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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.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pickens County, Appellant,

v.

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

Appellate Case No. 2017-000066

Appeal From the Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 5707
Heard May 6, 2019 – Filed January 8, 2020

REVERSED AND REMANDED

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Respondent South Carolina Department of Health and
Environmental Control.

MCDONALD, J.: Pickens County (the County) appeals an Administrative Law Court (ALC) order dismissing its challenges to an unnoticed permit modification issued to MRR Pickens, LLC (MRR) by the South Carolina Department of Health and Environmental Control (DHEC). The County argues the ALC erred in (1) dismissing the County's challenge to DHEC's permitting decision as untimely without considering whether DHEC complied with statutory and regulatory notice requirements; (2) dismissing based on the County's purported failure to exhaust administrative remedies; (3) granting MRR and DHEC's (collectively, Respondents) motions to dismiss based on evidence beyond the pleadings while denying the County the opportunity to conduct discovery; and (4) dismissing the case as untimely without resolving the status of the proposed intervenors. We reverse and remand.

Facts and Procedural History

In early 2007, MRR was involved in negotiations with the County regarding the construction of a Class Two Landfill at 2180 Greenville Highway in the town of Liberty.¹ MRR and the County entered into a Development Agreement and Host Agreement (collectively, the Agreements) for the Class Two Landfill in March 2007.² The Agreements specify MRR "shall construct and operate a Long-term Construction and Demolition and Land-Clearing Debris Landfill" and that the County will serve as the host local government for such operation.

On September 19, 2008, DHEC issued a draft permit for the Class Two Landfill. DHEC publicly noticed the draft permit in two local newspapers, the Easley Progress and The Pickens Sentinel, on September 24, 2008. DHEC also sent notice to adjacent landowners, the County, and others on its mailing list. After the public comment period expired, DHEC issued Solid Waste Permit LF2-00003 to MRR for the Class Two Landfill³ on November 3, 2008.⁴ The 2008 Permit

¹ DHEC classifies landfills that accept Construction and Demolition (C&D) waste as Class Two landfills. *See* S.C. Code Ann. Regs. 61-107.19.IV (outlining requirements for this classification).

² Although the Host Agreement included in the record is not signed, it is incorporated by reference in the signed Development Agreement.

³ The County did not request final review by the DHEC Board on the decision to issue the 2008 Permit or ask to be notified of any future decisions relating to the 2008 Class II Permit as issued.

contained the following special condition as to the nature of waste authorized for disposal: "This permit is limited solely to the disposal of items listed in Appendix I of R. 61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill." Regulatory Appendix I, as referenced in the special condition, lists "acceptable waste for class two landfills" and contains materials typically associated with land clearing, yard work, and construction, such as: brush and limbs, logs, rock, masonry, paint cans, glass, pipes, and plaster.

The County's Solid Waste Management Plan (SWMP), a local planning document required by state law,⁵ prohibits "special waste" from being deposited in the County and states "[t]here are no operating Class Three Landfills in Pickens County."⁶ The SWMP specifies "[a] Class Three Landfill is one designed to receive wastes such as household waste, sludge, incinerator ash[,] and certain industrial waste."

In 2014 and 2015, MRR and DHEC conducted a series of meetings and discussions regarding modifications to the landfill design approved in the 2008 Permit.⁷ While MRR was designing its modifications and communicating with DHEC, MRR misrepresented to the County and the Pickens County Planning Commission the nature of its plan for the landfill facility and operation. Dan Moore of MRR appeared before the Planning Commission on January 12, 2015, for the purpose of securing a land use approval, and stated there were "no changes" from the Class Two Landfill design approved in 2008. He made no mention of MRR's ongoing meetings with DHEC, certain engineering reports related to the permit modification MRR was discussing in the meetings with DHEC, or coal ash.

⁴ The permit's effective date is November 18, 2008.

⁵ See S.C. Code Ann. § 44-96-80 (setting forth the requirements for county or regional solid waste management plans).

⁶ DHEC classifies landfills accepting municipal solid waste as Class Three landfills. See S.C. Code Ann. Regs. 61-107.19.V (outlining requirements for this classification).

⁷ From 2008 through 2014, MRR requested and obtained permit extensions, informing DHEC each year that the economic downturn warranted postponement of development of the landfill.

When questioned about a landfill liner, Moore represented no liner would be required.

On March 30, 2015, MRR applied to DHEC for a "minor modification" of the 2008 Permit, requesting an option to install a liner and associated leachate collection system for a portion of the Highway 93 Class Two Landfill.⁸

After determining MRR's application to modify the 2008 Permit met the regulatory definition of a "minor" permit modification, DHEC issued a permit modification (the Permit Modification) on August 10, 2015. This "minor modification" authorized the following changes from the 2008 Permit:

- The addition of a landfill liner, a characteristic of Class Three Landfills not present in any other Class Two landfill in the state;
- Design changes from Class Two to Class Three characteristics, including changes to the final landfill cover;

⁸ DHEC's landfill regulations define the term "modification" to include changes to a solid waste landfill as follows:

- a. "Minor modification" means a change that keeps the permit current with routine changes to the facility or its operations, or an administrative change; and,
- b. "Major modification" means 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, Part I, 48. A major permit modification requires public review and comment while a minor permit modification does not. R.61-107.19, Part IV, 1.2; Part I, D.2.c.

- Elimination of language prohibiting "all other wastes" and replacement with language authorizing "any other waste approved by the Department"; and
- Allowance for disposal of "special wastes," defined as "nonresidential or commercial solid wastes, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at municipal solid waste landfills."^[9]

Notably, the requested modifications to the 2008 Permit did not seek to change the existing permitted landfill classification from a Class Two (construction and demolition debris) to Class Three (municipal solid waste) landfill. And because DHEC labeled this action as only a minor permit modification, DHEC deemed public notice and comment unnecessary under its solid waste regulations. Rather, DHEC determined it was only required to provide notice to MRR and to any affected persons who had requested in writing to be notified.¹⁰

The County did not receive notice of these modifications prior to DHEC's issuance of the Permit Modification. During this time period, MRR's engineering consultant submitted several engineering drawings and reports to DHEC reflecting a plan to convert the 2008 Permit to allow modification from Class Two Landfill characteristics to those of a Class Three Landfill. These reports note the following observation from MRR's consultant: "During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of Regulation R.61.107.19 Part V Class Three Landfills would require a minor permit modification."

⁹ See S.C. Code Ann. § 44-96-390 (setting out the approval procedures for landfills accepting special wastes).

¹⁰ See S.C. Code Ann. § 44-1-60(E)(1) ("Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified. Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail. Notice of staff decisions for which a department decision is not required pursuant to subsection (D) must be provided by mail, delivery, or other appropriate means to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified.").

Months after the Permit Modification had been issued, the County learned MRR might be changing the design of the Highway 93 Landfill to prepare it to accept coal ash. Gerald Wilson, Public Works Director for the County, then submitted a Freedom of Information Act request and sought a meeting with DHEC regarding the Highway 93 Landfill. On December 15, 2015, DHEC staff met with County officials, including Wilson, and informed them the 2008 Permit had been modified in August 2015. On January 11, 2016, DHEC emailed a copy of the Permit Modification to Wilson. On March 23, 2016, the County submitted a request for administrative review to DHEC. On April 21, 2016, DHEC declined to conduct a final review conference.

On February 1, 2016, MRR filed a lawsuit (*MRR Pickens, LLC v. Pickens County, et al.*, civil action number 2016-CP-39-100) against the County and members of the Planning Commission. This provided the County with the opportunity to depose Kent Coleman, then director of the Division of Mining and Solid Waste Management at DHEC, who signed both the 2008 Permit as well as the 2015 Permit Modification. Regarding the distinction between minor and major permit modifications, Coleman

- Admitted the definition of major modification in the relevant regulation includes alternate designs.
- Admitted the definition of minor modification does **not** include alternate designs.
- Admitted that in an August 10, 2015 letter accompanying the Permit Modification, he characterized the Permit Modification as an "alternate liner design" and "design change."
- Admitted that when DHEC determines a proposed landfill change to be a major modification, DHEC follows "our normal process, which would include [notice to] adjacent owners, concerned parties, local governments."

Coleman later engaged in the following exchange:

Q. In answers to Ms. King's questions one time today, you said this was a "new design for the landfill." Is that a fair statement?

A. Yeah, I mean it is.

Q. Okay.

A. It was a new design.

Q. And I wrote down also a quote earlier today when your answer to Ms. King's questions that this was "essentially the same design as a Class Three."

A. Yes, I recall saying that, yes.

Q. Alright. And that is basically the change from the [2008 Permit] to the 2015 [Permit] [M]odification was essentially the same design as a Class Three. Is that right?

A. Yes, uh-huh.

Q. So in other words, what we're doing is changing a Class Two by adding Class Three features. It became essentially the same design as a Class Three.

(objection)

A. The design became very similar to a Class Three, yes.

Coleman also testified regarding the wastes that could be disposed of in MRR's proposed landfill under the Permit Modification, admitting that:

- Construction and Demolitions (C&D) landfills are not required to have liners.
- MRR's landfill would be the first commercial Class Two landfill in South Carolina to have a liner.

- Coleman knew MRR was considering placing coal ash into this landfill when it applied for the Permit Modification.
- Coal ash would not have been allowed or accepted under the 2008 Permit.^[11]
- The Permit Modification application requested to accept "certain special wastes" into this landfill, even though such wastes, by statute, must be placed in Class Three Landfills.
- MRR submitted stability calculations that would be appropriate for coal ash, in addition to stability calculations for C&D waste, so it was clear to DHEC that MRR was planning to put both types of waste in the modified landfill.

On May 19, 2016, the County filed a request for a contested case hearing with the ALC. DHEC moved to dismiss. Subsequently, MRR filed motions to dismiss and to stay discovery. On August 18, 2016, the County filed a motion to intervene on behalf of various County property owners (Neighboring Property Owners). On September 7, 2016, the ALC held a telephone conference with the parties, and

¹¹ Coal ash requires special handling due to its propensity to create dust, contain toxic substances (such as mercury, lead, and arsenic), and contaminate groundwater and surface water. As such, coal ash qualifies as a "special waste" under South Carolina law and is generally unsuitable for disposal in a Class Two landfill. *See, e.g.*, S.C. Code. Ann. § 58-27-255 (providing "coal combustion residuals that result from an electrical utility, an electric cooperative, a governmental entity, a corporation, or an individual producing electricity for sale or distribution by burning coal must be placed in a commercial Class 3 solid waste management landfill, unless the coal combustion residuals are: (1) located contiguous with the electric generating unit; (2) intended to be beneficially reused; (3) placed into beneficial reuse; or (4) placed in an appropriate landfill which meets the standards of the Department of Health and Environmental Control Regulation 61-107, and that is owned or operated by the entity that produced the electricity which resulted in the coal combustion residuals").

granted MRR's motion to stay discovery. The ALC held the motion to intervene in abeyance pending the court's decision on the motions to dismiss. Following a hearing on the motions to dismiss, the ALC granted the motions in a December 12, 2016 order, finding the County did not timely fulfill the procedural requirements for bringing a contested case before the ALC. The ALC further found the County's failure to file a timely request for final review and participate in the Department's review process foreclosed any contested case action before the ALC. Regarding the County's request for final review to the DHEC Board, the ALC stated "the County's request was filed 226 days after the staff decision was issued, ninety-nine days after the meeting where the decision was discussed with the County, and seventy-two days after the decision was emailed to the County." The ALC held the County did not state a legally valid or compelling reason for its failure to timely file a request for review and, therefore, the case did not warrant the application of equitable tolling.

The County appealed on January 11, 2017. On March 29, 2017, the Neighboring Property Owners moved to intervene as parties to the appeal. This court denied the motion to intervene.

Standard of Review

The Administrative Procedures Act (APA) provides the standard for judicial review of cases decided by the ALC. S.C. Code Ann. § 1-23-610(C); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control*, 380 S.C. 349, 360, 669 S.E.2d 899, 904 (Ct. App. 2008), *rev'd on other grounds*, 390 S.C. 418, 702 S.E.2d 246 (2010). An appellate court "may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). The question of subject matter jurisdiction is a question of law for the court. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E. 2d 524, 528 (Ct. App. 2009).

Law and Analysis

I. Notice

The County argues the ALC erred in dismissing its challenge to the DHEC permitting decision as untimely prior to resolving whether DHEC had complied with the statutory and regulatory notice procedures applicable to its decision. We agree.

The ALC found the County failed to timely comply with the filing requirements set forth in section 44-1-60 of the South Carolina Code, which sets out the procedure through which DHEC staff decisions may be appealed through DHEC and to the ALC in the form of a contested case. The notice and filing provisions applicable to the County's appeal include:

The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person.

S.C. Code Ann. § 44-1-60(E)(2).

No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the [ALC]. The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten calendar days' written notice of the conference; and advise the applicant that evidence may be presented at the conference.

S.C. Code Ann. § 44-1-60(F).

An applicant, permittee, licensee, or affected person may file a request with the [ALC] for a contested case hearing within thirty calendar days after: (1) notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or (2) the sixty calendar day deadline to hold the final

review conference lapses and no conference has been held; or (3) the final agency decision resulting from the final review conference is received by the parties.

S.C. Code Ann. § 44-1-60(G).

The ALC concluded the County's appeal was untimely because it did not appeal the DHEC staff decision on the "minor" permit modification to the DHEC Board within fifteen days, as required by § 44-1-60. Thus, according to the ALC, the County failed to exhaust its administrative remedies, necessitating dismissal. On cursory review, this rationale may seem logical; however, it is problematic here because the ALC failed to undertake the prerequisite analysis of whether these time restraints apply at all here due to DHEC's misclassification of the permit modification as "minor." In so classifying the modification, DHEC has effectively permitted a Class III landfill without the required statutory notices by simply labeling the action as a "minor" modification of a "Class II" permit—despite the proposed landfill's actual design characteristics and the wastes its operators intend to accept.

As previously stated, the public notice requirements for major modifications differ substantially from those for minor modifications of an existing permit. *See* S.C. Code Ann. Regs. 61-107.19, Part IV, 1.2; Part I, D.2.c. (stating a major permit modification requires public review and comment while a minor permit modification does not). The pertinent regulatory language addressing DHEC's notice obligations provides:

(1) Notice of all applications submitted to the Department *for the initial construction and major modifications of Class Two and Class Three landfills* shall be published by the applicant once in a newspaper of general circulation in the area of the proposed landfill project. Notice for Class Two landfill application shall be published as provided in Part IV, Section H.3. Notice for new Class Three landfills that accept municipal solid waste shall be published as provided in S.C. Code Section 44-96-470 and Part V, Subpart H.3.a. of this regulation within 15 days of filing the permit application. Notice for all other new Class Three landfills shall be published as provided in Part V, Subpart H.3.b.

(2) All notices shall contain the following:

- (a) Name and address of the applicant;
- (b) The location of the proposed activity to include the county, roads and crossroads. (Class Three landfills shall provide a location map of the proposed site);
- (c) The nature of the proposed activity;
- (d) *A description of the proposed site or a description of the proposed major modification;*
- (e) An explanation of the type(s) of waste that will be accepted;
- (f) Department locations (Central Office and appropriate Regional Office) where a copy of the permit application or draft permit, as appropriate, can be viewed during normal working hours;
- (g) The Department's address and contact name for submittal of comments and inquires;
- (h) The approximate tonnage/year expected for disposal at the landfill; and,
- (i) The proposed life of the landfill.

(3) The Department will send a notice of receipt of the permit application by regular mail to all adjoining landowners of the proposed landfill.

Part I. General Requirements, SC ADC 61-107.19 Part I (emphasis added).

The filing deadlines of § 44-1-60 are contingent upon DHEC's compliance with the procedural and notice requirements of its own regulations. *See e.g., S.C. Code Ann. § 44-1-60(B)* ("The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a

department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings."'). Our supreme court reiterated this in *South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010), in which the Coastal Conservation League sought review of a critical area permitting decision more than fifteen days after DHEC issued the staff decision. DHEC failed to notify the Coastal Conservation League as required by statute; thus, the time limitations for review did not start to run until DHEC corrected its notice error. *Id.* at 430, 702 S.E.2d at 253. The plain language of § 44-1-60(A) supports this conclusion here as well: "All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits . . . shall be made using the procedures set forth in this section." The procedures in § 44-1-60 particularly emphasize public notification, as reflected in § 44-1-60(B). Only after DHEC issues a staff decision in compliance with the procedural and notice dictates of its own regulations and of § 44-1-60 subsections (A) through (E), does subsection (E)(1) trigger the fifteen day deadline for an appeal of the decision to the DHEC Board. *See also Leventis v. S.C. Dep't of Health & Env'tl. Control*, 340 S.C. 118, 143 n.14, 530 S.E.2d 643, 657 n.14 (Ct. App. 2000) ("DHEC's failure to provide adequate notice that the financial assurance regulations were still being considered excused Sierra Club from requesting a hearing [on those regulations].").

The ALC relied on the fact that the County received actual notice of the permit modification months after it was issued, yet did not take action on this notice within the fifteen day period prescribed by § 44-1-60(E)(2). However, nothing in § 44-1-60 suggests the fifteen day period for appealing a DHEC staff decision begins to run upon a party's simply learning of a permit action. To the contrary, the time period begins to run only after DHEC issues a staff decision in compliance with applicable statutory and regulatory notice safeguards.

DHEC argues it had no obligation to notify the County of the "minor" modification to the 2008 Permit because the County never requested to be notified as an "affected person" with respect to any DHEC staff decision regarding the Highway 93 Class Two Landfill. Although the County does not dispute that it never formally requested to be notified as an affected person, the County argues the relevant consideration here is whether the Modified Permit involved a major or minor modification. For a "major modification" request—which the County asserts has occurred here—DHEC was required to publish notice of the Permit Modification and mail notice (by regular mail) to adjoining landowners. DHEC's own representative has admitted the Permit Modification meets the regulatory

definition of a major modification. Thus, we find DHEC's labeling of the Permit Modification as minor denied contemporaneous notice and participation opportunities that DHEC's own regulations required be provided to both the public and the adjacent Neighboring Property Owners. Accordingly, the ALC erred in dismissing the County's challenge to the DHEC permitting decision as untimely because DHEC failed to comply with the notice procedures applicable to its decision to, in reality, permit a Class III landfill.¹²

II. Discovery

Next, the County argues the ALC improperly accepted evidence from outside the pleadings against the County while denying the County the right to undertake discovery.¹³ The County further asserts the ALC erred in resolving conflicting evidence in Respondents' favor. We agree.

The ALC failed to notify the parties it would consider affidavits and extra-pleading evidence but accepted such evidence in considering Respondents' Rule 12 motions. Our appellate courts have held repeatedly that a trial court's failure to "fairly apprise" a plaintiff that the court would consider material outside the pleadings in resolving a motion to dismiss is grounds for reversal. *See, e.g., Baird*, 333 S.C. at 528, 511 S.E.2d at 74 ("The first indication that County's 12(b)(6) motions would be converted to summary judgment motions was the trial court's order of dismissal. Under these facts, the trial court erred in converting County's 12(b)(6) motions into motions for summary judgment."); *Higgins v. MUSC*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (holding the plaintiffs had not been "fairly apprised" that the trial court would consider material outside the pleadings in support of the defendant's 12(b)(6) motion). Our ruling on the motions to dismiss resolves the ALC's need to stay discovery.¹⁴

¹² This analysis applies to the ALC's dismissal on exhaustion grounds as well. Until DHEC complies with its own regulatory requirements for the requested major modification, no exhaustion requirement is triggered.

¹³ Although the County served discovery requests and deposition notices prior to dismissal, MRR moved to stay all discovery during the pendency of the ALC's consideration of the motions to dismiss. The ALC granted MRR's motion to stay discovery.

¹⁴ On remand, in addition to lifting the discovery stay, the ALC will also be able to address the concerns of the Neighboring Property Owners. DHEC's own notice

Conclusion

Based on the foregoing, the ALC's order dismissing the County's challenge to the permit modification is reversed and this matter is remanded to the Administrative Law Court for further proceedings.

REVERSED AND REMANDED.

LOCKEMY, C.J. and SHORT, J., concur.

regulation "for the initial construction and major modifications of Class II and Class III landfills" mandates "(3) [t]he Department will send a notice of receipt of the permit application by regular mail to all adjoining landowners of the proposed landfill."

91979

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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Respondents,

v.

Pickens County, Appellant.

RECEIVED
JAN 23 2020
SC Court of Appeals

RESPONDENTS' PETITION FOR REHEARING

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Murphy v. Hagan,
275 S.C. 334, 271 S.E.2d 311 (1980)

Palmetto Alliance Inc. v. South Carolina Pub. Serv. Comm'n,
282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)

Pickens County v. S.C. Dept. of Health & Env't'l Control, and MRR Pickens, LLC,
Opinion No. 5707 (S.C. Ct. App. filed January 8, 2020)

Recco Tape & Label Co. v. Barfield,
312 S.C. 214, 439 S.E.2d 838 (1994)

S.C. Coastal Conservation League v. S.C. Dept. of Health & Env't'l Control,
363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)

Timms v. Timms,
286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985)

Waters v. S.C. Land Res. Conservation Comm'n,
321 S.C. 219, 226, 467 S.E.2d 913, 917 (S.C.1995)

INTRODUCTION

Pursuant to Rules 221(a) and 240, SCACR, Respondent MRR Pickens, LLC (“MRR”) petitions this Court for rehearing of the Court’s decision in Pickens County v. South Carolina Department of Health and Environmental Control and MRR Pickens, LLC, Opinion No. 5707 (S.C. Ct. App. filed January 8, 2020). The Court went outside the allowable standard of review, misapprehends the law, and overlooks evidence in the record in its reversal and remand of the decision of the Administrative Law Court (“ALC”).

The Opinion includes serious procedural and substantive errors. The Court impermissibly acts as the finder of fact, and in so doing, reaches conclusions of law based on alleged facts not in the record nor examined by the ALC, while ignoring findings reached by the ALC. The Court fails to give deference to the South Carolina Department of Health & Environmental Control (“SCDHEC” or “Agency”), and yet remands to the ALC “for further proceedings”, despite already reaching conclusions on the merits itself. Finally, the Court’s failure to give weight to the exhaustion of administrative remedies doctrine reverses established precedent from the South Carolina Supreme Court and is in violation of the procedural requirements of the Administrative Procedure Act (“APA”). For these reasons, the Opinion is flawed.

For the reasons stated herein, Respondents MRR and the South Carolina Department of Health and Environmental Control (together, MRR and SCDHEC are “Respondents”) respectfully request the Court reconsider its decision and grant this Petition for Rehearing.

ARGUMENT

I. The Opinion is Procedurally Flawed and Outside the Scope of its Authority.

A. The Court Disregarded the Substantial Evidence Standard of Review.

The Court disregarded the substantial evidence standard of review A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control, 428 S.C. 189, 201, 833 S.E.2d 451, 458 (Ct. App. 2019). “The review of the ALC’s order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact.” “When reviewing a decision of the ALC in [permitting] cases, this court’s standard of review is governed by section 1-23-610 of the South Carolina Code.” Id. at 200. As provided in Section 1-23-610, the court may only reverse or remand if it finds the decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-610(B)(Supp. 2018)(emphasis added). This is a very limited standard. “Substantial evidence” is “evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached” and is “more than a mere scintilla of evidence.” A.O. Smith Corp., 428 S.C. at 201, 833 S.E.2d at 457 (internal quotation omitted). In proceedings before the appellate court, the burden is on the appellants “to prove convincingly that the agency’s decision is unsupported by the evidence.” Waters v. S.C. Land Res. Conservation Comm’n, 321, S.C. 219, 226, 467 S.E.2d 913, 917 (1995) (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1990)).

Here, the Court went outside the record and substituted its judgment for that of the ALC.

1. The Administrative Law Court, not the Court of Appeals, acts as the finder of fact.

South Carolina law mandates the Court of Appeals' review of the decision of the ALC is limited to the ALC's findings of fact, which can only be based on the administrative record. "The review of the [Administrative Law Judge's ("ALJ")] order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALJ] as to the weight of the evidence on questions of fact." S.C. Code Ann. 1-23-610(B) (emphasis added).

The ALC reviews the final agency decision in a contested case hearing *de novo* and serves as the finder of fact, with the standard of proof being a preponderance of the evidence. See S.C. Code Ann. § 1-23-600(B) (Supp. 2019); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). As the trier of fact, the ALC may give testimony the weight it determines it deserves. Florence Cnty. Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). As fact finder, the ALC must also give consideration to the experience, technical competence, and specialized knowledge of SCDHEC and its staff in evaluating the evidence. S.C. Code Ann. §§ 1-23-330(4); 44-1-60(F)(2).

The ALC Order appealed was a grant of a motion to dismiss. Therefore, the ALC explicitly ordered the parties not to present evidence to be weighed by it on the issues that go to the merits. [R. pp. 3-4; 126:8-10, 127:13-22]. Right or wrong in the Court of Appeal's view of the case, these were the instructions to the parties. Id. Respondents abided by these instructions, Pickens County did not, stating unsupported facts in their pleadings and attaching very limited portions of documents, transcripts, and other incomplete evidence from a different case in Pickens County. [See R. p. 603-608]. The ALC instructed Pickens County numerous times to discontinue presenting any testimony on issues outside the single issue before the ALC on Respondents' Motion to Dismiss; that being, did Pickens County have actual notice of the permit modification

in December 2014 and January 2015 and, if so, why did it wait until March to file its appeal? [R. p. 2: “Issue”].

For this reason, the ALC makes very few findings of fact in its Order:

1. MRR Pickens received a Class 2 Landfill Permit from SCDHEC in 2008 for a landfill in Pickens County [R. p. 1];
2. In March and August of 2015, MRR applied for a permit modification and revised permit modification [R. p. 2];
3. SCDHEC determined the modification applied for was minor and therefore did not need engage in the public notice and comment period requirements set forth in Regulation 61-107.19, Part I for a major modification [Id.](emphasis added);
4. SCDHEC mailed the staff decision to MRR on August 10, 2015 approving the requested modification [Id.];
5. On December 15, 2015, SCDHEC informed Appellant Pickens County of the permit modification decision in a meeting [Id.];
6. On January 11, 2016, SCDHEC emailed the permit modification decision (“Modification Decision”) to Appellant Pickens County [Id.]; and
7. Appellant filed a Request for Final Review (“RFR”) with the SCDHEC Board on March 23, 2016. [Id.]

These findings of fact were used by the ALC to find Pickens County had actual notice and conclude actual notice of a SCDHEC permitting decision begins the fifteen-day deadline to file a Request for Final Review.

In its Opinion, the Court of Appeals ignores the statutory limitations on its “fact-finding” authority and goes outside the facts considered by the ALC, which made no findings of fact regarding the type of modification or landfill. [R. pp 1-5] The following facts included in the Opinion illustrate the Court’s procedural error as they were specifically not accepted into evidence, discussed, or ruled on by the ALC and are often cited from Pickens County’s pleadings with limited or no evidentiary support:

1. Facts relating to 2007 Host and Development Agreement between MRR and Pickens County [Opinion, Facts and Procedural History, para. 1, p. 2];

2. Facts relating to the types of waste allowed under the 2008 Permit and the 2015 modified permit [Id. at para. 2, p. 3];
3. Facts relating to the County Solid Waste Management Plan [Id. at para. 3, p. 3];
4. Facts relating to meetings in 2014 and 2015 between MRR and SCDHEC regarding “modifications to the landfill design approved in the 2008 Permit” [Id. at para. 4, pp. 3-4];
5. Facts relating to Pickens County Planning Commission Meeting in January of 2015 and any statements made by MRR at that meeting [Id. at pp. 3-4];
6. Facts relating to permit extensions requested by MRR from 2008-2014 [Id. at fn. 7];
7. Facts relating to the 2016 lawsuit filed by MRR against Pickens County *et al.* and very limited portions of the cross-examination deposition testimony of SCDHEC’s Kent Coleman early in that case [Id. at pp. 5-7]¹;
8. Facts relating to what permit changes SCDHEC considers major verses minor under SCDHEC regulation 61-107.19 [Id. at para 10, pp. 5-7]²;
9. Fact relating to what wastes SCDHEC would allow MRR to take under the 2008 Permit verses the 2015 Modification Decision [Id. at p. 7];
10. Facts relating to the specific changes authorized in the August 10, 2015 permit modification as compared to the 2008 permit modification [Id. at para. 6, bullet points 1-4, pp.*4-5³];
11. Facts relating to MRR’s permit modification application to SCDHEC and associated engineering reports [Id. at pp. 5-6]; and,

¹ Notably, as discussed in Section I.B., *infra*, this “evidence” is not even from the case before the ALC or the Court of Appeals, but from a different case entirely.

² In fact, the Court makes this *de novo* finding of fact, and others, by quoting directly from the County’s Memorandum in Opposition to MRR’s Motion to Dismiss – the attorney’s conclusory statements of its version of the facts. However, additional excerpts in the record offered by the County also contain the exact opposite statements from DHEC and other DHEC witnesses who have testified to the contrary in the case in Pickens County. [R. p. 261:13-18]

³ These findings are direct quotes from the County’s attorneys’ view of what the 2015 Modification Decision changed in the 2008 permit – citing to portions of incomplete reports. [R. 126:8-10, 127:13-22].

12. Facts relating to whether DHEC actually believes coal ash requires “special handling” or qualifies as “special waste.” [*Id.* at p. 7, fn. 11].

The Court improperly makes these and other findings of fact, accepting portions of transcripts and other documents and conclusory statements in pleadings not in the administrative record, and not weighed by the ALC, as reliable and probative facts that should be given weight – without allowing Respondents any opportunity to present evidence.⁴ This alone is grounds for rehearing because it is not statutorily allowed.

Moreover, the Opinion gives credence to all facts pled by Pickens County and ignores record evidence of Respondents—facts which conflict with the unrelated evidence improperly relied upon by the Court. The Court of Appeals cannot, as an appellant body, make *de novo* findings of fact. If there is conflicting evidence in the administrative record, the Court of Appeals must defer to the ALC findings on that issue. See A.O. Smith Corp. v. S.C. Dep’t of Health & Envtl. Control, 428 S.C. 189, 200, 833 S.E.2d 451, 457 (Ct. App. 2019)(emphasis added) (“When the evidence conflicts on an issue, the court’s substantial evidence standard of review defers to the findings of the fact-finder”) (quoting Be Mi, Inc. v. S.C. Dep’t of Revenue, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014)).

To illustrate the Court’s error, Respondents respectfully refer the Court to the following evidence which Respondents would present to the ALC during a hearing on the merits, but was correctly not reviewed or relied upon by the ALC in its Order⁵:

⁴ Respondents were not given the opportunity to refute these alleged facts as the parties were instructed by the ALC not to, because such facts were not relevant to the timeliness decision. [R. p. 126:8-10, 127:13-22]

⁵ Contradictory evidence to Pickens County’s version of the facts was intentionally not presented by Respondents because it was outside the administrative record and thus not properly before the Court; however, such evidence would have been presented at the ALC had it held a hearing on the merits. Respondents were not permitted to submit factual evidence into the record as to these issues by the ALC because such facts were not relevant to the decision to be made. [R. p. 126:8-10, 127:13-22]. There are multiple documents and deposition transcripts in the case in Pickens

1. The Host and Development Agreements: The 2007 Agreements referred to what is now a Class 2 Landfill; a Class 2 Landfill is not limited to construction and demolition or land-clearing debris; [R. p. 694-96]
2. Types of waste allowed under the 2008 Permit and the 2015 modified permit: DHEC testified the 2008 and 2015 Permits do not differ in the types of waste that can be allowed in the landfill and any Class 2 waste that meet the requirements of SCDHEC regulations would be allowed in the landfill under either permit [R. p. 385-86, 694-95, 780:9-782:8-11];
3. The County Solid Waste Management Plan: SCDHEC, not Pickens County, determines if a waste or landfill meets the County's Solid Waste Management Plan [R. p. 239:15-25; 476-77];
4. Pickens County Planning Commission Meeting in January of 2015 and any statements made by MRR at that meeting regarding a liner⁶: There is a full transcript of the meeting and submittals whereby MRR mentions a liner. A liner, even if not required for a Class II landfill, is more protective of the environment and therefore, not something that DHEC would expect would garner opposition [R. p. 693-94]; The addition of a liner does not change the waste allowed under the permit and does not make a Class 2 landfill a Class 3 Landfill able to take Class 3 waste [R. p. 476-78]
5. The 2016 lawsuit filed by MRR against Pickens County et al. and the deposition testimony of SCDHEC's Kent Coleman early in that case: MRR, not the County, noticed the deposition of Kent Coleman in order to bring the true facts to light.⁷ The Court did not consider all portions of the testimony in which Mr. Coleman stated:
 - a. Alternate designs are listed as one example of a "major modification" and do not refer to liners, but to changing the size and shape of the landfill [R. p. 696, 782:17-18];

County. MRR and DHEC have not had the opportunity to present conflicting evidence on the "facts" now improperly given weight by the Court of Appeals.

⁶ Additional evidence in the Pickens County case which reflect the facts in the Opinion include the following: the transcript of the hearing whereby it is clear MRR put in the cover letter to its application to the County for a land use permit that it was requesting permission to build a "lined landfill"; MRR's only statement during the public meeting with the County on its application was that a liner is not required for the portion of the landfill that takes asbestos waste.

⁷ Kent Coleman's testimony should not have been considered part of the record on appeal as it was not relied upon by SCDHEC in making the permit modification decision or by the ALC in making its decision; with that said, the Court should let the ALC consider all statements made by Mr. Coleman (not portions) and allow him to be called as a witness to explain his answers – this is the job of the ALC.

- b. The only similarity between the design of the MRR Class 2 Landfill and a Class 3 Landfill is that MRR's Class 2 Landfill will have a liner, which is more protective of the environment [R. p. 691-93];
6. What wastes SCDHEC would allow MRR to take under the 2008 Permit versus the 2015 Permit Modification Decision: SCDHEC would allow MRR to take any Class 2 Waste but would not allow MRR to take Class 3 wastes that do not meet Class 2 waste requirements - therefore the option to install a liner does not make MRR's landfill a Class 3 Landfill [R. p. 697, 783:20];
7. Whether DHEC actually testified the option to install a liner and verbiage change to Special Condition 2 was major not minor under the regulations: Additional excerpts in the record offered by the County also contain the following statement on cross-examination: "Q: All right. And it's still—as you sit here today, it's still the opinion of Kent Coleman that the changes we just discussed from the '08 permit to what you call a minor modification in 2015 is a minor modification? A: Yes." [R. p. 261:13-18]
8. The specific changes authorized in the August 10, 2015 permit modification as compared to the 2008 permit modification: The only substantive changes made to the 2008 permit by the August 10, 2015 modification is "the option to install a liner." The change to the wording in Special Condition 2 did not change the waste allowed under the permit – both permits allowed any Class 2 waste that MRR proves meet the requirements of the SCDHEC Class 2 landfill regulations. [R. p. 694-97] The changes in Special Condition 2 were made to reflect the language in the Pickens County Public Class 2 Landfill and all other class 2 landfills - it is standard language now used in all Class 2 permits [R. p. 694-95, 780:9-781:23]; and,
9. How coal ash should be handled and whether it requires "special handling": SCDHEC does not consider coal ash as "special waste" as that term is defined in the SC Solid Waste Policy and Management Act and regulations. [Coleman Dep. 168:7-20] The United States EPA has defined coal combustion residuals as a solid waste, not a hazardous waste at 80 Fed. Reg. 21301 (April 17, 2015);

Here, the ALC purposely determined it would not make findings of fact on the issues now addressed by the Court of Appeals because they were not relevant to the issue of timeliness and exhaustion of administrative remedies. See Gamble v. Int'l Paper Realty Corp. of South Carolina, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) ("The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal") (citing Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 439 S.E.2d 838 (1994)). If the Court of Appeals believed the ALC should have taken evidence on the issues of major verses

minor, alleged misrepresentations, and what makes a landfill a Class 3 landfill, its only remedy was to remand the case back to the ALC as the sole fact finder on these issues. See Timms v. Timms, 286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985) (holding it inappropriate for the Court of Appeals to address points or issues not decided on the merits by the lower court). However, the ALC correctly determined that fact-finding on these issues would not affect her conclusion that where a person has actual notice and misses its 15-day window, public notice or no public notice does not change the outcome.

The Court of Appeals has acted outside its statutory authority and has become the trier of fact. Id. at 293-94, 333 S.E.2d at 75 (“Where a point has not been decided by the lower court, we will not consider the point on appeal...[the Court of Appeals] is confined to the record in deciding issues on appeal”) (citing Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311 (1980), then Masters v. Rodgers Dev. Group, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984)). The Court disregarded the substantial evidence standard of review by making impermissible *de novo* findings of fact based on evidence outside the record, while ignoring facts found by the ALC based on evidence in the record. The Court goes so far as to rely on alleged facts from an entirely different case. The Court used portions of cross-examination testimony from the deposition of Kent Coleman, SCDHEC’s witness in a separate case, to support its *de novo* finding the Permit modification was “major” rather than “minor,” as SCDHEC maintains. But see fn. 2. The Court has acted outside the scope of its statutory authority and the Opinion must be reheard.

2. The Court makes legal conclusions not requested by the Appellant and prejudicial to any future proceedings.

Pickens County is appealing a narrow decision by the ALC. The appeal can only be on those items covered by the ALC Order. The ALC Order simply concluded:

1. S.C. Code Ann. § 44-1-60 requires a timely request for Board Review to be filed within 15 days of mailing of the decision to the permittee and affected parties [R. p. 3];
2. S.C. Code Ann. § 44-1-60 is the exclusive process for appeals of SCDHEC permitting decisions and is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies [Id.];
3. Statutorily imposed exhaustion of administrative remedy requirements have few exceptions [Id.];
4. Dismissal is proper where there is a requirement for exhaustion of administrative remedies as a matter of law and it has not been performed [Id.];
5. Failure to file a Request for Final Review to the Board in a timely matter forecloses a contested case action at the ALC [Id.];
6. There must be a compelling reason for granting equitable tolling to suspend the timeframe set by statute and the doctrine should be used sparingly [R. p. 4]; and
7. Pickens County failed to timely exhaust its administrative remedies prescribed by law as prerequisite to filing a contested case at the ALC and, waiting 99 days after the meeting where the decision of SCDHEC was discussed with the County and 72 days after the decision was emailed to the County, thus the case must be dismissed pursuant to S.C. Code 44-1-60 and SCALC Rule 23(B). [R. pp. 3-5]

Here, instead, the Court makes legal conclusions not requested by Pickens County on appeal which are prejudicial to any further proceedings. Pickens County only appealed six (6) issues, as follows:

1. Did the ALC err in dismissing Appellant's challenge to the SCDHEC permitting decision as untimely prior to resolving whether SCDHEC complied with proper notice decisions for that decision?
2. Did the ALC err in dismissing the appeal on basis of administrative exhaustion if SCDHEC acted outside scope of authority when issuing such decision and where there is public interest issues?
3. Did the ALC err in denying Appellant's right to discovery while granting Respondents' motions to dismiss?
4. May Respondents' plead and win on the basis of failure to exhaust administrative remedies when any such failure on the Appellant is "directly attributable to Respondents' misrepresentations and misinformation"?

5. Should a SCDHEC decision based on improper process and for improper purpose be protected by filing deadlines and the doctrine of administrative exhaustion?
6. Did the ALC err in dismissing this case on the bases of timeliness prior to resolving the status of proposed intervenors?

Even Pickens County understood it can only ask the Court of Appeals to rule on the findings and legal conclusions of the ALC. And yet, the Court, *sua sponte*, made conclusions of law on issues not properly before it. The Court of Appeals acting outside its statutory authority and procedure concludes:

- SCDHEC has permitted a Class III landfill for MRR in Pickens County by classifying the modification as minor;
- All coal ash is special waste under SC Code Ann. 58-27-255 and is generally unsuitable for a Class 2 Landfill; and
- The modification was major, not minor.

These issues were not before and not ruled on by the ALC and thus are improperly included in the Opinion. The ALC Order did not need to rule on the issue of whether the modification was major or minor if Pickens County failed to meet the timeliness requirements for an appeal despite having actual and constructive notice.⁸ The Court of Appeals, in ruling the modification was “major,” misapprehended the law in that it reached this conclusion based on erroneous findings of fact as explained in Section I.A.1, *supra*.

Just like the Court cannot make *de novo* findings of fact, it does not have the authority to go outside the ALC Order and make its own *de novo* conclusions of law based on limited and

⁸ Again, if the Court of Appeals disagreed with this conclusion, its only remedy is to remand for fact finding on the issue of whether the modification was major versus minor; however, here, the matter on appeal is one of procedure, not the substantive decision. See R. p. 126:8-10, 127:13-22.

unsubstantiated facts from the pleadings, witnesses, testimony, or documentary evidence not considered by the ALC. *See Timms*, 286 S.C. at 293, 333 S.E.2d at 75 (holding it inappropriate for the Court of Appeals to address points or issues not decided on the merits by the lower court); *Gamble*, 323 S.C. at 373, 474 S.E.2d at 441 (holding the admission of facts and evidence wholly within the discretion of the trial court, not to be revised on appeal absent clear abuse).⁹

The Court has disregarded the substantial evidence standard of review which it is to afford the ALC Order. Accordingly, the Court should reconsider its Opinion.

B. The Court gave no deference to the Agency.

The Court exceeded its authority in deciding the permit modification was “major,” overturning SCDHEC’s decision it was “minor.” The Court of Appeals is to give substantial deference to the ALC as to questions of fact, and both courts are required to give substantial deference to the Agency – SCDHEC - when the Agency interprets its own regulation. See Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 352 U.S. 410 (1945); see also 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) (reemphasizing the deference doctrine in South Carolina provides that courts defer to an administrative agency’s interpretations with respect to its own regulations “unless there is a compelling reason to differ”) (quoting S.C. Coastal Conservation League, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)). Not only did the Court fail to give deference to the Agency, the issue of whether the permit modification was major or minor was not even before the Court. If the Court remanded the case, the ALC would properly decide what level of deference to give the Agency

⁹ Moreover, the Court of Appeals erred in finding the ALC considered evidence outside the pleadings. The ALC only made findings of fact regarding notice and timeliness of the appeal, which is all that was required. The Court cites to no area where the ALC Order considered evidence outside the pleadings.

based on the facts it found to be relevant and probative. This is a misapprehension of the law and should be reversed.

II. The Court Misapprehends the Law and Could be Creating Troublesome Precedent, Negating the Timeliness Requirements for Appealing an Agency Decision.

In addition to the procedural errors set forth above, the Court's Opinion misapprehends the ruling of our Supreme Court in S.C. Coastal Conservation League v. S.C. Dept. of Health & Envtl. Control regarding notice of an agency decision under S.C. Code Ann. § 44-1-60(E), which provides:

The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person.

In S.C. Coastal Conservation League, the South Carolina Supreme Court interpreted Section § 44-1-60(E) to mean that the agency decision becomes final fifteen days after notice of the decision is mailed, and the agency is required to send notice of the decision simultaneously to the applicant, permittee licensee and affected persons who have asked to be notified. S.C. Coastal Conservation League v. S.C. Dept. of Health & Envt'l Control, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010). In situations where the agency fails to simultaneously notify the applicant and any affected persons asking to be notified, the latest date of mailing controls when the fifteen-day period begins to run. Id.

Here, SCDHEC provided actual notice to Pickens County on December 15, 2014, and at the very latest, on January 11, 2015. [R. p. 190, 394]. Therefore, the fifteen-day appeal period ran at the latest on January 26, 2015, and Pickens County's appeal was untimely under the clear precedent set by the South Carolina Supreme Court. The proper issue before the Court is whether the ALC relied upon substantial evidence in holding the County, fifteen days after it received actual notice, failed to appeal the decision. It did.

Moreover, the Opinion also incorrectly concludes that failure to provide public notice cannot be cured by actual notice. The Court excuses Pickens County's failure to timely appeal by ruling that because SCDHEC failed to provide the alleged required public notice under S.C. Code Ann. Regs. § 61-107.19, the time period for an appeal for actual notice under Section 44-1-60(E) cannot run and the failure cannot be cured. In so ruling, the Court again misapprehends the law as the Supreme Court already addressed this issue in A.O. Smith Corp. v. S.C. Dept. of Health & Env't'l Control, 428 S.C. 189, 833 S.E.2d 451 (2019) and Bursey v. S.C. Dept. of Health & Env't'l Control, 369 S.C. 176, 631 S.E.2d 899 (2006), overruled on other grounds by Allison v. W.L. Gore & Assocs., 392 S.C. 185, 714 S.E.2d 547 (2011) (clarifying the question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction rather than subject matter jurisdiction).

Similar to A.O. Smith, the triggering occurrence as to whether public notice was required was a non-determinative event. In A.O. Smith, the non-determinative event was a water supply operating permit; here, it is a minor permit modification. The Supreme Court in A.O. Smith held that because A.O. Smith had actual notice of the Board decision, it did not matter that the operating permit decision was not publicly noticed, and thus, its appeal outside the time limit set by Section 44-1-60(E) was untimely. A.O. Smith Corp., 428 S.C. at 204-05, 833 S.E.2d at 460. Here, the ALC correctly made no decision as to whether the permit modification was "major" or "minor," which if "major" would have triggered a public notice requirement, because Pickens County had actual notice of the permit modification and sat on its rights. For the Court of Appeals to overturn the ALC's decision and conclude, contrary to established precedent and substantial evidence, that the timeline did not begin to run because public notice was required is error of law.

In Bursey, the issue before the court was whether a decision by SCDHEC to not require a mining permit which was appealed to the South Carolina Mining Council ("Council") was timely

and whether the decision of the Council (the agency) was supported by substantial evidence—having held the APA to be the proper standard of review of final agency decisions before higher courts on appeal. The Court held it proper for the appellate courts (Circuit Court and Court of Appeals) to leave undisturbed the factual findings of the lower tribunal as to the date the parties had notice because the findings of fact were supported by substantial evidence. The Supreme Court held “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence... Rather, the appellate court need only find, considering the record as a whole, evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached.” Bursey, 369 S.C. at 188, 631 S.E.2d at 906.

The relevant governing statute in Bursey is substantively the same as the current case, requiring the appeal of SCDHEC’s decision to the reviewing body to occur within a certain number of days (30 in Bursey, 15 here) of notice of the decision by the agency. The Council, acting as the fact finder in reviewing the agency decision, found the appeal timely by choosing the date of written explanation of the decision despite testimony of numerous times prior where Bursey was informed of the agency’s permit decision. The Court held the Council’s election of this date as proper due to the conflicting evidence in the record as to whether there was a sufficient “final” decision or what substantive information Bursey had in the months prior to the written decision.

Here, the ALC as the fact-finder concluded the following after review of the complete record as to timeliness: “The County’s request was filed 226 days after the staff decision was issued, 99 days after the meeting where the decision was discussed with the County, and 72 days after the written decision was emailed to the County.” [R. p. 2]. The findings of the ALC are to be taken as true and this Court cannot disturb these findings without evidence it is “clearly

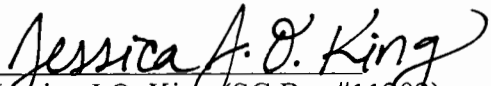
erroneous” or “an abuse of discretion.” See Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm’n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The Court found neither.

Finally, it is important to consider what precedent this Opinion arguably may create. The Opinion, as written, could be interpreted by some to allow appeals to be filed long after a non-public noticed SCDHEC decision is made, notwithstanding whether or not the appellant had actual or constructive notice of the decision. Respondents believe this is not what the South Carolina General Assembly nor the Supreme Court intended in enacting and interpreting S.C. Code Ann. § 44-1-60 and the APA. See S.C. Coastal Conservation League, 390 S.C. at 429, 702 S.E.2d at 252 (citing Act No. 387, § 53 (“This Act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies.”)). To find that actual notice is not relevant is to do away with the doctrine of exhaustion of administrative remedies in the permitting arena.

CONCLUSION

WHEREFORE, due to the Court’s misapprehension of the law and disregard for the substantial evidence standard of review, Respondents respectfully request the Court grant its request for rehearing to reconsider Opinion No. 5707 and rule in favor of Respondents.

This the 23rd day of January, 2020.


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The South Carolina Court of Appeals

Pickens County, Appellant,

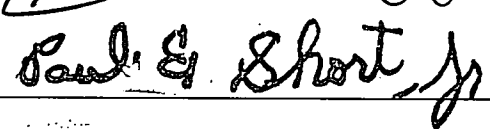
v.

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

Appellate Case No. 2017-000066

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:

Gary W. Poliakoff, Esquire

Etta R. Linen, Esquire

Robert Fredrick Goings, Esquire

Jessica James Orrick King, Esquire

FILED

February 14, 2020

Amy Elizabeth Armstrong, Esquire
Michael Gary Corley, Esquire
Jessica Lee Gooding, Esquire
Karen Christine Ratigan, Esquire

9

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2017-000066

RECEIVED
JAN 22 2018
SC Court of Appeals

Pickens County,

vs.

Appellant,

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

Respondents.

RECORD ON APPEAL
Volume 1 of 2

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DEC 12 2016

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Pickens County,

Docket No.: 16-ALJ-07-0164-CC

Petitioner,

vs.

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

Respondents.

**ORDER GRANTING
RESPONDENTS'
MOTIONS TO DISMISS**

APPEARANCES

For Petitioner:	Gary W. Poliakoff, Esquire and Kenneth S. Roper, Esquire
For the Department:	Etta R. Williams Linen, Esquire
For MRR Pickens, LLC:	A. Keith McAlister, Esquire, Jessica J. O. King, Esquire, and Robert Goings, Esquire

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("the ALC" or "the Court") pursuant to the Request for Contested Case Hearing filed May 20, 2016 by Pickens County ("Petitioner" or "the County"). Petitioner challenges the decision of the South Carolina Department of Health and Environment Control ("the Department" or "DHEC"), which granted a modification to the Class 2 Landfill Permit issued to MRR Pickens, LLC ("MRR") in 2008.

On July 28, 2016, the Department filed a Motion to Dismiss. The following day, Respondent MRR also filed a Motion to Dismiss. Petitioner filed memorandums in opposition of each motion. The Department filed a reply to the memorandum in opposition of its motion. On December 2, 2016, a motion hearing was held at the ALC in Columbia, South Carolina. Each party was represented by counsel and presented arguments on both motions. After consideration of the arguments and filings of all parties, the Court grants the motions to dismiss on the grounds that Petitioner did not timely fulfil the procedural requirements for bringing a contested DHEC case before the ALC.

BACKGROUND

Respondent, MRR Pickens, LLC, received a Class 2 Landfill Permit from DHEC in 2008. The landfill is located in Pickens County. In March 2015, MRR applied to DHEC for a permit modification. The Department received a revised application on August 6, 2015. The Department determined that the modification requested was minor, and therefore did not necessitate the public notice and comment procedure required by regulation 61-107.19 Part I for a major modification. Thereafter, the Department mailed a staff decision to MRR on August 10, 2015 approving the requested modification. This staff decision became final fifteen days later, after no request for final review by the DHEC Board was received.

On December 15, 2015, the Department informed the County of the permit modification decision in a meeting. Subsequently, the actual decision was emailed to the County's Director of Public Works, Gerald Wilson, who had been present at the meeting on January 11, 2016. The County filed a request for final review with the DHEC Board on March 23, 2016. This request was denied on April 21, 2016. The County's request was filed 226 days after the staff decision was issued, 99 days after the meeting where the decision was discussed with the County, and 72 days after the decision was emailed to the County.

ISSUE

Whether Petitioner has met the statutory and procedural requirements for filing a case before the ALC contesting a DHEC permit decision.

DISCUSSION

Both respondents have framed portions of their arguments using the term subject-matter jurisdiction. As a preliminary matter, the Court notes that it has subject-matter jurisdiction over this case. "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (citations omitted). Section 44-1-60 provides that the ALC hears contested cases stemming from final DHEC decisions relating to permits. Thus, the Court has the power to hear this type of case.

In addition to providing subject-matter jurisdiction over this case, section 44-1-60 also sets forth the procedural requirements for bringing a case contesting a DHEC agency decision. Both respondents argue that Petitioner failed to timely follow the procedural requirements of the statute.

Section 44-1-60 sets forth a series of steps that a party must follow to exhaust their administrative remedies before filing at the ALC. The process begins when the Department issues an initial decision involving a permit. See S.C. Code Ann. § 44-1-60(C) (Supp. 2016). This initial decision is known as a "staff decision." Id. In cases where no "Department decision" is required, the staff decision becomes the final agency decision fifteen calendar days after it is mailed to the permittee or other affected persons who have requested notice, unless a written request for final review is filed with the Department. Id. at § 44-1-60(E). Once a timely request for review is filed, the Board can hold a review conference and issue a final decision, decline to hold a review conference, or take no action, in which case the staff decision becomes final after sixty days. Id. at § 44-1-60(F). Following the issuance of a final agency decision, a party may appeal to the ALC. Id. at § 44-1-60(G).

The exclusive process established by section 44-1-60 is the statutory equivalent of the judicial doctrine of exhaustion of administrative remedies. See Ward v. State, 343 S.C. 14, 18-19, 538 S.E.2d 245, 247 (2000) (citations omitted) ("The general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few."). The South Carolina Supreme Court has held that dismissal of a case is proper where there is a requirement to first exhaust administrative remedies as a matter of law. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176-77, 551 S.E.2d 263, 273 (2001) (citation omitted). Section 44-1-60 provides that a party may only request a contested case hearing at the ALC if they have first given the Board an opportunity to conduct a final review of the agency decision in the time frame allowed. Failure to file the request for final review and participate in the Department's review process in a timely manner forecloses a contested case action at the ALC.

In this case, Petitioner was given various forms of notice over a period of months. However, Petitioner still waited months before filing a request for review. Petitioner asserts that it was never given the notice required by regulation. In part, the County argues that it did not have the opportunity to take action because DHEC improperly classified the matter as a minor permit modification, which exempted the Department from the public notice and comment procedure followed for major modifications and new construction. Whether the Department improperly classified the modification, and whether it should have granted the modification, is a matter that

can only be decided in a hearing on the merits of this case. However, the matter currently before the Court is Respondents' motions to dismiss this case on procedural grounds. Petitioner also argues that DHEC's failure to comply with the notice requirements in the regulations is the reason it filed the request for review months late. However, this argument is foreclosed by the fact that Petitioner received actual notice on multiple occasions and still failed to take prompt action.¹ Using the latest possible date of notice still renders Petitioner's request untimely.

Petitioner further argues that that it should be granted equitable tolling to make its filing timely. The doctrine of equitable tolling is applied when it is necessary to suspend the timeframe set by statute in order to preserve justice and provide fairness. See Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). There must be a compelling reason for granting such relief, "... equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." See id., 386 S.C. at 116, 687 S.E.2d at 33. In this case, the County had actual notice of the decision made by DHEC, but failed to pursue the available administrative remedies in a timely fashion, and has not stated a legally valid or compelling reason for its failure.² The Court does not find this to be a case that warrants the application of equitable tolling.

Therefore, because Petitioner failed to timely exhaust the administrative remedies prescribed by law as prerequisite to filing a contested DHEC case in the ALC,³ the Court concludes that this matter must be dismissed pursuant to Section 44-1-60 and SCALC Rule 23(B).⁴

¹ The actual notice also makes it unnecessary to construe whether Petitioner should have requested notice as an affected party, pursuant to section 44-1-60(E)(1).

² Counsel for Petitioner asserted at the hearing that the County took no action because it believed the matter to be final and because it took time for counsel to ascertain the facts of the case.

³ Because the Court concludes that the prerequisites for filing a contested case at the ALC were not met, the Court finds it unnecessary to address MRR's argument regarding improper service of the Request for Contested Case.

⁴ The Department argued that this matter should be dismissed under SCALC Rule 38. However, that rule is applicable only to cases heard in the ALC's appellate jurisdiction, not to contested cases. The comparable rule for contested cases is SCALC Rule 23(B), which provides:

Upon motion of any party, or on its own motion, the Court may dismiss a contested case or resolve the contested case adversely to the offending party for failure to comply with any of the rules of procedure for contested cases, including the failure to comply with any of the time limits provided in these rules or by order of the Court.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that the Respondents' Motions to Dismiss are **GRANTED**.

IT IS FURTHER ORDERED that this matter is **DISMISSED**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

December 12, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the foregoing order has been duly
served in accordance with the rules of procedure upon all
parties to this case by depositing a copy thereof
in the United States Mail, postage paid by the Agency
Mail Service addressed to the party (es) or their attorney (s).

This 12 day of December 2016
By: Teeshia Henderson
Judicial Law Clerk

From: Teckla Henderson
To: Prince, Claire; Williams Linen, Etta; Gary Poliakoff; "King, Jessica"; Ken; McAlister, Kip; rgoings@goingslawfirm.com
Cc: Hellerman, Donna; Terry Davidson
Subject: RE: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 Conference Call Scheduled 09/07 Summary
Date: Wednesday, September 07, 2016 12:26:39 PM
Attachments: image002.png
image003.png

Dear Attorneys:

Thank you for participating in our conference call this morning. I am sending this correspondence to summarize Judge Robinson's rulings and instructions made during our call.

1. Respondent MRR Pickens' Motion to Stay Discovery is **GRANTED**.
2. The Motion to Intervene is **HELD IN ABEYANCE** pending the Court's decision on the Motions to Dismiss.
3. Attorney Poliakoff is **granted** an extension of time in which to file a Reply to the Responses in Opposition to the Motion to Intervene.
4. The Motions to Dismiss are currently being considered by the Court. Should Judge Robinson determine that oral argument on the motions is necessary, I will contact the parties in order to set a Motions Hearing date.

As always, should you find that you have any questions or concerns or need anything in addition, please do not hesitate to contact me.

Very truly yours,

Teckla S. Henderson
Judicial Law Clerk to The Honorable Shirley C. Robinson
South Carolina Administrative Law Court
Edgar Brown Building
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Columbia, South Carolina 29201
(803) 734- 6402 Chambers
(803) 734- 6400 Fax

From: Teckla Henderson
Sent: Monday, August 29, 2016 11:01 AM
To: 'Prince, Claire' <PrinceCH@dhec.sc.gov>; Williams Linen, Etta <WILLIAER@dhec.sc.gov>; Gary Poliakoff <atty@gpoliakoff.com>; 'King, Jessica' <jking@williamsmullen.com>; Ken <ken@roperlawfirm.com>; McAlister, Kip <kmcalister@williamsmullen.com>; rgoings@goingslawfirm.com
Cc: Hellerman, Donna <hellerdk@dhec.sc.gov>; Terry Davidson <tdavidson@gpoliakoff.com>
Subject: RE: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 Conference Call Scheduled 09/07 11am

Dear Attorneys:

Thank you all for responding. The conference call will take place **Wednesday, September 7, 2016 at 11:00 am**. Should you have any further questions or concerns, please do not hesitate to contact me.

Very truly yours,

Teckla S. Henderson
Judicial Law Clerk to The Honorable Shirley C. Robinson
South Carolina Administrative Law Court
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From: Prince, Claire [<mailto:PrinceCH@dhec.sc.gov>]

Sent: Monday, August 29, 2016 10:59 AM

To: Teckla Henderson <thenderson@scalc.net>; Williams Linen, Etta <WILLIAER@dhec.sc.gov>; Gary Poliakoff <atty@gpoliakoff.com>; 'King, Jessica' <jking@williamsmullen.com>; Ken <ken@roperlawfirm.com>; McAlister, Kip <kmcalister@williamsmullen.com>; rgoings@goingslawfirm.com

Cc: Hellerman, Donna <hellerdk@dhec.sc.gov>; Terry Davidson <tdavidson@gpoliakoff.com>

Subject: Re: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 Conference Call Proposed
Date 09/07 11am

I am available. Thank you.

Name: Claire H. Prince

Title: Special Counsel

Program Area or Division: Office of General Counsel

S.C. Dept. of Health & Environmental Control

Columbia Office: (803) 898-3060

Myrtle Beach Office: (843) 238-4378

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Sent: Monday, August 29, 2016 10:50 AM
To: Williams Linen, Etta; Gary Poliakoff; 'King, Jessica'; Ken; McAlister, Kip; rgoings@goingslawfirm.com; Prince, Claire
Cc: Hellerman, Donna; Terry Davidson
Subject: RE: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 Conference Call Proposed
Date 09/07 11am

Good morning:

I have spoken with Judge Robinson and she suggests that the conference call take place on **Wednesday, September 7, 2016 at 11:00 am**. Does that date and time work for you all?

Teckla

Teckla S. Henderson
Judicial Law Clerk to The Honorable Shirley C. Robinson
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From: Williams Linen, Etta [<mailto:WILLIAER@dhc.sc.gov>]
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To: Gary Poliakoff <atty@gpoliakoff.com>; 'King, Jessica' <jking@williamsmullen.com>; Teckla Henderson <thenderson@scalc.net>; Ken <ken@roperlawfirm.com>; McAlister, Kip <kmcalister@williamsmullen.com>; rgoings@goingslawfirm.com; Prince, Claire <PrinceCH@dhc.sc.gov>
Cc: Hellerman, Donna <hellerdk@dhc.sc.gov>; Terry Davidson <tdavidson@gpoliakoff.com>
Subject: Re: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 DHEC'S Extension Granted and Conference Call Scheduling 09/01

I am not available on August 30th; I will be on family sick leave from August

31st through September 2nd, but will aim to make myself available for whatever other time and date might be chosen for the teleconference. ____

ETTA

Etta R. Williams Linen, Esquire
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From: Gary Poliakoff <atty@gpoliakoff.com>
Sent: Monday, August 29, 2016 9:16:58 AM
To: 'King, Jessica'; Teckla Henderson; Ken; Williams Linen, Etta; McAlister, Kip; rgoings@goingslawfirm.com; Prince, Claire
Cc: Hellerman, Donna; Terry Davidson
Subject: RE: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 DHEC'S Extension Granted and Conference Call Scheduling 09/01

Good Morning Everyone –

I am available on Thursday Sept. 1 anytime until 3:00 p.m. (I am flying to Houston then for depositions all day on Sept. 2).

I can also make myself available anytime tomorrow Aug. 30; anytime Wed. Aug. 31 after 2 p.m.; anytime on Tuesday Sept. 6.

If those times aren't workable I can find other times next week as well.

Thanks and best wishes to all.

Gary Poliakoff



Gary W. Poliakoff
Attorney at Law

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From: King, Jessica [<mailto:jking@williamsmullen.com>]

Sent: Sunday, August 28, 2016 2:41 PM

To: Teckla Henderson <thenderson@scalp.net>; Gary Poliakoff <atty@gpoliakoff.com>; Ken <ken@roperlawfirm.com>; Williams Linen, Etta R. <williaer@dhec.sc.gov>; McAlister, Kip <kmcalister@williamsmullen.com>; rgoings@goingslawfirm.com; Prince, Claire <PrinceCH@dhec.sc.gov>

Cc: Hellerman, Donna <hellerdk@dhec.sc.gov>; Terry Davidson <tdavidson@gpoliakoff.com>

Subject: RE: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 DHEC'S Extension Granted and Conference Call Scheduling 09/01

Teckla and Counsel – I just found out I need to fly to DC on Aug. 31st – returning on the 1st. The return flight has me in the air on the September 1st from 10:12 -11:52. I apologize for the late notice. Would it be possible to do it later in the day? Or any time on the 2nd? Please let me know - again, I am sorry for the late notice.

Sincerely,

Jessie King

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From: Teckla Henderson [<mailto:thenderson@scalc.net>]

Sent: Thursday, August 25, 2016 12:30 PM

To: Gary Poliakoff; Ken; Williams Linen, Etta R.; McAlister, Kip; King, Jessica;
rgoings@goingslawfirm.com; Prince, Claire

Cc: Hellerman, Donna; Terry Davidson

Subject: RE: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 DHEC'S Extension Granted and Conference Call Scheduling 09/01

Dear Attorney Poliakoff:

Thank you for responding. It appears that a representative for each party will be available to participate in our conference call on Thursday, September 1, 2016 at 11:30 am. The Court appreciates your office's willingness to facilitate the call and asks that you disseminate the conference call phone number and access code to all involved.

Very truly yours,

Teckla S. Henderson
Judicial Law Clerk to The Honorable Shirley C. Robinson
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From: Gary Poliakoff [<mailto:atty@gpoliakoff.com>]

Sent: Thursday, August 25, 2016 12:18 PM

To: Teckla Henderson <thenderson@scalc.net>; Ken <ken@roperlawfirm.com>; Williams Linen, Etta R. <williaer@dhec.sc.gov>; McAlister, Kip <kmcalister@williamsmullen.com>;
jking@williamsmullen.com; rgoings@goingslawfirm.com

Cc: Hellerman, Donna <hellerdk@dhec.sc.gov>; Terry Davidson <tdavidson@gpoliakoff.com>

Subject: RE: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 DHEC'S Extension Granted and Conference Call Scheduling 09/01

Dear Teckla-

Petitioner can participate in the conference call on Sept. 1 at 11:30 a.m.

Assuming that all parties can participate then, we will set up a call-in number for the call.

In the meantime, petitioner has no objection to any request by any party for a request for extension to respond to anything.

Thank you and best wishes,

Gary Poliakoff



Gary W. Poliakoff

Attorney at Law

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From: Teckla Henderson [<mailto:thenderson@scalco.net>]

Sent: Thursday, August 25, 2016 11:48 AM

To: Gary Poliakoff <atty@gpoliakoff.com>; Ken <ken@roperlawfirm.com>; Williams Linen, Etta R. <willjaer@dhec.sc.gov>; McAlister, Kip <kmcalister@williamsmullen.com>; jking@williamsmullen.com; rgoings@goingslawfirm.com

Cc: Hellerman, Donna <hellerdk@dhec.sc.gov>

Subject: Pickens County v. SCDHEC and MRR Pickens, LLC 16A0164 DHEC'S Extension Granted and Conference Call Scheduling 09/01

Dear Attorneys:

Judge Robinson has **granted** the Department's motion seeking an extension of time in which to file DHEC's Reply to Petitioner's Response in Opposition to DHEC's Motion to Dismiss. The Department's Reply shall be due on or before Tuesday, August 30, 2016.

In addition, Judge Robinson has asked that I schedule a telephone **conference call** to address several other issues that have been brought to her attention through the filing of the parties' motions/responses. She would like for our conference call to take place on **Thursday, September 1, 2016 at 11:30 am** and requests that counsel for Petitioner facilitate the call by providing everyone with a conference phone number and access code.

Please respond to this correspondence indicating whether you will be available for a conference call on Thursday, September 1st at 11:30 am.

Very truly yours,

Teckla S. Henderson
Judicial Law Clerk to The Honorable Shirley C. Robinson
South Carolina Administrative Law Court
Edgar Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734- 6402 Chambers
(803) 734- 6400 Fax

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,	)	
	)	Docket No.: 16-A1J-07-0164-CC
Petitioner,	)	
	)	
vs.	)	PETITIONER'S PREHEARING
	)	STATEMENT
South Carolina Department of Health and	)	
Environmental Control and MRR Pickens,	)	
LLC,	)	
	)	
Respondents.	)	

Pickens County would respectfully show:

1. Nature of Proceeding:

Pickens County appeals the granting of the Permit Modification dated August 10, 2015, issued by SC DHEC to MRR Pickens, LLC, which allowed major modifications to the original Permit, without having provided any notice or opportunity to be heard, to Pickens County or to the public.

(Original Permit was issued November 3, 2008, Permit No. LF2-00003, for operation of a Construction & Demolition (C&D) Landfill.)

The Permit Modification of August 10, 2015 was issued in violation of multiple Statutes and Regulations and must be rendered null and void.

2. Statutory Provisions, Regulations, Jurisdiction:

- S.C. Code Ann. § 44-1-60 (Final Agency Decision of DHEC)
- S.C. Code Ann. § 1-23-650 (Contested Case, per S.C. Administrative Procedures Act: Promulgation of Rules of Procedure for ALC); also S.C. Code Ann. § 1-23-310; 1-23-505 (contested case).

Applicable Statutes:

§ 44-1-60 - Jurisdiction; Appeals from Department decisions

§ 44-96-390 - "Special Wastes"

§ 44-96-290(E) - Demonstration of Need

§ 44-96-80 - Solid Waste Management Plans

§ 44-96-290(F) - Consistency with solid waste management plans and local ordinances

§ 58-27-255 - Coal Combustion Residuals

Applicable Regulations:

S.C. Code Ann. Regs. 61-107.19 - Solid Waste Management: Solid Waste Landfills and Structural Fills

3. Issues to be Presented for Determination:

- (1) Whether the issuance of the Permit Modification of August 10, 2015 was in violation of Statutes and Regulations:
 - (A) Whether the modifications included an "alternate design" and/or a "design change" (per R. 61-107.19, Part I, B. 48.).
 - (B) Whether the modifications constitute a "major modification" or a "minor modification" (per R. 61-107.19, Part I, B. 48. (a) and (b)).
 - (C) Whether notice to Pickens County and/or the public, as well as opportunity for public comment and review, was required prior to issuance of the modification. (R. 61-107.19, Part IV, I. 2. and R. 61-107.19, Part I, B. 48.)
 - (D) Whether any notice and/or opportunity for public comment and review was provided to Pickens County and/or the public, prior to issuance of the modification.
 - (E) Whether the addition of Class 3 operational features to the Class 2 Landfill Permit violated the Pickens County Solid Waste Management Plan.
 - (F) Whether the addition of Class 3 design features to the Class 2 Landfill Permit violate the Pickens County Solid Waste Management Plan.

- (G) Whether the modification of the Class 2 Landfill Permit was for the purpose of allowing "Special Wastes" (S.C. Code Ann. § 44-96-390), which are prohibited by the Pickens County Solid Waste Management Plan.
- (H) Whether the modification of the Class 2 Landfill Permit was for the purpose of allowing "Coal Combustion Residuals" (a/k/a "coal ash"), in violation of the Pickens County Solid Waste Management Plan; as well as violation of S.C. Code Ann. § 58-27-255 (Act 138 of 2016).
- (I) Whether the meetings between DHEC and MRR Pickens, LLC, held in 2014 and 2015 leading up to the modification in question, without notice to Pickens County or to the public, were conducted for the purpose of avoiding notice to Pickens County and/or the public, and included discussions of characterizing "major modifications" as "minor," for the purpose of avoiding such notice.
- (J) Whether the modifications in question had the effect of adding Class 3 Landfill features to the Class 2 Permit, in violation of the Pickens County Solid Waste Management Plan.
- (K) Whether the modifications in question had the effect of adding Class 3 Landfill features to the Class 2 Permit, in violation of the Department's Demonstration of Need determination.
- (L) Whether any Letter of Consistency has been issued by Pickens County or the Pickens County Planning Commission, regarding the Permit Modification in question, and whether such modification is in fact inconsistent with the Pickens County Solid Waste Management Plan and with local ordinances.
- (M) Whether the issuance of the modification in question was in violation of the 1999 State Solid Waste Management Plan.

4. Action Requested; Statement of Law:

Pickens County requests that this Court declare the Permit Modification of August 10, 2015 null and void, in that the purported issuance was in violation of multiple Statutes and Regulations.

Pickens County acknowledges and concurs that the original Permit, issued November 3, 2008, to MRR Pickens, LLC, for the operation of a Construction & Demolition Landfill, is valid and remains lawfully in effect. It is the purported Permit Modification of August 10, 2015 which was

issued in violation of law, and without notice to the Public or to Pickens County, and which must be rendered null and void.

This Court has the authority to render an illegally obtained permit modification null and void, per the Administrative Procedures Act and per S.C. Code Ann. § 44-1-60. As noted in paragraph 3 above, the purported issuance of the Permit Modification was in violation of S.C. Code Ann. §§ 44-96-390, 44-96-290(E), 44-96-290(F), 44-96-80 and 58-27-255, as well as multiple provisions of R. 61-107.19.

Also see *Stono River EPA v. S.C. Dept. of Health and Env'tl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991); *League of Women Voters v. Litchfield-by-the-Sea*, 305 S.C. 424, 406 S.E.2d 378 (1991); *Leventis v. South Carolina Dept. of Health and Env'tl. Control*, 340 S.C. 118, 530 S.E.2d 643 (S.C. App. 2000), *cert. den.*; *Ballenger v. South Carolina Dept. of Health and Env'tl. Control*, 331 S.C. 247, 500 S.E.2d 183 (S.C. App. 1998), *reh. den.*

5. Brief Summary of Facts to be Presented:

In 2007 and 2008, Pickens County and MRR Pickens, LLC entered into a Development Agreement and a Host Agreement, whereby Pickens County was the Host Local Government and MRR agreed to develop and operate a Construction & Demolition (C&D) Landfill, resulting in the Permit issued by DHEC to MRR on November 3, 2008. Both Pickens County and MRR acknowledge the validity of the 2008 Permit.

The 2008 Permit contained the following Special Condition:

This permit is limited solely to the disposal of items listed in Appendix I of R. 61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill.

