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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2017-002598

ALC Case Nos. 17-ALJ-07-0041-CC; 17-ALJ-07-0042-CC; 17-ALJ-07-0039-CC

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices,..Appellants,

v.

South Carolina Department of Health and Environmental Control and David Coggins Broilers, ...Respondents;

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices,..Appellants,

v.

South Carolina Department of Health and Environmental Control and Heath Coggins Broilers, ...Respondents;

Charles S. Blackmon and South Carolinians for Responsible Agricultural Practices,..Appellants,

v.

South Carolina Department of Health and Environmental Control and Jim Young Broilers, ...Respondents.

FINAL BRIEF OF RESPONDENTS BROILERS

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STATEMENT OF ISSUES ON APPEAL

1. Because Appellants failed to file a Rule 59(e) motion with the Administrative Law Court (ALC) or otherwise raise and seek to have the ALC rule upon the issues raised in their brief, should this Court conclude that Appellants failed to preserve the issues presented for appellate review?

2. Did the ALC correctly determine that an agricultural animal facility, which is specifically prohibited, by both regulation and the terms of its operating permit, from discharging pollutants into surface waters or groundwater of the State, is not obligated to seek or obtain a permit or a determination that it has "no potential to discharge" pursuant to the National Pollutant Discharge Elimination System?

3. Should the ALC be affirmed in determining that Broilers are not obligated to seek or obtain a permit or a determination that it has "no potential to discharge" pursuant to the National Pollutant Discharge Elimination System on the additional sustaining ground that the applicable regulations are ambiguous and conflict with other regulatory and statutory law?

4. Should the ALC be affirmed in determining that Broilers are not obligated to seek or obtain a permit or a determination that it has "no potential to discharge" pursuant to the National Pollutant Discharge Elimination System on the additional sustaining ground that the issue is not ripe for consideration?

5. Did the ALC correctly determine that Appellants failed to demonstrate by a preponderance of the evidence that Broilers should not be issued permits to construct and operate agricultural animal facilities?

6. Did the ALC correctly determine that Broilers fully, correctly, and completely complied with all statutory and regulatory prerequisites pertaining to the construction and operation of agricultural animal facilities and that, therefore, Broilers should be issued the subject Permits?

STATEMENT OF THE CASE

This administrative matter began when Respondents David Coggins Broilers (D.C. Broilers), Heath Coggins Broilers (H.C. Broilers), and Jim Young Broilers (J.Y. Broilers) (collectively, Broilers) separately filed applications with the South Carolina Department of Health and Environmental Control (DHEC) for agricultural animal facility[1] permits (Permits) to construct and operate new poultry farms in Laurens County, South Carolina, each consisting of six poultry barns housing between 162,000 and 237,600 broilers, and to dispose of the generated manure (Projects).

After reviewing the applications in accordance with applicable statutory and regulatory requirements, DHEC issued permits for the Projects. The permits explicitly prohibit the "discharge of pollutants from the operation into surface waters of the State (including ephemeral and intermittent streams)" and the "discharge of pollutants into groundwater" from the Projects. DHEC also determined that the Projects would not cause an increase in water pollution in the surrounding area. Appellants appealed the permits by first requesting a final review conference by the South Carolina Board of Health of Environmental Control, which was denied, and then, on February 17, 2017, by requesting a contested case hearing before the ALC.

On August 4, 2017, Broilers filed a motion for partial summary judgment on Appellants' claim that the Projects, as Large Concentrated Animal Feeding

[1] DHEC regulations governing the permitting of agricultural animal facilities generally are divided into two categories: 1) those pertaining to swine facilities, 4 S.C. Code Ann. Regs. 61-43 Part 100 *et seq.* (2011); and 2) those pertaining to animal facilities other than swine, 4 S.C. Code Ann. Regs. 61-43 Part 200 *et seq.* (2011). For the sake of brevity, references herein to "animal facilities" means "animal facilities other than swine."

Operations (CAFOs) were required to obtain either 1) a National Pollutant Discharge Elimination System (NPDES) permit pursuant to the provisions of the Clean Water Act, 33 U.S.C.A. §§ 1251 *et seq.* (2012, as amended) (CWA), or 2) a determination pursuant to 3 S.C. Code Ann. Regs. 61-9 Part 122.23 (2011) that the Projects have "no potential to discharge."

On August 15, 2017, the ALC granted the motion for partial summary judgment, finding that the plain language of the Permits and DHEC regulations prohibit animal facilities from discharging pollutants into waters of the State. Accordingly, the ALC determined that the Projects have no "potential to discharge" and no NPDES permit is required. The ALC also found that DHEC regulations do not require facilities proposing to discharge pollutants to seek or obtain an NPDES permit until at least 180 days prior to the time that they commence operation. Because the Projects have not been constructed, much less commenced operations, the ALC therefore found, in the alternative, that this issue was not ripe for consideration.

The ALC conducted a contested case hearing on August 15-17, 2017, with the Honorable Ralph King Anderson, III presiding. Appellants called six witnesses in support of their case in chief, including Appellant Charles S. Blackmon; four other members of Appellant South Carolinians for Responsible Agricultural Practices (SCRAP); Mr. David Coggins, owner of Respondent D.C. Broilers; and Dr. David Hargett, Ph.D., who was qualified as an expert in soil and water resource management. Broilers presented the testimony of Mr. Christopher Mosley, a Senior

Project Manager with Agri-Waste Technologies (AWT) and a registered professional engineer in South Carolina who prepared the application and Comprehensive Nutrient Management Plan (CNMP) reviewed by DHEC. DHEC presented the testimony of William Chaplin, DHEC's permit reviewer. Further, Appellants placed into evidence 13 exhibits and Respondents placed into evidence three exhibits.

On November 30, 2017, the ALC issued an order finding that Appellants failed to meet their burden of proof and did not show by a preponderance of the evidence that Broilers should not be issued the Permits. Rather, the Court found and concluded that Broilers fully, correctly, and completely complied with all statutory and regulatory prerequisites to the issuance of the Permits. At the hearing, however, Broilers agreed to modify the Permits so as to require additional conditions for the Projects and to address certain concerns raised by Appellants, which modifications were approved by the ALC. In addition, and even though the ALC concluded that Appellants' concerns about the Permits as approved by DHEC were not demonstrated by a preponderance of the evidence, the ALC ordered that the Permits be further modified such that the Projects would be moved further away from the Little River. These modifications were made for the specific purpose of addressing Appellants' stated concerns regarding potential impacts of the Projects on the waters of the State.

Appellants did not move the ALC to alter or amend the judgment pursuant to Rule 59(e), SCRCP, instead filing a Notice of Appeal on December 27, 2017.

STATEMENT OF THE FACTS

In June and July 2016, Broilers separately filed applications with DHEC for agricultural animal facility permits to construct and build new poultry farms off Lisbon Road in Laurens County, South Carolina, each consisting of six poultry houses. [R. pp. 1492-1660; pp. 1215-1331; pp. 1332-1491 (Pet'rs. Ex. 1B, DHEC_003184-3352; Pet'rs. Ex. 2C, DHEC_000917-1033; Pet'rs. Ex. 3B, DHEC_002062-2221).] As part of the Projects, Broilers proposed to utilize a manure broker licensed by DHEC, *see* 4 S.C. Code Ann. Regs. 61-43 Part 400 *et seq*. (2011), to dispose of the generated manure, also known as litter, on property located off-site from the Projects. [R. p. 1629; p. 1454; p. 1759 (Pet'rs. Ex. 1B, DHEC_003321; Pet'rs. Ex. 3B, DHEC_002184; Resp't Ex. 22).] The manure broker also will accept all waste utilization responsibilities and ensure the waste is handled, transported, stored, and/or applied in a manner consistent with DHEC regulations, thus relieving Broilers of these responsibilities. *Id.*; *see also* 4 S.C. Code Ann. Regs. 61-43 Part 400 (2011). In addition, J.Y. Broilers proposes to dispose of a portion of the manure generated at that specific facility by applying it on property located off site from the Projects. [R. p. 1497 (Pet'rs. Ex. 1B, DHEC_003189).]

