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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.

MRR PICKENS, LLC'S REPLY TO RETURN TO PETITION FOR CERTIORARI

The issues on which the Administrative Law Court ("ALC") ruled were discrete, direct, and uncontroversial. The Court will note that the Petition for Writ of Certiorari ("Petition") focused exclusively on these facts and legal precedents, including the applicable standard of review, to argue against the errors and departures from precedent and the Court of Appeals' standard in its Opinion No. 5707 ("Opinion"). Over the course of these proceedings, however, Respondent Pickens County ("County") has systematically ratcheted up its rhetoric in order to detract and distract from this reality, as well as mask the lack of any support for its legal and factual arguments. The County cannot prevail on a straightforward application of the undisputed facts and the law; it only wins if it is successful in convincing this Court that the circumstances surrounding the unconstructed landfill, application for modification, and ultimate issuance of the modification was something that it was not: controversial and the result of bad faith. Unfortunately, the Opinion misapprehended the pertinent issues in this appeal as a result of the County's misdirection.

Its latest effort, the County's Return to the Petitions for Writ of Certiorari ("Return"), is laden with unwarranted, gratuitous, and unprofessional attacks on Petitioner MRR Pickens, LLC ("MRR"), Petitioner South Carolina Department of Health and Environmental Control ("DHEC"), and the employees and agents of both. These insults are too numerous to list, but include astonishing accusations that progressively worsen in the Return:

- "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." Return at 2;
- "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." *Id.*;
- "MRR and DHEC engaged in factual misrepresentations and a legal charade for the purpose of denying contemporaneous notice to Pickens County and the public ...." Return at 6;
- Petitioners' actions were "surreptitious and [in] bad faith" Return at 11; and
- "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." Return at 12.

Having misguided the Court of Appeals into thinking that the issues in this appeal are the result of something untoward, when they are not, the County then chastises Petitioners[1] for having the gall to seek this Court's review—after the County lost at the department level and at the ALC, and availed itself of the right to review by the Court of Appeals. Return at 1.

These declarations go far beyond the bounds of zealous advocacy. They are demonstrably

[1] The Return derisively refers to the fact that it is now having to respond "to a petition filed by the third law firm to submit arguments for MRR in this appeal." Beyond being irrelevant, the statement is merely an attempted slight at the undersigned, as is its gratuitous citation to the Court's opinion in *Preservation Society of Charleston v. S.C. Dep't of Health and Envtl. Control et al.*, Opinion No. Op. No. 27949 (S.C. Sup. Ct. filed Feb. 19, 2020) (Shearouse Adv. Sh. No. 8 at 43) (petitions for rehearing pending), but the irony appears lost on the County that it has likewise employed three separate firms to advance its positions in this litigation. *See* **(R.p.23)** and Return at p.21.

false and stand athwart of this Court's mandates of civility and professionalism. *See In re Anonymous Member of S.C. Bar*, 392 S.C. 328, 335, 709 S.E.2d 633, 637 (2011) (citing Rule 402(k), SCACR). Petitioners and their counsel should not endure a litany of *ad hominem* attacks. They also reflect a troubling and growing trend in environmental litigation in this State where permittees and DHEC routinely are subject to unfounded screeds impugning their integrity, motives, and honor, rather than addressing the merits of the issues before the Court. These tactics will continue unabated unless called to task.

Stripped of the misguided ire that is designed to distract from, rather than narrow the Court's focus on the actual legal issues at hand, this case is simple. It is *not* about the discretionary process that DHEC's professional staff undertakes, guided by its regulations, to determine whether a submitted application is characterized as "minor" or "major." It is *not* about whether a particular permit modification application generally, or MRR's particular application specifically, is appropriately characterized as "minor" by DHEC staff upon its submission. It is *not* about when and to what extent public notice is to be given for a minor permit modification. It is *not* about coal ash or conspiracy theories of collusion between a government agency a private party. And finally, it is *not* about a party just barely missing the deadline, or even complying with the statutory guidelines upon receipt of actual notice of a permit decision. To the contrary, this case is about what happens when an interested party has actual notice of a permit modification (through public notice or otherwise), including knowledge of its right and obligation to seek timely review of the decision, but that party sits on its administrative rights and decides not to seek administrative review for over three months. The County cannot dispute that it had actual knowledge of the Minor Modification months in advance of filing its request for review before DHEC, and that its challenge is untimely if measured from the date of actual notice. Under this Court's precedent governing

