THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Case No. 2017-002598

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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SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, AND JIM YOUNG BROILERS, ... RESPONDENTS.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the ALC err in deferring to an agency interpretation of S.C. Code Ann. Regs. 61-9 and S.C. Code Ann. Regs. 61-43 that in effect ignores the mandate that large concentrated animal feeding operations must obtain an NPDES permit prior to or in conjunction with an agricultural animal permit, or else or obtain an exemption via determination from DHEC that the permittee's operation has "no potential to discharge?"

II. Did the ALC err in deferring to an agency interpretation of S.C. Code Ann. Regs. 61-43 that allowed DHEC to avoid mandated aspects of permit evaluation, thus precluding meaningful review of agricultural animal permit applications?

III. Did the ALC err in imposing a burden upon Appellants to prove actual discharges of pollutants into waters of the State by existing agricultural animal permittees when Appellants lack legal access to the properties of the existing permittees?

STATEMENT OF THE CASE

This appeal concerns DHEC's decision to approve three agricultural animal permits for industrial poultry growing operations utilizing a total of eighteen poultry barns housing over two million birds per year, all located on a 255-acre parcel notable for its onsite wetlands and streams and topography that drops down to the Little River. On November 30, 2016, the South Carolina Department of Health and Environmental Control ("Department" or "DHEC") issued an agricultural animal permit ("Permit"), 19,889-AG, to Heath Coggins Broilers ("Permittee") for construction of six (6) poultry broiler barns to grow 4.5 flocks of 237,600 broilers per year, totaling 1,069,200 birds annually. (R. p. 1712). On December 14, 2016, the Department issued an

agricultural animal permit ("Permit"), 19,886-AG, to David Coggins Broilers ("Permittee") for construction of six (6) poultry broiler barns to grow 4.5 flocks of 162,000 broilers per year, totaling 729,000 birds annually. (R. p. 1702). On December 21, 2016, the Department issued an agricultural animal permit ("Permit"), 19,889-AG, to Jim Young Broilers ("Permittee") for construction of six (6) poultry broiler barns to grow 4.5 flocks of 237,600 broilers per year, totaling 1,069,200 birds annually. (R. p. 1707). All three Permits authorize large concentrated feeding operations on property located between Lisbon Road and the Little River in the Mountville area of Laurens County ("Property").

Appellant South Carolinians for Responsible Agricultural Practices ("SCRAP") is an unincorporated association made up of members of the Mountville community in Laurens County. (R. p. 523, line 17 – p. 525, line 9). Mr. Charles Blackmon is a member and President of SCRAP. (R. p. 527, lines 15-17). Mr. Blackmon owns or jointly owns seven parcels surrounding the Property. (R. p. 1214; R. p. 400, line 23 – p. 401, line 1). Ms. Mary Basel and Ms. Margaret Sparrow are members of SCRAP. (R. p. 546, lines 21-22; R. p. 567, lines 21-23). Through a corporate entity, Dunlap Homeplace, LLC, Ms. Basel and Ms. Sparrow jointly own four parcels of land surrounding the Property. (R. p. 1214; R. p. 548, lines 12-14). Mr. Ross Stewart is a member of SCRAP. (R. p. 601, lines 8-9). Mr. Ross Stewart owns two parcels of land on the eastern side of the Property. (R. p. 1214).

Mr. Blackmon, Ms. Basel, Ms. Sparrow, Mr. Stewart and others in the Mountville community grew concerned about the adverse impacts of these new Permits upon their community and their property. They formed SCRAP for the purpose of challenging the Permits. (R. p. 523, line 17 – R. p. 525, line 9). On December 15, 2016, Mr. Blackmon and SCRAP

("Petitioners") filed a Request for Board Review ("RFR") seeking DHEC Board review of the Department's decision to issue the Permit to Heath Coggins Broilers. (R. p. 36-39). On December 28, 2016, Petitioners filed a RFR seeking DHEC Board review of the Department's decision to issue the Permit to David Coggins Broilers. (R. p. 40-43). On January 4, 2017, Petitioners filed a RFR seeking DHEC Board review of the Department's decision to issue the Permit to Jim Young Broilers. (R. p. 44-47). The RFRs were signed by 31 individuals, with Charles Blackmon listed first as the contact person for the group. Other signatories included Mary Basel, Margaret Sparrow, and Ross Stewart. (R. p. 43). All of the signatories were members of South Carolinians for Responsible Agricultural Practices ("SCRAP"), and own property within two miles of these proposed facilities. (R. p. 525, line 21 – R. p. 526, line 14; R. p. 526, lines 17-21).

On January 18, 2017, the Department notified the Petitioners that the DHEC Board declined to conduct a final review conference concerning the permits issued to David Coggins Broilers and Heath Coggins Broilers. (R. p. 72-73; R. p. 74-75). On January 23, 2017, the Department notified the Petitioners that the DHEC Board declined to conduct a final review conference concerning the permit issued to Jim Young Broilers. (R. p. 76-77). On February 17, 2017, the Petitioners timely filed petitions for a contested case with the Administrative Law Court Petitions for all three permits. (R. p. 79-113). On March 29, 2017, the Administrative Law Court ("ALC" or "Court") granted the Parties' joint motion to consolidate the cases for hearing purposes. (R. p. 1-3). On August 4, 2017, Permittees filed a motion for partial summary judgment as to whether they must obtain a National Pollutant Discharge Elimination System permit to operate their proposed poultry growing facilities. (R. p. 221-245). On August 10, 2017, Petitioners filed their memorandum in opposition to Permittees' motion for partial summary

judgment. (R. p. 246-293). Arguments concerning the motion, as well as a hearing on the merits, were held before the Honorable Ralph King Anderson, III on August 15-17, 2017. (R. p. 340 – p. 345; R. p. 372, line 1 – p. 390, line 22). Proposed orders were submitted to the ALC on October 13, 2017. On November 30, 2017, the ALC entered an order granting Permittees' motion for partial summary judgment, rejecting Petitioners' arguments on the merits, and approving the permits with certain modifications. (R. p. 4-35). On December 27, 2017, Petitioners timely filed a Notice of Appeal.

STATEMENT OF THE FACTS

In the Mountville area of Laurens County, there are twelve existing poultry facilities totaling approximately 50 poultry barns, all located along or near tributaries of the Little River. (R. p. 1212; R. p. 452, line 2 – p. 454, line 25). Adding to this concentration of poultry facilities in the Mountville Community, Jim Young Broilers, David Coggins Broilers and Heath Coggins Broilers individually sought permits to each construct an animal agricultural facility comprised of six poultry barns to grow broiler chickens, for a total of eighteen new poultry barns, on an approximately 255-acre tract on Lisbon Road in the Mountville area ("Property"). (R. p. 1496 – 1500; R. p. 1522; R. p. 1220 – 1225; R. p. 1245; R. p. 1213; R. p. 1337 – p. 1340; R. p. 1359; R. p. 769, lines 10-14).

David Coggins Broilers' operation would confine 162,000 birds for 45 days during any twelve-month period. (R. p. 1218). David Coggins' proposed barns are 45 feet wide and 600 feet long, spaced 60 feet apart from one another. (R. p. 1218). According to David Coggins' Headquarters Map within his Comprehensive Nutrient Management Plan ("CNMP"), there is a stream running across the back portion of the Property. (R. p. 1245). A delineated wetland is

located between this stream and the proposed barns. (R. p. 1245). Another stream flows into the wetlands. (R. p. 1245). Behind David Coggins' barns, the Property near the Little River slopes steeply down to the River. (R. p. 1245; R. p. 1256; R. p. 1214; R. p. 620, lines 3-21). Downslope ditches or swales are located 164 feet from the proposed facility. (R. p. 1222). The Little River's 100-year floodplain is near David Coggins' barns. (R. p. 1258).