In developing the applications for Broilers, AWT prepared a CNMP that, among other things, identifies and describes the planned and existing conservation practices to be applied in order to decrease non-point source pollution of surface and groundwater resources and establish vegetation to reduce soil erosion on the site. [R. pp. 1492-1660; pp. 1215-1331; pp. 1332-1491 (Pet'rs. Ex. 1B, DHEC_003184-3352;

Pet'rs. Ex. 2C, DHEC_000917-1033; Pet'rs. Ex. 3B, DHEC_002062-2221).] AWT also sited the proposed facilities so as to meet or exceed the setback requirements of 4 S.C. Code Ann. Regs. 61-43 Part 200 *et seq.* [*Id.*]

DHEC staff member Mr. William Chaplin reviewed the applications. *See* 4 S.C. Code Ann. Regs. 61-43 Part 200.70 (2011); R. pp. 1707-1710; pp. 1689-1700; pp. 1702-1705; pp. 1666-1677; pp. 1712-1715; pp. 1678-1688; p. 1150, line 9 – p. 1180, line 15 (Pet'rs. Ex. 1B, DHEC_003167-83; Pet'rs. Ex. 2C, DHEC_000895-910; Pet'rs. Ex. 3B, DHEC_002042-59); Tr. 813:9 – 843:15). As part of his review, Mr. Chaplin verified the setback distances and conducted a water resources review, including consideration of the 12 regulatory factors, *see* 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F), for the purpose of determining whether the Projects will cause an increase in water pollution. [*Id.*] Additionally, Mr. Chaplin took into consideration 4 S.C. Code Ann. Regs. 61-43 Part 200.20(B) (2011), which provides that all non-swine animal facility permits (including poultry facilities) are no-discharge permits, and the fact that the Projects would be disposing of the generated manure by either a manure broker or off-site land application. [*Id.*]

During the review process, *see* 4 S.C. Code Ann. Regs. 61-43 Part 200.60(D) (2011), DHEC also held public meetings and received and considered a number of written public comments concerning the Projects. [R. p.1159, line 17 – p. 1162, line 5 (Tr. 822:17 – 825:5).] Among other things, Mary Basel, a member of SCRAP who testified in the contested case hearing, complained that her family had secured a building permit for a residence on her family's property located across Lisbon Road

from the Projects. [R. p. 1174, line 24 – p. 1180, line 15 (Tr. 837:24 – 843:15).] Ms. Basel asked that DHEC require Broilers to move the proposed barns so that they would meet the 1,000-foot setback residential requirement from the proposed residence. [*Id.*; R. p. 578, line 14 – p. 579, line 8 (Tr. 239:14 – 240:8).] She also asked that DHEC require tree buffers along Lisbon Road to minimize dust and odor from the facilities. [*Id.*; R. p. 1661 (Pet'rs. Ex. 1B, DHEC_003514).]

In an effort to accommodate Ms. Basel's request, Mr. Chaplin required that D.C. Broilers' and J.Y. Broilers' proposed facilities be moved further away from her property and Lisbon Road. (R. p. 1175, lines 5-10 (Tr. 838:5 – 10).] Because H.C. Broilers' barns already were located more than 1,000 feet from Ms. Basel's proposed residence, DHEC did not require that those barns be relocated. [R. pp. 1332-1491 (Pet'rs. Ex. 3B, DHEC_002062-2221).] In addition, Mr. Chaplin required the Projects to keep the 400-foot property line setback along Lisbon Road and along the eastern side of Respondent J.Y. Broilers' parcel vegetated as requested by Ms. Basel.[2] [R. p. 1709; p. 1704; p. 1714 (Pet'rs. Ex. 1B, DHEC_003169; Pet'rs. Ex. 2C, DHEC_000897; Pet'rs. Ex. 3B, DHEC_002044).]

Although the amendments changed the setback distances for D.C. Broilers' proposed barns, this Project still met or exceeded all applicable setbacks requirements, including as follows:

[2] The Projects are designed to have a load-out area extending approximately 150 feet in front of the barns. For the purposes of meeting the setback requirements, distances are not measured from the load out area, but from the barns themselves. In order to allow the 400-foot property line setback area to remain in a vegetated state, DHEC therefore required D.C. Broilers' and J.Y. Broiler's proposed facilities to be moved so that not only the barns but also the load-out areas were 400 feet away from Lisbon Road. [R. p. 1178, line 10 – p. 1180, line 15 (Tr. 841:10 – 843:15).] This required the barns to be relocated closer to the Little River in order to satisfy Ms. Basel's request.

1) Potable wells (required 200 feet, actual, 2,084 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required 100 feet, actual 1,975 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required 100 feet, actual 27,129 feet);
4) Ephemeral or intermittent streams located downslope (required 100 feet, actual 428 feet); and
5) Ditches or swales located downslope (required 50 feet, actual 164 feet).

[R. p. 1222 (Pet'rs. Ex. 2C, DHEC_000924).]

The amendment also caused the setback distances for J.Y. Broilers to change, but this Project also met or exceeded all applicable setback requirements:

1) Potable wells (required 200 feet, actual, 1,786 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required 100 feet, actual 1,760 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required 100 feet, actual 27,498 feet);
4) Ephemeral or intermittent streams located downslope (required 100 feet, actual 426 feet); and
5) Ditches or swales located downslope (required 50 feet, actual 113 feet).

[R. p. 1497 (Pet'rs. Ex. 1B, DHEC_003189).]

H.C. Broilers' proposed barns were not required to be relocated and, as proposed, met or exceeded all applicable setbacks requirements:

1) Potable wells (required 200 feet, actual, 2,812 feet);
2) Waters of the State located downslope (excluding ephemeral and intermittent streams (required 100 feet, actual 834 feet);
3) Outstanding resource waters, critical habitats of endangered species, shellfish harvesting waters (required 100 feet, actual 26,859 feet);
4) Ephemeral or intermittent streams located downslope (required 100 feet, actual 278 feet); and
5) Ditches or swales located downslope (required 50 feet, actual 135 feet).

[R. p. 1338 (Pet'rs. Ex. 3B, DHEC_002068).]

Following its review, DHEC issued the Permits to H.C. Broilers, D.C. Broilers, and J.Y. Broilers on November 30, December 14, and December 21, 2016,

respectively. [R. pp. 1707-1709; pp. 1702-1704; pp. 1712-1714 (Pet'rs. Ex. 1B, DHEC_003167-69; Pet'rs. Ex. 2C, DHEC_000895-97; Pet'rs. Ex. 3B, DHEC_002042-44).] The Permits authorize construction of the Projects and contain certain Special Conditions, including requirements that Broilers 1) operate and maintain the waste system in accordance with the Waste Management Plan developed by AWT and with State and Federal law so as to prevent discharges to the environment and 2) obtain any other local permits that may be required for the Projects, including building permits and stormwater permits. [*Id.*]

At the contested case hearing, Appellants alleged that, in general, poultry facilities contribute to waters of the State and that DHEC should have considered stormwater runoff from the sites as part of the permitting process. Appellants presented anecdotal evidence of manure piles at an existing poultry facility—not operated by Broilers—being left uncovered for more than three days at various times from 2005 to 2013 and of manure brokers delivering or spreading without obtaining the required paperwork. [R. p. 596, lines 11-24; p. 598, lines 5-9; p. 644, line 22 – p. 646, line 7; p. 671, lines 3-21; p. 678, line 12 – p. 680, line 15 (Tr. 257:11 – 24, 259:5 – 9, 305:22 – 307:7, 332:3 – 21, 339:12 – 341:15).] However, a witness for Appellants also testified that he contacted DHEC to complain about certain violations and DHEC responded and investigated. [R. p. 671, line 3 – p. 674, line 9 (Tr. 332:3 – 335:9).]

