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S.C. SUPREME COURT

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

Pickens County,

Respondent,

vs.

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

Petitioners.

RETURN TO PETITIONS FOR WRIT OF CERTIORARI

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INTRODUCTION

The relatively straightforward preliminary inquiry presented in this appeal, while of the utmost significance to Respondent, is unlikely to have any important precedential value going forward. The central question in this appeal is whether Pickens County will have an opportunity to challenge a backroom landfill permit modification issued to MRR Pickens, LLC ("MRR"), given the peculiar circumstances through which Pickens County came to receive notice of such modification. As with any appeal as narrow and circumstance-specific as this one, the effect of any ruling announced in this case is likely to be constrained to this particular dispute between these particular parties. Such conclusion is particularly apparent when considering the aberrant, covert and improper permitting process that necessitated this appeal. As with any ruling announced in relation to agency and applicant impropriety, one must hope and expect that it will not be implicated often.

For years, Pickens County and certain of its most affected residents have sought a forum in which to present their arguments that the content of MRR's landfill permit modification violates our State's substantive landfill regulations. After much delay and expense, the Court of Appeals has now emphatically granted Pickens County that right by issuing an opinion that is scathing in its critique of MRR and DHEC's surreptitious actions. Yet, instead of finally presenting its position as to the merits of this case, the County is yet again submitting arguments regarding preliminary notice and timeliness, now responding to a petition filed by the third law firm to submit arguments for MRR in this appeal. If for no other reason, judicial economy and effectiveness dictate that the preliminary procedural issue presented in this appeal must be put to bed so that this important case can now *begin*.

The Court of Appeals' opinion in this case lays out clearly how MRR sought to modify the design of its Class 2 landfill in order to meet the specifications of a Class 3 landfill, but to prevent official designation of the landfill as Class 3, so as to hide the modifications from Pickens County and its residents. The Court of Appeals rightly recognized that a party undertaking such deception should not receive the benefit of a statutory timeliness shield when that party's subterfuge has its intended effect. Make no mistake, the Petitioners are here now effectively asking for the Supreme Court to restore the fruits of their subterfuge.

The Court of Appeals plainly saw through the false narrative advanced by the Petitioners that the permit modification at issue here was a legitimate and normal exercise of authority by the South Carolina Department of Health and Environmental Control ("DHEC") and that Pickens County and its residents were simply inattentive or dilatory. Instead, as laid out by the Court of Appeals, MRR went so far as deliberately misrepresenting facts and manipulating DHEC's landfill regulations in order to hide its actions from Pickens County and its residents, and DHEC cooperated, or at least did not resist. MRR and DHEC achieved the intended result when Pickens County received its first notice of the controversial permit modification well after the normal period for appealing that modification had expired.

Respondent is surely not alone in noticing the thread of cases emerging from this Court over the last decade or more that consistently strike at efforts to artificially constrict or overly burden the public's right to participate in the environmental permitting process. Most recently, this Court put an end to second-guessing of an affected party's standing to bring an environmental permit challenge, through its opinion in Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control, No. 2018-000137, 2020 WL 811729 (S.C. Feb. 19, 2020). Prior to that,

this Court put and end to second-guessing of an affected party's timeliness in bringing an environmental permit challenge when the notice provided to that party was defective. See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 702 S.E.2d 246 (2010). Taking these and other similar cases together, the overall message from this Court is clear: the preliminary inquiry as to whether an affected party can initiate an environmental permitting challenge leans heavily in favor of the would-be challenger, and there is no room within this inquiry for bending facts or law in order to close off public participation. In other words, this Court has already spoken as to exactly how it would resolve this case through its consistent decisions affirming the rights of the public to participate in the permitting process and rejecting various overreaches to deny that right. In this context, the Court's discretionary consideration of this case would be redundant.