Heath Coggins Broilers' operation would confine 237,000 birds during a 45-day period in any twelve-month period. (R. p. 1335). Heath Coggins' proposed barns are 66 feet wide and 600 feet long, spaced 60 feet apart from one another. (R. p. 1335). According to Heath Coggins' Headquarters Map within his CNMP, there are two streams running across the back portion of the Property. (R. p. 1359). Another surface water stream is located quite close to the western side of the barns. (R. p. 1359). A delineated wetland sits on the planned property line between Heath Coggins's facility and David Coggins' facility. (R. p. 1359). Behind Heath Coggins barns, the Property near the Little River slopes steeply down to the River. (R. p. 1362; R. p. 622, lines 8-12). Downslope ditches or swales are located 135 feet from the proposed facility. (R. p. 1338). The Little River's 100-year floodplain is near Heath Coggins' proposed barns. (R. p. 1363).

Jim Young Broilers' operation would confine 237,600 birds during a 45-day period in any twelve-month period. (R. p. 1495). Jim Young's proposed barns are 65 feet wide and 600 feet long, spaced 60 feet apart from one another. (R. p. 1517). Behind Jim Young's barns, the Property drops in elevation by eighty (80) feet down to the Little River and its floodplain. (R. p. 1517; R. p. 605, lines 2-19). Maps included in Jim Young's CNMP show that an ephemeral stream – an old channel of the Little River - runs along the rear property line parallel to the Little River.

(R. p. 1517; R. p. 1525; R. p. 624, lines 8-14). Delineated wetlands are located downslope near the barns as well as a smaller stream that feeds into the wetlands. (R. p. 1525). Another ephemeral stream feeds into the wetlands. (R. p. 1525). Behind Jim Young's barns, the Property near the Little River slopes steeply down to the River. (R. p. 1517; R. p. 605, line 2 - p. 609, line 2). Downslope ditches or swales are located 113 feet from the proposed facility. (R. p. 1497). The Little River's 100-year floodplain is near Heath Coggins' proposed barns. (R. p. 1522).

The Department's review of the above-stated permit applications is contained in written permit checklists. (R. p. 1666 – 1699). The purpose of these checklists is to provide for a comprehensive review of the proposed sites and facilities. (R. p. 1157, lines 3 – 13).

The Little River watershed is impaired due to excessive levels of fecal bacteria in the Little River and its tributaries. (R. p. 863, line 7 – p. 867, line 16). In 2004, DHEC issued a Total Maximum Daily Load for the Little River and its tributaries for the purpose of assessing the watershed and examining how to bring the watershed into compliance with the Clean Water Act and South Carolina water quality regulations. (R. p. 863, line 7 – p. 867, line 16; R. p. 868, lines 2-9). The TMDL identifies poultry facilities as a possible contributor to the impairment of the Little River watershed. (R. p. 1200, line 9 – p. 1202, line 6). The TMDL is still in effect. (R. p. 1199, line 24 – p. 1200, line 8).

Altogether, the Permittees' proposed operations will generate an estimated 3,886 tons of manure every year. (R. p. 1533; p. 1429; p. 1296). The Permittees' applications do not contain plans for manure storage or treatment. (R. p. 1066, line 1 - p. 1067, line 20). At some point in the future, the Permittees plan to submit applications to construct stacking sheds to store manure. (R. p. 1066, line 1 - p. 1067, line 20; R. p. 1218; R. p. 1335; R. p. 1495). Until stacking

sheds are constructed, Permittees may temporarily store manure outdoors for up to three days. (R. p. 1218; R. p. 1335). All three Permittees propose to use a manure broker to haul some or all of this manure offsite to apply to fields owned by third parties. (R. p. 1135, line 5 – p. 1137, line 17). DHEC lacks oversight as to where this manure will be land applied. (R. p. 1167, line 3 – p. 1168, line 15). The manure could be land applied within the Little River watershed or elsewhere. (R. p. 1135, line 5 – p. 1137, line 17).

REGULATORY OVERVIEW

S.C. Code Regs. 61-43 Part 200 governs the permitting of poultry growing facilities in South Carolina. The relevant stated purposes of Part 200 are:

> 1. To establish standards for the growing or confining of animals, processing of animal manure and other animal by-products, and to protect the environment, and the health and welfare of the citizens of The State from pollutants generated by this process.
> ...
> 5. To establish criteria for animal facilities ... location as they relate to protection of the environment and public health. ... S.C. Code Regs. 61-43.200.10(A).

Under the agricultural animal permitting regulation, an applicant must submit an Animal Facility Management Plan that contains the facility's National Pollutant Discharge Elimination System Permit, if applicable. S.C. Code Regs. 61-43.200.50(B)(2)(a). The Animal Facility Management Plan must also include, among other things, facility location maps showing topography; adjacent surface water bodies; the 100-year floodplain; soil types; an odor abatement plan; and plans for manure storage structures. S.C. Code Regs. 61-43.200.50(B)(2)(i); 200.50(B)(4) and (8).

As part of its decision-making process, the Department must "act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal

laws, an increase in pollution of the waters and air of the State from any new or enlarged sources." S.C. Code Regs. 61-43.200.70(E). Further, S.C. Code Regs. 61-43.200.80 sets forth minimum setback distances. At a minimum, a facility must be located 100 feet away from waters of the State, including intermittent and ephemeral streams.[1] *Id.* at (A)(2). A facility must be located at least 50 feet from a downslope ditch or swale.[2] *Id.* at (A)(3). A facility cannot be located in a 100-year floodplain. *Id.* at (A)(4). If a facility's normal production animal live weight is greater than 500,000 pounds, the facility must be at least 400 feet from the lot line of property owned by another person. *Id.* at (A)(6). In addition, the Department, on a case-by-case basis, "may impose additional or more stringent requirements for the management, handling, treatment, storage, or utilization of animal manure and other animal by-products." S.C. Code Regs. 61-43.200.140(B). Certain situations trigger mandatory evaluation by DHEC for additional or more stringent requirements, such as facilities proposed to be located upstream of an impaired waterbody. *Id.* at 140(C).

S.C. Code Regs. 61-43.200.70(F) makes clear that minimum setback distances specified within S.C. Code Regs. 61-43 are minimum distances that DHEC may increase on a case by case basis. In determining whether additional setbacks are necessary, the Department is mandated to evaluate the proposed site applying a nonexclusive list of factors:

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

[1] An exception does exist if a permanent vegetative water quality buffer is established and maintained.
[2] *Id.*

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.

S.C. Code Regs. 61-43.200.70(F).

If a facility is classified as a concentrated animal feeding operation under S.C. Code Regs. 61-9, an animal agricultural permit shall have a term of no more than five years. S.C. Code Regs. 61-43.200.70(I).

In addition to the requirements set forth within Part 200, S.C. Code Regs. 61-43.200.40 explicitly states that the State's permitting requirements for concentrated animal feeding operations ("CAFO") as defined by and contained in Regulation 61-9 are "referenced throughout" Part 200 and "may apply to facilities covered under this regulation." S.C. Code Regs. 61-43. 200.40(D). S.C. Code Regs. 61-9 pertains to National Pollutant Discharge Elimination System ("NPDES") permits issued under the authority of the federal Clean Water Act and the South Carolina Pollution Control Act. In 2003, the State of South Carolina adopted the U.S. Environmental Protection Agency's ("EPA") NPDES regulations applicable to CAFOs, promulgated in 2003. Vol. 27-12 S.C. REG. 50 (Dec. 26, 2003).

In its explanation of need for the CAFO NPDES rule, the EPA stated that "the agricultural sector including crop production, pasture and range grazing, concentrated and confined animal feeding operations, and aquaculture is the leading contributor of pollutants to identified water quality impairments in the Nation's rivers and streams." 68 FED. REG. 7176, 7181 (Feb. 12, 2003).