actual notice, that should end the matter right there. But the County sought a pass on its failure to act in a timely manner, and the Opinion rewarded the County's dilatoriness with a sweeping alteration to notice provisions governing the finality of administrative decisions, through a wholesale refashioning of the law that rewards the County's conduct, while having unintended deleterious downstream effects on non-publicly noticed permit decisions throughout this State.

The Opinion conflicts with this Court's established precedent, upends the appellate standard of review, and wholly disregards this Court's mandate that courts defer to an administrative agency's interpretation of its own regulations. This Court should grant certiorari to review and, ultimately, reverse the Opinion.

ARGUMENT

The Opinion, seemingly believing the County's invented narrative about an impending avalanche of coal ash descending upon Pickens County,[2] effected a wholesale departure from the law in order to allow the County's untimely challenge to proceed. The Return doubles down on the Opinion's analysis and, in certain respects, goes even further. The Return highlights three drastic changes to the law under the Opinion, all the while claiming "there is nothing to see here": (1) eviscerating the requirement that the time period to file a request for review begins running, at the very latest, when the would-be challenger receives actual notice of the decision; (2) granting appellate courts the power to make *de novo* findings of fact on disputed issues that are not a part

[2] The Return continues the County's theme of characterizing the Minor Modification as "modify[ing] that landfill from one accepting yard debris and construction waste to one that could or would accept coal ash." Return at 21; *see also* **(R.p.124, lines 1-4; p.153, lines 7-11)** (falsely asserting that the Highway 93 Landfill is "on the verge of receiving thousands of tons of coal ash"). It bears repeating that MRR has **not even begun construction on the Highway 93 Landfill**. **(R.p.698, line 25-p.699, line 6)** And as MRR and DHEC explained in detail, which the County does not dispute, the Highway 93 Landfill, even with the Minor Modification, cannot accept coal ash without receiving additional, separate regulatory approval from DHEC. *Id.*

of the subject appeal and prior to parties' ability to put forward evidence in support of or contradicting same; and (3) creating a carve-out from the rule of agency deference for the timeliness of complying with agency requirements. Each of these departures warrants review in light of the County's assertion that there is no change in the law.

I. The Opinion overrules the actual notice rule that provides an outer limit for timeliness of a request for review.

Section 44-1-60(E) governs the timeliness of the County's request for final review. The statute first requires that "[n]otice 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." It is undisputed that DHEC mailed its decision to MRR, the applicant, and the County never requested in writing to be notified of DHEC's decision.[3] It is also a fiction that the County participated in or was a party to any proceeding or challenge of the initial permit by DHEC; it was not. There is no evidence in the record to support the County's assertion that it "could not have been more involved in the initial permitting" and "actively took efforts to secure continued monitoring" of the permit, and the County cites none. The County's entire argument rises and falls on the idea that, had the County been provided notice of the application when filed,

[3] The County suggests that it should be deemed "an affected person who has requested in writing to be notified" because "[t]o 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." Return at 13-14. Petitioners disagree, but this argument is not preserved for appellate review, as the ALC expressly declined to reach that question, **(R.p.4)**, the County did not file a Rule 29(D), RPALC, motion on the issue, and cannot raise this issue for the first time now. *See I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The County points to the Host Agreement ("Agreement") between MRR and the County to allege that the County was required to send all "reports" by DHEC simultaneously to the County. This is true as it goes; however, DHEC is not a party to the Agreement, and these "reports" relate solely to the *annual operation* of the constructed landfill, the requirement appearing under a heading titled "Landfill Operations," not its permitting. It is undisputed that the Highway 93 Landfill is unconstructed and non-operational; thus, the reporting requirement in the Agreement is irrelevant and indicative of nothing.

it would have complied with § 44-1-60(E)(2) (decision becomes final in fifteen days).

