Appeals, resolution of that question hinges on whether DHEC's modification to the permit was "minor" or "major," a question the ALC specifically did not answer.

[2] Of course, the County here did not "simply learn[] of a permit action." It had an in-depth discussion with DHEC regarding the Minor Modification, obtained a copy of it directly from DHEC, and used it to take adverse action against MRR in separate litigation, all well in advance of filing the request for review.

See id. Rather than adhere to the standard of determining whether substantial evidence exists to support the findings of the ALC or, in the alternative, remand for further consideration and fact finding on this issue, the Court of Appeals made *de novo* findings of fact that largely adopted, in full, the County's version of facts. Critically, these were findings on issues that the ALC expressly declined to reach, involved hotly disputed issues which MRR and DHEC did not have a full opportunity to rebut under the posture of this case, were based on an incomplete record, and in substantial part were based solely on arguments of the County's counsel, not actual evidence. These findings include those related to contested issues and allegations in an ongoing legal dispute in a circuit court case that has not been tried and in which the evidence has not been presented for final resolution.[3] Finally, these *de novo* findings by the Court of Appeals, in addition to being incorrect, are also irrelevant due to the County's actual knowledge of the Minor Modification. The Court of Appeals' actions and findings in this regard were improper, deny MRR due process in this and the other litigation, and should be vacated in full.

Lastly, the Court of Appeals further held that the ALC "improperly accepted evidence from outside of the pleadings." Op. at 14. The court did not identify what evidence the ALC "improperly accepted" aside from a generalized statement that "[t]he ALC failed to notify the parties that it would consider affidavits and extra-pleading evidence," *id.*, and incorrectly framed Petitioners' motions to dismiss as motions under Rule 12(b)(6), SCRCP, that were improperly converted to summary judgment. As evidenced by the record, Petitioners actually sought relief under Rule 12(b)(1), SCRCP, for a lack of jurisdiction based upon the timeliness of the County's request.[4]

[3] Petitioners identified other inaccurate, incomplete, and flawed *de novo* findings made by the Court of Appeals in their Petition for Rehearing, *see* Pet. for Reh'g at 4-8.

[4] The Court of Appeals itself wrongly believed this issue was, at least in part, one of subject matter jurisdiction. Opinion at 9 (citing case law regarding subject matter jurisdiction). However, the ALC clearly has subject matter jurisdiction to hear a request for contested case hearing. Instead,

SUMMARY OF ARGUMENT

This is a simple case made needlessly and unfortunately complex by the Court of Appeals. Four undisputed facts are dispositive of this matter: (1) DHEC issued the Minor Modification on August 10, 2015; (2) DHEC informed the County of the Minor Modification on December 15, 2015; (3) DHEC provided the County with a hard copy of the Minor Modification on January 11, 2016; and (4) the County did not seek review of the Minor Modification until March 23, 2016, 72 days after receiving a copy of it and 99 days after receiving actual notice. Under § 44-1-60(E)(2), the County's challenge to the Minor Modification is untimely as a matter of law.

The question of timeliness was presented to the ALC, the sole question for which the ALC received evidence and argument, and the sole question on which the ALC ruled. The Court of Appeals nevertheless went far afield and greatly exceeded its powers under the APA, S.C. Code Ann. §§ 1-23-310, *et seq*. It ruled on unnecessary issues, ruled on issues that were not preserved, failed to adhere to this Court's precedents, and set the stage for certain DHEC determinations to be challenged at any future time despite the challenger's actual notice of the decision months (or perhaps years) in the past. This judicially-created open-ended window to challenge certain DHEC permits will wreak havoc on the system and create economic uncertainty, as neither DHEC nor the permittee can ever be sure that a non-publicly noticed decision is final and free from challenge.

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the issue of the timeliness of the request implicates the validity of the ALC's exercise of its general grant of subject matter jurisdiction over contested case hearings. *See S.C. Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 350, 675 S.E.2d 756, 759 (Ct. App. 2009) ("[W]hen there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.") (quoting *Piana v. Piana*, 239 S.C. 367, 372, 123 S.E.2d 297, 299 (1961)). Even so, "[t]he proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, rather than motion for summary judgment pursuant to Rule 56, SCRCP." *Woodard v. Westvaco Corp.*, 315 S.C. 329, 332, 433 S.E.2d 890, 891-92 (Ct. App. 1993). It was the Court of Appeals which erred in viewing this through the lens of summary judgment, and the ALC committed no error if it considered the unidentified evidence from the parties' "pleadings," as discussed *infra*.