The leading pollutants impairing surface water quality in the United States ... include nutrients, pathogens, sediment/siltation, and oxygen depleting substances. *Id.* These pollutants can originate from a variety of sources, including the animal production industry. *Id.* Addressing poultry farms, the EPA stated that "dry poultry operations continue to contaminate surface water and ground water because of rainfall coming in contact with dry manure and litter that is stacked in exposed areas; accidental spills such as from egg-wash facilities and drinking water lines; improper handling of large numbers of mortalities; and improper land application of litter." 68 FED. REG. 7176, 7192 (Feb. 12, 2003).

The NPDES program regulates "discharges"[3] or "discharges of a pollutant"[4] from a "point source" into waters of the State. S.C. Code Regs. 61-9.122.1(g). "Point source" means any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel, or other floating craft, from which pollutants are or may be discharged." (emphasis added). Thus, a CAFO is by definition deemed to be a "point source" from which agricultural waste, biological materials, and sediment are or may be discharged. As such, animal agricultural facilities that meet the definition of a CAFO are required to obtain a NPDES permit for discharges or potential discharges. S.C. Code Regs. 61-9.122.1(b)(4)(i); S.C. Code Regs. 61-9.122.23(a). "Once an operation is defined as a CAFO, the NPDES requirements for CAFO apply with respect to all animals in confinement at the operation and all manure, litter, and

[3] The word "discharge" is defined as "any discharge or discharge of any sewage, industrial wastes or other wastes into any of the waters of the State, whether treated or not." S.C. Code Regs. 61-9.122.2(b).

[4] The phrase "discharge of a pollutant" is defined in relevant part as "[a]ny addition of any pollutant or combination of pollutants to waters of the State from any point source." S.C. Code Regs. 61-9.122.2(b). "Pollutant" means in relevant part "... solid waste, ... sewage, ... chemical wastes, biological materials, ... sand, ... and agricultural waste discharged into water." *Id.*

process wastewater generated by those animals or the production of those animals, regardless of the type of animal." S.C. Code Regs. 61-9.122.23(a).

To be deemed a CAFO as defined within S.C. Code Regs. 61-9.122.23, the definition of an "animal feeding operation" ("AFO") must first be met, followed by tiered categories of AFOs triggered by the size of the operation. S.C. Code Regs. 61-9.122.23(b)(1) and (2). An "animal feeding operation" is "a lot or facility (other than an aquatic animal production facility) ... where the following conditions are met:

> (A) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and
> (B) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. S.C. Code Regs. 61-9.122.23(b)(1).

Whether an "animal feeding operation" is a CAFO then turns on whether the operations meet any of the following definitions: 1) a Large CAFO; 2) a Medium CAFO; or 3) a Small CAFO. An "animal feeding operation" for production of broilers is a Large CAFO if it confines 125,000 or more birds per year. S.C. Code Regs. 61-9.122.23(b)(4)(x). An "animal feeding operation" for production of broilers not using a liquid manure handling system is a Medium CAFO if it confines 37,500 to 124,999 birds annually and pollutants are either discharged into waters of the State through a man-made conveyance or discharged directly into waters of the State. S.C. Code Regs. 61-9.122.23(b)(6)(i)(I) and (ii) (emphasis added). A Small CAFO is an "animal feeding operation" that is not a Medium CAFO and is designated as a CAFO "upon determining that it is a significant contributor of pollutants to waters of the State. S.C. Code Regs. 61-9.122.23(b)(9) and (c) (emphasis added). Thus, an AFO confining 125,000 or more birds during a 45-day period at any

one time in a given year is deemed a Large CAFO that must obtain a NPDES permit regulating its facility operations. S.C. Code Regs. 61-9.122.23(b)(4) and (d)(1). For Large CAFOs, the regulation recognizes that a discharge of pollutants may occur, thereby triggering a mandatory requirement to obtain a NPDES permit. An AFO confining less than 125,000 birds can only be deemed a CAFO if the facility will in fact discharge pollutants into waters of the State or is determined to be a significant contributor of pollutants to waters of the State.

The rule imposes upon Large CAFOs a duty to apply for a permit in order "to identify and ultimately to prevent actual unauthorized discharges ...." 68 FED. REG. 7176, 7201 (Feb. 12, 2003). The EPA explained that this duty to apply was justified due to the unique characteristics of CAFOs and a historical record of CAFOs failing to report discharges or ignoring altogether NPDES permitting requirements. *Id.* The requirement that a Large CAFO obtain a NPDES permit can be avoided if the Large CAFO requests and receives from DHEC a determination that the CAFO "has no potential to discharge manure, litter, or process wastewater." S.C. Code Regs. 61-9.122.23(d)(2). In making this determination, DHEC must:

> ... consider the potential for discharges from both the production area and any land application areas. The Department must also consider any record of prior discharges by the CAFO. In no case may be CAFO be determined to have "no potential to discharge" if it has had a discharge within the 5 years prior to the date of the request submitted under paragraph (f)(2) of this section. For purposes of this section, the term "no potential to discharge" means that there is no potential for any CAFO manure, litter, or process wastewater to be added to the waters of the State under any circumstance or climatic condition. S.C. Code Regs. 61-9. 122.23(f)(1).

The term "no potential to discharge" should "be narrowly interpreted and applied by permitting authorities." 68 FED. REG. 7176, 7202 (Feb. 12, 2003). "This provision is intended to be a high bar that excludes those Large CAFOs from having an NPDES permit only where the CAFO

can demonstrate to a degree of certainty that they have no potential to discharge to the waters of the United States." *Id.* The EPA provided an example of such circumstances:

> a CAFO that meets the following conditions might be able to demonstrate no potential to discharge: (1) Located in an arid or semi-arid environment; (2) stores all its manure or litter in a permanent covered containment structure that prevents wind dispersal and precipitation from contacting the manure or litter; (3) has sufficient containment to hold all process wastewater and contaminated storm water and (4) does not land apply CAFO manure or litter because, for example, the CAFO sends all its manure or litter to a regulated, offsite fertilizer plant or composting facility. 68 FED. REG. 7176, 7202 (Feb. 12, 2003).

Before the Department makes a determination as to whether a Large CAFO has no potential to discharge, the Department must provide public notice of the request along with the factual basis upon which the request is based and the procedure for reaching a determination. S.C. Code Regs. 61-9.122.23(f)(3). The Department's determination must be based upon the administrative record. *Id.* The public notice and comment process is intended to prevent any State abuse of a "no potential to discharge" determination to the extent that a State merely rubber stamps a request to avoid permitting. 68 FED. REG. 7176, 7203 (Feb. 12, 2003).

Absent this determination, a large CAFO must apply for an NPDES permit. S.C. Code Regs. 61-9 Part 122.23(d)(1). A new Large CAFO must obtain an NPDES individual permit or general permit 180 days prior to commencing operation. S.C. Code Regs. 61-9.122.23(d)(1) and (g)(4). A "general permit" is an NPDES permit written by DHEC to regulate a category of discharges within an identified geographical area. S.C. Code Regs. 61-9.122.2(b); S.C. Code Regs. 61-9.122.28(a)(1). If the Department has not issued a general permit for CAFOs, then the CAFO must obtain an individual permit. S.C. Code Regs. 61-9.122.23(d)(1). Pursuant to S.C. Code Regs. 61-9.122.1(d)(2), federal regulations implementing the Clean Water Act serve as minimum technical

standards that the Department must use to determine requirements to include within an individual or general permit.