In response to Appellants' presentation of Dr. Hargett, who opined that rainwater and manure handling would cause fecal bacteria and other contaminants to run into waters of the State, [R. p. 885, lines 2-14 (Tr. 546:2 – 14)], Mr. Chaplin

testified that the CNMPs require the Projects to have permanent vegetation on site if there is an expectation of high erosion rates and that failing to comply with this requirement would result in a Permit violation. [R. p. 1173, line 2 – p. 1174, line 20 (Tr. 836:2 – 837:20).] He also testified that in order for the Projects to be built, Broilers will be required to obtain a building permit as well as a stormwater permit [R. p. 1187, lines 16-25 (Tr. 850:16 – 25).] And Mr. Mosley testified that there is nothing about the topography or terrain of the site that gives him concern about whether a stormwater plan could be done. Mr. Coggins further testified that he would do whatever DHEC requires as part of a stormwater plan to prevent erosion and similar events from occurring, including installing such measures as terraces, pipe drops, or high velocity fabric. [R. p. 765, line 7 – p. 766, l. 3 (Tr. 426:7 – 427:3); *see also* R. p. 647, line 21 – p. 649, line 4 (Tr. 308:21 – 310:4) (Appellants' witness testimony that terraces, pipe drops, rock drops, and high velocity fabric can address erosion issues); p. 902, lines 14-25 (Tr. 563:14 – 25) (Dr. Hargett acknowledging that there are a variety of best management practices that can be engaged to control stormwater and sediments on the site).]

Recognizing that Dr. Hargett did not have experience in constructing animal facilities and that he developed a number of his opinions after his deposition and that, therefore, Respondents were not timely advised of Dr. Hargett's opinions, the ALC expressly afforded little weight to Dr. Hargett's testimony about concerns regarding the impacts of the Projects on the waters of the State. [R. p. 892, lines 7-20; p. 953, lines 4-12; p. 21 (Tr. 553:7 – 20; 614:4 – 12; ALC Order, p. 18).] The ALC further

concluded that Appellants did not present any evidence demonstrating that the events alleged by Appellants' witnesses actually resulted in fecal bacteria or pollutants reaching waters of the State. [R. pp. 21-24 (ALC Order, pp. 18 – 21).] The ALC also recognized Dr. Hargett's acknowledgement that, while poultry facilities "may be" a source of contamination, they also "may not be" a potential source. [R. p. 895, lines 9-14; pp. 21-24 (Tr. 556:9 – 14; ALC Order, pp. 18 – 21).] The ALC further noted Dr. Hargett's testimony that riparian and vegetative buffers can be very effective in reducing sediment, nutrients, and other constituents of concern and that he would need to know whether or not such buffers were in place before he could opine whether a release of water from a manure pile would pollute waters of the State. [R. p. 913, lines 7-13; p. 987, lines 4-20; pp. 21-22 (Tr. 574:7 – 13, 648:4-20; ALC Order, pp. 18-19).] However, the ALC noted Appellants did not offer any evidence to suggest that vegetative and riparian buffers would not be utilized or would be ineffective. [R. p. 22 (ALC Order, p. 19).]

In reviewing the evidence of record, the ALC also considered the impact of the Projects to impaired bodies of water as required by 4 S.C. Code Ann. Regs. 61-43 Part 200.140(C) and found that the Projects will not have an impact to impaired bodies of water so as to necessitate more stringent requirements. [R. p. 22 (ALC Order, p. 19).] Specifically, the ALC recognized that Broilers will not dispose of the manure on the Project sites but will use a manure broker that will apply it offsite from the Property. [*Id.*] The ALC therefore agreed with DHEC's determination that, because manure will not be disposed of or discharged from the Projects, they will have no impact on

the Little River as an impaired water body. [*Id.*] Regarding J.Y. Broilers' Project, while some of the manure will be land applied by the operator, the ALC similarly found it will be applied on land that is not within the Little River watershed. The ALC also found that the installation of best management practices to control stormwater runoff will inferentially reduce the potential of runoff related to potential pollutants from the Projects. [R. p. 31 (ALC Order, p. 28).]

In sum, the ALC found Appellants did not present sufficient substantial or persuasive evidence to suggest that the Projects would increase pollution to waters of the State. The ALC thus concluded that the Projects complied with all statutory and regulatory prerequisites and confirmed that the Permits should be issued.

STANDARD OF REVIEW

This is an appeal from the ALC. The Administrative Procedures Act sets forth this Court's standard of review in appeals from the ALC and provides that the Court may reverse or modify a decision if the ALC's findings, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp.2017). The Court "may not substitute [its] judgment for that of the [ALC] as to the weight of the evidence on questions of fact unless the [ALC's] findings are clearly erroneous in view of the reliable, probative

and substantial evidence in the whole record." *Bailey v. S.C. Dep't of Health,* 388 S.C. 1, 5, 693 S.E.2d 426, 429 (Ct.App.2010) quoting *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control,* 372 S.C. 351, 358, 641 S.E.2d 763, 766–67 (Ct.App.2007). "In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC." *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).

ARGUMENT

I. Appellants failed to preserve the issues presented in their brief for appellate review because they failed to file a motion to alter or amend the ALC's decision.

None of the issues presented by Appellants in their brief have been preserved for review by this Court. South Carolina courts have repeatedly recognized "that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also Home Med. Sys., Inc. v. S.C. Dep't of Revenue,* 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009) (holding that issue preservation is required in administrative appeals). Under this principle, "[t]he losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C.,* 338 S.C. at 422, 526 S.E.2d at 724. "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id.* "The

requirement also ... prevents a party from keeping an ace card up his sleeve–intentionally or by chance–in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *Id.*

"It is well settled that an issue must have been raised to and ruled upon by the trial court to be preserved for appellate review." *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC,* 379 S.C. 645, 658, 667 S.E.2d 7, 14 (Ct.App.2008); *see also Noisette v. Ismail,* 304 S.C. 56, 403 S.E.2d 122 (1991) (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue). "Additionally, '[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.'" *M & T Enterprises of Mt. Pleasant, LLC,* 379 S.C. at 658, 667 S.E.2d at 14–15 (quoting *Elam v. South Carolina Dep't of Transp.,* 361 S.C. 9, 24 n. 4, 602 S.E.2d 772, 780 n. 4 (2004)); *see also Nelums v. Cousins,* 304 S.C. 306, 307, 403 S.E.2d 681, 681–82 (Ct.App.1991) (holding an issue was not preserved for appellate review "since the trial court was never afforded the opportunity to rule on the clarity of its order because [Appellant] made no motion, as [Appellant] was required to do, pursuant to Rule 59(e)").

Appellants never filed a Rule 59(e) motion or otherwise presented to the ALC the specific arguments presented for the first time in their brief. Appellants allege that the ALC's decision contains the following perceived errors:[3]

1. "DHEC's position that the issuance of a 'no-discharge' agricultural animal permit constitutes DHEC's determination that the [Projects] have no potential to discharge," renders the term "'no potential to discharge' as meaningless," which is "contrary to the well-established rule of statutory construction ..." Init. Br. App., pp. 19-22 (citations omitted).
2. DHEC's interpretation of its regulations that no NPDES permit is required because the Permits are "no discharge" permits "is merely a post hoc rationalization." Init. Br. App., pp. 23-24.
3. "Appellants need not prove that Respondents will discharge or intend to discharge pollutants" into waters of the State. Init. Br. App., pp. 24-25.
4. The performance standard for an NPDES permit is not the same as an animal facility permit and "federal best management practices promulgated as effluent standards for CAFOs are intended to be the absolute minimum that States must apply and enforce ...." Init. Br. App., pp. 25-26.
5. The issue of whether or not the Projects require an NPDES permit is ripe for review because "[t]here is nothing contingent, hypothetical or abstract

[3] In addition to these issues, Appellants also argue that Large CAFOs are not designated by DHEC and that the decision in *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2d Cir. 2005) is not controlling. *See* Init Br. App., p. 23-24, 26-29. In both cases, the ALC agreed with Appellants' positions.

about the duty of [Broilers] to apply for a NPDES or otherwise seek a determination from DHEC that their proposed operations have 'no potential to discharge.'" Init. Br. App., pp. 26-27.