It is noted that Appendix I of the Regulation lists Construction and Demolition, Land Clearing Debris, Animal Carcasses, and various types of used furniture. Appendix I does not contain such things as "Special Wastes" (per § 44-96-390), nor Municipal Solid Waste, nor Class 3 Wastes, nor Coal Combustion Residuals ("coal ash").

Pickens County developed a Solid Waste Management Plan in accord with the S.C. Solid Waste Policy and Management Act, S.C. Code Ann. §§ 44-96-10 et seq., and in accord with the 2008 Permit and its Special Conditions.

From 2008 through 2013, MRR did not proceed with constructing the Landfill, instead informing DHEC that economic considerations warranted postponement of construction, and requesting and receiving extensions.

In 2014 and through much of 2015, DHEC and MRR had a series of meetings and discussions, in which MRR proposed various modifications. No Notice was provided to Pickens County or to the public of the proposed modifications, or of the meetings and discussions. As Pickens County has subsequently learned, MRR's proposed modifications included design changes, an alternate design, adding a liner and other features of Class 3 Landfills to this Class 2 Permit, and drastically changing the above-referenced Special Condition. Such changes and modifications squarely meet the definition of "major modifications," per R. 61-107.19, Part I, B. 48. Yet early in the discussions and meetings, MRR and DHEC agreed to characterize these modifications as "minor."

During the course of the meetings and discussions between MRR and DHEC in 2014 and the first eight months of 2015, MRR provided extensive engineering reports, showing such major design changes and alternate designs, by MRR's consultant Civil & Environmental Consultants, Inc.

("CEC"). None of these engineering reports were provided to Pickens County.

According to MRR's consultant CEC:

During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of R. 61-107.19 Part V. Class Three Landfills would require a minor permit modification. ("Site Specific Hydrogeologic Investigation Report," d. 12-15-14, by CEC on behalf of MRR. Further, this same statement regarding characterization of changing Class 2 features to Class 3 as "minor" was provided in other reports by CEC).

The above-referenced meetings and discussions between DHEC and MRR resulted in the purported Permit Modification of August 10, 2015. To this date, DHEC has never mailed the Permit Modification to Pickens County, nor has it ever provided Notice of the proposed modifications, nor even the August 10, 2015 Modification itself. Pickens County and the public were deprived of Notice and opportunity to comment and review.

In December of 2015, some staff of Pickens County began hearing that MRR intended to deposit Coal Combustion Residuals (a/k/a "coal ash") into this C&D Landfill. At that point Pickens County made a FOIA request and began learning of the meetings and discussions between MRR and DHEC, and the issuance of the purported Permit Modification of August 10, 2015.

The changes authorized in the Permit Modification can only be described as "major modifications," per R. 61-107.19, Part I., B. 48. The discussions between MRR and DHEC – agreeing to characterize "major modifications" as "minor" – were for a specific purpose: to issue the Permit Modification without Notice or opportunity for comment and review by Pickens County and/or the public. Such action was in violation of Statutes and Regulations and was unlawful.

Further, the purported Permit Modification contravenes the Pickens County Solid Waste Management Plan, which prohibits Class 3 wastes, Municipal Solid Wastes and "Special Wastes" (coal ash meeting the definition of "Special Waste"). Further, the Pickens County Plan prohibits

Class 3 Landfills in Pickens County, and as stated above, the purported Permit Modification applies Class 3 Landfill features onto a Class 2 Landfill Permit. Still further, DHEC previously (and appropriately) determined that any request for a Class 3 Landfill Permit in Pickens County does not meet Demonstration of Need requirements. In addition to willfully mischaracterizing these “major” changes as “minor” so as to avoid Notice to Pickens County or the public, the purported Modification violates an array of Statutes and Regulations.

It should also be noted that in a March 8, 2016 deposition in a Common Pleas case, MRR Pickens, LLC v. Pickens County, et al., C/A No. 2016-CP-39-100, former DHEC Director of Mining and Solid Waste Management Kent M. Coleman admitted the following:

- (a) That the definition of “major modification” in the regulations includes “alternate designs;”
- (b) That in the definition of “minor modification” there is no provision for “alternate designs;”
- (c) That he has previously characterized the modifications in question as “alternate liner design” and as a “design change;”
- (d) That the Permit Modification in question was a “design change;”
- (e) That “design change” falls under the definition of “major modification” and is not included in the definition of “minor modification,” per the relevant regulation;
- (f) That a “major modification” requires Notice to affected persons;
- (g) That, per relevant statute, “affected persons” includes local governments and host local governments;
- (h) That when the Department determines a change to be a “major modification,” appropriate procedure is to provide Notice to adjacent owners, concerned parties and local governments;

- (i) That for the Permit Modification in question, no Notice was provided to Pickens County or to the public;
- (j) That when a "major modification" is being proposed, the public is supposed to receive Notice.

6. Summary of Motions Expected to be Raised:

At this time Pickens County is unaware of any motions likely to be raised.

7. Proposed Witnesses and Exhibits:

(A) Witnesses:

- Chris Brink - Pickens County Planning and Development
- Gerald Wilson - Pickens County Solid Waste
- Kent M. Coleman - former DHEC Director of Mining and Solid Waste (Deposition taken March 8, 2016)
- Dr. Avner Vengosh - Duke University - expert - Coal Combustion Residuals
- Wes Hulsey - Hulsey McCormack & Wallace - engineer
- DHEC Staff
- MRR Staff

(B) Exhibits:

1. Pickens County Host Agreement - 2008
2. Pickens County Development Agreement - 2008
3. Permit - November 3, 2008
4. Pickens County Solid Waste Management Plan
5. Reports of CEC (MRR's engineers) - 2014-2015
6. MRR letter of November 20, 2014

7. Minutes of County Planning Commission - January 12, 2015
8. Transcript of County Planning Commission Meeting - January 12, 2015
9. Planning Commission Letter of January 13, 2015
10. Permit Modification, August 10, 2015
11. Planning Commission Letter of January 11, 2016
12. Gary Poliakoff Letter of February 29, 2016
13. Deposition Transcript - Kent M. Coleman - March 8, 2016

8. Necessity of Discovery:

Pickens County needs to conduct discovery, to the full extent authorized by the Rules of Procedure and allowed by this Court. Pickens County maintains and will show that a number of meetings and discussions occurred in 2014 and 2015 between DHEC and MRR, which led to the unlawful issuance of the Permit Modification in question. As Pickens County was not a party to such meetings and discussions, discovery is necessary. Pickens County requests to serve Interrogatories, Requests for Production of Documents and Requests for Admissions, and wishes to take depositions of MRR and DHEC.

Note: The deposition of Kent M. Coleman, former DHEC Director of Mining and Solid Waste, was taken on March 18, 2016, consisting of approximately 213 pages. Although the deposition was held open, both MRR and Pickens County completed direct and cross examination that day. Pickens County proposes to place this deposition into evidence in this case, which would alleviate re-deposing Mr. Coleman.

Further Note: Discovery in the Common Pleas case of MRR Pickens, LLC v. Pickens County, et al. is at a standstill, due to MRR's appeal of three Orders issued by Court of Common Pleas; therefore, full discovery is necessary in this ALC proceeding.

9. Estimated Time for Hearing:

Pickens County estimates one full week.

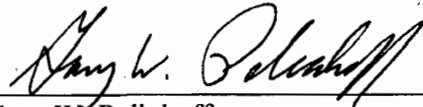
10. Unavailable Times:

Pickens County requests protection August 2-11, 2016, for vacation plans of the undersigned; also October 3 and 12, 2016.

11. Email:

atty@gpoliakoff.com

July 5, 2016



Gary W. Poliakoff
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ATTORNEYS FOR PICKENS COUNTY

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,	)	DOCKET NO. 16-ALJ-07-0164-CC
	)	
Petitioner,	)	
vs.	)	
	)	
South Carolina Department of Health and	)	Respondent South Carolina
Environmental Control and MRR Pickens,	)	Department of Health and
LLC,	)	Environmental Control's
	)	Prehearing Statement
Respondents.	)	
	)	

Responding to the Order for Prehearing Statements issued on June 13, 2016 by the Honorable Shirley C. Robinson, Administrative Law Court ("ALC") Judge, Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") respectfully submits the following:

1. The nature of this proceeding:

Petitioner, Pickens County ("County"), requests a contested case hearing challenging the Department's Final Agency Decision to issue a minor permit modification to MRR Pickens, LLC ("MRR"), modifying Permit No. LF2-00003 for MRR's Highway 93 Class 2 Landfill. On August 10, 2015, DHEC issued the permit modification, which was the Department Decision. County's Request for Review was not filed with the DHEC Board until March 23, 2016. On April 21, 2016, the DHEC Board declined to conduct a review conference, rendering the issuance of the minor permit modification the Final Agency Decision.

2. The statutory provision(s) conferring subject matter jurisdiction to the Agency and other applicable statutes and regulations:

The Department is authorized to issue and modify permits for the operation of solid waste landfills pursuant to the following statute and regulation:

DHEC's Prehearing Statement
Pickens County v. DHEC; # 22666
July 2016

- South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. §44-96-10 *et seq.* (2002); and
- 8 S.C. Code Ann. Regs. 61-107.19, SWM: Solid Waste Landfills and Structural Fills("Regulation"), specifically, Part 1(B)(48)(a)&(b), which defines a minor and major permit modification.

3. The issues to be presented for determination, including any claims or defenses expected to be raised:

The issue to be presented for determination is whether the Permit Modification that the Department issued on August 10, 2015 to MRR Pickens, LLC, for its Highway 93 Class 2 Landfill, was a "minor" or "major" modification. County contends that the Permit Modification was a "major" modification, which would have required public notice. The Department maintains that the Permit Modification was "minor," which did not require public notice.

Respondent DHEC will present the defense that the Permit Modification issued to MRR Pickens, LLC, was a "minor" Permit Modification and was issued properly and pursuant to all applicable statutes and regulations.

Respondent DHEC will also move to dismiss County's request for a contested case hearing on the grounds that County did not file a timely Request for Review of the Department Decision to the DHEC Board and, therefore, this Court does not have jurisdiction to hear this matter.

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations:

Respondent DHEC respectfully requests that this Court dismiss County's request for a contested case hearing because County failed to submit to the DHEC Board a timely request for

a final review of the Department Decision. The Department decision was issued on August 10, 2015, in accordance with the requirements of 8 S.C. Code Regs. 61-107.19, *SWM: Solid Waste Landfills and Structural Fills*, Parts I and IV, and became the Final Agency Decision 15 days after the decision was mailed to MRR. Notice of a Department Decision is required to be sent to the "... affected persons who have requested in writing to be notified." S.C. Code Ann. Section 44-1-60E(1). Pickens County did not request to be notified of Department decisions as an affected person and did not file a timely request for review by the DHEC Board prior to the expiration of the statutory 15-day period.

Further, the County knew as early as December 15, 2015 of the Department's decision regarding the permit modification. During a meeting with the County on December 15, 2015 County received actual notice of the permit modification by the Department. "Actual notice means all the facts are disclosed and there is nothing left to investigate." *Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 504 S.E.2d 117 (1998) *citing*, *Government Employees Ins. Co. v. Chavis*, 254 S.C. 507, 176 S.E.2d 131 (1970). "Actual notice may be shown by direct evidence or inferred from factual circumstances." *Ibid. citing* *Southern Railway-Carolina Division v. Home Investment Co.*, 223 S.C. 440, 105 S.E.2d (1958). Even after receiving actual notice of the Department decision, County waited until March 23, 2016 to file its Request for Review with the Board. Because the Request for Review was not filed timely with the Board, the Department's issuance of the minor permit modification to MRR is final, and any attempt to appeal the decision should be denied. Pursuant to the forgoing, the ALC does not have jurisdiction to hear County's request for a contested case hearing.

If DHEC's request to dismiss County's request for a contested case hearing is not granted, DHEC respectfully requests that this Court issue an Order affirming the Department's

Final Agency Decision to issue to MRR a minor permit modification for Permit No. LF2-00003. The application submitted by MRR to modify its Class 2 Landfill permit for the Highway 93 Landfill was a minor permit modification as defined in R.61-107.19, Part I.B.48. A "modification" is defined as changes to a solid waste landfill that can be either "minor" or "major." A "minor modification" is defined as a "change that keeps the permit current with routine changes to the facility or an administrative change." A "major modification" is defined as "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 the regulation."

The permit modification application submitted by MRR requested the addition of a liner and associated leachate collection system for a portion of the existing, permitted landfill. Inclusion of a liner is not considered a major permit modification for the following reasons: (1) the addition of a liner is not an alternate design of the required design criteria; (2) the 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, permitted landfill from a Class 2 to a Class 3 Landfill.

Further, 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 a permit applicant wanted to reduce the 2-foot separation requirement, it would necessitate an alternate design request which would be considered a "major" permit modification. The installation of a liner and associated leachate collection system does not constitute an alternate design triggering a major modification because the 2-foot groundwater

separation is being maintained. The installation of a liner is not required, is considered voluntary, and provides additional improvement over the required Class 2 landfill design features.

5. A brief summary of the facts to be presented at the hearing:

The Highway 93 Class 2 Landfill is located at 2180 Greenville Highway, Liberty, South Carolina, in an unincorporated area of Pickens County. On November 3, 2008, the Department issued Permit No. LF2-00003 to MRR for the operation of a Class 2 landfill.

On March 30, 2015 the Department received an application from MRR for a minor permit modification to allow the installation of a liner and associated leachate collection system for a portion of the existing permitted landfill area. On August 6, 2015 the Department received from MRR a revised copy of the application. Because the Department determined that the application met the regulatory definition of a minor permit modification, the Department was not required to have a public notice and comment period prior to the issuance of the permit modification by the Department. (R.61-107.19 Part I, B.48.a). The Solid Waste regulations require public notice of all applications for new construction and *major* modifications of Class 2 landfills, but does not require public notice of applications for minor permit modifications. (See R.61-107.19 Part I D.2.c.(1); Part IV I.2.).

On August 10, 2015, the Department issued a Department Decision (**Attachment**) approving the application from MRR, for a minor permit modification to modify its Class 2 Permit for their Highway 93 Class 2 Landfill by adding a liner system and associated leachate collection system to a portion of the existing, permitted Landfill.

The Department decision became the Final Agency Decision fifteen days after the decision was mailed to MRR. County did not request to be notified of any Department decisions

as an affected person, and did not file a timely request for review to the DHEC Board prior to expiration of the 15-day statutory period. Further, after meeting with the Department on December 15, 2015, and receiving at that time actual notice of the Department's decision to issue the minor permit modification, County waited until March 23, 2016 to file a Request for Review with the DHEC Board. On April 21, 2016 the DHEC Board declined to hear the request for review, rendering the Department decision to issue the minor permit modification to MRR the Final Agency Decision.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:

Pursuant to South Carolina Rules of Civil Procedure ("SCRCP"), Rule 12(b)(1), Respondent DHEC expects to file a Motion to Dismiss because County's Request for Review to the DHEC Board was not timely filed, therefore, County's request for contested case hearing is improperly before this Court and therefore, should be dismissed because the Court lacks jurisdiction to hear this matter.

7. A list of proposed witnesses and exhibits:

Witnesses:

Kent Coleman, former DHEC Director of Mining and Solid Waste Management

Exhibits: The Administrative File maintained by the Department.

8. A statement regarding the necessity for discovery, if any:

The Department anticipates standard discovery to be sufficient at this time. However, the Department respectfully reserves the right to submit a request to the Court for additional discovery if the need arises.

9. The estimated time required for the hearing:

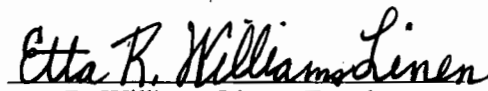
The Department anticipates that the estimated time required for the hearing will be two (2) days.

10. Any dates in the next one hundred-twenty (120) days when you will not be available for a hearing:

The Department is not available for a hearing on the merits in this case on the following dates: July 12 and 13; August 2, and 12-17; and October 26. The Department also notes that it received the Notice of Assignment on May 26, 2016, and pursuant to ALC Rule 21(A), which states that "all discovery shall be completed within 90 days of the receipt of the Notice of Assignment and Request for Information," based on Department's receipt of the Notice, discovery must be completed by August 24, 2016.

11. An email address where you can be reached: williaer@dhec.sc.gov and princech@dhec.sc.gov.

Respectfully submitted,



Etta R. Williams Linen, Esquire
Claire Prince, Esquire

Office of General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708
Attorney for SCDHEC
Tel.: (803) 898-3350
Fax: (803) 898-3367 (Not for service)
williaer@dhec.sc.gov (Not for service)

July 5, 2016
Columbia, South Carolina
DHEC's Prehearing Statement
Pickens County v. DHEC; # 22666
July 2016

Attachment



Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment

August 10, 2015

Mr. Christopher T. Roof
MRR Pickens, LLC
Highway 93 Landfill
5842 Faringdon Place, Suite 1
Raleigh, North Carolina 27609

RE: Issuance of Modified Class 2 Landfill Permit
Highway 93 Landfill
Permit No. LF2-00003
Pickens County

Dear Mr. Roof:

Enclosed is a modified Class 2 landfill permit for the Highway 93 Landfill located at 2180 Greenville Highway, Liberty, SC in Pickens County. The modification includes an alternate liner design and associated changes resulting from the design change. Enclosed is a copy of the Department approved revised engineering report to be kept at the referenced facility at all times. The guidelines and requirements to operate the site can be found in Regulation 61-107.19, *Solid Waste Management: Solid Waste Landfills and Structural Fill* and the conditions can be found in the attached Permit.

This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision fifteen (15) days after notice of the Department decision has been mailed to the applicant or respondent, unless a written request for final review accompanied by a filing fee in the amount of \$100 is filed with the Department by the applicant, permittee, licensee, or affected person. This decision may be appealed by complying with the requirements described in the attached *Guide to Board Review*, provided as a courtesy by the Department.

If you have any questions regarding the permit, please contact Timothy M. Eleazer, (803) 898-1374. General questions should be referred to Susan Turner with the Upstate Region EQC, BEHS Greenville Office, and (864) 372-3273.

Sincerely,

Kent M. Coleman, Director
Division of Mining & Solid Waste Management
Bureau of Land and Waste Management

KMC/TME/tmc

cc: Marty Lindler, Manager - BLWM Solid Waste & HW Compliance Section
Tom Knight, P.G. Manager - BLWM Solid Waste Groundwater Section
Susan Turner, Upstate Region, BEHS Greenville Office
Scott L. Brown, P.E., Civil & Environmental Consultants, Inc.
BLWM File 021212

South Carolina Board of Health and Environmental Control

Guide to Board Review

Pursuant to S.C. Code Ann. § 44-1-60

The decision of the South Carolina Department of Health and Environmental Control (Department) becomes the final agency decision fifteen (15) calendar days after notice of the decision has been mailed to the applicant, permittee, licensee and affected persons who have requested in writing to be notified, unless a written request for final review accompanied by a filing fee in the amount of \$100 is filed with Department by the applicant, permittee, licensee or affected person.

Applicants, permittees, licensees, and affected parties are encouraged to engage in mediation or settlement discussions during the final review process.

If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within thirty (30) calendar days after notice is mailed that the Board declined to hold a final review conference. In matters pertaining to decisions under the South Carolina Mining Act, appeals should be made to the South Carolina Mining Council.

I. Filing of Request for Final Review

1. A written Request for Final Review (RFR) and the required filing fee of one hundred dollars (\$100) must be received by Clerk of the Board within fifteen (15) calendar days after notice of the staff decision has been mailed to the applicant, permittee, licensee, or affected persons. If the 15th day occurs on a weekend or State holiday, the RFR must be received by the Clerk on the next working day. RFRs will not be accepted after 5:00 p.m.
2. RFRs shall be in writing and should include, at a minimum, the following information:
 - The grounds for amending, modifying, or rescinding the staff decision;
 - a statement of any significant issues or factors the Board should consider in deciding how to handle the matter;
 - the relief requested;
 - a copy of the decision for which review is requested; and
 - mailing address, email address, if applicable, and phone number(s) at which the requestor can be contacted.
3. RFRs should be filed in person or by mail at the following address:
South Carolina Board of Health and Environmental Control
Attention: Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201

Alternatively, RFR's may be filed with the Clerk by facsimile (803-898-3393) or by electronic mail (boardclerk@dhec.sc.gov).
4. The filing fee may be paid by cash, check or credit card and must be received by the 15th day.
5. If there is any perceived discrepancy in compliance with this RFR filing procedure, the Clerk should consult with the Chairman or, if the Chairman is unavailable, the Vice-Chairman. The Chairman or the Vice-Chairman will determine whether the RFR is timely and properly filed and direct the Clerk to (1) process the RFR for consideration by the Board or (2) return the RFR and filing fee to the requestor with a cover letter explaining why the RFR was not timely or properly filed. Processing an RFR for consideration by the Board shall not be interpreted as a waiver of any claim or defense by the agency in subsequent proceedings concerning the RFR.
6. If the RFR will be processed for Board consideration, the Clerk will send an Acknowledgement of RFR to the Requestor and the applicant, permittee, or licensee, if other than the Requestor. All personal and financial identifying information will be redacted from the RFR and accompanying documentation before the RFR is released to the Board, Department staff or the public.
7. If an RFR pertains to an emergency order, the Clerk will, upon receipt, immediately provide a copy of the RFR to all Board members. The Chairman, or in his or her absence, the Vice-Chairman shall based on the circumstances, decide whether to refer the RFR to the RFR Committee for expedited review or to decline in writing to schedule a Final Review Conference. If the Chairman or Vice-Chairman determines review by the RFR Committee is appropriate, the Clerk will forward a copy of the RFR to Department staff and Office of General Counsel. A Department response and RFR Committee review will be provided on an expedited schedule defined by the Chairman or Vice-Chairman.
8. The Clerk will email the RFR to staff and Office of General Counsel and request a Department Response within eight (8) working days. Upon receipt of the Department Response, the Clerk will forward the RFR and Department Response to all Board members for review, and all Board members will confirm receipt of the RFR to the Clerk by email. If a Board member does not confirm receipt of the RFR within a twenty-four (24) hour period, the Clerk will contact the Board member and confirm receipt. If a Board member believes the RFR should be considered by the RFR Committee, he or she will

respond to the Clerk's email within forty-eight (48) hours and will request further review. If no Board member requests further review of the RFR within the forty-eight (48) hour period, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, stating the Board will not hold a Final Review Conference. Contested case guidance will be included within the letter.

NOTE: If the time periods described above end on a weekend or State holiday, the time is automatically extended to 5:00 p.m. on the next business day.

9. If the RFR is to be considered by the RFR Committee, the Clerk will notify the Presiding Member of the RFR Committee and the Chairman that further review is requested by the Board. RFR Committee meetings are open to the public and will be public noticed at least 24 hours in advance.
10. Following RFR Committee or Board consideration of the RFR, if it is determined no Conference will be held, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, stating the Board will not hold a Conference. Contested case guidance will be included within the letter.

II. Final Review Conference Scheduling

1. If a Conference will be held, the Clerk will send a letter by certified mail to the Requestor, with copy by regular mail to the applicant, permittee, or licensee, if not the Requestor, informing the Requestor of the determination.
2. The Clerk will request Department staff provide the Administrative Record.
3. The Clerk will send Notice of Final Review Conference to the parties at least ten (10) days before the Conference. The Conference will be publically noticed and should:
 - include the place, date and time of the Conference;
 - state the presentation times allowed in the Conference;
 - state evidence may be presented at the Conference;
 - if the conference will be held by committee, include a copy of the Chairman's order appointing the committee; and
 - inform the Requestor of his or her right to request a transcript of the proceedings of the Conference prepared at Requestor's expense.
4. If a party requests a transcript of the proceedings of the Conference and agrees to pay all related costs in writing, including costs for the transcript, the Clerk will schedule a court reporter for the Conference.

III. Final Review Conference and Decision

1. The order of presentation in the Conference will, subject to the presiding officer's discretion, be as follows:
 - Department staff will provide an overview of the staff decision and the applicable law to include [10 minutes]:
 - Type of decision (permit, enforcement, etc.) and description of the program.
 - Parties
 - Description of facility/site
 - Applicable statutes and regulations
 - Decision and materials relied upon in the administrative record to support the staff decision.
 - Requestor(s) will state the reasons for protesting the staff decision and may provide evidence to support amending, modifying, or rescinding the staff decision. [15 minutes] *NOTE: The burden of proof is on the Requestor(s)*
 - Rebuttal by Department staff [15 minutes]
 - Rebuttal by Requestor(s) [10 minutes]

Note: Times noted in brackets are for information only and are superseded by times stated in the Notice of Final Review Conference or by the presiding officer.
2. Parties may present evidence during the conference; however, the rules of evidence do not apply.
3. At any time during the conference, the officers conducting the Conference may request additional information and may question the Requestor, the staff, and anyone else providing information at the Conference.
4. The presiding officer, in his or her sole discretion, may allow additional time for presentations and may impose time limits on the Conference.
5. All Conferences are open to the public.
6. The officers may deliberate in closed session.
7. The officers may announce the decision at the conclusion of the Conference or it may be reserved for consideration.
8. The Clerk will mail the written final agency decision (FAD) to parties within 30 days after the Conference. The written decision must explain the basis for the decision and inform the parties of their right to request a contested case hearing before the Administrative Law Court or in matters pertaining to decisions under the South Carolina Mining Act, to request a hearing before the South Carolina Mining Council. The FAD will be sent by certified mail, return receipt requested.
9. Communications may also be sent by electronic mail, in addition to the forms stated herein, when electronic mail addresses are provided to the Clerk.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.



Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment

OFFICE OF ENVIRONMENTAL QUALITY CONTROL
BUREAU OF LAND AND WASTE MANAGEMENT
CLASS 2 LANDFILL
PERMIT No. LF2-00003

Date of Issuance: November 3, 2008

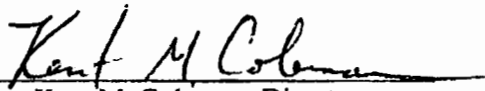
Date of
Modification: August 10, 2015

Permission is hereby granted to:

Name of Facility: Highway 93 Class 2 Landfill
Permittee: MRR Pickens, LLC
Address: 5842 Faringdon Place, Suite 1
Raleigh, NC 27609
Supervisor: Mr. Christopher T. Roof
Phone: (919) 436-3570

for the operation of a Class 2 landfill at 2180 Greenville Highway, in Pickens County located off Highway 93 near the City of Liberty, SC 29657.

This permit is issued pursuant to Sections 44-96-10 et seq., and 25A S.C. Code Regulation 61-107.19. The authority granted hereunder is subject to the requirements of the aforementioned laws and regulations and the attached conditions.


Kent M. Coleman, Director

Division of Mining and Solid Waste Management
Bureau of Land & Waste Management

Permit No. LF2-00003
August 10, 2015
Page 1 of 4

MRR PICKENS, LLC
CLASS 2 LANDFILL
PERMIT No. LF2-00003

A. SPECIAL CONDITIONS

1. The Permittee shall adhere to the approved design specifications, and construction plans received November 30, 2007; revised August 26, 2008, and last revised August 5, 2015, unless permit conditions state otherwise.
2. This permit is limited to the disposal of the items listed in Appendix I of R.61-107.19 and any other waste approved by the Department for disposal in a Class Two Landfill pursuant to R.61-107.19, Part IV, Section C.2.
3. The allowable rate of disposal for this facility is seventy thousand five hundred (70,500) tons per fiscal year (July 1 to Jun30). Information concerning the facility's previous Fiscal Year's waste receipts is due on the form of an annual report to the Department no later than **September 1st** of each year, as required by R.61-107.19 Part IV. Subpart C.16, to the attention of:

**Manager, Solid and Hazardous Waste Compliance Section
SC DHEC Bureau of Land and Waste Management
2600 Bull Street
Columbia, South Carolina 29201**

4. All Appendix-I acceptable wastes must be covered at least once every thirty (30) days with a minimum of six (6) inches of clean soil, except for asbestos-containing material, which must be covered with a minimum of six (6) inches of clean soil immediately upon placement in the landfill.
5. The total surface area within the permitted waste disposal footprint that has not been deemed closed by the Department is limited to five (5) acres. For an area to be considered closed, the following items shall be completed:
 - a. Official certification from a Professional Engineer registered in the State of South Carolina that the area has been closed in accordance with final cover requirements pursuant to Regulation 61-107.19, Part IV, Subpart F.1.
 - b. The area shall be inspected and deemed closed by Department staff.
6. On or before **July 1** of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that the total surface area within the permitted waste disposal footprint that is not deemed officially closed by the Department pursuant to Special Condition No. 5 (above) is equal to or less than five (5) acres (at the time of the certification). The certification shall be completed within sixty (60) days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.

7. On or before **July 1** of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that enough soil is currently available to use for final cover (16,133 yd³ of soil for 5 acres with 2' thickness). The certification shall have been completed within the last sixty (60) days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.
8. Sixty (60) days prior to starting construction of the Class Two landfill, the Permittee shall notify the Department of their selection between Option 1 (traditional Class Two landfill design), or Option 2 (alternate liner design). If the financial assurance mechanism needs to be increased, this shall be done prior to the acceptance of waste into the landfill.

B. GENERAL PERMIT CONDITIONS

1. If the landfill should become inundated with water, all water shall be removed before continuing disposal of waste.

C. ENVIRONMENTAL MONITORING PERMIT CONDITIONS

1. GROUNDWATER DETECTION MONITORING SYSTEM

- a) The Permittee shall maintain a groundwater detection monitoring system consistent with the most recently approved Groundwater Sampling and Analysis Plan and as required in R.61-107.19, Part IV, Section E. The groundwater detection monitoring system shall consist of monitoring wells as designated in the most recently approved Groundwater Sampling and Analysis Plan and any other monitoring wells specified by the Department. Modifications to the current groundwater detection monitoring system shall be in accordance with the requirements of R.61-107.19, Part IV, Section E.
- b) The Permittee shall perform all groundwater sampling activities in accordance with the most recently approved Groundwater Sampling and Analysis Plan and in accordance with the requirements of R.61-107.19, Part IV, Section E, along with any subsequent modifications deemed necessary by the Department to uphold the intent of this permit. The Permittee shall evaluate analytical results in accordance with the most recently approved Groundwater Sampling and Analysis Plan and any subsequent modifications required by the Department.
- c) The Permittee must determine during each sampling event the groundwater elevation in each well relative to mean sea level (MSL) to the nearest one-hundredth of a foot. All elevations should be determined on the same day. The Permittee shall determine the total depth of each well on an annual basis.
- d) Groundwater samples shall be analyzed by a laboratory certified by the State of South Carolina.

2. ASSESSMENT OF GROUNDWATER IMPACT

If the Permittee determines that a groundwater protection standard has potentially been exceeded for one or more constituents for routine at any monitoring well at the relevant point of compliance, then the Permittee shall perform any necessary groundwater assessment actions in accordance with the requirements of R.61-107.19 Subpart E.3.

3. REPORTING

- a) The permittee shall submit to the Department the result of the groundwater monitoring program as specified in the most recently approved Groundwater Sampling and Analysis Plan, in accordance with the following schedule:

Sampling Schedule	Results Due
November/December	January 15 (Semi-Annual)
May/June	July 15 (annual Report)

- b) The Permittee shall submit a properly bound annual report signed by a South Carolina qualified professional summarizing the semi-annual determinations of groundwater flow rate and direction. In addition, the report shall make a determination as to whether the monitoring well network continues to meet requirements of permit condition C.1.a.
- c) The groundwater data collected by the implementation of the groundwater monitoring program as specified by this Permit shall be submitted to the SCDHEC Bureau of Land and Waste Management, Division of Mining and Solid Waste Management, Solid Waste Ground water Section, and to the Solid Waste Consultant in Upstate Region BEHS Greenville.

4. METHANE MONITORING

In accordance with R.61-107.19, Part IV, Subpart C, methane monitoring is not required at the time of issuance of this permit. However, should the Department determine that methane is of concern at this Facility; the Facility may be required to comply with R.61-107.19, Part IV, Section C.21.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,

Petitioner,

v.

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

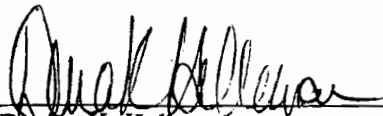
Respondent.

Docket No. 16-ALJ-07-0164-CC

CERTIFICATE OF SERVICE

I, Donna K. Hellerman, Legal Assistant with the South Carolina Department of Health and Environmental Control, hereby certify that I have this **5th day of July, 2016** served the foregoing ***South Carolina Department of Health and Environmental Control's Prehearing Statement*** upon all parties and counsel of record by placing a copy of same in an envelope and depositing it in the U.S. Mail, first-class, with sufficient postage paid, at the address indicated below:

Gary J. Poliakoff, Esquire Poliakoff & Associates Post Office Box 1571 Spartanburg, SC 29304	Jessica J. O. King, Esquire Allen K. McAlister, Jr., Esquire Williams Mullen P.O. Box 8116 Columbia, SC 29202
Kenneth S. Roper, Esquire Roper Law Firm Post Office Box 246 Pickens, SC 29671	Robert F. Goings, Esquire Goings Law Firm, LLC 914 Richland Street, Suite A-101 Columbia, SC 29201


Donna K. Hellerman

July 5th, 2016
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,	)	
	)	Docket No: 16-ALJ-07-0164-CC
Petitioner,	)	
	)	
vs.	)	PREHEARING STATEMENT
	)	OF RESPONDENT
South Carolina Department of Health	)	MRR PICKENS, LLC
and Environmental Control and MRR	)	
Pickens, LLC,	)	
	)	
Respondents.	)	

In response to the Order for Prehearing Statements, filed on June 13, 2016, Respondent MRR Pickens, LLC ("MRR Pickens") respectfully files this Prehearing Statement. This Prehearing Statement will be updated as necessary during the course of this proceeding.

1. The nature of this proceeding:

This proceeding is a "contested case" in which the Petitioner seeks review of the final decision by South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") to issue a Minor Permit Modification to Respondent MRR Pickens Class Two Landfill Permit Number LF2-00003 ("Class Two Permit LF2-00003") on August 10, 2015.

2. The statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations:

The Administrative Law Court is given subject matter jurisdiction over the issues in this proceeding pursuant to the Constitution of South Carolina, Article I, § 22; the South Carolina Administrative Procedures Act, S.C. Code Ann. §§1-23-10 to 660 (Law. Co-op. Rev. 2008 and Supp. 2015) ("APA"); and Procedures for Contested Cases, 6 S.C. Code Ann. Regs. 61-72 (Law. Co-op. Rev. 2008 and Supp. 2015).

The specific statutory provisions giving rise to this controversy are the South Carolina Solid Waste Policy & Management Act, S.C. Code Ann. §§44-96-10 et seq. (SCSWPMA), and associated South Carolina solid waste regulations, 8 S.C. Code Regs. 61-107.19 Solid Waste Management: Solid Waste Landfills and Structural Fills.

3. The issues to be presented for determination, including any claims or defenses expected to be raised:

A. Whether the Administrative Law Court has jurisdiction over this appeal pursuant to S.C. Code Ann. §44-1-60(e) in light of the fact that Petitioner filed its request for Final Agency Review with the DHEC Board more than fifteen (15) days after notice of the final agency decision was mailed.

B. Whether DHEC properly issued the modification to the Class Two Permit LF2-00003 in accordance with the applicable regulatory and statutory provisions in DHEC Regulation 8 S.C. Code Ann. R. 61-107.19 and the SCSWPMA.

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations:

Respondent MRR Pickens respectfully requests the ALC dismiss this action with prejudice as untimely pursuant to S.C. Code Ann. §§44-1-60(E) and (F)(2) thereby affirming MRR Pickens' Minor Permit Modification. In the alternative, MRR Pickens request the Court uphold the Minor Permit Modification consistent with S.C. Code Ann. R. 61-107.19 and the SCSWPMA.

5. A brief summary of the facts to be presented at the hearing:

On November 3, 2008, Respondent MRR Pickens received Class Two Permit LF2-00003 from DHEC to construct and operate a Class Two Landfill. On March 30, 2015, MRR Pickens

applied for a minor modification of Class Two Permit LF2-00003 to give it the option of installing a liner in the landfill. On August 10, 2015, DHEC issued Minor Modification to Class Two Landfill LF2-00003, granting it the option to install a liner in the landfill.

On February 17, 2016, Pickens County admitted in pleadings filed in the Pickens County Court of Common Pleas on a separate matter that it received notice of the Minor Permit Modification in December of 2015. On March 23, 2016, Petitioner filed a Request for Final Review with the DHEC Board challenging the DHEC staff decision to issue the Minor Permit Modification. On or about April 15, 2016, DHEC staff filed with the Board its Initial Staff Response to Request for Review, Docket No. 16-RFR-15. On April 21, 2016, the DHEC Board issued its Denial of Petitioner's Request for Final Review of the Permit. Petitioner requested this Contested Case on May 20, 2016.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:

Prior to the hearing on this matter, Respondent MRR Pickens will file a Motion to Dismiss pursuant to Rules 19 and 38 of the Rules of Procedure for the ALC ("the ALC Rules"), a Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure (SCRPC) and Rule 19 of the ALC Rules, a Motion to expand discovery pursuant to Rule 21(A) of the ALC Rules, and any necessary Motions in Limine.

7. A list of proposed witnesses and exhibits:

A. Proposed witnesses:

Christopher Roof
MRR Southern, LLC
5842 Faringdon Place, Suite 1
Raleigh, NC 27609

Joan Litton

SCDHEC – BLWM
2600 Bull Street
Columbia, South Carolina 29201

Kent Coleman
SCDHEC – BLWM
2600 Bull Street
Columbia, South Carolina 29201

Justin Koon
SCDHEC – BLWM
2600 Bull Street
Columbia, South Carolina 29201

Gerald Wilson
Pickens County
222 McDaniel Avenue
Pickens, South Carolina 29671

Christopher Brink
Pickens County
222 McDaniel Avenue
Pickens, South Carolina 29671

Neil Smith
Pickens County Council
Pickens County Administration Facility
222 McDaniel Avenue
Pickens, SC 29671

B. Proposed exhibits:

The exhibits will include documents from the Department file, other Department records relating to the permit application, documents associated with the latest date Petitioner learned of the Minor Permit Modification, and expert reports, if any, generated for use at the hearing.

8. **A statement regarding the necessity for discovery, if any:**

Respondent MRR Pickens anticipates serving standard interrogatories, requests to admit, and requests for production of documents. Petitioner may also depose Pickens County

employees, the staff members of DHEC and any witnesses identified by the Petitioner as relevant to this contested case. Petitioner may file a motion to allow for expanded discovery.

9. The estimated length of the hearing:

Respondent MRR Pickens estimates the hearing will take three (3) full days.

10. Any dates in the next one hundred-twenty (120) days when you will not be available for a hearing; and,

Respondent MRR Pickens is not available for a hearing on the following dates:
August 3-4, 2016.

11. An email address where you can be reached:

Jking@williamsmullen.com, kmcalister@williamsmullen.com, and
Rgoings@goingslawfirm.com.

Respectfully submitted,



Jessica J. O. King, Esquire (S.C. Bar # 11202)
jking@williamsmullen.com
Allen K. McAlister, Esquire (S.C. Bar # 78213)
kmcalister@williamsmullen.com
Williams Mullen
Post Office Box 8116
Columbia, South Carolina 29202
Telephone: (803) 567-4600
Fax: 803-567-4601

Robert Goings, Esquire (S.C. Bar # 74855)
rgoings@goingslawfirm.com
Goings Law Firm, LLC
914 Richland Street, Suite A-101
Columbia, South Carolina 29201
Telephone: (803) 350-9230
Fax: (877) 789-6340

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,

Petitioner,

vs.

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

Respondents.

CERTIFICATE OF SERVICE

DOCKET NO. 16-ALJ-07-0164-CC

I hereby certify that on the 5th day of July, 2016, in Columbia, South Carolina, a copy of the foregoing **Prehearing Statement on behalf of MRR Pickens, LLC** was served on all parties to this matter by hand delivery or depositing the same in the United States Mail, postage paid, and addressed as follows:

The Honorable Shirley C. Robinson
Administrative Law Judge
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

W. Marshall Taylor, Jr., Esquire
Office of the General Counsel
S.C. Department of Health and
Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Gary W. Poliakoff, Esquire
Poliakoff & Associates
P.O. Box 1571

Spartanburg, South Carolina 29304



Allen Keith McAlister, Jr.

S.C. Bar I.D. No: 78213

WILLIAMS MULLEN

1441 Main Street, Suite 1250

Columbia, SC 29201

Telephone: 803.567.4604

Facsimile: 803.567.4601

kmcalister@williamsmullen.com

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 16-ALJ-07-0164-CC

Pickens County,

Petitioner,

v.

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

Respondents.

COPY

ADMINISTRATIVE HEARING

Friday, December 2, 2016
10:03 a.m. - 12:21 p.m.

The hearing before the Honorable Shirley Robinson, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 2nd day of December, 2016 before Amanda Jo Creel Godfrey, Court Reporter and Notary Public in and for the State of South Carolina.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

APPEARANCES

The Honorable Shirley Robinson
Teckla Henderson, Clerk
Chelsea Clark, Staff Counsel

Gary W. Poliakoff, Esquire
 Poliakoff & Associates, P.A.
 215 Magnolia Street
 Spartanburg, South Carolina 29306
 Attorney for the Petitioner

Ken Roper, Esquire
 County Attorney
 Pickens County
 222 McDaniel Avenue B-2
 Pickens, South Carolina 29671
 Attorney for the Petitioner

Etta R. Williams Linen, Esquire
Claire Prince, Esquire
 DHEC-Office of General Counsel
 2600 Bull Street
 Columbia, South Carolina 29201-1708
 Attorneys for the Respondent - DHEC

Jessica J.O. King, Esquire
Kip McAlister, Esquire
 Williams Mullen
 1441 Main Street, Suite 1250
 Columbia, South Carolina 29201
 Attorneys for the Respondent - MRR Pickens, LLC

Also Present:

Robert F. Goings, Esquire

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CREEL COURT REPORTING, INC.
 1230 Richland Street / Columbia, SC 29201
 (803) 252-3445 / (800) 822-0896

REPLY:

MS. LINEN.	98
MS. KING	101
MR. POLIAKOFF	105
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Certificate	112

EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.



CREEL COURT REPORTING, INC.
 1230 Richland Street / Columbia, SC 29201
 (803) 252-3445 / (800) 822-0896

INTRODUCTION

THE COURT: Good morning. Please take your seats.

Okay, are we ready to begin?

MS. LINEN: Yes, Your Honor.

MR. POLIAKOFF: Yes, Your Honor.

THE COURT: Okay, thank you. Okay. I'm going to go ahead and -- as this is a motions hearing and I'm going to go ahead and call it to order. It's Pickens County, as Petitioner verses the South Carolina Department of Health and Environmental Control and MRR Pickens, LLC as Respondents. It's Docket Number 16-ALJ-07-0164-CC. We've got Gary Poliakoff?

MR. POLIAKOFF: Yes, Your Honor.

THE COURT: Okay, sorry about that, I'm looking the wrong way. Is here representing the Petitioner. And -- the Petitioner, Pickens County. And we've got Jessica King? Okay.

MS. KING: Good morning.

THE COURT: Good morning. Representing MRR.

MS. KING: Yes.

THE COURT: And, Etta Linen.

MS. LINEN: Yes, Your Honor. Good morning.

THE COURT: Representing the Department. Good morning. The motion that we've got before us



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1 today is motions that have been filed by the
2 Respondents seeking dismissal of the case.
3 And, we're ready to begin arguments unless
4 there's anything we need to deal with before we
5 go into the arguments.

6 **MS. KING:** We do not have anything, Your Honor.

7 **THE COURT:** Okay.

8 **MR. POLIAKOFF:** Your Honor, this may not be the best
9 time but we would also like the Court -- I know
10 Your Honor has already ruled to delay ruling on
11 the Motion to Intervene. We would ask that the
12 court consider and would renew our request to
13 allow for interventions.

14 **THE COURT:** Okay. Thank you, Mr. Poliakoff.

15 **MR. POLIAKOFF:** Thank you.

16 **THE COURT:** Okay. Ms. Linen?

17 **MOTION STATEMENT BY MS. LINEN:**

18 **MS. LINEN:** Good morning, Your Honor, may it please
19 the court. I'm Etta Linen and I'm here
20 representing the Department of Health and ---

21 **THE COURT:** I am sorry for ---

22 **MS. LINEN:** Oh that's okay, no problem. As you
23 said, we're here on the Motion to Dismiss by
24 DHEC and MRR Pickens, LLC, to dismiss the
25 Pickens County's request for a contested case



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1 hearing before this court. Your Honor, what is
2 being appealed by Pickens County is a minor
3 modification that was issued by the Department
4 on August the 10th, 2015. And, that minor
5 modification was a modification to allow MRR
6 Pickens to install -- well, approval for
7 installation of a liner and an associated
8 leachate collection system into their landfill
9 which is located in Liberty, South Carolina.
10 And it's a Class Two landfill that's located at
11 2180 Greenville Highway in Liberty, South
12 Carolina. Your Honor, DHEC has listed two
13 grounds for appeal. And the first one is the
14 Administrative Law Court lacks jurisdiction to
15 hear this matter. And the second ground is
16 that Pickens County's failure to exhaust the
17 administrative remedies. Both of these grounds
18 really boil down to one thing, and that is
19 their untimeliness in filing their appeal to
20 the DHEC Board for the Department's decision
21 that was issued on August 10. Your Honor, the
22 definition -- well, it was a minor modification
23 that was issued by the Department. And the
24 definition of a minor modification is a change
25 that keeps the permit current with routine



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1 changes to the facility or its operations. So,
2 the modification that was issued was designated
3 a minor modification by the Department and it
4 was designated as such for a couple of reasons.
5 And I want to tell you what those reasons were,
6 one second. The inclusion of a minor, which is
7 what MRR Pickens requested in their minor
8 modification, is not an alternate design of the
9 required design criteria for the landfill. The
10 addition of a minor does not substantially
11 change the operations of the landfill and the
12 addition of a minor does not allow the facility
13 to accept additional waste types or quantities
14 of waste. And likewise, the minor permit
15 modification does not change the existing
16 landfill from a Class Two to a Class Three.
17 And what you're gonna hear, probably hear Mr.
18 Poliakoff argue is that the fact that MRR is
19 allowed to add a minor to the landfill changes
20 the landfill from a Class Two to a Class Three,
21 changes the design substantially. And DHEC's
22 contention is that it does not. And, of
23 course, we're not hear to argue that today.
24 We're here to argue whether their case should
25 be dismissed because their untimely filing, but



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1 I'm sure you will hear from Pickens County that
2 this was a major modification. Because it was
3 a minor modification, Your Honor, the decision
4 that DHEC issued was not required to be public
5 noticed. The initial landfill permit was
6 issued in 2008 and at that time, because it was
7 a new construction, it was public noticed and
8 there is a requirement for public notice for
9 new landfills. Well for minor modifications,
10 there is no such requirement. So whenever the
11 landfill permit modification was issued notice
12 was not given -- it wasn't public noticed
13 because there was no requirement for that. As
14 a matter of fact, the public notice issue that
15 Pickens County raises is a non-issue for a
16 couple of reasons. The first reason is what
17 I've already stated, is that for minor
18 modifications there is no requirement to public
19 notice. But the second reason, which is more
20 significant, is that in order for Pickens
21 County to have received some kind of notice
22 from the Department, they are required to
23 notify the Department in writing that they want
24 to receive notice of any decisions made, you
25 know, on a landfill or anything that they want



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1 to know, they have to ask us in writing if they
2 feel that they're an affected party. Well,
3 Pickens County never requested to be notified
4 by DHEC of any decisions made on the MRR Class
5 Two Pickens County landfill. So whenever the
6 Department issued its decision, it issued it
7 directly to the applicant. Although it was
8 issued -- well before I say that, let me -- the
9 reference for this where Pickens County should
10 have requested notice of the decision is in 44-
11 1-60(E). Let me -- yeah. It just says notice
12 of -- I'm sorry, this is (E)(1), 44-1-60(E)(1),
13 "Notice of a department decision must be sent
14 by certified mail, return receipt requested to
15 the applicant, permittee, licensee and affected
16 persons who have," this is the important part,
17 "who have requested in writing to be notified.
18 Affected persons may request in writing to be
19 notified by regular mail or electronic mail in
20 lieu of certified mail. Notice of staff
21 decisions for which a department decision is
22 not required pursuant to subsection (D) must be
23 provided by mail, delivery, or other
24 appropriate means to the applicant, permittee,
25 licensee, and affected persons who have



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1 requested in writing to be notified." So this
2 is 44-1-60(E)(1) and Pickens County never made
3 that request to DHEC. We have an affidavit by
4 Ms. Joan Litton, who is the manager of the
5 Solid Waste Designing Program, who stated in
6 her affidavit that Pickens County never made
7 any such request to the Department. And, as a
8 matter of fact, Pickens County has never
9 asserted that they made any such request to the
10 Department. So they did not receive notice of
11 this decision. So the decision was issued --
12 well, I said August 10th, August '15. August
13 10th, 2015. And after the decision was issued,
14 Pickens County has actually acknowledged that
15 they did learn of the decision. Now when they
16 actually or constructively learned of it, we
17 don't have the exact date but we do know
18 pursuant to an affidavit by Mr. Gerald Wilson,
19 and this affidavit was attached to MRR's Motion
20 to Dismiss, it's Exhibit D, and it's number six
21 in his affidavit. We know that the County
22 became constructively notified of the decision
23 and once they became constructively notified,
24 they asked to meet with DHEC. So they called
25 DHEC, asked to meet with them about what they



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1 had heard, that the Department had issued a
2 minor modification to MRR Pickens, and a
3 meeting was held in December, on December 15th,
4 2015. Pickens County came to DHEC to discuss
5 what they had heard, and at that time they
6 received an actual notice regarding the
7 decision and it was a verbal notice and it was
8 DHEC telling them in person that yes, we did
9 issue this minor modification. Also on January
10 11th, 2016, Pickens County received written
11 notification from the Department by Tim Eleazer
12 to Mr. Gerald Wilson that DHEC had issued the
13 minor modification and he sent Mr. Wilson a
14 copy of the modification. So Pickens County
15 actually did not appeal the modification until
16 March, March 23rd, 2016. They wrote a letter
17 to the DHEC Board asking that the Department --
18 the Board to review the decision that was
19 issued by DHEC. And then, of course, on May
20 19th, 2016 -- well, let me back up. In April,
21 on April 21st, 2016, DHEC denied a hearing on
22 their request. And then on May 19th, 2016,
23 Pickens County filed their Request for a
24 Contested Case Hearing with this court. So,
25 Your Honor, the Court issue here or issue to be



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1 decided, as I said before, it concerns
2 timeliness. So Pickens County had actually
3 three opportunities to appeal DHEC's decision
4 and they failed to do so. They choose not to
5 file their appeal, which is pursuant to 44-1-
6 60, which is the appeal statute, which says in
7 44-1-60(E)(2), "The staff decision becomes the
8 final agency decision fifteen calendar days
9 after notice of the staff decision has been
10 mailed to the applicant, unless a written
11 request for final review accompanied by a
12 filing fee is filed with the department by the
13 applicant, permittee, licensee, or affected
14 person." So this is the requirement if you
15 want to appeal something, a decision from DHEC.
16 You need to file an appeal within 15 days of
17 the appeal being mailed, not received but
18 mailed. And if you don't do that, then the
19 staff decision, which DHEC issued in August of
20 2015, becomes the final agency decision. So
21 that means it's unappealable at that point in
22 time. So, the decision was issued in August
23 '15, 10th, 2015 so the deadline for Pickens
24 County to have appealed the decision to the
25 DHEC Board was December 25th, 2015. So that



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1 was their first opportunity to have appealed
2 this decision. They didn't do that because
3 they appealed the decision March 23rd, 2016.
4 That was 211 days after the deadline. Now,
5 they're going to argue, well we didn't notice
6 of the decision so we couldn't have appealed
7 it. Well, they didn't ask to get notice of the
8 decision and if they had asked to get notice of
9 the decision, then DHEC would have notified
10 them and they should have filed an appeal
11 within 15 days of the decision being mailed.
12 But that didn't happen.

13 The second opportunity that they had to file an
14 appeal, although I'm not saying it would have
15 been timely, but they did have a second
16 opportunity when they received constructive
17 notice of the decision sometime in -- actually
18 constructive and actual notice they received
19 -- actual notice December 15th, 2015 when they
20 attended a meeting at DHEC. So during that
21 meeting, DHEC verbally conveyed to Pickens
22 County, yes, we did issue a minor modification
23 to MRR Pickens. So the deadline for them to
24 have appealed at that time would have been
25 December 30th, 2015. Well, they didn't appeal.



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1 Again they waited to March 2016, after they had
2 verbal actual notice of the decision. And so
3 at this time, they've waited 84 days, 84 days
4 to appeal a decision that they think that was
5 issued wrongly.

6 And then they had a third opportunity, and that
7 opportunity was after DHEC sent them actual
8 notice, again in written notice on January
9 11th, 2016. So January 11th, 2016, Tim Eleazer
10 of DHEC sent Mr. Gerald Wilson, who's an
11 employee of Pickens County, the actual
12 modification that was issued by DHEC. So at
13 that time the deadline for them to have
14 appealed that was January 26th, 2016. Well,
15 they didn't appeal it. They waited 57 days to
16 appeal when they filed their appeal with DHEC
17 on March 23rd, 2016.

18 So they've had three different opportunities to
19 appeal and they've failed to do so. So, Your
20 Honor, by Pickens County failing to appeal in
21 a timely manner the decision that was issued by
22 DHEC, they have thereby divested this court of
23 its jurisdiction to hear the matter. South
24 Carolina Costal Conservation League stated that
25 there is no authority to extend the filing



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1 deadline period so when an appeal is filed
2 untimely, the Board lacks jurisdiction over the
3 appeal and therefore -- then they'll seek and
4 not invoke its jurisdiction. So the ALC
5 doesn't have jurisdiction to hear this case.

6 And also, Pickens County didn't exhaust
7 administrative remedies. There is a procedure
8 for appeal that is laid out in 44-1-60. You
9 have to appeal within 15 days or you have to
10 appeal when you've been noticed, when you
11 actually know that something has occurred.
12 They didn't do that. They had three
13 opportunities to appeal and they didn't do
14 that. So based on that, this matter should be
15 dismissed because the ALC doesn't have
16 jurisdiction and the time to extend to appeal,
17 they -- Pickens County hasn't even offered an
18 explanation as to why they didn't appeal
19 timely. They gave to the Court a lengthy Reply
20 in Opposition to DHEC's and MRR's Motion to
21 Dismiss, but the majority of the pleading
22 talked about why the decision should have been
23 a major modification as opposed to a minor
24 modification. They didn't address whatsoever
25 or any reason for why this case should not be



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1 dismissed. They didn't address the grounds
2 upon which DHEC brought forward as to why the
3 case should be dismissed. Basically, what
4 Pickens County has done is try to put the cart
5 before the horse and litigate this through
6 pleadings, the merits of the case, instead of
7 putting forth viable reasons or extraordinary
8 reasons for why they did not appeal this matter
9 in a timely fashion.

10 So Your Honor, I want to reiterate that I think
11 one of their big issues is that they didn't get
12 notice. But, I think it's worth repeating that
13 that notice, public notice argument, doesn't
14 have any merit because there was no requirement
15 for the Department to notice Pickens County.
16 Not only did they not ask DHEC to be notified
17 of any decisions, but they didn't even contact
18 the FOIA office and they could've gotten
19 regular updates and documentation from the
20 Freedom of Information Act, just by making a
21 request through them. And if they had done
22 that, they would've known when DHEC made any
23 decisions on the MRR landfill permit. They
24 didn't do that. I mean, they didn't do their
25 due diligence whatsoever, but yet they're



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1 asking this Court to hear this case.

2 So Your Honor, in closing I just want to say
3 that based on the untimeliness of the their
4 appeal to the DHEC Board and then also to this
5 Court, that this Court doesn't have
6 jurisdiction and that this case should be
7 dismissed pursuant to ALC Rule 38 and that it
8 should be dismissed in its entirety. And we
9 respectfully request that that be done. Thank
10 you very much.

11 **THE COURT:** Thank you, Ms. Linen. Ms. King?

12 **MOTION STATEMENT BY MS. KING:**

13 **MS. KING:** Good morning, Your Honor. My name is
14 Jessie King. I represent MRR Pickens, LLC in
15 this matter and on this Motion to Dismiss. I
16 also have with me Robert Goings and Kip
17 McAlister, who also are on record as
18 representing MRR Pickens. Before I get
19 started, I did want to address Mr. Poliakoff's
20 request that you consider the Motion to
21 Intervene today. My understanding from the
22 notice of the hearing today is that that was
23 not to be heard today. We are not prepared to
24 argue that completely today and also we would
25 note for the record that if the Court finds it



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1 does not have jurisdiction, appellate
2 jurisdiction of this matter, then a Motion to
3 Intervention is not appropriate because you
4 need initial appellate jurisdiction before
5 someone can intervene in the underlying case.
6 With that said, I'd like to begin my argument
7 by stating for the record that this is not a
8 case about coal ash and the Petitioner is going
9 to make it a case about coal ash. We're not
10 here today to discuss coal ash. We do feel
11 like it is appropriate to discuss it in the
12 sense that there is -- coal ash as a related
13 matter, but this decision that has been
14 appealed does not affect coal ash being
15 disposed of in MRR Pickens Class Two landfill.
16 As stated, and I'm not gonna go through the
17 facts as Ms. Linen has already done that for
18 the Court, but the minor modification at issue
19 here is actually the option to install a liner.
20 It's not even certain that MRR Pickens would be
21 installing a liner but it's the option, which
22 they will have to notify DHEC prior to
23 construction, I think it's 60 days prior to
24 construction, whether they have decided to
25 install a liner or not install a liner. So the



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1 liner itself does not add a waste stream to
2 their permit. The leachate collection system
3 is related to a liner. When you line a
4 landfill, you need something to deal with
5 leachate because it will no longer seep into
6 the soil, it needs to go somewhere else. Both
7 of those things have nothing to do with the
8 waste stream. Petitioner will argue that this
9 modification did change the waste stream, but
10 in the affidavits of DHEC and all of DHEC's
11 filings, they have adamantly stated that this
12 does not add any waste to the permit, the 2008
13 permit. This minor modification did not do
14 that. And that if coal ash is ever requested
15 to be added to the permit by MRR Pickens, there
16 will be another process. So I'll get into that
17 more later but I wanted the Court to understand
18 that Pickens County and the public in general
19 will have a right to comment on that when that
20 decision is made. So I wanted to make sure
21 because that really goes into the due process
22 and equitable tolling discussion that the
23 County has raised in its opposition to our
24 Motion to Dismiss.

25 As stated in our pleadings, our grounds for our



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1 Motion to Dismiss are Rules 11, 19 and 38 of
2 the Administrative Law Court's Rules and Rule
3 12(b)(1) of the Rules of Civil Procedure in
4 this state. We request it for two reasons.
5 One, because the request for review, as Ms.
6 Linen stated, to the DHEC Board, the first step
7 in the exhaustion of administrative remedies,
8 was not timely. And secondly, we actually add
9 another reason in our particular case which is
10 that Pickens County never served MRR Pickens at
11 its last place, known place of business within
12 the 30 day deadline, which is also this Court
13 has noted a jurisdictional issue. There's no
14 appellate jurisdiction when service is not
15 perfected as required by the rules. One thing
16 I think is important to note is that in the
17 lengthy filings in response to our Motion to
18 Dismiss that Pickens County has made, it never
19 denies either of the two grounds for dismissal
20 in this case. It never denies that it had
21 actual notice. It never denies -- in December
22 and January. And it never denies that it
23 didn't serve MRR Pickens at its last place of
24 business. It asks for equitable relief on both
25 of those grounds and I think that it's



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1 important to address that and I will do so
2 towards the end of my argument, but I do think
3 it is important to note that there really is no
4 legal basis, there's some equitable arguments,
5 but no legal basis for denying our Motion to
6 Dismiss that's been pled by the County in this
7 case. As stated by Ms. Linen, a Request for
8 Review is governed by 44-1-60(E)(1) when you're
9 at the Board level at DHEC. And that's the
10 exclusive procedure for appealing permitting
11 decisions made by DHEC. It becomes final after
12 mail to the permit applicant and other affected
13 persons who have properly requested
14 notification. And that's the important part,
15 who have properly affected notification. So,
16 as stated by Ms. Linen, that did not occur in
17 this case. And I think the most similar case
18 on this is the A.O. Smith Corporation case.
19 All of the cases I'm citing are in our briefs.
20 I have extra copies for the Court and for
21 Plaintiff's -- I mean Respondent's --
22 Petitioner's counsel if requested, but in that
23 case, in the A.O. Smith Corporation case, and
24 also in the Hyde case, which is another ALJ
25 case, both of these fairly recent cases, this



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1 court has held that only a party who has
2 exhausted all administrative remedies available
3 within the agency and is aggrieved of a final
4 decision in a contested case is entitled to
5 judicial review and that's citing 1-23-380(A).
6 So, there is a statutory requirement. This is
7 a statutory not a judicial deadline. The Hyde
8 case has said, that failure to exhaust the
9 administrative remedy in 44-1-60 is a bar, an
10 absolutely bar to a right to a contested case
11 in this court. The permit modification issued
12 in August of 2015, Plaintiff's going to argue
13 should've been public noticed because in
14 Plaintiff's opinion it was a major modification
15 verses a minor modification. I'm not going to
16 reiterate all that Ms. Linen stated regarding
17 the difference between a major and a minor
18 modification. We do support all those facts
19 stated by DHEC of the difference between the
20 two types of modifications, but I think what's
21 very important here, and Ms. Linen touched on
22 it but I'd like to reiterate, is that in 2008
23 when MRR was issued its original permit, there
24 was notice. There was a lot of notice. In the
25 exhibits to our motion, we show that there was



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1 notice in the Easley Progress, the Pickens
2 Sentinel, there was notice mailed to all
3 neighboring properties. There is a statutory
4 requirement for that. In fact, if you look at
5 Exhibits B and C in our motion, it shows all of
6 those notices that were made. Exhibit C is the
7 mailing list of everybody that was mailed
8 notice of that permit, and included on that
9 mailing list are in fact the properties that
10 the intervenors own in this case. There are
11 five intervenors. And each one of them, those
12 properties got notice of this -- of the 2008
13 permit. So I think that's very important
14 because as Ms. Linen says, to be an affected
15 party who has to get actual notice of any
16 subsequent decisions on a permit that's been
17 issued, these are later modifications, anything
18 having to do with that permit, you have to
19 request in writing to DHEC that you be treated
20 as an affected person. And not only was
21 Pickens County on that mailing list in '08 and
22 got actual notice of the '08 permit, but also
23 all the surrounding property owners, including
24 the intervenors, would have gotten that notice.
25 And it shows that on Exhibit C. You can see



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1 King Asphalt, that's Mr. King. You can see Mr.
2 Tabor. You can see their addresses. So all of
3 those parties, the public in general that
4 Pickens County now wishes to represent, all got
5 notice in '08 and none of them has said in Ms.
6 Joan Litton's affidavit, DHEC -- on DHEC's
7 pleadings in paragraph 4 of Joan Litton's
8 affidavit, she says nobody requested, none of
9 those people requested to be treated as
10 affected parties after the original permit was
11 issued. So those parties cannot state now that
12 the absence of public notice of the minor
13 modification that's at issue here somehow
14 deprived them of due process. That it was an
15 action by DHEC that deprived them of the right.
16 It was their own actions that deprived them of
17 an actual notice of this permit by mailing
18 under the statute, and this is statutorily
19 required. The County's going to argue -- well
20 first of all, before I move on to that, the
21 case on that issue that I think is most
22 important for the Court is the Hubbard and the
23 Fabery cases. There are two cases. The
24 Hubbard versus DHEC and Shavon's Purple Lotus
25 and then the Fabery case, both cases are cited



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1 in my brief for MRR Pickens. And those cases
2 say -- the Hubbard case says, and I quote, and
3 these are ALJ cases, these are cases within
4 this court, where notice not requested of
5 future staff decisions after initial license or
6 permit was issued, Department is not required
7 to give subsequent notices of renewals or
8 otherwise treat them as an affected party.
9 Ignorance of need to inform DHEC in writing if
10 it wants to be notified is not a defense. And
11 that's where they say that the public has to
12 know the law. They have a right -- they have
13 a duty to know what the law is and their
14 ignorance of that is not a defense. The Court
15 -- the County is going to say to this court
16 well, you know what, we are -- and they put
17 this in their pleading, their Request for a
18 Contested Case Hearing, that they're an
19 affected party because they're the host county.
20 So they're automatically, somehow
21 automatically, an affected party. Well, the
22 statute doesn't say that. The statute doesn't
23 say that a host county is automatically an
24 affected party or that anybody is automatically
25 an affected party. And the County cites to the



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1 host and development agreements between MRR
2 Pickens and the County as somehow support that
3 they are an affected party, because they have
4 a Host Development Agreement with the permittee
5 so they obviously are an affected party. Well
6 first of all, we don't deny that we have a Host
7 and Development Agreement with the County. MRR
8 Pickens does, but DHEC does not. DHEC is not
9 a party to that agreement. DHEC has no legal
10 duties under the Host and Development
11 Agreement, so DHEC because of even a knowledge
12 that there is a Host and Development Agreement
13 does not automatically -- is not automatically
14 required to treat them as an affected party as
15 a result. And more importantly, the statute
16 does not say that. An affected party is only
17 someone who request in writing to DHEC to be
18 treated as such. Regarding the major verses
19 minor modification of the public notice issue,
20 Regulation 61-107.19 controls, as Ms. Linen
21 said, when it comes to minor verses major
22 modifications and what notice is required.
23 Notice is not required for a minor, however if
24 notice had been required, it would've been sent
25 to affected parties and it would've been



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1 published in the newspaper. That did not occur
2 here because it was treated as a minor
3 modification because again, it is simply the
4 option to install a liner. The Fabery case,
5 which is a 2009 ALJ case, and it's cited on
6 page 12 of our Reply to Petitioner's Response
7 in Opposition to our Motion to Dismiss, was
8 very similar to this case, I think. And in
9 that case, the Court specifically held that
10 parties given actual notice when a permit is
11 first issued do not necessarily have the right
12 to future notices. And it cites the BBA
13 Nonwoven's case, which is a 2001 case, which is
14 also cited in my brief. And in that case the
15 Court goes a step further and says to receive
16 future notices a Petitioner has to take active
17 steps. So the presence of a host agreement
18 with the permittee is not an active step to
19 notify DHEC that it would like to be treated as
20 an affected party on all future permit
21 decisions. As stated by Ms. Linen, I'm not
22 going to go through all the dates, but
23 certainly the County who is the actual
24 Petitioner here, not the intervenors, not any
25 other member of the public who may have a



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1 complaint, had actual notice in December and in
2 January and in February. They certainly do not
3 dispute that because it's in affidavits.
4 Actually it was stated in another proceeding in
5 court, in Pickens County, by Pickens County's
6 own attorney in February of this year, and in
7 their pleadings, which I've included in our
8 Memorandum, that they are aware that -- that
9 they were made aware of a minor modification in
10 December and that they were planning to appeal
11 it, and this was in February. For whatever
12 reason, that was February 18th, they did not
13 file their appeal 'til March 23rd, I think it's
14 March 23rd of that year, and it does not meet
15 the 15 day deadline.

16 One other thing I think is very important to
17 state here is that, in this particular case, as
18 you may have noticed from our filings, this is
19 a very public dispute. There is a lawsuit
20 pending in Pickens County. It has been in the
21 newspapers. There's been a law passed related
22 to it, which I'll discuss in a minute. There
23 has been public meetings in Pickens County
24 held, organized by Pickens County's officials,
25 by the legislative delegation in Pickens



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1 County. So this is not a case where the public
2 in March would've said, I have never heard of
3 this. I have included in my brief, Exhibit G
4 to my Memo in Support of my Motion to Dismiss,
5 two newspaper articles from December of 2015
6 and January 4th of 2016 in the Greenville News,
7 where the modification is specifically stated
8 in it. In the December 28th newspaper article,
9 it says the state environmental agency received
10 a request from MRR to modify its 2007 permit
11 which has never been used by adding a synthetic
12 liner system. That's in December. In January,
13 article it says, Pickens County Council told an
14 overflow crowd Monday that it will fight a
15 company's plans to bring thousands of tons of
16 coal ash to a landfill near Liberty. The State
17 Department of Health has approved the company's
18 plan to install a synthetic liner in the
19 landfill. So there are two very public notices
20 of the minor modification. If any member of
21 the public had concern related to that, it
22 could have called any employee at DHEC related
23 to the case. It could have called DHEC's main
24 line and asked who do I talk to about a
25 landfill modification and gotten more



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1 information. I only included two articles in
2 my exhibit in an effort not to overburden the
3 Court with exhibits and filings, but I have
4 with me almost 20 other newspaper articles
5 during that exact time period from December
6 28th through February 11th. There are almost
7 20 of them. Not only are they in the
8 Greenville News, they are in the Pickens
9 Sentinel, they're in the Easley Progress,
10 they're in the Fox Carolina, they were on the
11 news showing the public meetings where hundreds
12 of Pickens County residents were in attendance
13 to discuss this exact ---

14 **MR. POLIAKOFF:** Objection and I hate to interrupt
15 counsel. If counsel is introducing new
16 material, I take the position that that opens
17 the door to discovery. The County has
18 requested discovery in this case. We need
19 discovery. I need to depose Joan Litton. I
20 need to depose several of these MRR people, so
21 if counsel is injecting new material into the
22 record, I take the position that that opens the
23 door and we respectfully request that we be
24 granted the hearing on the merits where we too
25 can enter new information into the record.



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1 **MS. KING:** Your Honor, certainly I -- first of all,
2 I have not entered this as an exhibit yet.

3 **MR. POLIAKOFF:** It was handed to the Court, Jessica.

4 **MS. KING:** Well, I'm handing it as an -- not for the
5 truth of the matters asserted in it, but as an
6 example of notice in this case, which is not
7 the merits of the case. It's about our Motion
8 to Dismiss. I'm not entering it to assert any
9 support in DHEC's decision at that time, but
10 simply as an addendum to the other newspaper
11 articles already provided to the Court and not
12 disputed by ---

13 **MR. POLIAKOFF:** May it please the Court, if counsel
14 is injecting anything new into the record, it
15 opens the door and we'd be entitled to put
16 evidence up.

17 **THE COURT:** Mr. Poliakoff, the sole issue that's
18 before me today is the jurisdiction and whether
19 you all filed a timely request and if you
20 exhausted your administrative remedies prior to
21 coming to this court. Now, how would
22 discovery aid you in ...

23 **MR. POLIAKOFF:** My point, Your Honor, is that
24 counsel is trying to inject new material into
25 the record. She's handed something up to you.



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1 I don't particularly oppose new material as
2 long as we get the opportunity for new
3 material. That's my point, Your Honor. This
4 case is screaming for testimony, Your Honor,
5 about what went on in 2014 and 2015. This is
6 an illegally obtained permit. It is an illegal
7 permit that they're trying to justify, which
8 I'll cover of course. The point is, there is
9 absolutely a necessity for a full open hearing
10 on the merits in this case and if counsel is
11 injecting new material, we need the opportunity
12 to inject information as well, information
13 crucial to this court's determination.

14 **THE COURT:** Okay. And you will get the opportunity
15 to present your case on the merits, but that's
16 if we can get beyond this motion.

17 **MR. POLIAKOFF:** And all of this is in response to
18 counsel's attempting to put new material into
19 the record at this point.

20 **THE COURT:** Okay. Thank you.

21 **MS. KING:** Your Honor, if it makes it easier for the
22 Court, we simply were -- we're using the new
23 material, which are public documents that can
24 be found on the internet, having to do with the
25 fact that this was in the newspaper. It has



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1 nothing to do with the merits of the case, it
2 only has to do with the fact that there was
3 actual discussion of this landfill, not only in
4 the newspaper but at public meetings. Moving
5 on.