But the County did not file its request for review within fifteen days of DHEC mailing the Minor Modification to MRR. Nor did it file its request for review within fifteen days of receiving actual notice of the Permit from DHEC. Similarly, the County does not dispute that it had actual notice of the Minor Modification more than fifteen days before it filed its request for review but failed to act on that notice in the statutory timeframe.[4] **The County learned of the particulars in an in-depth meeting with DHEC in December 2015, and received the actual modification on the January 11, 2016, (R.pp.501-02 ¶ 5, 505 ¶6, 509).** This personalized notice was greater than the County would have received under Regulation 61-107.19, Pt. 1, D.2.f., yet it still failed to act.[5]

The County actually agrees that "[i]f DHEC makes an error in noticing a permit decision, such permit decision is not forever open to challenge," and that even one who has been denied proper notice of a decision cannot "unnecessarily delay in appealing that permit." Return at 11. The Opinion provides no such restrictions, however, and allows for open ended challenges where there is any claimed notice deficiency. The County's foregoing statement is an absolute admission that a limit *should* exist, despite the Opinion's failure to provide one, and compels certiorari for

[4] The County summarily contends that the details of the notice it received are disputed. Return at 9. It failed to identify what facts it disputes. But there cannot be any dispute when the finding of actual notice primarily is based upon the County's own documents and witnesses. *See* **(R.pp.501-02 ¶ 5, 504-07, 509, 511-12, 525)**

[5] The County's argument that it would have received different notice during the application process is irrelevant. *See* Return at 14-15. First, it presumes (as the County's entire argument does) that the modification is major and not minor, which it is not. Second, those *pre*-decision notices do not concern the timeliness of a *post*-decision challenge. And third, the County received direct and actual notice and still did not act for months, thereby refuting any assertion that it would have acted differently had other notice been given. The ALC found this fact to be dispositive in its timeliness analysis, and expressly declined to consider additional evidence and make additional findings of fact beyond that discrete issue. The Opinion disagreed that actual notice controls, but instead of remanding the issue for further findings on issues neither raised to nor ruled upon by the ALC, the Opinion disregarded the standard of review and pre-emptively decided the issues on an incomplete record.

this Court to delineate where that line is drawn. Notably, the County studiously avoids saying what that limit is; only that it qualifies for the exception. In fact, the County advances an entirely new construct: § 44-1-60(E)(2) does not apply to affected persons who have not requested in writing to be notified so long as they can fashion any argument, no matter how specious, that DHEC colluded with the applicant to avoid giving *public* notice of its decision. For this class of affected persons, the County contends "[a]ctual [n]otice is [i]rrelevant." *Id.* at 9. They can sit on their actual knowledge and on their rights, lie in wait, and spring an untimely challenge that will tie up a permitted project for years (as the County has done here). The Opinion's endorsement of this rule, intentional or not, was fundamental error with sweeping implications for all minor modifications that have been issued by DHEC. Under the Opinion, no non-publicly noticed permit is final, no matter what actual notice a would-be challenger might have had, granting new substantive right to challenge agency decisions that is unprecedented and fundamentally alters the permitting scheme.

Prior to the Opinion, actual notice set the outer limit of when the time period to file a request for review begins to run. Never before have the appellate courts of this State allowed a request for review to proceed *after* the applicable period runs from the date of actual notice. Actual notice saved the challenge in *Bursey v. South Carolina Department of Health and Environmental Control*, 369 S.C. 176, 631 S.E.2d 899 (2006). There, DHEC notified SCE&G that no permit was required for work on Lake Murray. *Id.* at 187, 631 S.E.2d at 905. The governing statute required appeals within thirty days of the decision, which DHEC interpreted by regulation to mean thirty days from the date of notice of the decision. *Id.* at 187, 631 S.E.2d at 905. The challenges were filed well beyond the thirty-day limit. *Id.* Because there was evidence that the challengers did not have actual notice that DHEC issued a final decision at the time, this Court found substantial evidence supported a finding that the challenge was timely. *Id.* at 905-06, 631 S.E.2d at 905-06.

