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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,

v.

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

**SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL
CONTROL'S REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

Etta R. Williams Linen
Karen C. Ratigan
**SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL**
2600 Bull Street
Columbia, South Carolina 29201
(803) 898-3350
williaer@dhec.sc.gov
ratigakc@dhec.sc.gov

**Attorneys for Petitioner
South Carolina Department of
Health and Environmental Control**

INTRODUCTION

Petitioner South Carolina Department of Health and Environmental Control (“DHEC”) agrees with Respondent Pickens County (“the County”) that the inquiry presented in this appeal is a relatively straightforward one: whether the County has the ability to challenge a permit modification issued to Respondent MRR Pickens, LLC (“MRR”). As stated in DHEC’s Petition for Writ of Certiorari (“Petition”), this inquiry ends on the procedural ground of timeliness based on the dispositive fact that the County failed to exhaust its administrative remedies before commencing an untimely contested case proceeding.

The County’s Return to the Petitions for Writ of Certiorari (“Return”) focuses on the specific circumstances of this case and the significance of the resolution of this appeal to the County, which DHEC does not discount. Contrary to the County’s unfounded accusation that DHEC cooperated or at least did not resist MRR’s attempts to manipulate regulations to close off public participation in the permitting process, DHEC takes very seriously the importance of transparency and the public’s right to participate in the process. However, this case does not unreasonably impede on public participation because the County had actual notice of DHEC’s permitting decision in this case and failed to timely exercise their right to appeal such decision. In its Return, the County asks this Court to ignore actual notice and the failure to timely seek review because the County alleges the notice was deficient. Even assuming the County was entitled to notice at the time the modification was issued and did not receive it, the case law is clear that the date upon which the County received actual notice controls the timeliness inquiry.

As stated in its Petition, DHEC urges this Court to grant certiorari to review, and reverse, the decision of the Court of Appeals to avoid the harmful effects of establishing precedent which conflicts with and overrules the decisions of this Court in applying the actual notice rule. *See*

Bursey v. S.C. Dep't of Health & Envtl. Control, 369 S.C. 176, 188, 631 S.E.2d 899, 906 (2006) (holding the ALC properly found action to be timely where there was substantial evidence the challenger brought the action within the required period of time after receiving actual notice); *A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control*, 428 S.C. 189, 205, 833 S.E.2d 451, 460 (Ct. App. 2019) (affirming dismissal of contested case as untimely because the challenger failed to request final review within fifteen days of obtaining actual notice of the permit). A party should not be permitted to sit on its right to timely seek administrative review of a decision. In this case, it is undisputed the County had actual knowledge of DHEC's permitting decision no less than three months before filing its request.

In its Return, the County has misconstrued DHEC's assertion of deference. The County states: "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." *Return at 18-19*. In its petition, DHEC asked this Court to find the Court of Appeals exceeded its authority when addressing the classification of the permit issued to MRR after the Administrative Law Court ("ALC") correctly dismissed this case on procedural grounds. Only where the Court finds the modification classification is relevant to the issue of timeliness, which is expressly denied, does DHEC request deference in this case as to its classification determination.

ARGUMENT

- 1. Where there has been actual notice of a decision, there must be a deadline for seeking administrative review, even where there is an alleged deficiency in noticing the decision.**

DHEC and the County agree that "every DHEC permit must reach finality" and, even where there are technical deficiencies in noticing of a permitting decision, "such permit decision is not forever open to challenge." *Return at 11*. Where DHEC and the County disagree is with

respect to the implications of the Court of Appeals' decision in this case. The County argues the Court of Appeals' decision does not open the door to unnecessary delays in appealing a permit such that a permit can never truly be final. On the contrary, the Court of Appeals' decision fails to provide any restrictions on timeliness where there is any alleged notice deficiency, even if a party has actual knowledge and sits on its right to seek administrative review. Restrictions must exist to create a deadline for seeking administrative review so a permitting decision is not forever open to challenge. The failure by the Court of Appeals to provide any restrictions necessitates this Court grant certiorari.

2. Any implication that DHEC supports any action to unreasonably close off public participation in the permitting process is unfounded.

The County's Return points to cases where this Court has consistently struck down "efforts to artificially constrict or overly burden the public's right to participate in the environmental permitting process." *Return at 2*. DHEC recognizes the importance of the public's right to participate in this process and urges this Court to continue to affirm the public's right where a party timely pursues its right to do so. In this case, there is no "bending facts or law in order to close off public participation" or overreaching to deny the County's right to public participation in this case as alleged by the County. *Return at 3*. On the contrary, the County had actual notice of DHEC's permitting decision in this case and failed to timely exercise their right to appeal this decision.

3. If the modification classification issue addressed by the Court of Appeals is relevant to the issue of timeliness, DHEC is entitled to deference.

While the ALC dismissed this case on procedural grounds, the Court of Appeals went beyond the narrow standard of review and addressed issues for which the ALC did not receive evidence or argument or rule by addressing whether MRR sought a minor or a major modification

of its permit. The ALC correctly found the classification of a permit is an issue to be determined on the merits, which is irrelevant in this case for the same reason that equitable tolling should not be granted as “the County had actual notice of the decision made by DHEC, but failed to pursue the available administrative remedies in a timely fashion, and has not stated a legally valid or compelling reason for its failure.” (**R. p. 4**). As asserted in DHEC’s petition, the Court of Appeals went beyond the narrow standard of review in addressing the issue of modification classification because this case should be dismissed on procedural grounds. If the Court disagrees, DHEC asserts it is entitled to deference with respect to its interpretation of its regulation absent a compelling reason to do otherwise. The Court of Appeals failed to consider whether deference is owed to DHEC in this case which constitutes reversible error.

CONCLUSION

For the foregoing reasons and those stated in its Petition, DHEC respectfully requests this Court issue a writ of certiorari to review, and ultimately reverse, the decision of the Court of Appeals in this matter.

Respectfully submitted,

/s/ Karen C. Ratigan

Etta R. Williams Linen
Karen C. Ratigan
**South Carolina Department of
Health and Environmental Control**
2600 Bull Street
Columbia, South Carolina 29201
*Attorneys for Petitioner
South Carolina Department of
Health and Environmental Control*

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CERTIFICATE OF SERVICE

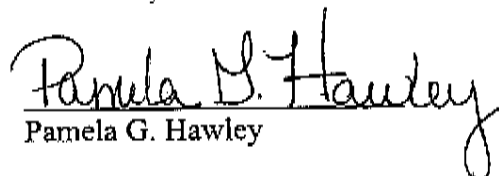
I, Pamela G. Hawley, paralegal with the South Carolina Department of Health and Environmental Control, hereby certifies that I have this 20th day of July, 2020, served the foregoing *South Carolina Department of Health and Environmental Control's Reply to Return to Petition for Writ of Certiorari* upon all parties and counsel of record by placing a copy of same in an envelope and depositing it in the U.S. Mail, first class, with sufficient postage paid, at the addresses indicated below:

Gary J. Poliakoff, Esquire
Poliakoff & Associates
Post Office Box 1571
Spartanburg, South Carolina 29304

Jessica J. O. King, Esquire
Williams Mullen
Post Office Box 8116
Columbia, South Carolina 29202

Amy E. Armstrong, Esquire
Michael G. Corley, Esquire
SC Environmental Law Project
Post Office Box 1380
Pawleys Island SC 29585

Robert F. Goings, Esquire
Jessica Lee Gooding, Esquire
Goings Law Firm, LLC
Post Office Box 43
Columbia, South Carolina 29202


Pamela G. Hawley

Columbia, South Carolina