STATEMENT OF FACTS

Drawing directly from the Court of Appeals' recitation of facts, it is clear that MRR had reason to know with near certainty that Pickens County and its residents would strongly object to MRR's proposal to modify its landfill design to allow for disposal of "special waste" including coal ash.[1] Most obviously, "[t]he County's Solid Waste Management Plan (SWMP), a local planning document required by state law, prohibits 'special waste' from being deposited in the County and states '[t]here are no operating Class Three Landfills in Pickens County.'" Opinion, p. 27. Moreover, Pickens County and MRR had entered a Development Agreement and Host

[1]DHEC asserts in its petition that it is "undisputed" that disposal of special waste and coal ash in the modified landfill would require separate, additional permission from the Agency. This assertion is most decidedly untrue, as MRR's counsel was specifically asked about this during arguments before the Court of Appeals and refused to concede that such disposal was not already authorized.

Agreement for MRR's construction of a Phase 2 landfill with no special waste. Opinion, p. 26. Knowing the opposition that would arise, MRR actively misrepresented the status of its landfill permit to Pickens County while pursuing modification of the landfill design to allow for disposal of special waste:

> While MRR was designing its modifications and communicating with DHEC, MRR misrepresented to the County and the Pickens County Planning Commission the nature of its plan for the landfill facility and operation. Dan Moore of MRR appeared before the Planning Commission on January 12, 2015, for the purpose of securing a land use approval, and stated there were "no changes" from the Class Two Landfill design approved in 2008. He made no mention of MRR's ongoing meetings with DHEC, certain engineering reports related to the permit modification MRR was discussing in the meetings with DHEC, or coal ash. When questioned about a landfill liner, Moore represented no liner would be required.

Opinion, p. 28.

The consequences of this and other misrepresentations in relation to the permit modification were then greatly amplified by DHEC's endorsement of MRR's legal maneuver for bypassing the usual public notice requirements. "A major permit modification requires public review and comment while a minor permit modification does not." Opinion, p. 28 (citing S.C. Code Ann. Regs. R.61-107 .19, Part IV, 1.2; Part I, D.2.c). DHEC's landfill regulations define a minor permit modification as "routine change" that "keeps the permit current" or an "administrative change," whereas a major permit modification is a substantial alteration to the facility or its operation or an "alternate design." Order, p. 28 n.8; S.C. Code Ann. Regs. 61-107.19, Part I, 48. At MRR's insistence, DHEC allowed MRR to install a liner in its landfill for the purpose of accepting "special waste," and to make other related design changes, as a minor modification without public notice. Opinion, p. 28-29; R. p. 229.

As relied upon by the Court of Appeals, the DHEC staff person responsible for allowing MRR to treat its permit modification as "minor" and to thereby avoid public notice subsequently provided extensive testimony reflecting that the modification was actually major, including: that the modification is a "new design for the landfill"; that the new design is essentially the same as a Class 3 landfill; that the permit modification sought disposal of previously unauthorized special wastes including coal ash; and that this would be the only "Class 2" landfill with a liner in the entire state. Opinion, pp. 31-32; R. pp. 164, 285-87. The Court of Appeals' reversal reflects that the court very obviously was not convinced of the legitimacy of DHEC allowing conversion of a Class 2 landfill into a Class 3 lined landfill design as a "minor" modification, especially given that MRR's motive to hide controversial waste disposal from Pickens County and the public was so readily apparent. Opinion, pp. 28, 38.

In relation to that motive, it is important to understand Pickens County's role in the original landfill design and permit. Quite contrary to the Petitioners' presentation of facts, which would have this Court believe that the County was simply a disinterested observer during the original permitting process, the County worked very closely with MRR to establish a mutually agreeable landfill design. MRR's initial pursuit of a landfill in Liberty, South Carolina included discussions and negotiations with Pickens County in order to accomplish compliance with the County's development standards and comprehensive plan. These discussions led the parties to execute a Development Agreement and Host Agreement for the landfill. (R. pp. 361-80). These agreements specify the nature of the landfill that MRR would develop ("Construction and Demolition ('C&D') and Land Clearing Debris ('LCD') landfill") and that Pickens County will serve as the Host Local Government for such operation. (R. pp. 362-63). As a reflection of the