This could not have been the intent of the legislature, which expressly allowed DHEC permits to be issued absent public notice. This Court should review and reverse the Opinion.

ARGUMENT

I. The Court of Appeals erred in looking beyond the County's undisputed actual knowledge of the Minor Modification of the Permit in determining whether the County's challenge was timely.

The sole issue before the Court of Appeals was whether substantial evidence supported the ALC's findings and conclusions that the County's request for final review of the Minor Modification by the DHEC Board was untimely based on the undisputed evidence of the County's receipt of actual notice of the modification decision and the date upon which it first instituted this challenge. The Court of Appeals did not cite or apply this standard of review, which failure alone constitutes reversible error under the precedent of this Court. *See State v. Moore*, 415 S.C. 245, 253, 781 S.E.2d 897, 901 (2016) (finding reversible error in circumstances in which "while the court of appeals' panel majority properly set forth the standard of review, it failed to follow the standard of review"). Indeed, in view the uncontested dates governing the County's actual notice and the institution of this challenge, this matter can and should be resolved without any reference to the method or level of notice required. Based upon the undisputed facts before the ALC, the County's action is untimely, even when using the last possible date upon which the County received actual notice of the Minor Modification. That should end the discussion, for this is a classic example of the old adage that the simplest answer is the best one.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If the language is plain, unambiguous, and conveys a clear and definite meaning, courts have no right to go beyond the text and import a different meaning. *Id.* The court is "confined to what the statute says" and

has "no right to modify a statute's application 'under the guise of judicial interpretation." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012). It is "improvident to engraft extra requirements to legislation." *Id.*

Here, the purpose of the notice provisions of the applicable statutory sections is the provision of actual notice. Section 44-1-60(E) is plain, unambiguous, and controls this question. It first requires that "[n]otice of the department decision must be sent by certified mail, return receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." S.C. Code Ann. § 44-1-60(E)(1). DHEC mailed the Minor Modification to MRR, and it is undisputed that the County did not request to be notified of any action with respect to the Permit. DHEC therefore fully complied with this provision. Section 44-1-60(E) goes on to provide that "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, or affected person." DHEC mailed the staff decision to MRR, the applicant, on August 10, 2015. No request for review was filed within fifteen days of that mailing. Thus, the decision became final. *See S.C. Coastal Conservation League v. S.C. Dept. of Health & Envtl. Control*, 390 S.C. 418, 426, 702 S.E.2d 246, 250 (2010) ("The clear and unambiguous language in the statute provides that the staff decision becomes final 'fifteen days after notice of the department *has been mailed* ....'").

The Court of Appeals seems to hold where DHEC fails to provide public notice, the clock to file an appeal never runs, even for a party with actual notice. This holding is erroneous, in that it does not follow established precedent in our state. In cases where a challenger did not receive proper notice of a permit or other decision to begin with, both this Court and the Court of Appeals have evaluated the timeliness of a request for review based upon the receipt of actual notice. *E.g.*,

id. at 429, 702 S.E.2d at 252 ("[W]e hold that in situations where DHEC fails to simultaneously notify the applicant, permittee, and affected persons asking to be notified, the latest date of mailing controls when the fifteen day period begins to run."); *Bursey v. S.C. Dept. of Health & Envtl. Control*, 369 S.C. 176, 188, 631 S.E.2d 899, 906 (2006) (holding the ALC properly found action to be timely where there was substantial evidence that the challenger brought the action within the required period of time after receiving actual notice); *A.O. Smith Corp. v. S.C. Dept. of Health & Envtl. Control*, 428 S.C. 189, 205, 833 S.E.2d 451, 460 (Ct. App. 2019) (affirming dismissal of contested case as untimely because the challenger failed to request final review within fifteen days of obtaining actual notice of the permit). Assuming that the County was entitled to earlier notice, which is expressly denied, the date that it received actual notice would then control the timeliness inquiry. The Court of Appeals here even recognized that this is "logical." Opinion at 11.