6. DHEC failed to meaningfully evaluate whether additional or more stringent requirements were required based on the Projects' proximity to impaired waterbodies. Init. Br. App., pp. 29-32.
7. DHEC's determination that no additional setbacks are required because the facility is a "no discharge" facility is contrary to the rules of statutory construction. Init. Br. App., pp. 32-35.
8. Requiring Appellants to bear the burden "of proving existing agricultural facilities actually discharge pollutants into waters of the State" creates an impossible and unfair burden on Appellants" because they "lack legal access to existing poultry facilities." Init. Br. App., p. 35.
9. If Appellants do in fact bear such a burden of proof, any such burden would not involve proof of actual discharges, but whether discharges may occur from animal facilities. Init. Br. App., pp. 35-37.

The record reflects that, in each of the above instances, Appellants either failed to raise these specific issues to the ALC or the ALC did not address these specific issues in its Order.[4] [*See* R. pp. 246-339; pp. 114-173; p. 372, line 1 – p. 390, line 22

[4] Appellants failed to raise Issue Nos. 1-5 and 8-9 and the ALC did not rule on them. While Appellants arguably raised Issues Nos. 6 and 7, the ALC did not rule on the specific issues presented by Appellants in their brief, but only generally found that no additional setbacks are required and that DHEC considered each of the 12 criteria contained in 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F), includes the proximity of the Project to impaired water bodies. ALC Op., pp. 19, 28. *But see Shealy v. Aiken Cty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444 (2000) (finding a trial judge's general ruling was

(Appellants' Mem. in Opp'n to Mot. for Partial Summ. J.; Appellants' Proposed Order; Tr. 33:1 – 51:22).]

Appellants therefore were required to file a Rule 59(e) motion presenting these specific issues to the ALC and preserving them for appellate review. *I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 (when a "losing party has raised an issue in the lower court, but the court fails to rule upon it, the party **must** file a motion to alter or amend the judgment ... to preserve the issue for appellate review.") (emphasis added); *see also In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct.App.1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal."); *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 394 S.C. 567, 576, 716 S.E.2d 111, 115 (Ct.App.2011) ("After the ALC issued its final order, Belfair filed a motion for reconsideration, but it never specifically objected that the ALC placed an impermissible burden of proof upon Belfair. Belfair's failure to do so precludes review of this issue on appeal.").

Instead of filing the required Rule 59(e) motion, Appellants immediately filed a notice of appeal with this Court and, thus, did not give the ALC the opportunity to correct or rule upon any of these perceived errors of law. *See Grant v. S.C. Coastal Council*, 319 S.C. 348, 355–56, 461 S.E.2d 388, 392 (1995) (finding that an inaccuracy

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insufficient to preserve a specific issue for appellate review and where a trial judge does not explicitly rule on an argument raised and no Rule 59(e), SCRCP, motion was filed, an appellate court may not address the issue).

in the trial court's order must be raised to the trial court by way of a motion to alter or amend a judgment before the inaccuracy may be challenged on appeal). Consequently, because Appellants failed to file a Rule 59(e) motion, which serves "a vital purpose for proper issue preservation," *Home Med. Sys., Inc.*, 382 S.C. at 562, 677 S.E.2d at 586, none of the issues raised in Appellants' brief have been preserved for appellate review.

II. The ALC correctly determined that the Projects are not required to apply for or obtain an NPDES wastewater discharge permit.

A. The ALC did not err in interpreting DHEC regulations, but properly held that, because the Projects are prohibited from discharging wastewater into waters of the State, there is an inherent determination that the facilities have "no potential to discharge."

It is undisputed that the Projects will be prohibited by law from discharging wastewater into waters of the State. First, 4 S.C. Code Ann. Regs. 61-43 Part 200.140(A), which governs the operation of animal facilities (other than swine), provides that "[t]here shall be no discharge of pollutants from the operation into surface waters of the State (including ephemeral and intermittent streams." *See also* 4 S.C. Code Ann. Regs. 61-43 Part 200.140(E) ("No manure may be released from the premises of an animal facility to waters of the State ... unless a permit pursuant to Section 402 or 404 of the [CWA] has been issued by [DHEC]"). Second, the Permits reflect these regulatory prohibitions and authorize Broilers to construct and operate "a **NO-DISCHARGE** agricultural manure and animal by-products treatment and storage system" and to "[o]perate and maintain [the] waste management system ... in accordance with State and Federal law so as to prevent discharges to the

environment." [R. pp. 1707-1709; pp. 1702-1704; pp. 1712-1714 (Pet'rs. Ex. 1B, DHEC_003167-69; Pet'rs. Ex. 2C, DHEC_000895-97; Pet'rs. Ex. 3B, DHEC_002042-44) (emphasis in originals).]

In short, there can be no discharges from the Projects. Appellants nonetheless argue that, as Large CAFOs, the Projects require NPDES permits that, in fact, would authorize them to discharge pollutants into waters of the State. Init. Br. App., p.12; 3 S.C. Code Ann. Regs. 61-9 Part 122.1(b)(1) (2011) ("The NPDES program requires permits for the discharge of 'pollutants'"). Alternatively, Appellants assert the Projects require DHEC determinations that they have "no potential to discharge manure, litter, or process wastewater." Init. Br. App., p.12. In other words, Appellants claim that, even though DHEC has taken action through regulation and the Permit restrictions to completely ban discharges from the Projects, it must also undertake the gratuitous action of analyzing discharges under a wholly separate regulatory scheme.

The ALC rejected Appellants' contentions. The ALC reasoned that, when DHEC issues a notification of its determination to issue a permit under 4 S.C. Code Ann. Regs. 61-43 Part 200 *et seq.*, which prohibits discharges from the permitted facilities, DHEC also considers that written notification to constitute its determination under 3 S.C. Code Ann. Regs. 61-9 Part 122.23 that the operation of the facility will not allow the discharge of pollutants into waters of the State. [R. p. 9 (ALC Order, p. 6).] The ALC also found that "since the permits ... do not allow any [animal feeding operations (AFO)] to contribute pollutants to the waters of the State,

[DHEC's] determination to issue an agricultural permit ... also constitutes a determination that the AFO has no potential to discharge into the waters of the State." [*Id.*] "In other words, [DHEC] asserts that the applicants' demonstrations [under 3 S.C. Code Ann. Regs. 61-9 Part 122.23] are made by the very nature of the permit request and thus no formal declaration be made" that the facilities have "no potential to discharge." [*Id.*] Thus, reading the two regulations *in pari materia*, the ALC concluded that "[s]ince [4 S.C. Code Ann. Regs. 61-43 Part 200] provides that the proposed facilities are not allowed to discharge, there is an inherent determination that the facilities have 'no potential to discharge' in keeping with [3 S.C. Code Ann. Regs. 61-9 Part 122.23(f)]." [*Id.*]

The ALC's determination was required by the principles of statutory construction and, moreover, DHEC's interpretation of its regulations is entitled to deference. As recognized below, "interpreting regulations administered by an agency is a two-step process." [R. p. 8 (ALC Order, p. 5).] First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation." *Kiawah Dev. Partners, II*, 411 S.C. at 32, 766 S.E.2d at 717. However, "[i]f a statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *see also S.C. Dep't of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct.App.2008).("If a [regulation] is

susceptible to two reasonable interpretations, it is ambiguous."). Unless an agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute," courts therefore must "defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations." *Kiawah Dev. Partners, II*, 411 S.C. at 34-35, 766 S.E.2d at 718.

As it pertains to this appeal, there are two regulatory processes by which DHEC regulate animal facilities. The first is the NPDES permitting program governing discharges of pollutants to waters of the State. Under this program, a CAFO may request an NPDES permit, which, if granted, would permit it to discharge pollutants. *See* 3 S.C. Code Ann. Regs. 61-9 Part 122.1(b)(1). Alternatively, the CAFO may seek a determination that it has "no potential to discharge." If the CAFO receives such a determination, it is exempt from seeking coverage under an NPDES Permit. 3 S.C. Code Ann. Regs. 61-9 Part 122.23(d)(2). As a result, the CAFO would be prohibited from discharging pollutants from the facility because it would not be subject to an NPDES permit. *See* 3 S.C. Code Ann. Regs. 61-9 Part 122.1(b)(1); 3 S.C. Code Ann. Regs. 61-9 Part 122.23(f)(5).