County's fundamental relationship to the landfill permit, the Host Agreement requires MRR to simultaneously submit to Pickens County all reports submitted to DHEC. (R. pp. 362-63 ("All reports required to be submitted to DHEC by MRR Pickens, LLC must be simultaneously submitted to the County Administrator.")). In sum, the County could not have been more involved in the initial permitting of the unlined Class 2 landfill, and the County actively took efforts to secure continued monitoring of the landfill permit. In such light, the absurdity of the County being denied contemporaneous notice of significant, publicly important modifications to the landfill permit is brought into stark relief.

ARGUMENT

With this factual framework in place, the core question of law presented in this appeal emerges, which is simply: whether, after MRR and DHEC engaged in factual misrepresentations and a legal charade for the purpose of denying contemporaneous notice to Pickens County and the public, § 44-1-60's fifteen-day limitation can effectuate a timeliness bar when proper notice under that statute has not been provided. Whatever greater significance the Petitioners may try to give to this appeal for purposes of piquing this Court's interest, the appeal actually comes down to this simple question of law that the Court of Appeals resolved from existing precedent of this Court that is exactly on point.

I. As Recognized by the Court of Appeals, Statutory Notice is a Prerequisite to Statutory Limitations.

The ALC's dismissal of this case was based on Pickens County's purported non-compliance with the filing limitations period set forth in S.C. Code § 44-1-60. That section covers the process and procedure through which DHEC staff decisions can be appealed through

the DHEC Board and to the ALC in the form of a contested case. The ALC concluded that Pickens County did not appeal DHEC Staff's decision on the minor permit modification to the DHEC Board within fifteen days, as required by § 44-1-60, so its appeal was untimely, requiring dismissal. (R. p. 3). The major problem with this rationale is that the ALC failed to undertake the necessary prerequisite analysis of whether the fifteen-day limitations period has been triggered here. For the reasons that follow, it clearly is not.

The time limitation set forth in § 44-1-60 is contingent on DHEC's compliance with the preceding procedural and notice requirements in that section. In other words, DHEC must satisfy its obligations in noticing a permit decision under § 44-1-60 before the time limitation for challenging that permit decision under § 44-1-60 is implicated. This Court held exactly that, unequivocally, in S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 702 S.E.2d 246 (2010), and the existence of this clear precedent is one of the most obvious reasons why the pending petitions are unwarranted. In that case, the Coastal Conservation League filed for DHEC Board review under § 44-1-60 more than fifteen days after the DHEC staff decision. However, DHEC had not followed its protocol in mailing notice to the Coastal Conservation League, causing the League to receive its legally-entitled notice after the limitations period had expired. Id. at 422, 702 S.E.2d 248-49. This Court determined that DHEC had failed to notify the Coastal Conservation League in the manner required under § 44-1-60 and that the time limitations in that section did not start to run until DHEC corrected its error.[2] Id. at

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

> Section 44–1–60(E) requires DHEC to simultaneously send notice of its decision to the applicant, permittee, licensee, and affected persons requesting to be notified by certified mail, and the decision becomes final fifteen days after the

430, 702 S.E.2d at 253. Exactly the same principle of law can be applied to resolve this appeal in full, and the Court of Appeals recognized and accomplished just that. The only difference between this case and the Coastal Conservation League case is that DHEC never corrected its notice failure in relation to Pickens County and other adjoining property owners,[3] instead relying upon "actual notice."

The Coastal Conservation League holding was based on the plain language of § 44-1-60, which clearly communicates that proper notice under the statute is required before the statutory limitations period is triggered. The procedures in § 44-1-60 particularly emphasize the necessity of public notification, as reflected by in subsection (B): "The department staff **shall comply with all requirements for public notice**, receipt of public comments and public hearings **before making a department decision**." (emphasis added). S.C. Code § 44-1-60(B). Only after DHEC issues a staff decision in compliance with procedural and public notice requirements does subsection (E) dictate that the appeal of such decision to the DHEC Board must be filed within fifteen days. See § 44-1-60(E)(2).