The County obtained actual knowledge of the Minor Modification on December 15, 2015, and received a copy of it on January 11, 2016, at the latest. This was a fact found by the ALC, is undisputed, was not challenged in this appeal, and was not reversed in the Opinion (nor could it have been). The County nevertheless missed the 15-day window by a long shot, waiting until March 23, 2016, to file its request for review—99 and 72 days later, respectively. Thus, substantial evidence supported the ALC's finding in this regard. It was entirely unnecessary, and contrary to the Court of Appeals' standard of review, to *sua sponte* determine whether the County should have received earlier notice based on the discretionary designation of the modification application "major" or "minor," as the County's action is untimely even under the actual notice test that would apply in its stead. And that, in a nutshell, is the crux of this case. **Even if DHEC had designated the modification as "major" and proceeded with the notice provisions and public hearing attendant to that designation, the County would have been in precisely the same position that**

it found itself on January 11, 2016: in possession of actual knowledge of DHEC's modification of the Permit. Yet, as the County's conduct in this case conclusively demonstrates, the fact that an interested person is in receipt of actual notice of an application does not guarantee that the person will take any timely action on that knowledge. The standard of review does not permit the Court of Appeals to go down the rabbit hole issues of minor versus major modifications, coal ash, and review of incomplete deposition excerpts from another case, each of which and collectively constitutes reversible error. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] court usually should refrain from deciding unnecessary questions."). Under no scenario can the County's action be deemed timely.

In short, the Court of Appeals effectively overruled the actual notice test:

> However, nothing in § 44-1-60 suggests the fifteen day period for appealing a DHEC staff decision begins to run upon a party's simply learning of a permit action. To the contrary, the time period begins to run only after DHEC issues a staff decision in compliance with applicable statutory and regulatory notice safeguards.

Opinion at 13; *see also id.* at 11 (observing the ALC's ruling is "problematic here because the ALC failed to undertake the prerequisite analysis of whether these time constraints apply at all here due to DHEC's misclassification of the permit modification as 'minor.'"). The Court of Appeals read § 44-1-60(A) through -(D)'s requirements into § 44-1-60(E)(2). *Id.* at 12-13. The critical portions of these subsections merely state a truism: DHEC must comply with its own rules and regulations when issuing a permit.[5] But this does not provide a challenger a "get out of jail free" card when that person has actual knowledge of a permit but still sits on his or her rights. The

[5] *E.g.*, S.C. Code Ann. § 44-1-60(A) ("All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits . . . must be made using the procedures set forth in this section."); *id.* § 44-1-60(B) ("The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision.").

Opinion has the practical effect of overruling the doctrine of exhaustion of administrative remedies for DHEC permit challenges under this section. But the Court of Appeals does not have the authority to judicially engraft these requirements into § 44-1-60(E)(2) in contravention of the statute's plain language and binding precedent. The Court of Appeals' refusal to apply the actual notice rule conflicts with and overrules the decisions of this Court and its own decisions. Certiorari therefore is warranted and should be granted to review the Court of Appeals' decision. *See* Rule 242(b)(3), SCACR.[6]

II. The Court of Appeals exceeded its authority under the APA in reaching issues not ruled upon by the ALC and making *de novo* findings of fact unsupported by the record.

The Court of Appeals also grossly exceeded its authority in reaching issues not ruled upon by the ALC, making *de novo* findings of fact and failing to defer to DHEC's interpretation of its own regulations. Even assuming any of the forgoing actions were proper, by failing to remand the case to the ALC for determinations on these issues by the factfinder in the first instance.

The General Assembly intended the APA to "provide a uniform procedure for contested cases and appeals from administrative agencies." *S.C. Coastal Conservation League*, 390 S.C. at

[6] Resolution of this issue is critical. Under the precedent set by the Opinion, parties have permission to raise a host of untimely challenges to DHEC permit decisions. The Court of Appeals held that actual notice cannot be a gatekeeper to any earlier agency notice failures (real or imagined). Per the Opinion, "the time period [to file a request for review] begins to run *only* after DHEC issues a staff decision in compliance with the applicable statutory and regulatory notice safeguards." Opinion at 13. This will allow contested cases to be instituted long after non-publicly noticed DHEC decisions are made, regardless of whether the challenger had actual notice of the decision. This will be true even if a challenger knows about the decision all along, as actual notice is rendered a nullity. This could needlessly consume public resources, clog the courts' dockets, and stagnate development by permit holders. Most importantly, DHEC will have to decide whether or not to public notice all decisions—even "minor" ones not required to be publicly noticed by state law—in order to ensure permit decisions are not open to challenge in perpetuity. This is not the law of our state and could not have been the intent of the General Assembly in enacting § 44-1-60 and the APA. These deleterious downstream effects of the Opinion constitute special and important reasons to grant certiorari. *See* Rule 242(b), SCACR.