The County's only retort is that *Bursey* was issued before the effective date of § 44-1-60. Return at 9. This makes no difference. This Court applied DHEC's interpretation of the applicable statute in that case, within the construct of this State's actual notice precedent; the Opinion did not.

But waiting too long after receiving actual notice was fatal in *A.O. Smith Corp. v. South Carolina Department of Health and Environmental Control*, 428 S.C. 189, 833 S.E.2d 451 (Ct. App. 2019). There, the subject permits were issued for the Town of McBee to operate and modify water wells. *Id.* at 196-97, 833 S.E.2d at 455. The petitioner, A.O. Smith, had actual notice that these permits had been issued; nevertheless it waited until after final approval had been granted to file a request for review. *Id.* at 197-99, 833 S.E.2d at 456-57. The Court of Appeals affirmed the dismissal of the challenge to the permits as untimely, finding A.O. Smith had actual knowledge of the permits and its failure to act was fatal. *Id.* at 205, 833 S.E.2d at 460.[6]

This Court's opinion in *Coastal Conservation League*, upon which the County relies extensively, does not compel a different result. 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010). In that case, this Court clarified that applicants, permittees, licensees, and affected persons who request in writing to be notified of a decision have fifteen days from the "latest date of mailing" per § 44-1-60(E)(1) to file a request for review, and for this statutory subset of individuals, the

[6] The County's claim that the issue in *A.O. Smith* "was not timeliness" and Petitioners wrongly assert that the decision "rested on 'actual notice'" is sophistry. Return at 10. The analysis section of the opinion has a heading titled "Timeliness," and the court concluded

> While the court recognizes that public notice was not required for the permits, [A.O. Smith] had notice and the opportunity to make comments or request notification as an affected person pursuant to section 44-l-60(E) and to challenge those decisions to the Board.' …. Because A.O. Smith did not file a request for a contested case hearing after the issuance of the permits in the time required, the ALC did not err in finding A.O. Smith's motion for a contested hearing untimely.

A.O. Smith, 428 S.C. at 205, 833 S.E.2d at 460 (quotation omitted).

date notice was received will not operate to extend or limit this notice period. *Id.* at 426-27, 702 S.E.2d at 250-51. Because the League had requested to be notified of the decision, the fifteen-day period began upon mailing. But because the County is not one of those specified individuals, *Coastal Conservation League*'s holding that the fifteen-day period begins upon mailing of the decision offers it no respite. And critically, the League filed within fifteen days of receiving actual notice. This Court was not presented with the question of timeliness when the challenger fails to timely file even after having actual notice of the decision.

Our courts have never allowed a challenge that was filed outside of the statutory window from the date of actual notice to proceed. This is not an effort to "overly constrict or overly burden the public's right to participate in the environmental permitting process," as the County derisively claims. Return at 2. Nor is it "bending facts or law in order to close off public participation." Return at 3. Rather, it is a faithful and logical adherence to the General Assembly's explicit judgment that requests for review of agency decisions must be filed promptly. The General Assembly consciously set an expedited deadline for filing a request for review in § 44-1-60(E)(2). Abolishing the outer limit for that time to run, as the Opinion does, upends that legislative limitation. It is undisputed that the County obtained actual knowledge of the Minor Modification on December 15, 2015, and received a copy of it on January 11, 2016, at the latest—99 and 72 days, respectively, before it filed its request for review. **(R.pp.501-02 ¶ 5, 505 ¶ 6, 509)** The County then used the Minor Modification against MRR on the same day it received the document via e-email, and later in other litigation, over one month before it sought review before DHEC. **(R.pp.504-07, 511-12, 525)** These simple facts, which the County does not address or refute in its Return, compel certiorari and reversal of the Opinion.