6 Again, this case, while I wanted the Court to
7 understand that the due process issue is not
8 present here because of all the public notice
9 of this decision that has gone on, this case
10 really, for today, is about actual notice. And
11 it's about the fact that the Petitioner, which
12 is Pickens County, had actual notice in
13 December 15th, January 11th, February 17th and
14 again February 18th. They did not file their
15 request timely. When it comes to equitable
16 tolling, I'd like to just quickly present a
17 little bit about the cases that deal with
18 equitable tolling in South Carolina, in this
19 court, and respond to some of the cases cited
20 by the County in its brief. First of all, I
21 think the Court needs to understand that
22 Pickens County in its Affidavit of Chris Brink
23 says, you know, we're a public body, we
24 represent everybody in the County. And so, the
25 fact that our county counsel, our attorneys,



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1 our county administrator, our head of solid
2 waste all had actual notice doesn't matter
3 because we represent everybody. And I think --
4 and everybody didn't get that email from Tim
5 Eleazer. And I think that's a very important
6 point to address because I think what you need
7 to understand is, if a public body or let's say
8 a environmental group, let's say Sierra Club,
9 just to show how this could affect other
10 matters. If Sierra Club files a notice or
11 Coastal Carolina, Coastal Conservation League,
12 excuse me, like in the Port's Authority case,
13 files a case and they've missed the deadline.
14 And they say, well, wait. Wait, wait, wait.
15 But I represent lots of people and while I had
16 actual notice, and I am the person who
17 requested to be served with actual notice by
18 DHEC, I represent everybody who is affected by
19 this permitting decision. So, that person
20 didn't have actual notice. And in this
21 particular case, Your Honor, that would open
22 the door to no deadline on any permit decision
23 where a body, whether it be an environmental
24 group or a governmental body, can choose to
25 find a resident or a neighboring landowner who



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1 may or may not have gotten actual notice after
2 the fact. And honestly, Your Honor, in this
3 particular case, in response to a Motion to
4 Dismiss, as an effort to save or remedy or
5 rescue a late filing, which I think is what
6 we've got here because nobody, nobody in the --
7 no citizens of Pickens County came forward
8 until Mr. Poliakoff presented their Motions to
9 Intervene. And Mr. -- interestingly enough,
10 Mr. Poliakoff not only represents the County
11 but now represents these individuals. The
12 Court -- the Grand Bees case is the case where
13 this court has talked about intervention. And
14 I'm not going to go into it too much because we
15 have not -- we are not here to argue that
16 motion, but in it, it did say that jurisdiction
17 is required, appellate jurisdiction is
18 required, in the underlying case before the
19 Court will entertain any motions to intervene.
20 So I guess I bring that to the Court's
21 attention today solely for the purpose of
22 stating that the County cannot argue that point
23 today of particular persons who may or may not
24 have been -- gotten notice of this because the
25 County didn't perfect its appeal and does not



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1 have that right to bring them in as
2 intervenors. Again, no members of the public
3 have asked to be affected parties, so none of
4 those intervenors did get actual notice in
5 terms of a mailing from DHEC when the decision
6 was made.

7 Again, we also don't have just general due
8 process concerns here which is the only remedy
9 that Pickens County can rely on since it
10 certainly missed the deadlines. Equitable
11 relief for due process violations are allowed
12 in very unique cases. In the Fabery case, as
13 I mentioned before, this court held that
14 equitable tolling is a doctrine rarely applied
15 in South Carolina to stop the running of the
16 Statute of Limitations. The doctrine is
17 typically available only if the Claimant was
18 prevented in some extraordinary way from
19 exercising his or her rights. If the relevant
20 facts present sufficiently rare and exceptional
21 circumstances that would warrant application of
22 the doctrine, as stated in the Citizens for
23 Sandy Platt case, which I've also cited in my
24 brief, one could not complain of a due process
25 violation if he has recourse to a



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1 constitutionally administrative procedure but
2 merely decline or fails to take advantage of
3 it. And I think that is what we have here,
4 Your Honor. I think whether or not DHEC public
5 noticed this minor modification when it was
6 made in August of 2015, Pickens County had an
7 opportunity once it discovered it in December
8 and did not, and declined to take advantage of
9 that within the statutory deadline. So it
10 can't bring up due process requirements. It
11 also declined because it didn't ask to be an
12 affected party, as did no member of the public
13 in this case. Equitable tolling again is a
14 very drastic measure and it's very rare. The
15 County cites -- I'm just gonna briefly go
16 through some of the cases cited by the County
17 to address its arguments. In the Hooper
18 verses Ebenezer case, the Court acknowledged,
19 and this is the -- I think the only South
20 Carolina case cited, in the Hooper verses
21 Ebenezer case, the Court acknowledged that
22 equitable tolling should be used sparingly and
23 only where interests of justice prevails. That
24 was a nursing home case, Your Honor, where a
25 patient died and its personal representative



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1 attempted to serve the nursing home with a
2 lawsuit and the nursing home had not updated
3 its registered agent and that person had left
4 the state. So there was a fault of the nursing
5 home that resulted in the petitioner in that
6 case not being able to properly affect service.
7 So this would be an event, as stated in that,
8 beyond his or her control. That is not what we
9 have here. The County had control if it wanted
10 to be noticed of future decisions on this
11 permit and it never exercised that. The County
12 also had notice and failed to timely file its
13 appeal. I think at best, and I offer this we
14 do not -- MRR Pickens does not concede that
15 this was appropriate in this case since nobody
16 asked to be treated as an affected party, but
17 at best, the only tolling that could take place
18 would be between August of 2015 and December
19 when the County actually got notice and that --
20 after December there is no equitable need for
21 relief because they had actual notice and they
22 still missed the deadline. So I think that's
23 a very important caveat in this case because
24 the County didn't meet the deadline after
25 receiving a copy of the minor mod in January.



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1 In the Helena case cited by the County, the
2 County cites it for the proposition that
3 dismissal is a drastic remedy because it
4 deprives a person of a right to a trial. Well,
5 the Helena case is not a Motion to Dismiss
6 case. It's a Summary Judgment case, an
7 insurance case on damages. And in that case,
8 the court actually upheld the granting of
9 Summary Judgment and said that it was
10 appropriate for the lower court to decide to
11 grant Summary Judgment on the damages issue in
12 the insurance case and it did not deprive the
13 party of its due process rights. That case
14 again was a Summary Judgment case and has
15 nothing to do with a case where a party misses
16 the deadline to file an appeal. In the Ogburn
17 Matthews verses Loblolly case, that's a due
18 process case. Petitioner timely filed a
19 request for a review of an OCRM decision. As
20 you know, OCRM is a branch of DHEC. And OCRM
21 made a decision to -- that a project was
22 consistent -- there was consistency with the
23 Costal Management Plan for a wetland. And in
24 that case, the petitioner argued that the
25 procedure, the administrative procedure in



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1 place for -- to appeal a consistency
2 determination was flawed. That the law was
3 flawed. And so because the law was flawed,
4 they were not given due process. Well, this
5 case has nothing to do with whether the law is
6 flawed. Pickens County has not alleged that
7 the 15 day deadline is flawed that's in the 44-
8 1-60. What it has said is that it -- DHEC's
9 decision not to public notice it was flawed.
10 Well that's very different than arguing that
11 a procedure is flawed. And due process -- the
12 court said due process will be allowed to give
13 a plaintiff another opportunity where there's a
14 flaw in the administrative process that denies
15 someone a right to a hearing. And here, there
16 was a right to a hearing and a right would have
17 been granted had a the appropriate party,
18 including the County and any member of the
19 public, asked to be treated as an affected
20 party and notified of the minor modification.
21 Finally, on this issue, I just want to say one
22 more thing which is there's no dispute here
23 that the County and the public will have a
24 right to due process if MRR is ever granted
25 both the variance that is brought up in



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1 Petitioner's pleadings for more capacity and if
2 it ever asks to add waste, add coal ash to its
3 waste stream. As stated at the beginning of my
4 argument, there will be more time for due
5 process, more time for hearings on that issue
6 and all Pickens County brings up in its Request
7 for a Contested Case Hearing is coal ash, and
8 that it does not -- coal ash should not be
9 allowed in this landfill and the minor
10 modification allows coal ash. Well, it
11 doesn't. So we would dispute that there won't
12 be another opportunity for due process in this
13 case, if the County so wishes to exercise its
14 rights.

15 I'm gonna quickly move on to the service issue.
16 I'm not gonna discuss that for very long. I
17 think it's pretty clear and I don't think
18 there's any facts in dispute. Mr. Poliakoff
19 has responded to it with an affidavit that sets
20 forth his admission that there was a mistake
21 made in the service. He asks again for some
22 equitable consideration due to personal
23 circumstances which were very unfortunate
24 during that time period. We're not arguing
25 that those circumstances exist, we simply are



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1 stating in our request, Motion to Dismiss for
2 Lack of Proper Service that the Rule 11B and C
3 of this Court, which has its own rules for
4 service, state that the copy of a request must
5 be served, must be served on each party and on
6 the affected agency in accordance with Rule 5.
7 And Rule 5 states, if no counsel is present by
8 mail to the last known address deemed complete
9 upon mailing. 11C states the request must be
10 filed and served within 30 days after actual or
11 constructive notice. And that is -- so the
12 service issue isn't on the DHEC Board Request
13 for Review, this is on their Request for a
14 Contested Case Hearing in this Court which is
15 very different. So if the Court somehow finds
16 that the Request for Review at the DHEC Board
17 was timely, or other circumstances to uphold
18 his Request for a Contested Case Hearing, the
19 Court needs to look at the fact that MRR
20 Pickens was not properly served within the 30
21 days of constructive notice or actual notice of
22 the DHEC Board decision denying their request
23 for review. There's no dispute in the record
24 that the DHEC Board mailed its denial on April
25 21st. Everyone received it. Mr. Poliakoff



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1 properly filed his appeal here within 30 days.
2 There's no dispute about that, but there is --
3 and there's no dispute that he mailed it to a
4 2008 address of an employee of MRR Pickens
5 that, yes, was referenced in the former permit
6 but has not been used by Pickens County since
7 2008. And I've stated numerous cases to this
8 court in my brief on the service issue. There
9 are one, two, three, four, five, six, seven,
10 eight cases all in this court, all within the
11 last few years where the Court has stated that
12 this is a jurisdictional issue, that the Court
13 cannot rescue a party who does not affect
14 service. Again, Mr. Poliakoff and Pickens
15 County will argue that this is an equitable
16 issue, however the Court's -- in the Jasic
17 case, in the Tollison case and in the Blocker
18 case the Court has been pretty adamant that it
19 cannot rescue a petitioner, no matter what the
20 reason is for not properly serving the party.
21 MRR Pickens does not dispute it got notice of
22 the appeal with the assignment of Your Honor to
23 this case because Ms. -- the clerk of the DHEC
24 Board had been using the proper address so it
25 wasn't difficult for any party to find the



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1 proper address for MRR Pickens and Mr.
2 Poliakoff has used the proper address on other
3 occasions. It should be noticed Mr. Poliakoff
4 while my firm had not represented MRR Pickens
5 at the DHEC Board level since no hearing was
6 ever held, and MRR Pickens was not represented
7 by counsel, Mr. Poliakoff certainly knew that
8 we have been representing MRR in other matters
9 and did not attempt to serve my law firm
10 either. So -- and he doesn't dispute any of
11 this. So I think we just ask the Court to
12 stand by its previous cases in stating that
13 jurisdiction is not something that it can
14 rescue, despite even a desire to do so because
15 of exigent circumstances.

16 In conclusion, I just want to state for the
17 Court, this court has held in previous cases,
18 in permitting cases, as has the Supreme Court
19 in South Carolina, that there needs to be some
20 point when an applicant for a permit can
21 presume the permit process is complete. And
22 here it has been 15 months since the minor
23 modification was issued. When the County filed
24 its appeal, it had been seven months since the
25 minor modification had been issued. And I



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1 think that this certainly is enough time for
2 the Court to uphold this proposition that there
3 has to be some finality in the permitting
4 process. And to allow the public or a county
5 which has not requested notification to state
6 that due process requires it this late in the
7 game is simply -- should not be allowed.
8 Especially where the petitioners have had
9 opportunity in the past and have failed to
10 exercise their rights. Therefore, we request
11 the Court dismiss for lack of jurisdiction and
12 both for the late filing at the Board level and
13 for lack of service of the Request for the
14 Contested Case Hearing.

15 **THE COURT:** Thank you, Ms. King.

16 **MS. LINEN:** Your Honor, may I speak just for a
17 moment on equitable tolling.

18 **THE COURT:** Yes.

19 **CONTINUATION OF MOTION STATEMENT BY MS. LINEN:**

20 **MS. LINEN:** Okay. Thank you. Ms. King, you know,
21 touched on -- talked about equitable tolling,
22 and I just wanted to say a couple of things
23 about it. Pickens County on pages 23 through
24 28 of their Reply to DHEC's and the MRR's
25 Motion to Dismiss, you know, did a whole



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1 section on equitable tolling. And they quoted
2 from the Hooper case to try to support their
3 contention that equitable tolling should be
4 used. But what they failed to state in their
5 pleading is that equitable tolling is
6 judicially created and that it stems from the
7 judiciary's inherent power to formulate rules
8 of procedure. And what the Hooper case went on
9 to say about equitable tolling is that the
10 party claiming the statute of limitations should
11 be told, bears the burden of establishing
12 sufficient facts to justify its use. There's
13 also another source, 54 C.J.S. Limitations of
14 Actions Section 115, that states that the party
15 who seeks to invoke equitable tolling bears the
16 devoir of persuasion and must therefore
17 establish a compelling basis for awarding such
18 relief. Well I haven't seen anything and I
19 don't know if you have, but in Pickens County's
20 pleadings establishing a compelling reason or
21 basis why equitable tolling should be used.
22 And equitable tolling also is typically applied
23 in cases where a litigant was prevented from
24 filing suit because of an extraordinary event
25 beyond his or her control. That's also in the



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1 Hooper case. So I just want to convey to the
2 Court that equitable tolling would not be a
3 reasonable or sufficient defense to be used in
4 this case by Pickens County because they have
5 not established any compelling reason why they
6 did not file a timely appeal to the DHEC Board
7 for the decision that was issued by the
8 Department. Thank you very much.

9 THE COURT: Okay. Thank you, Ms. Linen. Mr.
10 Poliakoff?

11 MOTION STATEMENT BY MR. POLIAKOFF:

12 MR. POLIAKOFF: Poliakoff. Thank you, Your Honor.
13 May it please the Court. Your Honor, I have
14 with me today the County Attorney, Ken Roper,
15 from Pickens County. I also have the County
16 Administrator, Gerald Wilson, and other county
17 officials with me here today. This is a matter
18 which is extremely important to Pickens County
19 government, to the people of Pickens County, to
20 adjoining landowners. One thing, Your Honor,
21 that we did not hear from either MRR or the
22 Department, was any addressing of the numerous
23 violations, blatant absolute violations of
24 South Carolina regulations. Regulations that
25 applied to notice, that applied to mailing



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1 documents to adjoining landowners, that applied
2 to notice at three different stages, they
3 didn't address it. The reason, Your Honor,
4 they didn't address it is because they
5 illegally granted this permit. They violated
6 each and every regulation that I'm about to
7 tell the Court about. We've put this in our
8 brief but I would like to reiterate it to the
9 Court. What occurred in the years 2014 and
10 2015, Your Honor, was a series of clandestine
11 meetings between DHEC and MRR. It's even
12 referenced in MRR's consultant's documents,
13 that it was agreed between the two that this
14 would be a quote, minor modification. I got
15 Mr. Coleman, Mr. Kent Coleman was the director
16 of the section of DHEC at the time who had
17 granted the 2008 permit and again who granted
18 this 2015 modification that is in so much
19 contention, he admits that this permit meets
20 every single definition of major modification.
21 The meetings between DHEC and MRR that took
22 place in 2014 and 2015 were all about calling
23 it minor. The reason being, if it's minor then
24 they don't have to give public notice, based on
25 some of the regulations. There are two other



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1 regulations that don't even talk about that.
2 Even if it's a minor modification, notice is
3 required, absolute -- newspaper publications
4 that were never done, mailings to adjoining
5 landowners that were never done, notice to
6 affected parties, never done. And that's why
7 they didn't address it, Your Honor, because
8 these were blatantly violated. The -- quoting
9 from the CEC, CEC is Civil and Engineering
10 Consultants, which is MRR's consulting firm,
11 what occurred in 2014 and 2015 was that a
12 series of engineering reports, these were no
13 small reports, these are reports, at least a
14 couple of them were in the order of 100 pages
15 of engineering documents and designs and
16 drawings, never once given to the County. This
17 is -- the County is their partner. They've got
18 a host agreement with the County and they're
19 doing this behind the County's back. Never
20 once giving this series of engineering designs
21 and drawings to the County, who has a
22 partnership agreement and this host agreement.
23 They've got a development agreement with them
24 and a host agreement. So their own host and
25 development partner, they never give these



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1 documents to. They meet with DHEC, a series of
2 meetings, never once telling the County or the
3 public or adjoining landowners we're meeting to
4 change this permit. Here's what their
5 consultants think, this is in the record,
6 Exhibits 1, 2 and 3 to my brief, quote, during
7 recent meetings between MRR and DHEC, it was
8 confirmed that a modification of the Class Two
9 landfill permit to meet the requirements of
10 Class Three landfills would require a minor
11 permit modification. This is no minor
12 modification. I'll get into the regulatory
13 definitions of major and minor, but here it is
14 documented that through these series of
15 meetings, MRR and DHEC, at least Mr. Kent
16 Coleman of DHEC, are meeting and confirming,
17 we'll call it minor to escape notice to the
18 public, to escape notice to adjoining
19 landowners, to escape notice to the County and
20 to anybody who's an affected party. So, Your
21 Honor, and I'll get to the specific regs that
22 they absolutely violated, in fact MRR violated
23 them and the Department violated them.

24 **THE COURT:** Mr. Poliakoff, before you get to that,
25 let's address the ---



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1 MR. POLIAKOFF: Thank you, Your Honor, and I know
2 where you're headed ---

3 THE COURT: --- issue that we're here dealing with,
4 which is the Motion to Dismiss and the basis
5 for those motions.

6 MR. POLIAKOFF: And I intend to address that and to
7 tell -- what I'm telling Your Honor exactly to
8 that point

9 THE COURT: Okay.

10 MR. POLIAKOFF: And the point is is that all of
11 these notices to landowners are required by
12 regulations, never took place. They're
13 required by the regulations, which they
14 violated. The notices to the public through a
15 series of newspaper ads at three different
16 times, it's required by the regulations, never
17 done. And so they're talking about why didn't
18 anybody request in writing anything -- excuse
19 me. Heard numerous times today that nobody
20 requested in writing. That takes a lot of --
21 it takes a lot of courage to stand up and
22 suggest that people didn't request in writing
23 when nobody was informed and it wasn't just not
24 informing them, there were major, major things
25 going on. These major engineering plans were



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1 being submitted. Major meetings between the
2 Department and MRR behind the back of the
3 County, no information to anybody. And so both
4 counsels today made a huge point to Your Honor
5 about the fact that nobody had requested in
6 writing to be informed. Nobody in Pickens
7 County had any reason to know that all this was
8 going on because of their violations of these
9 regulations. Had they complied with the
10 regulations, Your Honor, I suggest to you they
11 would've had many, many people request in
12 writing to be informed. Not only request in
13 writing, but they would've requested the public
14 hearings that are provided for in the
15 regulations. They would've requested the
16 public comment that's provided for in the
17 regulations. This proposal to change this
18 Class Two landfill into basically a Class Three
19 landfill is no minor thing. It is hugely
20 opposed in Pickens County by the citizens, the
21 adjoining landowners and the county government
22 itself. And so, what I'd like to get into,
23 Your Honor, is how fatally flawed this is. The
24 reason that the permit, the 2015 modification,
25 is fatally flawed is because of this series of



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1 specific blatant violations of the regulations
2 pertaining to notice to all these people that
3 they say didn't request anything in writing.
4 It's important that they tell you -- it's
5 important to them to tell you that nobody
6 requested anything in writing. The reason
7 nobody requested anything in writing is because
8 this was all hidden from all these people.
9 Hidden from the public, hidden from the
10 adjoining landowners, hidden from the County,
11 hidden from anybody who's an affected person.
12 So they want you to bless an illegal permit,
13 Your Honor. An illegal permit, illegal because
14 of these blatant and intentional failures of
15 giving notice. So first of all, there are
16 three stages of notifications to public,
17 adjoining landowners, county and affected
18 persons. All three of them were violated.
19 Going back a bit, 2008 a permit is granted.
20 Everybody was in agreement. I think everybody
21 in this room and all the people they represent
22 were in total agreement of what was issued in
23 2008. What was issued in 2008 was in accord
24 with the host agreement and with the
25 development agreement between MRR and Pickens



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1 County. That said that in Pickens County, MRR
2 would develop a Class Two C&D landfill. C&D is
3 construction and demolition. There's actually
4 -- and it also includes LCD, land clearing
5 debris. C&D, LCD there's actually an appendix
6 in the regs, appendix one, that lists
7 specifically what can go into a C&D, LCD
8 landfill and it's mostly pretty benign stuff,
9 construction debris, tree stumps, tree limbs,
10 etcetera. In the 2008 permit, to which
11 everybody in this courtroom had agreed, was a
12 provision, quote, all other wastes prohibited.
13 With that caveat that's in the 2008 permit,
14 everybody here was in agreement. The county
15 was in agreement. MRR was in agreement. The
16 Department was in agreement. Normally after
17 getting a permit, landfill companies proceed
18 typically within the next few months, typically
19 within the next year. MRR choose not to do
20 anything from 2008 until 2014. The economy was
21 down. We understand. They wrote DHEC a letter
22 pretty much every year saying, we'd like an
23 extension because the economy is down, we're
24 gonna delay this. No construction was done.
25 And by the way, I'm pretty sure that no



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1 construction has been done yet today so when
2 they tell you how many months it's been,
3 there's been no construction to this landfill.
4 I think there's been a little bit of grading
5 and some trees cut down, but no construction of
6 anything yet, Your Honor. And yes, there is a
7 lawsuit because MRR has sued Pickens County and
8 five individually named members of the County
9 Planning Commission for 30 million dollars. So
10 that's what's pending in Common Pleas Court at
11 this time, it's MRR's suing the County over
12 this. So for six years and into seven years,
13 2015, nothing takes place with regard to this
14 landfill permit. Behind the backs of the
15 County, in the year 2014, MRR starts meeting
16 with DHEC and they start submitting these
17 detailed engineering plans. Again, I'm talking
18 engineering plans on the order of 100 pages
19 each. They'd submitted at least two of those
20 major plans by the end of 2014. You'll see in
21 one of the affidavits, I believe it's the
22 Affidavit of Chris Brink that's attached to our
23 Memorandum, that in January of 2015, MRR even
24 came before the County Planning Commission and
25 said there are no changes from the 2008, and no



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1 liner is needed. This was such underhanded,
2 misrepresentation, Your Honor. They gold --
3 and we've got the transcript. We not only have
4 the transcript, we have the video -- the audio
5 recording and the Affidavit of Chris Brink who
6 talks about this where ---

7 **THE COURT:** One second, Mr. Poliakoff. Ms. Linen?

8 **MS. LINEN:** Your Honor, I'd like to object to this
9 argument because again, Mr. Poliakoff has not
10 gotten to the issues in this -- why we're here
11 before you today, which is a Motion to Dismiss
12 on the grounds that the ALC lacks jurisdiction
13 and that Pickens County did not exhaust their
14 administrative remedies. He's also said,
15 several times, that the Department should have
16 public noticed this decision, but he's not --
17 well, I'll just rest on what I just said about
18 it. He's not arguing the motion basically and
19 I'll comment on the other things he said later,
20 but I'm objecting to his argument.

21 **THE COURT:** Okay. Mr. Poliakoff ---

22 **MR. POLIAKOFF:** May it please the Court, I promise I
23 will tie it in, but everything I'm headed
24 toward is about public notice, notice to
25 landowners, notice to the County, notice to



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1 affected persons. I intend to tie all of this
2 together to talk about the blatant failures of
3 notice and that's why nobody requested in
4 writing to be informed. It was all done behind
5 their backs.

6 **THE COURT:** Ms./Linen? I'm sorry, Mr. Poliakoff.
7 Ms. Linen?

8 **MS. LINEN:** Your Honor, I just want to add
9 something. What Mr. Poliakoff is -- continues
10 to reference is public notice for a major
11 modification. We issued a decision for an
12 application for landfill for a minor
13 modification, an existing landfill. They had
14 a minor modification to it. There's no
15 requirement for public notice for minor
16 modifications. He's talking about major
17 modifications.

18 **MR. POLIAKOFF:** Oh, Your Honor, I -- please let me
19 address that. Please let address that. The
20 violations of regulations are so blatant on the
21 point of major and minor and I've got Mr. Kent
22 Coleman, the Director of DHEC at the time, to
23 admit this is a major modification. I'll get
24 to it. He admits it. I submitted his
25 deposition testimony and I'd like to quote from



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1 it. It's a major modification requiring notice
2 to adjoining landowners, requiring notice to
3 the public, newspaper notices, mailings, none
4 of these were done.

5 **THE COURT:** But, Mr. Poliakoff, that goes to the
6 crux of the case, of the substance of the case
7 ---

8 **MR. POLIAKOFF:** Yes, Your Honor.

9 **THE COURT:** --- is what that goes to. What we're
10 here is on the Motions to Dismiss, on the
11 Respondents' motions.

12 **MR. POLIAKOFF:** The County is here on behalf of not
13 only county government but also on behalf of
14 the public that never, to this day, has had
15 notice, Your Honor. The required publications,
16 the required newspaper publications to the
17 public have never occurred to this day as we
18 sit here. They talk about all the notice
19 perhaps for some type of constructive notice
20 that the County got because the County did its
21 own FOIA request in December of 2015 and we can
22 talk about whether that's any kind of actual
23 notice or not to the County. But the point is,
24 the public never got notice, the adjoining
25 landowners never got notice and the regulations



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1 require it. And if Your Honor will allow me,
2 I'd really like to get into how and why they
3 violated these regulations. The violations of
4 these regulations all pertaining to notice are
5 blatant and they go to the core, not only of the
6 merits, Your Honor, but also into this Motion
7 to Dismiss. The Motion to Dismiss is all about
8 why didn't people file things previously. The
9 reason that most people didn't file things
10 previously is because to this day, no adjoining
11 landowner has ever gotten a newspaper
12 publication, absolutely required by the
13 regulations. No adjoining landowner has ever
14 gotten a mailing, absolutely required by the
15 regulations. No member of the public has
16 gotten a newspaper -- and the regulations list
17 a long list of things about the nature of the
18 facility, the nature of the change, what's
19 being done, none of this ever provided. And so
20 the County is here on behalf of all those
21 people, as we've provided, and we've also
22 issued five affidavits of five of these
23 adjoining landowners who say they wish for the
24 County to speak for them, to advocate for them
25 and that they've never, to this day, have



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1 gotten the proper newspaper notifications or
2 mailings or notice of any kind.

3 **THE COURT:** Mr. Poliakoff, in December county
4 officials met with DHEC officials. At that
5 point, they learned about the modification that
6 was -- they learned about -- they got actual
7 notification that yes, there is a modification.
8 There was a permit issued. Why didn't the
9 County file their Request for Review at that
10 point?

11 **MR. POLIAKOFF:** Here's what occurred. Neither DHEC
12 nor MRR had notified the County of anything,
13 Your Honor. This permit was already granted
14 for four months, already finalized for four
15 months. There are three stages of getting a
16 modification like this to a permit. One,
17 there's an application. It's supposed to be
18 noticed to public, adjoining landowners and
19 county and affected people. Nothing done.
20 Stage two, when a draft permit is issued, new
21 round of notice and publications, mailings to
22 adjoining landowners where people can request a
23 public hearing, opportunity to be heard and
24 comment. Never done to this day. Number
25 three, when the final permit, the final agency



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1 decision is issued, another round of
2 opportunity, including a notice required by the
3 statue, excuse me, required by the regulations,
4 as to what to do if there's a final agency
5 decision and how many days anybody has and what
6 the procedure is. Never done. And so what
7 occurs is the County gets wind that MRR wants
8 to put coal ash into the C&D landfill. County
9 is wondering what's going on and there's rumor
10 talk that maybe DHEC has approved something.

11 **MS. KING:** Your Honor, he still hasn't answered your
12 question.

13 **MR. POLIAKOFF:** They do a FOIA request.

14 **MS. KING:** I would object that you've asked him why
15 after December, they didn't file it and he's
16 still not answering that question.

17 **MR. POLIAKOFF:** I'm being interrupted by counsel,
18 Your Honor. I'd like to get there please.

19 **THE COURT:** Okay. Ms. King, I'm going to give him
20 an opportunity ---

21 **MS. KING:** Yes.

22 **THE COURT:** --- to flush out his argument.

23 **MR. POLIAKOFF:** So, in December the County does a
24 FOIA request. They meet and they're given, I
25 think it's a couple of boxes of documents. And



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1 in the couple of boxes of documents is this
2 permit modification from 2015 and a year and a
3 half of activity and engineering reports that
4 they've never seen. County is trying to figure
5 out what are we supposed to do with this and
6 they see that it's been granted already for
7 four full months. They never had any of this,
8 of the regulatory required opportunities to be
9 heard or to do anything. So the County is
10 looking at, well this thing's been granted for
11 four months, what are we supposed to do?
12 Somebody from the County asks for something in
13 January, some point in January apparently DHEC
14 mailed something. So DHEC mails them something
15 else in January. I would argue that at least
16 there was some notice but never the formal
17 notice to this day required by the regulations,
18 and that's to Pickens County. To this day,
19 they have never done any notice, any mailings,
20 any kind to adjoining landowners, to the public
21 or to other affected persons. And the reason
22 there are no affected persons writing in asking
23 to be notified is because they didn't tell
24 anybody. This permit has been sitting there
25 for seven years. Everybody thought it was



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1 fine. Everybody was in agreement with the 2008
2 permit. It sits for seven years and they're
3 saying nobody requested in writing to be
4 notified because they didn't -- they hid from
5 the public, they hid from the adjoining
6 landowners, they hid from the County the fact
7 that this effort to change this from a Class
8 Two to a Class Three landfill and to add a
9 liner to add conditions that no Class Two
10 landfill in the history of South Carolina has
11 ever had. Mr. Coleman admitted this would be
12 the first landfill in South Carolina, a
13 commercial Class Two landfill, to have Class
14 Three features including a liner and other
15 Class Three features. You would be approving
16 -- they want you to approve not only an
17 illegally obtained, fatally flawed permit but
18 the most unusual landfill permit and the first
19 of its kind in the history of this state.
20 That's what they want Your Honor to do is to be
21 an apologist for wrongful behavior by both the
22 permittee and the Department. And that
23 shouldn't be. So the County arguably, by
24 sometime in January, gets some paperwork but
25 it's not the right paperwork that the



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1 regulations call for. So I'd like to get into
2 the regulations, of the specific regulations
3 that I'd like to cite to you, that were
4 specifically violated by both MRR and the
5 Department to get this permit changed from the
6 good permit issued in '08 that everybody agreed
7 to, to this illegally obtained permit in the
8 year 2015. The public has never had the
9 opportunity, never had any opportunity to be
10 publicly heard or to do anything to comment, to
11 oppose it, to offer objections. All that was
12 thwarted.

13 THE COURT: But, Mr. Poliakoff, we can't get to that
14 issue until we get beyond did the ---

15 MR. POLIAKOFF: That issue, Your Honor, is crucial
16 to the question before you, which is the Motion
17 to Dismiss. The Motion to Dismiss is based on
18 the fact that people didn't request a review
19 earlier. I'm trying to get to the reason
20 people didn't request a review earlier. People
21 didn't request a review earlier because they
22 were illegally thwarted by MRR Pickens, LLC and
23 the Department colluding, Your Honor.

24 THE COURT: Yes, but what your argument is, is that
25 we have got a major modification as opposed to



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1 a minor modification that was approved by DHEC.

2 MR. POLIAKOFF: I can prove it, and I've got the
3 admission by the director who signed the
4 document that it's a major modification.

5 THE COURT: But, before we can get to that proof,
6 we've got to get beyond these Motions for
7 Dismissal which is why didn't Pickens County
8 file their request for review earlier than ...

9 MR. POLIAKOFF: It was already a done deal at that
10 time. The permit was already issued four
11 months. The final agency decision was already
12 issued for four months. They assumed it was a
13 done deal. It was a done deal. They didn't
14 have any of the appropriate opportunity to be
15 heard, nor did these -- this notice quote --
16 notice in quotation marks that they received in
17 December when the Department hands them a
18 couple of boxes of documents and when something
19 else gets mailed in the month of January, does
20 not comply with the notice that's required by
21 the regulations, which is why I'd like to
22 address the regulations further. That doesn't
23 comply with what the regulations require in
24 terms of notice. And so perhaps the County did
25 receive paperwork that included this in the



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1 middle of December and again in January. I
2 think they made a specific request for the
3 crucial document so I would argue at least
4 January 11th or thereabouts is the date,
5 there's probably a few days after that, that
6 they actually received that paper. The County
7 was trying to figure out what to do, Your
8 Honor, with a permit that there was already a
9 final agency decision for four months before
10 they got word one about it.

11 **THE COURT:** Ms. Linen?

12 **MS. LINEN:** Your Honor, I hate to interrupt again,
13 but would it help if the Department conceded
14 that the regulations that Mr. Poliakoff keeps
15 putting forth to the Court that -- well, what
16 I want to say is that, that he's right that if
17 it was a major modification, we didn't do the
18 right thing. We'll concede that, if it was a
19 major modification. But we can't get to
20 whether it was a major modification until the
21 case is tried on the merits. The regulations
22 that he continues to cite to this court, refer
23 to a major modification. The Department issued
24 a modification that was for a minor, it was a
25 minor modification. It says it in the decision



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1 that was issued. That's what they object to,
2 the fact that we labeled it, we characterized
3 it as minor, they feel like its major, and
4 that's something that we can all resolve once
5 it gets to a case on the merits. But we're not
6 -- as you have said, we're not there yet.
7 We're here to discuss the Motion to Dismiss.
8 He continues to say that the Department and MRR
9 colluded. Well, if that's the case, then the
10 collusion ended. It was over when we issued
11 the decision in August. They waited until
12 December, I'm sorry until March, to appeal.
13 They knew about it, they had actual notice in
14 December, in January, in February. So, as
15 you've asked him this question several times,
16 why did you wait until March to appeal the
17 case. This was again, I'll just state this was
18 a minor modification issued by DHEC, not a
19 major modification. The Department concedes
20 that if it was a major modification, then he is
21 absolutely correct. The Department did not
22 follow the correct public notice procedures,
23 but we did not issue a major modification, it
24 was a minor modification. And I reiterate my
25 objection to his continuing to go down this



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1 path and failing to address the issues that are
2 before you today. Thank you, Your Honor.

3 **MR. POLIAKOFF:** Your Honor, I can address those
4 please.

5 **THE COURT:** Yes.

6 **MR. POLIAKOFF:** First of all, whether it's a major
7 or minor, I've got Mr. Coleman to admit in his
8 deposition that this was a major modification.
9 He admitted -- I've quoted these in my brief so
10 I won't go through all of them, but he admitted
11 -- and this is crucial to today's hearing, Your
12 Honor, because it has to do with notice. The
13 difference between calling it major and minor
14 is all about the notice. It was a major
15 modification that they called minor to
16 specifically avoid notice to public, to
17 adjoining landowners, to the County, to
18 affected persons. So it's extremely major, and
19 I appreciate the Department's admission of
20 their violation, but here's Mr. Coleman's
21 testimony. He admits that this was an
22 alternate design. He admits that it's an
23 alternate liner design. He admits that it's a
24 design change. All these cites are quoted in
25 my brief. He admits that it's a design change.



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1 He admits it's a new design. He admits the
2 design change falls under the definition of
3 major modification and is not included in the
4 definition of minor modifications. That's
5 Exhibit 4, page 105. Coleman admits that major
6 modification includes design changes and that
7 this is a design change. He admits that major
8 modification requires notice to affected
9 persons, adjacent landowners, concerned
10 parties, local governments and the public. All
11 this is in my brief. He admits that for major
12 modifications, there should be mailing of
13 notice to the County. Not done. He agrees
14 that affected persons, this is Coleman, the
15 Director of DHEC, who signed both the '08 and
16 the 2015 modification, the term affected
17 persons includes local governments and host
18 local governments. He agrees that it's a major
19 modification. He agrees that when there is a
20 major modification, the public is supposed to
21 receive notice, Exhibit 4, page 107. Further
22 testimony of Mr. Coleman, my question to him,
23 and again this was a design change, that is a
24 change from '08 to 2015 was a design change as
25 you stated in your letter, isn't it? Answer,



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1 yes. He admits it was a design change. Next
2 question. And design change again is mentioned
3 under the definition of major modification but
4 not under the definition of minor modification.
5 Answer, yes. He admits it's a new design for
6 the landfill. I asked him about the type of
7 changes. He says, he's changing it essentially
8 the same design as a Class Three. Now this
9 exchange is Exhibit 4, page 109 to page 111.
10 He admits that the -- question, and that is
11 basically the change from '08 to 2015
12 modification was essentially the same design as
13 a Class Three, is that right? Yes. Question,
14 so in other words, what we're doing is changing
15 a Class Two by adding Class Three features, it
16 became essentially the same design as a Class
17 Three. Answer, the design became very similar
18 to a Class Three, yes. I asked him again if
19 alternate designs would be a major
20 modification, is that correct? Answer, that's
21 what the definition says, yes. So Mr. Coleman,
22 the Director at DHEC, with authority who's
23 issued the '08 permit, the one that everybody
24 agrees to, who also issued the 2015 permit
25 which is obtained in secrecy behind the backs



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1 of the public, the landowners, the County and
2 everybody ---

3 **THE COURT:** But, Mr. Poliakoff, that still goes to
4 substance of the case.

5 **MR. POLIAKOFF:** Your Honor, to this day the public
6 has never received notice. That's why no
7 member of the public asked for anything during
8 the permitting process. They've never had
9 notice. Now, it was relevant when counsel for
10 MRR and counsel for DHEC mentioned many times
11 to you today that not a single person requested
12 in writing to be notified. The reason not a
13 single person requested in writing to be
14 notified, it's obviously relevant or they
15 wouldn't have told you about it, the reason no
16 person requested in writing to be notified is
17 because of hiding of all of these proceedings
18 from them, illegally, Your Honor. This permit
19 was issued illegally due to the actions of MRR
20 and the Department. Now the regulations, and
21 there are two regulations, Your Honor. I
22 appreciate Ms. Linen mentioning that some of
23 the regulations are regarding the issue of
24 major verses minor and what's required. Two of
25 the regulations I've cited don't make that



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1 distinction and were absolutely violated. It's
2 R 61-107.19, Part IV.H, permit application
3 requirements. This particular section applies
4 to all modifications of Class Two. Doesn't
5 distinguish between major and minor. It says
6 all modifications require a determination of
7 need. Not done. Require determination of
8 consistency, consistency with state and local
9 solid waste management plans. Never done.
10 Requires a disclosure statement to include
11 contiguous landowners. Never done.

12 **THE COURT:** Mr. Poliakoff, I think Ms. Linen has, in
13 essence, acknowledged that those procedures
14 weren't followed, but DHEC's position is that
15 it was a minor modification and what the issue
16 before me is those Motions for Dismissal. You
17 are really going to the substance of the case,
18 which is something that would have to be
19 determined if we get to the actual contested
20 hearing.

21 **MR. POLIAKOFF:** And, thank you ---

22 **THE COURT:** What I'm wanting to hear today is, first
23 off, the County received notice, there was some
24 argument that they received notice earlier than
25 December that DHEC had issued that permit.



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1 Then there is also, and I think the County's
2 also acknowledged that they met with DHEC in
3 December of 2015 at which point there was
4 discussion about the permit. They were later
5 provided a copy of the permit. My question to
6 you is, when they received those notices, is
7 what they are contesting now is the issuance of
8 that permit, when they received notices that
9 that permit had been issued, why -- what took
10 them so long to file their request for review
11 with DHEC's Board.

12 **MR. POLIAKOFF:** As far as county government, it was
13 a done deal. It was already a final agency
14 decision at that point in time. I agree with
15 Your Honor, it would have been better to have
16 filed that request sometime in January,
17 February or thereabouts once they ---

18 **THE COURT:** Well why wasn't that done? Let's get to
19 the arguments on your equitable tolling.

20 **MR. POLIAKOFF:** The County was trying to figure out
21 what to do. And by the first of February, Your
22 Honor, MRR is suing the County and the five
23 individuals who are on County Planning
24 Commission for 30 million dollars. So they're
25 trying to deal with all of that. That's when



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1 I was brought into the case, was early
2 February, to try to defend the County and these
3 five people from this 30 million dollar
4 lawsuit, which is still going on with MRR
5 saying because we can't put coal ash into this
6 landfill, we're being deprived of all this
7 profit. But, Your Honor, as to the issue of
8 the County, whatever notice the County may have
9 gotten December 15, by getting a box of paper
10 and by whatever mailing occurred on January 11,
11 still doesn't comply with the requirement of
12 the type of notice they're suppose to receive.
13 And that's why I would like to get to the
14 regulations a bit more as to what type notice
15 it's supposed to be. This is required by
16 regulations.

17 **THE COURT:** Yes, but that is when DHEC, if it was
18 determined by DHEC, that it was a major
19 modification.

20 **MR. POLIAKOFF:** Which, Your Honor, is inseparable
21 from the motion before you because everybody
22 was deprived of notice because of their
23 illegally calling it minor. I have got so much
24 information already documented, including Mr.
25 Coleman's admission, blatant admission, that



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1 this was a major modification that they called
2 minor. The reason for calling a major
3 modification minor is to specifically deprive
4 everybody from notice. And to this day,
5 whatever the County got in December and
6 January, first of all, A, that didn't comply
7 with what was required to be provided even to
8 the County. And B, to this day, no adjoining
9 landowner has ever gotten a publication in the
10 newspaper, no adjoining landowner has ever
11 gotten the mailings that are required by the
12 regulations and the public has never gotten any
13 of the above either. And, the public hearings
14 that are supposed to take place and the public
15 comment periods, none of that got done. Excuse
16 me. Excuse me, I'm just handed a note from the
17 county attorney, Your Honor, and I will read it
18 verbatim. And this is part of the reason why
19 we need a hearing on the merits. Quote, when
20 we met with DHEC in December, they told us the
21 notification period was over and the permit was
22 issued. So, Your Honor, I would suggest that
23 we need a hearing on the merits to flush out
24 testimony such as that. And again it says, we
25 were told by DHEC the notification period was



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1 over and the permit was issued. And that's why
2 they did not.

3 **THE COURT:** Yes, but subsequent to that, you did
4 file a Request For a Review. What changed?

5 **MR. POLIAKOFF:** I became involved. I was initially
6 hired simply to defend the County from this 30
7 million dollar lawsuit that MRR has brought.
8 And once I got that taken care of -- we had a
9 motion hearing within days of my being retained
10 as attorney to defend the County. It was a
11 huge Motion Hearing that occupied much of
12 February, and once we got into the case better,
13 I figured out that we should really oppose this
14 because this was illegally obtained. But
15 again, whatever the County was furnished in
16 December, and whatever the County was furnished
17 in January does not meet with the regulatory
18 requirements for what's to be furnished, which
19 is supposed to include, Your Honor,
20 instructions for requesting a Request for
21 Review, not provided, and what the time periods
22 are, not required (sic). The regulations
23 require those things. Instead of providing to
24 the County those instructions ---

25 **THE COURT:** Mr. Poliakoff, I'm sorry. I hate to



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1 interrupt you again but Ms. Linen is standing
2 and I'm going to hear what she has to say.

3 **MS. LINEN:** Your Honor, Mr. Poliakoff continues to
4 reference adjoining landowners and that they
5 weren't noticed about this decision, but he
6 represents Pickens County.

7 **THE COURT:** Yes.

8 **MS. LINEN:** And I know he has a Motion to Intervene,
9 but that has not been addressed and they have
10 not intervened yet. So, I mean, I think that,
11 you know, that he should contain his comments
12 to his clients and not to clients that have not
13 been brought into this case as of yet.

14 **MR. POLIAKOFF:** Your Honor ---

15 **THE COURT:** Mr. Poliakoff, I do agree that we're
16 only -- the only parties to this action at this
17 point is Pickens County and I have held your
18 motion in abeyance on whether those adjoining
19 landowners would be allowed to ---

20 **MR. POLIAKOFF:** If I might just add briefly, Your
21 Honor, the adjoining landowners, in each of
22 their affidavits, say we do want the County to
23 advocate for us. I mean, these are people who
24 don't have the ability to hire attorneys to
25 come fight this. These are -- if you look at



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1 the houses that surround this landfill that's
2 on the verge of receiving thousands of tons of
3 coal ash, they don't have the ability to hire
4 their own attorneys. They want the County to
5 advocate for them and that's why they're asking
6 the County in their affidavits to please
7 advocate for them. And so, we are here today,
8 Your Honor, because ---

9 **MS. KING:** Your Honor, may I address something?

10 **THE COURT:** Mr. Poliakoff. Ms. King?

11 **MS. KING:** May I just address that statement. We
12 are not going to address every statement or
13 falsity that the attorney is stating because
14 they all go to the merits of this case.
15 However, statements like on the verge of
16 disposing coal ash, they're inflammatory, they
17 have nothing to do with this case. There is no
18 facts in the record to support that. And they
19 simply -- we just simply can't allow it and not
20 stand and object to them because there is no
21 evidence that we are on the verge of disposing
22 coal ash. This case is not about coal ash,
23 it's about a liner and it's about -- this
24 motion is about the fact that Pickens County
25 did not timely file its appeal. He has



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1 conceded that. He has said the County was
2 figuring out what to do, in his own words.
3 Well the County had plenty of time to issue --
4 January 11 to withdraw a development permit
5 that was issued to my client and our lawsuit
6 has to do with their legal action to pull our
7 development permit in Pickens County. It is in
8 the record. I have added it as an exhibit to
9 my Motion to Dismiss. Pickens County was
10 actively pursuing actions against my client but
11 simply did not request final review of this
12 issue. And that's what we're here for today.
13 And I just -- I don't want to go further on
14 every falsity that he's stated, but I would
15 like the Court to know.

16 **MR. POLIAKOFF:** Your Honor, based on that and
17 counsel's using the term falsity, we have a
18 method here of resolving this entire matter in
19 the next one minute and counsel for MRR said
20 this is not about coal ash. If MRR will
21 stipulate on the record right now, and the
22 Department concur, that coal ash will not be
23 deposited in this particular landfill, we can
24 fold up tents and go home. Will you do that on
25 the record today?



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1 **MS. KING:** Do I need to respond to that, Your Honor?
2 I certainly can say that we will not do that
3 today but that this case is about a minor
4 modification for a liner and not coal ash.

5 **MR. POLIAKOFF:** Your Honor, I was just accused of
6 falsity by suggesting coal ash and now counsel
7 -- when counsel is put to it ---

8 **THE COURT:** Mr. Poliakoff, that goes to the
9 substance of the case which we're not dealing
10 with that today.

11 **MR. POLIAKOFF:** I just wanted to comment that I was
12 accused of some falsities because of bring up
13 this coal ash, and counsel has told the Court
14 that this is not about coal ash. Yet, they
15 still want coal ash in this Class Two landfill.
16 Class Two landfills are for construction and
17 demolition and LCD. It got changed so that
18 they can put coal ash in it illegally, Your
19 Honor. And so, yes, that -- first of all, in
20 further response to your question, the County
21 was told by -- first of all, the permit was
22 issued in August of 2015 unbeknownst to County,
23 adjoining landowners, public, affected parties
24 or anybody. So in December, yes, the County
25 gets paperwork from DHEC. That does not comply



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1 with what the regulations require to be
2 furnished to the County. Furthermore, the
3 public, the County is here attempting to
4 advocate on behalf of the public and on behalf
5 of adjoining landowners, neither the public nor
6 the adjoining landowners have to this day ever
7 received the notices required by the regs.

8 Now, not all the regs make the distinction
9 between major and minor either. There are two
10 regs, which I've cited in my brief, that apply
11 to these changes before us, regardless of
12 whether it's major or minor. R 61-1 ---

13 **THE COURT:** Mr. Poliakoff, I do apologize for
14 interrupting you again, but we still, before we
15 can even get to that issue, we've still got to
16 -- what I'm going to rule on as a result of
17 today's hearing is whether I can even address
18 if this case is properly filed ---

19 **MR. POLIAKOFF:** Okay.

20 **THE COURT:** --- or if the County missed it by not
21 filing their request for review timely with the
22 ---

23 **MR. POLIAKOFF:** If I can get to the regulations and
24 what the regulations do require in terms of
25 notice to the County, I can show Your Honor,



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1 first of all, that the paperwork furnished to
2 the County in December and January does not
3 comply with what the regulations require. So
4 that does not trigger the County's time
5 running. Second, the County attorney tells me
6 when we met with DHEC in December, they told us
7 the notification period was over and permit was
8 issued. So my decision was to let's give this
9 a try anyway because I determined that this was
10 illegally obtained. And, Your Honor, counsel
11 -- there's been a lot of talk of Hooper v.
12 Ebenezer. Hooper v. Ebenezer is by the South
13 Carolina Supreme Court. It is good law. It's
14 cited in my brief. Quote, the equitable power
15 of a Court is not bound by cast iron rules but
16 exists to do fairness and is flexible and
17 adaptable to particular exigencies so that
18 relief will be granted when in view of all the
19 circumstances to deny it would permit one party
20 to suffer a gross wrong at the hands of the
21 other. Equitable tolling may be applied where
22 it is justified under the circumstances.
23 Hooper v. Ebenezer. There's also the Ogburn
24 Matthews v. Loblolly Partners case. Also the
25 Stono River Environmental versus DHEC. Both



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1 those cases also allowed for cast iron rules to
2 give way to fairness so that people can be
3 heard. Your Honor, they're asking this Court
4 to be an apologist for illegal behavior by MRR
5 and the Department. I say it's illegal because
6 they violated the regulations. That's a valid
7 statement. I'd like to show Your Honor further
8 how they violated the regulations. If I may,
9 Your Honor, if you will indulge me just a bit
10 further, there are two particular regulations
11 that don't distinguish between the major and
12 minor issue. 61-107.19 Part IV.H applies to
13 all modifications. That particular one does
14 not distinguish between the major and minor.
15 It requires determination of need. That's
16 never been done, Your Honor. That's aside from
17 a notice issue. There's been no determination
18 of need for this major modification. A
19 determination of consistency, that's never been
20 done, Your Honor. And a disclosure statement
21 to include contiguous landowners, it's never
22 been done. This permit is fatally flawed.
23 They didn't follow what the regulations
24 require. Additionally, the applicant, that's
25 MRR, had the regulatory duty to issue public



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1 notice, a newspaper publication and affidavit
2 of the permit application. So yes, in my brief
3 I've cited a number of regulations blatantly
4 violated by both the Department and MRR, but
5 this one that I just cited to you makes no
6 distinction between major and minor. There's
7 yet another one that makes no distinction
8 between major and minor, 61-107.19, Part
9 IV.I.2. Prior to permits for major
10 modification and for new construction, this is
11 a new construction, new construction because
12 there has been no construction as of the time
13 of filing of this. I don't think there's been
14 any construction yet anyway. I got Mr. Coleman
15 to admit there had been no construction so that
16 any construction from this point forward would
17 be new construction. And in that reg that I
18 just cited, that there's notice requirement
19 again, never done and the Department makes the
20 draft permit available for public review and
21 comment, never done. Complete failure of both
22 those regulations which I cited to you. And
23 the other regulations that are blatantly
24 violated with no notice to the County, no
25 notice to the public, no notice to adjoining



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1 landowners, no notice to affected persons. And
2 again, affected persons include people who
3 request in writing to be notified. There can
4 be no people writing in requesting to be
5 notified if they have no information that
6 anything new is taking place. The old permit
7 in '08 was seven years earlier. Nobody told
8 anybody that this major thing, changing this
9 from a Class Two to a Class Three landfill --
10 and doing away with a crucial clause by the
11 way. The old clause in the 2008 permit said,
12 all other wastes prohibited. It was only C&D,
13 LCD, all other wastes prohibited. When they
14 did this modification, changing basically a
15 Class Two landfill into a Class Three, they
16 took out that all important sentence and
17 replaced it with any other waste approved by
18 the Department. That is major and that all
19 required public notice to county, adjoining
20 landowners, affected persons, none of who knew
21 that they were affected because there had been
22 this secrecy instead of the regulatory required
23 notice. So everything I'm suggesting to you,
24 yes, Your Honor, I understand that it goes to
25 the merits, but it also goes to the issues of



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1 notice. And again, what's required by these
2 regulations to be given to any of these people
3 includes a formal notice there has been a
4 change in writing. And it's supposed to
5 include, once the final agency -- even if one
6 glosses over the fact that the public comment
7 period didn't take place, the public hearing
8 didn't get requested because nobody knew to
9 request it, all of the opportunity for public
10 input was thwarted by this clandestine activity
11 between these two colluding parties, which this
12 court should not bless, Your Honor, because
13 what occurred in 2014 and 2015 was subterfuged,
14 it was underhanded, and worse MRR was even
15 misrepresenting directly to county officials.
16 But, Your Honor, by these blatant violations
17 the County never got, to this day never has
18 gotten, what the regulations require. Once you
19 get to the final, the third step in the process
20 -- the first step being that there is an
21 application with public notice about that.
22 Second stage is draft permit with notice to all
23 these people about that. Third stage is agency
24 final review. There's supposed to be a mailing
25 and there's supposed to be instructions on how



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1 many days you have to appeal, or to request the
2 review actually, and what the procedures are.
3 That procedures document and the number of days
4 is required by the regulations. I've cited
5 them here. The Department has never done that.
6 MRR has never done that. They've still to this
7 day, even with the County -- and again, yes,
8 I'm representing the County. The county wants
9 to advocate for the public as well and the
10 adjoining landowners as well, but even with
11 whatever paperwork was given to the County in
12 December and January, still doesn't comply with
13 what the regulations require.

14 **THE COURT:** And I don't think anyone denies that.

15 **MR. POLIAKOFF:** If it doesn't comply with the
16 regulations, then, Your Honor, we're entitled
17 to our hearing on the merits.

18 **THE COURT:** Mr. Poliakoff, what their -- the motion,
19 and you all can correct me if I'm wrong about
20 this, the motion is based upon the County's
21 failure to timely, when they received actual
22 notice in December, in January that this
23 modification permit had been issued by DHEC,
24 that the County then did not within 15 days of
25 receiving that notice, file something with the



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1 Board.

2 MR. POLIAKOFF: That they received the paperwork
3 that included the physical documents of the
4 permit modification.

5 THE COURT: Now, wouldn't you agree that that is
6 notice?

7 MR. POLIAKOFF: No, ma'am, because it doesn't comply
8 with what the regulations require.

9 THE COURT: But we're not talking about the
10 Department's alleged failure to -- any failures
11 on the part of the Department or MRR at this
12 point. We're talking about the County and the
13 ---

14 MR. POLIAKOFF: The County never received the notice
15 required by the regulations. The County did
16 receive paperwork in December, apparently
17 received some more crucial paperwork in
18 January, but it didn't receive the notice and
19 opportunity as to what to do with it. That is
20 -- they're supposed to -- regulations require
21 it, Your Honor. I can cite the ones that
22 require it.

23 THE COURT: And I understand that ---

24 MR. POLIAKOFF: After the final ---

25 THE COURT: --- Mr. Poliakoff, but you're here



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1 opposing the permit.

2 **MR. POLIAKOFF:** The County ---

3 **THE COURT:** This permit ---

4 **MR. POLIAKOFF:** Your Honor ---

5 **THE COURT:** And my question to you is, did the
6 County timely file the request for review of
7 this particular permit, the one that was
8 issued?

9 **MR. POLIAKOFF:** Yes, because what was provided in
10 December and January does not comply with
11 notice requirements. What was issued was yes,
12 they gave them a physical piece of paper,
13 either December or January that was the 2015
14 permit modification. The regulations require
15 more. The regulations require that they be
16 notified with the document about their appeal
17 rights or a request for review rights, and how
18 many days. None of that was furnished to them,
19 Your Honor. And so no, what was given to the
20 County in December and January is not
21 sufficient notice. They received some
22 paperwork but they didn't receive what the
23 regulations required. And beyond that, of
24 course as I've said, is the adjoining
25 landowners, the public, other affected persons



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1 never got any kind of notice, not zero for
2 those people.

3 **THE COURT:** Ms. Linen?

4 **MS. LINEN:** Your Honor, I think that what -- Mr.
5 Poliakoff is muddling the issue very well
6 because the notice that you continue to ask him
7 about, I believe is the notice that the
8 Department would have issued to Pickens County
9 when we issued the decision. The notice that
10 he continues to respond back to you with, are
11 the notices that apply to major modification
12 decisions.

13 **MR. POLIAKOFF:** And, Your Honor ---

14 **MS. LINEN:** And so when you ask him well, you know,
15 did you get notice. And he says, no, he never
16 got notice. And what he's -- what I discern
17 that he's saying is that, well they were
18 supposed to public notice it in the newspaper.
19 They didn't do that. They were supposed to let
20 the adjoining landowners know and they didn't
21 do that.

22 **THE COURT:** No, I understand exactly what he's
23 arguing ---

24 **MS. LINEN:** Okay.

25 **THE COURT:** --- Ms. Linen.



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1 MS. LINEN: All right.

2 THE COURT: His argument is that it's a major
3 modification and they should ---

4 MS. LINEN: Right.

5 THE COURT: --- have received all of these notices
6 as required by regulations.

7 MS. LINEN: Okay. I just want to say though -- I
8 want to point you to, excuse me, I just want to
9 point you to, I think in one of my briefs --
10 here it is. On the Respondent DHEC's Reply to
11 Petitioner Pickens County's Amended and
12 Supplemental Memorandum in Opposition, I have
13 an attachment or Exhibit A to that pleading
14 that shows via email that Tim Eleazer, which I
15 mentioned earlier, emailed to Mr. Gerald
16 Wilson, who was an employee of the County, the
17 actual decision that was issued. So, and that
18 was on January 11th, 2016 so he contends -- Mr.
19 Poliakoff contends that they didn't get notice,
20 but they did get notice, in writing. Now on
21 December 15th, 2015 they got verbal notice,
22 which is actual notice. So they were actually
23 notified verbally and in writing in December
24 and in January of the decision which is what
25 we're here to talk about today, the decision



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1 that was issued by DHEC. Thank you, Your
2 Honor.

3 **MR. POLIAKOFF:** Your Honor, the crucial regulation
4 is this one. It's Part G. Let me get the
5 exact cite for Your Honor. In this one -- this
6 is why I'm able to tell you that the County
7 never got notice that qualifies with what the
8 regulation requires. It's R 61-107.19, Part
9 I.D.2. We go down to G, "Notice of Department
10 Decision on the Permit. After the close of the
11 public comment period on the draft permit and
12 the public hearing, if held, the Department
13 will issue a Department Decision. Notice of
14 the Department Decision will be sent by
15 certified mail, return receipt requested to the
16 applicant." Never done. Notice of the
17 Department's -- well, excuse me, that's to the
18 applicant. "Notice of the Department's
19 Decision will be sent by regular mail, unless
20 certified mail is requested, to affected
21 persons who have asked to be notified," none of
22 them because nobody was ever informed, "to all
23 persons who commented in writing to the
24 Department and all persons who attended the
25 public hearing, if held." Quote, "The



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1 Department will also publish notice of the
2 Department Decision in a newspaper of general
3 circulation in the area of the proposed"
4 facility (sic). Violation, never done. Quote,
5 "The Department's notice will include
6 instructions on how to request a final review
7 conference and the time frame for filing such
8 a request." Never done. G of that regulation
9 I cited was never done. So, yes, Your Honor we
10 concede the County got some paperwork in
11 December. Got probably the crucial paperwork
12 sometime in the middle of January, however it
13 still did not -- that furnishing of paper still
14 did not comport -- didn't comply with G. So
15 they haven't gotten the notice that the
16 regulations require. So you're asking me today
17 why didn't the County file? Well, A, the
18 County never got the notice that's required by
19 the regulation. And B, of course, the argument
20 about the adjoining landowners, affected
21 persons, the public, the mailings to those
22 people, the newspaper publications, etcetera.
23 But, as far as just the County in isolation,
24 the County to this day has never received
25 what's required by G of that particular ---



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1 **THE COURT:** But, isn't that because the Department
2 contends that what they issued was a minor
3 modification permit, which did not require that
4 degree of notice.

5 **MR. POLIAKOFF:** Actually, Your Honor, and again
6 there are two regulations that don't make the
7 distinction between major and minor. One of
8 them being 61-107.19, Part IV.H, and the other
9 being 61-107.19, Part IV.I.2, that don't make
10 the distinction between major and minor. Those
11 weren't complied with either, regardless ---

12 **THE COURT:** And that may ---

13 **MR. POLIAKOFF:** --- of major/minor.

14 **THE COURT:** And that still is something that goes to
15 the substance of the case. In this instance,
16 what we're looking at is the permit that was
17 issued by the Department. We're looking at
18 that permit.

19 **MR. POLIAKOFF:** And ---

20 **THE COURT:** And once the County learned of that
21 permit, when did the County file their Request
22 for Review with the Board?

23 **MR. POLIAKOFF:** When you ask quote, did they learn
24 of it, which is a generic type of phrase and a
25 layman's type of phrase, they had information



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1 from paperwork, some in December, I think more
2 crucial documentation the middle of January.
3 However, what they got still does not comport
4 with what the notice that's required. And so,
5 yes, I understand your point that much of what
6 I'm saying is also relevant in the merits part
7 of this case, which we certainly request to be
8 had, but it's also relevant because of notice.
9 Everybody keeps asking why didn't the County
10 provide -- why didn't the County act earlier?
11 The answer to that is the County never got the
12 notice it was supposed to. So we have to go to
13 the merits here, Your Honor. The Kent Coleman
14 testimony answers all those questions. He
15 admits, he's the man at DHEC who issued the two
16 permits in question, he admits this was a major
17 modification. To now call it minor is
18 disingenuous, it's frankly dishonest and it's
19 simply wrong. They're trying to get you to
20 bless an illegally obtained permit. But going
21 back to your question, Your Honor, I understand
22 your question about notice to the County.
23 Whatever the County got in December and January
24 does not comply with what the regulations
25 required.



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1 MS. KING: Your Honor, may I address that -- just
2 that one issue?

3 THE COURT: Yes.

4 MS. KING: Thank you. We're here on whether the
5 County under 44-1-60, not the DHEC regulations
6 on a permit, met the requirements of the 15
7 days on the notice required by statute. In
8 that statute, this court in all the cases I
9 have cited there are two or three that state
10 that email -- the Court has broadened to allow
11 notice where it will benefit a party who says,
12 look I got it by email, I got it this way. The
13 Court has acknowledged that as long as you have
14 an actual copy of the decision in your hand --
15 Coastal Conservation verses Ports Authority,
16 the seminal case on notice, it went to the
17 Supreme Court, they got it by email when they
18 requested it that way and there was never an
19 issue of whether that's adequate notice. The
20 issue was when did they -- whether they had to
21 -- DHEC had to provide that simultaneous with
22 the notice to the permittee, which the Court
23 said it does. It has to be simultaneous in
24 that case because in that case it was a burden
25 to them and it took them longer to appeal it.



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1 But in that case, they did it within 15 days of
2 being emailed it. In this case, Pickens County
3 did not.

4 **MR. POLIAKOFF:** If I may comment on that particular
5 case, Your Honor. That case was very, very
6 fact specific and involved a group that had
7 been previously involved. In this case,
8 neither the County, the landowners, the public,
9 affected persons, none of them had been
10 involved in the process. So that case is
11 easily distinguishable as being fact specific
12 to that particular situation. In this case, to
13 this day the County has never received the
14 notice that would have sparked its legal duty
15 to file in 15 days. To this day as we stand
16 here, they've never received anything that
17 triggers that 15 day period of time. And
18 again, reiterating again, on behalf of the
19 landowners, the affected persons, the public in
20 general, they never got the mailings, the
21 newspaper notices, etcetera. So all these
22 issues I'm telling you, yes, Your Honor, those
23 are important for the merits part of the case,
24 but they're extremely relevant to the issue
25 that your asking me and that's why didn't the



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1 County file something sooner. It's all part of
2 it. And when counsel says we're here today
3 only on the Motion to Dismiss, we're here
4 because MRR wants you to give blessings to an
5 illegal permit, Your Honor, and this Court
6 should not be an apologist for wrongful
7 behavior such as that. Thank you.

8 **THE COURT:** Thank you, Mr. Poliakoff. Ms. King do
9 you have any ...

10 **MS. KING:** I have a -- I will let DHEC go first.

11 **THE COURT:** Okay, I'm sorry Ms. Linen.

12 **REPLY BY MS. LINEN:**

13 **MS. LINEN:** Oh, it's okay. Thank you, Your Honor.
14 I just want to make a few comments. First of
15 all, I want to state for the record that the
16 Department does not admit that we committed
17 any violations at all. What I stated earlier
18 was that if Mr. Poliakoff is correct and it was
19 a major modification issued. The Department
20 contends that, you know, we issued a minor
21 modification. But if he is correct that it is
22 a major modification, then we should have
23 followed those public notice requirements that
24 he, you know, kept citing to you. But as is
25 the case, a minor modification does not require



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1 any public notice whatsoever. The Department
2 would have noticed Pickens County if they had
3 been requested to be notified as in 44-1-
4 60(E)(1). But they didn't request that, so
5 therefore they found out later and the notice
6 that they received on December 15th, which was
7 a verbal notice, was actual notice to them.
8 And Mr. Poliakoff, you know, I think basically
9 his reasoning for why they didn't appeal it
10 within 15 days, I think I heard him say that he
11 came into the case a little bit late. He also
12 stated that they were pondering, you know,
13 trying to figure out what to do. But I'd like
14 to point out that even though he may have come
15 onto the case, you know, later than maybe he
16 should have, that the County has an attorney.
17 They have a county attorney. And so, if the
18 County knew that this decision had been issued,
19 then they had legal counsel to advise them as
20 to how to proceed. The fact that they didn't
21 proceed timely, I think Ms. King, you know,
22 stated this earlier, that ignorance of the law
23 is no excuse. And he -- Mr. Poliakoff also
24 mentioned the fact that the Department, you
25 know, when we send out decisions that we send



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1 out notice how to appeal things. Well, that's
2 a courtesy, that's not required by regulation.

3 It's not mandated that we do that. And I'd
4 also like to point out that the appeals
5 process, which is 44-1-60, it said that it's
6 been in effect since July 1st, 2006, ten years.
7 So, that information as to how to appeal a
8 Department Decision has been out there for
9 more than ten years. I guess the main point
10 that I want to make is that Pickens County had
11 ample opportunity to follow the appeal
12 procedures that are laid out in 44-1-60. On
13 one occasion they waited 211 days, the next
14 occasion, I think it was 80 something days and
15 then it was 54 days that they waited past the
16 time, the 15 day deadline, statutory deadline
17 period to appeal this decision. And if this
18 issue of coal ash perhaps coming to their
19 county was such a big issue, once they found
20 out about the decision, one would think that
21 they would work fast and not slow to try to get
22 ahead of this situation. But to wait 221 days
23 -- 211 days after you have notice of a minor
24 modification that you think was a clandestine,
25 collusion type situation, to wait that long to



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1 appeal the decision it just seems a little bit
2 disingenuous, for lack of a better word, you
3 know, for them to say that they were pondering
4 what to do. Your Honor, Mr. Poliakoff or
5 Pickens County has not presented anything to
6 this Court today to give a viable excuse or
7 reason or reasonable excuse for why they waited
8 211 days after they had actual notice of this
9 decision to file an appeal with the DHEC Board.
10 And based on that, because they did that, they
11 have divested this Court of jurisdiction to
12 hear this matter. And they did not exhaust the
13 administrative remedies. They are egregiously
14 untimely in filing this appeal. And based on
15 all of that, Your Honor, we respectfully
16 request that this matter be dismissed in its
17 entirety. Thank you very much.

18 **THE COURT:** Thank you. Ms. King?

19 **REPLY BY MS. KING:**

20 **MS. KING:** Thank you, Your Honor. I will be brief.
21 I just wanted to address a couple of issues
22 raised by Mr. Poliakoff. First of all, as I
23 stated earlier, there are a lot of statements
24 that we disagree with. We are not going to
25 address all of those statements because they



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1 really do go to the merits of this case, and
2 this case is about timeliness and jurisdiction.
3 I do though want the Court to note that in our
4 Motion to Dismiss, we do cite to Kent Coleman's
5 deposition as well because Mr. Poliakoff had
6 used it in his Request for a Contested Case
7 Hearing and it is in the record although we do
8 reserve our right to object to use of it in
9 that it is not a part of this proceeding and
10 that deposition was never finalized. However,
11 there are statements Mr. Poliakoff has said
12 repeatedly today that Kent Coleman says, this
13 was a major modification, and Kent Coleman
14 simply did not say that. Kent Coleman said on
15 page 9 of my Memo, I have excerpts from that
16 deposition and I also included it as Exhibit F
17 to that filing, the question presented to Mr.
18 Coleman was would MRR's 2008 permit allow them
19 to accept coal combustion residuals. He said
20 yes. I say, so let's talk about the
21 modification. It appears it states that this
22 is an issuance of a modified Class Two landfill
23 permit. Was this a minor or a major
24 modification? And he says, we issued this
25 modification as a minor modification. And I



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1 asked him why. And he says, yes, I can. And
2 he goes through the fact that it is more
3 environmentally protective and anytime there's
4 a modification that is more protective, they do
5 not see that as a major modification requiring
6 public comment. So he sees this as an upgrade
7 and he goes on to talk about that. Obviously
8 the deposition was long and there are many
9 excerpts from it, but I simply bring that to
10 the Court's attention to say that we dispute
11 that Mr. Coleman ever admitted that this was a
12 major modification since Mr. Poliakoff puts so
13 much importance on that deposition. Mr.
14 Poliakoff admits that they got the permit, the
15 permit modification. It's not a permit, it's
16 not a new permit. A new permit or a major
17 change to a permit or modification requires all
18 the stuff he talked about because it's new,
19 it's time -- they want to let everybody know
20 that this landfill is coming or a major change
21 to a landfill is coming. And, there's no
22 dispute that in 2008 DHEC did that and MRR did
23 that. There was public notice in the paper,
24 there was public notice by mailing to all the
25 residents and that's why all the cases I cited



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1 earlier state that if -- where there's a --
2 it's very important. Where there's a change to
3 a permit or a renewal of a permit or a re-
4 issuance of a permit, the time the permit is
5 first issued is your chance, that's for all the
6 -- your time to come, talk, get public noticed,
7 have opportunities for hearing and then tell us
8 if you're worried that sometime in the future
9 there could be a change to this permit, that
10 you want to know about it. And nobody in this
11 room for Pickens County made that request of
12 DHEC as required by the law. So, for him to
13 say that there has never been the notices
14 required in the regulations is not true because
15 they done in 2008. Mr. Poliakoff says the
16 County did not file it within 15 days of
17 December 28th or January 11th, whichever date
18 this court would like to use because the County
19 was trying to figure out -- he says county
20 trying to figure out what would've -- what to
21 do. County trying to figure out what to do.
22 And I think that's a very important statement
23 for this court. I think the County was doing
24 a lot at that time. And as stated on January
25 11th, the County issued a letter withdrawing my



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1 client's development permit. Mr. Poliakoff,
2 actually he doesn't know whether we've begun
3 construction, well we certainly haven't begun
4 construction because the County has withdrawn
5 our development permit. There's no
6 construction. There's no landfill built.
7 There's no coal ash coming into that landfill
8 on the verge as he states. So I think it's
9 very important just to clarify for the Court
10 that what we're here for today is whether the
11 County, on receiving notice, actually timely
12 filed their appeal and they simply don't
13 dispute that in any statements made today.
14 Therefore, we would request that this court
15 dismiss the case for lack of appellant
16 jurisdiction on those grounds and for lack of
17 service.

18 THE COURT: Thank you.

19 REPLY BY MR. POLIAKOFF:

20 MR. POLIAKOFF: Your Honor, if I may very, very
21 briefly just respond. I'll try to be extremely
22 brief, Your Honor.

23 THE COURT: Okay.

24 MR. POLIAKOFF: Just a couple of things. Again, the
25 papers provided to the County in December and



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1 in the middle of January simply do not comply
2 with what the regulations require, particularly
3 Section G of the regulation I cited to you that
4 requires not only a mailing but specific
5 information about request for review, what the
6 rules are and how many days, etcetera. The
7 opposite was provided to the County by DHEC.
8 The opposite being DHEC told them the
9 notification period was over and it was final.
10 So rather than give them what was required by
11 the regulation, which is what the rules are in
12 how many days and what the procedure is, DHEC
13 gave them the exact opposite, which was sorry
14 the notification period is over, this is
15 final. And that's what deterred the County.
16 I feel certain that was the primary deterrent
17 to the County. So when the regulations
18 required things, like the information sheet
19 about right to request for review, etcetera,
20 and it's extremely important, but instead again
21 they gave them the opposite and that is this is
22 over, it's final. No construction has been
23 done yet on this. There would be no prejudice
24 to anybody if this Court were to simply reopen
25 the notice period. If all of this was validly



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1 done, let's reopen the notice period. Let's
2 have public comment, public hearing, the
3 Department in its great wisdom could still
4 choose to grant this modification if it chose
5 to, but if they do, let's have them do it where
6 everybody that supposed to be involved, gets
7 involved. Where people who live next to this
8 thing that's on the verge of getting thousands
9 of tons of coal ash, which is extremely
10 environmentally problematic with toxic dust of
11 all kinds. I've submitted affidavits by
12 experts, by the way, Abner Bangash who teaches
13 at Duke University, Ph.D., one of the most
14 world renowned ---

15 **MS. KING:** We're going to have to object to this
16 line.