429, 702 S.E.2d at 252 (quoting 2006 Act. No. 387 § 53). Section § 1-23-610(B) details the narrow standard of review applicable to appeals from a contested case proceeding requiring that "[t]he review of the administrative law judge's order must be confined to the record" and the appellate court "may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is ... clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The Court of Appeals cited, but did not apply, this standard here. Again, this alone constitutes reversible error. Instead, the court erroneously took new matters alleged into its own hands. Primarily, the Court of Appeals failed to heed the command that its review "must be confined to the record," while also avoiding the requirement that "[w]here a point has not been decided by the lower court, we will not consider the point on appeal." *Timms v. Timms*, 286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985).

The ALC's order was narrow: (1) the County had actual knowledge of Minor Modification by January 11, 2016, at the latest; (2) the County did not file its request for review until March 23, 2016, beyond the deadline § 44-1-60(E)(2); and (3) there were no grounds to invoke equitable tolling of the deadline. The ALC expressly declined to rule on whether DHEC otherwise complied with the notice requirements and, relatedly, whether the permit modification was minor or major. Indeed, the ALC admonished the parties against presenting argument on that very issue. **(R. pp. 77-78, 104, 110-11)**; *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) ("The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law."). Despite this, the predominate legal and factual issue decided *de novo* in the Opinion was whether DHEC complied with certain notice requirements. It reached issues and found facts that the ALC expressly refused to consider. The Court of Appeals therefore indisputably went beyond the

confines of the record, improperly decided unpreserved issues, and violated the standard of review. This alone is sufficient grounds for reversal. *E.g.*, *Moore*, 415 S.C. at 253, 781 S.E.2d at 901 (holding that it constitutes reversible error if the Court of Appeals "reweighed the facts and substituted its *de novo* judgment" as "[t]he question before the court of appeals was whether there was any evidence to support the trial court's finding of reasonable suspicion—not the court of appeals' independent view of the facts."). The same standard governs the Court of Appeals' actions in this case, where it made *de novo* findings of fact and conclusions of law, as well as substituted its judgment for that of the ALC and DHEC.

a. The minor versus major distinction was not properly before the court.

The Court of Appeals exceeded its powers by deciding the permit modification was "major" in the first instance on appeal. The distinction between a minor and major modification, which is inherently discretionary by DHEC under the regulations, was not properly before the Court of Appeals. The ALC expressly declined to reach the issue in light of its determination that under no circumstances was the County's challenge timely based on its actual notice. Because the ALC never ruled on the issue, it should not have been considered. *See Timms*, *Moore*, *supra*.

b. The Opinion erred in making *de novo* findings to reach the unpreserved issue, rather than remanding the case to the finder of fact.

The facts which the Court of Appeals found *de novo* are relevant, not to the issues before them on timeliness and jurisdiction, rather to the ultimate issue presented in this case: whether DHEC's decision to modify the permit (whether minor or major) should be upheld. As a result, these "facts" severely prejudice DHEC and MRR. This is especially true given the undeveloped state of the record on these issues. The Opinion found facts against MRR and DHEC despite the fact that they followed the ALC's instructions to *not* present contrary argument on those points. It found these facts even though the County itself argued doing so was premature because further

discovery was needed.[7] According to the County's Prehearing Statement the "Issues to be Presented for Determination" at a final hearing included whether the modifications were major or minor, and whether the modifications had the effect of adding Class 3 Landfill features to a Class 2 Landfill, and other issues that the Court of Appeals reached *sua sponte*. **(R. pp. 15-16)** The County further requested that the Minor Permit Modification be declared null avoid because, *inter alia*, it was issued without notice to the County. **(R. pp. 16-17)** Yet knowing that the ALC did not allow MRR and DHEC to fully present its case on these issues and that discovery on them had been stayed, the Court of Appeals finally and improperly determined these facts. This deprived MRR and DHEC of its due process rights and an opportunity to be heard. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171-72, 656 S.E.2d 346, 350 (2008).