The second regulatory process governing animal facilities is DHEC's animal facility permitting program, which establishes standards for the growing or confining of animals, the processing of animal manure, and the land application of animal manure in order to protect the environment, and the health and welfare of citizens of The State from pollutants ...." 4 S.C. Code Ann. Regs. 61-43 Part 200.10(A)(1) (2011). As part of this program, DHEC has mandated that "[a]nimal manure and other

animal by-products from a new or expanded facility can only be generated, handled, stored, treated, processed, or land applied in the State in accordance with a permit issued by the Department under the provisions of this" program. 4 S.C. Code Ann. Regs. 61-43 Part 200.20(A).

In issuing a permit to an animal facility allowing it to operate under the animal facility permitting program, DHEC specifically prohibits any "discharge of pollutants from the operation into surface waters of the State (including ephemeral and intermittent streams)." 4 S.C. Code Ann. Regs. 61-43 Part 200.140(A). Thus, by virtue of the fact that DHEC allows these facilities to operate, they are prohibited from discharging pollutants into waters of the State at all and, if they do so, "are subject to the penalties in [S.C. Code Ann. §§ 48-1-320 (Criminal Penalties) and 48-1-330 (2008) (Civil Penalties) of the [PCA]." 4 S.C. Code Ann. Regs. 61-43 Part 200.200(A) (2011). *See also* R. p. 1164, lines 9-13 (Tr. 827:9 – 13) (a discharge from an animal facility is a violation of 4 S.C. Code Ann. Regs. 61-43 Part 200 *et seq.*); p. 1190, lines 1-4 (Tr. 853:1 – 4) (facilities that follow the regulations in their CNMPs should not be discharging and, if they do, they are in violation of the regulation and subject to enforcement action).]

Not only does reading these two regulatory provisions in this manner advocated by Appellants "elevate form over substance," R. p. 11 (ALC Order, p. 8), but also it "is plainly absurd." *Hodges v. Rainey*, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000). Under Appellants' interpretation, a CAFO first would be required to obtain an animal facility permit, which would specifically prohibit it from discharging. Then,

however, the CAFO also would be required to file a request pursuant to DHEC's NPDES program. Receipt of the NPDES permit, if granted, would allow the CAFO to discharge pollutants into waters of the State even though that discharge would be in direct violation of their animal facility permit. Alternatively, the CAFO could seek a determination that they have "no potential to discharge," which would exempt the CAFO from the NPDES requirements and also prohibit it from discharging. Because the same result would occur in the absence of the NPDES application—prohibiting the CAFO from discharging—the "no discharge" requirements of the animal facility permit and of 4 S.C. Code Ann. Regs. 61-43 Part 200.140(A) would be unnecessary. Simply put, the issuance of two separate permits or determinations under both the NPDES program and the animal facility permitting program would render one of the permits either meaningless or superfluous, and thus require DHEC to do a futile act that could not have been intended by the legislature. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

By comparison, DHEC's interpretation of its regulations is entirely reasonable and consistent with its authority under the PCA to "[t]ake all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act or the Federal Air Quality Act and any and all other Federal and State acts concerning air and water pollution control." S.C. Code Ann. § 48-1-50(17) (2008). When DHEC issues a permit pursuant to 4 S.C. Code Ann. Regs. 61-43 Part 200 *et seq.* and prohibits the facility from making any discharges of pollutants to waters of the State, the agency effectively makes an advance determination that the facility

has "no potential to discharge" as contemplated by 3 S.C. Code Ann. Regs. 61-9 Part 122.23.[5] As well, discharges are prohibited from occurring at all, it is irrelevant whether a facility has a "potential to discharge" because, if a discharge actually occurs, the facility is subject to both criminal and civil penalties under the CWA and the PCA. *See* 4 S.C. Code Ann. Regs. 61-43 Part 200.200(A).

Thus, DHEC has applied a "practical, reasonable, and fair interpretation" of the regulations "consonant with the purpose, design and policy of lawmakers." *State v. Henkel*, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015) (citation and internal quotation marks omitted); *see also Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("Moreover, it is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). Furthermore, DHEC's interpretation of these regulations is entitled to deference because it has "been entrusted with administering [its] statutes and regulations and because [it has] unique skill and expertise in administering those statutes and regulations." *Kiawah Dev. Partners, II*, 411 S.C. at 34, 766 S.E.2d at 718. Consequently, the ALC correctly

[5] Appellants assertion that because an animal facility is issued a "no discharge" permit does not mean it has "no potential to discharge" also is without merit. Appellants state that "it is not difficult to draw a conclusion that the proposed facilities have a potential to discharge" based on their proximity to various water bodies. Init. Br. App., p. 25 n. 6. Not only is this "evidence" circumstantial, there is nothing in the record to support a conclusion that these facts necessarily mean pollutants will be discharged to waters of the State. *See* R. p. 30 (ALC Order, p. 27) ("the evidence that Petitioners presented on that issue of the potential for the runoff of manure or its constituents was both limited and unimpressive."); R. p. 10 (ALC Order, p. 7) (finding "**the facts of this case** reflect that the facility will not discharge pollutants into waters of the State.") (emphasis in original). Contradicting this suggestion, Appellants' own expert testified that, in order to make such a determination, he would need to know whether or not riparian or vegetative buffers were present. [R. p. 987, lines 12-20 (Tr. 648, ll. 12-20).]

rejected the positions advanced by Appellants and upheld DHEC's application of its regulations that the Projects do not require an NPDES permit or a determination that they have "no potential to discharge."

B. Broilers are not required to obtain an NPDES Permit for the Projects because 3 S.C. Code Ann. Regs. 61-9 Part 122.23 is ambiguous and conflicts with other regulatory and statutory law.

As an additional sustaining ground, *I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724, Broilers contend that DHEC's NPDES permit regulations as they relate to CAFOs are ambiguous, contravene the plain language of the CWA pursuant to which they have been promulgated, and conflict with the requirements of the NPDES permitting program.

Specifically, if a point source does not discharge pollutants into waters of the State or the United States, there is no violation of the CWA or DHEC's NPDES regulations and the point source is not obligated to seek or obtain an NPDES permit. That is, through the NPDES permitting system, DHEC requires persons or facilities to obtain permits to discharge pollutants into waters of the State or the United States. *See* 3 S.C. Code Ann. Regs. 61-9 Parts 122.1(b)(1), 122.2(b) (2011). DHEC regulations also prohibit the discharge of a pollutant by any person from any point source to navigable waters unless authorized by an NPDES permit. *See* 33 U.S.C.A. §§ 1311(a), 1342 (2012, as amended); 3 S.C. Code Ann. Regs. 61-9 Parts 122.1(b)(1); *see also* 3 S.C. Code Ann. Regs. 61-9 Part 122.2(b) (2011) (defining the term "discharge of a pollutant" to mean "[a]ny addition of pollutant ... to waters of the State from any point source."). Thus, in the absence of an actual addition of any pollutant to

navigable waters from any point, there is no point source discharge for DHEC to regulate, no obligation of point sources to comply with regulations for point source discharges, and no obligation of point sources to seek or obtain an NPDES permit.

This exact issue was directly addressed by the Second Circuit in *Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2d Cir. 2005). There, the court reviewed an EPA rule, promulgated in 2003, which required all CAFO owners or operators to apply for an individual NPDES permit, unless they "secure[d] a determination from the director of the relevant permitting authority that the Large CAFO has 'no potential to discharge.'" *Id.* at 495 (*citing* 40 C.F.R. § 122.23(d)(2), (f) (effective 2003)); *cf.* 3 S.C. Code Ann. Regs. 61-9 Part 122.23(d)(2). In rejecting this language, the court concluded that the rule "contravene[d] the regulatory scheme enacted by Congress," which gives the permitting authorities the jurisdiction "to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." *Id.* at 505 (emphasis in original).