17 **MR. POLIAKOFF:** It's in my exhibits, Your Honor.
18 I'm talking about how these local people are
19 affected. Your Honor, we request that these
20 people who were supposed to get notice, get
21 notice, reopen the comment period. Since
22 there's been no construction of any landfill to
23 this date, they delayed seven years before they
24 even started to re- -- the act upon the old
25 2008 permit, reopen the notice period. There's



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1 no harm, no notice to anybody. I appreciate
2 MRR counsel citing Kent Coleman, some pages of
3 Kent Coleman when he was asked direct
4 questions. It seemed favorable to them but
5 then if Your Honor reads particularly 98 to
6 110, specifically page 107, I asked him, this
7 was a design change, that is from '08 to 2015
8 was a design change as you stated in your
9 letter, isn't it? Answer, yes. And design
10 change again is mentioned under the definition
11 of major modification but not under the
12 definition of minor modification. Answer, yes.
13 This is why all of this screams for Your Honor
14 to hold a full hearing on the merits. If
15 parties are taking two different positions on
16 what Mr. Coleman has said in his deposition,
17 then this Court needs to make those factual
18 determinations about whether this was major or
19 minor. And because of that, that's not only
20 the merits of the case, it's entirely, entirely
21 deeply involved with these failures of notice,
22 even the failure of the appropriate notice to
23 the County. In December and January, although
24 they did get papers, that was not what the
25 regulations require they get. Additionally,



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1 Your Honor, I'll close with this, the general
2 nature of equitable relief is when the facts
3 and circumstances show that justice,
4 fundamental fairness and due process are being
5 denied. That's what's happened here, Your
6 Honor. So many regulations were violated.
7 They're in my brief. Absolutely there's been
8 no defense to that. They violated those
9 regulations. These people are entitled to be
10 heard. There's no harm to anybody to reopen
11 the notice period and let them be heard. So we
12 request, Your Honor, that at some point in the
13 near future, you grant our motion to allow the
14 interventions by the five people who issued
15 affidavits to intervene. We request that you
16 allow discovery. We request that you give us
17 a hearing on the merits. Thank you.

18 **COMMENT BY THE COURT:**

19 **THE COURT:** Thank you, Mr. Poliakoff. Okay. Okay,
20 that completes the arguments. I'm gonna take
21 this matter under consideration. Dismissal is
22 not something that I take lightly and I think
23 -- nor do I think any other judge with the ALC
24 takes lightly. So I'm going to take some time
25 to just deliberate on this before I make a



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1 final decision. And, Mr. Poliakoff, I hear
2 your argument and it is very -- and it's
3 troubling that the Department would grant
4 modification to this landfill particularly --
5 to a landfill particularly and not provide
6 notice to the County where the landfill is
7 located. That's something that I find
8 personally troubling, but I am still having to
9 apply the law and not my personal opinions in
10 matters such as this. But, having said that,
11 I am going to adjourn the hearing. And thank
12 you all for coming. And I should have an order
13 to you all this week because we've been kind of
14 sitting on this for awhile. I should have an
15 order to you all between now and the Christmas
16 holiday.

17 **MS. LINEN:** Thank you, Your Honor.

18 **MR. POLIAKOFF:** Thank you, Your Honor.

19 **THE COURT:** I won't have you wait long.

20 **MR. POLIAKOFF:** I wish you and all your staff a
21 wonderful holiday.

22 **THE COURT:** The same to you all.

23 **MR. POLIAKOFF:** And my colleagues on the other side
24 of the room, I wish everyone a happy holiday.

25 **MS. LINEN:** The same to you.



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1 (There being nothing further, the hearing adjourned
2 at 12:21 p.m.)
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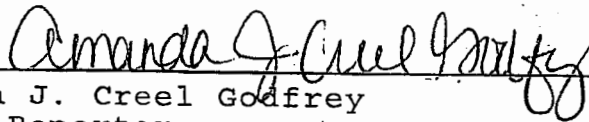
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CERTIFICATE

This is to certify that the hearing consisting of one hundred eleven (111) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on December 30, 2016.



Amanda J. Creel Godfrey
Court Reporter

Notary Public for South Carolina
My Commission Expires: August 17, 2021



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South Carolina Administrative Law Court (SC ALC)
Request for Contested Case Hearing FORM
Mail to: 1205 Pendleton St., Suite 224, Columbia, SC 29201

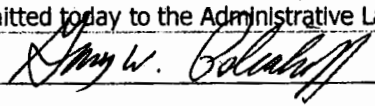
Last Name: Pickens County		First:	Middle:	☐ Mr. ☐ Mrs.	☐ Miss ☐ Ms.	Docket No. (To Be Completed by ALC)
Mailing Address: 222 McDaniel Avenue, B-1		City: Pickens		State and Zip: SC 29671		
Home Number:	Work Number: 864-898-5856	Cell Number:		*E-Mail Address:		

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

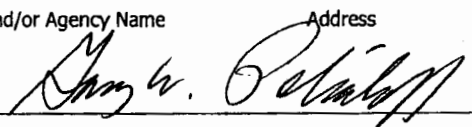
REPRESENTATION

Are you representing yourself? ☐ Yes ☒ No	
Are you represented by an Attorney? ☒ Yes ☐ No	Name of Attorney: Gary W. Poliakoff
Attorney Mailing Address: P.O. Box 1571	City, State and Zip: Spartanburg, SC 29304
Attorney Work Number and Cell Number: 864-582-5472 w; 864-205-6755 c	Attorney E-Mail Address: atty@gpoliakoff.com

CASE INFORMATION

Name of Agency that Issued the Decision: (Example - Dept. of Revenue, Dept. of Insurance, DHEC) DHEC	
In order to have your case processed, you must attach the agency decision. Is it attached?: ☒ Yes ☐ No	If no, please explain:
Date the decision was issued:	Date the decision was received: April 21, 2016
Please provide a brief statement regarding why the hearing is being requested and the relief sought: Pickens County filed a Request for Final Review (attached) with S.C.D.H.E.C., requesting that DHEC rescind a Permit Modification dated August 10, 2015, regarding Facility named Highway 93 Class 2 Landfill, for Permittee MRR Pickens, LLC, as such Permit Modification was unlawfully issued. DHEC declined review. Pickens County requests Hearing.	
Payment via ☒ Check ☐ Money Order ☐ Cash for \$ submitted today to the Administrative Law Court via	(applicable filing fee pursuant to ALC Rule 71) is being ☒ U.S. Postal Service ☐ Hand-delivery
 X Your Signature or Signature of Attorney	Date May 19, 2016

PROOF OF SERVICE (MUST BE COMPLETED)

Your Name: Gary W. Poliakoff	Date: 5/19/16	City: Spartanburg State: SC
I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing on all other parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):		
S.C.D.H.E.C.	c/o Etta R. Williams Linen, Esq.	2600 Bull Street
Office of General Counsel	Columbia, SC 29201	
Name and/or Agency Name	Address	City, State and Zip
MRR Pickens, LLC	11743 Trails End Lane	Charlotte, NC 28078
Name and/or Agency Name	Address	City, State and Zip
 X Your Signature or Signature of Attorney	Date May 19, 2016	

Attention: All cases filed in the Administrative Law Court are subject to the Rules of Procedure found at the Court's website www.scalc.net or from the Clerk of Court. Failure to follow these rules may result in dismissal of your case.

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Mark S. Lutz
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Ann B. Kirol, DDS
Secretary



Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment
South Carolina Board of Health and Environmental Control

2600 Bull Street, Columbia, South Carolina 29201 · Telephone: (803) 898-3309 · Facsimile: (803) 898-3393 · lisa.longshore@dhec.sc.gov

BOARD:
R. Kenyon Wells
Charles M. Joye II, P.E.
L. Clarence Batts, Jr.
John O. Hutto, Sr., MD
William Lee Hewitt, III

April 21, 2016

U.S. Mail – Certified

9214 8969 0099 9790 1404 5178 18
Gary W. Poliakoff, Esq.
Poliakoff & Associates
Post Office Box 1571
Spartanburg, SC 29304

U.S. Mail

Christopher T. Roof, Supervisor
MRR Pickens, LLC
5842 Fairington Place, Suite 1
Raleigh, NC 27609

Electronic Mail Delivery

Etta R. Williams Linen, Esquire
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 16-RFR-15, MRR Pickens/Hwy 93 C&D Class 2 Landfill – Modification of Permit No. LF2-00003

Dear Counsel of Record and Mr. Roof:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law

Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

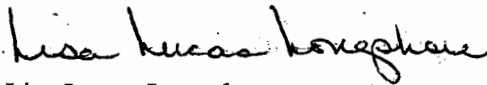
A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scale.net>. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,



Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

**BEFORE THE
SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL**

In Re:

**REQUEST FOR
FINAL REVIEW
(BOARD REVIEW)**

Staff Decision to Grant
Permit Modification dated
August 10, 2015

Facility: Highway 93 C&D Landfill
Permittee: MRR Pickens, LLC
Class 2 Landfill
Permit No. LF2-00003

Pickens County, an "affected person" pursuant to S.C. Code Section 44-1-60(E), hereby requests Final Review by the South Carolina Board of Health and Environmental Control, of the Staff Decision to grant a Permit Modification dated August 10, 2015.

1. Staff Decision at Issue:

Permit Modification to Permit No. LF2-00003, dated August 10, 2015, by Division of Mining and Solid Waste Management, Bureau of Land & Waste Management.

Attached hereto:

- Copy of the August 10, 2015 Permit Modification (issued contrary to law and which must be voided).
- Copy of the Permit issued November 3, 2008 (which is valid and remains valid as issued November 3, 2008).

2. Timeliness of this Request for Review:

(A) Pickens County is an "affected person," per S.C. Code Section 44-1-60(E), in that Pickens County is the duly qualified and approved Host Local Government in regard to Permit No. LF-2-00003, and based upon its Host Agreement and Development Agreement with the Permittee,

and based upon the Pickens County Solid Waste Management Plan, revised in 2013. The Department of Health and Environmental Control is fully aware of Pickens County's status as Host Local Government, and is fully aware of and in possession of the Host Agreement and Development Agreement in question.

(B) Pickens County requests this Review on behalf of (1) Pickens County, a governmental entity duly existing and authorized to govern; and (2) on behalf of the affected public, particularly those members of the public who reside in Pickens County, and those members of the public who reside within one mile of the Landfill in question in Pickens County and who will be immediately affected adversely by dust and ash, groundwater contamination, air pollution, decrease in property values, and other resulting problems and damages, should the purported Permit Modification of August 10, 2015 be allowed to stand.

(C) Despite its status as an "affected person," Pickens County has never, to this date, received formal Notice of the purported Permit Modification dated August 10, 2015, nor has the Department ever mailed the staff decision in question, or the Permit Modification dated August 10, 2015, to Pickens County. Pickens County only learned of such staff decision and purported Permit Modification recently, after controversies between Pickens County and the Permittee arose.

As no formal Notice to Pickens County ever occurred, nor any mailing of the staff decision or Permit Modification of August 10, 2015 by the Department to Pickens County, this Request for Final Review is timely.

To date, Pickens County has never received formal Notice or mailing of the decision in question.

(D) Illegality of the Failure to Notify Pickens County

- (1) The Permit, validly issued on November 3, 2008, was for a C&D Landfill, and which contained the following special condition:

This permit is limited solely to the disposal of items listed in Appendix I of R. 61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill.

The above Permit issued November 3, 2008, with the above Special Condition, is in accord with the Pickens County Solid Waste Management Plan, and is in accord with the agreements and representations between Pickens County and the Permittee.

- (2) The purported Permit Modification dated August 10, 2015 made major modifications to the original Permit, which substantially alter and change the facility and its operations, including but not limited to:

- (a) An alternate design that varies from the design prescribed in the relevant Class 2 Regulations R. 61-107.19, Parts I and IV).
- (b) An alternate design that includes the addition of a liner, which was not previously permitted (and not approved by Pickens County).
- (c) The addition of Class 3 design features to the Class 2 Landfill Permit (done for the purposes of adding wastes which were not previously approved by Pickens County, and which in fact

would violate the Pickens County Solid Waste Management Plan).

- (d) The addition of Class 3 operational features to a Class 2 Landfill Permit (also done for the purpose of adding wastes which were not previously approved by Pickens County, and which in fact would violate the Pickens County Solid Waste Management Plan).
- (e) The alternate designs of the purported Permit Modification of August 10, 2015, as well as the changes that substantially alter the facility and its operations, constitute a "Major Modification," per R. 61-107.19, Part I, B. 48.
- (f) Despite the alternate designs and the changes that substantially alter the facility and its operations, the Department characterized these changes as a "minor modification." Such characterization was in violation of R. 61-107.19, Part I, B. 48., and the result was to deprive Pickens County and the public of any Notice, any involvement in the application and in the permitting modification process, and of the right to comment and review.
- (g) Per R. 61-107.19, a "major modification" of a Permit requires Notice to "affected persons" (here, Pickens County), and to the public, and requires opportunity for public review and

comment. The failure to provide Notice to Pickens County and to the public was a further violation of relevant regulations.

- (h) That, according to MRR's engineering consultants:

During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of R. 61-107.19 Part V. Class Three Landfills would require a minor permit modification.

("Site-Specific Hydrogeologic Investigation Report," prepared by MRR Pickens, LLC, by Civil & Environmental Consultants, Inc., d. 12-15-14, received by S.C. DHEC December 16, 2014).

Note: The above-referenced report, and several subsequent reports by MRR' consultant, were submitted to S.C. DHEC in 2014 and 2015, without any Notice whatsoever to Pickens County or to the public. Only recently, since controversies between Pickens County and MRR have arisen, has Pickens County learned of such reports.

- (i) That the Department and MRR apparently had meetings and discussions, regarding the changing of this Class Two Permit to meet Class Three Permit features, wherein DHEC and MRR agreed to call these changes a "minor modification"

despite the clear and unequivocal true qualification as a
“major modification.”

(j) That the apparent purpose of MRR and the Department meeting, conducting discussions, and “confirming” that this would be a “minor modification,” was to avoid Notice to Pickens County and to the public.

(k) The above actions of the Department and of the Permittee were in violation of relevant Statutes and Regulations, as referenced above.

(l) That, due to the failure of Notice and mailing, as required by relevant Statutes and Regulations, Pickens County’s Request for Review is timely.

3. Grounds for Rescinding the Staff Decision (Permit Modification of August 10, 2015):

(A) The Pickens County Solid Waste Management Plan, revised 2013, prohibits:

(i) Class Three Landfills in Pickens County. (A purpose purported Permit Modification was to add Class Three design features to a permitted Class Two Landfill).

(ii) “Special Wastes” are prohibited. (Coal Ash, a/k/a Coal Combustion Residuals (CCR), require special handling, due to propensity to create dust, and due to propensity to contain toxic substances, and propensity to contaminate groundwater and surface water, and therefore qualifies as “Special Wastes,” per S.C. Code Section 44-96-390, and per the definition

of "Special Waste" contained in the Pickens County Solid Waste Management Plan).

(B) The Department has already determined, per the Demonstration of Need Regulations, that no "Need" (as defined by the DON Regulations) exists for a Class Three Landfill in Pickens County. The efforts by the Department and MRR to add Class Three design and operational features to a permitted Class Two Landfill constitute an attempt to circumvent, and/or to render null and void, the DON Regulations.

(C) That Pickens County had determined to enter into agreements with the Permittee MRR, including a Host Agreement and other agreements, for the Permittee to operate a Landfill solely to receive Construction and Demolition (C&D) and Land Clearing Debris (LCD) wastes. The changes and modifications to the 2008 Permit violate and contravene the agreements between Pickens County and MRR, and are in contravention of MRR's continued representations to Pickens County, to the public, and to the Planning Commission.

(D) That representatives of MRR not only intentionally concealed from Pickens County and from the public its intentions and efforts to make substantial and major alterations to the agreed-upon Permit issued in 2008, but also made willful misrepresentations to Pickens County and to the Pickens County Planning Commission, regarding the nature of the landfill facility and its operations. The Department must not be a party to such misrepresentations, nor should it condone, allow, ratify or approve such misrepresentations and/or such behavior. (Proof of such continuing misrepresentations by MRR will be submitted to the Board).

(E) The Land Use Approval issued by the Pickens County Planning Commission on or about January 12, 2015, was issued in reliance upon the material misrepresentations by MRR, which

the Commission discovered in early 2016 to have been false. The Pickens County Planning Commission, in January of 2016, once it learned of the material misrepresentations by MRR, rescinded the land use approval issued January 12, 2015. NOTE: Pickens County has clarified repeatedly, and continues to emphasize, that it remains in full agreement for the Permittee to operate a C&D/LCD Landfill, in accord with the conditions of the Permit issued November 3, 2008. Further: the Pickens County Planning Commission directed the Permittee to come back before it, to answer questions and provide further information, which the Permittee has failed and refused to do. Further, the Permittee failed and refuses to exhaust available administrative remedies with the Planning Commission.

(F) That neither Pickens County nor the Pickens County Planning Commission has issued a Letter of Consistency regarding the purported Permit Modification issued August 10, 2015. Both Pickens County and the Planning Commission were kept in secrecy of the application for modification, the reports leading up to the modification, and the issuance of the modification itself.

(G) The purported Permit Modification issued August 10, 2015 was issued in violation of the 1999 State Solid Waste Management Plan, and operation of this Landfill pursuant to said purported Modification would violate the 1999 State Solid Waste Management Plan.

(H) The allowance of Coal Ash, or CCR, into this Landfill would violate recently enacted Act 138 of 2016, signed into law March 2, 2016, prohibiting disposal of Coal Ash into Class Two Landfills such as the Landfill in question, in South Carolina.

(I) The allowance of Coal Ash, or CCR, into this Landfill would violate regulations and guidelines of the United States Environmental Protection Agency.

(J) That the issuance of the purported Modification of August 10, 2015 is in contravention of the needs and desires of Pickens County and its citizens and of the public.

4. Significant Issues and Factors:

All of the above-stated Grounds are re-emphasized. The Department has acted in violation of relevant Statutes and Regulations by willfully mischaracterizing a “major modification” as a “minor.” The purpose of the meetings and discussions between DHEC and MRR, and the agreement to mischaracterize the modification, was no mere issue of unimportant semantics. The purpose of such mischaracterization was to deprive Pickens County and the public of Notice, and to prevent any input and any public comment and review. Further, as stated hereinabove, Pickens County has substantive reasons to oppose this purported Modification, including the violations of its Solid Waste Management Plan, and the violations of its agreements with the Permittee, among other substantive reasons and issues.

The Department must not participate in such violations of Statutes and Regulations, and must not participate in efforts to deprive Counties, Host Local Governments, “affected persons,” and/or the public, of legitimate Notice, opportunity for input, and opportunity for public comment and review.

5. Relief Requested:

(A) Pickens County requests that the purported Permit Modification issued August 10, 2015 be rescinded and be declared null and void. It is appropriate for the original Permit, issued November 3, 2008, with the Conditions issued therein at that time, to remain in full force and effect.

(B) Should the Board for any reason deny this Request for Review, Pickens County requests that the Department issue a Notice to All Host Local Governments and to All County Governments as follows:

That should any Host Local Government or County Government consider entering into a Host local Government Agreement or similar Agreement with a Landfill owner or operator, that the Host Local Government and/or County Government must be aware:

- (i) That the Department may, and will, make major modifications to a Landfill Permit, without any Notice to the Host Local Government and/or County Government and/or the public, and without any opportunity to be heard, or to provide input, or to have comment or review.
- (ii) That the Department may, and will, conduct meetings and engage in discussions with Permittees, regarding major modifications to Permits, without any Notice to the Host Local Government and/or County Government and/or the public, and without any opportunity to be heard, or to provide input, or to have comment or review.
- (iii) That the Department may, and will, characterize a "major modification" as "minor," in violation of the Regulations defining such, and that in defense of such violation, the Department may, and will, claim that the Department has the right to make permit determinations (even when the actions are unequivocally in violation of Statutes and Regulations), and that all parties must give great deference to Department determinations (even those in violation of Statutes and Regulations).

- (iv) That the Department may, and will, meet with and discuss with Permit Applicants and Permittees, ways and methods of depriving Host Local Governments, Counties and the public, of Notice and opportunity to be heard, in situations in which such Notice and opportunity are appropriate and legitimate.

Note: The above is presented as emphasis of the inappropriateness of the issuance of the purported Permit Modification, and of the inappropriateness of any approval of such Permit Modification by this Board.

5. Enclosed Herewith:

- Check for filing fee in the amount of \$100.00
- Copy of the Permit Modification issued August 10, 2015, which is the subject of this Request for Review.
- Copy of the Permit issued November 3, 2008, which is valid and should be recognized as remaining in full force and effect.

6. Pickens County requests a formal Conference and/or formal Hearing, with opportunity to present evidence and to make arguments.

7. Addresses:

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Pickens, SC 29671

March 23, 2016

Gary W. Poliakoff
Attorney for Pickens County

DHEC

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,	)	DOCKET NO. 16-ALJ-07-0164-CC
	)	
Petitioner,	)	
	)	
vs.	)	NOTICE AND MOTION
	)	TO DISMISS
South Carolina Department of Health and	)	
Environmental Control and MRR Pickens,	)	
LLC,	)	
	)	
Respondents.	)	
	)	

TO: GARY J. POLIAKOFF, ESQUIRE, ATTORNEY FOR PETITIONER, PICKENS COUNTY, AND JESSICA J.O. KING, ESQUIRE, ATTORNEY FOR RESPONDENT, MRR PICKENS, LLC

YOU WILL PLEASE TAKE NOTICE that Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department"), through its undersigned counsel, will move before the Administrative Law Court ("ALC" or "Court") as soon after service hereof as counsel may be heard, for an Order dismissing the Request for a Contested Case Hearing filed with the ALC by Respondent Pickens County ("Petitioner" or "County"), on May 19, 2016. This Motion to Dismiss ("Motion") is being filed pursuant to South Carolina Rules of Civil Procedure ("SCRPC"), Rule 12(b)(1), and Administrative Law Court Rule 38; and S.C. CODE ANN. §§ 44-1-60(E)(2) (Supp. 2007). The grounds for dismissal are set forth below.

I. BACKGROUND

The Highway 93 Class 2 Landfill ("Landfill"), owned by MRR Pickens, LLC ("MRR"), is located at 2180 Greenville Highway, Liberty, South Carolina, in an unincorporated area of

Pickens County. On November 3, 2008, the Department issued Permit No. LF2-00003 to MRR for the operation of a Class 2 landfill.

On March 30, 2015, the Department received an application from MRR for a minor permit modification to allow the installation of a liner and associated leachate collection system for a portion of the existing permitted landfill area. On August 6, 2015, the Department received from MRR a revised copy of the application. Because the Department determined that the application met the regulatory definition of a minor permit modification, the Department was not required to have a public notice and comment period prior to the issuance of the permit. (R.61-107.19 Part I, B.48.a). The Solid Waste regulations require public notice of all applications for new construction and major modifications of Class 2 landfills, but does not require public notice of applications for minor permit modifications. (See R.61-107.19 Part I D.2.c.(1); Part IV I.2.). On August 10, 2015, the Department issued its staff decision ("Department Decision") (**Exhibit 1**), approving the application from MRR for a minor permit modification to modify its Landfill by adding a liner system and associated leachate collection system to a portion of the existing and permitted Landfill.

The Department's Decision became the Final Agency Decision 15 days after the decision was mailed to MRR. County did not request to be notified of any department decisions as an affected person in relation to the Landfill, and did not file a timely request for review to the DHEC Board ("Board") prior to the expiration of the 15-day statutory period. Further, during a meeting with the Department on December 15, 2015, the Department informed County of the issuance of the permit modification to MRR. Even after receiving actual notice on December 15, 2015 of the Department's issuance of the permit modification, County waited until March 23, 2016 to file a *Request for Review* with the Board. On April 21, 2016, the Board declined to hear

the *Request for Review*. Thereafter, on May 19, 2016, County filed a Request for a Contested Case Hearing with this Court, which is now the above-captioned matter.

II. GROUNDS FOR DISMISSAL

Dismissal of County's Request for a Contested Case Hearing is warranted, both for lack of jurisdiction and because County failed to exhaust its administrative remedies.

A. The ALC Lacks Subject Matter Jurisdiction over County's Request for a Contested Case Hearing.

1. **County failed to follow the appeal procedure outlined in Section 44-1-60(E)(2).**

Section 44-1-60(E)(2) of the South Carolina Code provides:

The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person.

According to the Supreme Court of South Carolina, this "clear and unambiguous language . . . provides that the Department's staff decision becomes final 'fifteen days after notice of the department decision has been mailed.'" S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control, 390 S.C. 418, 426, 702 S.E. 2d 246, 251 (2010). As such, a decision for which the DHEC Board review is sought more than 15 days after mailing is not subject to review before either the DHEC Board or the ALC. As the South Carolina Court of Appeals has stated:

The DHEC Board ha[s] no authority to extend or expand the period in which appeals requests could be timely filed and was limited to the fifteen-day filing window enacted by the General Assembly, ... [In the event of a] failure to comply with the mandatory appeals term, the DHEC Board lack[s] jurisdiction and could not validly exercise dominion over the matter without erroneously extending the span in which appeals could be filed. Because the appeal was untimely and the DHEC Board lacked jurisdiction, the ALC could not invoke jurisdiction to hear the matter.

S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 380 S.C. 349, 377, 669 S.E.2d 914 (Ct. App. 2008), rev'd on other grounds, 390 SC. 418, 702 S.E.2d 246.

Here, the Department Decision was issued on August 10, 2015, in accordance with the requirements of 8 S.C. Code Regs. 61-107.19, *SWM: Solid Waste Landfills and Structural Fills*, Parts I and IV, and became the Final Agency Decision 15 days after the decision was mailed to MRR. Notice of a Department Decision is required to be sent to the "... affected persons who have requested in writing to be notified." S.C. Code Ann. Section 44-1-60(E)(1). Pickens County did not request to be notified of Department decisions as an affected person regarding the Landfill and did not file a timely request for review to the DHEC Board prior to the expiration of the statutory 15-day period. County did not file its *Request for Review* with the Board until March 23, 2016, well beyond the statutory 15-day time period.

Notwithstanding the failure of County to request notification or to timely file a *Request for Review* with the DHEC Board, County was given actual notice of the Department Decision pertaining to the MRR Landfill when it attended a meeting on December 15, 2015 at the DHEC main office located at 2600 Bull Street in Columbia, South Carolina, to discuss the Decision with the Department. (See Affidavit of Joan Litton, attached as **Exhibit 2**). "Actual notice means all the facts are disclosed and there is nothing left to investigate." Strother v. Lexington County Recreation Com'n, 332 S.C. 54, 504 S.E.2d 117 (1998) *citing*, Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 176 S.E.2d 131 (1970). "Actual notice may be shown by direct evidence or inferred from factual circumstances." *Ibid.* *citing* Southern Railway-Carolina Division v. Home Investment Co., 223 S.C. 440, 105 S.E.2d (1958). The meeting on December 15, 2015 had been precipitated

by the County's desire to discuss with the Department the decision regarding the Landfill that was issued on August 10, 2015. Even after receiving actual notice of the Department Decision, County waited until March 23, 2016 to file its *Request for Review* with the Board. Statutorily, pursuant to Section 44-1-60(E)(2), County was required to file its *Request for Review* within 15 days after the Department Decision was mailed (August 10, 2015) to the applicant, MRR. However, this did not occur. Moreover, even after County received actual notice of the Department Decision during the December 15, 2015 meeting with DHEC, it waited approximately 99 days after December 15, 2015 to file its *Request for Review* with the Board, and did not file its Request until March 23, 2016. In any event, the date that County filed the *Request for Review* in this matter, March 23, 2016, was indisputably well past the statutory deadline, and County further failed to comply with the statutory requirement for appeals by unduly delaying the filing of its Request even after gaining actual notice of the Department Decision pertaining to the MRR Landfill. Because the *Request for Review* was not filed timely with the Board, the Department's issuance of the minor permit modification to MRR is final, as this Court lacks subject matter jurisdiction to hear this matter, and therefore, any attempt to appeal the Department Decision should be denied.

2. Pursuant to Administrative Law Court Rule 38, this case should be dismissed because County failed to comply with the rules of procedure for appeals in Section 44-1-60(E)(2).

Rule 38 of the Administrative Law Court Rules states that “upon motion of any party, or on its own motion, an administrative law judge may dismiss an appeal for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section.”

Petitioner County has failed to comply with the rules of procedure for appeals that are set forth in S.C. CODE ANN. §§ 44-1-60(E)(2). This rule of procedure for appeals clearly states when an affected party must file an appeal with the Board, which is 15 days after notice of the decision has been mailed to the applicant. (See 44-1-60(E)(2)). Since County failed to file its appeal timely, this contested case should be dismissed pursuant to Administrative Law Court Rule 38.

B. County Failed to Exhaust its Administrative Remedies.

This matter is also subject to dismissal because County failed to exhaust its administrative remedies. It is fundamental that “an appellant is required to exhaust administrative remedies prior to filing an appeal” in the ALC. Hill v. S.C. Dep’t of Health and Env’tl. Control et al., Docket No. 08-ALK-07-0353-CC, at 2 (Admin. Law Ct. Sept. 15, 2009) (citing Howard v. Mutz, 315 S.C. 356, 434 S.E.2d 254 (1993)); see also Chris’s Dry Cleaning and Shirt Service v. S.C. Dep’t of Health and Env’tl. Control, Docket No. 15-ALJ-07-0368-CC, at 2 (Admin. Law Ct. Nov. 6, 2015) (dismissing case for failure to exhaust administrative remedies where the appellant did not submit a timely request for review to the SCDHEC Board). South Carolina law expressly requires exhaustion of remedies before an aggrieved party may seek review to the ALC. See S.C. Code Ann. § 44-1-60 (mandating compliance with specified procedures before a party may seek ALC review of a Department decision); S.C. Code Ann. § 1-23-380 (authorizing judicial review for “[a] party who has exhausted all administrative remedies within the agency”). Pursuant to Section 44-1-60, the Board only has authority to review a Department Decision if the request is submitted to the Department during the clearly-defined 15-day statutory time frame, which is within 15 days after a Department Decision is mailed to an applicant.

In this case, County waited beyond the statutory appeal period to file its *Request for Review* with the Board. Although County had actual notice (on December 15, 2015) of the Department Decision regarding the minor modification for MRR's Landfill, it waited to file its *Request for Review* of the Decision 99 days after receiving actual notice of the Decision and 226 days after the Decision was mailed to the applicant, MRR, thus failing to complete a requisite step in the appellate process. Having failed to exhaust an adequate administrative remedy provided by statute, County is precluded from seeking further review before the ALC or elsewhere. See e.g., Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994).

III. CONCLUSION

WHEREFORE, pursuant to the above-stated grounds for complete dismissal of DOCKET NO. 16-ALJ-07-0164-CC, Respondent DHEC respectfully requests that this matter be dismissed with prejudice.

Respectfully submitted,

Etta R. Williams Linen
Etta R. Williams Linen, Esquire
Assistant General Counsel for SC DHEC
Claire Prince, Esquire
Special Counsel for SC DHEC

South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708
Tel: 803/898-3350
Fax: 803/898-3367

July 27th, 2016
Columbia, South Carolina

EXHIBIT 1



Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment

OFFICE OF ENVIRONMENTAL QUALITY CONTROL
BUREAU OF LAND AND WASTE MANAGEMENT
CLASS 2 LANDFILL
PERMIT No. LF2-00003

Date of Issuance: November 3, 2008

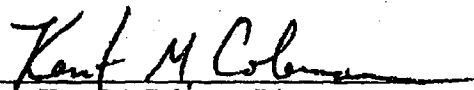
Date of
Modification: August 10, 2015

Permission is hereby granted to:

Name of Facility: Highway 93 Class 2 Landfill
Permittee: MRR Pickens, LLC
Address: 5842 Faringdon Place, Suite 1
Raleigh, NC 27609
Supervisor: Mr. Christopher T. Roof
Phone: (919) 436-3570

for the operation of a Class 2 landfill at 2180 Greenville Highway, in Pickens County located off Highway 93 near the City of Liberty, SC 29657.

This permit is issued pursuant to Sections 44-96-10 et seq., and 25A S.C. Code Regulation 61-107.19. The authority granted hereunder is subject to the requirements of the aforementioned laws and regulations and the attached conditions.


Kent M. Coleman, Director

Division of Mining and Solid Waste Management
Bureau of Land & Waste Management

Permit No. LF2-00003
August 10, 2015
Page 1 of 4

**MRR PICKENS, LLC
CLASS 2 LANDFILL
PERMIT No. LF2-00003**

A. SPECIAL CONDITIONS

1. The Permittee shall adhere to the approved design specifications, and construction plans received November 30, 2007; revised August 26, 2008, and last revised August 5, 2015, unless permit conditions state otherwise.
2. This permit is limited to the disposal of the items listed in Appendix I of R.61-107.19 and any other waste approved by the Department for disposal in a Class Two Landfill pursuant to R.61-107.19, Part IV, Section C.2.
3. The allowable rate of disposal for this facility is seventy thousand five hundred (70,500) tons per fiscal year (July 1 to Jun30). Information concerning the facility's previous Fiscal Year's waste receipts is due on the form of an annual report to the Department no later than September 1st of each year, as required by R.61-107.19 Part IV. Subpart C.16, to the attention of:

**Manager, Solid and Hazardous Waste Compliance Section
SC DHEC Bureau of Land and Waste Management
2600 Bull Street
Columbia, South Carolina 29201**

4. All Appendix-I acceptable wastes must be covered at least once every thirty (30) days with a minimum of six (6) inches of clean soil, except for asbestos-containing material, which must be covered with a minimum of six (6) inches of clean soil immediately upon placement in the landfill.
5. The total surface area within the permitted waste disposal footprint that has not been deemed closed by the Department is limited to five (5) acres. For an area to be considered closed, the following items shall be completed:
 - a. Official certification from a Professional Engineer registered in the State of South Carolina that the area has been closed in accordance with final cover requirements pursuant to Regulation 61-107.19, Part IV, Subpart F.1.
 - b. The area shall be inspected and deemed closed by Department staff.
6. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that the total surface area within the permitted waste disposal footprint that is not deemed officially closed by the Department pursuant to Special Condition No. 5 (above) is equal to or less than five (5) acres (at the time of the certification). The certification shall be completed within sixty (60) days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.

2. ASSESSMENT OF GROUNDWATER IMPACT

If the Permittee determines that a groundwater protection standard has potentially been exceeded for one or more constituents for routine at any monitoring well at the relevant point of compliance, then the Permittee shall perform any necessary groundwater assessment actions in accordance with the requirements of R.61-107.19 Subpart E.3.

3. REPORTING

- a) The permittee shall submit to the Department the result of the groundwater monitoring program as specified in the most recently approved Groundwater Sampling and Analysis Plan, in accordance with the following schedule:

Sampling Schedule	Results Due
November/December	January 15 (Semi-Annual)
May/June	July 15 (annual Report)

- b) The Permittee shall submit a properly bound annual report signed by a South Carolina qualified professional summarizing the semi-annual determinations of groundwater flow rate and direction. In addition, the report shall make a determination as to whether the monitoring well network continues to meet requirements of permit condition C.1.a.
- c) The groundwater data collected by the implementation of the groundwater monitoring program as specified by this Permit shall be submitted to the SCDHEC Bureau of Land and Waste Management, Division of Mining and Solid Waste Management, Solid Waste Ground water Section, and to the Solid Waste Consultant in Upstate Region BEHS Greenville.

4. METHANE MONITORING

In accordance with R.61-107.19, Part IV, Subpart C, methane monitoring is not required at the time of issuance of this permit. However, should the Department determine that methane is of concern at this Facility; the Facility may be required to comply with R.61-107.19, Part IV, Section C.21.



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

**OFFICE OF ENVIRONMENTAL QUALITY CONTROL
BUREAU OF LAND AND WASTE MANAGEMENT
CLASS 2 LANDFILL
PERMIT No. LF2-00003**

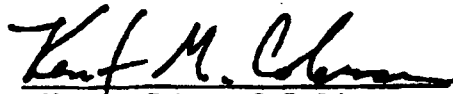
Permit Issued Date: November 3, 2008 Permit Effective Date: November 18, 2008

Permission is hereby granted to:

Name of Facility: Highway 93 C & D Landfill
Permittee: MRR Pickens, LLC
Address: 11743 Trails End Lane
Charlotte, NC 28078
Contact: Mr. Ronald C. Gilkerson
Phone: (704) 947-6652

for the operation of a Class 2 landfill at 2180 Greenville Highway, Liberty, South Carolina, 29657 in Pickens County located off Highway 93 at Clardy Road approximately 2,000 feet NE of the City of Liberty, SC.

This permit is issued pursuant to Sections 44-96-10 *et seq.* (Supp. 2007) and 25A S.C. Code of Regulations Section 61-107.19. The authority granted hereunder is subject to the requirements of the aforementioned laws and regulations and the attached conditions.


Kent M. Coleman, P.G., Director

Division of Mining and Solid Waste Management
Bureau of Land & Waste Management

Permit No. LF2-00003
November 3, 2008
Page 1 of 4

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 896-9432 • www.cdhec.gov

185/865

**MRR PICKENS, LLC
CLASS 2 LANDFILL
PERMIT No. LF2-00003**

A. SPECIAL CONDITIONS

1. The Permittee shall adhere to the design specifications and construction plans received November 30, 2007; and last revised August 26, 2008, unless permit conditions state otherwise.
2. This permit is limited solely to the disposal of items listed in Appendix I of R.61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill.
3. The allowable rate of disposal for this facility is seventy thousand five hundred (70,500) tons per fiscal year (July 1 to June 30). Information concerning the facility's previous Fiscal Year's waste receipts is due in the form of an annual report to the Department no later than September 1st of each year, as required by R.61-107.19 Part IV. Subpart C.16, to the attention of:

**Manager, Solid and Hazardous Waste Compliance Section
SC DHEC Bureau of Land and Waste Management
2600 Bull Street
Columbia, South Carolina 29201**

4. All Appendix-I acceptable wastes must be covered at least every thirty (30) days with a minimum of six (6) inches of clean soil, except for asbestos-containing material, which must be covered with a minimum of six (6) inches of clean soil immediately upon placement in the landfill.
5. The total surface area within the permitted waste disposal footprint that has not been deemed closed by the Department is limited to twelve (12) acres. For an area to be considered closed, the following items shall be completed:
 - a. Official certification from a Professional Engineer registered in the State of South Carolina that the area has been closed in accordance with final cover requirements pursuant to Regulation 61-107.19, Part IV, Subpart F.1.
 - b. The area shall be inspected and deemed closed by Department staff.
6. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that the total surface area within the permitted waste disposal footprint that is not deemed officially closed by the Department pursuant to Special Condition No. 5 (above) is equal to or less than twelve (12) acres (at the time of the certification). The certification shall have been completed within the last sixty (60) days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.

7. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that enough soil is currently available to use for final cover (38,720 yd³ of soil for 12 acres with 2' thickness). The certification shall have been completed within the last 60 days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.

B. GENERAL PERMIT CONDITIONS

1. If the landfill should become inundated with water, all water shall be removed before continuing disposal of waste.
2. Within ninety (90) days of the effective date of this permit, the Permittee shall submit a detailed Compliance Plan that describes steps to be taken in order to fully comply with all regulatory requirements of R.61-107.19 that relate to Class 2 Landfills. This Compliance Plan shall include, but not limited to, the following: a groundwater monitoring design workplan, a landfill post-closure care plan, and a landfill post-closure care cost estimate. Upon the Department's approval of said Compliance Plan, the Permittee will have six (6) months to implement the plan and will have a deadline for full compliance with R.61-107.19 of November 19, 2009.

C. ENVIRONMENTAL MONITORING PERMIT CONDITIONS

1. SPECIAL ENVIRONMENTAL PERMIT CONDITIONS

Within ninety (90) days of the effective date of this permit, the Permittee shall submit to the Department for review, a Groundwater Monitoring Design Workplan in accordance with R.61-107.19, Part IV, Section E (Groundwater Monitoring and Corrective Action). In addition, an approved groundwater monitoring system must be installed and operating prior to November 19, 2009, pursuant to R.61-107.19, Part I, Section A.6.c. Upon the Department's approval of the Groundwater Monitoring Design Workplan, permit conditions C.2, C.3 and C.4 will become effective.

2. GROUNDWATER DETECTION MONITORING SYSTEM

- a) The Permittee shall maintain a groundwater detection monitoring system consistent with the most recently approved Groundwater Sampling and Analysis Plan and as required in R.61-107.19, Part IV, Section E. The groundwater detection monitoring system shall consist of monitoring wells as designated in the most recently approved Groundwater Sampling and Analysis Plan and any other monitoring wells specified by the Department. Modifications to the current groundwater detection monitoring system shall be in accordance with the requirements of R.61-107.19, Part IV, Section E.
- b) The Permittee shall perform all groundwater sampling activities in accordance with the most recently approved Groundwater Sampling and Analysis Plan and in accordance with the requirements of R.61-107.19, Part IV, Section E, along with any subsequent modifications deemed necessary by the Department to uphold the intent of this permit.

The Permittee shall evaluate analytical results in accordance with the most recently approved Groundwater Sampling and Analysis Plan and any subsequent modifications required by the Department.

- c) The Permittee must determine during each sampling event the groundwater elevation in each well relative to mean sea level (MSL) to the nearest one-hundredth of a foot. All elevations should be determined on the same day. The Permittee shall determine the total depth of each well on an annual basis.
- e) Groundwater samples shall be analyzed by a laboratory certified by the State of South Carolina.

3. ASSESSMENT OF GROUNDWATER IMPACT

If the Permittee determines that a groundwater protection standard has potentially been exceeded for one or more constituents for routine monitoring at any monitoring well at the relevant point of compliance, then the Permittee shall perform any necessary groundwater assessment actions in accordance with the requirements of R.61-107.19 Part IV Subpart B.3.

4. REPORTING

- a) The Permittee shall submit to the Department the results of the groundwater monitoring program as specified in the most recently approved Groundwater Sampling and Analysis Plan, in accordance with the following sampling schedule:

<u>Sampling Schedule</u>	<u>Results Due</u>
November/December	January 15 (Semi-Annual)
May/June	July 15 (Annual Report)

- b) The Permittee shall submit a properly bound annual report signed by a South Carolina qualified professional summarizing the semi-annual determinations of groundwater flow rate and direction. In addition, the report shall make a determination as to whether the monitoring well network continues to meet requirements of permit condition C.2.A.
- c) The groundwater data collected by the implementation of the groundwater monitoring program as specified by this Permit shall be submitted to the SCDHEC Bureau of Land and Waste Management, Division of Mining and Solid Waste Management, Solid Waste Groundwater Section, and to the Solid Waste Consultant in Region 2 BQC (Greenville).

5. METHANE MONITORING

In accordance with R.61-107.19, Part IV, Subpart C, methane monitoring is not required at the time of issuance of this permit. However, should the Department determine that methane is of concern at this Facility, the Facility may be required comply with R.61-107.19, Part IV, Section C.21.

EXHIBIT 2

AFFIDAVIT OF JOAN FARVER LITTON
Docket No. 16-RFR-15; Office of General Counsel # 22666

PERSONALLY appeared before me, Joan Farver Litton, who being duly sworn, deposes and says:

1. I have been employed by the South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") since February 4, 1999.

2. I am currently the Manager for the Mining and Solid Waste Permitting Section in the Division of Mining and Solid Waste Management at DHEC.

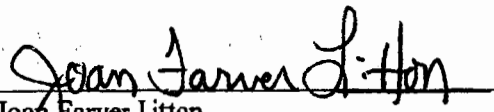
3. I am submitting this affidavit as supplemental information for the Request for Review Staff Summary Response in the matter of Pickens County's request for the DHEC Board to review the department's decision to issue an approval of the addition of a liner system to the MRR Pickens Highway 93 Class Two Landfill ("MRR Pickens"), which the Department issued to MRR Pickens on August 10, 2015.

4. I hereby affirm that Pickens County did not request to be notified of permitting decisions related to MRR Pickens, LLC's Highway 93 Class 2 Landfill, identified as Permit Number LF2-00003, prior to the Department's decision of August 10, 2015, to issue a modification for the addition of a liner system.

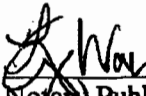
5. A meeting was held at 2600 Bull Street in Room 1425 on December 15, 2015, to discuss the Department's decision to issue the approval for the liner system (a minor modification) with representatives of Pickens County and their solid waste consultant. Those present on the County's behalf were Gerald Wilson, Director of Public Works for Pickens County; Ralph Guarino, Jr., who at the time was the acting Interim Administrator for Pickens County; and Wesley Hulsey, PG, President of Pickens County's solid waste consulting firm

Hulsey, McCormick & Wallace. Those in attendance for the Department were Justin Koon, Permitting Project Manager; Andrea Skinner, Permitting Project Manager; David Oberly II, Groundwater Project Manager; and myself, Joan Farver Litton, Manager of the Mining and Solid Waste Permitting Section. During the meeting, the Department confirmed that it had issued the decision to MRR Pickens for approval of the addition of a liner system as a minor modification to the MRR Pickens Highway 93 Class 2 Landfill; and, that decision was discussed at length during the meeting with the representatives of Pickens County.

I, Joan Farver Litton, hereby certify, under penalty of perjury, that the above-stated facts are true and correct to the best of my knowledge.


Joan Farver Litton

SUBSCRIBED AND sworn to before
me this 15th day of April, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 01/22/2018

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,

Petitioner,

vs.

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

Respondents.

Docket No.: 16-A1J-07-0164-CC

**PETITIONER'S AMENDED AND
SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO
SCDHEC'S MOTION TO DISMISS**

Petitioner Pickens County, responding in opposition to SCDHEC's Motion to Dismiss, would respectfully show:

I. Background

In 2007 and 2008 MRR Pickens, LLC and Pickens County had discussions and negotiations regarding development of a Construction and Demolition ("C&D") and Land Clearing Debris ("LCD") Landfill to be located in Pickens County. By 2008 MRR and Pickens County had entered into a Host Agreement and a Development Agreement regarding such development. Per said Agreements Pickens County was MRR's Host and its Development Partner.

On November 3, 2008 DHEC issued Permit No. LF2-00003 to MRR for "Highway 93 C&D Landfill," for the operation of a Class Two Landfill at 2180 Greenville Highway, off Highway 93 near Liberty, in Pickens County. Said 2008 Permit included seven (7) Special Conditions, including the following:

A. Special Conditions

1. The Permittee shall adhere to the design specifications and construction plans received November 30, 2007; and last revised August 26, 2008, unless permit conditions state otherwise.
2. This permit is limited solely to the disposal of items listed in Appendix I of R. 61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill. (emphasis added). (2008 Permit, Ex. 1 to MRR's Motion to Dismiss).

Pickens County and MRR were in complete accord with the terms of the 2008 Permit, particularly including the Special Conditions referenced above. The 2008 Permit was in accord with the agreements between MRR and Pickens County, and in accord with MRR's representations to Pickens County.

In accord with the 2008 Permit, Pickens County issued the Pickens County Solid Waste Management Plan (SWMP), per S.C. Code Sec. 44-96-80. The Pickens County SWMP prohibited "Special Wastes" (defined by S.C. Code Sec. 44-96-390) and prohibited any Class Three Landfill in Pickens County. (S.C. Code Sec. 44-96-290(F) requires consistency with SWMP's and local ordinances.)

For the years 2008 to 2014, MRR delayed proceeding with development of the Landfill, informing DHEC each year that the economic downturn warranted postponement of development, and requesting and obtaining extensions.

As best as Pickens County can presently determine, the actions leading to the current controversy began in 2014, when MRR and DHEC conducted a series of meetings and discussions, with no notice or information to MRR's Host and Development Partner Pickens County. MRR

submitted a series of lengthy, detailed engineering plans which proposed significant design changes in the Landfill and to the 2008 Permit, including the addition of a liner and a leachate storage pond (design features not applicable to C&D/LCD Landfills), and other design changes and features applicable to Class Three Landfills, and operational changes. The engineering reports and plans were submitted by MRR's engineering consultant, Civil & Environmental Consultants, Inc. ("CEC"). None of these engineering reports were provided to Pickens County, either by MRR or DHEC or anyone.

According to MRR's consultant CEC:

During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of R. 61-107.19 Part V Class Three Landfills would require a minor permit modification. (Petitioner's Ex. 1).

In essence, MRR in 2014 and the first half of 2015 was proposing serious design changes and alternate designs, to the 2008 Permit and to this Landfill. These design changes included changing the 2008 Class Two Permit to meet the requirements of Class Three Landfills. These design changes unquestionably met the definition of "major" modification, per R. 61-107.19, Part 1., B. 48. Yet MRR and DHEC had discussions and meetings, to the exclusion of MRR's Host and Development Partner Pickens County, and agreed to characterize these unequivocally "major" modifications as "minor." Such characterization was erroneous and in violation of R. 61-107.19, Part 1., B. 48 (a) and (b).

Based upon this erroneous classification by DHEC of the modification as "minor," DHEC and MRR avoided any Notice to the public or to Pickens County. A "major" modification requires detailed Notice to the Public (including a detailed newspaper ad, opportunity for comment and

review, opportunity for public hearing, etc.), and Notice to adjacent landowners, which specifically includes Pickens County, per relevant regulations. No Notice of any kind was provided to the public, or to adjacent landowners.

Without any Notice to the public, adjacent landowners, or to Pickens County, DHEC issued a purported Permit Modification on August 10, 2015. Said Permit Modification made major changes to the Landfill, including an alternate design and substantive operational changes. Nor did DHEC or MRR, after issuance of the purported Permit Modification of August 10, 2015, ever provide Notice to the public, or to adjacent landowners. To this day, the required Notice to the public (including the newspaper ad, etc.) has never been provided, nor has there been any Notice to all adjacent landowners.¹

Due to the utter and complete failure of Notice to the public or to adjacent landowners, as is required by the Regulations, this Permit Modification is null and void, having never been properly obtained.

Pickens County filed a Request for Review with DHEC. DHEC declined any review. Pickens County then timely filed this appeal to the Administrative Law Court. Pickens County has standing to assert this appeal, on behalf of its citizens and residents, which are members of the public and which are adjacent landowners.

II. Evidence Available in the Case to Date

Per Reg. 61-107.19, Part 1., B. 48:

¹ In mid-December, 2015, several staff of Pickens County, having heard rumors of major changes, requested documents and met with DHEC, receiving some documents and information regarding the modification. Yet no Notice to the public, or to all adjoining landowners, and no formal Notice to Pickens County, nor any mailing, has occurred.

- a. Minor modifications means a change that keeps the permit current with routine changes to the facility or its operations, or an administrative change; and
- b. Major modification means a change that substantially alters the facility or its operations, e.g., tonnage increase above 29%, any volumetric capacity increase, **alternate designs** that vary from the design prescribed in this regulation. (emphasis added).

The modifications from the 2008 Permit, proposed in 2014 and 2015 by MRR, and embodied in the purported 2015 Permit Modification, include the following:

- the addition of alternate liner design (no liner was included in the 2008 Permit). (See Ex. 1 to DHEC's Motion to Dismiss, 2008 Permit and 2015 Permit Modification).
- changes from Class Two to Class Three characteristics (see CEC Reports, Petitioner's Exhibits 1, 2, and 3).
- changes eliminating the limiting language of "all other wastes . . . are prohibited." (See Ex. 1, to DHEC's Motion to Dismiss, 2008 Permit and 2015 Permit Modification).
- changes replacing the 2008 restrictions on waste streams to allow "any other waste approved by the Department for disposal in a Class Two Landfill" (See Ex. 1 to DHEC's Motion to Dismiss, 2008 Permit and 2015 Permit Modification).
- changes to provisions for final cover. (See Ex. 1 to DHEC's Motion to Dismiss, 2008 Permit and 2015 Permit Modification).

The modifications from the 2008 Permit can only be reasonably interpreted as “major,” per the regulatory definition. The Department’s agreement with MRR to characterize these modifications as “minor” was erroneous and in violation of the regulations.

Both the 2008 Permit and the purported 2015 Permit Modification were issued and signed by Kent M. Coleman, then Director of the Division of Mining and Solid Waste Management, Bureau of Land and Waste Management at DHEC. In a related case pending in Common Pleas Court, MRR Pickens, LLC v. Pickens County, et al., Mr. Coleman was deposed on March 8, 2016, with counsel for MRR and DHEC present. At the time of his deposition Mr. Coleman was still the Director and in position to speak to the 2008 Permit and the purported 2015 Permit Modification, in his capacity as DHEC Director.

Mr. Coleman provided sworn testimony in his deposition (Petitioner’s Ex. 4) as follows:

- Coleman admits that the Department must follow the language of relevant statutes and regulations. (Ex. 4, p. 98, L. 14 - p. 99, L. 4).
- Coleman admits that the definition of “major modification,” in the relevant regulation; includes “alternate designs.” (Ex. 4, p. 102, L. 11 - p. 103, L. 6; p. 103, LL. 20-21).
- Coleman admits that in the definition of “minor modifications,” there is no inclusion of “alternate designs.” (Ex. 4, p. 103, LL. 7-10).
- Coleman admits that he previously, in a letter signed by him on August 10, 2015 accompanying the purported Permit Modification, characterized the

modification as an "alternate liner design: and as a "design change." (Ex. 4, p. 103, L. 20 - p. 105, L. 2² and Ex. 5, Coleman letter of August 10, 2015).

- Coleman admits that the purported Permit Modification was a "design change." (Ex. 4, p. 105, LL. 3-16).
- Coleman admits that this was a "new design." (Ex. 4, p. 110).
- Coleman admits that "design change" falls under the definition of "major modification," and is not included in the definition of "minor modification," per the relevant regulation. (Ex. 4, p. 105, LL. 17-21).
- Coleman admits that "major modification" includes "design changes," and that this is a design change. (Ex. 4, pp. 128-129).
- Coleman admits that a "major modification" requires notice to affected persons, adjacent landowners, concerned parties, local governments and the public.
- Coleman admits that, for major modifications, there should be mailing of Notice to the County. (Ex. 4, p. 126).
- Coleman admits that, per relevant statute; the term "affected persons" includes local governments and host local governments. (Ex. 4, p. 106, LL. 4-12).
- Coleman admits that when the Department determines a proposed change to be a "major modification," that "... we would have followed our normal

² In the deposition transcript, the Court Reporter erroneously typed "alternate ladder design," instead of "alternate liner design." Mr. Coleman's letter of August 10, 2015, Ex. 6 to his deposition, states "alternate liner design." (Ex. 5 to this Memorandum).

process, which would include [Notice to] adjacent owners, concerned parties, local governments.” (Ex. 4, p. 106, LL. 13-22).

- Coleman admits that, for the 2015 Permit change, there was no notice provided to Pickens County or to the Public. (Ex. 4, p. 106, L. 23 - p. 107, L. 3).
- Coleman admits that if there is a “major modification,” the public is supposed to receive notice. (Ex. 4, p. 107, LL. 4-19).

Mr. Coleman also testified:

Q. . . . And again, this was a design change; that is, a change from ‘08 to 2015 was a design change as you stated in your letter. Isn’t it?

A. Yes.

Q. And design change, again, is mentioned under the definition of “major modification” but not under the definition of “minor modification?”

A. Yes.

(Ex. 4, p. 107, L. 20 - p. 108, L. 2).

Q. . . . In addition to the “design change,” I made notes today as you were answering Ms. King’s question. In answers to Ms. King’s question one time today, you said this was a “new design for the landfill.” Is that a fair statement?

A. Yeah, I mean it is.

Q. Okay.

A. It was a new design.

Q. And I wrote down also a quote earlier today when your answer to Ms. King's questions that this was "Essentially the same design as a Class Three."

A. Yes, I recall saying that, yes.

Q. All right. And that is basically the change from the '08 to the 2015 modification was essentially the same design as a Class Three. Is that right?

A. Yes, uh-huh.

Q. So in other words, what we're doing is changing a Class Two by adding Class Three features. It became essentially the same design as a Class Three.

(objection).

A. The design became very similar to a Class Three, yes.

Q. Okay. And you agree, I wrote this down, "Alternate designs would be a major modification," is that correct?

A. That's what the definition says, yes.

Q. Okay. Yeah, and another thing I wrote down earlier today, "If it substantially alters," if it substantially alters the facility or the operations, then it's a major modification, isn't it?

A. Yes.

(Ex. 4, p. 109, L. 25 -p. 111, L. 7).

Mr. Coleman also admitted that the 2008 Permit was limited solely to the wastes listed in Appendix 1 to R. 61-107.19, and included the Special Condition, "All other waste, including animal carcasses, are prohibited from disposal in this landfill." Mr. Coleman also admitted that such

restrictive language concerning authorized wastes was removed in the purported 2015 Modification.

(Ex. 4, p. 114, L. 14 - p. 117, L. 2).

Mr. Colman also admitted:

- That C&D landfills are not required to have liners. (Ex. 4, p. 191).
- That he would not expect a liner for a C&D landfill. (Ex. 4, p. 199).
- That the addition of a liner to a Class Two Landfill would be "unusual," as Class Two Landfills usually do not have liners. (Ex. 4, p. 211).
- That, if approved, this would be the first commercial Class Two Landfill in South Carolina to have a liner. (Ex. 4, p. 210).
- That he knew that MRR was considering placing coal ash into this landfill when it applied for the Permit Modification. (Ex. 4, p. 189).
- That coal ash was not allowed or acceptable under the 2008 Permit. (Ex. 4, p. 221).
- That, per recently enacted S.C. Code § 58-27-255 (Act 138 of 2016), Coal Combustion Residuals (coal ash) can no longer be placed into a Class Two Landfill in South Carolina.
- That MRR's Permit Modification Application asks to accept "certain special wastes" into this Class Two Landfill. (Ex. 4, p. 165).
- That "Special Wastes," per statute, must be placed in Class Three, not Class Two, Landfills, in South Carolina. (Ex. 4, p. 167).
- That it would be illegal in South Carolina to deposit "Special Waste" into this landfill in Pickens County. (Ex. 4, p. 168).

The changes to the 2008 Permit meet the definition of “major” modification. The Department erroneously characterized them as “minor,” in violation of R. 67-107.19, Part 1, B. 48. (a) and (b). The effect of this mischaracterization was that no Notice of any kind was ever provided to the public, and no Notice of any kind was ever provided to adjacent landowners.³

The Regulations require Notice to the public and a period for comment and review, coupled with opportunity for a public hearing, when a “major modification” is being proposed. Notice to adjacent landowners is also required.

To this day, no Notice to the public, nor any period for comment and review, nor any Notice to adjoining landowners, as is required by R. 61-107.19, Part 1. D. 2, c. has been provided. The changes to the 2008 Permit are “major” modifications. The proposed Permit Modification is not valid, unless and until there has been Notice to the public and opportunity for comment and review, and opportunity to request a public hearing.

R. 61-107.19, Part 1, D. 2. c. provides the following:

c. Notice of Filing Permit Application.

- (1) Notice of all applications submitted to the Department for the initial construction and major modifications of Class Two and Class Three landfills shall be published by the applicant once in a newspaper of general circulation in the area of the proposed landfill project. Notice for Class Two landfill application shall be published as provided in Part IV, Section H. 3.

³ While DHEC apparently argues that documents were handed to some County staff, after staff requested them, in December of 2015, no Notice was ever provided to the public, and no Notice of any kind was ever provided to all adjacent landowners. There are multiple adjacent landowners in addition to the County.

(2) All Notices shall contain the following:

- (a) Name and address of the applicant;
- (b) The location of the proposed activity to include the county, roads and crossroads . . . ;
- (c) The nature of the proposed activity;
- (d) A description of the proposed site or a description of the proposed major modification;
- (e) An explanation of the type(s) of waste that will be accepted;
- (f) Department locations (Central Office and appropriate Regional Office) where a copy of the permit application or draft permit, as appropriate, can be viewed during normal working hours;
- (g) The Department's address and contact name for submittal of comments and inquiries;
- (h) The approximate tonnage/year expected for disposal at the landfill; and,
- (i) The proposed life of the landfill.

(3) The Department will send a notice of receipt of the permit application by regular mail to all adjoining landowners of the proposed landfill.

(d) . . .

(e) Notice of Draft Permit. For Class Two and Class Three Landfills, the Department will publish a notice when the draft permit is ready for review for all new landfills and for major modifications as determined by the Department. This notice will be published in a newspaper of general circulation in the area of the proposed landfill and will be sent to affected persons who have asked to be notified. The notice will list locations where a copy of the draft permit can be reviewed. The public will have a 30-day period to review the draft permit and submit comments to the Department, pursuant to the Administrative Procedures Act, S.C. Code Section 1-23-10 et seq.

(f) Public Hearings for Draft Permits.

- (1) The Department will conduct a public hearing upon receipt of requests in writing by ten (10) persons or by a governmental subdivision or agency or by an association having not less than ten members.
- (2) A request for a public hearing must be mailed (postmarked) to the Department during the 30 day comment period and shall be based on technical reasons relating to siting, design, or operation of the landfill. The Department will send a notice acknowledging receipt of a request for a public hearing to the applicant and to the person(s) requesting a hearing within 15 days following receipt of the request. The

Department will publish a notice of the time, date and location of the hearing.

- (g) Notice of Department Decision on the Permit. After close of the public comment period on the draft permit and the public hearing, if held, the Department will issue a Department Decision. Notice of the Department Decision will be sent by certified mail, return receipt requested, to the applicant. Notice of the Department's decision will be sent by regular mail, unless certified mail is requested, to affected persons who have asked to be notified, to all persons who commented in writing to the Department, and to all persons who attended the public hearing, if held.

... The Department will also publish notice of the Department Decision in a newspaper of general circulation in the area of the proposed activity. The Department's notice will include instructions on how to request a final review conference and the time frame for filing such a request.

Also, R. 61-107.19, Part IV, H. Permit Application Requirements also applies to "modification" of a Class Two Landfill. No distinction in Part IV. H. is provided for "major" or "minor" modification; rather, it applies to "modification" of a Class Two landfill (i.e., all modifications). Required in Part IV. H. are Determination of Need and a Consistency (with State and local Solid Waste Management Plans and local ordinances Determination, and a Disclosure Statement (to include names and addresses of contiguous landowners) and other requirements. Most of these requirements have not been met.

In particular, R. 61-107.19, Part IV. H. includes the following:

3. Public Notice. When the submittal is administratively complete, the Department will notify the applicant in writing. Within 15 days of receipt of Notification from the Department, the applicant shall publish notice of the permit application pursuant to Part 1., Section D. 2. of this regulation, and submit an affidavit of publication of the public notice in the newspaper to the Department.

The "applicant" is MRR Pickens, LLC. No such notice was published nor was any affidavit of publication provided. Again, the above provision applies to any and all "modification" of a Class Two Permit.

Further, R. 61-107.19, Part IV., I. 2. Permit Conditions and Review, includes the following:

2. Prior to issuance of permits for major modifications, as determined by the Department, and for new construction, the Department will make the draft permit available for public review and comment pursuant to Part 1, Section D of this regulation.

Nor was there compliance with the above.

It is reiterated that R. 61-107.19, Part IV. H. Permit Application Requirements applies to all modifications of a Class Two Landfill Permit, (regardless of whether such is "major" or "minor"). The arguments of DHEC regarding its characterization as a "minor" modification are of no avail to the requirements of Part IV. H. As noted above, the Public Notice requirements applicable to the applicant (MRR) were never met. No Public Notice by the applicant was ever accomplished. Nor was there any publication in the newspaper, nor any affidavit of publication of the Public Notice

provided to the Department. Aside from any arguments of "major" or "minor," the applicant failed in its required duties of Public Notice in Part IV. H. 3. And DHEC failed to require the affidavit of publication. The validity of the purported 2015 Modification fails due to the utter and complete failure of compliance with these requirements.

As for the regulatory provisions applicable to "major" modifications, the following failures and violations of the Regulations have occurred:

Per R. 61-107.19, Part 1., D. 2. c.:

- (1) No publication in a newspaper of the application for modification.
- (2) Complete failure of all contents of any notice.
- (3) No notice mailed to all adjoining landowners of the application.

Per R. 61-107.19, Part 1., D. 2. e.:

- (1) No publication of the notice of the draft permit in a newspaper.
- (2) No list of locations where a copy of the draft permit can be viewed was provided.
- (3) No 30-day period for the public to review the draft permit was provided.
- (4) No opportunity for the public to submit comments was provided.

Per R. 61-107.19, Part 1., D. 2. f.:

- (1) No opportunity for submission of requests for a public hearing was provided.
- (2) No opportunity for a public hearing was provided.

Per R. 61-107.19, Part 1., D. 2. g.:

- (1) No notice of the Department's decision was provided to the public.
(No opportunity for the public to request anything).
- (2) No publication of the Department Decision in a newspaper.
- (3) No instructions provided to the public regarding request of a final review conference.

Per R. 61-107.19, Part IV. I. Permit Condition and Review:

Regarding Part IV. I., there was a complete and utter failure of compliance, as the provision applies both to "major modifications" and for "new construction." Regardless of DHEC's flawed claims concerning "major" or "minor" modification, this Notice provision applies to "new construction." First, prior to August 10, 2015, the landfill had not yet been constructed (MRR had requested and obtained extensions repeatedly from 2008 to 2015 to delay construction). Second, the substantial design changes provided in the 2015 Modification called for construction of a liner and other features not provided for in the 2008 Permit. Under any reasonable reading of Part IV. I., the 2015 Modification provided for "new construction." The Notice requirements, and period for public review and comment, were ignored and never provided.

In the present Administrative Law Court case no discovery has been produced. (Pickens County has submitted Notices to Depose Christopher Roof of MRR and Joan Litton of DHEC, and has issued Interrogatories, Requests for Production of Documents and Requests to Admit to DHEC and MRR; both DHEC and MRR have asked to postpone discovery while the Motions to Dismiss

are pending). However, in a related case in Common Pleas Court, MRR Pickens, LLC v. Pickens County, et al. (Including the five individually named members of the County Planning Commission, all of which were sued by MRR for \$25 Million), some documents and Affidavits have been produced, which are relevant to the current Motions. Provided herewith are the following:

- (A) Petitioner's Exhibits 1, 2, and 3 - Reports of MRR's engineering consultants, CEC, which were submitted to DHEC on behalf of MRR in 2014 and 2015, without any Notice to the public, to adjacent landowners or to Pickens County. These are engineering reports, in support of MRR's proposed modifications. Each of these Exhibits contains the following statement:

During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of R. 61-107.19, Part V. Class Three landfills would require a minor permit modification.

Exhibit 1 also states:

The permitted facility has not been constructed, and is currently a heavily wooded area with limited access of overgrown, unimproved dirt roads

Also, noting that the 2008 Permit was for a Class Two Landfill, Ex. 1 states:

To satisfy the Class Three Landfill requirements, MRR engaged Civil & Environmental Consultants, Inc. (CEC) . . . to provide additional data for a permit modification.

Note: Kent M. Coleman identified these documents – Exhibits 1, 2, and 3 to this Memorandum,

as having been submitted by MRR to DHEC. (Ex. 4, Coleman depo., pp. 118, 135-137, 155-158, and 161-163).

(B) Exhibit 6 - Affidavit of C. Wesley Hulsey, P.G. Mr. Hulsey is a licensed Professional Geologist who has provided various services to Pickens County, including landfill-related engineering/geological work. Please see his sworn statements, including paragraph 4, which states that the addition of a liner and the changes to the Permit "all constitute a "major modification," which requires public review and public comment (which was not done), as opposed to MRR's attempted mischaracterization as a "minor modification." Also see his sworn statements regarding the failure of Consistency with the Pickens County Solid Waste Plan, the prohibition on "Special Waste" in Pickens County (which includes coal ash, or CCR), and the violations and failures of public review and public comment.

(C) Ex. 7 - Affidavit of Christopher Brink. Mr. Brink is the Director of the Pickens County Department of Community Development, also known as "Planning Director" for Pickens County. Please see Mr. Brink's sworn statements regarding the misrepresentations by MRR (including MRR's denial that a liner would be needed, which representation by MRR was made in early January of 2015, when MRR was submitting engineering reports to add a liner, with no notice to the County). Please also see paragraphs 10, 11, 12, and 13 regarding MRR's requests for the major modifications, which were never disclosed to Pickens County, and the failures of Notice.

- (D) Ex. 8 - Affidavit of Gerald G. Wilson. Mr. Wilson is the Public Works Director for Pickens County. Please see his sworn statements regarding MRR's requests for major modifications which were hidden from Pickens County, and the failures of Notice.
- (E) Ex. 9 - Report and Affidavit of Avner Vengosh, Ph.D. Dr. Vengosh is an eminently qualified Professor of Geochemistry and Water Quality at Duke University. Please see his Report and Affidavit concerning the inappropriateness of coal ash, or CCR, in this Class Two Landfill in Pickens County.
- (F) Ex. 10 - Affidavit and Report of Shelley H. Robbins. Ms. Robbins is a regulatory consultant, experienced and knowledgeable in solid waste management and regulations. Please see her Report and Affidavit concerning the proposed changes to the landfill as constituting "major modification," and the requirements for public review and comment, and the failures of providing public review and comment. Also see her statements regarding regulatory violations and the inappropriateness of MRR's attempted changes to the design and operation of this landfill.
- (G) Ex. 11 - Pickens County Solid Waste Management Plan (portions) - Please see provisions prohibiting "Special Waste" being deposited into Pickens County (p. 18) and the exclusion of Class Three Landfills in Pickens County (p. 12).
- (H) Host Agreement between MRR and Pickens County, 2008.

(I) Development Agreement between MRR and Pickens County, 2008.

In summary, the proposed changes to the 2008 Permit, by any reasonable reading of the relevant regulations, and as admitted by DHEC Director Kent M. Coleman, constitute a "major modification." The requirements of Public Notice of the proposed changes, Public Notice of the Draft Permit and Public Notice of the final Department Decision were never followed. No such Notices took place, and the public was deprived of any opportunity for review and comment, any opportunity for Public Hearing, and other requirements. Further, aside from DHEC's flawed position that these "major" modifications were "minor," there was absolute non-compliance with R. 61-107.19 H. (requiring the applicant to provide Public Notice for all modifications), and with R. 61-107.19, I. 2., requiring notice, public review and comment for "new construction." The public and all adjacent landowners have never been afforded the Regulatory requirements of any of the three (3) separate Public Notices (proposed changes; draft permit; and final Department Decision), nor opportunity for Public Review and Comment, nor opportunity for Public Hearing. The proposed 2015 Permit Modification is fatally flawed, and of no validity.

III. Pickens County is Appearing on Behalf of the Public, Adjoining Landowners, Affected Parties, and the County

In this case Pickens County is appearing on behalf of the public (particularly those members of the public in Pickens County residing in close proximity to this landfill; on behalf of adjoining landowners; on behalf of Affected Parties, and on behalf of Pickens County and its citizens and residents, taxpayers and property owners. (See. Ex. 15, Affidavit of Christopher Brink of August 17, 2016; Ex. 16, Affidavit of Robert L. Traber; Ex. 17, Affidavit of Matthew S. Stone; Ex. 18, Affidavit of Randolph E. Revis, Sr., by P.R. Randy Martin; Ex. 19, Affidavit of Tony Charping; and Ex. 20, Affidavit of Randall King.

As reflected in Ex. 15, Affidavit of Christopher Brink, the County is appearing on behalf of all of the aforementioned parties. The Affidavits of Traber, Stone, Revis, Charping and King (Exhibits 16-20), show that these are adjoining landowners and members of the public, in close proximity to this landfill. These persons, as stated in their Affidavits, received no Notice of proceedings (in particular, no newspaper publications or mailings of the Application for Permit Modification, the Draft Permit, the final Department Decision, or any other relevant proceedings, and were kept entirely in the dark regarding the major modifications being proposed. Thus, they had no opportunity for review or comment, or to object, or to request a hearing, or to be heard in any manner. As stated in these Affidavits, all of these parties will be adversely affected by such Modification, and would have participated and objected had they been given the opportunity. All of these parties wish to have Pickens County appear and advocate on their behalf.

IV. Legal Argument

The proposed changes to the 2008 Permit include alternate design, new design, design changes, and substantial changes in operation. The proposal is to add Class Three (Municipal Solid Waste and Special Waste) design features to a Class Two (Construction and Demolition/Land Clearing Debris) Landfill. (See Ex. 14, 2008 Permit with Appendix I - Acceptable Wastes). In essence, the Class Two Permit was being changed to meet the characteristics of Class Three Landfills. (See Ex. 4, Coleman depo., and Exhibits 1, 2, 3 - CEC Reports). The effect of mischaracterizing the changes as "minor" was that the public and all adjoining landowners were deprived of three (3) separate required Notices (proposed changes, draft permit, and final Department Decision), and deprived of any opportunity for public review and comment, any opportunity for a Public Hearing, and any opportunity to request review of the Department Decision.