The Court of Appeals also erred in making these findings *de novo*, rather than remanding, because the ALC is the "ultimate finder of fact" in contested cases. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011). In an action at law such as this one, an appellate court may not make its own findings of fact and instead may only determine whether the ALC's findings lack evidentiary support. *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005); *see also* § 1-23-610(B)(e) (allowing an appellate court to reverse an ALC if the decision is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"). If further fact finding is needed, the only recourse is to remand to the ALC for further proceedings. *See Fox v. Newberry Cty. Mem'l Hosp.*, 319 S.C. 278, 282, 461 S.E.2d 392,

[7] The County argued discovery was not complete on issues "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 the notice provided for such modification." Final Br. of Appellant at 28. By the County's own admission, the record was incomplete and these facts cannot be determined. But the Court of Appeals finally determined these facts nonetheless.

395 (1995) ("[T]he merits of this issue should have never been addressed by the Circuit Court or the Court of Appeals, but instead the case should have been remanded to the Commission for findings of fact….").

It is undisputed here that the ALC, the ultimate fact finder, expressly declined to make any findings on whether earlier notice was required and any attendant issues such as minor versus major modification, *et cetera*. It was entirely improper for the Court of Appeals to take up that mantle and make those findings itself, and even more so based upon a record that even the County argued was incomplete. The Opinion's engagement in this fact finding is entirely incongruous with its holding that the ALC improperly ruled "while denying the County the right to undertake discovery." Opinion at 15; *see also* discussion, *infra*. To the extent that this Court believes that distinction between minor and major, or the issues of special waste and what constitutes a Class III landfill, are relevant to the question of exhaustion of administrative remedies, the Opinion should still be vacated and the matter remanded to the ALC for factual development and findings.

c. <u>The Opinion misapprehends and misinterprets the law as applied to the Permit.</u>

To the extent that consideration of the minor/major distinction was proper, the Opinion misapprehended and misinterpreted the law as applied to the Permit. Specifically, the Opinion first recounts and unquestioningly adopts the County's narrative that MRR misled the County regarding its intent to install a liner at the Highway 93 Landfill and that DHEC facilitated this action. Opinion at 4. This simply is not true and perfectly exemplifies the Court of Appeals' folly in making its own findings of fact, which it did not have the power to make in the first instance, on an incomplete record. In addition to being irrelevant to the issue of actual notice and timeliness, if given the opportunity, MRR would have presented evidence to rebut these false assertions and insinuations,

including but limited to a copy of MRR's cover letter to the County for a land use permit expressly seeking permission to build a "lined landfill." Pet. for Reh'g at 7.

Second, the Opinion recounts only limited snippets from the cross-examination portion of Mr. Coleman's deposition,[8] Opinion at 6-8, in order to find that "DHEC's own representative has admitted that the [Minor] Permit Modification meets the regulatory definition of a major modification" and "DHEC failed to comply with the notice procedures applicable to its decision to, in reality, permit a Class III landfill," *id.* at 14. First, neither the ALC nor the Court of Appeals had a complete copy of Mr. Coleman's deposition from the other litigation. The Court of Appeals should have allowed the ALC to consider the entire transcript and hear directly from Mr. Coleman—as a true factfinder would—but it did not. Second, the Court of Appeals ignored portions of the record that were before it. Perhaps most importantly, Mr. Coleman remained of the opinion that the modification MRR requested was minor and not major. **(R. p. 261, lines 13-18)** As to the statement that DHEC "in reality" permitted a Class 3 landfill, the undisputed evidence is that the type and amount of waste the Highway 93 Landfill can accept did not change and the landfill remains a Class 2 landfill. **(R. p. 476; p. 692, lines 6-10; p. 695, line 24-p. 696, line 7)** Further, although the County gave great emphasis to other changes to the language of the Permit, to which it assigned a nefarious purpose and intent; in fact, DHEC provided evidence that those other changes to the language of the Permit were simply to incorporate the language now used in *all* Class 2 permits issued today and were not substantive. **(R. pp. 694, line 9-p. 696, line 7)** Finally, DHEC testified in writing in its staff response to the DHEC Board that the modification

[8] This deposition was not taken in this case but in another case pending in the circuit court. Furthermore, the Opinion's recitation of Mr. Coleman's testimony came effectively verbatim from the County's brief, and in particular from counsel's conclusory statements of their version of the facts. *Compare* Opinion at 6-8, *with* Final Br. of Appellant at 9-10.

was deemed to be minor under the regulation and that DHEC would testify as such if able to present its position again. **(R. pp. 472-79)**; *see also* discussion, *infra* (regarding deference).