A CAFO NPDES permit must contain effluent limitations intended to achieve water quality standards. S.C. Code Regs. 61-9.122.4(a); S.C. Code Regs. 61-9.122.43(a); S.C. Code Regs. 61-9.122.44(a)(1). For CAFO production areas, "new source" CAFOs are prohibited from discharging manure, litter, or process wastewater into waters of the State. 40 C.F.R. § 412.46(a). Any permit issued to a CAFO must include a nutrient management plan that, at a minimum, contains practices and procedures necessary to:

(i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;
(ii) Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;
(iii) Ensure that clean water is diverted, as appropriate, from the production area;
(iv) Prevent direct contact of confined animals with waters of the United States;
(v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;
(vi) Identify appropriate site-specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the State;
(vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;
(viii) Establish protocols to land apply manure, litter, or process wastewater in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and
(ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.
S.C. Code Regs. 61-9.122.42(e)(1).

The CAFO must also perform regular visual inspections of the production area and comply with detailed record keeping obligations. 40 C.F.R. § 412.37. The permit must include additional or more stringent limitations or conditions necessary to "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." S.C. Code Regs. 61-9.122.44(d)(1)(i). A permit cannot be issued if "the imposition of conditions cannot ensure compliance with the applicable water quality requirements" of the State. S.C. Code Regs. 61-9.122.4(d).

STANDARD OF REVIEW

An appellate court may reverse or modify the decision of the Administrative Law Court if "substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are ... in violation of constitutional or statutory provisions ... or affected by other error of law." S.C. Code Ann. § 1-23-380. This Court "may reverse or modify decisions that are controlled by an error of law or are clearly erroneous in view of the substantial evidence on the record as a whole." *CareAlliance Health Servs. v. S.C. Dep't of Revenue*, 416 S.C. 484, 488, 787 S.E.2d 475, 477 (2016). The construction of a regulation is a question of law subject to de novo review. *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 414 S.C. 581, 593, 779 S.E.2d 805, 811 (Ct. App. 2015).

ARGUMENTS

In this appeal, Appellants assert that the ALC impermissibly interpreted S.C. Code Regs. 61-43 Part 200 and S.C. Code Regs. 61-9 Part 122.23 in a manner that essentially erases clearly mandated regulatory requirements imposed upon DHEC in evaluating agricultural animal permits and in administering the Department's NPDES program. Prior to or in conjunction with the application process to obtain an agricultural animal permit, the applicant proposing to operate what amounts to a Large CAFO must seek coverage under a CAFO NPDES permit or obtain an exemption by showing the proposed facilities has "no potential to discharge." S.C. Code Regs. 61-43.200.50(B)(2)(a); S.C. Code Regs. 61-9.122.23(d)(1) and (2). Further, within S.C. Code Regs. 61-43 Part 200, DHEC's permit decision-making process includes a mandate to act on permits to prevent an increase in pollution, so far as reasonably possible considering relevant state and federal standards. S.C. Code Regs. 61-43.200.70(E). For proposed facilities located upstream of an impaired waterbody, DHEC must evaluate the permit application for additional or more stringent requirements. S.C. Code Regs. 61-43.200.140(C). Under Part 200.70(F), DHEC must apply a non-exclusive list of factors to evaluate whether the facility should be subject to setback distances above the minimum setbacks contained in the regulation.

The Department avoids these obligations based upon an erroneous interpretation of the of both S.C. Code Regs. 61-43 and 61-9 that in effect nullifies the requirement that Large CAFOs must seek coverage under a CAFO NPDES permit and nullifies the Department's mandated obligations to provide meaningful review of an application for an agricultural animal permit. The ALC deferred to the Department's interpretation of S.C. Code Regs. 61-9 and 61-43. However, regulations must be interpreted with the presumption that their provisions are intended to

accomplish something. *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). Because the plain language of the regulations at issue are contrary to the Department's interpretation, this Court should reject DHEC's interpretation and reverse the ALC's decision. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envt'l Control*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014). DHEC must comply with the law in furtherance of the public interest, not ignore it. *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 414 S.C. 581, 621, 779 S.E.2d 805, 825 (Ct. App. 2015).

1. **The ALC erred in interpreting S.C. Code Regs. 61-43 and S.C. Code Regs. 61-9 in a manner that rendered meaningless the regulatory duty of Permittees to apply for a CAFO NPDES Permit.**

Under the agricultural animal permitting regulation, an applicant seeking an agricultural animal permit must submit an Animal Facility Management Plan that contains the facility's National Pollutant Discharge Elimination System ("NPDES") Permit, if applicable. S.C. Code Regs. 61-43.200.50(B)(2)(a). The Department's permit review checklist for agricultural animal permit applications requires evidence of payment of a fee for an NPDES permit if the proposed facility is a Large CAFO. DHEC_000908. If the proposed agricultural animal facility is classified as a concentrated animal feeding operation under South Carolina's NPDES regulations, then the agricultural animal permit must contain a term of no more than five years. S.C. Code Regs. 61-43.200.70(I). Clearly then, S.C. Code Regs. 61-43 contemplates that, for applicants whose proposed animal facility meets the definition of a "concentrated animal feeding operation," DHEC's review process for an agricultural animal facility must include compliance with requirements under S.C. Code Regs. 61-9 concerning NPDES permits for concentrated animal feeding operations ("CAFO") prior to the issuance of an agricultural animal permit.

The ALC correctly found that David Coggins Broilers, Heath Coggins Broilers and Jim Young Broilers are Large CAFOs as defined in S.C. Code Regs. 61-9.122.23(b)(4). (R. p. 7). Each of the Respondents' proposed operations that will handle manure in a manner other than a liquid manure handling system and confine and feed or maintain over 125,000 broilers for 45 days or more in any 12-month period. (R. p. 1218 (David Coggins Broilers' Comprehensive Nutrient Plan stating that the operation would confine 162,000 birds during a 45-day period in any twelve month period, with 27,000 in each of the six proposed barns; approximately 4.5 flocks will be raised per year, each flock grown for 8-9 weeks)); (R. p. 1335 (Heath Coggins Broilers' Comprehensive Nutrient Plan stating that the operation would confine 237,000 birds during a 45-day period in any twelve month period, with 35,000 in each of the six proposed barns; approximately 4.5 flocks will be raised each year, each grown for 8-9 weeks)); (R. p. 1495 (Jim Young Broilers' Comprehensive Nutrient Plan stating that the operation would confine 237,600 birds during a 45-day period in any twelve month period, with 39,600 in each of the six proposed barns; approximately 4.5 flocks will be raised each year, each grown for 8-9 weeks)). Large CAFOs must seek coverage under a NPDES permit unless the CAFO requests and receives a determination from DHEC that there is "no potential to discharge." S.C. Code Regs. 61-9. 122.23(d)(1) and (2). However, no such request was made by the Large CAFOs in this case, and DHEC made no such determination, much less in compliance with procedure set forth in S.C. Code Regs. 61-9.122.23(f)(3).

In response, Respondents asserted below that DHEC is not required to determine whether the proposed operations have "no potential to discharge" because agricultural animal facilities operate under a "no-discharge" standard under S.C. Code Regs. 61-43.200; therefore,

"animal facilities do not require NPDES permits because no discharge should occur." (R. p. 181). The ALC accepted this rationale, stating that "the Department's application of Regs. 61-43 [sic] in keeping with the regulation of CAFOs under the NPDES provisions is entitled to deference." (R. p. 9). The ALC elaborated on DHEC's explanation by adding that the agricultural animal regulation should be read in conjunction with the NPDES regulation to mean that agricultural facilities only 'discharge' pollutants into waters of the State if the discharge is made through a conveyance or if surface runoff from these facilities is deliberately channeled into waters of the State." (R. p. 10). Because agricultural animal facilities are subject to a "no-discharge" agricultural animal permit, the ALC upheld DHEC's position that the "no-discharge" standard within S.C. Code Regs. 61-43 Part 200 amounts to "an inherent determination that the facilities have no 'potential to discharge' in keeping with Regs. 61-9.122.23(f)." (R. p. 10). The Court found that an issued agricultural animal permit "is congruous with the requirements of Regs. 61-9.122.23 that the Department determine whether Respondents' facilities have no potential to discharge manure, litter, or process wastewater." Respectfully, the ALC's conclusions are affected with errors of law.