It follows as a matter of precedent and statutory interpretation, and indeed as a matter of practical and logical necessity, that a DHEC decision issued without the appropriate public notice

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> decision has been mailed. In this case, we find that because the League was an affected person who asked to be notified, the decision did not become final until fifteen days after DHEC mailed the decision to the League.

[3]S.C. Reg. 61-107.19, Part I, D(2)(a)-(g) require notice to adjoining landowners, regardless of whether they request such notice. None of the adjoining landowners ever received any kind of notice from DHEC or MRR, not even the late, insufficient "actual notice" that the County arguably received. R. pp. 397-417

otherwise would set up the type of perverse incentives that are implicated in this case: that is, controversial agency decisions could be protected from legal challenge through the conscious decision to provide deficient or contorted public notice.

A. Actual Notice is Irrelevant to the Statutory Limitations Period.

The Petitioners, along with the ALC, attempt to substitute actual notice for the notice required under § 44-1-60. Under their argument, which is in conflict with this Court's Coastal Conservation League holding, the County received some form of notice (the details of which are disputed) of the permit modification months after it was issued, and it then had to appeal from that notice within the fifteen-day period prescribed by § 44-1-60. (R. p. 3). As the court of appeals held: "nothing in § 44-1-60 suggests that the fifteen-day period for appealing a DHEC staff decision begins to run upon just any form of actual notice of the decision. To the contrary, such period begins to run only after DHEC issues a staff decision in compliance with the procedural and public notice requirements of that section." Pickens Cty. v. S.C. Dep't of Health & Envtl. Control, 429 S.C. 92, 105, 837 S.E.2d 743, 750 (Ct. App. 2020), reh'g denied (Feb. 14, 2020); see also S.C. Coastal Conservation League, 390 S.C. at 430, 702 S.E.2d at 253 (starting time limitation in § 44-1-60 upon DHEC's compliance with public notice requirements).[4]

MRR misconstrues and mischaracterizes the legal authority in making its "actual notice" arguments. First, Bursey v. S.C. Dept. of Health & Envt'l Control was decided before § 44-1-60 was enacted and is thus inapplicable here. 369 S.C. 176, 631 S.E.2d 899 (2006). Second, the A.O. Smith case supports the Court of Appeals' opinion in this case, not negates it. That case

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

rested on the court's determination that the Final Approvals which A.O. Smith sought to challenge were not staff decisions subject to appeal under § 44-1-60. In other words, the issue was not timeliness, but whether the Approvals could be challenged in the first instance. In this regard, MRR's assertion that the decision in A.O. Smith rested on "actual notice" is wrong. MRR Pet. 13.

Moreover, the A.O. Smith court did exactly what the court of appeals did here: looked at the statutory language as a whole, and specifically regulations that establish procedures for review of permitting decisions. See S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("the statute must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect."). Using established laws of statutory interpretation, the court declined to look at § 44-1-60(E) in isolation, and instead read the statute as a whole which mandates DHEC compliance with public notice requirements of § 44-1-60(B). Op. at 37.

Because DHEC failed in its public notice obligations in relation to the permit modification, it is no answer to say that the County should have known to appeal within fifteen days of getting some level of actual notice months after the improperly issued decision. Once again, the Court of Appeals recognized this clear flaw in the rationale of the ALC and the Petitioners and applied this Court's precedent accordingly.