II. The County advocates for a fundamental alteration of the standard of review for decisions from the ALC.

Having provided the County a pass on its failure to timely act after receiving actual notice of the Minor Modification, the Opinion wholly re-writes the appellate standard of review from decisions of the ALC, making *de novo* findings of disputed facts on an incomplete record and on dispositive questions addressing the merits well beyond the timeliness question before the ALC.

a. There is no exception to the limited standard of review for the timeliness of a request for review.

The Return evinces a failure to understand the fundamental difference between legal and factual questions presented for review. *See* Return at 15-18. This case presents both questions. The legal question is by what standard the timeliness question is judged, *i.e.*, does the period of time begin to run upon the County's receipt of actual notice of the Minor Modification or does it begin at some other time? The factual question is whether the County met this standard, *i.e.*, when did it receive actual notice of the Minor Modification? *See Allwin v. Russ Cooper Assocs. Inc.*, 426 S.C. 1, 13, 825 S.E.2d 707, 713 (Ct. App. 2019) (holding that whether applicable statute of limitations has been satisfied is a question of fact). After the Opinion determined (incorrectly) that the limitations period runs from DHEC satisfying a non-applicable public notice requirement, the remaining questions are factual and properly left to the lower court to decide.

Yet, the Opinion runs contrary to its prior pronouncements that "[w]here a point has not been decided by the lower court, we will not consider the point on appeal." *Timms v. Timms*, 286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985). Similarly, it is reversible error if the Court of Appeals "reweighed the facts and substituted its *de novo* judgment" as "[t]he question before the court of appeals was whether there was any evidence to support the trial court's finding of reasonable suspicion—not the court of appeals' independent view of the facts." *State v. Moore*,

415 S.C. 245, 253, 781 S.E.2d 897, 901 (2016).[7]

Against this backdrop, the County submits a truly remarkable argument that violates the Administrative Procedures Act and upends established precedent: appeals regarding the timeliness of an action are not subject to these rules, and appellate courts can make *de novo* findings of fact even in cases at law. Return at 20. Unsurprisingly, the County cites no law for this proposition. The County actually swings hard the other way, claiming that it is unaware of a single case where the question of timeliness was remanded for factual findings by a trial court, and goes so far as to claim that "[i]t 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." *Id*. But, this is also wrong. Appellate courts uniformly remand cases for further determinations of timeliness.[8] Once the Opinion incorrectly held that the ALC applied the wrong legal standard for evaluating the timeliness of the County's challenge, it was required to stop there. It was further compelled to remand for additional fact finding by the ALC, subject to review under the substantial evidence standard in any subsequent appeal. *Doe*, *supra.* It was fundamental error for the Opinion to make these findings *de novo* and in the first instance.[9]

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[7] As this Court has held, the ALC is the "ultimate finder of fact" in contested cases. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011); *see* S.C. Code Ann. § 1-23-610(B). Where the ALC applies the incorrect legal standard when making factual findings, a remand is required rather than the appellate court making its own factual findings. *See Doe v. Dept. of Health & Human Servs.*, 398 S.C. 62, 74, 727 S.E.2d 605, 611 (2011).

[8] *E.g.*, *Gary v. State*, 324 S.C. 627, 557 S.E.2d 662 (2001); *Blyth v. Marcus*, 335 S.C. 363, 517 S.E.2d 433 (1999); *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993); *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015). Also, more to the point, giving appellate courts this fact-finding power in cases at law violates the South Carolina Constitution. S.C. Const. art. 5, § 4; *see also Parnell v. Carolina Coca-Cola Bottling Co.*, 231 S.C. 426, 428, 98 S.E.2d 834, 835 (1957) (holding the Supreme Court constitutionally is "without jurisdiction" to weigh evidence in an appeal of a case at law).