The issue in this case is one of fundamental due process being denied to the public (particularly members of the public residing in close proximity), adjoining landowners, and Pickens County (on behalf of its citizens and residents, taxpayers and property owners), none of which received Notice, newspaper publication, mailings, or any opportunity to comment or participate.

In a Motion to Dismiss, the burden is on the party seeking the dismissal.

The trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. Hooper v. Ebenezer Senior Services & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009).

Because dismissal is such a drastic remedy, it should be cautiously invoked to ensure that a litigant is not properly deprived of a trial. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004), and Hooper v. Ebenezer, *supra*.

Equitable Tolling

Equitable Tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.

The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Hooper v. Ebenezer, 386 S.C. 108, 115-117, 687 S.E.2d 29, 32-33 (2009).

"The requirements of due process include notice and an opportunity to be heard in a meaningful way, and judicial review." Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998). Also see Stono River Envtl. Ass'n. v. South Carolina Dept.

of Health and Env'tl. Control, 305 S.C. 90, 406 S.E.2d 340 (1991). Further, due process is protected in the South Carolina Constitution, Art. 1, § 22.

The Ogburn-Matthews case further noted that, to prove the existence of a denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced. Here, Petitioner and MRR and DHEC were all in accord in 2008 with the 2008 Permit for a Construction and Demolition (C&D) Landfill. The major modifications, attempted without Notice or opportunity for Public Hearing and subsequent proceedings, all deprived the public, all adjacent landowners and Pickens County of due process. All are substantially prejudiced by this transformation of a C&D Class Two Landfill into basically a Landfill with Class Three design features, which will allow Special Wastes, such as coal ash/CCR, into Pickens County whose Solid Waste Management Plan excludes such, and which Plan disallows Class Three Landfills. Ogburn-Matthews, 332 S.C. at 561, 505 S.E.2d at 603. Also see Palmetto Alliance, Inc. v. South Carolina Public Service Comm'n., 282 S.C. 430, 319 S.E.2d 695 (1984).

Further, in Leventis v. South Carolina Dept. of Health and Env'tl. Control, 340 S.C. 118, 530 S.E.2d 643, (S.C. App. 2000), the Court recognized that it would overturn agency decisions in a number of circumstances, including those when the agency action is made upon unlawful procedure, affected by other error of law, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or if arbitrary or capricious or characterized by abuse of discretion. Also, see S.C. Code Ann. § 1-23-380(A)(6) (Supp. 1998); and Ballenger v. South Carolina Dept. of Health and Env'tl. Control, 331 S.C. 247, 500 S.E.2d 183 (Ct. App. 1998). In Leventis, the Court stated "...we expressly disapprove of the ex parte procedure utilized by DHEC and Laidlaw . . .," but found that prejudice to the Plaintiff had been removed. In the case at hand, all of the above-

stated circumstances apply, and the public, all adjacent landowners and Pickens County remain severely prejudiced.

Even if DHEC's position, that Pickens County received, informally, a copy of relevant documents long after issuance by DHEC, the evidence shows that the public and all adjacent landowners have never been provided with multiple required Notices, opportunity for review and comment, opportunity for Public Hearing, or other due process rights and requirements.

Further, Footnote 14 to the Leventis decision is informative and relevant: "... Therefore, we hold DHEC was required to satisfy the notice requirements for a public hearing. See 1-23-110(A)(3)(c) (Supp. 1993). Furthermore, DHEC's failure to provide adequate Notice ... excused Sierra Club from requesting a hearing." Leventis, 340 S.C. at 118, 530 S.E.2d at 643.

In Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) the Court stated that the Due Process clause demands "Notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Also, S.C. Const. Art. 1., § 22 states, "No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except in due notice and an opportunity to be heard"

In Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) our Supreme Court stated:

It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights.

Also see Brown v. Malloy, 345 S.C. 113, 546 S.E. 195 (Ct. App. 2001).

An administrative board must follow its own rules and regulations. Triska v. Dept. of Health and Env'tl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987). The obligation of such a body to follow its own rules and regulations is founded in principles of administrative law. Ogburn-Matthews v. Loblolly Partners, 505 S.E.2d 598, 332 S.C. 551 (1998). The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. Stono River Env'tl. Protection Ass'n. v. South Carolina Dept. of Health and Env'tl. Control, 305 S.C. 90, 406 S.E.2d 340 (1991). Judicial review assures a determination that the agency action has a factual basis. South Carolina Wildlife Fed'n. v. South Carolina Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988). These fundamental requirements have been clearly mandated by our Constitution and our Supreme Court to comport with due process. Stono River, Id.

The agency is acting in a quasi-judicial capacity when fulfilling its role in this administrative setting. Stono River, Id. "Clearly, contestants are entitled to opportunity to be heard by the Agency; that is, to submit their position and their comments for consideration by the Agency, with opportunity to respond to opposing views before a final determination is made. This, in turn, requires notice that the Agency action is pending and access to the information which has been submitted to the Agency for review. S.C. Const., Art. 1, § 22; Ogburn-Matthews, Id.

In the present case, the Public, all adjoining landowners, and Pickens County all have serious interest in the major changes which DHEC and MRR seek to make to the 2008 Permit. The 2008 Permit was strictly limited to Construction and Demolition (C&D) and Land-Clearing Debris (LCD) wastes (wastes listed in Appendix I to R. 61-107.19; per the 2008 Permit "All other wastes, including animal carcasses are prohibited"). The changes would allow "Special Waste," (defined by S.C. Code Sec. 44-96-390), which are disallowed under the Pickens County Solid Waste

Management Plan. (See Exhibits 6, 7, 8, 9, 10, 11). S.C. Code Sec. 44-96-290(F) requires Consistency with local Solid Waste Management Plans. Further, the Pickens County Solid Waste Management Plan excludes Class Three Landfills. The waste envisioned by MRR, with the purported 2015 Modification, would vastly exceed the C&D/LCD wastes approved in the 2008 Permit, and would allow "Special Wastes" and wastes such as coal ash (a/k/a Coal Combustion Residuals, or CCR), which are significantly more problematic for adjoining landowners, the public and the County. (See Ex. 9, Report and Affidavit of Avner Vengosh, Ph.D., and Ex. 10, Report and Affidavit of Shelley H. Robbins). Such intended wastes create serious and toxic effects from dust and ash, which are carried by wind from transport trucks and from the fill area to neighboring properties, and contaminate soil, surface water and groundwater, and create other problems, including property devaluation. Adjacent landowners are severely adversely affected, as are members of the public who live in the area.

Pickens County has standing to bring this action on behalf of the Public, all adjoining landowners, and the County itself. Substantial rights of all of these are affected. Pickens County, as the local government, has citizens and residents of the public, and citizens and residents as adjoining landowners, who are directly affected. Further the issues of dust and ash, and contamination of the air, soil, surface water and groundwater in the area in which the transport trucks travel, and in the area of the landfill, are of serious concern and produce serious adverse effects to the public, all adjoining landowners, and Pickens County. The injuries to be suffered by the public, all adjoining landowners and Pickens County, include use and enjoyment of their properties, the adverse effects of dust and ash, the contamination of the air, soil, surface water and groundwater, property values, and enjoyment of the surrounding areas.

IV. Need for Discovery Related to the Motion to Dismiss and for Full Hearing by this Court

Petitioner Pickens County has heretofore in this action served Notices of Depositions, to depose Christopher Roof of MRR and Joan Litton of DHEC, and has served Interrogatories, Requests for Production of Documents, and Requests to Admit, on both DHEC and MRR. Both DHEC and MRR requested to reschedule the noticed depositions to which Petitioner consented. Further, both DHEC and MRR have requested to postpone discovery.

Petitioner does not object to the requests of MRR and DHEC to postpone discovery compliance regarding issues that go strictly to the merits of this case. However, Petitioner is in need of reasonable discovery regarding issues pertinent to their Motion to Dismiss, to include: issues of determination of "major" modification and whether the changes are "major" pursuant to regulation; proof of lack of Notice; proof of prejudice to the public, to all adjoining landowners and to the County; communications between MRR and DHEC regarding the agreement to characterize the modifications as "minor," and any issues regarding standing (if standing becomes challenged).

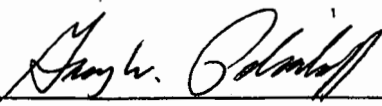
Petitioner would show that, in many aspects, this Motion to Dismiss is akin to a Motion for Summary Judgment. Reasonable discovery, as to the issues pertinent to the Motion, is necessary. Further, Petitioner respectfully submits that a full hearing before this Court, to include all factual matters related to this Motion, is necessary.

V. Conclusion

For the reasons stated above, DHEC's Motion to Dismiss must be denied; or in the alternative, reasonable discovery pertinent to this Motion must be allowed prior to this Court's determination.

Respectfully submitted,

August 18, 2016



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ATTORNEYS FOR PICKENS COUNTY

EXHIBITS
(Petitioner's Amended and Supplemental Memorandum
in Opposition to SCDHEC's Motion to Dismiss)

1. CEC "Site-Specific Hydrogeologic Investigation Report," d. 12-15-14 (portions of).
2. CEC "Work Plan for Site-Specific Hydrogeologic Investigation," d. Aug.-Sept. 2014.
3. CEC "Minor Permit Modification," d. March-Aug. 2015.
4. Kent M. Coleman Deposition, Intro & pp. 98-118, 119-121, 126-129, 135-137, 155-158, 161-163, 165-168, 173-174, 189-191, 199, 210-211, 221, 227.
5. Kent M. Coleman letter of August 10, 2015.
6. Affidavit of C. Wesley Hulsey, P.G., with C.V.
7. Affidavit of Christopher Brink
8. Affidavit of Gerald G. Wilson
9. Report & Affidavit of Avner Vengosh, Ph.D.
10. Report & Affidavit of Shelley H. Robbins.
11. Pickens County Solid Waste Management Plan (portions).
12. Host Agreement between MRR & Pickens County, 2008.
13. Development Agreement between MRR & Pickens County, 2008.
14. 2008 Permit, with Appendix I.
15. Affidavit of Christopher Brink.
16. Affidavit of Robert L. Traber.
17. Affidavit of Matthew S. Stone.
18. Affidavit of Randolph E. Revis, Sr., by P.R. Randy Martin.
19. Affidavit of Tony Charping.
20. Affidavit of Randall King.

SITE-SPECIFIC HYDROGEOLOGIC INVESTIGATION REPORT

**HIGHWAY 93 LANDFILL
2180 GREENVILLE HIGHWAY
LIBERTY, SC 29657
PICKENS COUNTY**

Prepared For:

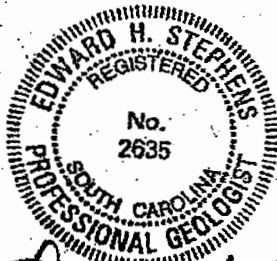
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Prepared By:

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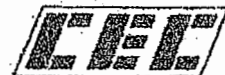
CEC Project 142-152

December 2014



Edward H. Stephens
12-15-14

RECEIVED
DEC 16 2014
DIVISION OF MINING &
SOLID WASTE MANAGEMENT
BLWM



Civil & Environmental Consultants, Inc.

Charlotte

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1.0 INTRODUCTION

1.1 BACKGROUND AND PURPOSE

MRR Pickens, LLC (MRR) previously received a Class Two Landfill Permit for the subject landfill facility at 2180 Greenville Highway in Liberty, South Carolina in Pickens County. The permit, issued in November 2008, is for a Construction, Demolition, and Land-Clearing Landfill with 7.3 million cubic yards of capacity. The permitted facility has not been constructed, and is currently a heavily wooded area with limited access consisting of overgrown, unimproved dirt roads installed for site evaluation activities that initially took place in March 2007 and also recently in September-October 2014.

During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of Regulation R61-107.19, Part V. Class Three Landfills would require a minor permit modification. To satisfy the Class Three Landfill requirements, MRR engaged Civil & Environmental Consultants, Inc. (CEC) to conduct further hydrogeologic evaluation of the proposed landfill to provide additional data for a permit modification. The recent data collection effort was performed in September and October 2014. A previous site hydrogeologic investigation of the proposed landfill was reported by BP Barber in June 2007. This subject report provides an interpretation of the newly acquired site data in concert with the older June 2007 data collected by BP Barber to provide an appropriate site hydrogeologic characterization.

1.2 SITE LOCATION

The proposed MRR landfill site is situated off Highway 93 at Clardy Road approximately 2,000 feet northeast of the city limits of Liberty, SC. Access to the site is from Highway 93. The general geographic coordinates of the land parcel are 34° 47' 57" N and 82° 40' 37" W. A site location map is provided as Figure 1.

Pickens

**WORK PLAN
FOR
SITE-SPECIFIC HYDROGEOLOGIC INVESTIGATION**

**HIGHWAY 93 LANDFILL
2180 GREENVILLE HIGHWAY
LIBERTY, SC 29657
PICKENS COUNTY**

Prepared For:

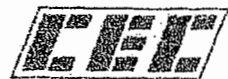
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CEC Project 142-152

**August 2014
Revised September 19, 2014**



Civil & Environmental Consultants, Inc.

Charlotte

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FIGURES

- Figure 1 – Site Location Map
- Figure 2 – Site Topographic Map
- Figure 3 – Aerial Site Vicinity Map
- Figure 4 – Regional Geologic Map
- Figure 5 – Proposed Boring Location Map

APPENDICES

- Appendix A - Enviro-Pro, P.C. - Lithologic Logs and Water Well Records

2.0 PROPOSED WORK PLAN FOR SITE-SPECIFIC HYDROGEOLOGICAL INVESTIGATION

2.1 CLASS TWO PERMIT MODIFICATION

MRR previously received a Class Two Landfill Permit for the subject landfill facility to be constructed at 2180 Greenville Highway, Liberty, South Carolina. The permit, issued in November 2008, is for a Construction, Demolition, and Land-Clearing Landfill with 7.3 million cubic yards of capacity. The permitted facility has not been constructed, and is currently a heavily wooded area with limited access consisting of overgrown, unimproved dirt roads installed for drilling activities that took place in March 2007.

During recent meetings between MRR and DHEC, it was confirmed that the modification of the Class Two permit to meet the requirements of Regulation R61-107.19, Part V, Class Three Landfills would require a minor permit modification.

2.2 RELIANCE ON PREVIOUS DATA

As previously described in Section 1.4, soil classification and depth-to-bedrock data have been obtained from 15 borings advanced at the proposed landfill site in March 2007. In addition, seven borings were converted to piezometers during the 2007 investigation, and these piezometers still exist, allowing for further data collection (i.e. water levels, slug tests, and gradient data). Previous data indicate that soil and bedrock conditions across the landfill footprint are uniform. This Work Plan has been designed to utilize the existing data in combination with newly acquired data to provide an appropriate site-specific hydrogeological characterization of the site. Both existing and proposed soil boring/well locations are shown in Figure 5.

MINOR PERMIT MODIFICATION
HIGHWAY 93 LANDFILL
PICKENS COUNTY, SOUTH CAROLINA

Prepared For:
MRR SOUTHERN, LLC

Prepared By:
CIVIL & ENVIRONMENTAL CONSULTANTS, INC.
CHARLOTTE, NC

CEC Project 142-152

MARCH 2015
UPDATED: AUGUST 2015



Scott L. Brown



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1.0 GENERAL INFORMATION

1.1 INTRODUCTION

MRR Pickens, LLC owns the Highway 93 Landfill (Facility) located off Greenville Highway (SC Highway 93) in the southern portion of Pickens County, SC. This facility was originally permitted in November, 2008 as a Class 2 Landfill under Permit Number LF2-00003.

This document consists of a Minor Permit Modification Application to obtain the option to develop cells of the Facility with an Alternate Liner system as opposed to the currently permitted Class 2 system. These cells will be developed in accordance with *South Carolina Department of Health and Environmental Control (SCDHEC) R.61-107.19, SWM: Solid Waste Landfills and Structural Fill*.

A completed Permit Application Form for the Highway 93 Landfill is provided in the first tabbed section of this document. SCDHEC regulatory requirements for a permit application are summarized in Table 1-1, which also indicates where the sections that correspond to these requirements can be found in this document.

TABLE 1-1 - REGULATORY REQUIREMENTS SCDHEC R.61-107.19, PART IV			
Section	Sub Section	Requirement	Location in This Permit Modification
Subpart B		Location Restrictions	1.3.3
	2	Airport Safety	1.3.3.1
	1.b	Floodplains	1.3.3.2
	1.c	Wetlands	1.3.3.3
	1.a, e – h	Buffer Zones	1.3.3.8
	1.d	Access Requirements	3.2.2

- Training of facility personnel to recognize unapproved or unauthorized waste, hazardous wastes as defined in the South Carolina Hazardous Waste Management Regulations R.61-79.261, and polychlorinated biphenyls (PCB) wastes as defined in Toxic Substances Control Act (TSCA), Part 761;
- All inspections shall take place in an area adjacent to the working face but not on the working face. Mechanical tools shall be used to separate and inspect for unapproved or unauthorized waste items; and
- Should unapproved or unauthorized materials be detected, the area shall be cordoned off while the site supervisor and SCDHEC are contacted.

SCDHEC will be notified within 72 hours if a hazardous waste or PCB waste is discovered.

4.11 RELEASES OF HAZARDOUS OR TOXIC MATERIALS

The landfill will accept Class 2 and certain special wastes as may be specified in the permit or otherwise specifically approved in writing by SCDHEC. No hazardous or toxic wastes will be accepted; therefore, releases of hazardous or toxic materials should not occur.

4.12 GROUNDWATER AND SURFACE WATER CONTAMINATION, WHICH MAY INCLUDE PUBLIC WATER SUPPLY CONTAMINATION AS A RESULT OF AN ACCIDENTAL SPILL

The facility is monitored by a comprehensive groundwater and surface-water monitoring system. Should statistical analysis of testing results indicate possible contamination, subsequent testing will follow with enhanced groundwater parameters. An assessment plan will be provided to SCDHEC and upon approval will be implemented. No hazardous or toxic wastes will be accepted; therefore, accidental spills should not occur.

4.13 LEACHATE STORAGE FACILITY BEING AT OR ABOVE CAPACITY

In the event that leachate levels reach or exceed storage capacity through equipment breakdown or facility outages, excess leachate will be pumped and transported via privately owned or

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C/A NO.: 2016-CP-39-100

MRR PICKENS, LLC,

PLAINTIFF,

vs.

DEPOSITION TRANSCRIPT

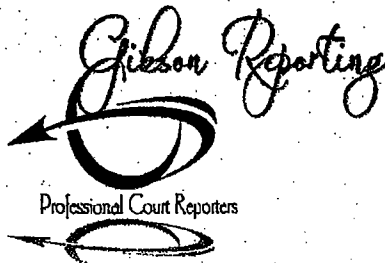
KENT M. COLEMAN

COUNTY OF PICKENS AND WILLIAM CATO,
WELDON CLARK, ROBERT BALLENTIN, JO
JOHNSON, DENNIS REINERT, and BOB
YOUNG, individually and in their
official capacity as appointed
members of the PICKENS COUNTY
PLANNING COMMISSION,

DEFENDANTS.

MARCH 8, 2016

DEPOSITION ON THE ORAL EXAMINATION OF KENT M. COLEMAN
REPORTED BY KRISTA GIBSON, COURT REPORTER AND NOTARY PUBLIC IN AND
FOR THE STATE OF SOUTH CAROLINA; SAID DEPOSITION TAKEN PURSUANT TO
NOTICE AND IN ACCORDANCE WITH THE SOUTH CAROLINA RULES OF CIVIL
PROCEDURE AT THE LAW OFFICE OF WILLIAMS MULLEN, 1441 MAIN STREET,
SUITE 1250, COLUMBIA, SOUTH CAROLINA ON TUESDAY, MARCH 8, 2016,
SCHEDULED FOR 10:00 A.M. AND COMMENCING AT 10:08 A.M.



A P P E A R A N C E S

REPRESENTING THE PLAINTIFF: *MRR Pickens, LLC*

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REPRESENTING THE WITNESS: *Kent Coleman and The South Carolina
Department of Health and Environmental Control*

ETTA R. LINEN, ESQUIRE

S.C. DEPARTMENT OF HEALTH

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A P P E A R A N C E S

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REPRESENTING THE DEFENDANT: *Pickens County Planning Commission*

MATTHEW K. JOHNSON, ESQUIRE
CAMDEN D. NAVARRO, ESQUIRE
OGLETREE DEAKINS NASH SMOAK & STEWART, PC
106 DOMINICK COURT
GREENVILLE, SOUTH CAROLINA 29602
EMAIL: matthew.johnson@ogletreedeakins.com
EMAIL: camden.navarro@ogletreedeakins.com

ALSO PRESENT: SHELLEY ROBBINS, CHRIS ROOF, AND DONALD
GRAVES (VIDEOGRAPHER)

1 This deposition is taken in accordance with
2 the South Carolina Rules of Civil Procedure.

3 VIDEOGRAPHER: We're on the record at
4 10:10. Today's date is March 8th, 2016.
5 This is video Number 1 in the deposition
6 of Kent M. Coleman, taken in the matter of
7 *MRR Pickens, LLC, Plaintiff, vs. County*
8 *of Pickens and William Cato, et al,*
9 *Defendants, in the Court of Common Pleas,*
10 *Thirteenth Judicial Circuit, State of*
11 *South Carolina, County of Pickens.*

12 This deposition is being held at
13 1441 Main Street, Columbia, South
14 Carolina.

15 Will counsel introduce themselves
16 for the record, please?

17 MR. POLIAKOFF: I'm Gary Poliakoff, and I
18 represent the Defendant, Pickens County.

19 MS. NAVARRO: I am Camden Navarro, and I'm
20 standing in for Matt Johnson, who
21 represents the Pickens County Planning
22 Commission members, both individually and
23 in their official capacity.

24 And I just want to reserve for the
25 record that per the judge's ruling, Matt

1 Johnson, who's representing the Pickens
2 County Planning Commission members, he
3 reserves the right to depose Kent Coleman
4 at a later date.

5 SHELLEY ROBBINS: I'm Shelley Robbins.
6 I'm here with Gary Poliakoff.

7 MS. POLIAKOFF: As my expert and/or
8 consultant.

9 MR. GOINGS: My name is Robert Goings, and
10 I am counsel for MRR Pickens, LLC.

11 MS. KING: I'm Jessie King, Jessica King,
12 and I represent MRR Pickens, LLC.

13 MS. LINEN: I'm Etta Linen --

14 MS. SNYDER: And I'm Amy Snyder, and I
15 represent the Defendants.

16 MS. KING: Amy, could you clarify which
17 Defendants?

18 MS. SNYDER: I represent all of them at
19 this moment.

20 MS. KING: All of them being the County
21 and each Planning Commission member
22 individually?

23 MS. SNYDER: Yes, yes.

24 MS. KING: Okay.

25 MS. LINEN: I'm Etta Linen, and I

1 represent South Carolina Department of
2 Health and Environmental Control. I'm
3 here with Kent Coleman.

4 VIDEOGRAPHER: Will the court reporter
5 please swear the witness?

6 WHEREUPON:

7 KENT M. COLEMAN, being duly sworn and
8 cautioned to speak the truth, the whole truth and nothing
9 but the truth, testified as follows:

10 MR. GOINGS: This is Robert Goings for MRR
11 Pickens, LLC. Ms. King will be doing the
12 principal examination of the witness;
13 however, I want to put two things on the
14 record.

15 First, the Plaintiff stipulated to
16 allowing this deposition to remain open,
17 and that goes for all parties in this
18 matter pending additional discovery and
19 production of documents by DHEC.

20 Secondly, the Plaintiff will object
21 to Pickens County having a representative
22 from Upstate Forever in attendance of
23 this deposition. No prior notice was
24 given that a third party would be in
25 attendance for purposes of this

1 A. I was a project manager in the Solid Waste
2 Program at DHEC from '92 to -- when I started there,
3 until about, let's see, probably middle of '94 or so,
4 maybe '95, right in there, where I then became a program
5 manager for the CERCLA Program, where I dealt with
6 primarily groundwater issues related to CERCLA, but also
7 brown fields, dry cleaning, and some Department of Energy
8 sites as well.

9 And then I went -- I was -- then I became
10 director, I think it was about '93 -- I think, around -- I
11 mean, not '93, '03 -- 2003, director of the underground
12 storage tank program at DHEC. And then in the end of 2007
13 is when I started in my current position as the director
14 of mining and solid waste management at DHEC.

15 Q. Okay. And what are your job duties as the
16 Director of Mining and Solid Waste Management?

17 A. Well, I oversee the permitting programs for
18 both mining and solid waste in terms of any types of mine
19 activity in the state or solid waste management
20 facilities. Also, I also oversee the Office of Solid
21 Waste Reduction and Recycling. It resides in my
22 division, as well as the planning -- Solid Waste Planning
23 and Regulation Development and the solid waste grants for
24 the state.

25 And then also the Solid Waste Groundwater

1 section that oversees groundwater activities for both
2 mining and solid waste permits. And also financial
3 assurance requirements for mines and solid waste
4 facilities.

5 Q. And when you --

6 A. I think that kind of covers most of it.

7 Q. Okay. Sorry. Didn't mean to interrupt.

8 A. That's all right.

9 Q. When you say solid waste facilities or solid
10 waste managed facilities, would that include landfills?
11 Solid waste landfills?

12 A. Yes. It would include landfills, yes.

13 Q. But not hazardous waste landfills?

14 A. That's correct.

15 Q. Okay. And do you manage individuals in that
16 position?

17 A. Yes.

18 Q. How many employees do you manage?

19 A. I'm direct supervisor for four program
20 managers. And then there's 37 employees within the
21 division that are under my chain of command, I would say.

22 Q. Okay. And is it true that you are -- you have
23 resigned or retired from DHEC?

24 A. I've -- I have submitted a letter of, I guess
25 you would call it resignation, notifying my -- my

1 group.

2 A. Right.

3 Q. Do you recall?

4 A. Yes.

5 Q. And there were, of course, industry people
6 represented as well.

7 A. Yes.

8 Q. At the end of six months or so, a new package
9 of regs were submitted to the Board and those were
10 approved. And I believe you're correct. It was the --

11 A. That was demonstration of need, yes.

12 Q. Demonstration of need and notice of issues.

13 A. Yes, sir.

14 Q. All right. In your position with DHEC, would
15 you agree that you're required to uphold the law as it
16 pertains to solid waste?

17 A. Yes.

18 Q. And you would agree that you have to follow the
19 law?

20 A. Yes.

21 Q. You've got to follow statutes. You've got to
22 follow regulations. Would you agree?

23 A. Yes.

24 Q. And you must carry out statutes and
25 regulations to the best of your ability. Would you

1 agree?

2 A. Yes.

3 Q. And would you agree that you must not violate
4 statutes or regulations?

5 A. We are to follow them, certainly.

6 Q. All right, sir. In regard to local
7 government's solid waste management plans, in the Solid
8 Waste Act itself, there are provisions, statutory
9 provisions, that talk about local governments developing
10 solid waste management plans. Is that correct?

11 A. Yes.

12 Q. It can be counties or it can be even regional
13 groups of local governments. Is that right?

14 A. Yes.

15 Q. And once they develop a solid waste management
16 plan, any actions by the Department and any actions by a
17 permittee or proposed permittee have to be consistent
18 with the local government's solid waste management plan.

19 A. Well, I mean I think the word "any action", I
20 don't know that I could answer that exactly. That's
21 fairly broad. But certainly permitting, the permitting
22 decisions in regard to solid waste facilities have to
23 take into account the solid waste management plan. And
24 permits that we issue for solid waste facilities are
25 supposed to be consistent with County solid waste plans.

1 Q. All right, fair enough to talk about it in
2 terms of permitting. But the permits issued by the
3 Department and any permits issued to a permittee or a
4 proposed permittee, or a permit applicant, must be
5 consistent with the local government's solid waste
6 management plan?

7 A. Unless they conflict directly with state law,
8 but yes, generally we --

9 Q. Obviously you --

10 A. We certainly try -- we certainly try to be
11 consistent with those County plans.

12 Q. Well, in addition to try to be consistent,
13 doesn't the law say that you must be consistent in
14 permitting decisions. They must be consistent with the
15 local government's solid waste management plan?

16 A. It says -- I wish I had the Act in front of me.
17 But it says that we are not to issue a permit that --
18 unless it's consistent, or something along those lines.

19 Q. All right. In general, a permit is supposed to
20 be consistent with the local government solid waste
21 management plan.

22 A. Yes, uh-huh.

23 Q. And if you issued a permit that violated a --
24 or that was not consistent with a local government solid
25 waste management plan, that would be invalidly issued.

1 Would you agree?

2 A. Well, I mean our permits are supposed to be
3 consistent. And if they're not, and if they're
4 challenged, you know, then obviously that might be a
5 reason to have a permit overturned or remanded or
6 something along those lines.

7 Q. Right, because again, the law does require a
8 permit issued by the Department to be consistent --

9 A. Yes.

10 Q. -- with the local government solid waste
11 management plan.

12 A. Yes.

13 Q. All right. If the language of a statute is
14 clear and unambiguous, if the language is plain, you must
15 follow it. Would you agree?

16 A. We make every attempt to follow statutes, yes.

17 Q. In addition to making every attempt, if the
18 language of a statute is clear and unambiguous, you must
19 follow it, would you --

20 A. Yes.

21 Q. -- agree?

22 A. Correct.

23 Q. Same with the regulation. If the language of a
24 regulation that's been passed and approved, if the
25 language of a regulation is clear and unambiguous, you

1 must follow that?

2 A. Yes.

3 Q. All right. You've been asked about
4 definitions of major and minor. If you would pick up
5 Exhibit 2 for me, please, sir. And if you would turn back
6 to page 8, Number 48. Again, the definition of
7 "modification".

8 (WHEREUPON, the Deponent reviewed the document
9 previously identified as Plaintiff's Exhibit 2.)

10 A. Uh-huh.

11 Q. So minor modification, "Means a change that
12 keeps the permit current with routine changes to the
13 facility or its operations or an administrative change."

14 A. Uh-huh.

15 Q. All right. I read that correctly?

16 A. Yes.

17 Q. All right. Then B, major modification, "Means
18 a change that substantially alters the facility or its
19 operations, e.g., tonnage increase above 25 percent, any
20 volumetric capacity increase, alternate designs that
21 vary from the design prescribed in this regulation." Do
22 you see that?

23 A. Yes, uh-huh.

24 Q. All right. Now let's focus on that word,
25 "alternate designs", it goes on to the "vary from the

1 design prescribed in this regulation".

2 A. Uh-huh.

3 Q. All right, so "alternate designs" would be a
4 major modification under this regulation. Would you
5 agree?

6 A. Yeah, that's what it says.

7 Q. Okay. Under A, 48A, "minor modification",
8 there's no mention of alternate designs under 48A, is
9 there?

10 A. No.

11 Q. All right, so if it's an alternate design, then
12 it's a major modification, would you agree?

13 A. Perhaps.

14 Q. Tell me why it wouldn't be clearly? Is there
15 any -- I just asked you, is there any mention of
16 alternate designs in 48A?

17 A. Right.

18 Q. But there is none in 48A, is there?

19 A. No, not specifically, no.

20 Q. And the term "alternate designs" is in 48B,
21 "major modifications" definition, is that right?

22 A. Yes, it is.

23 Q. Okay. Keep that handy for just one minute,
24 please. And would you pick up Exhibit 6? So the first
25 page of that being your cover letter of August 10, 2015.

1 A. Uh-huh.

2 (WHEREUPON, the Deponent reviewed the document
3 previously marked for identification as Plaintiff's
4 Exhibit 6.)

5 Q. All right. Do you see that? Let's look at the
6 second sentence talking about the modification. It says,
7 "The modification includes an alternate ladder design
8 and associated changes resulting from the design
9 change." Did I read that correctly?

10 A. Uh-huh. Yes, uh-huh.

11 Q. All right. And that's your signature there, at
12 least a copy of your signature. Is that right?

13 A. Yes.

14 Q. All right. So again your sentence was, "The
15 modification includes an alternate ladder design and
16 associated changes resulting from the design change."

17 A. Uh-huh.

18 Q. All right, and that's -- you wrote this letter?

19 A. Yes.

20 Q. All right, you signed --

21 A. I signed that letter.

22 Q. You signed the letter, so you stand by the
23 letter I take it.

24 A. Uh-huh, sure.

25 Q. Okay. "Design change" is the words in your

1 letter. Is that right?

2 A. Yes.

3 Q. Now let's look back again at 48B, "alternate
4 designs that vary from the design prescribed."

5 A. Uh-huh.

6 Q. So 48B, definition of "major modification",
7 includes "alternate designs," In this sentence alone it
8 says -- it talks about "the design change." There was a
9 design change in this permit modification that occurred
10 in 2015 that is a design change from the 2008 permit,
11 isn't it?

12 A. Yeah. We approved an optional design change to
13 add a liner.

14 Q. And I'm just asking you, it was a design
15 change. Is that right?

16 A. Sure. Yes.

17 Q. Okay. And we've just confirmed that design
18 change is mentioned under "major modification"
19 definition but not mentioned under "minor modification"
20 definition. Isn't that correct?

21 A. That is correct.

22 Q. Now, the big difference as far as the public
23 and Pickens County or any local host government is
24 concerned, if it's a minor modification, then the public
25 and the local host government gets no notice. Is that

1 right?

2 A. There's certainly less noticing during a minor
3 modification.

4 Q. Okay. We'll get to what noticing was. But a
5 major modification requires notice to affected persons.
6 Is that right?

7 A. Yes.

8 Q. And affected person is -- there's actually a
9 statute that divides -- that defines "affected persons",
10 but it generally includes things like local governments,
11 host -- a host local government. So, would you agree?

12 A. Yes. Uh-huh.

13 Q. So if it's determined that this change that
14 occurred from the '08 permit to the 2015 permit was a
15 major modification, then that would have required notice
16 to Pickens County and the public at large. Would it not?

17 A. Yeah, if we had -- if we'd determined it to be
18 a major modification, we would have noticed --

19 Q. Okay.

20 A. -- adjacent land -- we would have followed our
21 normal process, which would include adjacent owners,
22 concerned parties, local governments.

23 Q. Okay. And again, we know that there was -- for
24 this 2015 permit change, I see you've written Mr. Roof at
25 MRR Pickens, and it's copied people at DHEC, but there's

1 no copy that went to Pickens County. And there was no
2 public notice, was there?

3 A. I don't -- not that I recall, no, uh-uh.

4 Q. So again, if it's a major modification, the law
5 requires there to have been a public notice, notice to
6 the County, and notice to the public. Is that correct?

7 A. Yes. That's our normal process for major
8 modifications, yes.

9 Q. It's not only normal process, but isn't it
10 actually required in regulations that if it's a major
11 modification that it has to be notice provided to the
12 public?

13 A. I, I think that wording -- let me -- generally,
14 yes. Let me --

15 Q. I can dig it out somewhere.

16 A. Yeah, there's a process.

17 Q. You would agree with generally if it's a major
18 modification the public gets notice?

19 A. Uh-huh. Yes.

20 Q. All right, sir. And again, this was a design
21 change; that is, a change from '08 to 2015 was a design
22 change as you stated in your letter. Isn't it?

23 A. Yes.

24 Q. And design change, again, is mentioned under
25 the definition of "major modification" but not under the

1 definition of "minor modification."

2 A. Yes.

3 Q. Is that correct?

4 A. Uh-huh.

5 Q. All right. So if it's determined, if some
6 court or some higher authority than you or perhaps us
7 determines that this in fact was a major modification,
8 then it should have been -- there should have been notice
9 to Pickens County and notice to the public, shouldn't
10 there?

11 A. Well, you know, we, we made a decision to treat
12 it as a minor modification at the time.

13 Q. Yes, sir.

14 A. And I don't -- I can't really speak to what --
15 you know, what would happen if others determined
16 otherwise.

17 Q. All right. Clearly, you made a determination,
18 or you and MRR made a determination that this was going
19 to be a "minor modification." But if it's determined
20 that in fact the design change puts it into the category
21 of a "major modification" then the law required there to
22 be public notice, didn't there? And notice to the host
23 local government?

24 A. I mean we determined that it was a minor
25 modification. And that's, you know, many, it's many

1 months in the past at this point, so I don't know what,
2 what you're asking me about.

3 Q. Well, if your determination was wrong that in
4 fact it met the definition of a "major modification" --

5 A. Right.

6 Q. -- it should have had public notice and notice
7 to the host local government, shouldn't it?

8 A. Well, I guess if --

9 MS. LINEN: Object to form. Speculative.

10 A. -- if someone determines --

11 Q. You can answer.

12 A. -- you know, if someone --

13 Q. It's not speculative.

14 A. -- determines that it was wrong, then I guess
15 they'll direct us to do whatever they need to do.

16 Q. All right.

17 A. And we'll certainly follow that.

18 Q. All right. But again, we, we've covered the
19 definition of "major" and "minor", and you admit in your
20 letter that this was a design change. Isn't that right?

21 A. That's what the letter calls it. The letter
22 terms it that, yes, uh-huh.

23 Q. Your letter, signed by you, is that correct?

24 A. Yes. That's correct.

25 Q. All right. In addition to the "design change",

1 I made notes today as you were answering Ms. King's
2 question. In answers to Ms. King's question one time
3 today, you said this was a, "New design for the
4 landfill." Is that a fair statement?

5 A. Yeah, I mean it is.

6 Q. Okay.

7 A. It was a new design.

8 Q. And I wrote down also a quote earlier today
9 when your answer to Ms. King's questions that this was,
10 "Essentially the same design as a Class Three."

11 A. Yes. I recall saying that, yes.

12 Q. All right. And that is basically the change
13 from the '08 to the 2015 modification was essentially the
14 same design as a Class Three. Is that right?

15 A. Yes, uh-huh.

16 Q. So in other words, what we're doing is changing
17 a Class Two by adding Class Three features. It became
18 essentially the same design as a Class Three.

19 MR. GOINGS: Object to the form of the
20 question.

21 Q. You can answer that.

22 A. The design became very similar to a Class
23 Three, yes.

24 Q. Okay. And you agree, I wrote this down,
25 "Alternate designs would be a major modification", is

1 that correct?

2 A. That's what the definition says, yes.

3 Q. Okay. Yeah, and another thing I wrote down
4 earlier today, "If it substantially alters", if it
5 substantially alters the facility or the operations,
6 then it's a major modification, isn't it?

7 A. Yes.

8 MR. GOINGS: Object to the form of the
9 question.

10 Q. All right. And in addition, the changes from
11 the '08 permit to the 2015 permit -- of course we've
12 talked about it -- added the liner, is that right?

13 A. Yes.

14 Q. And it had additional groundwater monitoring
15 requirements. Is that right?

16 A. I'm not -- I don't recall that.

17 Q. All right. Well, what additionally in regard
18 to groundwater was done in the -- from the change from
19 the '08 permit to the 2015 modification?

20 A. I don't -- I don't think there were any changes
21 in groundwater that I remember.

22 Q. Not even in monitoring?

23 A. Uh-uh. They were already in place. I mean
24 groundwater monitoring was already in place in the 2008
25 permit, so --

1 Q. All right. The 2015 permit added some final
2 coverage changes, did it not?

3 A. It would, yes --

4 Q. All right.

5 A. -- to correspond with the liner.

6 Q. Didn't -- but, are you sure? I mean, we can
7 hold the two permits, the 2008 permit and the 2015
8 modification side by side, but weren't there additional
9 groundwater reporting requirements done in the 2015?

10 A. I'd have to look. I don't recall that.

11 Q. Could you do that for me, please?

12 A. Sure.

13 Q. If you would grab those two permits. Let's
14 see, Exhibit 6 is the 2015, and Exhibit 5 is the 2008.

15 A. You want -- there's a section in each of these
16 permits called -- under the "Groundwater" called
17 "Reporting".

18 Q. Uh-huh.

19 A. Is that the parts that you want me to compare?

20 Q. Well, any of it related to groundwater,
21 assessment of groundwater impact. Let me see. In the
22 2008 permit, under "Special Conditions", I see seven
23 paragraphs, and in the 2015 modification I see eight
24 paragraphs.

25 A. Uh-huh. Yeah. I don't -- I mean I don't

1 really think there's -- I haven't really identified any
2 differences in the groundwater monitoring or reporting
3 requirements that are -- maybe there are some slight
4 differences in the wording, but there's -- I think
5 they're the same.

6 Q. All right. Let me ask you this. The name of
7 the facility changed in 2008. It was addressed to
8 Highway 93 C & D Landfill, was it not?

9 A. 2008? Are you looking at the permit cover
10 page? I think so.

11 Q. The --

12 A. 93 --

13 Q. The front page of the permit itself, LF2-0003,
14 says, "Name of Facility: Highway 93 C & D Landfill".

15 A. Yes. Uh-huh.

16 Q. Okay. And in the 2015 modification it says,
17 "Name of Facility: Highway 93 Class Two Landfill".

18 A. Correct.

19 Q. All right, so the name changed. Is that right?

20 A. You know, we, we -- I don't know if the company
21 name changed. We referred to it differently in our
22 permit because, you know, the new regs. I think we were
23 still sort of using the old -- the old names before. I'm
24 not sure what -- I'm not sure if this Highway 93 C & D
25 Landfill was actually a company name at the time or

1 whether we --

2 Q. Well, the company name is MRR Pickens --

3 A. Right.

4 Q. -- LLC, isn't it?

5 A. That's, that's my understanding, yes.

6 Q. Okay. But "Name of Facility" -- I mean a
7 permit is a pretty formal document, isn't it?

8 A. Yes.

9 Q. And it indicates "Name of Facility" in '08
10 "Highway 93 C & D Landfill" and indicates in year 2015
11 modification "Highway 93 Class Two Landfill". Is that
12 right?

13 A. That's correct.

14 Q. Okay. Additionally, if you would take a look
15 at Special Condition Number Two. It's actually A2 -- in
16 each of them. Let's hold these side by side, please,
17 sir. Now, in 2008 --

18 A. We're looking at A2?

19 Q. A2, yes, sir, under "Special Conditions". All
20 right, A2, "This permit is limited solely to the disposal
21 of items listed in Appendix 1 of R61-107.19."
22 Emphasizing "all other waste, including animal
23 carcasses, are prohibited from disposal in this
24 landfill." Did I read that correctly?

25 A. Yes.

1 Q. So we can talk about what's listed or not
2 listed on Appendix 1 shortly, but aside from what's
3 listed on Appendix 1, it specifically said, "All other
4 waste, including 'animal carcasses' are prohibited."
5 Isn't that right?

6 A. Yeah, unless the permit's modified. That's
7 correct.

8 Q. We'll get to -- unless the permit's modified.
9 But under the '08 permit, all other wastes were
10 prohibited, right?

11 A. Yeah, that's what it says.

12 Q. Okay. And then in the 2015 modification, "This
13 permit is limited to the disposal of the items listed in
14 Appendix 1 of R61-107.19, 'and any other waste approved
15 by the department for disposal in a Class Two landfill'
16 pursuant to R61-107.19, Part IV, Section C2." So aside
17 from the items that are listed on Appendix 1 of the reg,
18 previously, in '08, it said, "All other wastes including
19 animal carcasses are prohibited from disposal in the
20 landfill."

21 A. Uh-huh.

22 Q. And the modification in '15 said, "Any other
23 waste approved by the Department."

24 A. Uh-huh.

25 Q. Would you agree that that's correct?

1 A. Yes.

2 Q. All right. So the change from '08 to your
3 modification in '15 took away the prohibition of other
4 waste and added "Any other waste approved by the
5 Department", didn't it?

6 A. Well, I mean, first of all, the wording is
7 different --

8 Q. Wait a minute --

9 A. -- but the process --

10 Q. -- first of all, am I correct in that
11 statement?

12 MR. GOINGS: Let the witness finish his
13 answer and then you can follow up.

14 Q. First answer my question, and then I'm happy
15 for you to explain. My question is, did -- in '08 it
16 said, "All other wastes are prohibited," your
17 modification in '15 took out that prohibition language
18 and added expansive language of "Any other waste approved
19 by the Department for disposal in a Class Two". Didn't
20 it make that change?

21 A. Well, Item -- clearly we've read Item 2 on both
22 and --

23 Q. First of all, am I correct that that change --

24 A. -- they say something different.

25 Q. -- was made?

1 A. A change was made, yes.

2 Q. All right, sir. You can explain whatever you
3 want to explain about it.

4 A. Okay. Well, I mean what -- I guess I was only
5 going to say that the process for the regulation didn't
6 change. In other words, if they'd asked for a new waste
7 under this permit or a new waste under the -- if they'd
8 asked for new waste under the '08 permit or a new waste
9 under the '15 permit, the process would not have been any
10 different from DHEC's point of view.

11 Q. All right, so from -- but as far as the
12 differences between the '08 permit and the modification
13 in 2015, which you and MRR had decided to call a "minor
14 modification" to avoid public notice --

15 MS. KING: Object to form.

16 A. I don't understand what you're just saying
17 there.

18 Q. Oh, you didn't have discussions with MRR about
19 calling this a "minor modification"?

20 A. I did not, no.

21 Q. Did anybody at DHEC have those discussions?
22 Because I'm going to show you some MRR documents
23 submitted to DHEC that say that.

24 A. Okay. Well, not to my knowledge. I don't
25 recall that.

1 Q. We'll get to those documents in a minute. I'm
2 talking about documents submitted by CEC. Do you recall
3 there being a Work Plan for Hydrogeologic Study and
4 Hydrogeologic Study Minor Modification, all submitted by
5 CEC, Civil and Environmental Consultants, Inc., on
6 behalf of MRR? Remember seeing those engineering reports
7 coming --

8 A. I mean I'm aware that they were -- there were
9 engineering reports, yes.

10 Q. Okay. I'm going to get to those shortly, but -
11 -

12 A. Okay.

13 Q. So let's talk about the differences then from
14 '08 to your "minor modification", as you choose to
15 describe it, in the 2015 modification. So first of all
16 we've got an alternate design, as you stated in your
17 letter. Is that correct?

18 A. Yes.

19 Q. All right. And you've got -- you're adding a
20 liner. Is that right?

21 A. We approved the addition of a liner, yes.

22 Q. All right. There were final cover changes. Is
23 that right?

24 A. That's part of the liner, yes.

25 Q. All right. You admitted that -- earlier today

1 you described this as adding Class Three features to this
2 Class Two landfill.

3 A. I don't think I used the word "features", but
4 yeah, the class, the design -- I think I said it would be
5 essentially --

6 Q. I wrote down --

7 A. -- the same as a Class Three as far as the
8 liner design.

9 Q. Right, talking about the changes, and I wrote
10 down, "essentially the same design as a Class Three." Is
11 that right?

12 A. I believe I did say it that way, yes, sir.

13 Q. Okay. And additionally, we just talked about
14 changing from Appendix 1 in '08, Appendix 1, and "All
15 other waste, including animal carcasses, are prohibited"
16 and changing that and instead saying, "Waste on Appendix
17 1 and any other waste approved by the Department for
18 disposal in a Class Two." So all of those changes
19 occurred from the '08 permit to this "minor modification"
20 done in 2015. Is that right?

21 A. There was a change in design and --

22 Q. Yes, sir.

23 A. -- there were differences in wording between
24 the two permits.

25 Q. Well, when you talk about differences in

1 wording, if, if there's a local host government, such as
2 a county, that has made it clear that it doesn't want
3 waste other than construction and demolition and land
4 clearing debris, C & D LCD, and in the '08 permit it says
5 all other waste other than Appendix 1 "are prohibited",
6 that's a big difference from expanding that to say
7 Appendix 1, "and all other waste approved by the
8 Department." You took out the prohibition.

9 A. Right. Yeah. I mean, I understand why -- in
10 DHEC's --

11 MS. KING: Object to the form of the question.

12 Q. Didn't you? You took out the prohibition?
13 Previously there was a prohibition on any other wastes
14 other than Appendix 1, wasn't there?

15 A. That's the wording in the permit, yes.

16 Q. And you took that out for the 2015
17 modification?

18 A. That's correct.

19 Q. Okay. All those changes -- if it's determined
20 that that's a "major modification", then your major
21 modification would have required, to be legal, public
22 notice, wouldn't it?

23 MS. KING: Object to form. Speculative.

24 Q. You can answer that question.

25 A. I don't -- I don't know.

1 Q. Wait a minute, you are the head of Solid Waste
2 Management --

3 A. Right.

4 Q. -- and you don't know if major modification
5 would require --

6 A. I'm not, I'm not -- you said if it's
7 determined. That's what I'm saying I don't know, I
8 don't.

9 Q. Let me ask it this way then. If it's a major
10 modification, it requires public notice, doesn't it?

11 A. Yes. If DHEC determines it to be major, then
12 it requires public notice.

13 Q. All right. And it still -- as you sit here
14 today, it's still the opinion of Kent Coleman that the
15 changes we just discussed from the '08 permit to what you
16 call a minor modification in 2015 is a minor
17 modification?

18 A. Yes.

19 Q. All right. Does anybody in your department
20 agree with that?

21 A. I assume so. I mean you'd have to ask them.

22 Q. All right. Who is superior to you within the
23 DHEC, within the Department?

24 A. My direct supervisor is Stan Clark.

25 Q. All right. Does Stan Clark agree that these

1 Q. That's how I read the regulation, yes, sir. I
2 believe it says that exactly.

3 A. Okay. I don't -- I don't recall whether --
4 whether they were mailed a copy of the draft permit or
5 the permit back, you know, at some point in the past. I
6 don't remember.

7 Q. The draft of the 2015 permit?

8 A. Right.

9 Q. All right. Should they have been mailed the
10 draft of the 2015 permit?

11 MR. GOINGS: Object to the form of the
12 question; calls for legal conclusion.

13 BY MR. POLIAKOFF:

14 Q. You can answer that. Because it should --
15 should Pickens County have been mailed --

16 A. Well, if it were determined to be a major
17 modification, we would have mailed it to them.

18 Q. All right. We agree with that. If it's
19 legitimately a major modification, Pickens County was
20 entitled to notice, weren't they?

21 A. Yes.

22 Q. All right. I haven't seen any indication that
23 Pickens County was ever formally notified.

24 A. Right.

25 Q. Are you able to tell me --

1 MS. LINEN: Object to form. I'm sorry.

2 BY MR. POLIAKOFF:

3 Q. Are you able to tell me of any formal mailing
4 or providing of formal notice to Pickens County either of
5 the proposed draft permit modification or even the permit
6 modification after it was issued?

7 MR. GOINGS: Object to the form of the
8 question.

9 BY MR. POLIAKOFF:

10 Q. You can answer.

11 A. I don't -- I don't recall.

12 Q. In fact, wasn't the entire purpose of calling
13 it a "minor modification" instead of a "major
14 modification," the entire purpose of that is to avoid
15 public notice, isn't it?

16 A. No.

17 Q. What other purpose is there?

18 A. I don't -- I don't understand. The purpose --
19 the purpose is if, if we determine it to be minor,
20 there's a process. And if we determine it to be major,
21 there's a process.

22 Q. And when --

23 A. And we follow the process.

24 Q. And the difference between the two processes
25 is notice to the public and notice to affected persons,

1 isn't it?

2 A. Yes. That's part of it.

3 Q. What other -- what else is different? The
4 effect of calling it minor versus the effect of calling
5 it major is all about whether you have to notify the host
6 local government, affected persons, and the public.

7 MR. GOINGS: Object to the form of the
8 question.

9 BY MR. POLIAKOFF:

10 Q. Now you agree with me, if it's a major
11 modification, that, quote, affected persons, host local
12 government and the public are entitled to notice. Is
13 that right?

14 MR. GOINGS: Object to the form of the
15 question.

16 BY MR. POLIAKOFF:

17 Q. What else is different? If it's a minor
18 modification, what -- what other differences are there in
19 effect from calling it a minor or a major?

20 MR. GOINGS: Same objection.

21 A. Well, the the method, the process that we use
22 or the methods that we use to change -- to modify the
23 permit may differ depending on the nature of it.

24 Q. How does it differ other than the fact that you
25 can avoid giving notice to affected persons, host local

1 government, and the public?

2 A. Well, we may just decide to modify it by letter
3 versus changing the permit itself or something like that,
4 depending on what the issue is.

5 Q. Right, because minor modification, if it's a
6 legitimate minor modification, it says, "A change that
7 keeps the permit current with routine changes to the
8 facility or its operations or an administrative change,"
9 is that right?

10 A. That's -- that's the wording in the
11 definition, yes.

12 Q. All right. But you would agree with me, we've
13 already discussed this, major modification includes
14 design changes, doesn't it?

15 A. That is in the definition.

16 MR. GOINGS: Object to the form of the
17 question.

18 Q. Yeah, and this was a design change, as you
19 described in your letter, wasn't it?

20 MR. GOINGS: Object to the form of the
21 question.

22 A. Yes.

23 Q. Okay. So whose idea was it to call this a
24 minor modification instead of a major modification? Was
25 it your idea or was it MRR's idea?

1 Defendant's 9? That's what I was asking.

2 THE WITNESS: It's consecutive though. I
3 mean --

4 MS. KING: Right.

5 THE WITNESS: There's not a Defendant's 1
6 --

7 MR. POLIAKOFF: Right.

8 THE WITNESS: -- that I know of.

9 MS. LINEN: Right.

10 THE REPORTER: Let's just go off the
11 record until she comes back.

12 MR. POLIAKOFF: Okay.

13 (OFF THE RECORD DISCUSSION)

14 VIDEOGRAPHER: We're on the record at
15 2:11.

16 (DEFENDANT'S EXHIBIT NO. 9; MARKED FOR IDENTIFICATION)

17 MR. POLIAKOFF: Are you ready to go?

18 MS. KING: Yes. Thank you.

19 MR. POLIAKOFF: Okay.

20 CONTINUATION OF CROSS-EXAMINATION

21 BY MR. POLIAKOFF:

22 Q. All right. I've handed you three pages from --
23 we've marked it as Pickens County Exhibit 9, Work Plan
24 for Site Specific Hydrogeologic Investigation.

25 It says, "Prepared for MRR Pickens, LLC." It

1 references the Highway 93 landfill, and it's by --
2 prepared by Civil & Environmental Consultants, Inc. The
3 first date is August 2014. Below that, it says revised
4 September 19, 2014.

5 First of all, do you see that?

6 A. Yes.

7 Q. And is this a copy of a report that was
8 submitted to your department by MRR through its
9 consultant, Civil & Environmental Consultants?

10 A. This -- this would be the type of report that
11 would be submitted to us as part of a process. I don't --
12 I mean, I don't see a received stamp on it. Was there one
13 on the cover?

14 Q. I might be able to find out.

15 A. I'm assuming.

16 Q. I could represent to you that it was submitted
17 to me through the DHEC response that I received
18 yesterday.

19 A. Okay.

20 Q. All right. So August '14, do you recall that
21 by August of 2014, there were discussions between DHEC
22 and MRR concerning site specific hydrogeologic
23 investigation?

24 A. Well, I mean, that doesn't surprise me. I
25 couldn't have recalled it off the top of my head prior to

1 seeing this document, but I can see that there was some -
2 - there was a submittal at that time related to this
3 landfill.

4 Q. All right. Do you have any information as to
5 whether Pickens County at the time got any notice of this
6 document?

7 A. No.

8 Q. All right. If you would turn to the third page
9 of what I've -- what I've handed to you, it's actually --
10 at the bottom, it indicates that it's page 5 of the
11 actual report. And under paragraph 2.1, Class Two permit
12 modification, do you see that?

13 A. Uh-huh, yes.

14 Q. All right. The second sentence of that says,
15 "The permit issued in November 2008 is for a construction
16 demolition and land clearing landfill with 7.3 million
17 cubic yards of capacity."

18 First of all, did I read that accurately?

19 A. Yes.

20 Q. And would you agree that that's an accurate
21 statement, that is that the November 2008 permit was for
22 a construction demolition and land clearing landfill?

23 A. Well, the -- the 2008 permit was a Class Two
24 landfill, so this --

25 Q. Can you take a look at --

1 MR. GOINGS: Gary, there is not a
2 controversy. I just want to make sure
3 we're all singing on the same sheet of
4 music, and apparently we haven't been.

5 MR. POLIAKOFF: No. We've been -- there's
6 no changing any documents here.

7 KIP MCALISTER: How many copies?

8 MR. GOINGS: Same amount, if you don't
9 mind.

10 THE REPORTER: What was his name? The man
11 that was just --

12 MS. KING: Kip McAlister.

13 THE REPORTER: McAlister.

14 MS. KING: With Williams Mullen.

15 MR. POLIAKOFF: Do you want to wait until
16 he's back, or can we proceed?

17 MS. KING: No, you can proceed.

18 BY MR. POLIAKOFF:

19 Q. Okay. All right. We've marked this Site-
20 Specific Hydrogeologic Investigation Report. Again, it
21 says, Highway 93 Landfill; prepared for MRR Pickens, LLC;
22 prepared by Civil & Environmental Consultants, Inc.

23 December '14 is typed. Handwritten, it says,
24 "12-15-14" on the front page. Do you see that, Mr.
25 Coleman?

1 A. Yeah. Handwritten, you mean the 12-15-14?

2 Q. Yes, sir.

3 A. Yes.

4 Q. It's handwritten, the --

5 A. Uh-huh.

6 Q. -- 12-15-14.

7 A. Yes, I see it.

8 Q. All right. If you would page over to the
9 second page of what I've handed you. It actually has a
10 numbered -- a No. 1 on that page.

11 A. Uh-huh.

12 Q. All right.

13 The second sentence under 1.1 says, quote,
14 "The permit, issued in November 2008, is for a
15 Construction, Demolition, and Land-Clearing Landfill."

16 First of all, did I read that correctly?

17 A. Yes.

18 Q. All right. The next paragraph.

19 "During recent meetings between MRR and DHEC,
20 it was confirmed that a modification of the Class Two
21 Landfill Permit to meet the requirements of Regulation
22 61-107.19, Part V., Class Three Landfills, would require
23 a minor permit modification," end quote.

24 First of all, did I read that correctly?

25 A. Yes.

1 Q. All right. So this is MRR again -- excuse me.
2 It's CEC, on behalf of MRR, in a report to DHEC, again
3 saying -- talking about the recent meetings between MRR
4 and DHEC and meeting the requirements, modification, of
5 the Class Two permit to the Class Three landfills.

6 Would you agree that that's what it says, at
7 least?

8 A. I would just -- I mean, can we just stick to
9 the quote? Like what the sentence says?

10 Q. All right. First of all, did I read it
11 correctly as to what it says?

12 A. Yes. When you read it, you did. Yes.

13 Q. All right. The next sentence says, "To satisfy
14 the Class Three Landfill requirements, MRR engaged Civil
15 & Environmental Consultants, Inc. (CEC) to conduct
16 further hydrogeologic evaluation of the proposed
17 landfill to provide additional data for a permit
18 modification."

19 First, did I read that correctly?

20 A. Yes.

21 Q. All right. So, first of all, would you agree
22 that what CEC is telling DHEC here, on behalf of MRR, is
23 quote, "to satisfy the Class Three landfill
24 requirements?"

25 Doesn't it say that?

1 MR. GOINGS: Object to the form of the
2 question.

3 A. My view of what this says is that they were --
4 this -- this is, you know, engineers basically talking
5 about design. And so they're saying that -- they're
6 talking about the design requirements; the liner design.

7 Q. Now, how do you know what they're talking
8 about? Are you surmising?

9 A. Because -- because I know what we were talking
10 to them about. I mean, I know what the -- what the
11 proposal is.

12 Q. All right. Well, see what they put in writing.

13 A. They're not say all the --

14 MR. GOINGS: Let -- let the deponent
15 finish answering the question.

16 BY THE WITNESS: (RESUMING)

17 A. -- requirements of Class Three. They're just
18 saying, in other words, this facility cannot take Class
19 Three waste, and it never could. And we never would
20 allow it, so that's not an issue. They're just talking
21 about the design.

22 Q. But the actual statement is, quote, "to
23 satisfy the Class Three landfill requirements."

24 Doesn't that say -- isn't that what CEC --

25 A. But they --

1 Yeah. That would -- is that --

2 THE WITNESS: That's 11.

3 MR. POLIAKOFF: All right. Thank you.

4 MR. GOINGS: What does 11 say, because the
5 cover sheets all kind of look similar.

6 MS. KING: Minor --

7 MR. POLIAKOFF: It's Minor Permit
8 Modification.

9 THE WITNESS: It's March 2015.

10 MR. GOINGS: And it says updated August
11 15th underneath?

12 MR. POLIAKOFF: Yes.

13 THE WITNESS: Yes. Uh-huh.

14 MR. GOINGS: And that is 11?

15 THE REPORTER: Yes.

16 MR. POLIAKOFF: That's 11, yeah.

17 MR. GOINGS: Okay.

18 BY MR. POLIAKOFF:

19 Q. All right. First of all, would you agree that
20 on the front page of this that I've handed you, it says,
21 "Minor Permit Modification Highway 93 Landfill?"

22 It says, "Prepared for MRR Southern, LLC."

23 Do you see that?

24 A. Yes.

25 Q. Okay. MRR Southern, LLC is an entity different

1 from MRR Pickens, LLC; is it not?

2 A. My understanding is it's a parent or some
3 relationship like that, or some of the same principles.
4 But, yes, it's different.

5 Q. All right. But in any case, this document says
6 that it's prepared for MRR Southern, LLC; is that right?

7 A. Yes.

8 Q. All right. And it's prepared, also, by Civil &
9 Environmental Consultants, Inc.; is that right?

10 A. Yes.

11 Q. And it says, "March 2015, updated August
12 2015."

13 Is that correct?

14 A. Yes.

15 Q. All right. If you would turn to the second
16 page of what I've handed you, it bears a number at the
17 bottom of
18 Page 1.

19 The second paragraph says, quote, "This
20 document consists of a Minor Permit Modification
21 Application to obtain the option to develop cells of the
22 facility with an alternate liner system, as opposed to
23 the currently permitted Class Two system."

24 Is that correct?

25 A. Yes.

1 Q. That's what it says. So fair enough to say
2 that the alternate liner system is something different
3 from what was currently permitted in '08?

4 A. Yes.

5 Q. And if you go to the next page for me, the
6 third page of what I just handed you, it's actually -- 51
7 is the page number, actually, from the report itself. If
8 you would look in the middle there, it says, "4.11
9 Releases of Hazardous or Toxic Materials."

10 The first sentence says, "The landfill will
11 accept Class Two and certain special wastes as may be
12 specified in the permit or otherwise specifically
13 approved in writing by SCDHEC."

14 First of all, did I read that correctly?

15 A. Yes.

16 Q. The -- I think we've talked plenty here today
17 about Class Two wastes, but it says, "certain special
18 wastes."

19 Do you see that?

20 A. Uh-huh.

21 Q. Special waste is defined by -- defined by
22 statute, isn't it?

23 MR. GOINGS: Object to the form of the
24 question.

25 BY MR. POLIAKOFF:

1 Q. -- but I'm also going to show you the reg that
2 talks about special waste.

3 A. Okay. That's fine.

4 Q. I can go back to the statute in just a minute,
5 but -- let's see if I can put my hands on the statute real
6 quickly.

7 MS. KING: Gary, I have one of each of
8 these.

9 MR. POLIAKOFF: If you -- thank you.

10 MS. KING: Sure.

11 THE REPORTER: Can we go off the record?

12 MR. POLIAKOFF: Sure.

13 THE REPORTER: I just need to make a phone
14 call.

15 MR. POLIAKOFF: Sure.

16 MS. KING: Of course.

17 VIDEOGRAPHER: We're off the record at
18 2:43.

19 (BREAK FROM 2:43 PM - 2:55 PM)

20 VIDEOGRAPHER: We're on the record at
21 2:55.

22 CONTINUATION OF CROSS-EXAMINATION

23 BY MR. POLIAKOFF:

24 Q. Okay. Mr. Coleman, we were talking about
25 Exhibit 11, which is the -- it's titled "Minor Permit

1 Modification," and it's got a date, "March 2015."

2 It says, "Updated August 2015."

3 And on the third page of what I handed you,
4 it's got a Page No. 51.

5 It says, "The landfill will accept Class Two
6 and certain special wastes."

7 And so I was asking you about special wastes,
8 and Ms. King was kind enough to hand me a copy of the
9 statutes. And 44-96-390 is regarding special wastes.

10 And --

11 A. Uh-huh.

12 Q. Would you agree that -- the statute is titled
13 "Approval Procedures for Special Wastes." And under A,
14 it says, "For the purposes of this section, quote,
15 'special wastes,' end quote, is defined as non-
16 residential or commercial solid wastes, other than
17 regulated hazardous wastes that are either difficult or
18 dangerous to handle and require unusual management of
19 municipal solid wastes landfills, including, but not
20 limited to." And then it's got a number of categories
21 listed.

22 No. 4, it says, "Industrial processed waste."

23 Do you see that?

24 A. Yes.

25 Q. And No. 5 is waste from a pollution control

1 process. Do you see that?

2 A. Uh-huh.

3 Q. All right. First of all, would you agree that
4 special wastes are supposed to go into municipal solid
5 waste landfills, otherwise known as MSW, which is also
6 known as a Class Three landfill?

7 A. Yeah. That's -- the statutory definition of
8 special waste refers to MSW landfills.

9 Q. Okay. Which is Class Three?

10 A. Yes.

11 Q. All right. And actually, there's a regulation
12 also on it. If you would take a look for me, please, at
13 Exhibit 2, and go to Page 11. And it's Paragraph 77.

14 And it says, quote, "Special waste," end
15 quote, means non-residential or commercial solid waste,
16 other than regulated hazardous waste that are either
17 difficult or dangerous to handle and require unusual
18 management at Class Three landfills, including, but not
19 limited to those waste contained in South Carolina code
20 section 44-96-390(a).

21 A. Yes.

22 Q. All right. So would you agree that if
23 something is a special waste, it's supposed to go into a
24 Class Three landfill?

25 A. Yes.

1 Q. All right. Now, this statement here that was
2 submitted by MRR's consulting firm, CEC, says, "The
3 landfill will accept Class Two and certain special
4 waste;"

5 Is that correct?

6 A. Yes.

7 Q. Wouldn't you agree that it would be illegal to
8 put special waste into this Class Two landfill in Pickens
9 County?

10 A. Yes.

11 Q. All right. Is that what they're trying to do?

12 A. No.

13 Q. How do you know? I mean, it says it right
14 here, doesn't it?

15 A. Yeah. Just a misuse of the term there.

16 Q. Okay.

17 A. But they -- they will not be allowed to use --
18 they will not be allowed to put special waste in the
19 Class Two. Their statement in their report doesn't
20 change what the statute says. That's --

21 Q. Okay. Now going back to coal ash, CCR.
22 Regardless of whether the -- the toxic levels are less
23 than ten times the EPA MCLs for drinking water purposes,
24 in fact, the special waste doesn't have -- you would
25 agree that between the statute for special waste and the

1 MR. GOINGS: Object to the form of the
2 question.

3 A. If -- if it's -- if it's not properly managed,
4 it can create dust, yes.

5 Q. Which is why the EPA requires a dust -- dust
6 suppression program; isn't that right?

7 A. Yes.

8 MS. LINEN: Object to form.

9 Q. All right. So would you agree, if we go back
10 to the statutory definition of "special waste," that coal
11 ash, CCR, coal combustion residuals, meet the definition
12 of "special waste?"

13 MR. GOINGS: Object to the form of the
14 question.

15 A. No, I don't think I do. I don't really agree
16 with that.

17 Q. Okay.

18 A. Not the way I think of it.

19 Q. Do you know if anybody else at DHEC shares your
20 opinion on that?

21 A. No. Uh-uh.

22 Q. All right. The -- going back to the statutory
23 definition for special wastes, it lists -- it lists eight
24 different categories that would qualify as special
25 waste. But No. 4, industrial processed wastes, would you

1 agree that coal ash, coal combustion residuals, are an
2 industrial processed waste?

3 A. Yes.

4 Q. And going to the next page, under No. 5, waste
5 from a pollution control process.

6 Coal ash, also known as coal combustion
7 residuals, would also qualify as "waste from a pollution
8 control process?"

9 A. Some types of -- certain types of coal
10 combustion residuals would be -- could be classified as a
11 pollution from a pollution control process, yes.

12 Q. All right. And if they are, then they would be
13 special wastes and the deposit would be appropriate for a
14 Class Three, not a Class Two, landfill; isn't that right?

15 MR. GOINGS: Object to the -- object to
16 the form of the question.

17 A. If they're -- if they're difficult or
18 dangerous to handle and require unusual management
19 practices at a municipal solid waste landfill, then --
20 and they're these things, yes, I would say they're
21 special wastes.

22 Q. All right. And you've read what the EPA
23 published about a year ago on CCR, coal ash.

24 Would you agree that EPA likely thinks that
25 coal ash is difficult to handle?

1 doesn't really matter. What we did know was that in the
2 application, the permit application that we received for
3 the modification, they're required to do stability
4 calculations --

5 Q. Okay.

6 A. -- in the application for the waste.

7 Q. Right.

8 A. And in those stability calculations, they
9 submitted calculations that would be appropriate for C&D
10 waste and calculations that would be appropriate for coal
11 ash.

12 Q. Okay. And how far --

13 A. So they submitted --

14 Q. I'm sorry. Go ahead.

15 A. In the application for the modification, they
16 -- they had done the stability calculations for both
17 types of waste.

18 Q. All right.

19 A. So we -- we certainly knew at that point that
20 they were considering maybe putting some coal ash, but we
21 didn't really have any detail on where or how much and
22 that sort of thing.

23 Q. All right. The -- for the CEC reports that we
24 identified today and talked about, the first one, I
25 believe, was dated August of '14. I can pull up the

1 number. I think it was Exhibit 10 or 11, maybe. But it
2 was the August --

3 MR. POLIAKOFF: Thank you, Jessica.

4 MS. KING: I think that's it.

5 BY MR. POLIAKOFF:

6 Q. The August '14 -- it was the work plan.

7 A. March 2015. August of --

8 Q. I think the first one was August '14, which was
9 the work plan.

10 MS. KING: I think that's right.

11 A. December 2014 work plan, yeah. The work plan
12 was August of 2014; revised September of 2014.

13 Q. All right. So you would agree that submission
14 of engineering reports like this, the work plan, the site
15 specific hydrogeologic investigation, the application
16 for the minor permit modification, I mean, these are all
17 engineering reports that would be some significant
18 expense to put together. Would you agree?

19 A. Uh-huh. Sure.

20 Q. And adding a liner to a permit that doesn't
21 require a liner, that's an expense. Isn't it?

22 A. Yes.

23 Q. Fair to say that by August of 2014, you at
24 least had some idea that they were intending to put coal
25 ash into this landfill?

1 A. I don't -- I don't know if I knew any -- I don't
2 know about at that time frame. When this -- these
3 documents are all previous -- generally, they're
4 submitted previous to the actual technical application.

5 So when the technical application came in,
6 that's when it had the calculations for stability.

7 Q. All right.

8 A. And I don't know exactly. It would have been
9 probably after these documents. I don't know exactly
10 what date.

11 Q. Now, for companies that operate landfills that
12 are restricted to C&D and LCD, typically those don't have
13 liners?

14 A. Correct.

15 Q. Because a liner is an expensive item, right?

16 A. Yes. Uh-huh.

17 Q. So when you start getting reports in that would
18 indicate intent to -- at least requesting an option for a
19 liner, wouldn't you then start assuming that the permit
20 applicant/permittee is requesting something more than
21 just C&D LCD?

22 MS. KING: Objection to form.

23 MS. LINEN: Objection to form;
24 speculative.

25 BY MR. POLIAKOFF:

1 combustion residuals other -- other than when the
2 landfill's technical application came in, which included
3 the stability calculations. That's when we first -- that
4 I'm aware of that we first saw anything about coal ash.

5 Q. What -- what -- when you saw that they were
6 intending to or asking for the option to put a liner in
7 and submitting these pretty lengthy detailed engineering
8 reports, is it fair to say that you assumed that they
9 were going to -- that their intent was to put something
10 other than just construction and demolition waste into
11 this landfill?

12 MS. KING: Object to the form.

13 A. Well, we certainly assumed that they had some
14 type of plan. We didn't really know what it was.

15 Q. All right. Didn't know exactly, but you would
16 assume something other than strictly construction and
17 demolition waste?

18 A. Well, I would not expect them to install a
19 liner for construction and demolition waste. That's not
20 normally done.

21 Q. All right. And the reason I'm asking these
22 questions is because I can reference to you -- you may or
23 may not want to see it -- the transcript of the County
24 Planning Commission of January 2015 where I can show you
25 where County Planning asked MRR, "Do you need a liner?"

1 processes --

2 Q. Okay.

3 A. -- just out of their own election.

4 Q. All right. And non-commercial, again, is
5 typically a utility or some entity that's producing the
6 coal ash or other waste onsite?