B. The Court of Appeals has not Authorized an Infinite or Indefinite Appeal Period.

The Petitioners have raised the alarmist proposition that the Court of Appeals' opinion, if taken to its logical conclusion, would dictate that Pickens County could have delayed indefinitely without consequence in filing its permit challenge, or, even more alarmist, would dictate that no

DHEC permit will hereafter ever be truly final. While such propositions are obviously flawed, the County does agree that, for the sake of order and administration, every DHEC permit must reach finality, even those that were issued without proper public notice. If DHEC makes an error in noticing a permit decision, such permit decision is not forever open to challenge, and the Court of Appeals decision does not stand for such a proposition. Rather, the Court of Appeals held, as the County argued, merely that the fifteen-day limitations period under § 44-1-60 cannot be the measure of timeliness when proper notice under that statute has not been provided. Such conclusion is practically a truism and is dictated by this Court's precedent. The Court of Appeals' holding in this case does not provide that an affected party who has been denied proper notice of a permitting decision can unnecessarily delay in appealing that permit, but it does provide that such party is not limited to appealing within a statutory limitations period when DHEC fails to provide proper statutory notice.

Notably, the Petitioners never once a invoked laches or a similar doctrine to argue to the Court of Appeals that Pickens County unduly delayed in filing its appeal. Rather, the Petitioners' sole argument was that actual notice triggered the limitations period in § 44-1-60. This argument is decidedly inconsistent with the law. Had the Petitioners presented arguments on timeliness beyond § 44-1-60, the Court of Appeals undoubtedly would have undertaken an analysis weighing the culpability and disruptive nature of the Petitioners' efforts to hide the permit notice against the basis for any delay in Pickens County's timely pursuit of an appeal. But, no such arguments were presented, and, therefore, no such arguments were considered.

Further, as to the Petitioners' alarmist assertions, it must be reemphasized that the Petitioners' surreptitious and bad faith actions here, particularly as it relates to MRR, are truly

aberrant in the context of DHEC's usual environmental permitting process. The obvious bad faith manipulation of DHEC's permitting process, which clearly astonished the Court of Appeals, can only be explained as the product of a uniquely poor match between an exploitation-minded permit applicant and a DHEC staff person lacking the will or interest to resist. In short, it is decidedly not the case that DHEC often issues permits without providing the requisite statutory public notice, and it is even less common that DHEC allows manipulation of its regulations in order to facilitate that outcome. In that light, one can accept the proposition that the Court of Appeals' decision in this case will "open the floodgates" only if one ignores the truly extraordinary departure from the permitting process in this case, or if one assumes that DHEC's permitting process is often subject to stark failures of notice in controversial projects.

In sum, it will obviously be quite uncommon going forward that an affected party will seek review of a permit decision for which the legally required public notice was never provided, but even if that does happen, a timeliness inquiry is appropriate and allowed, just not the one that was undertaken by the ALC in this case.

C. Pickens County was entitled to Formal Permitting Notice it did not Receive.

It is most emphatically not the case, as put forward by the Petitioners, that Pickens County received the same notice that it would have for a major modification, or that Pickens County was not entitled to written notification of the final permitting decision.

First, as to notice of the final permitting decision, the running theme of this brief applies–that is, this Court has already addressed the issue in the Coastal Conservation League case. Section 44-1-60 dictates the following as to notice of final permitting decisions: "Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant,

permittee, licensee, and *affected persons who have requested in writing to be notified.*" (emphasis added). This Court recognized in Coastal Conservation League, however, that the formality of the requisite request to be notified is open to interpretation and that DHEC does not and has not applied that requirement strictly. The lower courts in Coastal Conservation League had "found that the League failed to avail itself of the right to be notified under § 44–1–60(E) because the League failed 'to make a formal request to be notified of a decision' and 'failed to request notification of the staff decision as delineated in section 44–1–60(E).'" 390 S.C. at 427, 702 S.E.2d at 251. While the League indeed had not explicitly and formally requested to be notified, this Court nevertheless reversed the conclusion that the League was not entitled to notice under § 44–1–60(E), noting: "**DHEC never stated it followed a formal procedure as to how a party acquires 'affected persons who have asked to be notified' status. To the contrary, DHEC indicated it took an informal approach in deciding which parties it notified of its decision.**" Id. at 428, 702 S.E.2d at 252. As to whether the League had met this informal standard for notification, this Court explained:

> The record clearly establishes that throughout the permit application process in this matter, the League was not an obscure or unknown party. The League has been involved in this particular permitting process from the beginning. Therefore, SPA's bold statement that DHEC should not bear the burden of "guess[ing] which commenter or member of the public would like to know about particular decisions" is unavailing under these facts.