[9] The County spends two pages "[d]rawing directly from the Court of Appeals' recitation of facts" as evidence, Return at 3-5, despite the fact none of these findings were made by the ALC, the

b. The County does not refute that the Opinion made *de novo* findings of fact on a material issue based upon an incomplete record.

Under the rubric of the Opinion, as supported by the County, the minor/major modification distinction is central to Petitioners' motions to dismiss. If the modification were minor, then the County's challenge evaporates. The Opinion's resolve to make these factual findings on this material question is even more surprising in light of the County's repeated assertion that further discovery was needed on these very issues.[10] But the County's argument reveals itself to be one of mere convenience. When facing dismissal at the outset of its challenge, it argued discovery was incomplete on these factual questions. When it lost before the ALC, it urged the Court of Appeals to reverse on that ground. Now, having prevailed at the Court of Appeals, suddenly these questions are legal instead of factual and there is no error in finally determining them based on the limited record presented. Most impressively, the County flipped so far as to now argue that there "most decidedly" are no disputed facts to be weighed by the court on these issues. Return at 18. With respect to the County's actual notice, that is correct. But with respect to the myriad other issues

finder of fact, and the Court of Appeals was without the authority to make *de novo* findings of fact at any stage, much less following an appeal from a preliminary motion to dismiss. The County's treatment of the Opinion's findings as "facts" confirms that the County understands these findings to be final and underscores the error in allowing the Opinion to make them. MRR will not endeavor to correct all of the factual errors the County advances, but it vigorously disputes in particular the baseless and scurrilous allegations that it mispresented anything, engaged in "subterfuge," and attempted to hide its actions. If the appeal is incorrectly deemed timely, MRR should be given the opportunity to present evidence regarding the falsity of these facts, which it is prepared to do.

[10] For instance, the County argued to the ALC that it "is in need of reasonable discovery regarding issues pertinent to [Petitioners'] Motion to Dismiss, to include: issues of determination of 'major' modification and whether the changes are 'major' pursuant to regulation…." **(R.p.219)** Before the Court of Appeals, the County similarly argued discovery was not complete on issues "necessary for the ALC to properly resolve the question of administrative exhaustion, including: whether the permit modification was minor or major, the nature of notice required for such modification, and the nature of the notice provided for such modification." Br. of App. at 28. And the ALC admonished the parties against presenting evidence and argument on these very questions. **(R.p.127, lines 13-22)**

the County injected into this case, that "most decidedly" is wrong.[11]

Resolving disputed facts at this stage, after a motion to dismiss, and without giving MRR and DHEC an opportunity to present evidence in light of the ALC's admonition against doing so, violates Petitioners' due process rights and denies them an opportunity to be heard. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171-72, 656 S.E.2d 346, 350 (2008).

III. The County concedes the Opinion creates an exception to the long-standing rule of agency deference for questions involving the timeliness of challenges.

The County's efforts to sustain the Opinion creates yet another exception from the general rules of agency and administrative practice. The County contends that the Court of Appeals did not err because "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 18-19. In truth, the deference at issue here is primarily DHEC's interpretation of its solid waste regulations by staff in making the discretionary decision of whether an application is characterized under the applicable regulations as minor or major, *not* DHEC's arguments regarding timeliness determinations of administrative challenges. As described by DHEC:

> Inclusion of a liner is not considered a major modification for the following reasons: 1) addition of a liner is not an alternate design of the required design criteria; (2) addition of a liner does not substantially change the operations of the landfill; and, (3) the addition of a liner does not allow the facility to accept additional waste types (i.e., Class 3 waste) or quantities of waste. Likewise, the minor permit modification does not change the existing landfill from a Class 2 to a Class 3 landfill.
>
> In accordance with R.61-107.19, Part IV, Section D.1, the design criteria for a Class 2 Landfill requires a 2-foot separation between the landfill base grade and the seasonal high water table. If an applicant wanted to reduce the 2-foot separation requirement, then it must request an alternate design in lieu of the 2-foot separation, which would be considered a major modification. The Department does not consider the installation of the liner and associated leachate collection system an alternate design that would be a major modification requiring a public notice because the 2-foot of groundwater separation is being maintained. The installation

[11] MRR previously detailed the host of disputed factual issues and ignored uncontradicted evidence, all of which require remand. *See* Pet. at 20-22.