Interpreting and applying statutes and regulations administered by an agency is a two-step process. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014). First, a court must determine whether the language of a statute or regulation directly speaks to the issue. *Id.* If so, the court must utilize the clear meaning of the statute or regulation. *Id.* If the plain language of the regulation is contrary to the agency's interpretation, a court will reject the agency's interpretation. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). "If the 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." *Kiawah*, at 33, 717.

Here, DHEC takes the position that its notice of determination that a "no-discharge" agricultural animal permit will be issued to the Respondents constitutes a determination under S.C. Code Regs. 61-9.122.23(d)(2) that Permittees are not required to seek coverage under an NPDES permit. (R. p. 9). Under S.C. Code Regs. 61-9.122.23(d)(2), Permittees "need not seek coverage under an NPDES permit otherwise required ... once the owner or operator has received from the Department notification of a determination under paragraph (f) of this section that the CAFO has 'no potential to discharge' manure, litter, or process wastewater." The ALC accepted DHEC's position that the issuance of a "no-discharge" agricultural animal permit constitutes DHEC's determination that the Permittees' facilities have "no potential to discharge." The ALC erred, for the term "no-discharge" is plainly different from "no potential to discharge."

The word "discharge" is not defined within S.C. Code Regs. 61-43; nor it is defined within the South Carolina Pollution Control Act, under which Regulation 61-43 was promulgated. The plain meaning of "discharge" is the action of "allowing (a liquid, gas or other substance) to flow out from where it has been confined. NEW OXFORD AMERICAN DICTIONARY, 494 (3rd ed. 2010). "No-discharge" then means the prohibition of allowing a substance to flow out from where it has been confined. Put in context within Regulation 61-43, a requirement of the permit is that the permittee is prohibited from discharging pollutants into surface waters and groundwaters of the State. S.C. Code Regs. 61-43 Part 200.140(A). "No-discharge" is a term of permit compliance. It does not mean that actual discharges will never occur. In contrast, "no potential to discharge" is

a broader term used differently than the "no-discharge" performance standard for animal agricultural permits. As defined within S.C. Code Regs. 61-9.122.23, "no potential to discharge" means "that there is no potential for any CAFO manure, litter, or process wastewater to be added to waters of the State under any circumstance or climatic condition." S.C. Code Regs. 61-9.122.23(f)(1). "Potential" is ordinarily defined as "the possibility of something happening or of someone doing something in the future." NEW OXFORD AMERICAN DICTIONARY, p. 1368 (3rd ed. 2010). Having "no potential to discharge" is a higher bar than "no discharge." "No-discharge" is a permit performance standard stating that compliance means no release of wastes or pollutants. "No potential to discharge" is the standard that an applicant must meet in order to be exempt from an NPDES permit. It means that there is no possibility that a release of wastes or pollutants could occur "under any circumstance or climatic condition." A person can accept a permit that requires "no-discharge," but that does not mean that a person's permitted operations have absolutely "no potential to discharge."

DHEC asks this Court to read "no discharge" as identical to "no potential to discharge," contrary to the well-established rule of statutory construction that "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous ...." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). By accepting DHEC's rationale, the ALC in effect rendered "no potential to discharge" as meaningless. If "no-discharge" means the same as "no potential to discharge," then the entirety of S.C. Code Regs. 61-9.122.23(f) is treated as if it does not exist. The "no potential to discharge" provisions of S.C. Code Regs. must have intended to have regulatory effect. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("the General Assembly obviously intended the statute to have some efficacy, or

the legislature would not have enacted it into law."). The ALC erred in ruling that "no-discharge" and "no potential to discharge" are interchangeable terms. DHEC's interpretation is not entitled to deference because it is plainly contrary to both S.C. Code Regs. 61-43.200 and S.C. Code Regs. 61-9.122.23. Courts "defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Kiawah*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014).

Furthermore, S.C. Code Regs. 61-43 does not and cannot replace the State's CAFO NPDES regulations. Under S.C. Code Regs. 61-9.122.23(d)(1), CAFOs must obtain an NPDES permit. A Large CAFO may qualify for an exemption only if it seeks and obtains a determination from DHEC that the proposed operations have "no potential to discharge." *Id.* at (d)(2). Part 122.23 does not exempt a Large CAFO who has obtained an agricultural animal permit. Had there been such an exemption, the State's CAFO NPDES regulation would have unlawfully fallen below the minimum requirements of the Clean Water Act. 33 U.S.C. § 1370. For animal feeding operations other than those that meet the definition of a Large CAFO, a State's non-NPDES program may require measures that avoid their designation as a Medium or Small CAFO. *See* 68 FED. REG. 7176, 7232 (Feb. 12, 2003). In this regard, DHEC's issuance of a "no-discharge" agricultural animal permit may indeed eliminate some agricultural animal operations from the duty to obtain an NPDES Permit. But the Permittees here are unquestionably Large CAFOs who must seek coverage under a CAFO NPDES permit or else demonstrate "no potential to discharge."

If the plain language of S.C. Code Regs. 61-9 and 61-43 are not enough to defeat DHEC's position, evidence in the record shows the Department's view is merely a post hoc rationalization that should be rejected by this Court. Attached to DHEC's letters to concerned citizens

announcing its decision to issue the agricultural animal permits is a response to citizen inquiry as to why the Permittees are not deemed to be CAFOs. (R. p. 1662-1665). DHEC explained away the question, stating that "[a]ccording to state law, an animal feeding operation (AFO) can only be designated as a CAFO if the Department, after considering other factors, inspects the AFO and determines the AFO is discharging a regulated pollutant or pollutants that is determined to be a significant contributor to downstream or adjacent waters." (R. p. 1662 – 1665). DHEC cited to S.C. Code Regs. 61-9.122.23(c) as the basis for its explanation. (R. p. 1664).

The designation process that DHEC referred to applies to Medium and Small CAFOs, not Large CAFOs like the Permittees. Under S.C. Regs. 61-9.122.23(b)(6), a Medium CAFO is defined as an AFO that meets a certain threshold of the number of confined birds and that has been designated by DHEC as a CAFO. Similarly, a Small CAFO is defined as an AFO that is not a Medium CAFO and is designated by DHEC as a CAFO. S.C. Code Regs. 61-9.122.23(b)(9). (emphasis added). Although Part 122.23(c) states that DHEC "may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the State," when read in light of the definition of a Large CAFO, it is clear that Medium and Small CAFOs are the only categories of CAFO that are subject to "designation." *Compare* S.C. Code Regs. 61-9.122.23(b)(4) with (b)(6) and (b)(9). Respondents are animal feeding operations confining over 125,000 chickens during a 45-day period in any given twelve-month period; therefore, they are, by definition, Large CAFOs. S.C. Code Regs. 61-9.122.23(a)(4). As a Large CAFO, no further inquiry is made into whether it "is a significant contributor of pollutants to waters of the State." *Id.* at (c). In other words, Large CAFOs are defined as such, not "designated." The Department is charged with implementing S.C.

Code Regs. 61-9.122.23, not avoiding its reach by relying on a designation process plainly inapplicable to Large CAFOs.