Similarly, the Court of Appeals appears to have made findings of fact through wholesale adoption of portions of the County's brief. Specifically, the Court of Appeals uses direct quotes (without attribution) of conclusory statements regarding the changes authorized by the Minor Modification from the County's brief, as written and argued by counsel to the County. *Compare* Opinion at 4-5, *with* Final Br. of Appellant at 8-9. The County itself cites to incomplete documents to support its claims. *See* Final Br. of Appellant at 8-9. **(R. p. 476)**

Further, much like the County, the Court of Appeals perseverated on the issue of coal ash and thus, made findings of fact related to it that have nothing to do with the issues before the court. The entire discussion in the Opinion is a non sequitur as the Highway 93 Landfill is not currently constructed and cannot accept coal ash **without additional regulatory approval**. **(R. p. 698, line 25-p. 699, line 6)**; *contra* **(R. p. 124, lines 1-4; p. 153, lines 7-11)** (wherein the County repeatedly—and disingenuously—suggested that the landfill is "on the verge of receiving thousands of tons of coal ash"). The notion that the Minor Modification allows for the receipt of coal ash is a tall tale advanced by the County with zero factual support, and in fact, is directly contradicted by the record and the law. Furthermore, the Opinion concludes that "[c]oal ash requires special handing" and it qualifies as "special waste." Opinion at 8 n. 11. There is not a shred of testimony or support in the record for that finding. In fact, DHEC does not consider coal ash to be "special waste" as that term is defined in the South Carolina Solid Waste Policy and Management Act and its attendant regulations. **(R. p. 280, lines 9-16);** *see also* 80 Fed. Reg. 21301 (April 17, 2015) (wherein EPA defines coal combustion residuals or coal ash as a non-hazardous solid waste, not a hazardous waste. From all of this, the Opinion concludes that "DHEC failed to

comply with the notice procedures applicable to its decision to, in reality, permit a Class III landfill." Opinion at 14 solid waste. However, a Class III landfill is not a Class II landfill with a liner, but is a designation in for a landfill that is allowed to accept Class III waste (*i.e.* municipal) and for which there must be a geographical need. S.C. Reg. 61-107.19, Part V.

d. The Opinion erred in failing to defer to DHEC's interpretation of its regulations.

Finally, even if the issue of what qualifies as a major verses minor permit was properly before the Court (which it was not), the Court of Appeals was required to give substantial deference to DHEC's interpretation of its own regulations and failed to do so here. *Kiawah Dev. Partners, II v. S.C. Dept. of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014) ("[W]here an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'") (citation omitted). Courts give such deference to administrative agencies "both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Id.*

The major/minor permit modification distinction is found in DHEC's regulations promulgated under the South Carolina Solid Waste Policy and Management Act of 1991, S.C. Code Ann. §§ 44-96-10, *et seq.* As is pertinent here, these regulations impose heightened notice requirements for new construction and major modification permits. S.C. Code Ann. Regs. 61-107.19, Pt. I, D.2.c. DHEC determined in its discretion that the MRR's requested modification was a minor, not major, modification and therefore not subject to these additional requirements. **(R. pp. 474-76; p. 696, line 17-p. 696, line 11)** Under established precedent, this decision can only be overturned by a court if it is arbitrary, capricious, or manifestly contrary to the statute and

regulations. The Court of Appeals did not make this finding and did not give DHEC any of the deference it was due. Instead, the court simply substituted its judgment for that of DHEC, *de novo*, based on an incomplete record. *See Moore, supra*. This was fundamental and reversible error.

III. The Court of Appeals' finding that the ALC considered evidence outside of the pleadings is based on a misapprehension of administrative practice and procedure and is unsupported by the record.