> of a liner would be voluntary and is considered an upgrade from the prescribed regulation.

(R.p.476), Staff Response to DHEC Board (presenting DHEC's interpretation of its regulations governing the minor/major distinction).[12] That determination *is* one of "unique skill and expertise in administering those statutes and regulations" made by DHEC, *see Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014), not the applicant, and the Opinion fails to defer, or even engage in the necessary analysis of whether deference is owed, to DHEC under these circumstances. That failure constitutes reversible error.

But even if the question regarding deference to timeliness were the primary issue here, the County's position is contrary to the law, asking this Court to sanction an abandonment of agency deference in any decision or interpretation that may affect the timeliness of a challenge. This "timeliness exception" turns on an artificial determination of when the interpretation of agency statutes and regulations goes to timeliness versus the merits of a dispute, and is untenable.[13] DHEC

[12] The minor/major modification distinction comes from DHEC's regulations imposing heightened notice requirements for new construction and major modifications. A minor modification is one "that keeps the permit current with routine changes to the facility or its operations, or an administrative change," whereas a major modification is "a change that *substantially alters the facility or its operations*, e.g., tonnage increase above 25%, any volumetric capacity increase, alternate designs *that vary from the design prescribed in this regulation.*" S.C. Code Ann. Regs. 61.107.19, Pt. 1, B.48 (emphasis added). It is not enough to say that the addition of a liner was a design change; any proposed change must also "substantially alter[] the facility or its operations" or "vary" from the regulations. The use of the terms "substantially" and "vary" confers inherent discretion on DHEC to make that determination. As set forth in the quote above, DHEC found MRR's proposed modification is none of these things. Deference is required.

[13] Through the lens of this exception, the County claims the Opinion did not err in deeming the application a major modification because this question does not go to the merits of its underlying case. Return at 19. This is a bridge too far. The County's Prehearing Statement asserted that the minor/major distinction had the effect of adding Class 3 Landfill features to a Class 2 Landfill and were "Issues to be Presented for Determination" at a final hearing. **(R.pp.15-16)** The lack of notice to the County is one of the independent grounds upon which it requested invalidation of the modification. **(R.pp.16-17)** The County cannot seriously maintain that these timeliness issues do not pertain to the merits of its challenge.

exercised that discretion here and determined that MRR's requested modification was a minor, not major, modification that was not subject to the heightened notice requirements. **(R.pp.474-76; p.696, line 17-p.696, line 11; pp.782, line 17-783, line 23)** DHEC does not lose the deference due to it just because the County decided to ignore its actual notice and fail to seek timely review.

The County does not argue, and the Opinion did not find, that DHEC's decision was arbitrary, capricious, or manifestly contrary to the statute and regulations, as would be required for reversal. *Kiawah Dev.*, 411 S.C. at 34-35, 766 S.E.2d at 718. They simply claim DHEC was wrong and substitute their own judgment in place of DHEC's. The Opinion agrees, despite the lower court failing to rule on this issue. This is insufficient to overrule DHEC's action and standing alone requires reversal.[14]

CONCLUSION

For the foregoing reasons, those stated in Petition, and in the filings of co-Petitioner DHEC, MRR requests that this Court issue a writ of certiorari to review and reverse the Opinion.

Respectfully submitted,

s/Chad Johnston

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[14] Moreover, the County's proffered rule would wreak havoc on administrative decision making, for example, under the County's theory DHEC is entitled to no deference if the minor/major distinction concerns timeliness but is entitled to deference if it concerns the merits of the decision. *See* Return at 18. There is no law supporting this dichotomy for good reason.