Compounding the error is the ALC's conclusion that Appellants "elevate form over substance" because none of the Respondents actually propose to discharge pollutants through a conveyance or channel into waters of the State,[5] and Appellants failed to prove that Respondents intended to or would discharge pollutants into waters of the State. ALC Op. pp. 7-8. Appellants need not demonstrate that Respondents' facilities would convey or channel pollutants, for CAFOs are, by definition, point sources of pollutants. A "point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel, or other floating craft from which pollutants are or may be discharged." S.C. Code Regs. 61-9.122.2(b) (emphasis added). Further, Appellants need not prove that Respondents will discharge or intend to discharge pollutants. Under the express language of S.C. Code Regs. 61-9.122.23(a), CAFOs "are point sources that require NPDES permits for discharges or potential discharges." (emphasis added). Large CAFOs such as the Permittees' operations have a duty to apply for a NPDES Permit unless the Respondents demonstrate that their proposed facilities have "no potential discharge." S.C. Code Regs. 61-9.122.23(a) and (f)(2). The NPDES CAFO Regulation seeks to prevent pollution by Large CAFOs by imposing a duty to apply for a NPDES permit, which can only be avoided if DHEC determines that there is "no potential to discharge."[6]

[5] *See also* R. p. 1162, line 6 – p. 1163, line 12 for testimony from the DHEC permit reviewer suggesting that CAFOs are not point sources.

[6] The Permittees have not submitted to DHEC information specific to a request for any determination of "no potential to discharge." Even so, evidence in this record shows a "potential to discharge." David Coggins' proposed facility is

To the extent that the ALC suggests that requiring Respondents to seek coverage under a CAFO NPDES permit "elevates form over substance" because the performance standard for an NPDES permit is the same as an agricultural animal permit, the ALC is mistaken. An agricultural animal permit and a CAFO NPDES permit both contain a no-discharge requirement. However, the federal best management practices promulgated as effluent standards for CAFOs are intended to be the absolute minimum that States must apply and enforce via a general permit or site-specific individual permits written and issued by DHEC. 33 U.S.C. § 1370; *see Mich. Farm Bureau v. Dep't of Envtl. Quality*, 292 Mich. App. 106, 130-31, 807 N.W.2d 866, 884 (2011) (stating that a state which administers its own NPDES program may adopt discharge standards and effluent limitations that are more stringent than the federal standards and limitations). A State

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located on Property with a stream running across the back portion. (R. p. 1245). A delineated wetland is located between this stream and the proposed barns. *Id.* Another stream flows into the wetlands. *Id.* Similarly, Heath Coggins' proposed facility is located on Property with two streams running across the back portion. (R. p. 1359). Another surface water stream is located quite close to the western side of the barns. *Id.* A delineated wetland sits on the planned property line between Heath Coggins's facility and David Coggins' facility. *Id.* Likewise, Jim Young's proposed facility is located on Property with an ephemeral stream – an old channel of the Little River - running along the rear property line parallel to the Little River. (R. p. 1517; R. p. 1522; R. p. 624, lines 8-14). Delineated wetlands are located downslope near the barns as well as a smaller stream that feeds into the wetlands. *Id.* Another ephemeral stream feeds into the wetlands. (R. p. 1517; R. p. 1522). The Property upon which all three proposed facilities are located slope steeply down to the Little River. (R. p. 1246; R. p. 1258; R. p. 622, lines 8-12; R. p. 1362; R. p. 605, lines 9-14; R. p. 1517; R. p.622, lines 3-21; R. p. 848, line 12 – p. 854, line 4). The Little River's 100-year floodplain is near all three proposed facilities. (R. p. 1258; R. p. 1363; R. p. 1522). Given the location of the proposed barns on property sloping to the Little River and its floodplain, with a network of streams and wetlands located nearby, it is not difficult to draw a conclusion that the proposed facilities have a potential to discharge. *See* 68 FED. REG. 7176, 7202 (Feb. 12, 2003) (EPA stating that "no potential to discharge" should be high bar to meet; for example, a facility located in an arid or semi-arid environment may, along with other circumstances, may be able to demonstrate "no potential to discharge"); R. p. 862, line 14 – p. 863, line 6; R. p. 877, line 15 – p. 878, line 8; R. p. 883, line 6 – p. 891, line 7; R. p. 981, line 5 – p. 982, line 21). In addition, Ms. Lowman testified that she took photographs over a period of several years of what she believed were manure piles left uncovered for days, surrounded by puddles of water. (R. 1716 – p. 1721; R. p. 674, line 13 – p. 684, line 7). Mr. Blackmon has observed satellite images showing several poultry farmers stockpiling manure outside and uncovered, including Mr. David Coggins' existing facility. (R. p. 506, line 19 – p. 511, line 7). The Permittees propose to initially operate without a manure storage shed; thus, storage of manure outside, uncovered and left exposed to rain events, presents a possibility.

may write a general or individual permit for CAFOs that adds to or exceeds the minimum federal standards. Put another way, the NPDES standards by which a CAFO must comply with the no-discharge requirement may exceed what the agricultural animal regulations require. Moreover, unlike animal agricultural permits, any general or individual permit for CAFOs is subject to the review and conditioning authority of federal and state natural resource agencies. S.C. Code Regs. 61-9.124.59(b). Further, the federal CAFO regulations include monitoring and reporting requirements that exceed those found in the agricultural animal permit regulation. *Compare* 40 C.F.R. § 412.37 to S.C. Code Regs. 61-43.200.170 and 180. And NPDES permit holders are subject to citizen suit actions for Clean Water Act violations. 33 U.S.C. § 1365(a). A CAFO NPDES permit involves more scrutiny and additional measures intended to protect water resources.

As an alternative basis for ruling that Respondents need not seek an NPDES permit, the ALC rejected the NPDES permit requirement because the Respondents have not yet begun operations, thus no manure, litter, or wastewater have been discharged. (R. p. 11). Without actual commencement of operations, the ALC reasoned that the issue of an NPDES permit was not ripe for review. *Id.* Under S.C. Code Regs. 61-9.122.23, Large CAFOs are mandated to apply for an NPDES permit or otherwise seek an exemption through the process of determining whether the proposed operations have "no potential to discharge manure, litter, or process wastewater." S.C. Code Regs. 61-9.122.23(d)(1) and (2). The regulation expressly contemplates a permit requirement for "potential discharges." S.C. Code Regs. 61-9.122.23(a). The issue here involves a duty to apply for an NPDES permit before CAFO operations commence. There is nothing contingent, hypothetical or abstract about the duty of Permittees to apply for a NPDES or otherwise seek a determination from DHEC that their proposed operations have "no potential

to discharge." This issue is a real controversy appropriate for judicial determination. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996).

In an effort to avoid compliance with the State's CAFO NPDES rule, DHEC and the Permittees may argue that this Court should strike the CAFO NPDES rule as exceeding the authority of DHEC under the reasoning found in *Waterkeeper Alliance Inc. v. U.S. E.P.A.*, 399 F.3d 486 (2nd Cir. 2005). In *Waterkeeper*, the Court of Appeals for the Second Circuit invalidated the EPA 2003 CAFO NPDES Rule requiring an NPDES permit for "potential discharges" as exceeding the EPA's authority under the Clean Water Act. The Second Circuit is not controlling precedent. Although the State of South Carolina has had ample opportunity to revise its CAFO NPDES Regulation over the past 12 years since *Waterkeeper* was decided, the State has chosen not to revise its Regulations.[7]

The Clean Water Act does not prevent states from promulgating water quality regulations that are different than federal requirements so long as state regulations meet the minimum requirements of the Act. 33 U.S.C. § 1370. Indeed, "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...." 33 U.S.C. § 1251 (emphasis added); *see Mich. Farm Bureau v. Dep't of Envtl. Quality*, 292 Mich. App. 106, 130-31, 807 N.W.2d 866, 884 (2011)

[7] In *Waterkeeper*, the Court gave credence to the idea that legislation providing the power to impose a duty for Large CAFOs to apply for a NPDES permit would be justifiable. 399 F.3d 486 at 524, n. 22. "EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process." *Id.*

(stating that a state which administers its own NPDES program may adopt discharge standards and effluent limitations that are more stringent than the federal standards and limitations).