Id.

Pickens County was involved in the initial permitting process for this landfill at least to the extent of the Coastal Conservation League in that case, and clearly Pickens County should and would have received notice of a major permit modification under § 44–1–60(E). To insist

that the County should have submitted an additional, formal written request for notice to DHEC under these circumstances constitutes the most extreme example of form over substance. The County had been extensively involved in DHEC's issuance of the landfill permit to MRR in 2008. The County had both a Host Agreement and Development Agreement with MRR for the landfill, facts which DHEC was aware of from the permitting process. DHEC has acknowledged multiple times in these proceedings that the County was on the agency's mailing list for matters related to the original landfill permit. (See, e.g., Final Brief of Respondent SCDHEC, p. 1 ("Prior to the issuance of the Permit, DHEC publicly noticed the draft permit in the local newspapers and provided notice in writing to adjacent landowners, **Pickens County, and others on the agency's mailing list**." (emphasis added)). Yet, when that permit was modified, DHEC and MRR applied an overly formalistic, "gotcha" interpretation of what it means to be an affected party under § 44-1-60(E)(1), in order to turn a willful and intentional blind eye to the County's obvious documented interest in the permit. After participating extensively in the process through which the original permit was created and issued, and after receiving individual notice from DHEC as to that permit decision, it would have been illogical and indeed bizarre for the County to turn around and formally ask again in writing for notifications related to the permit. Clearly Pickens County was entitled to notice of the permit modification under § 44-1-60 by the exact same rationale as in Coastal Conservation League.

Further, had the permit modification been properly treated as major, DHEC's regulations would then require five separate newspaper publications and five separate instances of direct notice by mail to adjoining landowners and affected parties, occurring at all stages of the permitting process from pre-application to final decision. See S.C. Reg. 61-107.19, Part I,

D(2)(a)-(g). Note the critical distinction that these regulations require: DHEC and the landfill permit applicant must alert the public that a permit modification is under consideration, so that an affected person can *then* ask in writing to receive a mailed copy of the final decision, under § 44-1-60(E)(1).[5] One must ignore these notice provisions, as well as the holding in Coastal Conservation League, to assert that the County would have received the same actual notice for a major landfill permit modification.

II. The Court of Appeals Undertook the Legal Analysis of Timeliness With Which it was Presented and did not Overreach.

The Petitioners argue that the Court of Appeals applied the incorrect standard of review, or otherwise overreached, in considering whether the permit modification was "major" or "minor." For the reasons that follow, such arguments are misguided.

A. The Court of Appeals Applied the Correct Standard of Review for a Legal Error.

An appellate court's role is to correct a lower court's failure to undertake all necessary inquiries in evaluating a legal standard, not, as the Petitioners seem to argue, to identically constrain its evaluation. See CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011); S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 629 S.E.2d 624 (2006). In other words, if a trial court chooses to ignore an inquiry that is legally significant, the appellate standard of review does not require a reviewing court to similarly ignore that inquiry. These are exactly the circumstances at play in relation to the lower courts in this case.

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[5]This distinction is particularly important here, given MRR's subterfuge against the County. During the time that DHEC and MRR were surreptitiously meeting to modify the landfill permit, MRR made false representations to Pickens County that the landfill design was undergoing "no changes" since its original permit in 2008, and that "no liner" would be added to the landfill. (R. pp. 388-89.)

While the Petitioners rely on the substantial evidence standard of review, "[t]he decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence **or controlled by some error of law**." 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) (emphasis added). "Questions of statutory interpretation are questions of law, which this Court is free to decide without any deference to the tribunal below." Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). Moreover, the Administrative Procedures Act, which provides the applicable standard of review here, explains that "review of the administrative law judge's order must be confined to the record" and that such order may be reversed if it is "in violation of constitutional or statutory provisions" or "affected by other error of law." S.C.Code Ann. § 1–23–610(C).