In response to *Waterkeeper*, the EPA revised its regulations in 2008 to require that a CAFO owner or operator apply for a permit only if the CAFO "discharges or proposes to discharge pollutants." 40 C.F.R. § 122.23(d)(1) (2008). In 2011, the Fifth Circuit in *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738 (2011), struck down this requirement that CAFOs which "propose to discharge" must apply for an NPDES permit. 635 F.3d 738, 750 (5th Cir. 2011). There, the court held that the regulation at issue "required CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of *Waterkeeper*, as well as Supreme Court

and other well-established precedent." *Id.* at 750; *see also Service Oil, Inc. v. U.S. E.P.A.*, 590 F.3d 545, 550 (8th Cir.2009) (reiterating the scope of the EPA's regulatory authority and concluding that "[b]efore any discharge, there is no point source" and the EPA does not have any authority over a CAFO). In recognition of these decisions, the EPA further amended its regulations in 2012 to provide that "[a] CAFO must not **discharge** unless the discharge is authorized by an NPDES permit." 40 C.F.R. § 122.23(d)(1) (2012) (emphasis added).

Although DHEC regulations have not since been amended to conform to this new language,[6] the same analyses set forth in *Waterkeeper*, *Nat'l Pork Producers Council*, and *Service Oil* apply here. DHEC has mandated—both by the plain language of the Permits and by regulation—that animal facilities like the Projects are prohibited from discharging pollutants. *See* 4 S.C. Code Ann. Regs. 61-43 Parts 200.140(A) and 200.20(B); R. pp. 1707-1709; pp. 1702-1704; pp. 1712-1714 (Pet'rs. Ex. 1B, DHEC_003167-69; Pet'rs. Ex. 2C, DHEC_000895-97; Pet'rs. Ex. 3B, DHEC_002042-44). Consequently, requiring animal facilities that do not discharge to obtain NPDES permits or requiring DHEC to determine whether facilities prohibited from discharging have "no potential to discharge" would be wholly inconsistent with the regulatory scheme enacted by Congress, the South Carolina General Assembly,

[6] The EPA Final Rule provides, however, that the 2012 revised rule "applies to CAFOs as ... defined in the NPDES regulations at 40 C.F.R. 122.23" and "applies to States ... with authorized NPDES Programs." *See* 77 Fed. Reg. 44494-01; *see also* 40 C.F.R. §§ 123.25(a) (2017) (state programs must be administered in conformance with the EPA provisions governing CAFOs, among other provisions), 123.25(b) (states shall assure that the approved planning process is at all times consistent with the Clean Water Act).

and DHEC, all of which give the permitting authorities the jurisdiction to regulate and control only actual discharges—not potential discharges.

In an attempt to evade *Waterkeeper*, Appellants cite to the Michigan Court of Appeals decision in *Mich. Farm Bureau v. Dep't of Envtl. Quality*, 807 N.W.2d 866 (2011), suggesting that DHEC has authority under the PCA to require Large CAFOs to obtain an NPDES permit for proposed or potential discharges.[7] This decision is readily distinguished, however.

There, the Michigan court addressed whether or not the Michigan Department of Environmental Quality (DEQ) had the authority to promulgate rules equivalent to the 2003 EPA regulations and that required CAFO owners to either apply for an NPDES permit or a determination that they have "no potential to discharge." *Id.* at 874. The court specifically recognized that Michigan statutes "authoriz[ed] the DEQ to promulgate any rules '**as it considers necessary** to carry out its duties ...' to 'protect and conserve the water resources of the state' and to 'control ... the pollution of surface or underground waters of the state ...." *Id.* at 885 (emphasis added) (citations omitted). The court also found that "the DEQ has the duty 'to protect and conserve the water resources of the state' ... and to 'to take all appropriate steps to prevent any pollution **the [DEQ] considers to be unreasonable** ....'" *Id.* at 886 (emphasis added) (citations omitted). The Michigan court therefore concluded that

[7] Appellants assert that the PCA "provides broad discretion to DHEC to prevent pollution under permit programs" and suggest that it is this authority that authorizes DHEC "to require Large CAFOs to obtain an NPDES permit for proposed or potential discharges." Init. Br. App., p. 29. Throughout their brief, however, Appellants cite to and rely upon federal guidance pertaining to the exact EPA regulations that were rejected by the *Waterkeeper* court and that, therefore, are no longer applicable. *See* Init. Br. App., pp. 9-10, 12, 13, 22.

the DEQ, which was advocating for the enforcement of its regulations, had the authority to "exercise [its] discretion" and "to carry out its duties by requiring all CAFOs" to either seek an NPDES permit or to request a determination that they have "no potential to discharge." *Id.* at 886-87 (citations omitted).

Like the DEQ, DHEC also has exercised its discretion in how it addresses pollution control from animal facilities located in South Carolina, albeit in a different way. Specifically, DHEC recognizes that 4 S.C. Code Ann. Regs. 61-43 Part 200 *et seq.*, which prohibits CAFOs from discharging **any** pollutants, is **more stringent** than the NPDES permitting requirements, which authorize discharges under certain circumstances. DHEC therefore has determined that the permitting requirements of 3 S.C. Code Ann. Regs. 61-9 Part 122.23 are not applicable to CAFOs and, in fact, would be more permissive in allowing the discharge of pollutants. This interpretation is wholly within the authority granted to DHEC under the PCA, which provides that DHEC "may, by regulation, specify equipment, operational practice, or emission control method, or combination thereof" "[e]xcept where [it] determines that it is not feasible to prescribe or enforce an emission standard or standard of performance." S.C. Code Ann. § 48-1-30 (2008); *see also* S.C. Code Ann. § 48-1-50(5) (2008) (DHEC "may ... [i]ssue ... permits, under such conditions as it may prescribe for the discharge of sewage ... or other waste ...."). This determination therefore requires deference. *Kiawah Development Partners, II*, 411 S.C. at 33, 766 S.E.2d at 717.

For these reasons, the decision in *Mich. Farm Bureau* does not support Appellants' inference that DHEC *must* require CAFOs to obtain NPDES permits or

obtain a determination that they have "no potential to discharge." To the contrary, it supports the agency's decision in that it demonstrates DHEC has been given the authority by the South Carolina General Assembly to determine how to safeguard the State against water pollution.

C. Appellants claims are not ripe inasmuch as Broilers are not presently required to apply for an NPDES permit or request a determination that the Projects have "no potential to discharge."

Finally, even assuming Broilers are required to seek or obtain an NPDES permit or a determination that they have "no potential to discharge," the ALC's decision should be affirmed based on its alternative finding that this issue is not ripe for consideration. The basis of Appellants' appeal is that "**[p]rior to** or in conjunction with the application process to obtain an agricultural animal permit," Broilers "must seek coverage under a CAFO NPDES permit or obtain an exemption by showing the proposed facilities [have] 'no potential to discharge.'" Init. Br. App., p.16 (emphasis added). Appellants further acknowledge that "[t]he issue here involves a duty to apply for an NPDES permit **before CAFO operations commence**." Init. Br. App., p.27 (emphasis added). In this regard, Appellants recognize the requirements of 3 S.C. Code Ann. Regs. 61-9 Part 122.23(g) which provides:

> When must a CAFO seek coverage under an NPDES permit?
>
> ...
>
> (4) New sources. New sources must seek to obtain coverage under a permit **at least 180 days prior to the time that the CAFO commences operation**.

(emphasis added); *see also* 3 S.C. Code Ann. Regs. 61-9 Part 122.23(f) ("In requesting a determination of "no potential to discharge," the CAFO owner or operator must

submit any information that would support such a determination, **within the time frame provided by the Department and in accordance with paragraphs (g) and (h) of this section**.") (emphasis added).

Broilers, as "new sources,"[8] plainly would not be required to apply for coverage under an NPDES permit or seek a determination that the Projects have "no potential to discharge" until 180 days prior to the date they begin operations (assuming that they are required to do so). As correctly determined by the ALC, the facilities are not in any event presently subject to the NPDES permitting requirements because they have not been constructed or begun operations and therefore cannot presently produce manure, litter, or wastewater. [R. p. 11 (ALC Order, p. 8).] Because nothing in the record remotely suggests that the Projects will begin operating in 180 days, there is no present requirement that Broilers must apply for an NPDES permit or seek a "no potential to discharge" determination even under Appellants' theory. *See Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006) ("[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review.").