In *Mich. Farm Bureau v. Dep't of Envtl. Quality*, the Michigan Court of Appeals addressed the same issue as here, and the foreign court's reasoning is persuasive. 292 Mich. App. 106, 807 N.W.2d 866 (2011). Michigan had adopted the 2003 CAFO Rule, which was challenged as invalid under the Clean Water Act. *Id.* After disposing of *Waterkeeper* as inapposite, the court centered its analysis on whether state enabling law supported the CAFO Rule. *Id.* at 130-132; 885-887. Michigan's enabling statute for its NPDES program provided broad powers to its environmental protection agency "protect and conserve the water resources of the state ... and to take all appropriate steps to prevent any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions in any . . . waters of the state ...." *Id.* at 134-35, 866, 886. The court concluded that "the duty to take all appropriate steps to *prevent* any pollution the [DEQ] considers to be unreasonable and against public interest," *id.* (emphasis added), clearly grants the DEQ authority to forestall potential pollution *even before* any discharge of pollutants ever occurs." (emphasis in original).

Like Michigan, the State of South Carolina administers its own NPDES program. S.C. Code Regs. 61-9. The State's NPDES regulations were promulgated under both the Clean Water Act and the South Carolina Pollution Control Act. S.C. Code Regs. 61-9.122.1(a). The Pollution Control Act provides broad discretion to DHEC to prevent pollution under permit programs. Pursuant to S.C. Code Ann. § 48-1-20, "the Department of Health and Environmental Control shall have authority to abate, control and prevent pollution." (emphasis added). Under S.C. Code Ann.

§ 48-1-50(5), DHEC is authorized to "develop a general comprehensive program for the abatement, control and prevention of air and water pollution." (emphasis added). "Pollution" is defined broadly as "the presence in the environment of any substance, including, but not limited to, sewage, industrial waste, other waste, air contaminant, or any combination thereof in such quantity and of such characteristics and duration as may cause, or tend to cause the environment of the State to be contaminated, unclean, noxious, odorous, impure or degraded, or which is, or tends to be injurious to human health or welfare; or which damages property, plant, animal or marine life or use of property ...." S.C. Code Ann. § 48-1-10(7) (emphasis added). The Department possesses the authority to require Large CAFOs to obtain an NPDES permit for proposed or potential discharges.

2. The ALC erred in accepting DHEC's interpretation of certain provisions within S.C. Code Regs. 61-43 and further placing an unfair burden of proof upon Appellants.

DHEC has identified 25 agricultural animal facilities within the Little River watershed, of which 20 are poultry farms. (R. p. 1672). In the Mountville area of Laurens County, there are twelve existing poultry facilities totaling approximately 50 poultry barns within a radius of approximately five miles. (R. 1212; R. p. 452, line 2 – p. 453, line 24). Adding to this concentration of poultry facilities in the Mountville Community, Respondents seek to add eighteen new poultry barns within the Little River watershed. (R. p. 1496 – p. 1500; R. p. 1220 – p. 1225; P. 1248; R. p. 1213; R. p. 1337 – p. 1340). The Little River watershed has impaired water quality due to levels of fecal bacteria in the water that exceeds the State's water quality standards. Consequently, the Little River is the subject of a Total Maximum Daily Load ("TMDL") issued by DHEC in 2004. (R. p. 1681; R. p. 1692; *see also* R. 425, line 22 – p. 426, line 5; R. 851,

lines 4-6; R. 863, line 7 – p. 869, line 23; R. p. 1165, line 20 – p. 1166, line 23). The Little River TMDL identifies agricultural animal facilities as a possible contributor of the Little River's impairment. (R. p. 863, line 10 – p. 869, line 23; R. p. 1200, line 9 – p. 1202, line 6).

Under Part 200.140(B) and (C)(2), the Department is required to evaluate permit applications for additional or more stringent requirements when the facilities are located upstream from an impaired waterbody. DHEC's permit checklists state that the proposed facilities are located in a watershed that is the subject of a Total Maximum Daily Load ("TMDL") due to water quality impairment within the Little River watershed. (R. p. 1692; R. p. 1681; R. p. 1670; *see also* R. p. 1165, line 20 – p. 1166, line 23). More specifically, the checklist states that the facilities are located upstream from an impaired site, S-305. *Id.* This fact triggers mandatory evaluation of the permit applications pursuant to Part 200.140(C) for any additional or more stringent permit requirements. Yet DHEC's permit reviewer, Mr. Chaplin, stated in the permit checklists that no additional setback was required because "ag facilities are not considered as contributors to the TMDL." *Id.* The Little River TMDL was issued in 2004 and has not been subsequently revised. (R. p. 1199, line24 – p. 1200, line 6). Although the TMDL states that agricultural animal facilities may be a cause of the fecal bacteria impairment, DHEC subsequently decided that because the permits are "no-discharge" permits, agricultural animal facilities do not contribute to water quality impairment. (R. p. 1184, lines 1-15). In other words, DHEC rejected consideration of additional requirements or setbacks because the permit is a no-discharge permit; thus, no additional setbacks or requirements are warranted.

Again, in considering its mandate that the "Department shall act on all permits to prevent, so far as reasonably possible considering relevant standards under state and federal laws, an

increase in pollution of the waters and air of the State from any new or enlarged sources," the Department summarily concludes that there is no increase in water pollution because "being a no-discharge facility, they don't - we don't consider them contributing to pollution to waters and the air of South Carolina."[8] (R. p. 1197, line 14 – p. 1198, line 3). DHEC's permit checklists are consistent with this position. (R. p. 1666 – p. 1699) (concluding on numerous factors that "as this facility is classified as a no-discharge facility, no additional setbacks are required.")).

Further, under Part 200.70(F), the Department "shall evaluate the proposed site" under certain mandated factors, and any other relevant factor, "when determining if additional distances are necessary." Addressing the mandated factor of proximity to "other known point source discharges," DHEC simply states that "as this facility is classified as a no-discharge facility, no additional setbacks are required." (R. p. 1691; R. p. 1680; R. p. 1669). Addressing the factor of impairment of adjacent waters, DHEC merely concludes that "since Ag facilities are not considered contributors to the TMDL, no additional setbacks are required." (R. p. 1670; R. p. 1681).

DHEC's application of the Regulation is flawed. "The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 597-98, 757 S.E.2d 408, 416 (2014). "The true guide to statutory construction is not the phraseology of an isolated section or

[8]Read in the context of the language of S.C. Code Regs. 61-43, the term "new source" logically has a technical meaning related to the State's pollution control regulations. Under the State's NPDES regulation, "new source" is defined in relevant part as "any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced ... [a]fter promulgation of standards of performance under section 306 of CWA which are applicable to such source ...." S.C. Code Regs. 61-9.122.2(b). During the ALC hearing, DHEC conceded that "new source" means Respondents' permit applications as well as the fifty existing poultry barns already permitted to fourteen growers in the Mountville area. (R. p. 1196, line 1 – p. 1197, line 20; R. p. 1212).

provision, but the language of the statute as a whole considered in the light of its manifest purpose." *Id.* "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Id.* DHEC is charged with more than simply adhering to minimum standards; the Department must actually examine on a case-by-case basis whether additional requirements or setbacks are needed. The Department mechanically puts forth a rote response essentially stating that the permit imposes a no-discharge standard; therefore, no evaluation of additional requirements or setbacks is necessary. DHEC's circular reasoning leads to an absurd interpretation of the Regulation, for it allows the Department to avoid the plain intent of the Regulation for heightened review of permit applications and imposing additional requirements if necessary to fulfill the purpose of S.C. Code Regs. 61-43 Part 200 – "to protect the environment, and the health and welfare of citizens of The State from pollutants generated by [growing or confining of animals]." S.C. Code Regs. 61-43 Part 200.10(A)(1); *see Ross v. Waccamaw Cmty. Hosp.,* 404 S.C. 56, 63, 744 S.E.2d 547, 550-51 (2013) (rejecting a reading of a statute that enables a party to circumvent the intent of the law).