The ALC's decision to apply the limitations period of § 44-1-60 based on actual notice, and its failure to look at the statute as a whole and assess whether Pickens County had been provided the notice due under that statute, clearly constitutes an error of law. The Court of Appeals was not constrained in its remedying of that error by undertaking the appropriate legal analysis. Both the Administrative Law Court and the Court of Appeals considered only the basic legal question of whether Pickens County's permit appeal is timely, in light of the permitting notice it received. Both the Administrative Law Court and the Court of Appeals were presented with arguments and evidence that Pickens County was denied proper notice because the landfill permit modification was misclassified. The Court of Appeals rightly determined that it was necessary to consider misclassification in relation to timeliness, while the Administrative Law

Court did not. This difference has nothing to do with standard of review and instead relates entirely to effectuating the proper legal standard.

The most important step in the legal analysis undertaken by the lower courts in this case was determining the applicable limitations period for evaluating timeliness. As discussed above, the ALC resolved that the fifteen day period in § 44-1-60 applied, regardless of whether DHEC complied with the notice requirements in that section, because Pickens County received actual notice. The Court of Appeals, on the other hand, recognized the import of this Court's holding in Coastal Conservation League and that the limitations period in § 44-1-60 is only triggered after the public notice required by that section has been provided. Clearly, if DHEC and MRR falsely classified the permit modification as minor so as to deny Pickens County of notice of the permitting decision, the limitations period in § 44-1-60 does not apply.[6] It is legally necessary, then, for any court evaluating timeliness to determine the legitimacy of the "minor modification" designation. The ALC's failure to do so does not reflect its weighing or application of evidence in a manner that is entitled to deference but, rather, reflects that the ALC's decision is controlled by an error of law.

In short, the Court of Appeals had to undertake an analysis of "major" versus "minor" in order to evaluate the legal question with which it had been presented. In doing so, the Court of Appeals corrected an obvious legal error on the part of the ALC, and that action constitutes the

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[6]As explained above, the public notice requirements for major landfill permit modifications differ substantially from the requirements for minor modifications. If the DHEC decision at issue in this case had been properly treated as a major modification, Appellant would have been entitled to multiple instances of direct written notice, especially including notice of the final permit modification decision. Instead, Pickens County did not get any notice until months after the permit modification had been issued, because DHEC improperly classified the permit modification as minor.

most basic function of appellate review. The Court of Appeals' review in this case most decidedly does not involve weighing disputed evidence in the manner that would invoke the substantial evidence standard, and the Court of Appeals owes no deference to the ALC's flawed legal interpretation of notice and timeliness.

B. The Court of Appeals did not Abuse Agency Deference.

Relatedly, the Court of Appeals did not fail to give deference to DHEC by evaluating whether the permit modification at issue here is actually "minor." The Court of Appeals owes no deference to DHEC's interpretation of its own regulations in the context of a preliminary judicial determination of timeliness. The Petitioners have attempted to conflate the deference that would be owed to DHEC in considering the merits of its permitting decision with the present context wherein the Court of Appeals has simply endeavored to evaluate the timeliness of a filing. DHEC is owed deference as to its regulatory interpretation, in relation to permitting decisions. See, e.g., Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) (reversing ALC's failure to defer to DHEC on its interpretation of scope of permitting analysis.); Bruning v. SCDHEC, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (Ct. App. 2016) (distinguishing that while a court "generally gives deference" to an agency's interpretation of its own authority, statutory interpretation remains a question of law for the court.); Converse Power Corp. v. S.C. Dep't of Health & Env't Control, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) (discussing agency deference in the context of reviewing substantive permitting decision); Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) (same); Savannah Riverkeeper v. S.C. Dep't of Health & Envtl. Control, 400 S.C. 196, 205, 733 S.E.2d 903, 908 (2012) (same). DHEC is not owed deference as to its regulatory

interpretation, in relation to the normal judicial function of determining whether a case has been timely filed. In the context of the preliminary judicial inquiry at issue here, the Court of Appeals owed no more deference to DHEC than is laid out above in relation to the ALC.