7 A. Right.

8 Q. And it handles it either onsite or adjacent to
9 site itself?

10 MS. KING: Object to the form.

11 BY MR. POLIAKOFF:

12 Q. Is that essentially correct?

13 A. Yes.

14 Q. All right. And non-commercial, again, meaning
15 that it's not taking wastes from other companies? It's
16 only handling its own wastes?

17 A. Correct.

18 Q. All right. So if we then go to the -- just the
19 category of commercial landfills, this would be -- if
20 this one ends up having a liner and getting permitted for
21 a liner, this would be the first time in South Carolina
22 history that the department has permitted a liner for a
23 Class Two landfill that's commercial?

24 A. Yeah. I don't -- I think this would be the
25 first commercial Class Two with a liner.

1 Q. Did that seem unusual to you as far as how
2 things have gone in the past?

3 MS. KING: Object to the form.

4 A. Well, it -- it's clearly different. I mean,
5 it's unusual in the sense that Class Twos don't usually
6 have liners.

7 Q. And so about when was it the first time that
8 you in your capacity realized that something other than
9 basic construction and demolition land clearing debris
10 was intended by MRR for this landfill?

11 MS. KING: Object to form.

12 MS. LINEN: Object to form. Asked and
13 answered.

14 BY MR. POLIAKOFF:

15 Q. You can go ahead.

16 A. Well, when they first asked if they could put a
17 liner in a Class Two, of course we wondered why.

18 Q. Did you --

19 A. But we didn't have any information, you know,
20 so it doesn't -- you know, we just waited on the
21 application.

22 Q. Did anybody at the department -- at the
23 department ask them why?

24 A. I don't know. No, not that I know of. But then
25 when the application came in and had the -- you know, the

1 And you've just agreed with me that coal ash,
2 coal combustion residuals are not listed in those
3 categories on Appendix 1; is that correct?

4 A. Yes.

5 Q. And the second sentence says, "All other
6 waste, including animal carcasses, are prohibited from
7 disposal in this landfill."

8 Do you agree with that?

9 A. Yes.

10 Q. So under the terms of the 2008 permit, coal
11 combustion residuals, also known as coal ash, would not
12 be allowed under this 2008 permit, would it?

13 A. Right.

14 MR. GOINGS: Object to the form of the
15 question.

16 Q. You can answer.

17 A. That permit -- yeah, that permit would have to
18 be modified to allow coal ash.

19 Q. All right. Coal ash was not permissible or
20 acceptable under the November 3, 2008 permit; is that
21 correct?

22 A. Correct.

23 Q. All right.

24 MS. KING: Object to the form.

25 BY MR. POLIAKOFF:

1 on the record at 4:08.

2 CONTINUATION OF CROSS-EXAMINATION

3 BY MR. POLIAKOFF:

4 Q. Mr. Coleman, before we took a break, I was
5 asking you about the new bill that was signed by the
6 governor on or about March 2nd, titled "Coal Combustion
7 Residuals Disposal." And I was asking you if it was your
8 understanding that, under this bill, coal combustion
9 residuals, also known as coal ash, can no longer be put
10 in a Class Two landfill in South Carolina.

11 A. It is my understanding that coal combustion
12 residuals can no longer be placed in a commercial Class
13 Two landfill in South Carolina.

14 Q. All right. And it actually has several things
15 that say unless it's located contiguous with the electric
16 generating unit, if it's intended to be beneficially
17 reused, if it's placed into beneficial reused -- and No.
18 4 talks about an entity that produced the electricity.

19 As far as this Class Two landfill, the Highway
20 93 Class Two landfill, call it C&D or whatever, in
21 Pickens County, is it your understanding that coal ash
22 would be prohibited under this new law in the Highway 93
23 landfill in Pickens County?

24 MR. GOINGS: Object to the question;
25 calls for a legal conclusion.



Catherine E. Hetzel, Director

Promoting and protecting the health of the public and the environment

August 10, 2015

Mr. Christopher T. Roof
MRR Pickens, LLC
Highway 93 Landfill
5842 Faringdon Place, Suite 1
Raleigh, North Carolina 27609

RE: Issuance of Modified Class 2 Landfill Permit
Highway 93 Landfill
Permit No. LF2-00003
Pickens County

Dear Mr. Roof:

Enclosed is a modified Class 2 landfill permit for the Highway 93 Landfill located at 2180 Greenville Highway, Liberty, SC in Pickens County. The modification includes an alternate liner design and associated changes resulting from the design change. Enclosed is a copy of the Department approved revised engineering report to be kept at the referenced facility at all times. The guidelines and requirements to operate the site can be found in Regulation 61-107.19, *Solid Waste Management: Solid Waste Landfills and Structural Fill* and the conditions can be found in the attached Permit.

This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision fifteen (15) days after notice of the Department decision has been mailed to the applicant or respondent, unless a written request for final review accompanied by a filing fee in the amount of \$100 is filed with the Department by the applicant, permittee, licensee, or affected person. This decision may be appealed by complying with the requirements described in the attached *Guide to Board Review*, provided as a courtesy by the Department.

If you have any questions regarding the permit, please contact Timothy M. Eleazer, (803) 898-1374. General questions should be referred to Susan Turner with the Upstate Region EQC, BEHS Greenville Office, and (864) 372-3273.

Sincerely,

Kent M. Coleman, Director
Division of Mining & Solid Waste Management
Bureau of Land and Waste Management

KMC/TME/tmc

cc: Marty Lindler, Manager - BLWM Solid Waste & HW Compliance Section
Tom Knight, P.G. Manager - BLWM Solid Waste Groundwater Section
Susan Turner, Upstate Region, BEHS Greenville Office
Scott L. Brown, P.E., Civil & Environmental Consultants, Inc.
BLWM File 021212

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

MRR Pickens, LLC,

Plaintiff,

vs.

County of Pickens and William Cato,
Weldon Clark, Robert Ballentine, Jo
Johnston, Dennis Reinert, and Bob Young,
individually and in their official capacity as
appointed members of the Pickens County
Planning Commission,

Defendants.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2016-CP-39-100

**AFFIDAVIT OF
C. WESLEY HULSEY, P.G.**

Personally appeared before me C. Wesley Hulsey, P.G., who having been duly sworn,
deposes and states:

1. That I am over the age of 18 years and am competent to issue this Affidavit.
2. That I am President and CEO of Hulsey McCormick & Wallace, an engineering,
environmental and science firm and am a licensed Professional Geologist with a B.S. in Health
Science and a M.S. in Hydrology. My C.V. is attached hereto. I am qualified to render the opinions
provided herein. Further, my work for Pickens County includes the following:

- (A) Groundwater Assessment and Corrective Action Plan development and
implementation for the closed Easley Class Three Landfill.
- (B) Groundwater Assessment and Corrective Action Plan development and
implementation for the closed Clemson-Central Class Three Landfill.
- (C) Landfill Gas Control System design for the closed Easley Class Three
Landfill.

- (D) Landfill Gas Control System design for the closed Clemson-Central Class Three Landfill.
- (E) Groundwater Corrective Action Monitoring for the closed Easley Class Three Landfill.
- (F) Groundwater Corrective Action Monitoring for the closed Clemson-Central Class Three Landfill.
- (G) Plans and Specifications for expansion of the Easley Class Two (i.e.; Construction and Demolition Waste) Landfill in 2006.
- (H) Plans and Specifications for expansion of the Easley Class Two (i.e.; Construction and Demolition Waste) Landfill in 2013.
- (I) Preparation of the Groundwater Sampling and Analysis Plan for the Easley Class Two Landfill.
- (J) Preparation of the County Solid Waste Management Plan 2013.
- (K) Title V (Air Permit) Compliance.

3. That I am familiar with S.C. Statutes and Regulations pertaining to solid waste, and I deal with these regularly in my professional work.

4. That I have reviewed the 7-page Report issued by Shelley Hudson Robbins, and I concur entirely with her findings and conclusions. In particular, I concur that deposit of Coal Combustion Residuals (CCR) into a Class Two Landfill in South Carolina would violate federal law; and further, that under S.C. Statutes and Regulations, CCR qualifies as a "Special Waste" per S.C. Code Section 44-96-390, and must be deposited into a Class Three Landfill that holds a "Special Waste Permit" from DHEC, and its deposit into a Class Two Landfill would violate S.C. Statutes and Regulations. Further, the changes to the original Permit, including the addition of a liner, the inclusion of other wastes such as CCR, and the dramatic increase in annual tonnage intake, all

constitute a "major modification," which requires public review and public comment (which was not done), as opposed to MRR's attempted characterization as a "minor modification."

5. That in addition to my concurrence with the Report of Shelley Hudson Robbins, I conclude the following:

- (A) That CCR meets the definition of "Special Waste," per S.C. Code Section 44-96-390. Further, CCR meets the definition of "Special Waste" in the Pickens County Solid Waste Management Plan (SWMP), January 2013, (attached), which my firm and I prepared for Pickens County. The definition of "Special Wastes" in the Pickens County SWMP is as follows:

P. Special Wastes

Special Waste is defined as commercial or nonresidential solid waste, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at MSW Landfills, including but not limited to pesticide wastes, liquid wastes, sludge, **industrial process wastes, wastes from pollution control processes**, residue or debris from chemical cleanups, contaminated soil from chemical cleanup, containers and drums, and animal carcasses. **Special Waste is not accepted at any of the county facilities.**

(emphasis added).

First: CCR is an "industrial process waste" and is a "waste from pollution control processes," and qualifies as Special Waste, per the S.C. Statute and per the Pickens County SWMP.

Second: **Special Waste is prohibited in any landfill in Pickens County, per the Pickens County SWMP.**

- (B) That any Permit issued by S.C. DHEC must be consistent with the Pickens County SWMP, as Pickens County is the host local government for the landfill in question. Further, the Solid Waste Regulatory Program requires DHEC to seek input and approval from the local host government (here, Pickens County) regarding issuance of any new Permit, as to issues including consistency with the SWMP. This was done in regard to the Permit issued in 2008. The failure to consult with Pickens County regarding the new Permit apparently issued in 2015 as to matters including consistency violates the S.C. Regulatory Program and violates the SWMP, and renders the 2015 Permit invalid.
- (C) That both the modification request (from the 2008 Permit) and the 2015 Permit are invalid, as they were not obtained in accordance with S.C. Statutes and Regulations.
- (D) That in order to deposit CCR into the Highway 93 Landfill, per the S.C. Regulatory Program, MRR would be required to submit an entirely new Permit Application for a Class Three Landfill and to obtain a Special Waste Permit, including CCR, subject to the S.C. Demonstration of Need (DON) Regulations (which it cannot meet), and subject to Consistency Determination required in R.61-107.17 (which it cannot meet, as the Pickens County SWMP disallows Special Waste and disallows Class Three Landfills).

- (E) That the attempts by MRR to obtain a new Permit without public review or public comment, and unbeknownst to Pickens County, are in violation of the S.C. Solid Waste Regulatory Program, and in violation of the Pickens County SWMP, and constitute an attempt by MRR to circumvent the Demonstration of Need requirements and Consistency requirements, and have eliminated the "point of entry" to stakeholders through the public comment process, all in violation of S.C. Statutes and Regulations.

SWORN and subscribed to before me this
17th day of February 2016.

Rita D. Laxton
Notary Public for South Carolina
Print Name: Rita D. Laxton
My Commission Expires: 8/26/2024

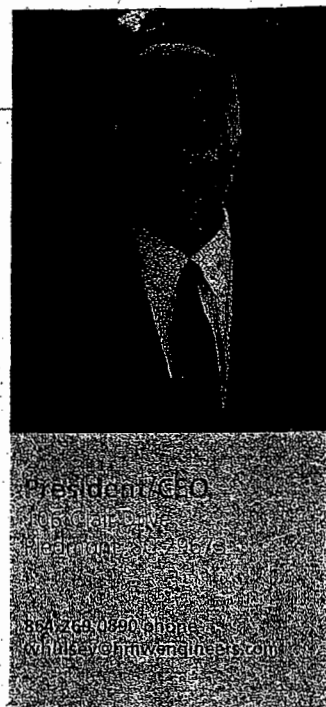
C. Wesley Hulsey
C. Wesley Hulsey, P.G.

PROJECT TEAM

C. Wesley Hulsey, P.G.

President/Chief Executive Officer

Wes. Hulsey is the President and Chief Executive Officer of Hulsey McCormick & Wallace, Inc.. As the catalyst of client development, Mr. Hulsey is successful in delivering on customer commitments. Mr. Hulsey manages a multi-state team of experienced civil and environmental engineers, environmental scientists and technical staff to serve over 100 municipal, county and industrial clients, as well as academic institutions and state departments. Under his leadership, HMW has developed over \$25 Million in consulting work and performed engineering design and project management on capital projects totaling over \$100 Million. Mr. Hulsey serves as a Principal Consulting Scientist for environmental regulatory program compliance and has over 23 years of technical consulting experience in strategic regulatory planning, environmental site restoration, water resource planning, wastewater planning, and NPDES compliance. Mr. Hulsey is a registered Professional Geologist in Georgia, North Carolina and South Carolina with a focus on the hydrologic sciences. Mr. Hulsey resides in Easley, South Carolina.



EDUCATION

M.S. Hydrology, 1994, University of Georgia, Athens, Georgia
B.A. Health Science, 1987, Furman University, Greenville, South Carolina

PROFESSIONAL MEMBERSHIPS

Water Environment Association of South Carolina
Georgia Association of Water Professionals
American Planning Association
SC Economic Developers Association

BOARD, COMMISSIONS, & COMMITTEES

Governor's Savannah River Committee - SC Representative | 2014 - Present
Anderson County Airport Advisory Committee (Vice-Chairman) | 2013 - Present
First Citizens Bank Advisory Board | 2006 - Present
Upstate Forever Board of Directors | 2006 - 2011
Anderson County Planning Commission | 2006 - 2010
Anderson Chamber - Public Policy Committee | 2005 - Present
WEASC Industrial Committee Chairman /Executive Committee | 2008

PROFESSIONAL BACKGROUND

Hulsey McCormick & Wallace, Greenville, SC - Founder and President | 1998 - Present
HMW Properties, LLC, Greenville, SC - Developer | 2001 - 2006
Rust Environment & Infrastructure, Greenville, SC - Project Manager | 1994 - 1998
Georgia Environmental Protection Division/University of Georgia Wellhead Protection Project | 1991 - 1994
Financial Designs, Gainesville, GA - Principal | 1998 - 1991
United States Navy Reserve, Pensacola, FL | 1987



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS)

THIRTEENTH JUDICIAL CIRCUIT

MRR Pickens, LLC,)

Civil Action No.: 2016-CP-39-100

Plaintiff,)

vs.)

**AFFIDAVIT OF
CHRISTOPHER BRINK**

County of Pickens and William Cato,)
Weldon Clark, Robert Ballentine, Jo)
Johnston, Dennis Reinert, and Bob Young,)
individually and in their official capacity as)
appointed members of the Pickens County)
Planning Commission,)

Defendants.)

Personally appeared before me Christopher Brink, who having been duly sworn, deposes and states:

1. That I am over the age of 18 years and am competent to issue this Affidavit.
2. That I am the Director of the Pickens County Department of Community Development, also known as "Planning Director" for Pickens County. I have been with Pickens County since September of 2006 (9 years, 5 months). I have been a practicing planner for 20 years and a Certified Planner for 16 years.
3. That my department works very closely with the Pickens County Planning Commission, and in my capacity as "Planning Director" I regularly attend meetings of the Pickens County Planning Commission.
4. That I attended the January 12, 2015 meeting of the County Planning Commission, at which representatives of MRR appeared and provided information which was extremely important information for the Planning Commission, for my department, and for Pickens County. In

attendance on behalf of MRR, per the Minutes of the meeting and per the Transcript of the audio recording of the meeting, were the following:

Dan Moore - MRR Project Manager for the landfill project.
Norbert Hector - MRR's Managing Member
Chris Roof - MRR's General Manager
Scott Brown - MRR's lead engineer, with Civil and Environmental Consultants (CEC).
Jessie King - MRR's attorney.
(See transcript of January 12, 2015 County Planning Commission Meeting, p. 6, attached).

Mr. Moore was MRR's primary spokesperson at this meeting.

5. That Dan Moore, MRR's Project Manager, made important statements and provided material information to the County Planning Commission, which included the following:

- (A) "It's probably also important to note right up front that the land use details and development details for the project are just the same as they were when we got the initial approval on the site back in 2007." (Tr., p. 6).
- (B) "And as y'all know, our proposed activity is a DHEC Class Two Landfill. This was previously called and referred to as a construction and demolition debris landfill. This is the same type of facility that the county is operating."
"This is exactly the same type of landfill that the county is operating over on Old Liberty Road just, I guess, west of Liberty." (Tr., p. 8).
- (C) "Earlier I mentioned the development agreement which is in effect between ourselves and the county. The agreement was reached after very thoughtful consideration of the disposal needs for the county. This agreement provides MRR to provide the county with all of our regulatory reports, things such as semiannual groundwater monitoring results, any compliance issues, notices of violation. We have to -- anything we submit to DHEC has to be

submitted to you all at the very same time we submit it to DHEC. Anything we get from DHEC has to be submitted to you all, I think -- I forget in the agreement, but in a matter of a day or so." (Tr., p. 11).

(D) No Liners Needed:

By a Commission Member:

Do you have to provide the same kind of liners and so forth for your landfill that --

By Mr. Moore:

We do not.

By a Commission Member:

Do not have to for demolition, that kind of --

By Mr. Moore:

That's right.

(Tr., p. 14).

6. That the representations made by MRR at the January 12, 2015 County Planning Commission, particularly including the representations noted hereinabove, were of utmost importance to the County Planning Commission, to the County Department of Community Development and to me as its Director, and to Pickens County. Further, MRR's representations were material to all ongoing decisions and subsequent decisions, and we relied upon MRR's representations.

7. That at all prior meetings with MRR, including the January 12, 2015 Planning Commission Meeting, MRR always told Pickens County officials what wastes it would and would not accept at this new landfill. We were always informed that the only wastes would be Construction and Demolition (C&D) and Land Clearing Debris (LCD), and no other wastes. At no time did MRR ever inform us of any intent to accept Coal Combustion Residuals (CCR); to the contrary, MRR

always informed us that the only wastes that would be deposited into this new landfill were C&D and LCD.

8. That the Pickens County Solid Waste Management Plan (SWMP), January 2013, with which MRR must comply, makes it clear that "Special Wastes" are not accepted at any of the landfill facilities for Pickens County. Any Permit, and any activity by MRR, by law must be consistent with our Solid Waste Management Plan.

9. That the Permit for this new landfill, "Highway 93 C&D Landfill," was issued by DHEC on November 3, 2008. Paragraph 2 states:

This permit is limited solely to the disposal of items listed in Appendix I of R. 61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill.

(Note: Appendix I includes four categories of waste: C&D, LCD, Brown Goods (furniture, etc.) and animal carcasses only).

The above limiting statement was developed with County approval, and in accord with the Development Agreement and the Solid Waste Management Plan.

10. We have only recently learned that, without any notice to my department or to the County Planning Commission, that MRR submitted a variety of documents to DHEC in 2014 and in 2015, and has apparently obtained a new Permit, dated August 10, 2015, which has major changes and major modifications to the original 2008 Permit, including the following:

(A) Changes in Paragraph 2:

(i) Eliminating the limiting language of "all other wastes . . . are prohibited."

(ii) Adding: "... and any other waste approved by the Department for disposal in a Class Two Landfill pursuant to R. 61-107.19, Part IV, Section C.2."

- (B) Adding provisions for a liner.
- (C) Changing provisions for final cover.
- (D) Other changes.

11. That the major changes and major modifications to our 2008 Permit, as reflected in the new Permit apparently issued in 2015, were never approved by Pickens County. Further, such changes (particularly regarding the elimination of the limitations on types of wastes and the addition of "other wastes") are in contravention of Pickens County's intentions and are in direct contradiction to the representations MRR made to Pickens County.

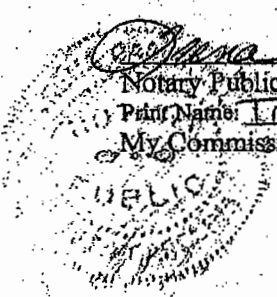
12. That neither MRR nor DHEC provided my department or the County Planning Commission with engineering reports, documents and correspondence apparently provided by MRR to DHEC in 2014 and throughout most of 2015, regarding these major changes and major modifications. Submission of such documents and information to Pickens County is required by our Development Agreement and our Solid Waste Management Plan. Further, Mr. Dan Moore of MRR stated at the January 12, 2015 Planning Commission Meeting, as noted above, that such documents must be submitted to Pickens County immediately.

13. As of the time of the signing of this Affidavit, MRR has never submitted such documents relating to its requested major changes and modifications, nor the 2015 Permit, to my department or to the County Planning Commission. Nor has DHEC formally provided such documents to us; rather, after the current recent disagreements between MRR and Pickens County

commenced, a Pickens County staff person made a Freedom of Information Act (FOIA) request to DHEC, and obtained copies. No formal Notice of such has been provided.

14. That the audio recording of the January 12, 2015 Planning Commission meeting was made at the time of said meeting, and the audio recording is a true and genuine recording of said meeting. Further, said audio recording was submitted to a court reporter who has transcribed it. To the best of my knowledge, the court reporter's transcript correctly reflects the statements made at said meeting.

SWORN and subscribed to before me this
17th day of February, 2016.

A circular notary seal for Trena Gambrell, Notary Public for South Carolina. The seal contains the text "Trena Gambrell", "Notary Public for South Carolina", and "My Commission Expires: 1-24-23".
Trena Gambrell
Notary Public for South Carolina
Print Name: Trena Gambrell
My Commission Expires: 1-24-23

A handwritten signature of Christopher Brink.

Christopher Brink

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

MRR Pickens, LLC,

Plaintiff,

vs.

County of Pickens and William Cato,
Weldon Clark, Robert Ballentine, Jo
Johnston, Dennis Reinert, and Bob Young,
individually and in their official capacity as
appointed members of the Pickens County
Planning Commission,

Defendants.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2016-CP-39-100

**AFFIDAVIT OF
GERALD G. WILSON**

Personally appeared before me Gerald G. Wilson, who having been duly sworn, deposes and states:

1. That I am over the age of 18 years and am competent to issue this Affidavit.
2. That I am the Public Works Director for Pickens County and have served in that capacity since 2009. Prior to that I was the Solid Waste Director/Recycling Coordinator from 2002 to 2009 and prior to that I was the foreman for the Solid Waste/Recycling Department. I came to work for Pickens County in February of 1992.
3. That the Pickens County Department of Public Works includes solid waste issues, with which I am most familiar. I have been actively involved with the proposed Highway 93 C&D Landfill since early discussions between MRR and Pickens County in approximately 2007. I am qualified to issue the statements and opinions contained herein.

4. That the only valid Permit for the Highway 93 C&D Landfill is the Permit issued November 3, 2008, Permit No. LF2-00003. The Special Conditions of this Permit provide the following:

2. This permit is limited solely to the disposal of items listed in Appendix I of R. 61-107.19. **All other wastes, including animal carcasses, are prohibited from disposal in this landfill.** (emphasis added).

5. That Appendix I of said Regulation provides for four categories of waste: Construction and Demolition (C&D); Land Clearing Debris (LCD); Brown Goods (furniture, etc.); and Animal Carcasses. The limiting language stated above – “all other wastes . . . are prohibited from disposal in this landfill” – was crucial to Pickens County, and was developed after negotiations between MRR and Pickens County. Further, this limiting language is in accord with the Development Agreement between MRR and Pickens County and the Solid Waste Management Plan of Pickens County.

6. That in December of 2015, after hearing from sources other than MRR, that MRR had intentions of depositing Coal Combustion Residuals (CCR) into this C&D Landfill, I traveled to DHEC and asked questions. DHEC officials informed me that “minor modifications” had been made to the Permit, and since they were “minor,” neither DHEC nor MRR had notified Pickens County of any changes or modifications to the Permit.

7. That I made a Freedom of Information Act (FOIA) request to DHEC for documents pertaining to these changes and modifications. We have only recently learned that, without any notice to my department or to Pickens County, that MRR submitted a variety of documents to DHEC in 2014 and in 2015, regarding proposed changes and modifications, and has apparently obtained a new Permit, dated August 10, 2015, which has major changes and major modifications to the original 2008 Permit, including the following:

(A) Changes in Paragraph 2:

- (i) Eliminating the limiting language of "all other wastes . . . are prohibited."
- (ii) Adding: ". . . and any other waste approved by the Department for disposal in a Class Two Landfill pursuant to R. 61-107.19, Part IV, Section C.2."

(B) Adding provisions for a liner.

(C) Changing provisions for final cover.

(D) Other changes.

8. That the major changes and major modifications to our 2008 Permit, as reflected in the new Permit apparently issued in 2015, were never approved by Pickens County. Further, such changes (particularly regarding the elimination of the limitations on types of wastes and the addition of "other wastes") are in contravention of Pickens County's intentions and are in direct contradiction to the representations MRR made to Pickens County.

9. That neither MRR nor DHEC provided my department or Pickens County with engineering reports, documents and correspondence apparently provided by MRR to DHEC in 2014 and throughout most of 2015, regarding these major changes and major modifications. Submission of such documents and information to Pickens County is required by our Development Agreement and our Solid Waste Management Plan. Further, Mr. Dan Moore of MRR stated at the January 12, 2015 Planning Commission Meeting that such documents must be submitted to Pickens County immediately.

10. As of the time of the signing of this Affidavit, MRR has never submitted such documents relating to its requested major changes and modifications, nor the 2015 Permit, to my department or to Pickens County. Nor has DHEC formally provided such documents to us; rather, after the current recent disagreements between MRR and Pickens County commenced, I made the FOIA request to DHEC, and obtained documents. No formal Notice of these changes or modifications, nor the 2015 Permit, has been provided by MRR or DHEC or anyone.

SWORN and subscribed to before me this
17th day of February 2016.

Sheila W. Winsley
Notary Public for South Carolina
Print Name: Sheila W. Winsley
My Commission Expires: 11/6/2022

Gerald G. Wilson
Gerald G. Wilson

Assessment of the Environmental Effects Associated with Coal Ash Residuals disposal in Class Two Landfill in Pickens County, South Carolina

Avner Vengosh, PhD

Professor of Geochemistry and Water Quality,

Division of Earth and Ocean Sciences

Nicholas School of the Environment

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Duke University, Durham, NC 27708

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1. Personal information

I was asked by Gary W. Poliakoff, Attorney at Law from Spartanburg, South Carolina to review the possible environmental effects and water contamination associated with the disposal of coal combustion residuals (CCR) in Class Two Landfill in Pickens County, SC. I am a professor of Geochemistry and Water Quality at the Nicholas School of the Environment at Duke University, and for over 30 years I have been engaged in research related to water quality and contamination. I have been working extensively on water quality issues in different parts of the world, including the Middle East (Israel, Jordan), Australia, Southeastern Asia (Vietnam, China), Northern Africa (Morocco), Europe (Italy, Cyprus, Greece, Turkey), and the U.S. My research aims to delineate the sources and pathways of contaminants in the environment and their possible impacts on human health through integrated research of environmental geochemistry, advanced isotope geochemistry (boron, strontium, carbon, lithium, and radium isotopes), and environmental health research (arsenic, fluoride, boron, chromium, radium).

After joining Duke University in 2005, my research group has investigated the energy-water nexus with extensive research on the environmental risks of unconventional energy exploration and hydraulic fracturing, coal mining, CCRs and their disposal. In particular, my team has investigated the composition of CCRs, their potential effects on the environment, and developed methods to delineate their distribution and impact on the environment. Since our early investigation of the 2008 Tennessee Valley Authority (TVA) coal ash spill, which was the largest coal ash spill in the U.S. history, we have published 10 papers specifically addressing the

contaminants occurrence in coals and CCR, their mobilization from coals to water, their fate in the environment, and contamination of water resources. Currently we are engaged in a study that investigates possible leaking of coal ash ponds from 22 sites in five states (NC, TN, KY, GA, VA) through the Southeastern U.S. and the impact on associated surface water and underlying groundwater. Overall, I have published 104 papers in peer-reviewed top journals (5 currently under review) at the top peer-reviewed journals in the U.S. In 2015, the Geological Society of America elected me as a Fellow.

2. What's in coal combustion residuals (CCR)

During coal combustion process, most of the toxic elements in the parent coals are retained to the coal combustion residuals (CCR, or coal ash). CCR encompasses fly ash, bottom ash, and flue gas desulfurization (FGD) materials, and represent one the largest industrial waste streams in the U.S. CCR typically contains five- to ten-fold (depending on coal properties) higher concentrations of toxic elements relative to the original coals. Numerous studies have characterized the occurrence and distribution of a wide range of elements in coals and CCRs (see examples in references 1-6). These studies have shown that CCRs are enriched in trace metals and metalloids such as arsenic, selenium, vanadium, chromium, lead, mercury, molybdenum, thallium, boron, manganese, iron, boron, strontium, and others, with concentrations up to several orders of magnitude higher than in typical soil. Some of these elements are highly toxic and carcinogenic and can affect human health and ecological system upon their release to the environment. In addition to trace metals, CCRs are characterized by relatively high concentrations of Naturally Occurring Radioactive Materials (NORM) that include uranium, radium, radon, lead, and polonium radionuclides. During the combustion of coal, most of the NORM are retained on CCRs, leading to their enrichment in CCR. Volatilization of lead and recapture by tiny particles results in further enrichment of lead and lead radioactive element (lead-210) in CCR by two-fold, relative to the other NORMs. A recent survey of NORM occurrence and distribution in CCR has shown that NORM levels in CCR are higher by five-fold higher relative to typical soil in the U.S. (7).

CCR was recognized as a Group I human carcinogen (based on occupational exposure studies) associated with increased risks of skin, lung, and bladder cancers (8). Specifically, arsenic and radium exposures in humans are associated with increased risks of skin, lung, liver, leukemia, breast, bladder, and bone cancers (8, 9) for exposure predominantly due to chronic ingestion or chronic inhalation, with the dose-response curve dependent on location, sources, and population susceptibility and/or tolerance.

3. Environmental risks of coal combustion residuals (CCR)

Many studies have shown that metals and metalloids are easily mobilized (removed) from CCR to water in aquatic environment (1-6). The high mobilization of CCR is due to the fact that metals and metalloids are entrapped to the surface of CCR following coal combustion, and consequently are readily leached out upon interaction with water. The mobilization of metals and metalloids specifically increases with increasing the acidity of the aquatic system, with high leaching rates at low pH. The leaching of metalloids like arsenic and selenium increases also with higher pH (10).

The possible leaching of metals and metalloids from CCR and the impact on the environment has been examined by three ways (1) leaching experiments and simulation at the laboratory (1-3; 10); (2) studying of effluents discharge from coal ash ponds, such as those in NC (11); and (3) studying the impact of CCR spills (10, 12-15). The fate of the different elements that are mobilized from CCRs depend on their chemical properties. Some elements are highly soluble in water and thus the interaction of water and CCR would lead to direct contamination of the water. Clear evidence for water contamination has been shown for toxic and carcinogenic elements such as arsenic, selenium, boron, and strontium (10-15). Other elements are less soluble in water such as lead, manganese, chromium, but changes in the water conditions such as low pH, which is common in landfills, could enhance their mobilization and transport in water.

The storage of CCR in surface impoundments has resulted in direct contamination of waterways. A detailed study from NC (11) investigated the effluents that are discharged from coal ash ponds through the National Pollution Discharge Elimination System (NPDES) Program. The NPDES Program was established by the Clean Water Act and requires the control and

permitting of point source discharges of wastewater. Data from all of the coal ash ponds in NC has shown that the discharge effluents were enriched in several toxic and carcinogenic elements (arsenic, selenium, molybdenum, thallium, boron) that has caused direct contamination of lakes and rivers in NC. The level of contaminants' enrichment was up to 100-fold relative to reference water, and exceeded in many cases the drinking water regulations (11). Furthermore, it was shown that contamination of lake water causes arsenic to be accumulated to lake sediments that are sinking to the lake bottom, followed by the release of arsenic back to the environment under changes in the reducing conditions (11). The accumulation and release of arsenic in the TVA spill in Kingston, TN resulted in extremely high levels of arsenic in water from the bottom of the river with concentrations of up to 2,000 ppb (relative to 10 ppb in drinking water regulations) (12). A current research by our team on coal ash impoundments from 22 sites across the southeastern U.S. has reveal that all of the ponds are leaking and CCR effluents have migrated and contaminated associated surface water and underlying groundwater.

Overall, these studies have collectively demonstrated that disposal of CCR without adequate protection causes direct contamination of associated water resources.

4. Specific risks of coal combustion residuals (CCR) to Class Two Landfill

Numerous studies have shown that landfills containing domestic materials (based on the definition of Class Two Landfill in SC) such as construction and demolition debris and land-clearing activities do not contain specific toxic elements. Yet the disposal of organic materials and accelerated biological degradation of the organic matter in landfills can induce acidic condition (low pH) and reduced condition (low dissolved oxygen). Mixing the domestic landfill materials with CCR would inevitably generate leaching process of CCR and mobilization of toxic contaminants to landfill effluents that could be leaked to the environment. Enhancement of the leaching process is expected under reducing and low pH conditions, which are typical to domestic landfills. Lining a Class Two landfill may reduce the direct infiltration of the landfill effluents, but this would not prevent contamination of nearby waterways and groundwater. Without comprehensive management of the landfill effluents that would include specific lining material, collecting and treating the landfill effluents, and establishing a monitoring network to monitor possible migration and leaks of the landfill effluents to the nearby surface water and

underlying groundwater – disposal of CCR to a Class Two Landfill could contaminate associated water resources.

The second risk for human health from CCR disposal in a landfill is the wind-blown resuspension of tiny CCR particles to the atmosphere and transport to nearby population. Fly ash-airborne particles with diameters less than 10 μm (PM10) are regarded as respirable and may affect the human lung and bronchus. The particles that are of most importance for human health are in the fine particulate (PM2.5) mode, which readily deposit deep in the lung. Previous research has shown that CCP ash has particulate sizes ranging from less than 1 μm to 100s of micrometers in size. Several studies have shown measured ambient fine particulate matter associated with elevated concentrations of toxic metals in the vicinity of coal-fired power plants (16,17). Overall, the literature clearly shows that CCR contains inhalable particulate matter, and that resuspension of fly ash from dry surface disposal can be transported to the atmosphere and therefore poses risks to the nearby and downwind population.

References

- 1) Swaine, D. J. (1990) Trace Elements in Coals; Butterworths: London, UK.
- 2) Swaine, D. J.; Goodarzi, F. (1995) Environmental Aspects of Trace Elements in Coal; Kluwer Academic Pub: Dordrecht, The Netherlands.
- 3) Meij, R. (1994) Trace element behavior in coal-fired power plants. Fuel Proc. Technol., 39, 199–217.
- 4) Querol, X.; Fernandez-Turiel, J.L.; Lopez-Soler, A. (1995) Trace elements in coal and their behavior during combustion in a large power station. Fuel, 74 (3), 331–343.
- 5) Yudovich, Y. E.; Ketris, M. P. (2005) Arsenic in coal: a review. Int. J. Coal Geol. 2005, 61, 141–196.
- 6) Cornelis, G.; Johnson, C. A.; Gerven, T. V.; Van de casteele, C. (2008) Leaching mechanisms of oxyanionic metalloid and metal species in alkaline solid wastes: A review. Appl. Geochem. 2008, 23, 955–976.
- 7) Lauer, N.E., Hower, J.C., Hsu-Kim, H., Taggart, R.K., Vengosh, A. (2015) Naturally

occurring radioactive materials in coals and coal combustion residues in the United States. *Environmental Science & Technology*, 49, 11227–11233.

8) IARC (1987). Overall evaluation of carcinogenicity: an updating of IARC Monographs Volumes 1 to 42. IARC Monograph Evaluation Carcinogenic Risk Chemistry Human Suppl. 7, 1987

9) Shifrine, M.; Fisher, G. L.; Taylor, N. J. (1984) Effect of trace elements found in coal fly ash, on lymphocyte blastogenesis. *J. Environ. Pathol. Toxicol. Oncol.*, 5, 15–24.

10) Ruhl, L., Vengosh, A., Dwyer, G.S., Hsu-Kim, H., Deonarine, (2010). The Environmental Impacts of the Coal Ash Spill in Kingston, Tennessee: An Eighteen-Month Survey. *Environmental Science and Technology*, 44, 9272–9278.

11) Ruhl, L., Vengosh, A., Dwyer, G.S., Hsu Kim H., Schwartz, G., Romanski, A., and Smith, S.D. (2012). The impact of coal combustion residue effluent on water resources: A North Carolina example. *Environmental Science & Technology*, 46, 12226–12233.

12) Ruhl, L., Vengosh, A., Dwyer, G.S., Hsu-Kim, H., Deonarine, A., Bergin, M., Kravchenko, J. (2009). Survey of the potential environmental and health impacts in the immediate aftermath of the coal ash spill in Kingston, Tennessee. *Environmental Science and Technology*, 43, 6326–6333.

13) Deonarine, A., Bartov, G., Johnson, T.M., Ruhl, L., Vengosh, A., and Hsu-Kim, H. (2013). Environmental impacts of the Tennessee Valley Authority Kingston coal ash spill. 2. Effect of coal ash on methylmercury in historically contaminated river sediments. *Environmental Science & Technology*, 47(6), 2100–2108.

14) Bartov, G., Deonarine, A., Johnson, T.M., Ruhl, L., Vengosh, A. and Hsu-Kim, H. (2013) Environmental impacts of the Tennessee Valley Authority Kingston coal ash spill. 1. Source apportionment using mercury stable isotopes. *Environmental Science & Technology*, 47(6), 2092–2099.

15) Liu, Y.-B., Chen, T.-Y., Mackee, W.G., Ruhl, L., Vengosh, A., and Hsu-Kim, H. (2013) Selenium Speciation in Coal Ash Spilled at the Tennessee Valley Authority Kingston Site. *Environmental Science & Technology*, 47, 14001–14009.

16) Iordanidis, A.; Buckma, J.; Triantafyllou, A. G.; Asvesta, A. (2008) Fly ash-airborne particles from Ptolemais-Kozani area, northern Greece, as determined by ESEM-EDX. *Int. J. Coal Geol.* 73 ,63–73.

17) Rose, N. L. (1996) Inorganic fly-ash spheres as pollution tracers. *Environ. Pollut.*, 91, 245–252.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	THIRTEENTH JUDICIAL CIRCUIT
MRR Pickens, LLC,	)	Civil Action No.: 2016-CP-39-100
Plaintiff,	)	
vs.	)	AFFIDAVIT OF
	)	AVNER VENGOSH, PH.D.
County of Pickens and William Cato,	)	
Weldon Clark, Robert Ballentine, Jo	)	
Johnston, Dennis Reinert, and Bob Young,	)	
individually and in their official capacity as	)	
appointed members of the Pickens County	)	
Planning Commission,	)	
Defendants.	)	

Personally appeared before me Avner Vengosh, who having been duly sworn, deposes and states:

1. That I am over the age of 18 years and am competent to issue this Affidavit.
2. That I hold a Ph.D. in Environmental Geochemistry and currently serve as Professor of Geochemistry and Water Quality at Duke University. My current Curriculum Vitae is attached hereto (33 pages, plus a 2-page summary).
3. That I was asked by Attorney Gary W. Poliakoff to review various materials and regulations related to proposed disposal of Coal Combustion Residuals (CCR) into a Class Two Landfill in Pickens county. A true and genuine copy of my Report, consisting of six pages, is attached hereto.
4. That, as stated in greater detail in my Report, deposit of Coal Combustion Residuals (CCR) into a South Carolina Class Two Landfill, even with a liner, would be most inappropriate and

would present serious risks of toxic exposure to the nearby population and to the environment
(including toxic effects to air quality and water quality).

SWORN and subscribed to before me this
16 day of FEB 2016.

Maury D. Klein

Notary Public for South Carolina

Print Name: MAURY D. KLEIN

My Commission Expires: 9/27/2016

Avner Vengosh



Avner Vengosh

Nicholas School of the Environment & Earth Sciences
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Publications and Grants Summary

• Publications: total - 104 in peer-reviewed journals; Google Scholar Stats: h-index=43; 5,801 total citations; 15 papers with >100 citations each. Web of Science: h-index=30, 3,082 total citations. Grants: PI or co-PI on Federal and Foundation Awards totaling ~\$7.9 million since 2005.

EDUCATION

AUSTRALIAN NATIONAL UNIVERSITY, RESEARCH SCHOOL OF EARTH SCIENCE
Canberra, Australia

• Ph.D., 1990, Environmental Geochemistry (Thesis title: *Boron isotope geochemistry in the sedimentary environment*).

Advisor: Professor Allan Chivas and Professor Malcolm McCulloch.

HEBREW UNIVERSITY OF JERUSALEM, Jerusalem, Israel

• M.Sc., 1986, Isotope Geology (Thesis title: *Stable isotopes in coexisting phases of phosphatic, carbonate and siliceous rocks of the Mishash Formation, Israel*).

Advisor: Professor Yehushua Kolodny.

HEBREW UNIVERSITY OF JERUSALEM, Jerusalem, Israel

• B.Sc., 1984.

ACADEMIC APPOINTMENTS

DUKE UNIVERSITY, Durham, NC, USA

NICHOLAS SCHOOL OF ENVIRONMENT, DIVISION OF EARTH AND OCEAN
SCIENCES,

2010- *Professor (tenured)*

DUKE UNIVERSITY, Durham, NC, USA

NICHOLAS SCHOOL OF ENVIRONMENT, DIVISION OF EARTH AND OCEAN
SCIENCES,

2005 -2010 *Associate Professor (tenured)*

DUKE UNIVERSITY, Durham, NC, USA

PRATT SCHOOL OF ENGINEERING, DEPARTMENT OF CIVIL AND ENVIRONMENTAL
ENGINEERING,

2009 - *Secondary Appointment*

STANFORD UNIVERSITY, Stanford, California, USA,

DEPARTMENT OF GEOLOGICAL AND ENVIRONMENTAL SCIENCES

August 2003 – March 2004, *Visiting Professor (sabbatical leave)*

BEN GURION UNIVERSITY, Beer Sheva, Israel,
DEPARTMENT OF GEOLOGICAL AND ENVIRONMENTAL SCIENCES
1999 -2005 (since 2002 tenured position); *Associate Professor*

UNIVERSITY OF CALIFORNIA SANTA CRUZ, Santa Cruz, California, USA,
INSTITUTE OF EARTH AND MARINE SCIENCES
1996-1997, *Visiting Scientist (sabbatical leave)*

HYDROLOGICAL SERVICE, Jerusalem, Israel
RESEARCH DEPARTMENT
1991-1999, *Senior Lecturer*

HONORS

2011 – International Association of Geochemistry (IAGC) Fellow.
2013 – Best Science Paper Award, *Environmental Science & Technology*.
2014 - Second Runner-Up Best Environmental Policy Paper, *Environmental Science & Technology*.
2015 – Geological Society of America Fellow.

AFFILIATIONS & MEMBERSHIPS

Geochemical Society, American Geophysical Union (AGU), Geological Society of America (GSA), International Association of Geochemistry (IAGC).

PROFESSIONAL SERVICE

Reviewer for dozens articles per month in *Environmental Science and Technology*, *Geochimica Cosmochimica Acta*, *Chemical Geology*, *Applied Geochemistry*, *Journal of Hydrology*, *Water Research*, *Water Quality Research of Canada*, *Aquatic Geochemistry*, *Hydrogeology Journal*, *The Science of Total Environment*, *Journal Environmental Quality*.

Reviewer for numerous NSF grants.

2015-present **Editorial board** of the international journal *Environmental Science and Technology*.

2007-present **Associate Editor** of the international journal *Applied Geochemistry*.

2015 Invited speaker to the Joint US-UK workshop on Improving Understanding of Potential Environmental Impact Associated with Unconventional Hydrocarbons, National Environment Research Council (NERC) and National Science Foundation (NSF) joint workshop, Washington DC, November 5-6, 2015.

- 2015 Invited speaker in the Pardee keynote Symposia P4: Similar Information , different results: fracking from state to state, Geological Society of America, Baltimore, November 3, 2015.
- 2015 Chair of The Second Workshop on the Water-Energy Nexus in China", Kunshan, China, October 14-15, 2015.
- 2015 Invited keynote speaker to the ICCE 2015, Leipzig, Germany, September 20, 2015.
- 2015 Theme chair "Energy Resources", Goldshmidt Conference, Prague, Czech Republic, August 16-21, 2015.
- 2015 Chair of a session "Geochemical Characterizations of Unconventional Petroleum Reservoirs and Environmental Impacts Associated with their Production", Goldshmidt Conference, Prague, Czech Republic, August 16-21, 2015.
- 2015 Invited speaker at the National Academy of Science workshop "Chemistry and Engineering of Shale Gas and Tight Oil Resource Development", May 18-19, 2015 , Washington DC.
- 2014 Chair of workshop "Water-energy Nexus in China", Kunshan, China, November 7, 2014.
- 2014 Theme chair "Hydrogeochemistry", Goldshmidt Conference, Sacramento California, June 8-13, 2014.
- 2014 Keynote speaker in a session on shale gas development, 2014 European Union of Geoscience (EGU) meeting , Vienna, Austria, April 28-May 2, 2014.
- 2013 Keynote speaker to a session entitled "Environmental and Social Implications of Hydraulic-Fracturing-Driven Oil and Gas Development: Toward a More Holistic Assessment", 2013 GSA Annual Meeting & Exposition, Denver, October 27-30, 2013.
- 2013 Keynote speaker to a special session (Pardee Keynote Symposia) of the Geological Society of America, entitled "Energy and Health: The Emergence of Medical Geology in Response to the Shale Gas Boom", 2013 GSA Annual Meeting & Exposition, Denver, October 27-30, 2013.
- 2013 Testimony to the Office of Management and Budget (OMB) on new EPA's proposed effluent limitation guidelines (ELGs) for the steam electric sector; Washington, DC, April 12, 2013.
- 2012 Chair, Pardee Symposium, Geological Society America Meeting, Charlotte, NC, USA, 4-7 Nov 2012.
- 2012 A Congretional briefing on "*Environmental Consequences of Past and Future Energy Production in the United States*," Rayburn House Office Building., Washington DC, October 16, 2012.

- 2012 Keynote speaker to the Association of Ecosystem Research Centers (AERC) annual meeting, Washington Dc, October 16, 2012.
- 2009 A testimony to the Subcommittee on Water Resources and Environment, U.S. House of Representatives; *"The Tennessee Valley Authority's Kingston Ash Slide: Potential Water Quality Impacts of Coal Combustion Waste Storage"*. Washington, DC, March 31, 2009.
- 2008 Keynote speaker at University Council on Water Resources/ National Insititue for Water Research annual conference " International water resources: Challenges for the 21st century" , Durham, NC, July 2008.
- 2007 Chair of a special session (Pardee Keynote Symposia) of the Geological Society of America, entitled *"Middle Eastern Water Resources in Times of Crisis"*, 2007 GSA Annual Meeting & Exposition, Denver, October 28-31, 2007.
- 2007 Chair of a session entitled *"Natural Contaminants in Groundwater Resources: Occurrence, Geochemistry, Health, and Remediation"*, American Geophysical Union (AGU), Joint Assembly Meeting, Acapulco, Mexico, May 22-25, 2007.
- 2007- present Member of the Environmental Surveillance Committee of the N.C. Radiation Protection Commission.
- 2006-2009 Principle Investigator of a USDA reseach project entitled *"An integrative investigation of the sources and effects of groundwater contamination for local communities and homeowners in North Carolina"*.
- 2006-2009 Investigator of a USAID (MERC) research project entiled *"The salinity curse of the Middle East fossil groundwater: The Radioactivity factor"*.
- 2006 Chair of a Workshop on *"Radon Occurrence, Health Risks and Policy, with an Emphasis on Radon in Ground Water Drinking Supplies"*, Duke Garnens, Duke University, Durham, NC, (<http://www.nicholas.duke.edu/radon/>), October 4, 2006.
- 2003 Advisor to International Atomic Energy Agencythe for designing Cooperation Research Project on application of isotopes in studying agricultural return flow.
- 2003 - 2004 Vice-President, International Commission on Water Quality, International Association of Hydrological Sciences.
- 2001-2005 **Associate Editor** for the international journal *Water Resources Research*.
- 2001-2004 Coordinator of the geochemistry research group of European Union Firth Framework research BOREMED entitled *"Boron contamination of Water resources in the Mediterranean region: Distribution, Sources, Social impact and Remediation"*.

- June 2001 Invited Speaker at *Water-Rock Interaction –10* International conference, Sardinia, Italy.
- 1999-2004 Coordinator of US-AID - Middle East Regional Cooperation Research (MERC) project entitled "*Water Quality along the Jordan River and evaluation of the sources of salts*".
- 2000 Organizer of a special workshop with the International Atomic Energy Agency, entitled "*Regional workshop on isotopes and geochemical methods in the study of water and salinization in arid region.*"
- 1999 Advisor for the design of Cooperation Research Project on application of isotopes in studying salinization, International Atomic Energy Agency, Vienna, Austria.

Duke University service

- 2007- 2011 Chair of *Water and Air Resources Program* at the Nicholas School of Environment and Earth Sciences, Duke University.

Member of Duke University Radioactivity Safety Committee, Duke University Misconduct committee, University Calendar Committee, Academic Council (2006-2008), Nicholas School of Environment Water Initiative Committee, and head of Search Committee for a Global Hydrology position.

PUBLICATIONS

(in bold, research done while Vengosh's graduate students or post-docs)

Refereed articles in scientific journals

Articles published after appointment at Duke

2016

104) Schlesinger, W.H. and Vengosh, A. (2016), Global Boron Cycle in the Anthropocene. *Global Biogeochemical Cycles*, doi:10.1002/2015GB005266.

2015

103) King, K.E., Darrah, T.H., Money, E., Meentemeyer, R., Maguire, R.L., Michener, L., Murtha, A.P., Jirtle, R., Murphy, S.K., Mendez, M.A., Robarge, W., Vengosh, A., Hoyo, C. (2015) Geographic clustering of elevated blood heavy metal levels in pregnant women. *BMC Public Health*, 15, 1035-1035.

102) Drollette, B.D., Hoelzer, K., Warner, N.R., Darrah, T.H., Karatun, O., O'Connor, M.P., Nelson, R.K., Fernandez, L.A., Reddy, C.M., Vengosh, A., Jackson, R.B., Elsner, M., Plata, D.L.

- (2015) Elevated levels of diesel range organic compounds in groundwater near Marcellus gas operations are derived from surface activities. *PNAS* (doi: 10.1073/pnas.1511474112).
- 101) Darrah, T.H., Jackson, R.B., Vengosh, A., Warner, N.R., Whyte, C.J., Walsh, T.B., Poreda, R.J. (2015) The evolution of Devonian hydrocarbon gases in shallow aquifers of the northern Appalachian Basin: insights from integrating noble gas and hydrocarbon geochemistry. *Geochimica Cosmochimica Acta*, 170, 321-355.
- 100) **Kondash, A.** and Vengosh, A. (2015) Water footprint of hydraulic fracturing. *Environmental Science & Technology Letters*, 2, 276-280.
- 99) **Lauer, N.E.**, Hower, J.C., Hsu-Kim, H., Taggart, R.K., Vengosh, A. (2015) Naturally occurring radioactive materials in coals and coal combustion residues in the United States. *Environmental Science & Technology*, 49, 11227-11233.
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Vengosh, A., **Farber, E.**, Shavit, U., **Holtzman, R., Segal, M.**, Gavrieli, I., Bullen, T.M., (2001). *Exploring the sources of salinity in the Middle East: A hydrologic, geochemical and isotopic study of the Jordan River*. In: Cidu, R., Proceeding of the Tenth International Symposium on Water-Rock Interaction, WRI-10, Villasimuis, Sardinia, Italy, June 2001, (keynote lecture), Vol. 1, 71-79, A.A. Balkema Publishers.

Vengosh, A., **Farber, E.**, Shavit, U., Holtzman, R., Segal, M., Gavrieli, I., Bullen, T.M., and Mayer, B. (2001). *Tracing the origin of salinity of the Jordan River*. 4th International Symposium on Applied Isotope Geochemistry, June 25-29, 2001, Pacific Grove, California, USA, pp. 162-164.

Vengosh, A., Kolodny Y. and A.J. Spivack (1998) *Ground-water pollution determined by boron isotope systematics*. In: 'Application of isotopic techniques to investigate groundwater pollution', Cooperation Research Program, The International Atomic Energy Agency (IAEA), IAEA-TECDOC-1046, pp. 17-37, October 1998, Vienna.

Vengosh A. (1992). *Boron isotope variations during brine evolution and water-rock interaction*. Kharaka Y.K. and Maest A.S. (eds.), Proceedings of the 7th International Symposium on Water-Rock Interaction, Park City, Utah, 1992. A.A. Balkema, Rotterdam, p. 693-696.

TEACHING

Courses at Duke University: Introduction to Hydrogeology (EOS123), International Water Resources (EOS227), Stable and Radioactive Isotopes in Environmental Sciences (EOS271), Water Seminar (EOS226).

Graduate students:

Duke University:

- Jennie Harkness (PhD, 2013 -)
- Nancy Lauer (PhD, 2013 -)
- Andrew Kondash (PhD, 2014 -)

- Hadas Raanan (PhD, 2005-2011). Research topic: *Radium isotope geochemistry as a tracer for groundwater-surface water interaction.*
- David Vinson (PhD, 2005-2011). Research topic: *The impact of salinity and water chemistry on radium mobilization in groundwater systems.*
- Nathaniel Warner (PhD, 2008-2013). Research topic: *Tracing the origin of salinization and radium contamination in water resources of Morocco.*
- Laura Ruhl (PgD, 2008-2012). Research topic: *The geochemistry and isotopic characterization of coal ash and its impact on the environment.*
- Brittany R. Merola (PhD-2010 -). Research topic: *Biomarkers of arsenic and fluoride from contaminated water resources.*
- Daniella Hirschfeld (Master of Environmental management, 2006-2008). Research topic: *Radium isotopes in groundwater in Jordan.*
- Kristen Tull (Master of Environmental management, 2006-2008). Research topic: *Mini-Superfund" Site in Kawerau, New Zealand: A Closer Look at Water Quality.*
- Britany R. Merola (Master of Environmental management, 2007-2009). Research topic: *Arsenic Exposure from Groundwater in Union County, North Carolina.*
- Heidi Hausman (Master of Environmental management, 2007-2009). Research topic: *Responsible Development in Tulum, Mexico: Considering Water Quality and Subaqueous Cave Locations.*

Ben Gurion University:

- Efrat Farber (PhD, 2000-2005). Research topic: *The lower Jordan River: river salinization, relationship with adjacent groundwater and future management.*
- Yohanan Artzi (M.Sc., 1999-2003) Research topic: *The origin of salinity in the coastal aquifer of Israel.*
- Osnat Velder (M.Sc., 2000-2003) Research topic: *Mapping of oxygen isotopes and salinity in groundwater from the coastal aquifer of Israel.*
- Sharon Henig (M.Sc., 2002-2004) Research topic: *Geochemical and isotopic (oxygen, hydrogen, boron, and strontium) characterization of groundwater from the Kurnub Group aquifer in the Negev and the Arava Valley, Israel.*
- Dana Roded (M.Sc., 2003-2005) Research topic: *Identification of the origin of nitrate pollution in the coastal aquifer by isotopic traces.*
- Nitzan Pery (M.Sc., 2003-2005) Research topic: *Radioactivity in groundwater from the Negev, Israel.*

AWARDS AND GRANTS

Duke University

2016-2017	North Carolina Water Research Institute, Vengosh (PI). <i>Tracing Groundwater Contamination Near And Away From Coal Ash Ponds in North Carolina</i> (\$100,000).
2016-2017	National Insitution of Health (NIH), National Institute of Environmental Health Sciences, Nagel, S. University of Missouri (PI), Vengosh, A. (co-PI). <i>Endocrine disrupting activity associated with hydraulic fracturing</i> (\$239,743).

- 2015- Southern Environmental Law Center. Vengosh, A. (PI). *Applying geochemical tracers for elucidating the leaking of coal ash ponds*. (\$60,000).
- 2015-2016 Park Foundation. Vengosh, A. (PI), *Radioactivity and Isotopic Markers of Oil and Gas Liquid and solid Wastes in New York and Pennsylvania* (\$60,000).
- 2014-2017 National Science Foundation. Vengosh (PI), Jackson R.B., Darrah, T. *SusChEM: Geochemical Characterization and Evaluation of the Environmental Impacts of Hydraulic Fracturing Fluids* (\$258,436). (EAR-1441497).
- 2014-2015 Park Foundation. Vengosh, A. (PI), Jackson R.B., Plata, D. *The environmental and health risks of oil and gas wastewater in New York and Pennsylvania* (\$70,000).
- 2014-2015 Duke Energy Initiative. Vengosh, A., Weinthal, E., Dalia Patino-Echeverri, Marc Deshusses. *A global perspective of water scarcity and unconventional shale gas development* (\$40,000).
- 2013-2014 National Science Foundation Exploratory Research (EAGER). Darrah, T. (PI), Vengosh, A., Jackson J. *A novel geochemical approach for environmental risk assessment of stray gas contamination in shallow aquifers within active and prospective shale gas development zones* (\$100,000). (EAR-1249255)
- 2013-2014 Park Foundation. Vengosh, A. (PI), Jackson R.B., Plata, D. *The environmental effects of oil and gas wastewater disposal in New York and Pennsylvania* (\$70,000).
- 2013-2017 National Science Foundation. Ferguson, L. (PI), Wiesner, M., Tarabara, V., Bang, J. Plata, D., Hsu-Kim, H., Gunsch, C., Seshusses, M., Vengosh, A., Golden, J. *PIRE: Water and Commerce: Technologies to enable environmental sustainability in global markets* (\$4,750,443).
- 2012-2015 National Science Foundation. Hsu-Kim, H. (PI), Vengosh, A., Hower, J. *Characterization of contaminants and isotopic tracers associated with coal combustion products* (\$301,000).
- 2011-2012 Park Foundation. Jackson, R.B. (PI), Vengosh, A. *Impact of Gas Drilling and Hydraulic Fracturing on Water Quality* (\$50,000)
- 2012-2013 North Carolina Water Resources Research Insitute. Jackson, R.B. (PI), Vengosh, A. *Baseline groundwater quality sampling in parts of Lee and Chatham Counties, North Carolina*. (\$50,000).
- 2011-2012 Duke University - Problem-Focused Interdisciplinary Research-Scholarship Teams (PFIRST). Jeuland, M., Vengosh, A., Weinthal, E., McCornick, O. Crump, J. and Krauchanka, J. *Understanding linkages between climate change, water resources, and health in Ethiopia* (\$30,000)

- 2011-2012 National Science Foundation. Vengosh, A. (PI), Jackson, R. Weinthal, E. *Environmental and social implications of hydraulic fracturing and gas drilling in the United States: An integrative science and policy workshop* (\$45,000)
- 2011-2012 Duke Cancer Institute. Vengosh, A. (PI), Krauchanka, Y. *Environmental contaminants in drinking water from rural communities of Union county, North Carolina: an integrated approach for evaluation of biomarkers of human exposure to arsenic and trace metals.* (\$50,000)
- 2011-2012 North Carolina Water Resources Research Insitute. Vengosh, A. (PI), Hsu-Kim, H. *The impact of coal combustion products on the quality of water resources in North Carolina.* (\$50,000)
- 2010-2013 Oak Ridge Associated Universities. Vengosh, A. (PI), Hsu-Kim, H., Hower, J., Johnson, T. *Geochemical and isotope characterization of TVA coal combustion products: Identification of contaminants and modeling their fate in the environment.* (\$357,115).
- 2010-2011 Duke Global Health Institute. McCornick, P. and Vengosh, A. *Processes controlling groundwater quality and impacts on human health in the Main Ethiopian Rift.* (\$50,000).
- 2010-2013 DOE. Rob Jackson (PI), Avner Vengosh, Mark Little. *The Potential Risks of Freshwater Aquifer Contamination with Geosequestration Simulation and Risk Assessment of Carbon Capture and Storage (CCS).* (\$298,304).
- 2009-2010 National Science Foundation. Vengosh, A. (PI), Backer, P., Dywer, G.S. and Hsu-Kim, H. Title: *Environmental effects of the coal ash spill and remediation at Kingston, Tennessee* (\$105,000).
- 2009 Fred and Alice Stanback gift to the Nicholas School of Environment. Vengosh, A. (PI). Seed funding *The Environmental and Health Effects of the coal ash spill at Kingston, Tennessee* (\$50,000).
- 2008-2012 NATO Science for Peace and Security Program. Vengosh A. (PI) and Bouchaou, L. *Investigating salinity and radioactivity in water resources in Morocco.* (EUR 234,000).
- 2008-2009 Center of Global Change, Duke University. Vengosh, A. (PI) Jackson, R. Hsu-Kim, H. Emily S. Bernhardt, E.S. *The drought effect on water availability and quality of North Carolina water resources: Groundwater-surface water interaction and contributions of recycled wastewater* (\$50,000)
- 2007-2009 Kuwait Institute for Scientific Research (KISR). Vengosh, A. (PI). *Radium isotopes in the Persian Gulf and associated groundwater.* (\$30,000).

- 2007-2008 Health Research Council of New Zealand, Hikuroa, D. and Vengosh, A. (PI's); *"Preliminary investigation of the link between naturally occurring contaminants and health in Tarawera Valley, New Zealand"*; (\$5,000).
- 2006-2009 United States Department of Agriculture (USDA): Vengosh, A. (PI), Klein, E. Benneer, L., Weinthal, E. Wiesner, M., Mirenda M. *An integrative investigation of the sources and effects of groundwater contamination for local communities and homeowners in North Carolina* (\$570,000).
- 2006-2009 United States Agency for International Development (US-AID), Middle East Research Program (MERC). Ganor, J. (PI), Vengosh, A., Marie, A. Rimawi, O. (PIs). *The salinity curse of the Middle East fossil groundwater: The Radioactivity factor* (\$500,000).
- 2005-2006 Cancer and the Environment: Seed Funding Award of Duke Comprehensive Cancer Center and Nicholas School of the Environment, Duke University. Avner Vengosh (PI), James J. Vredenburg, Jennifer Garst, Richard Di Giulio, Lincoln Pratson, and Emily M. Klein. *"The Link Between Environmental Radon and Cancer: A Pilot Study For a New Biogeochemical Tracer and Geographical Relationships"* (\$25,000).

Ben Gurion University, Beer Sheva, Israel

- 2003-2004 Blaustein Visiting Scholar award, School of Earth Sciences, Stanford University, California, USA.
- 2002-2005 United States States Agency for International Development (US-AID), Middle East Research Program (MERC). Vengosh, A. (PI), U. Shavit, I. Gavrieli, E. Salameh, R. Daud, A. Marie. *"Water Quality along the Jordan River and evaluation of the sources of salts: Phase Two"* (\$499,000)
- 2001-2004 Water Commission, Israel. Vengosh, A. *"Using isotopic tracers for elucidating the sources and mechanism of nitrate pollution of groundwater from the coastal aquifer of Israel"* (300,000 NIS).
- 2001-2004 European Community: FP5 program "Energy, Environment and Sustainable Development", "Sustainable Management and Quality of Water". Kloppmann, W., Vengosh, A. et al., *"Boron contamination of Water resources in the Mediterranean region: Distribution, Sources, Social impact and Remediation"* (Euro 1,200,000 for the total project, Euro 120,000 for BGU).
- 2000-2003 International Atomic Energy Agency, Research Co-operation Projects, Y. Ganor and A. Vengosh, *"Boron and strontium isotopic compositions of ground water from the Lower Cretaceous Kurnob sandstone: Geochemical characterization of inland saline ground water"* (\$15,000)

- 1999-2003 United States Agency for International Development (US-AID), Middle East Research Program (MERC). Vengosh, A. (PI), U. Shavit, I. Gavrieli, E. Salameh, R. Daud, A. Marie. "*Water Quality along the Jordan River and evaluation of the sources of salts: A geochemical prospective*" (\$499,000)
- 1999-2002 International Atomic Energy Agency, Research Co-operation Projects, Vengosh, A. "*Environmental Isotopes, Boron, and Bromide Variations in the Coastal Aquifer of Israel: The Impact of Long-term Exploitation*" (\$18,000).
- 1999-2000 Department of Energy, Lawrence Livermore National Laboratory. Vengosh, A., Marie, A., "*The Mediterranean Coastal aquifer and the Shallow Aquifer System in Jericho area*" (\$12,000).
- 1998-2001 Ministry of Science, Israel. I. Gavrieli (PI), Y. Yechieli, A. Vengosh, A. Starinsky, "*Dating and geochemical characterization of shallow ground water from the coastal aquifer of Israel*". (\$190,000)

Hydrological Service, Jerusalem, Israel

- 1997-1998 University of California Water Resources. J. Gill and A. Vengosh. "*Multi-isotope investigation of ground water contamination in Salinas Valley, California*". (\$25,000).
- 1995 -1998 Israel Academy of Science. I. Gavrieli (PI), A. Starinsky (PI), A. Vengosh, A. Ayalon. "*Boron, sulfur, strontium, oxygen, and hydrogen isotopes in freshwater of a carbonate aquifer: Judea Mountain, Israel*". (\$140,000).
- 1996 - 1998 Water Commission Research grants. A. Starinsky and A. Vengosh. "*Relationships between contaminants and salinity in the coastal aquifer of Israel*" (210,000 NIS)
- 1995 -1997 International Atomic Energy Agency (IAEA). Y. Kolodny and A. Vengosh. "*Boron isotope investigations of polluted groundwater and contamination sources: Establishing the rules of the game*" (\$12,000).
- 1992 - 1995 The German-Israeli Cooperative Grant (BMFT and MOST). A. Vengosh, R. Keren, K.G. Heumann (PI's). "*The influence of the coastal aquifer rocks on groundwater composition and contamination*". (148,000 DM).
- 1993 - 1995 The Ashdod-Yavneh Regional Association for Environmental Protection. A. Vengosh. "*Sources of Salinization of Groundwater from Gan Yavne-Gedera-Ashdod Area, the Coastal Plain Aquifer, Israel*" (100,000 NIS).

- 1993 - 1996 Water Commission Research grants. Y. Yechieli, (PI), D. Ronen, and A. Vengosh. *"Isotopic measurements and dating of intrusion of saline groundwater at the interface zone, the Coastal Plain Aquifer of Israel"*. (160,000 NIS).
- 1993 - 1996 Water Commission Research grants. A. Starinsky and A. Vengosh. *"A survey of natural isotopic and chemical tracers in groundwater from Yarqon-Taninim aquifer as indicators for salinization"* (210,000 NIS).
- 1991 - 1994 Water Commission Research grants. E. Mazor and A. Vengosh. *"A conceptual model for aquifer systems in the coastal plain of Israel: A pilot study along Tel Aviv-Judea Mountain"* (240,000 NIS).
- 1986 - 1990 Research School of earth Sciences, The Australian National University, Canberra, Australia. Ph.D. Scholarship for Avner Vengosh.

Media:

Research on water resources in the Gaza Strip

- November 3, 2003 - Geological Society of America: *Water On The Gaza Strip: Time Bomb Or Ray Of Hope* (<http://www.geosociety.org/news/pr/03-34.htm>)
- November 13, 2003 - Nature 426, 110 (13 November 2003) | doi:10.1038/426110b
Geologists call for desalination of Gaza Strip's water
(<http://www.nature.com/nature/journal/v426/n6963/full/426110b.html>)
- March 4, 2003 - Environmental Change and Security Program: *The State of the Water Crisis in Israel and The Palestinian Authority: Integrating Science and Policy*
(http://www.wilsoncenter.org/index.cfm?topic_id=1413&categoryid=A82CCAEE-65BF-E7DC-46B3B37D0A3A575F&fuseaction=topics.events_item_topics&event_id=23109)

Research on Radioactivity and fossil groundwater in the Middle East

- May 6, 2010, National Geographic News: *"Underground "Fossil Water" Running Out"*
(<http://news.nationalgeographic.com/news/2010/05/100505-fossil-water-radioactive-science-environment/>)
- February 25, 2009 - Reuters, London: Ancient Jordanian wells radioactive, study finds
(<http://www.reuters.com/article/latestCrisis/idUSLN96135>)
- February 26, 2009 - The Jerusalem Post: Radioactive materials found in Jordanian wells
(www.jpost.com/servlet/Satellite?cid=1235410729639&pagename=JPost%2FJPArticle%2FPrinter)
- February 27, 2009 - The Jordan Times : Government: water is safe
(<http://www.jordantimes.com/?news=14653>)
- March 9, 2009 - The Jordan Times: Clear waters
(<http://www.jordantimes.com/?news=14872>)
- March 4, 2009 - Green Prophet: Study on Jordanian Groundwater Sparks Controversy
(<http://greenprophet.com/2009/03/04/7321/jordan-groundwater-controversy/>)

- March 3, 2009 - KISR will check; Aquifer 'radiation' in Kuwait unlikely (<http://www.arabtimesonline.com/kuwaitnews/pagesdetails.asp?nid=29378&ccid=9>)
- February 23, 2009 - The New Security Beat: Hot Water: High levels of radioactivity found in Jordan's groundwater (<http://newsecuritybeat.blogspot.com/2009/02/hot-water-high-levels-of-radioactivity.html>).
- March 6, 2009 - The Grist: Tall Glass of denial - Fallout from Jordan's radioactive water (<http://www.grist.org/article/Tall-glass-of-denial>)
- March 6, 2009 - Science Daily: Jordan's Fossil Water Source Has High Radiation Levels (<http://www.sciencedaily.com/releases/2009/02/090224163647.htm>).
- February 25, 2009 - Haaretz: Report: Mideast in danger of exposure to high levels of radioactive water (<http://www.haaretz.com/hasen/spages/1066925.html>).
- March 1, 2009 - Jordan Science and Environment Monitor: The Curious case of radioactivity in Disi aquifer (<http://www.arabenvironment.net/archive/2009/3/816500.html>).
- February 24, 2009 - Bio-Medice: Jordan fossil water source has high radiation levels (<http://www.bio-medicine.org/medicine-news-1/Jordans-fossil-water-source-has-high-radiation-levels-37588-2/>).
- March 17, 2009 - International Water and Sanitation Centre: Jordan: ancient wells radioactive, US study finds (<http://www.irc.nl/page/47171>).
- March 9, 2009 - Middle East Business Information (ZAWYA): Clean waters (<https://www.zawya.com/Story.cfm/sidZAWYA20090309034554/Clear%20waters/>).
- February 25, 2009 - World Bulletin: Ancient Jordan water high level radioactive, study says (http://www.worldbulletin.net/news_detail.php?id=37261).
- February 26, 2009 - Boston Globe: Excess radiation found in ancient Jordan wells (http://www.boston.com/news/world/europe/articles/2009/02/26/excess_radiation_found_in_ancient_jordan_wells/).
- April 1, 2009 - JO: Poisoning The Well (http://www.jo.jo/index.php?option=com_content&view=article&id=306:poisoning-the-well&catid=81:politics&Itemid=197).
- March 2, 2009 - Jordan Times: No hidden agenda behind water study – researcher (<http://www.jordantimes.com/?news=14692>).
- August 2009, Jordan's Radioactive Water Problem. IEEE Spectrum (<http://www.spectrum.ieee.org/energy/environment/jordans-radioactive-water-problem>)

Research on the TVA coal ash spill, Kingston, Tennessee

- November 29, 2010, Science Daily News: *Scientists Look Deeper for Coal Ash Hazards* (<http://www.sciencedaily.com/releases/2010/11/101129203342.htm>)
- November, 29, 2010, Duke press release: *New Monitoring Methods More Accurately Measure Coal Ash Impacts* (<http://www.nicholas.duke.edu/news/new-monitoring-methods-more-accurately-measure-coal-ash-impacts>)
- December 6, 2010, Chemical and Engineering News, American Chemical Society: *Coal Ash Spill In Tennessee Still A Problem* (<http://pubs.acs.org/cen/news/88/i49/8849news1.html>)

- December 1, 2010, Technology Magazine Daily: *Scientists Look Deeper for Coal Ash Hazards* (<http://www.techmagdaily.com/scientists-look-deeper-for-coal-ash-hazards.html>)
- December 8, 2010, Facing South: *Scientists call for a deeper look at coal ash contamination* (<http://www.southernstudies.org/2010/12/scientists-call-for-a-deeper-look-at-coal-ash-contamination.html>)
- Sep 15, 2010, Scientific American: *On eve of EPA hearings, scientists sample lake for coal-ash toxins* (<http://www.scientificamerican.com/blog/post.cfm?id=on-eve-of-epa-hearings-scientists-s-2010-09-15>)
- Sep 13, 2010. Duke Press release: *Duke Expert to Testify on Coal Ash's Effects on Hyco Lake, TVA Pond* (http://www.dukenews.duke.edu/2010/09/tip_vengosh.html)
- August 17, 2009, Toxics in coal ash from TVA Ash Spill May Pose Risks to the Environment. Duke Press release (<http://www.nicholas.duke.edu/news/ns-tva.08.17.09.html>)
- May 13, 2009 – WBIR: Warmer weather raises risks associated with TVA ash spill (<http://www.wbir.com/news/local/story.aspx?storyid=87506&provider=rss>)
- March 30, 2009 - Testimony to the Subcommittee on Water Resources & Environment, U.S. House of Representatives -Tennessee Valley Authority's Kingston Ash Slide: Potential Water Quality Impacts of Coal Combustion Water Storage (<http://transportation.house.gov/hearings/hearingDetail.aspx?NewsID=834>)
- January 28, 2009 – Duke Today: Analysis Shows Exposure to Ash from TVA Spill Could Have "Severe Health Implications" (<http://www.nicholas.duke.edu/news/ns-vengosh.01.28.09.html>; <http://www.dukenews.duke.edu/2009/01/tva.html>)
- January 30, 2009 – The Huffington Post: Exposure To TVA Coal Spill Could Have 'Severe Health Implications' (http://www.huffingtonpost.com/2009/01/30/exposure-to-tva-coal-spill_n_162471.html).
- April 1, 2009 – Chattanooga Time: 100 Days Later, Ash Spill Questions Linger for Tennessee Valley Authority (<http://www.istockanalyst.com/article/viewiStockNews/articleid/3166217>)
- February 2, 2009 – Facing South: Fallout fallacies: How TVA misled on coal ash radiation threat (<http://www.southernstudies.org/2009/02/fallout-fallacies-how-tva-misled-on-coal-ash-radiation-threat.html>).
- January 29, 2009 – Knoxville News Sentinel: Coal ash health risk, Duke finds (<http://www.knoxnews.com/news/2009/jan/29/coal-ash-health-risk-duke-finds/?printer=1/>)

- January 29, 2009 – The Huffington Post: Tennessee Coal Ash Contaminated With Radioactivity and Arsenic (http://www.huffingtonpost.com/bill-chameides/tennessee-coal-ash-contam_b_162336.html).
- May 2009 – Dukeenvironment Magazine: Raising the Question of Safety (<http://www.nicholas.duke.edu/dukenvironment/sp09/raising-the-question-of-safety>).
- January 29, 2009 – Associated Press: Arsenic, radium levels high at ash spill site (<http://www.msnbc.msn.com/id/28917966/>)
- February 4, 2009 – The Nation: Toxic Coal in Tennessee (<http://www.thenation.com/doc/20090223/hearn>)

News Releases - Duke:

- June 09, 2008 - "Man-made" Water has Different Chemistry - -- Duke University (<http://news.duke.edu/2008/06/tracewater.html>)
- September 15, 2006 - Health Risks of Radon in North Carolina Groundwaters to be Examined at Nicholas School Workshop on Oct. 4 (<http://www.nicholas.duke.edu/news/ns-radon.html>)

Others

- October 4, 2006; The News and Observer: Experts address N.C. radon hazard (<http://www.newsobserver.com/102/story/494204.html>)
- April 1, 2006; Washington Post: April 01, 2006 - EPA May Weaken Rule on Water Quality.
- July 14, 2004; BBS news: South Israeli water 'radioactive' (http://news.bbc.co.uk/2/hi/middle_east/3894263.stm)

Avner Vengosh, Ph.D., GSA Fellow, IAGC Fellow
Professor, Nicholas School of the Environment, Duke University

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Duke University
Durham, NC 27708-0287

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Email: vengosh@duke.edu
<http://sites.nicholas.duke.edu/avnervengosh/>

RESEARCH INTERESTS

Dr. Vengosh research aims to delineate the sources and pathways of contaminants in the environment and their possible impacts on human health through integrated research of environmental geochemistry, advanced isotope geochemistry (boron, strontium, carbon, lithium, radium isotopes), and environmental health research (arsenic, fluoride, boron, chromium, radium). Dr. Vengosh research is focused on the energy-water nexus with extensive research on the environmental risks of shale gas exploration and hydraulic fracturing, coal mining, coal combustion residues and their disposal. Dr. Vengosh's team is currently engaged in research of unconventional energy development in different parts in the U.S. and China, the environmental and human health effects of coal ash in the U.S. and China, and the relations between the occurrence and distribution of inorganic contaminants on human health in the U.S., Morocco, Vietnam, Ethiopia, and China.