At the heart of DHEC's flawed interpretation is a misapplication of its presumption that a permittee will comply with his permit. *See e.g. Kimbrell v. Bi-Lo, Inc.*, 248 S.C. 365, 370, 150 S.E.2d 79, 80 (1966) ("It is a general rule that everyone has the right to presume that every other person will obey the law ...."). Upon issuing a permit, it is reasonable to assume that the agricultural animal permittee will comply with the "no-discharge" permit standard unless shown otherwise. But here, Appellants take issue with the Department invoking this presumption before a permit is issued, during the time in which the Department must evaluate the permit application to

determine whether the particular context of the proposed facility warrants additional or more stringent conditions beyond the minimum requirements under S.C. Code Regs. 61-43.200. DHEC reasons that it need not evaluate the proposed operation under S.C. Code Regs. 61-43.200.70(E) or Part 200.70(F)(6) or 200. 140(C) because the permittee will not discharge waste or pollutants. DHEC's reasoning cannot stand, for it serves to essentially read out of existence its mandate to evaluate and make decisions about a permit request under S.C. Code Regs. 61-43 Part 200 in a manner that protects the public interest.

The terms of the Regulation are clear – DHEC must undertake a meaningful evaluation of the mandated factors, standards or criteria under Part 200.70(E), 200.70(F) and 200.140(C) to make a determination as to whether additional requirements or setbacks are needed. *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) ("where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). Although this Court generally gives deference to an agency interpretation of a regulation it administers, if the plain language of the regulation is contrary to the agency's interpretation, this Court will reject the agency's interpretation. *Kiawah*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014).

The ALC deferred to DHEC's interpretation and looked to the Appellants for evidence proving that existing permitted facilities actually increased pollution to waters of the State. The Court found that "the evidence presented by Petitioners concerning the alleged improper operations of existing facilities did not demonstrate that poultry facilities actually increase pollution to waters of the State." ALC Op. p. 26. The ALC further concluded that "alleged violations of other poultry facilities are not relevant to whether the applications filed by Respondents comply with applicable regulations." *Id.* Respectfully, the ALC erred.

The ALC erred in addressing Appellants' argument as a question of fact, not law. The issue raised is whether the Department impermissibly interprets Part 200 in a manner that essentially erases the mandate that DHEC act on permits to prevent an increase in pollution, or otherwise impose additional requirements. The Department claims that, because an agricultural animal permit contains a no-discharge standard, then permittees never discharge; therefore, DHEC has no duty under Part 200.70(E) and 200.140(C) to impose additional conditions, nor under Part 200.70(F) to impose additional setbacks, because agricultural animal facilities would never cause an increase in pollution, nor warrant additional scrutiny. The Department's interpretation in effect eliminates any obligation to give meaningful permit review for the purpose of "protect[ing] the environment, and the health and welfare of citizens of the State from pollutants generated by the process." S.C. Code Regs. 61-43.200.10(A)(1). Regulations must be interpreted with the presumption that their provisions are intended to accomplish something. *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). The Department's reading nullifies the plain language of Part 200.70(E), 200.70(F)(6) and 200.140(C)(2). Because the plain language of the regulation is contrary to the Department's interpretation, this Court should reject DHEC's interpretation. *Kiawah*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014).

Further, by suggesting Appellants bear a burden of proving that existing agricultural animal facilities actually discharge pollutants into waters of the State, the ALC's ruling creates an impossible and unfair burden on Appellants. Appellants lack legal access to existing poultry facilities. It is the Department who possesses the investigatory authority to determine if actual discharges occur, not the Appellants. "Due process is flexible and calls for such procedural

protections as the particular situation demands." *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998). Here, putting the burden upon ordinary citizens to prove actual discharges of pollutants by previously permitted poultry facilities, when they lack the ability or authority to do so, is patently unjust.[9] "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983).

Nevertheless, assuming that a question of fact exists that Appellants bear the burden to prove, any such burden would not involve proof of actual discharges. The existing agricultural animal facilities in the Little River watershed are "new sources." See S.C. Code Regs. 61-43.200.70(E). Under the State's NPDES regulation, "new source" is defined in relevant part as "any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced ... [a]fter promulgation of standards of performance under section 306 of CWA which are applicable to such source ...." S.C. Code Regs. 61-9.122.2(b) (emphasis added). CAFOs are, by definition, a conveyance "from which pollutants are or may be discharged." S.C. Code Regs. 61-9.122.2(b) (emphasis added). Thus, if any fact is to be proved here, it is whether discharges may occur from agricultural animal facilities.

[9] Illustrating the point raised here that the ALC imposed an unfair burden on Appellants, Appellants entered into evidence photographs taken offsite showing what a SCRAP member could see from a bridge overlooking an existing poultry facility, Alexander Family Farms. (R. p. 674, line 13 – p. 680, line 25; R. p. 1716 – 1721). The photos show, on numerous occasions, what the witness believed to be large uncovered manure piles surrounded by puddles of water. (R. p. 1716 – 1718; R. p. 1721). Respondents objected to the witness' characterization of the piles as manure or a discharge of pollutants because the witness had not entered the property, taken a sample of the substance of the pile, tested the substance for existence of pollutants, and tracked the water surrounding the piles to any waters of the State. (R. p. 681, lines 2-14; R. p. 690, line 18 – p. 691, line 9). The witness had no legal access to the property to obtain a sample of the substance nor survey the property to trace how pollutants would enter waters of the State.

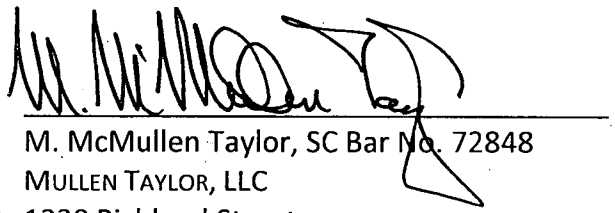
Appellants have adduced evidence showing that discharges may occur from existing agricultural animal facilities. Appellants entered into evidence photographs showing, on numerous occasions, what the witness believed to be large uncovered manure piles surrounded by puddles of water. (R. p. 2221 – 1718; R. p, 1721); R. p. 674, line 13 – p. 680, line 25). Mr. Blackmon observed satellite images showing several poultry farmers stockpiling manure outside and uncovered, including Mr. David Coggins' existing facility. (R. p. 506, line 19 – p. 511, line 7). Appellants also elicited testimony from Mr. David Coggins who testified that, at his existing poultry facility, rainwater running into ditches near the poultry barns flow into a pond that then flows into an ephemeral stream. (R. p. 694, lines 2-9; R. p. 710, line 17 – p. 713, line 25). Appellants have thus shown the potential for discharges by agricultural animal facilities. Contrary to the ALC's ruling that alleged discharges by existing facilities is irrelevant, evidence showing potential discharges rebuts DHEC's position that its process of permit decision-making may lawfully assume that applicants simply do not discharge wastes or pollutants.

In stating that the requirements of S.C. Code Regs. 61-43.200.70(E), 200.70(F) and 200.140(C) are of no import because agricultural animal permittees do not discharge, the ALC is putting the cart before the horse. DHEC's permit decision-making should be aimed at site-specific conditions or requirements to assure that the no-discharge standard is achievable. Instead, DHEC is impermissibly assuming no-discharge as part of its decision-making, thereby short-circuiting its permit review process through avoidance of important protective measures.

CONCLUSION

Appellants respectfully request that this Court reverse the decision of the ALC, or in the alternative, remand for further proceedings consistent with an order of this Court.

Respectfully Submitted,



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Aug. 6, 2018.