The primary questions involved in this case are: (1) whether the modifications DHEC authorized to MRR's landfill are "minor" or "major" under DHEC's regulations; (2) whether the challenges to those modifications brought by Pickens County are barred on the basis of timeliness; and (3) whether the modifications are justifiable under DHEC's landfill regulations (the merits). A significant part of this appeal relates to the order in which these questions should have been considered by the ALC. While the Petitioners try to present the major/minor distinction as part of the merits, the relevance of that distinction goes entirely to the preliminary question of notice and timeliness. To wit, if this case does go back to the ALC for consideration of the merits, the fact that DHEC treated a major permit modification as minor is not a basis for arguing that such modification is invalid or should otherwise be reversed. The circumstances here, then, are entirely dissimilar to those cases and principles cited by the Petitioners that call for agency deference or judicial restraint in the context of a merits review.

Once again, the Coastal Conservation League case is instructive. In that case, this Court did not once mention the issue of agency deference in its analysis of timeliness, even though such analysis touched on DHEC's interpretation of its own statutes and regulations, just like here. As is hopefully obvious at this point, the preliminary issue in this appeal is simply not the context wherein the type of agency deference cited by the Petitioners is implicated.

C. The Court of Appeals was Correct to Fully Resolve the Question of Timeliness.

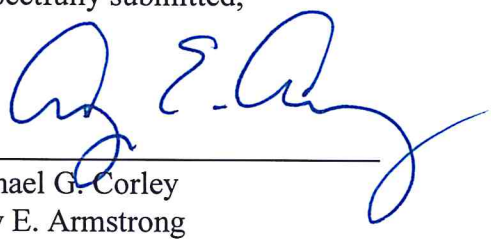
Related to the Petitioners' agency deference arguments, Petitioners have also argued that the Court of Appeals should have remanded the case to the ALC in order for that court to evaluate the major/minor distinction and determine timeliness. Once again, this argument from the Petitioners attempts to treat the major/minor distinction as if it is part of the merits. Note that, in Coastal Conservation League, this Court was not compelled to remand the case with the legal principles it had established, in order to allow the lower court to render the final determination of timeliness. It would be absurd and inconsistent with this Court's precedent for the Court of Appeals to be presented with the preliminary procedural question of a filing's timeliness, but to remand that question unresolved. Indeed, the County is unable to find any cases within this Court's jurisprudence where a statute of limitations or timeliness determination was appealed from a lower court and then remanded without ultimate resolution of that issue.

Moreover, the Petitioners' arguments that the ALC did not consider evidence that the permit modification was major is false. The ALC was presented with information and arguments that the permit modification was actually major and was asked to consider that evidence in order to find that the County's permit appeal was timely. The ALC *considered* the evidence of permit misclassification but determined that such evidence did not affect the timeliness inquiry. This was an incorrect legal conclusion adopted by the ALC at the urging of the Petitioners. The appellate courts' role is not to remand a preliminary procedural timeliness inquiry to a lower court so that such court can consider the same evidence previously presented to it, but which it failed to give proper weight.

III. Conclusion.

If this Court accepts certiorari, it would quickly realize, just like the Court of Appeals, that the Petitioners' actions in collaborating to prevent Pickens County from gaining timely knowledge of a controversial permit modification, and their succeeding at exactly this objective, cannot be legally sustained by relying on regulations intended to ensure full and fair public notice. It is objectively outrageous that Pickens County, having multiple agreements in place with respect to the disputed landfill, would not be notified that DHEC was considering whether to modify that landfill from one accepting yard debris and construction waste to one that could or would accept coal ash. This Court has already rendered the Coastal Conservation League case, which is based on a seemingly innocent mistake of notice by DHEC, and no further guidance is necessary in relation to this situation where notice was denied for less innocuous purposes.

Respectfully submitted,



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