EMPLOYMENT

DUKE UNIVERSITY

Professor, Division of Earth and Ocean Sciences, Duke University	2010-Present
Associate Professor, Division of Earth and Ocean Sciences, Duke University	2005-2010

BEN GURION UNIVERSITY OF THE NEGEV, ISRAEL

Associate Professor, Dept. of Geological and Environmental Sciences	1999-2005

HYDROLOGICAL SERVICE, ISRAEL

Senior Lecture, Research Department	1991-1999

EDUCATION

Australian National University, Canberra, Australia (PhD)	1986-1990
Hebrew University of Jerusalem, Israel (M.Sc.)	1984-1986
Hebrew University of Jerusalem, Israel (B.Sc.)	1981-1984

SELECTED AWARDS, RECOGNITIONS, AND SERVICES

2015 – Geological Society of America Fellow.

2014 - Second Runner-Up Best Environmental Policy Paper, *Environmental Science & Technology*.

2013 – Best Science Paper Award, *Environmental Science & Technology*.

2011 – International Association of Geochemistry (IAGC) Fellow.

2015-present	Editorial board of the international journal <i>Environmental Science and Technology</i> .

2007-present	Associate Editor of the international journal <i>Applied Geochemistry</i> .

2001-2005	Associate Editor for the international journal <i>Water Resources Research</i> .

SELECTED PUBLICATIONS (out of 104 peer-reviewed journal articles; Google Scholar Stats: h-index=43; Web of Science: h-index=30; for full list of publications see: <http://sites.nicholas.duke.edu/avnervengosh/publications/>)

- Schlesinger, W.H. and Vengosh, A. (2016), Global Boron Cycle in the Anthropocene. *Global Biogeochemical Cycles*, doi:10.1002/2015GB005266
- Kondash, A. and Vengosh, A. (2015) Water footprint of hydraulic fracturing. *Environmental Science & Technology Letters*, 2, 276-280.
- Lauer, N.E., Hower, J.C., Hsu-Kim, H., Taggart, R.K., Vengosh, A. (2015) Naturally occurring radioactive materials in coals and coal combustion residues in the United States. *Environmental Science & Technology*, 49, 11227-11233.
- Darrah, T.H., Vengosh, A., Jackson, R.B., Warner, N.R., Poreda, R.J. (2014) Noble gases identify the mechanisms of fugitive gas contamination in drinking-water wells overlying the Marcellus and Barnett Shales. *PNAS*, 111, 14076-14081.
- Vengosh, A., Jackson, R.B., Warner, N.R., Darrah, T. H., Knodash, A.J. (2014) A Critical Review of the Risks to Water Resources from Unconventional Shale Gas Development and Hydraulic Fracturing in the United States. *Environmental Science & Technology*, 48, 8334-8348.
- Vengosh, A. (2013). *Salinization and Saline Environments*. In: Sherwood Lollar, B. (ed.), *Environmental geochemistry* (volume 9), *Treatise in Geochemistry Second Edition*. Executive Editors: Holland, H.D. and Turekian, K.T., Volume 11, 325-378, Elsevier Science.
- Warner, N.R., Christie, C.A., Jackson, R.B., Vengosh, A. (2013) Impacts of shale gas wastewater disposal on water quality in western Pennsylvania. *Environmental Science & Technology*, 47, 11849-11857.
- Warner, N.R., Jackson, R.B., Darrah, T.H., Osborn, S.G., Down, A., Zhao, K., White, A., Vengosh, A. (2012). Geochemical evidence for possible natural migration of Marcellus formation brine to shallow aquifers in Pennsylvania. *PNAS* 109, 11961-11966.
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STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

MRR Pickens, LLC,

Plaintiff,

vs.

County of Pickens and William Cato,
Weldon Clark, Robert Ballentine, Jo
Johnston, Dennis Reinert, and Bob Young,
individually and in their official capacity as
appointed members of the Pickens County
Planning Commission,

Defendants.

) IN THE COURT OF COMMON PLEAS

) THIRTEENTH JUDICIAL CIRCUIT

) Civil Action No.: 2016-CP-39-100

) **AFFIDAVIT OF**
) **SHELLEY HUDSON ROBBINS**

Personally appeared before me Shelley Hudson Robbins, who having been duly sworn,
deposes and states:

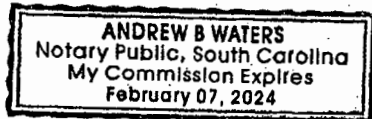
1. That I am over the age of 18 years and am competent to issue this Affidavit.
2. That I hold a B.A. degree from Duke University and a Masters in Business Administration from S.W. Oklahoma State University. I currently serve as Project Manager for Upstate Forever and also as Vice-Chair of the S.C. Solid Waste Advisory Council (member since 2010; appointed by Governor Sanford). I have also served in regulatory positions in the Oklahoma Department of Commerce, and as Policy Analyst for the Executive Office of the Governor of Florida and as Regulatory Analyst for the Florida Public Service Commission. Further, I have served on a number of work groups for the S.C. Department of Health and Environmental Control (DHEC) relating to environmental regulations and specifically including Solid Waste Regulations. I am familiar with South Carolina Solid Waste Regulations and requirements and am sufficiently knowledgeable and experienced to issue this Affidavit and my attached Report.

3. That I was asked by Attorney Gary W. Poliakoff to review various materials pertaining to the Class Two Landfill being developed by MRR Pickens in Pickens County, S.C., and the proposal to deposit Coal Combustion Residuals (CCR) into it. Also, I reviewed various relevant Federal and State Regulations. My Report, consisting of seven pages, is attached hereto.

4. As indicated in more detail in my attached Report, it is my analysis that deposit of CCR into a Class Two Landfill in South Carolina would violate federal law. Further, under S.C. Law and Regulations, CCR qualifies as a "Special Waste" per South Carolina Code Section 44-96-390, and must be deposited into a Class Three Landfill that holds a "Special Waste Permit" from DHEC, and its deposit into a Class II Landfill would violate S.C. Statutes and Regulations. Further, the changes to the original Permit, including the addition of a liner, the inclusion of other wastes such as CCR, and the dramatic increase in annual tonnage intake, all constitute a "major modification," which requires public review and public comment (which was not done), as opposed to MRR's attempted characterization as a "minor modification." Please see my attached Report for further details and explanation.

SWORN and subscribed to before me this
17 day of February 2016.

Andrew B. Waters
Notary Public for South Carolina
Print Name: Andrew B. Waters
My Commission Expires: 02/07/2024



Shelley Hudson Robbins
Shelley Hudson Robbins

**Proper Classification of Coal Combustion Residuals:
An Examination of Federal and South Carolina Regulations**
(Sections in italics are my analytical remarks)

Federal:

From RCRA Subtitle D

CRITERIA FOR SANITARY LANDFILLS; SANITARY LANDFILLS REQUIRED FOR ALL DISPOSAL SEC. 4004. (a) CRITERIA FOR SANITARY LANDFILLS.—Not later than one year after the date of enactment of this section, after consultation with the States, and after notice and public hearings, the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this Act. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility. Such regulations may provide for the classification of the types of sanitary landfills. (b) DISPOSAL REQUIRED TO BE IN SANITARY LANDFILLS, ETC.—For purposes of complying with section 4003(2) 1 each State plan shall prohibit the establishment of open dumps and contain a requirement that disposal of all solid waste within the State shall be in compliance with such section 4003(2). 1 (c) EFFECTIVE DATE.—The prohibition contained in subsection (b) shall take effect on the date six months after the date of promulgation of regulations under subsection (a).

In South Carolina, Class III landfills are routinely referred to professionally as Subtitle D landfills. Class II landfills are not referred to as Subtitle D landfills. Class II landfills are referred to federally as Construction and Demolition landfills and federal definitions specifically exclude the waste from electric power generation from C&D landfills (see below).

RCRA Authority (source: Federal Register Vol. 80 No. 74)

RCRA section 4005(a), entitled "Closing or upgrading of existing open dumps" generally establishes the key implementation and enforcement provisions applicable to EPA regulations issued under sections 1008(a) and 4004(a). Specifically, this section prohibits any solid waste management practices or disposal of solid waste that does not comply with EPA regulations issued under RCRA section 1008(a) and 4004(a). 42 U.S.C. 6944(a). See also 42 U.S.C. 6903(14) (definition of "open dump"). (underline added)

And (same source)

A. Regulation of Solid Wastes Under RCRA Subtitle D

Solid wastes that are neither a listed nor characteristic hazardous waste are subject to the requirements of RCRA subtitle D. Subtitle D of RCRA establishes a framework for federal, state, and local government cooperation in controlling the management of nonhazardous solid waste. The federal role is to establish the overall regulatory direction, by providing minimum nationwide standards that will protect human health and the environment, and to provide technical assistance to states for planning and developing their own environmentally sound waste management practices. The actual planning and any direct implementation of solid waste programs under RCRA subtitle D, however, remains a state and local function, and the Act envisions that states will devise programs to deal with state-specific conditions and needs. EPA has no role in the planning and direct implementation of the minimum national criteria or solid waste programs under RCRA subtitle D, and has no authority to enforce the criteria. However, states are not required to adopt solid waste management programs, and thus, Congress developed a statutory structure that creates incentives for states to implement and enforce the federal criteria, but that does not necessarily rely on or require a regulatory entity to oversee or implement them. While Congress developed the statutory structure to create incentives for states to implement and enforce the federal criteria, it does not require them to do

so. As a result, subtitle D is also structured to be self-implementing. RCRA sections 1008(a)(3) and 4004(a) delegate broad authority to EPA to establish regulations governing the management of solid waste. Under section 4004(a) EPA is charged with establishing requirements to ensure that facilities will be classified as sanitary landfills "only if there is no reasonable probability of adverse effects on health or the environment from the disposal of solid waste" at the facility. Or in other words, under section 4004(a) EPA is charged with issuing regulations to address all "reasonable probabilities of adverse effects" (i.e., all reasonably anticipated risks) to health and the environment from the disposal of solid waste. Section 1008(a)(3) expands EPA's authority to address the risks from any of the listed activities. Specifically, EPA is authorized to establish requirements applicable to "storage, transportation, transfer, processing, treatment, and disposal of solid waste." (42 U.S.C. 6907(a), 6903(28)).

This citation is from the publication of the Coal Combustion Residuals Rule in the Federal Register. The authority for managing CCR is RCRA Subtitle D – better known in South Carolina as a Class III landfill – not a Class II C&D.

40 CFR Part 257 – Criteria for Classification of Solid Waste Disposal Facilities and Practices

§ 257.2 Definitions

The definitions set forth in section 1004 of the Act apply to this part. Special definitions of general concern to this part are provided below, and definitions especially pertinent to particular sections of this part are provided in those sections. Construction and demolition (C&D) landfill means a solid waste disposal facility subject to the requirements of subparts A or B of this part that receives construction and demolition waste and does not receive hazardous waste (defined in § 261.3 of this chapter) or industrial solid waste (defined in § 258.2 of this chapter). (underline added)

40 CFR Part 258 – Criteria for Municipal Solid Waste Landfills

§ 258.2 Definitions

Industrial solid waste means solid waste generated by manufacturing or industrial processes that is not a hazardous waste regulated under subtitle C of RCRA. Such waste may include, but is not limited to, waste resulting from the following manufacturing processes: Electric power generation; fertilizer/agricultural chemicals; food and related products/by-products; inorganic chemicals; iron and steel manufacturing; leather and leather products; nonferrous metals manufacturing/ foundries; organic chemicals; plastics and resins manufacturing; pulp and paper industry; rubber and miscellaneous plastic products; stone, glass, clay, and concrete products; textile manufacturing; transportation equipment; and water treatment. This term does not include mining waste or oil and gas waste. (underline added)

Thus, disposing of the waste from electric power generation – or coal combustion residuals – in a Class II landfill violates federal law. See RCRA Authority, above.

State:

State Statute: Title 44-96 Solid Waste Management

Section 44-96-20 Findings; purposes

(9) Insufficient and improper methods of managing solid waste can create hazards to public health, cause pollution or air and water resources, constitute a waste of natural resources, and create public nuisances.

Section 44-96-240 Findings; purposes.

(B) It is the purpose of this article to:

(2) ensure that all solid waste management facilities in this State are sited, designed, constructed, operated, and closed in a manner that protects human health and safety and the environment.

44-96-40 Definitions

(6) "Construction and demolition debris" means discarded solid wastes resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. The wastes include, but are not limited to, bricks, concrete, and other masonry materials, soil, rock, lumber, road spoils, paving material, and tree and brush stumps, but does not include solid waste from agricultural or silvicultural operations.

(19) "Industrial waste" means solid waste that results from industrial processes including, but not limited to, factories and treatment plants.

(28) "Municipal solid waste landfill" means any sanitary landfill or landfill unit, publicly or privately owned, that receives household waste. The landfill may also receive other types of solid waste, such as commercial waste, nonhazardous sludge, and industrial solid waste.

(46) "Solid waste" means any garbage, refuse, or sludge from a waste treatment facility, water supply plant, or air pollution control facility and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities. This term does not include solid or dissolved material in domestic sewage, recovered materials, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to NPDES permits under the Federal Water Pollution Control Act, as amended, or the Pollution Control Act of South Carolina, as amended, or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended. Also excluded from this definition are application of fertilizer and animal manure during normal agricultural operations or refuse as defined and regulated pursuant to the South Carolina Mining Act, including processed mineral waste which will not have a significant adverse impact on the environment. For the purposes of this chapter, this term excludes steel slag that is a product of the electric arc furnace steelmaking process, provided that such steel slag is sold and distributed in the stream of commerce for consumption, use, or further processing into another desired commodity and is managed as an item of commercial value in a controlled manner and not as a discarded material or in a manner constituting disposal. (underline added)

It is clear in the statutory definitions that industrial wastes are meant for Class III landfills, not Class II landfills.

Section 44-96-390 - Approval procedures for special wastes

(A) For the purposes of this section, "special wastes" is defined as nonresidential or commercial solid wastes, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at municipal solid waste landfills, including, but not limited to:

(1) pesticide wastes;

(2) liquid wastes and bulk liquid wastes;

(3) sludges;

(4) industrial process wastes, defined as wastes generated as a direct or indirect result of the manufacture of a product or the performance of a service, including but not limited to, spent pickling liquors, cutting oils, chemical catalysts, distillation bottoms, etching acids, equipment cleanings, point

sludges, core sands, metallic dust sweepings, asbestos dust, and off-specification, contaminated, or recalled wholesale or retail products. Specifically excluded are uncontaminated packaging materials, uncontaminated machinery components, landscape waste, and construction or demolition debris;

(5) wastes from a pollution control process;

(6) residue or debris from the cleanup of a spill or release of chemical substances, commercial products, or wastes listed in items (1) through (5);

(7) soil, water, residue, debris, or articles that are contaminated from the cleanup of a facility or site formerly used for the generation, storage, treatment, recycling, reclamation, or disposal of wastes listed in items (1) through (6); and

(8) containers and drums;

(B) A special waste must not be disposed of nor accepted for disposal at a municipal solid waste landfill without prior written approval by the disposal facility in accordance with department requirements.

(C) A facility may apply to the department at any time for modifications or additions to the types of special waste disposed of or methods for disposal;

(D) Not later than six months after this article is effective or the initial receipt of wastes, whichever is later, the owner or operator of a municipal solid waste landfill shall prepare and submit to the department a waste analysis plan that addresses, at a minimum, the:

(1) parameters for which each waste will be analyzed and the rationale for the selection of those parameters;

(2) test methods which will be used to test for those parameters;

(3) sampling methods which will be used to obtain a representative sampling of the special waste to be analyzed;

(4) frequency with which the initial analysis of the special waste will be reviewed or repeated to ensure that the analysis is accurate and up to date; and

(5) procedures which will be used to inspect and, if necessary, analyze each special waste received at the facility to ensure that it matches the identity of the special waste designated on the accompanying transportation record. At a minimum, the plan must describe the:

(a) procedures which will be used to determine the identity of each special waste managed at the facility; and

(b) the sampling methods which will be used to obtain a representative sample of the special waste to be identified, if the identification method includes sampling. (underline added)

CCR is difficult and dangerous to handle and requires unusual management. In addition, fly ash and flue gas emission control waste are wastes from a pollution control process. CCR is a "special waste" and thus must be disposed of at a Class III landfill that holds a "Special Waste Permit" approved by DHEC. A "municipal solid waste landfill" is a Class III landfill. See definitions above.

State Regulation 61-107.19 SWM: Solid Waste Landfills and Structural Fill

61-107.19 Part I

Part I. General Requirements.

A. Applicability.

1. This regulation establishes minimum standards for the site selection, design, operation, and closure of all solid waste landfills and structural fill areas. Disposal of waste under the purview of this regulation is based on the waste's chemical/physical properties and is not dependent upon the source of generation with the exception of municipal solid waste that shall be disposed in Class Three landfills. This regulation is divided into the following parts:

a. Part I outlines the general criteria that applies to one or more Parts of the regulation, e.g., the applicability for the regulation, waste characterization requirements for determining the type of landfill needed, definitions for the purposes of this regulation;

b. Part II outlines the Permit-by-rule requirements for structural fill activity using a limited waste stream;

c. Part III outlines the General Permitting requirements for Class One Landfills - using landclearing debris, and yard trash to fill low areas, including permitted mining sites, for an aesthetic benefit or property enhancement;

d. Part IV outlines the requirements for Class Two Landfills - all landfills for the disposal of waste as outlined in Appendix I of this regulation, and similar waste, and wastes that test, pursuant to Section C of this Part, less than ten (<10) times the maximum contaminant level (MCL) as published in R 61-58, State Primary Drinking Water Regulation current at the time of the permit application. When a waste not listed in Appendix I is approved by the Department for disposal, the landfill's permit will be modified to include the acceptability of the approved waste; and,

e. Part V outlines the requirements for Class Three Landfills that accept municipal solid waste, industrial solid waste, sewage sludge, nonhazardous municipal solid waste incinerator ash and other non-hazardous wastes.

Section (d) does not apply to coal combustion residuals because CCR's are mentioned specifically in Part V Class Three Landfills but they are not mentioned specifically at all in Part IV Class Two Landfills:

Subpart D. Design Criteria for Class Three Landfills.

258.40. Design Criteria.

a. Class Three landfills shall be constructed:

(1) In accordance with a design approved by the Department. The design shall ensure that the maximum contaminant level (MCL) as specified in the South Carolina State Primary Drinking Water Standards, R.61-68 will not be exceeded in the uppermost aquifer at the relevant point of compliance, as specified by the Department in Section 258.40.i. below; or,

(2) With a composite liner, as defined in Item b. below of this section and a leachate collection system that is designed and constructed to maintain less than a one (1) foot depth of leachate over the liner, except in sumps.

(3) Monofills that accept coal combustion byproducts that test greater than ten (>10) times the

maximum contaminant level (MCL), may be constructed with a clay liner system consisting of a minimum of a two (2) foot layer of compacted soil with a hydraulic conductivity of no more than 1 x 10⁻⁷ cm/sec, and an appropriate leachate collection system. These facilities shall comply with all other requirements for a Class III landfill.

Part IV Class Two Landfills does not include any reference at all to coal combustion byproducts (residuals).

61-107.19 Part I

B. Definitions for the purposes of this regulation

77. "Special Wastes" means nonresidential or commercial solid wastes, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at Class Three landfills, including, but not limited to, those wastes contained in S.C. Code Section 44-96-390.(A). (underline added)

See Statutory discussion of Special Wastes. The regulation reflects the statute with the addition of the specific reference to the Class III requirement. CCR is a Special Waste and therefore must be disposed of in a Class III landfill.

Respectfully submitted,
Shelley Hudson Robbins
Project Manager, Upstate Forever
(864) 327-0090
srobbins@upstateforever.org
www.upstateforever.org

Qualifications:
BA Duke University (major: economics, *cum laude*) 1989
MBA Southwestern Oklahoma State University 1997

Project Manager, Upstate Forever 2007-current
Programs Planner II, Oklahoma Department of Commerce 1997-1998
Policy analyst, Executive Office of the Governor of Florida 1994-1995
Regulatory analyst, Florida Public Service Commission 1990-1994

-SC Solid Waste Advisory Council (2010-today), current Vice-Chair, appointed by Governor Sanford
-Member of the SC DHEC MSW Incinerator and Pyrolysis (61-107.14) Regulatory Revision workgroup (2015-present, awaiting legislative approval)
-Member of the SC DHEC Commercial Composting (61-107.4) Regulatory Development workgroup (2009- 2014, adopted by the legislature June 2014)
-Member of the SC DHEC Landfill Determination of Need (61-107.17) Regulatory Revision workgroup (2007-2009, adopted by the legislature 2009)

SOLID WASTE MANAGEMENT PLAN

Prepared for

Pickens County, South Carolina



January 2013

Plan Update by



Hulsey McCormick & Wallace
ENGINEERING • ENVIRONMENT • SCIENCE

Piedmont, South Carolina
HMW Project No. PIC 035 0804-07

D. SOLID WASTE PROCESSING FACILITIES

A solid waste processing facility is any combination of structures, machinery, or devices utilized to reduce or alter the volume, chemical, or physical characteristics of solid waste through processes such as baling or shredding, prior to delivery of such waste to a recycling or resource recovery facility, or to a solid waste treatment, storage, or disposal facility, and excludes collection vehicles. A County-owned and operated bailing facility is located at 2043 Old Liberty Road, in Liberty, South Carolina for recycled goods.

E. CLASS THREE LANDFILLS (MUNICIPAL, INDUSTRIAL, SLUDGE, INCINERATOR ASH)

A Class Three Landfill is one designed to receive wastes such as household waste, sludge, incinerator ash and certain industrial waste, but is not a land application unit, surface impoundment, injection well, or waste pile. There are no operating Class Three Landfills in Pickens County.

F. CLASS TWO LANDFILL (CONSTRUCTION, DEMOLITION, AND LAND-CLEARING DEBRIS LANDFILLS & CERTAIN INDUSTRIAL LANDFILLS)

Class Two Landfills are designed to accept various inert wastes such as Construction, Demolition, and Land-Clearing Debris (C&D) and similar industrial wastes. Currently one (1) active Class Two Landfill is located in Pickens County. One additional Class Two Landfill is permitted but is not constructed and received no waste in FY11.

The Easley Class Two Landfill (Facility ID No. 391001-1201), is a county owned facility located within Pickens County (Exhibit C). The Easley Class Two Landfill is an active landfill but is estimated for completion in 2016 without further expansion. The facility is permitted to take 20,000 tons of waste each year, but currently receives approximately 15,000 tons per year. For more information regarding the Easley Class Two Landfill contact:

Easley Class Two Landfill

Mr. Gerald Wilson, Public Works Director
Pickens County Public Works Department
186 Camp Bridge Road
Pickens, SC 29671
Phone: (864) 898-5933

The Highway 93 Landfill is currently permitted by SC DHEC for 70,500 tons of waste per year. The privately-owned landfill has not been constructed (as of January 2013) and did not receive any waste in FY11.

N. LAND APPLICATION OF SOLID WASTE PERMITS

Permits for the land application of solid waste establishes appropriate application rates, frequency of application, and monitoring requirements for the uniform surface spreading or mechanical incorporation of nonhazardous solid waste on or into soil that is being used for agricultural, silvicultural, and horticultural production. Land application of solid waste is a way to recycle South Carolina's resources and is not a means of waste disposal. No land application permits have been issued for any facility within Pickens County.

O. RECYCLING PROGRAMS

Pickens currently operates eight (8) recycling drop off convenience centers, listed in Table 4, on page 10. Pickens County relies primarily on curbside collection and these drop off/convenience centers for collection of recyclables within the County.

P. SPECIAL WASTES

Special Waste is defined as commercial or nonresidential solid waste, other than regulated hazardous wastes, that are either difficult or dangerous to handle and require unusual management at MSW landfills; including but not limited to pesticide wastes, liquid wastes, sludge, industrial process wastes, wastes from pollution control processes, residue or debris from chemical cleanups, contaminated soil from a chemical cleanup, containers and drums, and animal carcasses. Special Waste is not accepted at any of the county facilities.

Q. HOUSEHOLD HAZARDOUS MATERIAL (HHM)

Household Hazardous Material (HHM) is defined as material found around the home, usually in small amounts, which can harm people or the environment. Examples of household hazardous materials include paint, pesticides, cleaning supplies and batteries. Household hazardous materials are not regulated as hazardous materials by South Carolina law but are considered part of the MSW stream. Pickens County does not currently collect HHM separately from the MSW stream. Therefore, these materials will be collected and transported to a receiving MSW Landfill for disposal.

R. IMPORT AND EXPORT OF WASTE

The County has no specific policy on the movement of waste, thus does allow the import of waste into the County. There are no controls over the export of waste to areas outside of the County.

S. SOLID WASTE MANAGEMENT FUNDING

Pickens currently receives solid waste management funding through tax revenues from the County's General Fund. Revenues from tipping fees, recycled materials sales and other receipts are

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)
) **HOST AGREEMENT FOR A LONG TERM
CONSTRUCTION, DEMOLITION AND
LAND-CLEARING DEBRIS LANDFILL AND
OTHER ASSOCIATED DEVELOPMENT**

WHEREAS, MRR Pickens, LLC is under contract to purchase an approximately 446.70 acre site ("the Site") in Pickens County, South Carolina ("County"); shown on Exhibit 1 to this Agreement ("the Host Agreement"); and;

WHEREAS, County previously conducted a study on the Site, which study found that portions of the Site are well situated to serve as an expansion of the County's present industrial park, which is contiguous to the Site; and;

WHEREAS, County has previously expressed its desire to purchase the Site and develop all or a portion of the Site for expansion of its nearby industrial park; and;

WHEREAS, MRR Pickens, LLC wishes to construct and operate a Long-term Construction, Demolition and Land-Clearing Debris Landfill and associated recycling, composting, and waste processing activities (collectively, the "Landfill") on a portion of the Site; and;

WHEREAS, County's current Construction, Demolition and Land-Clearing Debris Landfill has nearly exhausted its capacity; and;

WHEREAS, County needs additional Construction, Demolition and Land-Clearing Debris disposal capacity; and;

WHEREAS, the South Carolina Department of Health and Environmental Control ("DHEC") has made a preliminary finding that construction of this facility is consistent with the Pickens County Solid Waste Management Plan; and;

WHEREAS, in addition to both of these portions of the Site which (i) MRR Pickens, LLC desires to use as the location of the Landfill and (ii) that which is suitable as an expansion

of the County's industrial park (the "Pickens Co. Industrial Lots"), there is a portion of the Site consisting of approximately 162.2 acres which, due to poor topography, is unsuitable for development; and;

WHEREAS, MRR Pickens, LLC wishes to convey to County this area of approximately 162.2 acres free of charge for use as a County recreational facility ("Park") or for other uses deemed appropriate by County; and;

WHEREAS, pursuant to negotiations County and MRR Pickens, LLC have reached an agreement which would allow each to meet their respective goals. MRR Pickens, LLC, on the one hand, will own and manage a Landfill that will serve as the replacement Construction, Demolition and Land Clearing Debris Landfill for the County. On the other hand, the County will have the benefit of the Landfill which will serve the County in an environmentally appropriate manner and in accordance with the requirements set forth in this Agreement will acquire additional properties for economic development and a Park to further meet the recreational needs of County residents.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that MRR Pickens, LLC, and Pickens County agree as follows:

LANDFILL OPERATIONS

1. MRR Pickens, LLC shall construct and operate a Long-term Construction, Demolition and Land-Clearing Debris Landfill at the Site.
2. The location of the Site is designated as Pickens County Tax Map Number 4098-00-82-5916 and consists of 446.70 acres, more or less, and has the following coordinates: W 34°47'50", Latitude N 82°40'30". The Landfill, associated reprocessing, stormwater ponds, and buffer areas are depicted on Exhibit 1, which is incorporated into this Agreement and consists of

the approximately 147.4 acre parcel designated on Exhibit 1 as "LF FACILITY."

3. County shall allow MRR Pickens, LLC to construct and operate a Long-Term Construction and Demolition and Land Clearing Debris Landfill as long as it is operated in accordance with the terms and conditions of this Host Agreement.

4. The Landfill shall be constructed and operated in accordance with DHEC's rules, regulations and statutes, specifically S.C. Code Ann. Regs 61-107.11 Part IV or its equivalent under any superseding regulations and S.C. Code Ann. §§44-96-10 *et. seq.*

5. During operating hours and upon 24 hours telephonic notice, representatives authorized by the County shall have the right to enter and inspect the Landfill and the Landfill records of MRR Pickens, LLC.

6. MRR Pickens, LLC must report any notice of violation of regulations or permit requirements from DHEC to the County Administrator within seventy-two (72) hours after notification by DHEC.

7. All reports required to be submitted to DHEC by MRR Pickens, LLC must be simultaneously submitted to the County Administrator. On a fiscal year basis MRR Pickens, LLC shall provide data to the County indicating the amount, in tons per year, of Construction and Demolition Debris ("C&D") and Land Clearing Debris ("LCD") recycled. Data relating to LCD generated through curbside collection programs may be used by the County to demonstrate progress toward achievement of the County's solid waste recycling goals under the South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. § 44-96-50 (G).

8. All complaints received by MRR Pickens, LLC from the public, whether verbal or written must be reported to the County Administrator on a monthly basis, along with any resolution or proposed resolution.

9. MRR Pickens, LLC shall buffer the Landfill using appropriate landscaping techniques and vegetative buffer of appropriate width and height in accordance with specifications approved by the County's Planning Commission.

10. MRR Pickens, LLC shall not conduct any active Landfill operations within five hundred (500) feet of the Highway 93 entrance to the Landfill.

11. Waste Acceptance, Mulch, Compost Material

A. County Generated Waste.

The County will be allowed to dispose of all County Generated Waste (as defined below) at a rate of 57% of the Landfill's published "gate" rate at the time of disposal. Any time MRR Pickens, LLC adjusts its published "gate" rate it shall provide County 90 days written notice of said change before applying this adjustment to the County rate, which shall at all times remain no more than 57% of the published "gate" rate. Notwithstanding any provision to the contrary herein, the actual rate charged to the County shall not be greater than the actual rate charged to any other Landfill customer.

"County Generated Waste" shall be limited to a) C&D, LCD and other DHEC -approved waste streams generated from demolition, repairs, renovation, or construction of buildings under the County's ownership or control, or as a result of enforcing nuisance or condemnation ordinances; b) C&D, LCD and other DHEC -approved waste streams found illegally dumped at unpermitted sites that the County undertakes to clean up and transport to the MRR Pickens, LLC Landfill utilizing County-owned resources; c) non-commercial C&D, LCD and other DHEC-approved waste streams deposited at Convenience Centers owned by the County and transported to the Landfill by County vehicles. County Generated Waste must be transported to the Landfill by County vehicles or by pre-designated vehicles owned by contractors employed by the County.

B. Curbside Yard Trash.

The County and municipalities within the County will be allowed to dispose of domestic Yard Trash (excluding tree stumps) generated through publicly administered curb-side pick-up programs at the Landfill free of charge. Curbside Yard Trash must be transported to the Landfill by government owned vehicles or by pre-designated vehicles owned by contractors of the public entity administering the program. This Curbside Yard Trash waste may be composted or mulched for recycling by MRR Pickens, LLC.

C. Disaster Waste.

MRR Pickens, LLC will maintain a storm debris staging area at the Landfill for County or municipally generated storm debris that can be staged onsite for grinding by the County or under the auspices of a Federal Emergency Management Agency ("FEMA") funded project. MRR Pickens, LLC will allow use of this staging area free of charge. County will be responsible for delivery, grinding and disposal of disaster waste, and for defraying the costs of said activities.

D. Onsite Construction LCD.

MRR Pickens, LLC shall accept any LCD generated by the County or its contractors as part of the development of the adjacent Pickens County Commerce Park or lots purchased by the County from MRR Pickens, LLC free of charge.

E. Mulch/Compost Material.

MRR Pickens, LLC shall allow the County available mulch and/or composted soil additive product generated by the Landfill at no charge upon reasonable notice.

F. Fill Dirt for Closure of County Landfill.

MRR Pickens, LLC shall allow County access at no charge to any excess soil not required by the Landfill for its daily operations or closure and to be used by the County for

closure of the existing County C&D landfill. The County shall be responsible for excavating and transporting said materials.

12. In lieu of a host fee, MRR Pickens, LLC agrees to maintain the provisions of paragraph 11 above for the County and any municipality located within the County for the permitted operational lifetime of the Landfill.

13. The maximum yearly disposal rate is set by S.C. Code Ann. Regs 61-107.17. DHEC has currently approved a disposal rate of seventy thousand five hundred (70,500) tons per year for the Landfill. As circumstances change MRR Pickens, LLC shall be entitled to increases in this annual disposal rate, up to the maximum permitted by R. 61-107.17. MRR Pickens, LLC shall not require County approval for increases in the permitted disposal rate that may occur solely as a result of DHEC's review of the current 10 mile planning area as defined by R. 61-107.17. Should subsequent regulatory amendments result in a change in the way DHEC calculates a Landfill's maximum annual disposal rate, or otherwise increases the size of the planning area under R. 61-107.17, such requests for increases in the permitted disposal rate shall require approval from County in writing.

14. The disposal "footprint" of the Landfill shall not exceed approximately 68 acres (including the 10 acre reprocessing area, within which area landfilling may also be conducted) as permitted by DHEC or as allowed in the final permit to operate issued by DHEC.

15. MRR Pickens, LLC shall maintain a recycling center for waste processing and recycling at the Landfill.

16. No lateral expansions to the Landfill will be allowed without written permission of County and only under such terms and conditions as to be prescribed by County.

17. MRR Pickens, LLC shall post such Financial Assurance as may be required by

DHEC providing for DHEC approved closure and post-closure care of the Landfill in the event of insolvency or bankruptcy of MRR Pickens, LLC or the death of its managers/owners. By this agreement MRR Pickens, LLC agrees that the Financial Assurance instrument shall be limited to an irrevocable letter of credit, surety bond, or cash.

18. By this agreement MRR Pickens, LLC hereby covenants that it will retain the permit in its name throughout the closure and post-closure process and shall remain responsible for all costs associated with all monitoring, any required corrective action, and liabilities associated with closure and post-closure for the Landfill.

19. MRR Pickens, LLC shall not convey the Landfill or transfer the permit to any unrelated third party without the express written consent of the County and only upon the execution of a substantially similar agreement binding transferee to performance of all the terms and conditions of this agreement for the life of the landfill.

20. Upon closure of the Landfill, and at County's option, MRR Pickens, LLC shall make the Landfill available to the County for any appropriate public use consistent with a closed C&D landfill site. Should County so request, prior to the change in use, MRR Pickens, LLC agrees to and will assist County in having the site of the Landfill enrolled in DHEC's Brownfields program with MRR Pickens, LLC listed on Brownfields contracts as a "Responsible Party" and with County listed as a "Non-Responsible Party" if this is permitted by DHEC.

INDUSTRIAL PARK EXPANSION PORTION

21. As part of the development of the Site, MRR Pickens, LLC shall sell, and the County shall purchase approximately 39 acres of platted property depicted on Exhibit 1 attached hereto as "PICKENS CO. INDUSTRIAL LOTS" for industrial development lots within 90 days of the date of MRR Pickens, LLC's acquisition of fee simple title to the Site.

22. The County will be responsible for construction and grading for all lots, roads, and the construction of or otherwise acquisition of all necessary utilities for the Industrial Park Expansion Portion.

23. MRR Pickens, LLC shall sell the Industrial Lots to County at a price of \$10,000.00 per acre.

24. Contemporaneously with the sale of the 39 acre Industrial Lots MRR Pickens, LLC shall grant to the County a sewer easement so that County can provide sewage disposal to the Industrial Lots, provided such easement does not interfere with the planned Landfill operations. This easement shall be granted to County at no cost to the County, and using a routing agreeable to both MRR, Pickens, LLC and County.

COUNTY RECREATIONAL FACILITY

25. Within 30 days of the issuance of a final DHEC landfill permit MRR Pickens, LLC shall deed the approximately 162.2 acre area depicted on Exhibit 1 as "Future County Park" to County for use as a recreational facility or for other uses deemed appropriate by County at no cost to the County. County may, at its option place restrictive covenants or other property use restrictions on this property consistent with said use. County shall be responsible for development of this land.

This Agreement shall be binding on the parties hereto, their successors, personal representative or assigns.

This Agreement shall be executed contemporaneously with a separate Development Agreement between the Parties and survive the expiration of the Development Agreement between the Parties.

The term of this Agreement commences upon execution of this Agreement by the Parties and shall terminate upon fulfillment of MRR Pickens, LLC's closure and post-closure obligations under the permit issued by DHEC for operation of the Landfill ("Term"). The County may terminate this Agreement prior to the expiration of the Term only upon a material breach of this Agreement, which is limited to the occurrence of one of the following:

- a) Revocation by DHEC of the permit issued for the operation of the Landfill;
- b) MRR Pickens, LLC's failure to deed to the County the property described in and pursuant to the provisions of paragraph 25 above; or
- c) MRR Pickens, LLC's refusal to accept waste pursuant to paragraphs 11 and 12 above.

Upon the occurrence of (a), (b), or (c) above, the County shall provide MRR Pickens, LLC with notice in writing of the material breach as defined herein. The County may elect to terminate this Agreement upon MRR Pickens, LLC's failure to cure a material breach of this Agreement within one hundred eighty (180) days of such written notice. Upon termination of this Agreement pursuant to the provisions of this paragraph, MRR Pickens shall initiate and complete closure of the Landfill.

WITNESS, our hands and seals this 8th day of March, 2007.

WITNESSES

MRR Pickens, LLC

Its: _____

PICKENS COUNTY

Its: County Administrator

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS) DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "Agreement") is made and entered into as of the 8th day of March, 2007, by and between MRR PICKENS, LLC, a South Carolina Limited Liability Company having its principal place of business in Pickens County, South Carolina, (the "Developer"); and the COUNTY OF PICKENS, a political subdivision of the State of South Carolina (the "COUNTY") (collectively, the Developer, and the County are referred to as the "Parties").

WHEREAS, the Developer desires to develop certain real property owned by Craig Harris McDaniel, William Harris McDaniel, and Mary McDaniel Ridgeway. E. Scott Sanders, LLC has this property under an option to purchase. E. Scott Sanders, LLC has assigned this option to CG Property Holdings, LLC. CG Property Holdings LLC, is a wholly owned subsidiary of MRR Southern, LLC, a North Carolina Limited Liability Company and the owner of Developer. The property consists of approximately 446.70 acres of land, bounded on the North by Greenville Highway, on the South by Woodbine Road, and on the East by Cartee Road, Pickens County Tax Map Number 4098-00-82-5916. A copy of the legal description of the 446.70 acre property covered by this Agreement is attached hereto as EXHIBIT A.

WHEREAS, pursuant to the South Carolina Local Government Development Agreement Act, codified as Sections 6-31-10 to -160 in the South Carolina Code of Laws, 1976, as amended (the "Act"), the County and the Developer have agreed to enter into this Agreement to set forth the terms and conditions of the development of the Property in order to more fully protect the Developer's development rights;

000004479 03/08/2007 12:34:21PM
 Filed At Register of Deeds
 Pickens County SC
 Fees Paid \$0.00

WHEREAS, the Developer desires to obtain from the County in connection with the development of the Property assurances that: (1) the Property will be appropriately zoned for the duration of the period of development; (2) upon receipt of development and construction permits the Developer may proceed with the development of and construction on the Property; and (3) the Developer's development rights will be vested for the duration of the period of development;

WHEREAS, in connection with the proposed development, the Developer and the County recognize that the scope and term of the planned development under this Agreement accomplish the statutory aims of comprehensive, orderly planning and development within the County.

WHEREAS, the County certifies that there is no applicable zoning designation for the property; and that said fact allows the development of industrial uses, County Park/Recreational uses, operation of a construction and demolition and land clearing debris landfill, and operation of associated recycling equipment.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants of the Parties herein, and pursuant to the Act, the County and Developer, intending to be legally bound hereby, agree as follows:

Section 1. Definitions. Terms not otherwise defined herein have the meaning set forth in the Act, the provisions of which are incorporated herein by reference. As used in this Agreement, the following terms mean:

(A) "Land Development Regulations" and "Laws" means all ordinances, resolutions, regulations, comprehensive plans (if any), policies and rules enacted by the appropriate governing body for the regulation of any aspect of development and includes a local government zoning, rezoning, subdivision, building construction, sign regulations and includes laws

governing permitted uses of the Property, density, design, improvement, and construction standards and specifications, and consistency with the Pickens County Solid Waste Management Plan. All applicable "Land Development Regulations" and "Laws" as such are listed on EXHIBIT B except as provided in Section 6-31-140(A), S. C. Code Ann. (1976).

(B) "Property" means the real property identified by Pickens County Tax Map Number 4098-00-82-5916 and identified on EXHIBIT A.

(C) "Development Uses Permitted" mean the uses identified on EXHIBIT C, and the Site Layout Map identified on EXHIBIT D, specifically the C&D Landfill, Reprocessing Area, Industrial Lots, and Park Area identified therein.

Section 2. Purpose. The purpose of this Agreement is to set forth the terms and conditions of the development of the Property in order to protect the Developer's development rights and to accomplish the statutory aims of comprehensive, orderly planning, and development within the County.

Section 3. Property Covered by Agreement. The Property covered by this Agreement, and its legal description and the names of the Property's legal and equitable owners, is the approximately 446.70 acre parcel designated by TMS # 4098-00-82-5916, described in EXHIBIT A, which is attached hereto and incorporated herein by reference.

Section 4. Duration. Except as may be otherwise provided in this Agreement, this Agreement shall terminate ten (10) years from the date of execution.

Section 5. Development Uses. The description of the uses proposed by the Developer and permitted on the property are those as described in EXHIBIT C.

Section 6. Development Plan. The Developer may make modifications in the development plan so long as the development plan remains in accordance with Land Development Regulations and Laws and this Agreement.

Section 7. Public Facilities that will service the development. As part of the Industrial Park Expansion, and the County Park/Recreational Area, County will be responsible for providing water, sewer, and all utilities to these areas. For the Landfill and associated recycling center, Developer will be responsible for all necessary infrastructure.

Section 8. Dedication of Land, Environmentally Sensitive Areas. Within thirty (30) days of the issuance of a final DHHC landfill permit Developer will dedicate and deed to County an area of approximately 162.2 acres free of charge for use as a County recreational facility ("Park") or other uses deemed appropriate by County as depicted on EXHIBIT D. Developer shall comply with all legal and permit requirements necessary to protect any streams or environmentally sensitive areas on the Property.

Section 9. Local Development Permits. The County agrees to cooperate with the Developer in the permitting process, including any state and federal permits. Local Development Permits that are required for this project are listed in Exhibit G. The development of the site will require review by the Pickens County Planning Commission as per Pickens County Code Chapter 14, Article V. The failure of this Agreement to address a particular permit, condition, term, or restriction does not relieve the Developer of the necessity of complying with the law governing the permitting requirements, conditions, terms, or restrictions.

Section 10. Finding of Consistency. The County finds that this Agreement and the development, as permitted or proposed, is consistent with the County's Laws and Land

Development Regulations, as applicable. The County further finds that the development is consistent with the County's current Solid Waste Management Plan.

Section 11. Development Schedule, Changes.

(A) The schedule for development of the Property is to immediately commence construction of the landfill within 30 days of receipt of a final permit to construct and operate to be issued by the South Carolina Department of Health and Environmental Control.

(B) The County and Developer acknowledge that the schedule for development is an estimate and that events outside the control of the Parties can affect this schedule.

(C) The County agrees that it will not unreasonably withhold consent to any modification to the schedule of development during the life of this Agreement.

Section 12. Vested Rights.

(A) The County agrees that the Developer, upon receipt of its development permits as required herein, may proceed to develop the Property according to the terms and conditions of this Agreement. As of the date of this Agreement, the right to develop the Property is vested with the Developer for the duration of this Agreement.

(B) The County agrees that the Land Development Regulations and Laws in force at the time of execution of this Agreement govern all aspects of the development of the Property for the duration of this Agreement, unless otherwise provided in this Agreement. The Land Development Regulations and Laws in force at the time of execution of this Agreement are those as contained in EXHIBIT B, attached hereto and incorporated by reference.

(C) The County agrees that it will not modify its current Solid Waste Management Plan to render this development inconsistent with the provisions of said Plan for the duration of this Agreement.

(D) The County may apply Land Development Regulations and Laws adopted after the execution of this Agreement to the development of the Property only if the County Council holds a public hearing and determines:

(1) the subsequently adopted Land Development Regulations and Laws are not in conflict with the Land Development Regulations and Laws governing this Agreement and do not prevent the development set forth in this Agreement;

(2) the Land Development Regulations and Laws are essential to the public health, safety, or welfare and the Land Development Regulations and Laws expressly state that they apply to the development that is subject to this Agreement;

(3) the Land Development Regulations and Laws are specifically anticipated and provided for in the Development Agreement;

(4) that substantial changes have occurred in pertinent conditions existing at the time this Agreement was approved which changes, if not addressed by County, would pose a serious threat to public health, safety, or welfare; or

(5) the Agreement is based on substantially and materially inaccurate information supplied by the Developer.

(E) Notwithstanding the provisions of subsection (B), the Developer agrees to comply with any applicable construction codes subsequently adopted by the County and as authorized by Chapter 9 of Title 6 of the Code.

(F) This section does not abrogate or in any way affect any rights that may vest pursuant to common law or state statute in the absence of this Agreement.

Section 13. Periodic Review.

(A) At least every twelve months, the Pickens County Planning Department shall conduct a review of the Developer's compliance with the terms of this Agreement. At the time of the review, the Developer must demonstrate good faith compliance with the terms of this Agreement.

(B) If, as a result of the periodic review, as conducted pursuant to subsection (A), the County finds and determines that the Developer has committed a material breach of the terms and conditions of this Agreement, then the County may serve notice in writing, within a reasonable time after the periodic review, upon the Developer setting forth with reasonable particularity the nature of the breach and the evidence supporting the finding and determination, and providing the Developer a reasonable time in which to cure the material breach.

(C) If the Developer fails to cure the material breach within the time given, then the County may unilaterally terminate or modify this Agreement. Prior to such termination or modification, the County must first give the Developer the opportunity to:

- (1) Rebut the finding and determination;
- (2) Consent to amend this Agreement to meet the concerns of the County with respect to the findings and determinations.

Section 14. Amendments, Cancellation, Modifications. This Agreement may be amended or cancelled by mutual consent of the Parties to the Agreement. A major modification of this Agreement may occur only after public notice and a public hearing by the County.

Section 15. Successors in Interest. The burdens of this Agreement are binding upon, and the benefits of the Agreement shall inure to, all successors in interest to the Parties to this Agreement.

Section 16. Public Notice and Hearings. The County represents and warrants that in the deliberations and approval of this Agreement, the County has, in accordance with Section 6-31-50 of the South Carolina Code of Laws: (1) conducted at least two public hearings; (2) advertised in a newspaper of general circulation in the County notice of intent to consider a development agreement; and (3) included in any required notices the prescribed information.

Section 17. Recording of Agreement. The Developer agrees to record this Agreement with the Register of Deeds within fourteen days after the Developer and the County enter into this Agreement.

Section 18. Later Enacted Federal or State Laws. In the event state or federal laws or regulations, enacted after this Agreement has been entered into, prevent or preclude compliance with one or more provisions of this Agreement, the provisions of this Agreement must be modified or suspended as may be necessary to comply with the state or federal laws or regulations.

Section 19. Severability. If any provision of this Agreement or the application of any provision of this Agreement is held invalid by a court of competent jurisdiction, the invalidity shall apply only to the invalid provision and the remaining provisions of this Agreement, and the application of this Agreement, shall remain in full force and effect.

Section 20. Governing Law. This Agreement is governed by, and shall be construed in accordance with the Act and the laws of the State of South Carolina.

Section 21. Effective Date. This Agreement is effective upon execution by the County and the Developer.

Section 22. Executed Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to constitute an original.

Section 23. Host Agreement. A separate Host Agreement between the Parties governing the rights and duties between and among the Parties including, but not limited to, acceptance of County waste is incorporated into this Development Agreement as Exhibit I and shall survive the expiration of this Development Agreement.

IN WITNESS WHEREOF this Agreement has been duly executed by the parties hereto.

WITNESS:

Orna F. Dole
Sheila W. Linsley

MRR PICKENS, LLC

By: Ronald C. Silverman
RONALD C. SILVERMAN, MANAGER, SC OPERATIONS
Date: 3/8/07

PICKENS COUNTY, SOUTH CAROLINA

Marjorie C. Pope
Sheila W. Linsley

By: Neil Smith
Neil Smith, Chairman
Date: 3/08/07



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

OFFICE OF ENVIRONMENTAL QUALITY CONTROL
BUREAU OF LAND AND WASTE MANAGEMENT
CLASS 2 LANDFILL
PERMIT No. LF2-00003

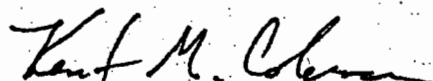
Permit Issued Date: November 3, 2008 Permit Effective Date: November 18, 2008

Permission is hereby granted to:

Name of Facility: Highway 93 C & D Landfill
Permittee: MRR Pickens, LLC
Address: 11743 Trails End Lane
Charlotte, NC 28078
Contact: Mr. Ronald C. Gilkerson
Phone: (704) 947-6652

for the operation of a Class 2 landfill at 2180 Greenville Highway, Liberty, South Carolina, 29657 in Pickens County located off Highway 93 at Clardy Road approximately 2,000 feet NE of the City of Liberty, SC.

This permit is issued pursuant to Sections 44-96-10 *et seq.* (Supp. 2007) and 25A S.C. Code of Regulations Section 61-107.19. The authority granted hereunder is subject to the requirements of the aforementioned laws and regulations and the attached conditions.


Kent M. Coleman, P.G., Director

Division of Mining and Solid Waste Management
Bureau of Land & Waste Management

Permit No. LF2-00003
November 3, 2008
Page 1 of 4

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

381/865

**MRR PICKENS, LLC
CLASS 2 LANDFILL
PERMIT No. LF2-00003**

A. SPECIAL CONDITIONS

1. The Permittee shall adhere to the design specifications and construction plans received November 30, 2007; and last revised August 26, 2008, unless permit conditions state otherwise.
2. This permit is limited solely to the disposal of items listed in Appendix I of R.61-107.19. All other wastes, including animal carcasses, are prohibited from disposal in this landfill.
3. The allowable rate of disposal for this facility is seventy thousand five hundred (70,500) tons per fiscal year (July 1 to June 30). Information concerning the facility's previous Fiscal Year's waste receipts is due in the form of an annual report to the Department no later than September 1st of each year, as required by R.61-107.19 Part IV. Subpart C.16, to the attention of:

**Manager, Solid and Hazardous Waste Compliance Section
SC DHEC Bureau of Land and Waste Management
2600 Bull Street
Columbia, South Carolina 29201**

4. All Appendix-I acceptable wastes must be covered at least every thirty (30) days with a minimum of six (6) inches of clean soil, except for asbestos-containing material, which must be covered with a minimum of six (6) inches of clean soil immediately upon placement in the landfill.
5. The total surface area within the permitted waste disposal footprint that has not been deemed closed by the Department is limited to twelve (12) acres. For an area to be considered closed, the following items shall be completed:
 - a. Official certification from a Professional Engineer registered in the State of South Carolina that the area has been closed in accordance with final cover requirements pursuant to Regulation 61-107.19, Part IV, Subpart F.1.
 - b. The area shall be inspected and deemed closed by Department staff.
6. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that the total surface area within the permitted waste disposal footprint that is not deemed officially closed by the Department pursuant to Special Condition No. 5 (above) is equal to or less than twelve (12) acres (at the time of the certification). The certification shall have been completed within the last sixty (60) days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.

7. On or before July 1 of each year, the Permittee shall submit to the Department's Solid and Hazardous Waste Compliance Section certification from a Professional Engineer registered in the State of South Carolina that enough soil is currently available to use for final cover (38,720 yd³ of soil for 12 acres with 2' thickness). The certification shall have been completed within the last 60 days of submittal to the Department. The Department may, where circumstances warrant, require that any documentation deemed necessary to make such certification be submitted to the Department for review.

B. GENERAL PERMIT CONDITIONS

1. If the landfill should become inundated with water, all water shall be removed before continuing disposal of waste.
2. Within ninety (90) days of the effective date of this permit, the Permittee shall submit a detailed Compliance Plan that describes steps to be taken in order to fully comply with all regulatory requirements of R.61-107.19 that relate to Class 2 Landfills. This Compliance Plan shall include, but not limited to, the following: a groundwater monitoring design workplan, a landfill post-closure care plan, and a landfill post-closure care cost estimate. Upon the Department's approval of said Compliance Plan, the Permittee will have six (6) months to implement the plan and will have a deadline for full compliance with R.61-107.19 of November 19, 2009.

C. ENVIRONMENTAL MONITORING PERMIT CONDITIONS

1. SPECIAL ENVIRONMENTAL PERMIT CONDITIONS

Within ninety (90) days of the effective date of this permit, the Permittee shall submit to the Department for review, a Groundwater Monitoring Design Workplan in accordance with R.61-107.19, Part IV, Section E (Groundwater Monitoring and Corrective Action). In addition, an approved groundwater monitoring system must be installed and operating prior to November 19, 2009, pursuant to R.61-107.19, Part I, Section A.6.c. Upon the Department's approval of the Groundwater Monitoring Design Workplan, permit conditions C.2, C.3 and C.4 will become effective.

2. GROUNDWATER DETECTION MONITORING SYSTEM

- a) The Permittee shall maintain a groundwater detection monitoring system consistent with the most recently approved Groundwater Sampling and Analysis Plan and as required in R.61-107.19, Part IV, Section E. The groundwater detection monitoring system shall consist of monitoring wells as designated in the most recently approved Groundwater Sampling and Analysis Plan and any other monitoring wells specified by the Department. Modifications to the current groundwater detection monitoring system shall be in accordance with the requirements of R.61-107.19, Part IV, Section E.
- b) The Permittee shall perform all groundwater sampling activities in accordance with the most recently approved Groundwater Sampling and Analysis Plan and in accordance with the requirements of R.61-107.19, Part IV, Section E, along with any subsequent modifications deemed necessary by the Department to uphold the intent of this permit.

The Permittee shall evaluate analytical results in accordance with the most recently approved Groundwater Sampling and Analysis Plan and any subsequent modifications required by the Department.

- c) The Permittee must determine during each sampling event the groundwater elevation in each well relative to mean sea level (MSL) to the nearest one-hundredth of a foot. All elevations should be determined on the same day. The Permittee shall determine the total depth of each well on an annual basis.
- e) Groundwater samples shall be analyzed by a laboratory certified by the State of South Carolina.

3. ASSESSMENT OF GROUNDWATER IMPACT

If the Permittee determines that a groundwater protection standard has potentially been exceeded for one or more constituents for routine monitoring at any monitoring well at the relevant point of compliance, then the Permittee shall perform any necessary groundwater assessment actions in accordance with the requirements of R.61-107.19 Part IV Subpart E.3.

4. REPORTING

- a) The Permittee shall submit to the Department the results of the groundwater monitoring program as specified in the most recently approved Groundwater Sampling and Analysis Plan, in accordance with the following sampling schedule:

<u>Sampling Schedule</u>	<u>Results Due</u>
November/December	January 15 (Semi-Annual)
May/June	July 15 (Annual Report)

- b) The Permittee shall submit a properly bound annual report signed by a South Carolina qualified professional summarizing the semi-annual determinations of groundwater flow rate and direction. In addition, the report shall make a determination as to whether the monitoring well network continues to meet requirements of permit condition C.2.A.
- c) The groundwater data collected by the implementation of the groundwater monitoring program as specified by this Permit shall be submitted to the SCDHEC Bureau of Land and Waste Management, Division of Mining and Solid Waste Management, Solid Waste Groundwater Section, and to the Solid Waste Consultant in Region 2 EQC (Greenville).

5. METHANE MONITORING

In accordance with R.61-107.19, Part IV, Subpart C, methane monitoring is not required at the time of issuance of this permit. However, should the Department determine that methane is of concern at this Facility, the Facility may be required comply with R.61-107.19, Part IV, Section C.21.

Appendix I ACCEPTABLE WASTE FOR CLASS TWO LANDFILLS

The following types of waste have been determined by the Department to be environmentally safe and may be accepted at Class Two Landfills unless specifically prohibited by the Department. Acceptable wastes may be generated by construction, demolition, land-clearing, industrial, and/or manufacturing activities, and/or obtained from segregated commercial waste. However, any of the materials listed in this appendix that have been contaminated by any hazardous constituent listed in the S.C. Hazardous Waste Management Regulations 61-79.261, or petroleum products, are prohibited from disposal at a Class Two Landfill.

Acceptable Land-Clearing Debris Such As:

brush & limbs
earthen material, e.g., clays,
sands, gravels, & silts
logs
rock

root mats
top soil
tree stumps
vegetation

Acceptable Debris Such As:

asbestos-containing material²
bricks & masonry blocks
cardboard
dry paint cans
dry caulking tubes
fiberglass matting
floor covering
glass
glass wire (optical fiber)
hardened asphaltic concrete³
hardened cement
hardened concrete (may include rebar)
insulation material
lumber (includes treated lumber)
mirrors

other items physically attached to structure,
e.g., signs, mailboxes, awning, vinyl siding
other structural fabrics
packaging material
painted waste (includes lead-based paint)
pallets & crates
pipes
plaster & plasterboard
polyfiberglass (highly polished, cured
material used for shower stalls, roofing, etc.)
shingles & roofing materials
structural steel
tile (floor, wall & ceiling)
tires⁴
tubing
wall coverings

² Friable and nonfriable asbestos-containing material shall be disposed in a designated area and covered immediately upon receipt with at least six inches (6") of acceptable material. Prior to disposal of asbestos-containing material, the generator of the asbestos waste shall obtain a "permission for disposal" letter from the Department's Bureau of Air Quality (BAQ) and submit this letter to the landfill. All landfills accepting asbestos-containing material for disposal are subject to the BAQ regulation 61-86.1 Standards of Performance for Asbestos Abatement Operations, and the National Emissions Standards for Hazardous Air Pollutants [40CFR61, Subpart M;]

³ Tar sealant material is not acceptable.

⁴ Tires shall be reduced in size by a minimum of one-eighth the size of the original tire prior to landfill disposal.

Acceptable Brown Goods:

· box springs · mattresses · wooden swing sets · nonmotorized bulky outdoor children's toys	· furniture including lawn furniture: - laminated - metal⁵ - plastic - PVC - vinyl - wooden

Animal Carcasses Acceptable Under Following Conditions:

· Animal carcasses shall be buried in a separate designated area. The facility shall submit to the Department a written request to dispose of animal carcasses including a plan that shows the portion of the landfill to be used for this type of disposal. The permit will be modified to reflect the designated disposal area, and;

· Animal carcasses shall be buried and covered with at least twelve inches (12") of dirt immediately upon receipt.

· Hydrated lime shall be added to the carcass and surrounding area before cover is applied to control bacterial growth and odor.

· Mass kill burial shall not be acceptable at Class Two Landfills unless approved by the Department prior to disposal.

⁵The Department recommends that all metal furniture be recycled if feasible.

Pickens County,

Petitioner,

VS.

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

Respondents.

App. p.0428

Pickens County is the Host Local Government, per the S.C. Solid Waste Management Act. It is noted that the Host Agreement and Development Agreement make specific reference to C&D and LCD wastes, and no other wastes.

5. That, as a result of the aforesaid Host Agreement of 2008 and Development Agreement of 2008, and negotiations with MRR, and based upon representations of MRR that the landfill would be limited to C&D/LCD wastes, a Permit was issued by DHEC on November 3, 2008, Permit No. LF2-00003. (Ex. 14 to Petitioner's Memo). Said Permit appropriately and accurately reflected the agreements between Pickens County and MRR. In particular, the 2008 Permit contains seven (7) Special Conditions, including:

1. The Permittee shall adhere to the design specifications and construction plans received November 30, 2007; and last revised August 26, 2008, unless permit conditions state otherwise.
2. This permit is limited solely to the disposal of items listed in Appendix 1 of R. 61-107.19. **All other wastes, including animal carcasses, are prohibited from disposal in this landfill.** (emphasis added).

6. That Appendix 1 of R. 61-107.19 includes C&D and LCD wastes, and also "brown goods" (i.e., certain furniture parts) and provisions for animal carcasses. The limitations contained in Special Condition No. 2 of the 2008 Permit, based upon Appendix 1, were in accord with the representations of MRR and the agreements between Pickens County and MRR, particularly including the prohibition of "all other wastes."

7. That the prohibition against "All other wastes," as stated in Special Condition No. 2 of the 2008 Permit, was an essential and material provision, and was of utmost importance to Pickens County and its citizens and residents, taxpayers and property owners.

8. That Pickens County has for years owned and operated its own C&D/LCD landfill, which is nearing reaching full capacity. This existing Pickens County Landfill is limited to the acceptance of C&D and LCD wastes.

9. That is was in the interest of Pickens County, its citizens and residents, taxpayers and property owners to have landfill capacity to accept C&D and LCD wastes, and to have such capacity available upon the closure of Pickens County's current C&D/LCD landfill.

10. That Pickens County, definitely and expressly stated, did not wish or intend for any landfill in Pickens County to accept any wastes other than as stated in Appendix 1 to R. 61-107.19 and as provided in Special Condition No. 2 of the 2008 Permit, i.e., limited to C&D and LCD wastes. Such intent is further set forth in the Pickens County Solid Waste Management Plan (SWMP), (Ex. 11 to Petitioner's Memo) which specifically precludes "Special Wastes," and specifically disallows any Class Three Landfills and Class Three Wastes, and only provides for C&D/LCD Class Two Wastes.

11. That, from 2008 until 2015, MRR did not develop the landfill provided for in the 2008 Permit, and instead, sought and obtained extensions to develop same, citing economic downturn.

12. That, unbeknownst to Pickens County or the public, MRR and DHEC conducted a series of meetings in 2014 and 2015, in which MRR began submitting detailed engineering reports through its consultant Civil & Environmental Consultants, Inc. (CEC), to make major and substantial

modifications to the 2008 Permit, including the alternate design of adding a liner to this Class Two Landfill and making other changes to substantially alter the facility and its operations. Further, we now know that in these meetings between DHEC and MRR, that DHEC and MRR agreed to characterize these major modifications as "minor." Incredibly, the Reports of CEC stated:

During recent meetings between MRR and DHEC, it was confirmed that a modification of the Class Two Landfill Permit to meet the requirements of . . . Class Three Landfills would require a minor permit modification. (See Exhibits 1, 2 and 3 to Petitioner's Memo, being the CEC Reports).

13. That neither Pickens County nor the public was advised of, or provided with any Notice of, the aforesaid meetings between DHEC and MRR in 2014 and 2015, nor the submission of any engineering reports by CEC or MRR.

14. That, per R. 61-107.19, Part 1, B. 48, the modifications sought and obtained by MRR meet the definition of "major modifications," in that:

- (A) The modifications provide a design change and an alternate design;
- (B) The modifications substantially alter the facility and its operations;
- (C) The modifications include changing this Class Two Permit to meet the requirements of Class Three Landfills;
- (D) The modifications add the essential requirements of Class Three Landfills to the 2008 Class Two Landfill Permit;
- (E) The modifications include the addition of a liner, which is not a feature of Class Two Landfills, but a feature of Class Three Landfills. (Liners are not necessary for C&D/LCD landfills, but are necessary for Class Three Landfills because of the need to prevent seepage and leachate from Class Three

Wastes, which are more problematic than C&D/LCD wastes and more likely to cause groundwater contamination).

- (F) The modifications eliminate Special Condition No. 2 of the 2008 Permit and the prohibition against "all other wastes," and substituting an open-ended provision to allow "any other wastes"
- (G) The modifications are a substantial and direct departure from Special Condition No. 1 of the 2008 Permit and its limitations to the November 30, 2007 design specifications and construction plans and the revisions of August 26, 2008, and the modifications represent a major change and substantial alteration of the 2007-2008 design specifications and construction plans.
- (H) The modifications represent a substantial alteration of the regulatory requirements for Class Two C&D/LCD landfills.
- (I) The modifications include further design changes and alternate design and substantial changes to the facility and its operations.

15. Despite the aforesaid "major modifications" being proposed in 2014 and 2015, and approved by DHEC, as reflected in the Permit Modification of August 10, 2015, neither DHEC nor MRR provided any Notice to Pickens County or to the public of such modifications. Further, MRR spokespersons appeared before the Pickens County Planning Commission in January of 2015, stating that no liner was intended, and that MRR's landfill was the same as discussed in 2008, and was the same as the County's own C&D landfill, and made absolutely no mention of its having submitted engineering reports to DHEC for these modifications and no mention of its meetings with DHEC to discuss these changes. (See Ex. 7, my Affidavit in Common Pleas Court).

16. That, more specifically, no Notice was provided to Pickens County, or to adjoining landowners, or to the public, of the Application for Permit Modification, the Draft Permit, or the final Department Decision.

17. That the failures of Notice to the public, to adjoining landowners and to Pickens County, include the following, in violation of relevant Regulations:

- (A) No newspaper publication of Notice of the Application for Permit Modification, or the Draft Permit, or the final Department Decision, in the area of the landfill, ever took place (upon information and belief and to the best of our knowledge).
- (B) No mailing of any such Notice was sent to adjoining landowners (upon information and belief and to the best of our knowledge – further, Pickens County itself is an adjoining landowner and was never provided with any mailing of Notice, nor were any other adjoining landowners provided with Notice by mail, to the best of our knowledge).
- (C) No opportunity for public review or public comment was ever afforded, to the public or to anyone.
- (D) No opportunity to request a Public Hearing was ever afforded, due to the complete failures of Notice, including the failures of newspaper publication and mailing.

18. That the Application for Minor Permit Modification (Ex. A to MRR's Memo in Support of Motion to Dismiss) also constitutes a "new construction," in that:

(A) The Application is titled "Application for Permit to Construct a Solid Waste Management System."

(B) As of the time of submission of said Application (March 30, 2015), and as of the time of the Permit Modification of August 10, 2015, and as of the present, actual landfill construction has not commenced, and therefore any landfill construction would be a "new construction."

Note: Per R. 61-107.19, Part IV, I. 2., "for new construction, the Department must make the draft permit available for public review and comment" (in addition to provisions for "major modifications").

19. That, per S.C. Code Section 44-1-60, Pickens County is an "affected party," as it serves as the Host Local Government, and by virtue of its Host Agreement and Development Agreement with MRR, and by virtue of the Pickens County Solid Waste Management Plan.

20. That Pickens county did not request in writing to be notified of actions on the 2008 Permit because:

(A) Pickens County never had any Notice that any modification of any kind was being sought, or considered or approved, and therefore had no reason to request in writing any information on actions or changes.

(B) Pickens County never was provided with any Notice, by DHEC or MRR or anyone, of the Application for Permit Modification, the Draft Permit, or the final Department Decision, and specifically, was not provided with newspaper publication of Notice nor any mailing of Notice (either by virtue of being an adjoining landowner or as an affected party).

(C) The public and adjoining landowners were never provided with Notice of such, either by newspaper publication or mailing, or any other means.

21. That in late 2015, some staff members heard rumors of MRR's intent to deposit coal ash/CCR into this C&D/LCD Landfill, and made a request to DHEC for documents. In mid-December 2015 DHEC provided documents regarding the Permit Modification to several county staff, for the first time. Further documents regarding the DHEC Approval were provided by email to County Staff on or about January 11, 2016.

22. That this first information of the modification was provided to County Staff long after submission of the Application for Modification, the issuance of the Draft Permit, and the issuance of the Permit Modification of August 10, 2015.

23. That Pickens County brings this action in the Administrative Law Court on behalf of the citizens and residents of Pickens County, taxpayers and property owners of Pickens County, on behalf of adjoining landowners, and on behalf of Pickens County, a governmental entity. In particular, Pickens County brings this action on behalf of members of the public residing in close proximity to the landfill, and on behalf of adjoining landowners.

24. That, aside from any issue of Pickens County Staff having received information in December of 2015 and thereafter, the public has never received the required Notices, and adjoining landowners have never received the required Notices, neither by newspaper publication or mailing, to date. No opportunity for review or comment, nor any opportunity for Public Hearing has yet been provided to the public or to all adjoining landowners.

25. That, had there been any Notice by newspaper publication in the area, or any Notice by mailing to adjoining landowners, or any Notice to Pickens County, of the Application for Permit

Modification, the issuance of the Draft Permit, and/or the issuance of the final Department Decision, Pickens County would certainly have objected, would have offered comments in opposition and would have requested a Public Hearing, to oppose any such modifications, on behalf of its citizens and residents, taxpayers and landowners of Pickens County, adjoining landowners, and the County itself (and particularly on behalf of members of the public in Pickens County who reside and/or own property in close proximity to this landfill). Further, had such Notices occurred, it is highly likely that members of the public and adjoining landowners would have objected, offered comments in opposition, requested a Public Hearing and otherwise opposed this Modification.