Thus, DHEC's decision to issue the animal facility Permits at issue would not presently be impacted in any way by Appellants' flawed NPDES permit theory. At most, Broilers would only be required to request an NPDES determination at the appropriate time specified in 3 S.C. Code Ann. Regs. 61-9 Part 122.23(g), which has not yet occurred. If the Court concludes that the Projects are required to obtain

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[8] *See* Init Br. App., p. 31 n. 8 ("During the ALC hearing, DHEC conceded that 'new source' means Respondents' permit applications ....").

NPDES permits or seek determinations that they have "no potential to discharge," the Court therefore should still affirm the ALC's alternative finding that this issue is not ripe for consideration and, on this alternate basis, uphold the ALC's decision that the Permits should issue.

III. The ALC did not err in determining that DHEC properly and adequately considered and evaluated the potential impacts of the Projects to the Waters of the State.

A. The record contains substantial evidence that DHEC and the ALC, as the finder of fact, properly evaluated whether additional setbacks were necessary for the Projects.

Appellants suggest that DHEC erred by not requiring additional setbacks for the Projects because "ag facilities are not considered as contributors to the [Total Maximum Daily Load]." Init. Br. App., p. 30. Appellants also suggest that DHEC improperly "rejected consideration of additional requirements or setbacks because the permit is a no-discharge permit; thus, no additional setbacks or requirements are warranted." Init. Br. App., p. 31. These claims lack merit for a number of reasons.

As an initial matter, 4 S.C. Code Ann. Regs. 61-43 Part 200.70(F) provides that DHEC:

> shall evaluate the proposed site, including, but not limited to the following factors when determining if additional distances are necessary:
>
> 1. Proximity to 100-year floodplain;
> 2. Geography and soil types on the site;
> 3. Location in a watershed;
> 4. Classification or impairment of adjacent waters;
> 5. Proximity to a State Designated Focus Area; Outstanding Resource Water; Heritage Corridor; Historic Preservation District; State Approved Source Water Protection Area; state or national park or forest;

state or federal research area; and privately-owned wildlife refuge, park, or trust property;
6. Proximity to other known point source discharges and potential nonpoint sources;
7. Slope of the land;
8. Animal manure application method and aerosols;
9. Runoff prevention;
10. Adjacent groundwater usage;
11. Down-wind receptors; and
12. Aquifer vulnerability.

The record reflects that, in compliance with these requirements, DHEC used a review checklist "to go down through the management plan and the application to do a comprehensive review to determine that [each] site meets the setbacks as set forth in 61-43." [R. p. 1157, lines 10-13 (Tr. 820:10 – 13); *see also* R. pp. 1689-1700; pp. 1666-1677; pp. 1678-1688 (Pet'rs. Ex. 1B, DHEC_003171-82; Pet'rs. Ex. 2C, DHEC_000899-910; Pet'rs. Ex. 3B, DHEC_002049-59).] Furthermore, the record reflects substantial evidence that DHEC's permit reviewer considered the proximity of the Projects to the Little River, the impairment of adjacent waters, and other related factors. [R. p. 1162, line 10 – p. 1167, line 2 (Tr. 825:10 – 830:2); *see also* pp. 1689-1700; pp. 1666-1677; pp. 1678-1688 (Pet'rs. Ex. 1B, DHEC_003171-82; Pet'rs. Ex. 2C, DHEC_000899-910; Pet'rs. Ex. 3B, DHEC_002049-59) (reflecting, among other things, DHEC considered the locations of upstream and downstream point discharges and the proximity of the Projects to impaired bodies).] Accordingly, there is substantial evidence that DHEC complied with the regulatory requirements when considering the appropriate setbacks for each of the Projects and that DHEC in fact did evaluate the sites for their proximity to each of the required factors, but ultimately determined that no additional setbacks were required.

Appellants real complaint, however, is that DHEC reached a position contrary to their preferred view. Init. Br. App., p. 32 (complaining that DHEC's evaluation of the factors was not "meaningful" and that the agency only attempted to "simply adher[e] to minimum standards"). That is, they complain not about whether DHEC considered these factors in its evaluation, but about its conclusion that the Projects will not contribute to water quality impairment because the Permits are "no-discharge" permits. Init. Br. App. 30. But because the proceeding below was a contested case, the ALC served as the finder of fact and made a *de novo* determination regarding the matters in controversy. *See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 577, 595 S.E.2d 851, 853 (Ct.App.2004). As a finder of fact, the ALC was entitled to weigh the evidence presented by the parties in order to determine, by a preponderance of the evidence, whether the relief requested by Appellants should be granted. S.C. Code Ann. § 1-23-600(A)(5) (Supp.2017). In this regard, the ALC made several findings—all fully supported by reliable, probative, and substantial evidence—to conclude that additional setbacks are not warranted.

First, each of the Projects, as approved by DHEC, was sited so as to equal at least twice, and up to 22 times, the minimum setbacks pertaining to water bodies. [R. p. 15; p. 17; p. 1497; p. 1222; p. 1338 (ALC Order, p. 12, 14 ; Pet'rs. Ex. 1B, DHEC_003189; Pet'rs. Ex. 2C, DHEC_000924; Pet'rs. Ex. 3B, DHEC_002068).] Thus, the ALC recognized that, as approved by DHEC, "each of the Projects is sited as to well exceed the minimum setback requirements." [R. p. 30 (ALC Order, p. 27).] *See also* S.C. Code Ann. § 46-45-80 (as amended by Act No. 139 of 2018) ("Any setback

distances given in R. 61-43 ... are minimum siting requirements as established by [DHEC]. **As long as the established setbacks are achieved, [DHEC] may not require additional setback distances**.") (emphasis added).

The ALC also recognized that the Permits are issued under 4 S.C. Code Ann. Regs. 61-43 Part 200 *et seq.*, which is concerned with the runoff of manure from those permitted facilities. [R. p. 30 (ALC Order, p. 27).] However, the ALC determined that Appellants' "evidence concerning runoff centered upon runoff of sediment." [*Id.*] Based on this record, the ALC found that the "evidence failed to establish the existence of an interrelated concern" between runoff of sediment and runoff of manure at the proposed facilities." [*Id.*] Specifically, Dr. Hargett admitted "that riparian and vegetative buffers can be very effective in reducing sediment, nutrients, and other constituents of concern."[9] [R. p. 23; p. 913, lines 7-13 (ALC Order, p. 20; Tr. 574:7 – 13).] The record also reflects that the CNMPs for each of the Projects require vegetation to be established "around the buildings and storage structures to reduce soil erosion, ... offsite nutrient and pathogen transport." [R. p. 1532; p. 1295; p. 1428 (Pet'rs. Ex. 1B, DHEC_003224; Pet'rs. Ex. 2C, DHEC_000997; Pet'rs. Ex. 3B, DHEC_002158); *cf.* R. p. 22 (ALC Order, p. 19) (Appellants "failed to present probative evidence addressing whether vegetative or riparian buffers will exist between the manure piles and waters of the State.").] In addition, Dr. Hargett

[9] Dr. Hargett also testified that he would need to know whether or not such buffers were in place before he could opine whether a release of water from a manure pile would pollute waters of the State. [R. p. 987, lines 4-20 (Tr. 648:4 – 20).] Because he was not aware of these facts, the record does not support Appellants assertions, much less contain substantial evidence, that the Projects will increase pollution in waters of the State.

acknowledged that issues pertaining to riparian and vegetative buffers can be addressed as part of site-specific stormwater issues when the Projects apply for stormwater permits. [R. p. 847, lines 7-10; p. 902, line 3 – p. 903, line 3 (Tr. 508:7 – 10; 563:3 – 564:3).] He also admitted that manure is not being disposed of into waters of the State as a function of the proper operation of the facility and that the land application sites for J.Y. Broilers appear to be "well suited." [R. p. 875, lines 12-14; p. 950, lines 13-18 (Tr. 536:12-14; 611:13 – 18).]