Finally, in a section entitled "Discovery," the Opinion finds additional reversible error in the ALC's alleged consideration of evidence from outside of the "pleadings." Opinion at 14.[9] On this issue, the Opinion is incorrect on both the substance and the law governing administrative practice and procedure. The Opinion holds that the only evidence the ALC may consider in reviewing a motion to dismiss under the equivalent of Rule 12(b)(1) is the petitioner's request for final review to the DHEC Board and prehearing statement to the ALC. This holding fundamentally misapprehends the practice and procedure before the ALC and constitutes an error of law. In contested cases, parties are not required to file traditional civil pleadings such as a complaint. In fact, in 2013, the ALC Rules of Procedure were amended to eliminate the rule regarding the filing of a Petition and an Answer, filings that resembled traditional civil pleadings. *Compare* ALC Rule 18 (eff. May 1, 2011) *with* ALC Rule 18 (eff. May 1, 2013); *see also* Notes to 2013 Amendments to Rule 18, RPALC ("Former Rule 18, which provided for pleadings, has been repealed….In lieu of pleadings, the Court may order the submission of prehearing statements.")). However,

> The Request for Contested Case Hearing along with the Prehearing Statements establish a core statement of the facts and issues for determination that is comparable to the pleadings in a civil trial. Thus, since the Court's review [on a motion to dismiss] is limited to the 'pleadings,' the Court must limit its review to the Request for Contested Case Hearing and Prehearing Statements to determine whether Petitioners have failed to state facts sufficient to state a claim unless otherwise provided by law.

[9] Despite being labeled as a discovery issue, the discussion and holding have nothing to do with the ALC's stay of discovery.

Preservation Soc'y of Charleston, No. 13-ALJ-0056-CC at 4, Order Denying Motion to Dismiss (Dec. 2, 2013) (Anderson, J.) (rev'd on other grounds, Op. No. 27949 (S.C. Sup. Ct. filed Feb. 19, 2020) (Shearouse Adv. Sh. No. 8 at 43) (petition for rehearing forthcoming)). Thus, while there are no "pleadings" at the ALC, the court considers the request for contested case and each of the respective prehearing statements as the operative "pleadings" in considering a motion to dismiss.

The Court of Appeals' misapprehension that the ALC's review was limited to the County's request for DHEC Board review and contested case can be traced directly to the County's misstatement of the law to that effect in its primary brief to the Court. Final Br. of Appellant at 26-29. The County states that it was error for the ALC to have "accepted" anything other than the "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," citing its request for final review to the DHEC Board. *Id.* at 27. The County further cites the fact that only argument regarding "actual notice" appears in the submittals of the Petitioners, which the ALC improperly weighed against the County. *Id.* However, the arguments regarding notice were properly made by DHEC and MRR in their respective prehearing statements to the Court, *see* **(R. pp. 25-29, 41-42)**, which are appropriately considered by the ALC in a motion to dismiss. The facts regarding the timeliness of the County's filings are also easily discernable from the County's own submissions, as the County cited the date on which the modification was issued, August 10, 2015, and the County's requests to the DHEC Board and the ALC were dated and submitted on March 23, 2016, and May 19, 2016, respectively. Reference to MRR and DHEC's prehearing statements is thus not even required. Accordingly, the Opinion's holding that the motion to dismiss was converted into a motion for summary judgment by virtue of the ALC's consideration of Petitioners' respective prehearing statements and the undisputed

facts regarding the timing of the County's filings, constitutes an error of law that warrants this Court's review and reversal.[10]

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review, and ultimately reverse, the decision of the Court of Appeals in this matter.

Respectfully submitted,

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[10] It should also be noted that the Opinion's holding that the County was not "fairly apprise[d]" of the fact that the Court would consider material outside of the pleadings in resolving a motion to dismiss is ironic to say the least, and wholly unsupported by the record. Opinion at 14. Indeed, the County's argument that "[t]he 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," *see* Initial Br. of County at 29, is an utterly astonishing attempt at revisionist history. A simple reference to the record reveals that the County submitted no less than twenty-three (23) exhibits to its response in opposition to the motion to dismiss, including twelve (12) affidavits and a deposition transcript, and the transcript of the motion to dismiss hearing is replete with the County's arguments and citations, over Petitioners' repeated objections, to its response and accompanying exhibits. The suggestion, apparently accepted by the Court of Appeals, that the County was somehow caught off guard or prejudiced by the Court's consideration of evidence beyond the County's "pleading" is illogical.