The record also reflects that as part of the management plans for the Projects, the Permits require Broilers to employ "conservation practices ... as a part of a conservation management system in order to decrease non-point-source pollution of surface and groundwater resources, and establish vegetation to reduce soil erosion on the site...." [R. p. 13; pp. 1492-1660; pp. 1215-1331; pp. 1332-1491 (ALC Order, p. 10; Pet'rs. Ex. 1B, DHEC_003184-3352; Pet'rs. Ex. 2C, DHEC_000917-1033; Pet'rs. Ex. 3B, DHEC_002062-2221).] The plain language of the Permits also mandates that Broilers "operate and maintain [the Projects] in accordance with State and Federal law so as to prevent discharges to the environment." [R. p. 1708; p. 1703; p. 1713 (Pet'rs. Ex. 1B, DHEC_003168; Pet'rs. Ex. 2C, DHEC_000896; Pet'rs. Ex. 3B, DHEC_002043).] And, as noted previously, in order for the Projects to be built, Broilers will be required to obtain a building permit as well as a stormwater permit which can include various best management practices to address erosion and runoff issues. [R. p. 1187, lines 16-25; p. 647, line 21 – p. 649, line 4; p. 902, lines 14-25 (Tr. 850:16 – 25; 308:21 – 310:4; 563:14 – 25).]

Based on this substantial evidence, the ALC therefore properly and correctly determined that no additional setbacks were required to address potential pollution from the sites and that the Projects "will not result in an increase of pollution to waters of the State." [R. p. 23 (ALC Order, p. 20).] The ALC's determination is entitled to deference on this basis alone.

However, the ALC went further and noted that Appellants' concerns presented in this matter largely arose out of the location of the D.C. Broilers and J.Y. Broilers barns, which, in an effort to accommodate Ms. Basel, DHEC had required be moved closer to the Little River and to certain ditches or swales existing on the property. [R. p. 31; p. 1175, lines 5-10 (ALC Order, p. 28; Tr. 838:5 – 10).] The ALC also recognized Dr. Hargett's testimony that, if the houses were moved away from the Little River, it would alleviate some of his concerns regarding the potential impact to water resources. [R. p. 958, lines 1-23 (Tr. 619:1 – 23) (also stating that "[i]t would provide additional conservatism in protecting the water resources"); p. 959, lines 16-23 (Tr. 620:16 – 23).] For these reasons, the ALC modified the Permits so as to move them further away from the Little River, and also to require the Projects to obtain a stormwater permit that addresses whether setback limitations should exceed the minimum setback requirements. [R. pp. 32-33 (ALC Order, pp. 29-30).] In doing so, the ALC enlarged the setbacks approved by DHEC even further beyond those which the ALC had already determined were sufficient.

In short, taken separately or together, these determinations are supported by substantial evidence and demonstrate that the ALC considered these issues in a

meaningful way when evaluating these Projects. The ALC thus properly concluded that additional setbacks, although not necessarily required, were warranted.

B. Appellants' alleged evidence of potential discharges is insufficient to demonstrate the ALC's decision is clearly erroneous.

Appellants apparently seek to have this Court substitute its view of the facts for that below by erroneously suggesting that the ALC erred based on alleged "evidence showing potential discharges rebuts DHEC's position that ... [animal facilities] simply do not discharge wastes or pollution." Init. Br. App., p. 36. However, the ALC determined that the testimony identified by Appellants was anecdotal and "suggests, at most, that certain growers are operating out of compliance with DHEC's regulations, which is an enforcement issue and not relevant to [DHEC's] review of [Broilers'] applications." [R. p. 21 (ALC Order, p. 18).] The ALC also found that this evidence did "not demonstrate that pollutants reached the waters of the State ... or that runoff from these facilities was not controlled by vegetative or riparian buffers." [*Id.*]

The ALC's decision in this regard should be respected because an appellate "court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B). Furthermore, Appellants have made no demonstration that these findings are "unsupported by substantial evidence or controlled by some error of law." *Kan Enterprises, Inc. v. S.C. Dep't of Revenue*, 420 S.C. 596, 603, 803 S.E.2d 882, 886 (Ct.App.2017), reh'g denied (Sept. 22, 2017) (quoting *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));

see also Barton v. S.C. Dep't of Prob. Parole & Pardon Servs., 404 S.C. 395, 401, 745 S.E.2d 110, 113 (2013). To the contrary, the ALC properly weighed this evidence and determined it was not persuasive.

C. The ALC did not require Appellants to bear an unreasonable burden of proof.

Appellants' assertion that the ALC improperly "looked to the Appellants for evidence proving that existing permitted facilities actually increased pollution to waters of the State" also is without merit. Init. Br. App., p. 34. As discussed previously, Appellants never raised the issue of burden of proof to the ALC. Thus, it has not been preserved for appellate review. *See Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375, 496 S.E.2d 17, 18–19 (1998) (finding issue of burden of proof must be raised and ruled upon to be preserved for appellate review).

Nevertheless, as the party seeking to challenge DHEC's decision, Appellants had the burden to convince the ALC of its position that the Projects would discharge pollutants to waters of the State. *Hoffman v. Greenville County*, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963). That they failed to do so means they failed to meet their burden. And, despite their complaint that they "lack legal access to existing poultry facilities," they could have sought access to Broilers' facilities pursuant to SCALC Rule 21(A) and Rule 34(a), SCRCP, and to the properties of others through a subpoena pursuant to SCALC Rule 22 and Rule 45, SCRCP. Appellants failure to take available steps to meet their burden of proof does not amount to error on the part of the ALC.

D. Appellants improperly allege that DHEC must assume applicants for animal facility permits will violate the law.

Finally, Appellants advocate a standard that is to be found nowhere in the law. They assert that "[a]t the heart of DHEC's flawed interpretation is a misapplication of its presumption that a permittee will comply with his permit." Init. Br. App., p. 35. In other words, Appellants seek to have DHEC presume that all applicants will violate the conditions and requirements of their permits in order to "determine whether the particular context of the proposed facility warrants additional or more stringent conditions beyond the minimum requirements." Init. Br. App., p. 33.

Appellants advocated standard would improperly assume that all animal facilities will violate the law. *See Augusta Power Co. v. Savannah River Elec. Co.*, 163 S.C. 541, 163 S.E. 822, 825 (1930) ("To assume an intention on the part of defendant to violate the Constitution or laws of this state is to prejudge the case.") (citing *McMeekin v. Central Carolina Power Co.*, 80 S.C. 512, __, 61 S.E. 1020, 1024 (1908) ("[T]he petitioner assumes that the defendant will not comply with the requirements of the statute. It would be prejudging the case to decide that question at this time."). Instead, as the ALC properly determined, DHEC "must assume that a permittee will comply with the conditions of the permit that it issues to the permittee." [R. p. 11 at n.4 (ALC Order, p. 8 n.4).] Appellants' proposed interpretation of DHEC's regulations "would improperly penalize the permittee and create an absurd result," [*id.*] and therefore must be rejected.

CONCLUSION

For the reasons explained above, the Court should deny Appellants' appeal and affirm the Order of the Administrative Law Court.

Respectfully submitted,

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Columbia, South Carolina
August 7, 2018

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Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2017-002598

ALC Case Nos. 17-ALJ-07-0041-CC; 17-ALJ-07-0042-CC; 17-ALJ-07-0039-CC

Charles S. Blackmon and South Carolinians for
Responsible Agricultural Practices,..Appellants,

v.

South Carolina Department of Health and Environmental
Control and David Coggins Broilers, ...Respondents;

Charles S. Blackmon and South Carolinians for
Responsible Agricultural Practices,..Appellants,

v.

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Control and Heath Coggins Broilers, ...Respondents;

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Control and Jim Young Broilers, ...Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondents David Coggins Broilers, Heath Coggins Broilers, and Jim Young Broilers** complies with Rule 211(b), SCACR.

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Columbia, South Carolina
This 7th day of August, 2018