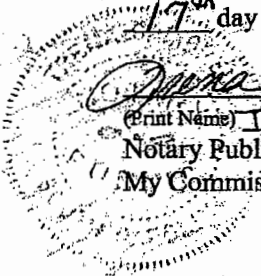
26. That this Permit Modification is highly opposed by the vast majority of citizens and residents of Pickens County. Certainly, any support of this Permit Modification by any citizens or residents of Pickens County is extremely minimal or non-existent.

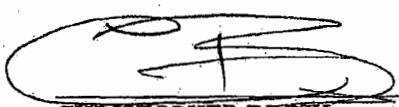
27. That Pickens County has standing to bring this action in this Court on behalf of its citizens and residents, on behalf of taxpayers and property owners of Pickens County, on behalf of adjoining landowners, and in particular, on behalf of members of the public in Pickens County who reside and/or own property in close proximity to this landfill. Further, many citizens and residents of Pickens County, members of the public and adjoining landowners, will likely suffer individual harms and injuries should this Modification stand. Further, Pickens County, its citizens and residents, taxpayers and property owners, adjoining landowners, and members of the public in Pickens County, particularly those residing or owning property in close proximity thereto, will suffer harms and injuries as a result of this Modification. The harms and injuries that will likely result from this Modification include, but are not limited to, use and enjoyment of their properties, the adverse

effects of dust and ash, the contamination of the air, soil, surface water and groundwater, property values, and enjoyment of the surrounding areas.

28. That I previously issued an Affidavit in Common Pleas Court (Ex. 7 to Petitioner's Memo), which I hereby reiterate, and request that this Court review and consider.

Sworn to and Subscribed before me this
17th day of August, 2016


Trena Gambrell
(Print Name) Trena Gambrell
Notary Public for South Carolina
My Commission Expires: 1-24-23


CHRISTOPHER BRINK

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,

Petitioner,

vs.

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

Respondents.

Docket No.: 16-A1J-07-0164-CC

**AFFIDAVIT OF
ROBERT L. TRABER**

Personally appeared before me ROBERT L. TRABER, who having been duly sworn, deposes
and states:

1. That he is over the age of 21 and is competent to issue this Affidavit.
2. That he is the owner of a residence located at 2041 Greenville Highway.
3. That he is familiar with the site, just off Highway 93, at 2180 Greenville Highway,
near the City of Liberty, in Pickens County, S.C., on which MRR Pickens, LLC originally intended
to develop a Construction & Demolition/Land Clearing Debris (C&D/LCD) Landfill, limited to
C&D/LCD waste. More recently he has learned that MRR Pickens, LLC obtained a Modification
of the initial Permit, which could allow additional types of waste to be deposited there, including but
not limited to coal ash (also known as Coal Combustion Residuals, or CCR), Special Wastes, and
other wastes.
4. That his property is across the street from the MRR Pickens Landfill site.

5. That he is informed and believes that if the Permit Modification is allowed to stand, and if the landfill is allowed to accept wastes other than C&D/LCD, such as coal ash or CCR, or Special Wastes, or other wastes more problematic and offensive than C&D/LCD, that his use and enjoyment of his property will be adversely affected, quality of life will likely be adversely affected, and his property value will likely be adversely affected. Concerns include the blowing of coal ash/CCR from trucks entering the landfill, the blowing of coal ash/CCR by the wind, the inherent and typical toxic components and toxic nature of coal ash/CCR, the propensity of coal ash/CCR to contaminate nearby properties such as his, including the soil, surface water and groundwater and air; as well as problems and potential and likely odors from other wastes (other than C&D/LCD wastes), which may be deposited into this landfill if the Permit Modification is allowed to stand.

6. That he is informed and believes that the Permit Modification in question is a major and substantial modification and change from the original 2008 Permit for C&D/LCD wastes, and that this Modification, if allowed to stand, will likely result in adverse consequences for him and his property.

7. That despite being an adjoining landowner, and being in close proximity to this landfill, he was never provided with any Notice of the filing of any application for Modification, nor any Notice of the preparation of a Draft Permit Modification by DHEC, nor any Notice of any final Department Decision by DHEC.

8. That in particular, he was never furnished with any mail that provided Notice of the Permit Application for Modification, nor any mailing of Notice of a Draft Permit Modification by DHEC, nor any mailing of Notice of a final Department Decision by DHEC.

9. That neither DHEC, nor MRR Pickens, LLC, nor any other person or entity, provided any mailing of the Notices referenced in paragraphs 7 and 8 above.

10. That, to the best of his knowledge, no Legal Notices regarding the Application for Modification, the Draft Permit, or the final Department Decision were published in any newspaper of general circulation in the area of the proposed landfill project, in any manner pertaining to this Modification. He never saw any such newspaper publication, and to the best of his knowledge, no such newspaper publication of such Notice(s) occurred.

11. That he was never informed of any opportunity for public review of any Application for Modification, nor any public review of any Draft Permit, nor any opportunity to provide comments to such Application for Modification or any Draft Permit, as he had never been informed of such and had never received any form of Notice of such (his first information regarding same having been received verbally, in 2016, long after the issuance of the Permit Modification by DHEC.)

12. That he was deprived of the opportunity to review the Application for Permit Modification and the Draft Permit, the opportunity to submit comments, the opportunity to sign a Petition to request a Public Hearing, and the opportunity to offer objection and opposition to such Modification, by having been entirely deprived of Notice or knowledge at the time of such filings and events. Had he received such Notice he likely would have taken appropriate actions in opposition to this Modification.

13. That he did not request a Public Hearing, nor did he file any appeal or request for review of the Department Decision regarding the Modification, because he was never provided with Notice or knowledge at the time of such filings and events.

14. That to this day, he has never been furnished with any Notice by mail, nor any newspaper Notice, nor any information by DHEC or MRR apprising him of the proposed Modification, nor any action having been taken thereon, nor any opportunity for review, comment, Public Hearing, appeal or request for review.

15. That had he received such Notice(s) regarding this proposed Modification, he likely would have taken actions, including comments in opposition, as well as other actions to oppose and/or appeal it.

16. That at this point he does wish to participate, along with Pickens County, to appeal the issuance of this Modification, and to oppose the issuance of such.

17. That he is a citizen and resident of Pickens County, a property owner and taxpayer of Pickens County, and wishes for Pickens County to advance his interests in appealing and opposing this Modification, and supports and joins with Pickens County, which is acting on behalf of adjoining landowners such as himself, as well as on behalf of the Public of which he is a member, as well as on behalf of Pickens County, of which he is a citizen, resident, property owner and taxpayer.

Sworn to and Subscribed before me this
17th day of August, 2016

Chad Fisher
(Print Name) Chadley Fisher

Notary Public for South Carolina

My Commission Expires: 3/26/2023

Robert L. Traber
ROBERT L. TRABER

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,

Petitioner,

vs.

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

Respondents.

Docket No.: 16-A1J-07-0164-CC

**AFFIDAVIT OF
MATTHEW S. STONE**

Personally appeared before me MATTHEW S. STONE, who having been duly sworn,
deposes and states:

1. That he is over the age of 21 and is competent to issue this Affidavit.
2. That he is the owner of a residence located at 137 Clover Street, Liberty, SC.
3. That he is familiar with the site, just off Highway 93, at 2180 Greenville Highway,
near the City of Liberty, in Pickens County, S.C., on which MRR Pickens, LLC originally intended
to develop a Construction & Demolition/Land Clearing Debris (C&D/LCD) Landfill, limited to
C&D/LCD waste. More recently he has learned that MRR Pickens, LLC obtained a Modification
of the initial Permit, which could allow additional types of waste to be deposited there, including but
not limited to coal ash (also known as Coal Combustion Residuals, or CCR), Special Wastes, and
other wastes.
4. That his property is adjacent to or in extremely close proximity to the MRR Pickens
Landfill site.

14. That to this day, he has never been furnished with any Notice by mail, nor any newspaper Notice, nor any information by DHEC or MRR apprising him of the proposed Modification, nor any action having been taken thereon, nor any opportunity for review, comment, Public Hearing, appeal or request for review.

15. That had he received such Notice(s) regarding this proposed Modification, he likely would have taken actions, including comments in opposition, as well as other actions to oppose and/or appeal it.

16. That at this point he does wish to participate, along with Pickens County, to appeal the issuance of this Modification, and to oppose the issuance of such.

17. That he is a citizen and resident of Pickens County, a property owner and taxpayer of Pickens County, and wishes for Pickens County to advance his interests in appealing and opposing this Modification, and supports and joins with Pickens County, which is acting on behalf of adjoining landowners such as himself, as well as on behalf of the Public of which he is a member, as well as on behalf of Pickens County, of which he is a citizen, resident, property owner and taxpayer.

Sworn to and Subscribed before me this
17th day of August, 2016

Ashley Fisher
(Print Name) Ashley Fisher

Notary Public for South Carolina

My Commission Expires: March 24, 2023

Randy Martin. PR
Randy Martin. PR

RANDOLPH E. REVIS, SR.

5. That he is informed and believes that if the Permit Modification is allowed to stand, and if the landfill is allowed to accept wastes other than C&D/LCD, such as coal ash or CCR, or Special Wastes, or other wastes more problematic and offensive than C&D/LCD, that his use and enjoyment of his property will be adversely affected, quality of life will likely be adversely affected, and his property value will likely be adversely affected. Concerns include the blowing of coal ash/CCR from trucks entering the landfill, the blowing of coal ash/CCR by the wind, the inherent and typical toxic components and toxic nature of coal ash/CCR, the propensity of coal ash/CCR to contaminate nearby properties such as his, including the soil, surface water and groundwater and air, as well as problems and potential and likely odors from other wastes (other than C&D/LCD wastes), which may be deposited into this landfill if the Permit Modification is allowed to stand.

6. That he is informed and believes that the Permit Modification in question is a major and substantial modification and change from the original 2008 Permit for C&D/LCD wastes, and that this Modification, if allowed to stand, will likely result in adverse consequences for him and his property.

7. That despite being an adjoining landowner, and being in close proximity to this landfill, he was never provided with any Notice of the filing of any application for Modification, nor any Notice of the preparation of a Draft Permit Modification by DHEC, nor any Notice of any final Department Decision by DHEC.

8. That in particular, he was never furnished with any mail that provided Notice of the Permit Application for Modification, nor any mailing of Notice of a Draft Permit Modification by DHEC, nor any mailing of Notice of a final Department Decision by DHEC.

9. That neither DHEC, nor MRR Pickens, LLC, nor any other person or entity, provided any mailing of the Notices referenced in paragraphs 7 and 8 above.

10. That, to the best of his knowledge, no Legal Notices regarding the Application for Modification, the Draft Permit, or the final Department Decision were published in any newspaper of general circulation in the area of the proposed landfill project, in any manner pertaining to this Modification. He never saw any such newspaper publication, and to the best of his knowledge, no such newspaper publication of such Notice(s) occurred.

11. That he was never informed of any opportunity for public review of any Application for Modification, nor any public review of any Draft Permit, nor any opportunity to provide comments to such Application for Modification or any Draft Permit, as he had never been informed of such and had never received any form of Notice of such (his first information regarding same having been received verbally, in 2016, long after the issuance of the Permit Modification by DHEC.)

12. That he was deprived of the opportunity to review the Application for Permit Modification and the Draft Permit, the opportunity to submit comments, the opportunity to sign a Petition to request a Public Hearing, and the opportunity to offer objection and opposition to such Modification, by having been entirely deprived of Notice or knowledge at the time of such filings and events. Had he received such Notice he likely would have taken appropriate actions in opposition to this Modification.

13. That he did not request a Public Hearing, nor did he file any appeal or request for review of the Department Decision regarding the Modification, because he was never provided with Notice or knowledge at the time of such filings and events.

14. That to this day, he has never been furnished with any Notice by mail, nor any newspaper Notice, nor any information by DHEC or MRR apprising him of the proposed Modification, nor any action having been taken thereon, nor any opportunity for review, comment, Public Hearing, appeal or request for review.

15. That had he received such Notice(s) regarding this proposed Modification, he likely would have taken actions, including comments in opposition, as well as other actions to oppose and/or appeal it.

16. That at this point he does wish to participate, along with Pickens County, to appeal the issuance of this Modification, and to oppose the issuance of such.

17. That he is a citizen and resident of Pickens County, a property owner and taxpayer of Pickens County, and wishes for Pickens County to advance his interests in appealing and opposing this Modification, and supports and joins with Pickens County, which is acting on behalf of adjoining landowners such as himself, as well as on behalf of the Public of which he is a member, as well as on behalf of Pickens County, of which he is a citizen, resident, property owner and taxpayer.

Sworn to and Subscribed before me this
17th day of August, 2016

Ashley Fisher
(Print Name) Ashley Fisher

Notary Public for South Carolina

My Commission Expires: March 26, 2023

Matthew Stone
MATTHEW S. STONE

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,

Petitioner,

vs.

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

Respondents.

Docket No.: 16-A1J-07-0164-CC

**AFFIDAVIT OF
RANDOLPH E. REVIS, SR.**

Personally appeared before me RANDOLPH E. REVIS, SR., who having been duly sworn,
deposes and states:

1. That he is over the age of 21 and is competent to issue this Affidavit.
2. That he is the owner of commercial property located on the south side of Greenville Highway.
3. That he is familiar with the site, just off Highway 93, at 2180 Greenville Highway, near the City of Liberty, in Pickens County, S.C., on which MRR Pickens, LLC originally intended to develop a Construction & Demolition/Land Clearing Debris (C&D/LCD) Landfill, limited to C&D/LCD waste. More recently he has learned that MRR Pickens, LLC obtained a Modification of the initial Permit, which could allow additional types of waste to be deposited there, including but not limited to coal ash (also known as Coal Combustion Residuals, or CCR), Special Wastes, and other wastes.
4. That his property is adjacent to the MRR Pickens Landfill site and in close proximity thereto.

5. That he is informed and believes that if the Permit Modification is allowed to stand, and if the landfill is allowed to accept wastes other than C&D/LCD, such as coal ash or CCR, or Special Wastes, or other wastes more problematic and offensive than C&D/LCD, that his use and enjoyment of his property will be adversely affected, quality of life will likely be adversely affected, and his property value will likely be adversely affected. Concerns include the blowing of coal ash/CCR from trucks entering the landfill, the blowing of coal ash/CCR by the wind, the inherent and typical toxic components and toxic nature of coal ash/CCR, the propensity of coal ash/CCR to contaminate nearby properties such as his, including the soil, surface water and groundwater and air, as well as problems and potential and likely odors from other wastes (other than C&D/LCD wastes), which may be deposited into this landfill if the Permit Modification is allowed to stand.

6. That he is informed and believes that the Permit Modification in question is a major and substantial modification and change from the original 2008 Permit for C&D/LCD wastes, and that this Modification, if allowed to stand, will likely result in adverse consequences for him and his property.

7. That despite being an adjoining landowner, and being in close proximity to this landfill, he was never provided with any Notice of the filing of any application for Modification, nor any Notice of the preparation of a Draft Permit Modification by DHEC, nor any Notice of any final Department Decision by DHEC.

8. That in particular, he was never furnished with any mail that provided Notice of the Permit Application for Modification, nor any mailing of Notice of a Draft Permit Modification by DHEC, nor any mailing of Notice of a final Department Decision by DHEC.

9. That neither DHEC, nor MRR Pickens, LLC, nor any other person or entity, provided any mailing of the Notices referenced in paragraphs 7 and 8 above.

10. That, to the best of his knowledge, no Legal Notices regarding the Application for Modification, the Draft Permit, or the final Department Decision were published in any newspaper of general circulation in the area of the proposed landfill project, in any manner pertaining to this Modification. He never saw any such newspaper publication, and to the best of his knowledge, no such newspaper publication of such Notice(s) occurred.

11. That he was never informed of any opportunity for public review of any Application for Modification, nor any public review of any Draft Permit, nor any opportunity to provide comments to such Application for Modification or any Draft Permit, as he had never been informed of such and had never received any form of Notice of such (his first information regarding same having been received verbally, in 2016, long after the issuance of the Permit Modification by DHEC.)

12. That he was deprived of the opportunity to review the Application for Permit Modification and the Draft Permit, the opportunity to submit comments, the opportunity to sign a Petition to request a Public Hearing, and the opportunity to offer objection and opposition to such Modification, by having been entirely deprived of Notice or knowledge at the time of such filings and events. Had he received such Notice he likely would have taken appropriate actions in opposition to this Modification.

13. That he did not request a Public Hearing, nor did he file any appeal or request for review of the Department Decision regarding the Modification, because he was never provided with Notice or knowledge at the time of such filings and events.

14. That to this day, he has never been furnished with any Notice by mail, nor any newspaper Notice, nor any information by DHEC or MRR apprising him of the proposed Modification, nor any action having been taken thereon, nor any opportunity for review, comment, Public Hearing, appeal or request for review.

15. That had he received such Notice(s) regarding this proposed Modification, he likely would have taken actions, including comments in opposition, as well as other actions to oppose and/or appeal it.

16. That at this point he does wish to participate, along with Pickens County, to appeal the issuance of this Modification, and to oppose the issuance of such.

17. That he is a citizen and resident of Pickens County, a property owner and taxpayer of Pickens County, and wishes for Pickens County to advance his interests in appealing and opposing this Modification, and supports and joins with Pickens County, which is acting on behalf of adjoining landowners such as himself, as well as on behalf of the Public of which he is a member, as well as on behalf of Pickens County, of which he is a citizen, resident, property owner and taxpayer.

Sworn to and Subscribed before me this
17th day of August, 2016

Chelsey Fisher
(Print Name) Chelsey Fisher

Notary Public for South Carolina

My Commission Expires: March 24, 2023

Randy Martin, PR
Randy Martin, PR

RANDOLPH E. REVIS, SR.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,

Petitioner,

vs.

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

Respondents.

Docket No.: 16-A1J-07-0164-CC

**AFFIDAVIT OF
TONY CHARPING**

Personally appeared before me TONY CHARPING, who having been duly sworn, deposes
and states:

1. That he is over the age of 21 and is competent to issue this Affidavit.
2. That he is the owner of commercial property located on the south side of Greenville Highway.
3. That he is familiar with the site, just off Highway 93, at 2180 Greenville Highway, near the City of Liberty, in Pickens County, S.C., on which MRR Pickens, LLC originally intended to develop a Construction & Demolition/Land Clearing Debris (C&D/LCD) Landfill, limited to C&D/LCD waste. More recently he has learned that MRR Pickens, LLC obtained a Modification of the initial Permit, which could allow additional types of waste to be deposited there, including but not limited to coal ash (also known as Coal Combustion Residuals, or CCR), Special Wastes, and other wastes.
4. That his property is adjacent to the MRR Pickens Landfill site and in close proximity thereto.

5. That he is informed and believes that if the Permit Modification is allowed to stand, and if the landfill is allowed to accept wastes other than C&D/LCD, such as coal ash or CCR, or Special Wastes, or other wastes more problematic and offensive than C&D/LCD, that his use and enjoyment of his property will be adversely affected, quality of life will likely be adversely affected, and his property value will likely be adversely affected. Concerns include the blowing of coal ash/CCR from trucks entering the landfill, the blowing of coal ash/CCR by the wind, the inherent and typical toxic components and toxic nature of coal ash/CCR, the propensity of coal ash/CCR to contaminate nearby properties such as his, including the soil, surface water and groundwater and air, as well as problems and potential and likely odors from other wastes (other than C&D/LCD wastes), which may be deposited into this landfill if the Permit Modification is allowed to stand.

6. That he is informed and believes that the Permit Modification in question is a major and substantial modification and change from the original 2008 Permit for C&D/LCD wastes, and that this Modification, if allowed to stand, will likely result in adverse consequences for him and his property.

7. That despite being an adjoining landowner, and being in close proximity to this landfill, he was never provided with any Notice of the filing of any application for Modification, nor any Notice of the preparation of a Draft Permit Modification by DHEC, nor any Notice of any final Department Decision by DHEC.

8. That in particular, he was never furnished with any mail that provided Notice of the Permit Application for Modification, nor any mailing of Notice of a Draft Permit Modification by DHEC, nor any mailing of Notice of a final Department Decision by DHEC.

9. That neither DHEC, nor MRR Pickens, LLC, nor any other person or entity, provided any mailing of the Notices referenced in paragraphs 7 and 8 above.

10. That, to the best of his knowledge, no Legal Notices regarding the Application for Modification, the Draft Permit, or the final Department Decision were published in any newspaper of general circulation in the area of the proposed landfill project, in any manner pertaining to this Modification. He never saw any such newspaper publication, and to the best of his knowledge, no such newspaper publication of such Notice(s) occurred.

11. That he was never informed of any opportunity for public review of any Application for Modification, nor any public review of any Draft Permit, nor any opportunity to provide comments to such Application for Modification or any Draft Permit, as he had never been informed of such and had never received any form of Notice of such (his first information regarding same having been received verbally, in 2016, long after the issuance of the Permit Modification by DHEC.)

12. That he was deprived of the opportunity to review the Application for Permit Modification and the Draft Permit, the opportunity to submit comments, the opportunity to sign a Petition to request a Public Hearing, and the opportunity to offer objection and opposition to such Modification, by having been entirely deprived of Notice or knowledge at the time of such filings and events. Had he received such Notice he likely would have taken appropriate actions in opposition to this Modification.

13. That he did not request a Public Hearing, nor did he file any appeal or request for review of the Department Decision regarding the Modification, because he was never provided with Notice or knowledge at the time of such filings and events.

14. That to this day, he has never been furnished with any Notice by mail, nor any newspaper Notice, nor any information by DHEC or MRR apprising him of the proposed Modification, nor any action having been taken thereon, nor any opportunity for review, comment, Public Hearing, appeal or request for review.

15. That had he received such Notice(s) regarding this proposed Modification, he likely would have taken actions, including comments in opposition, as well as other actions to oppose and/or appeal it.

16. That at this point he does wish to participate, along with Pickens County, to appeal the issuance of this Modification, and to oppose the issuance of such.

17. That he is a citizen and resident of Pickens County, a property owner and taxpayer of Pickens County, and wishes for Pickens County to advance his interests in appealing and opposing this Modification, and supports and joins with Pickens County, which is acting on behalf of adjoining landowners such as himself, as well as on behalf of the Public of which he is a member, as well as on behalf of Pickens County, of which he is a citizen, resident, property owner and taxpayer.

Sworn to and Subscribed before me this
17th day of August, 2016

Ashtley Fisher

(Print Name) Ashtley Fisher

Notary Public for South Carolina

My Commission Expires: March 26, 2023

Tony Charping
TONY CHARPING

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,

Petitioner,

vs.

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

Respondents.

Docket No.: 16-A1J-07-0164-CC

**AFFIDAVIT OF
RANDALL KING**

Personally appeared before me **RANDALL KING**, who having been duly sworn, deposes and
states: *+ Judy*

1. That he is over the age of 21 and is competent to issue this Affidavit.
2. That he is the owner of active commercial property located on the northwest side of Greenville Highway.
3. That he is familiar with the site, just off Highway 93, at 2180 Greenville Highway, near the City of Liberty, in Pickens County, S.C., on which MRR Pickens, LLC originally intended to develop a Construction & Demolition/Land Clearing Debris (C&D/LCD) Landfill, limited to C&D/LCD waste. More recently he has learned that MRR Pickens, LLC obtained a Modification of the initial Permit, which could allow additional types of waste to be deposited there, including but not limited to coal ash (also known as Coal Combustion Residuals, or CCR), Special Wastes, and other wastes.
4. That his property is across the street from the MRR Pickens Landfill site.

5. That he is informed and believes that if the Permit Modification is allowed to stand, and if the landfill is allowed to accept wastes other than C&D/LCD, such as coal ash or CCR, or Special Wastes, or other wastes more problematic and offensive than C&D/LCD, that his use and enjoyment of his property will be adversely affected, quality of life will likely be adversely affected, and his property value will likely be adversely affected. Concerns include the blowing of coal ash/CCR from trucks entering the landfill, the blowing of coal ash/CCR by the wind, the inherent and typical toxic components and toxic nature of coal ash/CCR, the propensity of coal ash/CCR to contaminate nearby properties such as his, including the soil, surface water and groundwater and air; as well as problems and potential and likely odors from other wastes (other than C&D/LCD wastes), which may be deposited into this landfill if the Permit Modification is allowed to stand.

6. That he is informed and believes that the Permit Modification in question is a major and substantial modification and change from the original 2008 Permit for C&D/LCD wastes, and that this Modification, if allowed to stand, will likely result in adverse consequences for him and his property.

7. That despite being an adjoining landowner, and being in close proximity to this landfill, he was never provided with any Notice of the filing of any application for Modification, nor any Notice of the preparation of a Draft Permit Modification by DHEC, nor any Notice of any final Department Decision by DHEC.

8. That in particular, he was never furnished with any mail that provided Notice of the Permit Application for Modification, nor any mailing of Notice of a Draft Permit Modification by DHEC, nor any mailing of Notice of a final Department Decision by DHEC.

9. That neither DHEC, nor MRR Pickens, LLC, nor any other person or entity, provided any mailing of the Notices referenced in paragraphs 7 and 8 above.

10. That, to the best of his knowledge, no Legal Notices regarding the Application for Modification, the Draft Permit, or the final Department Decision were published in any newspaper of general circulation in the area of the proposed landfill project, in any manner pertaining to this Modification. He never saw any such newspaper publication, and to the best of his knowledge, no such newspaper publication of such Notice(s) occurred.

11. That he was never informed of any opportunity for public review of any Application for Modification, nor any public review of any Draft Permit, nor any opportunity to provide comments to such Application for Modification or any Draft Permit, as he had never been informed of such and had never received any form of Notice of such (his first information regarding same having been received verbally, in 2016, long after the issuance of the Permit Modification by DHEC.)

12. That he was deprived of the opportunity to review the Application for Permit Modification and the Draft Permit, the opportunity to submit comments, the opportunity to sign a Petition to request a Public Hearing, and the opportunity to offer objection and opposition to such Modification, by having been entirely deprived of Notice or knowledge at the time of such filings and events. Had he received such Notice he likely would have taken appropriate actions in opposition to this Modification.

13. That he did not request a Public Hearing, nor did he file any appeal or request for review of the Department Decision regarding the Modification, because he was never provided with Notice or knowledge at the time of such filings and events.

14. That to this day, he has never been furnished with any Notice by mail, nor any newspaper Notice, nor any information by DHEC or MRR apprising him of the proposed Modification, nor any action having been taken thereon, nor any opportunity for review, comment, Public Hearing, appeal or request for review.

15. That had he received such Notice(s) regarding this proposed Modification, he likely would have taken actions, including comments in opposition, as well as other actions to oppose and/or appeal it.

16. That at this point he does wish to participate, along with Pickens County, to appeal the issuance of this Modification, and to oppose the issuance of such.

17. That he is a citizen and resident of Pickens County, a property owner and taxpayer of Pickens County, and wishes for Pickens County to advance his interests in appealing and opposing this Modification, and supports and joins with Pickens County, which is acting on behalf of adjoining landowners such as himself, as well as on behalf of the Public of which he is a member, as well as on behalf of Pickens County, of which he is a citizen, resident, property owner and taxpayer.

Sworn to and Subscribed before me this
17 day of August, 2016

C Satterfield
(Print Name) C Satterfield
Notary Public for South Carolina
My Commission Expires: 4-2-22

Randall L. King
RANDALL KING (R/K)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,

Petitioner,

vs.

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

Respondents.

Docket No.: 16-A1J-07-0164-CC

**AFFIDAVIT OF
GARY W. POLIAKOFF
ATTORNEY FOR PETITIONER**

Personally appeared before me Gary W. Poliakoff, who having been duly sworn, deposes and states:

1. That I am over the age of 18 years and am competent to issue this Affidavit.
2. That I am the duly authorized attorney for Petitioner Pickens County in the matters pending before this Court, and was representing Pickens County in this litigation in May of 2016.

3. Exigent Circumstances Existing in May of 2016:

- (A) On May 8, 2016 my 13 year-old daughter was severely injured in a head-on collision, in which three people died. My daughter was airlifted to Greenville Memorial Hospital where she underwent emergency surgery for multiple severe internal injuries. Her spleen was severely ruptured and had to be removed. Serious lacerations to her liver and colon were repaired. The tail of her pancreas was severed, an issue which has caused significant problems. Also she suffered a bruised lung, bruised kidney, bruised diaphragm and bruised duodenum and broken ribs. Following surgery she entered Pediatric

Intensive Care Unit (PICU) at Greenville Memorial Hospital, in critical condition. For the first few days she was on life support, in a medically induced coma. Once she was removed from the ventilator, she remained in critical condition in the PICU, now with a Bi-Pap (mask covering face, with forced air to breathe), as she could not sufficiently breathe, due to the injuries to her lung, diaphragm, broken ribs, chest tube, and fluid build-up on her lung and heart. This led to what is known as "ICU psychoses," from a combination of her injuries, narcotic medication, and inability to breathe well, and her feeling that she was under water and drowning, all of which was extremely stressful for her, her mother and me. She was unable to consume food, and was fed intravenously, then through a nasal-gastric tube, and finally a stomach feeding tube that extended into her intestine was installed. She stayed in the PICU for nearly two weeks, then transferred to a surgery recovery room. She was not released from the hospital until May 31, 2016, having been an inpatient for 23 days. During her hospital stay she underwent subsequent surgeries and multiple medical procedures. When we got her home on May 31 she still had the pancreas tube and drain, and the stomach feeding tube, through which she received nutrition for weeks thereafter. During the first week in PICU my wife and I were with her in Greenville constantly, and thereafter I spent most of each day in the hospital with her, and many nights all night. (There was never a time in the 23 days of hospitalization that either my wife or I, or both of us, was not with her).

- (B) As of May 19, 2016, when the Request for Contested Case Hearing was prepared and mailed, my daughter was still in the Pediatric Intensive Care Unit in Greenville. During that time I was rarely in my office (which is in Spartanburg), dropping by only sporadically to take care of necessary issues.
- (C) At this point in time I do not recall whether it was I or my staff who retrieved MRR's address from the 2008 Permit instead of the 2015 Modification. It was a simple error, with no intent to deprive MRR of any ability to respond or participate. I signed the form and I take responsibility. I had informed my client previously that I would handle the ALC filing and had accepted the duty.
- (D) I can state certainly, that, due to the above circumstances, I was not as vigilant at that time as I otherwise would have been. This was a simple error of retrieving an older address.

4. The Mailing to Trails End Lane was not Returned to my Office

The Request for Contested Case Hearing form was mailed by my office to MRR Pickens, LLC at 11743 Trails End Lane, Charlotte, N.C. 28078, by First Class U.S. Mail, postage prepaid. The Form was placed in an envelope which contained the return address of my law firm. To date, said letter has not been returned to my office by the Post Office. I have seen no such returned letter, and I questioned my staff, who responded that they had seen no such returned letter. To the best of our collective knowledge, the mailing has not been returned to us by the Post Office.

Sworn to and Subscribed before me this
18th day of August, 2016

Theresa J. Davidson
(Print Name) Theresa J. Davidson

Notary Public for South Carolina

My Commission Expires: 10/14/25

Gary W. Poliakoff
Gary W. Poliakoff

Aug 15 2016

REFERENCE ID: 1608150916179

Mark Hammond
Secretary of State of South Carolina

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF ORGANIZATION
LIMITED LIABILITY COMPANY

TYPE OR PRINT CLEARLY IN BLACK INK

The undersigned deliver the following articles of organization to form a South Carolina limited liability company pursuant to Sections 33-44-202 and 33-44-203 of the 1976 South Carolina Code, as amended

1 The name of the limited liability company which complies with Section 33-44-105 of the South Carolina Code of 1976, as amended is MRR Pickens, LLC

2 The office of the initial designated office of the Limited Liability Company in South Carolina is

5000 Thurmond Mall Blvd

Street address

Columbia

City

29223

Zip Code

3 The initial agent for service of process of the Limited Liability Company is

Corporation Service Company

Name

Signature of Agent

and the street address in South Carolina for this initial agent for service of process is

5000 Thurmond Mall Blvd

Street address

Columbia

City

29223

Zip Code

4 The name and address of each organizer is

(a) Cheryl A Hansen

Name

214 North Tryon Street, 47th Floor

Street address

Charlotte

City

North Carolina

State

28202

Zip Code

5 ☐ Check this box only if the company is to be a term company. If so, provide the term specified N/A

6 ☒ Check this box only if management of the limited liability company is vested in a manager or managers. If this company is to be managed by managers, specify the name and address of each initial manager

MRR Southern, LLC - Manager
431 Raleigh View Road
Raleigh, North Carolina

7 ☐ Check this box only if one or more of the members of the company are to be liable for its debts and obligations under Section 33-44-303(c). If one or more members are so liable, specify which members, and for which debts, obligations or liabilities such members are liable in their capacity as members
N/A

070124-0232

FILED 01/24/2007

MRR PICKENS, LLC

Filing Fee \$110.00 ORIG

Mark Hammond

South Carolina Secretary of State

Aug 15 2016

REFERENCE ID: 1608150916179

Mark Hammond

SECRETARY OF STATE OF SOUTH CAROLINA

MRR Highway 92, LLC

Name of Limited Liability Company

8 Unless a delayed effective date is specified, these articles will be effective when endorsed for filing by the Secretary of State. Specify any delayed effective date and time.

9 Set forth any other provisions not inconsistent with law which the organizers determine to include including any provisions that are required or are permitted to be set forth in the limited liability company operating agreement.

10 Signature of each organizer

Cheryl A Hansen

CHERYL A HANSEN
(Add additional lines if necessary)

Date January 23, 2007

FILING INSTRUCTIONS

- 1 File two copies of this form: the original and either a duplicate original or a conformed copy.
- 2 If space on this form is not sufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form, or prepare this using a computer disk which will allow for expansion of the space on the form.
- 3 This form must be accompanied by the filing fee of \$110.00 payable to the Secretary of State.

Return to: Secretary of State
P O Box 11350
Columbia, SC 29211
- 4 The first annual report for a Limited Liability Company must be delivered to the Secretary of State between January first and April first of the calendar year after which the Limited Liability Company was organized or the foreign company was first authorized to transact business in South Carolina. Subsequent annual reports must be delivered to the Secretary of State no later than three and one-half months after the end of the limited liability company's taxable year.

NOTE

THE FILING OF THIS DOCUMENT DOES NOT, IN AND OF ITSELF, PROVIDE AN EXCLUSIVE RIGHT TO USE THIS CORPORATE NAME OR IN CONNECTION WITH ANY PRODUCT OR SERVICE. USE OF A NAME AS A TRADEMARK OR SERVICE MARK WILL REQUIRE FURTHER CLEARANCE AND REGISTRATION AND BE AFFECTED BY PRIOR USE OF THE MARK. FOR MORE INFORMATION, CONTACT THE TRADEMARKS DIVISION OF THE SECRETARY OF STATE'S OFFICE AT (803) 734-1728.

Form Revised by South Carolina
Secretary of State, January, 2000

Aug 15 2016

REFERENCE ID: 1608150916179

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

AGENT'S STATEMENT OF CHANGE OF ADDRESS FOR SERVICE OF PROCESS

Pursuant to Section 33-44-109 of the South Carolina Code of Laws, as amended, the undersigned registered agent submits the following information for the purpose of changing the address of the agent for service of process of the following limited liability company in the State of South Carolina

- 1 The name of the limited liability company is

MRR PICKENS, LLC

- 2 The state of organization is

SOUTH CAROLINA

- 3 The date it was organized or authorized to transact business in South Carolina is

1/24/2007

- 4 The street address of the current agent for service of process is

5000 Thurmond Mall Boulevard
Columbia, SC 29201

- 5 The street address to which the agent for service of process is to be changed is

1703 Laurel Street
Columbia, SC 29201

- 6 The name of the company's current agent for service of process is

CORPORATION SERVICE COMPANY

- 7 The address of the registered office and the address of the business office of the registered agent, as changed, will be identical

- 8 The above named limited liability company has been notified of the change

Dated November 30, 2007

CORPORATION SERVICE COMPANY

John H. Polletier

John H Polletier
Assistant Vice President

1 COPY

080116-0228
MRR PICKENS, LLC
FILED: 12/05/2007
Filing Fee \$10.00 ORIG
Mark Hammond
South Carolina Secretary of State

024114

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Pickens County,

Petitioner,

vs.

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

Respondents.

NOTICE OF APPEARANCE

DOCKET NO. 16-ALJ-07-0164-CC

PLEASE TAKE NOTICE I, Allen Keith McAlister, Jr., and Jessica J.O. King of Williams Mullen law firm and Robert F. Goings of the Goings Law Firm, LLC will appear in the above-captioned matter on behalf of Respondent MRR Pickens, LLC.

Respectfully submitted this 1st day of June, 2016.

WILLIAMS MULLEN



A. Keith McAlister, Jr. (S.C. Bar # 78213)
Jessica J.O. King (S.C. Bar # 11202)
1441 Main Street, Suite 1250
Columbia, South Carolina 29201
Telephone: (803) 567-4000
Facsimile: (803) 567-4601
Email: kmcalister@williamsmullen.com
Email: jking@williamsmullen.com

GOINGS LAW FIRM, LLC

Robert F. Goings (S.C. Bar # 74855)

Goings Law Firm, LLC
914 Richland Street, Suite A-101
Columbia, South Carolina 29201
Telephone: (803) 350-9230
Facsimile: (877) 789-6340
Email: rgoings@goingslawfirm.com

**ATTORNEYS FOR RESPONDENT
MRR PICKENS, LLC**

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,

Petitioner,

vs.

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

Respondents.

CERTIFICATE OF SERVICE

DOCKET NO. 16-ALJ-07-0164-CC

I hereby certify that on the 1st day of June, 2016, in Columbia, South Carolina, a copy of the foregoing Notice of Appearance was served on all parties to this matter by hand delivery or depositing the same in the United States Mail, postage paid, and addressed as follows:

The Honorable Shirley C. Robinson
Administrative Law Judge
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

W. Marshall Taylor, Jr., Esquire
Office of the General Counsel
S.C. Department of Health and
Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Gary W. Poliakoff, Esquire
Poliakoff & Associates
P.O. Box 1571
Spartanburg, South Carolina 29304



Allen Keith McAlister, Jr.

S.C. Bar I.D. No: 78213

WILLIAMS MULLEN

1441 Main Street, Suite 1250

Columbia, SC 29201

Telephone: 803.567.4604

Facsimile: 803.567.4601

kmcalister@williamsmullen.com

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,	)	DOCKET NO. 16-ALJ-07-0164-CC
	)	
Petitioner,	)	
	)	
vs.	)	RESPONDENT DHEC'S REPLY TO
	)	PETITIONER PICKENS COUNTY'S
South Carolina Department of Health and	)	AMENDED AND SUPPLEMENTAL
Environmental Control and MRR Pickens,	)	MEMORANDUM IN OPPOSITION
LLC,	)	TO DHEC'S MOTION TO DISMISS
	)	
Respondents.	)	
	)	

TO: GARY J. POLIAKOFF, ESQUIRE, ATTORNEY FOR PETITIONER, PICKENS COUNTY, AND JESSICA J.O. KING, ESQUIRE, ATTORNEY FOR RESPONDENT, MRR PICKENS, LLC:

Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") replies to Petitioner Pickens County's ("County") Amended and Supplemental Memorandum in Opposition to DHEC's Motion to Dismiss ("Motion"), as follows:

I. INTRODUCTION

On August 18, 2016, Petitioner County filed an Amended and Supplemental Memorandum in Opposition to DHEC's Motion to Dismiss, filed on July 28, 2016 with the Administrative Law Court ("ALC" or "Court"), upon the following grounds:

- 1) lack of jurisdiction; and
- 2) for County's failure to exhaust its administrative remedies.

DHEC hereby incorporates by reference all arguments raised in its Motion to Dismiss and in MRR Pickens LLC's Motion to Dismiss that was filed with the ALC on July 29, 2016.

The subject of this matter is the Highway 93 Class 2 Landfill ("Landfill"), owned by

MRR Pickens, LLC ("MRR"). The landfill is located at 2180 Greenville Highway, Liberty, South Carolina, in an unincorporated area of Pickens County. On November 3, 2008, the Department issued Permit No. LF2-00003 to MRR for the operation of a Class 2 landfill, and on August 10, 2015, the Department issued a "minor" modification to MRR's Class 2 landfill permit.

Petitioner County requested review of the August 10, 2015 issuance of said modification to the DHEC Board on March 23, 2016, which was 225 days after the issuance of the modification, by letter, to MRR. Although Petitioner County was not notified of the issuance at the same time that MRR was issued the modification, by their own admission (see Memo in Opposition, Page 4), "[i]n mid-December, 2015, . . . Pickens County . . . heard rumors of major changes" and received "some documents and information regarding the modification." In addition, around that same timeframe, on December 15, 2015 during a meeting with the Department, the Department informed Pickens County of the issuance of the permit modification to MRR. However, even after becoming aware of the modification, constructively in mid-December, and actually on December 15, 2015, County failed to request review of the Department's modification decision per statutory requirements, which are found at S.C. Code Ann. § 44-1-60(E)(2) (Supp. 2007). County waited approximately 98 days to file its request for review with the DHEC Board, even after becoming constructively aware of the modification and having actual notice of the modification in mid-December 2015.

II. REPLY ARGUMENTS

A. County's Memorandum in Opposition is not responsive to DHEC's Motion to Dismiss

Petitioner County's Memorandum in Opposition to DHEC's Motion is not a response to

the Motion, but instead, it is County's attempt to litigate the merits of the case via its response to the Motion. Since it has not yet been determined that this matter can and will be heard by the ALC, and because the ALC does not have subject matter jurisdiction to hear the merits of this case, County's response to DHEC's Motion is inappropriate. County used the majority of its response to the Motion (approximately 21 pages, Pp. 2-22) to include portions of discovery obtained from a related civil case between MRR and County, and to argue the merits of this pending case instead of directly responding to the grounds DHEC raised as reasons why this matter should be dismissed. This tactic is County placing the cart before the horse. The first order of business should be the ALC deciding whether this case should be dismissed. Time for providing the Court with testimony and evidence regarding the merits of this case will only be appropriate after the Court has ruled on Respondents' Motions to Dismiss. Moreover, County has not offered any excuse whatsoever showing that it had good cause for failing to adhere to statutory requirements that govern appeals by timely requesting a review by the DHEC Board of the Department's decision to issue a modification to MRR's permit.

B. Inaccurate Information is Contained in County's Response to DHEC's Motion

Petitioner County misleadingly and inaccurately states on Page 4 of its Memorandum in Opposition, footnote 1, that "no formal Notice to Pickens County, nor any mailing, has occurred." First, the use of the word "formal" by County is baffling. The Department is unclear of the word's meaning in the way that County has used the word. The statute governing appeals for the Department does not make "formal" notice of a department decision a requirement. Section 44-1-60(E)(2) of the South Carolina Code, the statute that addresses notice, provides the following:

The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person.

The word "formal" is not stated anywhere in this statutory provision, nor anywhere else in the chapter. Second, County's statement is inaccurate when it states that "nor any mailing, has occurred" as it refers to having received notice of the MRR modification. On January 11, 2016 at 1:26 PM, Mr. Gerald Wilson, Pickens County Administrator, requested via e-mail (**Attachment A**) a copy of the August 10, 2015 approval letter that was issued to MRR. A copy of the requested letter was sent on that same day, January 11, 2016 at 3:39 PM to Mr. Wilson via e-mail (**Attachment A**), from DHEC personnel, Mr. Timothy Eleazer. Therefore, County's contention that no mailing occurred is not correct. Once requested from County, the Department provided the letter that granted MRR's modification of its landfill permit. In addition, in all probability, the letter had been provided on an earlier date, when the Department fulfilled a Freedom of Information Act ("FOIA") request for County regarding this matter. This request was fulfilled, per the e-mail from Mr. Wilson on January 11, 2016, during the week of January 4, 2016. Mr. Wilson stated in his January 11th e-mail that he "could not find the approval letter referenced in Kent's original press release in December." However, in all likelihood, since the files provided to County were in response to its FOIA request in regards to this matter, the approval letter was amongst the files provided by the Department the week of January 4th. Moreover, a copy of the approval that was provided to Mr. Wilson was additional actual notice of MRR's modification, as the Department had already informed County verbally of the modification during a meeting with County on December 15, 2015. Furthermore, again, "in mid-December, 2015, several staff of Pickens County" had "heard rumors of . . . changes," (see

Memorandum in Opposition, Page 4, Footnote 1), therefore, by County's own admission, it had received constructive notice of the modification in mid-December 2015.

The record is clear that County received both constructive notice (in mid-December 2015) and actual notice (both verbally - on December 15, 2015 - and in writing - on January 11, 2016) of the MRR modification, yet County chose to delay its request for a review of the department decision beyond the statutory period of fifteen (15) days. After receiving constructive notice and actual notice verbally of the department decision, County waited approximately 98 days to file its request for review of the decision with the DHEC Board. After receiving actual notice in writing of the MRR modification, County waited 71 days to file its request for review of the decision with the DHEC Board. In these instances of delay, County waited approximately 83 days (after constructive and actual verbal notice) and 56 days (after actual written notice) beyond the 15-day statutory period to file its request for review with the DHEC Board. This delay is unacceptable and is not allowed by statute. Even if County did not receive notice at the same time as MRR, the record shows that it did receive notice subsequent to the notice to MRR and the notice was both constructive and actual. The record also clearly shows that County waited an excessive number of days to request review of the department decision to issue a permit modification to MRR, days that were far beyond the statutory period for appeal. Therefore, County's appeal is untimely and must be dismissed.

C. County's "Legal Argument" Section in its Memorandum in Opposition is Devoid of any Reasonable Explanation or Excuse for the Delay in filing its Request for Review with the DHEC Board

County contends on Page 22 of its Memorandum in Opposition that "the effect of mischaracterizing the changes as "minor" was that the public and all adjoining landowners were deprived of . . . any opportunity to request review of the Department Decision." Here, it appears

that County is advocating for people who are not a party to this litigation. Therefore, the Department will not address County's argument in this Reply.

1.) County's due process argument - inaccurate and misleading.

County, who is a party in this litigation, again fails to address the grounds raised by the Department as reasons why this matter should be dismissed:

1) lack of jurisdiction; and

2) for County's failure to exhaust its administrative remedies,

but County instead claims that the issue "is one of fundamental due process being denied to . . . Pickens County. . . ." (Memorandum in Opposition, P. 23). This statement is inaccurate and misleading. County further muddles the issues by stating on Page 23 of the Memorandum in Opposition that "the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion," quoting from Hooper v. Ebenezer Senior Services & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009). This reference is misleading and misplaced, as the motion being referenced in the Hooper case is a summary judgment motion, not a motion to dismiss. Similarly, County's reference to the case of Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004) is another reference that is actually in regards to summary judgment, not a motion to dismiss. The actual quote states:

"Furthermore, since it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." Helena, quoting Baughman v. Ann. Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 547, 543 (1991).

Here, if County is deprived of a trial, it would not be upon disputed factual issues, but rather

upon its failure to adhere to administrative procedure requirements and file a statutorily timely request for review with the DHEC Board, which such failure divested the ALC of its authority to hear this matter.

The issue in this instance is not one of due process because due process means "an orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case." Kazubowski v. Kazubowski, 45 Ill.2d 405, 259 N.E.2d 282, 290 (1970). County was afforded all of the foregoing but divested itself of its due process rights because it failed to exhaust its administrative remedies by adhering to the statutory appeal requirements for review of a department decision. County received actual and constructive notice of MRR's modification and if it had timely filed its request for review with the DHEC Board, instead of delaying its filing by approximately 83 days beyond the statutory deadline for appealing a department decision, then County would have preserved its "opportunity to be heard and to enforce and protect" its rights before a court having power to hear and determine the case." (See Kazubowski 259 N.E.2d at 290). However, because County did not timely file its request for review of the department decision, it did not protect its rights before the ALC, and divested the ALC with the power to hear and determine the case. Thus, due process is not the issue here. The only issue is that the ALC lacks jurisdiction to hear this matter because County did not timely file its appeal, and therefore, the ALC is divested of subject-matter jurisdiction that would enable it to hear and determine this matter. In fact, for the ALC to hear this matter, its jurisdiction must be properly invoked. See Botany Bay Marina, Inc. v. Townsend, 296 S.C. 330, 372 S.E.2d 584 (1988) (holding that a party's failure to file an appeal of a zoning decision **within the statutory time period** divested the board of adjustment of jurisdiction to hear the

appeal), overruled on other grounds by Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995). (*Emphasis added*). Burnett v. S.C. State Highway Dep't., 252 S.C. 568, 167 S.E.2d 571 (1969) (holding that a landowner's failure to timely appeal a condemnation decision by the Highway Department deprived the reviewing court of jurisdiction to hear the appeal.) The Court may not relieve a party from failure to timely file an appeal due to mistakes, inadvertence or excusable neglect. Burnett, 167 S.E.2d at 571. By County's inaction, it failed to take advantage of its right to judicial review of this matter. Zaman v. S.C. State Bd. of Medical Exam'rs, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) ("One cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it"). Therefore, the ALC has no choice but to find that County failed to properly invoke the Court's jurisdiction and to conclude that this matter must be dismissed.

2.) County's equitable tolling argument - inaccurate and misleading.

The section entitled "Equitable Tolling" on pages 23-28 in County's Memorandum in Opposition is another section that is significantly misleading and inaccurate. County is correct when it states that "equitable tolling" is judicially created and that it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. However, what County fails to convey is that "the party claiming the statute of limitation should be tolled bears the burden of establishing sufficient facts to justify its use." Hooper 687 S.E.2d at 115, *quoting* Ocana v. Am. Furniture Co., 135 N.M. 539, 91 P.3d 58, 66 (2004). Furthermore, "[T]he party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief.") 54 C.J.S. *Limitations of Actions* § 115. County has not established sufficient facts nor a compelling basis to justify the use of "equitable tolling." The Ocana case further states that "[e]quitable tolling typically applies in cases where a

litigant was prevented from filing suit because of an extraordinary event beyond his or her control." Hooper 687 S.E.2d at 116, *quoting* Ocana, 91 P.3d at 66. County has not stated in its response to DHEC's Motion any extraordinary event beyond its control that prevented it from filing a request for review in adherence with the statutory deadline for filing such appeal. In fact, as already stated, County has failed to address whatsoever either of DHEC's grounds for dismissal.

County further attempts to assert in the "Equitable Tolling" section that it was substantially prejudiced by the fact that the Department did not initially notice it with the MRR modification. However, again, this assertion is inaccurate and misleading. County has not been substantially prejudiced because it has taken affirmative action against MRR implementing its modification to place a liner in its MRR Pickens landfill ("Landfill"). In fact, in early January 2016, County suspended the land use permit granted for MRR in Pickens County after it learned of MRR's plans to use the landfill for coal ash disposal. In addition, County was instrumental in the passing of a South Carolina law, S.C. Code Ann. § 58-27-255 (2016) (**Attachment B**), which prohibits coal ash from being disposed of into a Class Two (construction and demolition debris) landfill - only a Class Three (municipal solid waste) landfill, with some exceptions. The law was ratified on February 25, 2016, and approved on March 2, 2016. Thus, MRR is prohibited from disposing of coal ash into their Landfill located in Pickens County. So, one would be hard-pressed to show substantial prejudice from a Department decision that the Department rescinded, and also one where County has taken affirmative and definitive measures to ensure that the modification issued by DHEC is not implemented.

County further argues in the "Equitable Tolling" section, while citing Leventis v. South

Carolina Dept. of Health and Envtl. Control, 340 S.C. 118, 530 S.E.2d 643 (S.C. App. 2000), that the Court recognized that it would overturn agency decisions in a number of circumstances. However, what County omits from the conversation is that a case can only be overturned if it is able to survive a motion to dismiss. County statement from Leventis about an overturn of agency decisions can only occur after a case is fully heard by a quasi-judicial or judicial body that has the authority to hear the case. Here again, County is placing the cart before the horse and making a merits argument when it should be addressing the grounds for dismissal that DHEC has asserted. In its "equitable tolling" argument, County continues to claim that it is advocating for people who are not parties to this case and that themselves, as well as these other people have been "severely prejudiced" in regards to this matter, yet County again fails to communicate how it has been severely prejudiced. The fact remains, and has not been disputed by County, that it received constructive and actual notice of MRR's modification. A simple adherence to the statutory deadline for appealing such modification would have afforded County an opportunity to be heard and would have vested the ALC with the authority of subject-matter jurisdiction over this matter. Having not adhered to the statutory deadline for the filing of administrative appeals, County lost its right to have this matter heard before the ALC.

On page 25 of County's Memorandum in Opposition, it references Footnote 14 in the Leventis case, which states that DHEC was required to satisfy the notice requirement for a public hearing and that because this did not occur that the Sierra Club was excused from requesting a hearing. Here, again, is just one more misleading statement by County. This statement perpetuates the idea that because DHEC did not initially notice County of MRR's modification that DHEC's action exonerates County from either timely filing a request for review or from filing a request for review at all. This is not what the Court was suggesting in Leventis, and

surely will not be the outcome in this matter. One can only assume that Phil Leventis, the petitioner in the Leventis action, timely filed for a review of DHEC's decision to promulgate hazardous waste regulations addressing financial assurances for environmental impairment without proper notice and opportunity for public comment, because the Court's statement about the Sierra Club being excused from requesting a hearing came after a lower court had heard the merits of the case. The hearing referred to in the Leventis case was not a hearing before the Board or before the ALC, but was a reference to a request for a public hearing for citizens to be informed about the hazardous waste regulations before the regulations were promulgated. County, by invoking the Leventis case, is comparing apples to oranges, which is inappropriate.

D. There is No Need for Discovery Related to the Motion to Dismiss and for a Full Hearing by this Court.

Contrary to County's assertion that discovery is needed regarding issues pertinent to the Department's Motion, the Department strongly disagrees. Supported by County's Memorandum in Opposition, the Court can see that County has already engaged in substantial discovery, albeit in a related MRR and Pickens County case, that has already delved into the issues of minor vs. major modification. In addition, it would be premature to allow discovery of matters concerning proof of prejudice to the public and all adjoining landowners, when members of the public and all adjoining landowners are not, at the present time, parties to this litigation. Moreover, any prejudice that has been suffered or will be suffered by County should have already been articulated by County, but no such articulation has occurred. Furthermore, the Department struggles to understand how discovery on any of these issues prior to a hearing on DHEC's Motion will aid the Court in determining if County failed to exhaust its administrative remedies by its untimely filing of its request for review to the DHEC Board. Therefore, the Department is

opposed to any discovery being conducted prior to this Court ruling on Respondents' Motions to Dismiss.

III. CONCLUSION

The majority of the arguments raised in Petitioner County's response to DHEC's Motion to Dismiss were inaccurate and misleading, and failed to address the two grounds that DHEC raised in its Motion: lack of jurisdiction of the ALC; and failure of County to exhaust its administrative remedies. County also failed to offer any reasonable excuse or explanation for why it failed to file its request for review in adherence of statutory deadlines.

THEREFORE, pursuant to the above-stated grounds for complete dismissal of DOCKET NO. 16-ALJ-07-0164-CC and the grounds stated in DHEC's Motion to Dismiss filed on July 28, 2016, Respondent DHEC respectfully requests that this matter be dismissed with prejudice.

Respectfully submitted,

Etta R. Williams Linen

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Claire Prince, Esquire
Special Counsel for SC DHEC

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Tel: 803/898-3350
Fax: 803/898-3367

August 30, 2016
Columbia, South Carolina

ATTACHMENT “A”

Jason Anders

From: Gerald Wilson
Sent: Tuesday, March 15, 2016 3:29 PM
To: Jason Anders
Subject: FW: Question
Attachments: Highway 93 Landfill Final Permit Mod Alt Liner.pdf

Please Print

Gerald

From: Eleazer, Timothy [mailto:eleazetm@dhec.sc.gov]
Sent: Monday, January 11, 2016 3:39 PM
To: Gerald Wilson; Litton, Joan F.
Cc: Coleman, Kent M.; Koon, Justin; York, Karla A.
Subject: Re: Question

Mr. Wilson,

As requested, please find attached a copy of the August 10, 2015 permit approval.

Let me know if you should have any questions.

Tim Eleazer
Mining and Solid Waste Permitting Section
Bureau of Land and Waste Management
(803) 898-1374

From: Gerald Wilson <geraldw@co.pickens.sc.us>
Sent: Monday, January 11, 2016 1:26 PM
To: Litton, Joan F.
Cc: Coleman, Kent M.; Eleazer, Timothy; Koon, Justin
Subject: RE: Question

Joan

Thanks for the update. I also appreciate the files that were sent over last week. While reviewing the files I could not find the approval letter referenced in Kent's original press release in December. Kent stated that the permit was modified to allow the upgraded liner design on August 10, 2015. Would it be possible to get a copy of the approval letter?

Sincerely,

Gerald

ATTACHMENT “B”

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

(A138, R142, H4857)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 58-27-255 SO AS TO REQUIRE COAL COMBUSTION RESIDUALS RESULTING FROM THE PRODUCTION OF ELECTRICITY TO BE PLACED IN A CLASS 3 LANDFILL AND TO PROVIDE EXCEPTIONS.

Be it enacted by the General Assembly of the State of South Carolina:

Coal combustion residuals disposal

SECTION 1. Article 1, Chapter 27, Title 58 of the 1976 Code is amended by adding:

"Section 58-27-255. (A) Coal combustion residuals that result from an electrical utility, an electric cooperative, a governmental entity, a corporation, or an individual producing electricity for sale or distribution by burning coal must be placed in a commercial Class 3 solid waste management landfill, unless the coal combustion residuals are:

- (1) located contiguous with the electric generating unit;
- (2) intended to be beneficially reused;
- (3) placed into beneficial reuse; or
- (4) placed in an appropriate landfill which meets the standards of the Department of Health and Environmental Control Regulation 61-107, and that is owned or operated by the entity that produced the electricity which resulted in the coal combustion residuals.

(B) The 'beneficial reuse' of coal combustion residuals, as used in this section, is subject to the applicable regulations as promulgated by the Department of Health and Environmental Control."

Other provisions or requirements unaffected

SECTION 2. Nothing in this act affects any other provisions or requirements of law or regulation applicable to coal combustion residuals.

Provisions to sunset in five years

SECTION 3. The provisions of this act are repealed five years from the act's effective date, unless reenacted or otherwise extended by the General Assembly.

Time effective

SECTION 4. This act takes effect upon approval by the Governor and applies to the disposal of coal combustion residuals placed in a landfill on or after that date.

Ratified the 25th day of February, 2016.

Approved the 2nd day of March, 2016.

This web page was last updated on March 8, 2016 at 11:51 AM

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,

Petitioner,

v.

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

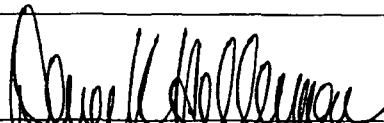
Respondent.

Docket No. 16-ALJ-07-0164-CC

CERTIFICATE OF SERVICE

I, Donna K. Hellerman, Administrative Legal Assistant with the South Carolina Department of Health and Environmental Control, hereby certify that I have this 30th day of August, 2016 served the foregoing *South Carolina Department of Health and Environmental Control's Reply to Pickens County's Amended and Supplemental Memorandum in Opposition to DHEC's Motion to Dismiss*, upon all parties and counsel of record by placing a copy of same in an envelope and depositing it in the U.S. Mail, first-class, with sufficient postage paid, at the address indicated below:

Gary J. Poliakoff, Esquire Poliakoff & Associates Post Office Box 1571 Spartanburg, SC 29304	Jessica J. O. King, Esquire Allen K. McAlister, Jr., Esquire Williams Mullen P.O. Box 8116 Columbia, SC 29202
Kenneth S. Roper, Esquire Roper Law Firm Post Office Box 246 Pickens, SC 29671	Robert F. Goings, Esquire Goings Law Firm, LLC 914 Richland Street, Suite A-101 Columbia, SC 29201


Donna K. Hellerman

August 30th, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2017-000066

RECEIVED
JAN 22 2018
SC Court of Appeals

Pickens County,

Appellant,

vs.

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

Respondents.

RECORD ON APPEAL
Volume 2 of 2

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,	)	
	)	Docket No. 16-ALJ-07-0164-CC
Petitioner,	)	
	)	
vs.	)	RESPONDENT MRR PICKENS, LLC'S
	)	NOTICE OF MOTION AND MOTION
South Carolina Department of Health	)	TO DISMISS
and Environmental Control and MRR	)	
Pickens, LLC,	)	RULES 11, 19 & 38 SCALCR and RULE
	)	12(b)(1) SCRPC
Respondents.	)	

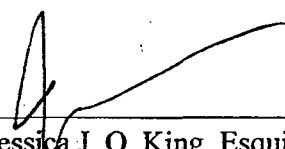
TO: GARY J. POLIAKOFF, ESQUIRE, ATTORNEY FOR PETITIONER PICKENS COUNTY, AND ETTA R. WILLIAMS LINEN, ESQUIRE, ATTORNEY FOR RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

YOU WILL PLEASE TAKE NOTICE that Respondent MRR Pickens, LLC ("MRR Pickens"), by counsel and pursuant to South Carolina Administrative Law Court Rules 19 and 38, Rule 12(b)(1) of the South Carolina Rules of Civil Procedure ("SCRPC"), and S.C. Code Ann. §§ 44-1-60(A)-(E) (Supp. 2015), and, will move before the Administrative Law Court ("ALC" or "Court") as soon after service hereof as counsel may be heard, for an Order dismissing with prejudice the Request for a Contested Case Hearing filed in this matter on May 19, 2016, by Petitioner Pickens County ("Petitioner" or "Pickens County"). The grounds for dismissal are as follows: (1) the Court lacks subject matter jurisdiction because the Petitioner did not file its Request for Final Review to the Board of the South Carolina Department of Health and Environmental Control ("DHEC Board") within the statutorily required fifteen day time frame; and (2) the Court lacks subject matter jurisdiction because the Petitioner failed to serve its Request for a Contested Case Hearing on Respondent MRR Pickens within thirty days of actual or constructive notice as required by Rule 11 of the SCALCR. In support of its Motion

to Dismiss, Respondent MRR Pickens respectfully refers the Court to MRR Pickens, LLC's Memorandum in Support of Motion to Dismiss filed contemporaneously herewith.

WHEREFORE, Respondent MRR Pickens respectfully requests that the Court enter an Order dismissing Petitioner Pickens County's Request for a Contested Case Hearing with prejudice, thereby upholding the modification issued by the Department to MRR Pickens for its Class 2 Solid Waste Permit ("DHEC Permit LF2-00003") on August 10, 2015. Furthermore, MRR Pickens requests this Court stay all discovery until a decision on this Motion can be issued.

Respectfully submitted, this the 29 day of July, 2016.



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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Pickens County,	)	
	)	Docket No. 16-ALJ-07-0164-CC
Petitioner,	)	
	)	
vs.	)	RESPONDENT MRR PICKENS, LLC'S
	)	MEMORANDUM IN SUPPORT OF
South Carolina Department of Health	)	MOTION TO DISMISS
and Environmental Control and MRR	)	
Pickens, LLC,	)	
	)	
Respondents.	)	

Respondent MRR Pickens, LLC ("MRR Pickens") by counsel, and pursuant to Rules 11, 19, and 38 and of the Administrative Law Court Rules (SCALCR), Rule 12(b)(1) of the South Carolina Rules of Civil Procedure ("SCRCP"), and S.C. Code Ann. §§44-1-60(A)-(E), moves for dismissal with prejudice of Petitioner Pickens County's Request for a Contested Case Hearing on the grounds the Court lacks subject matter jurisdiction because: (1) the Petitioner did not file its Request for Final Review to the Board of the South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") within the statutorily required fifteen day time frame; and (2) the Petitioner failed to serve MRR Pickens with its Request for a Contested Case Hearing within thirty days of actual or constructive notice of the DHEC Board's Final Agency Decision as required by Rule 11 of the SCALCR.

FACTS

A. Class 2 Solid Waste Permit LF2-00003

On November 3, 2008, the Department issued Solid Waste Permit LF2-00003 to MRR Pickens to construct and operate a Class 2 Landfill on property located at 2180 Greenville

Highway, Liberty, South Carolina, Pickens County (the “Highway 93 Landfill”). On March 30, 2015, MRR Pickens applied for a modification to Permit LF2-00003 for the option to install a liner and associated leachate collection system. [Exhibit A; Highway 93 Landfill Application for Minor Permit Modification (March 30, 2015)]. On August 10, 2015, the Department staff issued a “Minor Modification” to Permit LF2-00003, allowing MRR Pickens the option to install a liner and associated leachate collection system in the Highway 93 Landfill (the “Minor Permit Modification Decision”). [Exhibit B; Minor Permit Modification (August 10, 2015)].

Prior to issuing the Minor Permit Modification Decision, the Department did not provide for public notice or a comment period on its decision because DHEC determined that the requested modification qualified as “minor”; public notice and comment are only required for “Major” modifications per Reg. 61-107.19, Part I, B, 48a. [Exhibit C; Initial Staff Response to Request for Review, p. 1 (April 16, 2015)]. DHEC mailed the Minor Permit Modification Decision to MRR Pickens as the applicant on August 10, 2015. *Id.* DHEC staff did not mail the Minor Permit Modification Decision to Petitioner on August 10, 2015. *Id.* Prior to the Department’s issuance of the Minor Permit Modification, Pickens County had not requested in writing via certified mail, electronic mail or by any other method, to be notified by the Department of any decisions relating to Permit No. LF2-00003. *Id.* at pp. 1-2.

B. Pickens County’s Knowledge of the Permit Modification Decision

Pickens County had actual knowledge of the Minor Permit Modification in December of 2015 and received a copy of it in January of 2016, as follows:

- In December of 2015, Pickens County filed a Freedom of Information Act request with the Department for the MRR Pickens permit file and requested a meeting to discuss

Permit No. LF2-00003 [**Exhibit D**; Affidavit of Gerald Wilson, CA No: 2016-CP. 39-100 (Feb. 17, 2016)];

- On December 15, 2015, DHEC staff met with Pickens County representatives and discussed the August 10, 2015 Minor Modification Permit Decision [*Id.* and **Exhibit C** - Att. 4, Affidavit of Joan F. Litton (April 15, 2016)];
- On January 11, 2016, DHEC sent Pickens County a copy of the Minor Permit Modification Decision via Electronic delivery to Gerald Wilson [**Exhibit E**; Electronic Mail from Tim Eleazer of DHEC to Gerald Wilson of Pickens County (Jan. 11, 2016)];
- On January 11, 2016, Pickens County issued a Land Use Approval Termination Letter to MRR Pickens and informed it of its knowledge of the Minor Permit Modification Decision. [**Exhibit F**; Letter from Pickens County to MRR Pickens (January 11, 2016)];
- On February 17, 2016, Gerald Wilson, an employee of Pickens County signed a sworn affidavit used as an exhibit in a Civil Action in the Court of Common Pleas for the Thirteenth Judicial District; CA No: 2016-CP-39-100 (Feb. 17, 2016)[**Exhibit D**]; and,
- On February 18, 2016, Petitioner attached a copy of the August 10, 2015, Minor Permit Modification Decision as Exhibit 12 to a pleading in CA No: 2016-CP-39-100 [**Exhibit G**; Pickens County's Response to Request for Emergency Preliminary Injunction; List of Exhibits and Exhibit 12 Minor Permit Modification Decision (February 18, 2016)(Other Exhibits Excluded)].

Therefore, Petitioner had actual and constructive notice of the Minor Permit Modification Decision on December 15, 2015; January 11, 2016; February 17, 2016; and at the latest, on February 18, 2016 (the date it used the Minor Permit Modification Decision as an Exhibit in a

State court proceeding). DHEC electronically mailed the decision to Pickens County employee Gerald Wilson on January 11, 2016.

C. Procedural History

i. Petitioner's Request for a Final Review Conference to the DHEC Board

Petitioner filed with the DHEC Board its Request for Final Review ("RFR") of the DHEC staff Minor Permit Modification Decision on March 23, 2016. On April 16, 2016, DHEC staff submitted Initial Staff Response to Request for Review with the DHEC Board setting forth its position that the request was untimely. [Exhibit C]. The DHEC Board sent its Acknowledgment of the RFR to Petitioner and also to MRR Pickens to the attention of Christopher Roof, MRR Pickens, LLC, 5842 Faringdon Place, Suite 1, Raleigh, NC 27609 (the "Faringdon Raleigh Address") on April 6, 2016. [Exhibit H; DHEC Board Acknowledgement of RFR & Cert. of Service (April 6, 2016)]. The DHEC Board denied the RFR by letter dated April 21, 2016, making the Minor Permit Modification Decision the "Final Agency Decision." The Clerk of the DHEC Board served a copy of its decision denying Petitioner's RFR for Pickens County by sending it Certified U.S. Mail to, Gary W. Poliakoff, Esq. as counsel for Petitioner and on Respondent MRR Pickens, by sending it U.S. Mail to Christopher T. Roof, MRR Pickens LCC at the Faringdon Raleigh Address. [Exhibit I; DHEC Board Denial of RFR and certificate of Service (April 21, 2016)] MRR Pickens received the DHEC Board's Final Agency Decision denying the RFR on April 25, 2016 [Exhibit J; Affidavit of Christopher T. Roof.] The Faringdon Raleigh Address is the address listed on the cover page of the August 10, 2015, Minor Permit Modification [Exhibit B].

ii. Petitioner's Request for a Contested Case Hearing

On May 19, 2016, Petitioner mailed its Request for a Contested Case Hearing to the ALC. [Exhibit K; Pickens County's Request for Contested Case Hearing (May 19, 2016)]. Petitioner, through its counsel Gary R. Poliakoff, Esq., used the ALC Request For Contested Case Hearing Form to file its appeal and completed and signed the Proof of Service section as follows:

"I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing on all other parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):

Name and/or Agency Name: S.C.D.H.E.C.
Address: c/o Etta R. Williams Linen, Esq.
2600 Bull Street
Office of General Counsel
City, State and Zip: Columbia, SC 29201

Name and/or Agency Name: MRR Pickens, LLC
Address: 11743 Trails End Lane
City, State and Zip: Charlotte, NC 28078."

Id., p. 1

Petitioner thus purported to serve its Request for a Contested Case Hearing on Respondent MRR Pickens by mailing it to 11743 Trails End Lane, Charlotte, North Carolina 28078 ("the Trails End Charlotte Address"). The Trails End Charlotte Address is not and has not been associated with MRR Pickens since 2008. [Exhibit J] MRR Pickens does not have an office at the Trails End Charlotte Address nor does its affiliated company, MRR Southern, LLC have an office there. *Id.* A former employee of MRR Pickens, Ronald Gilkerson, used to own the parcel identified as 11743 Trails End Lane, Charlotte, North Carolina and he worked from that address for a short period of time in 2008. *Id.*; Exhibit L, Mecklenburg County, NC Real Estate

lookup (July 27, 2016); **Exhibit M**, Mecklenburg County, NC Tax Bill Search for Years 2008-2014)]. Ronald Gilkerson has not been employed by either MRR Pickens or MRR Southern since 2008. *Id.* MRR Pickens LLC's registered agent is listed on the South Carolina Secretary of State's website as Corporation Service Company, 1703 Laurel Street, Columbia, SC 29201. **[Exhibit N; Secretary of State Corporation Registration for MRR Pickens (July 27, 2016)]**

To date MRR Pickens has not been served with Petitioner's Request for a Contested Case Hearing in this matter. **[Exhibit J]** The first time that MRR Pickens received notice that the Request for a Contested Case Hearing had been filed with the Administrative Law Court was upon receipt of the ALC Notice of Assignment, mailed to MRR Pickens by the clerk of the ALC at the Faringdon Raleigh Address and received there on May 31, 2016. **[Exhibit J]** The record reflects MRR Pickens was not represented by counsel at any time during the Board RFR process and therefore, Petitioner attempted to serve the Request for a Contested Case hearing on MRR Pickens directly.

ARGUMENT

I. PETITIONER FAILED TO TIMELY FILE ITS REQUEST FOR REVIEW OF THE STAFF DECISION WITH THE DHEC BOARD PURSUANT TO 44-1-60(E)

Section 44-1-60 of the South Carolina Code provides the exclusive procedure for bringing a contested case regarding permitting or licensing actions taken by "DHEC". *A.O. Smith Corporation vs. SCDHEC and Town of McBee*, 2016 WL 2771749, (S.C.ALC (May 5, 2016)); S.C. Code Ann. § 44-1-60(A) (Supp. 2015). A DHEC staff decision on a permit becomes the "final agency decision" fifteen calendar days after it has been mailed to the permit applicant and other affected persons who have properly requested notification, unless an RFR is filed with the DHEC Board within that time frame. S.C. Code Ann. § 44-1-60(E)(1)-(2). If an RFR is filed, the Board has three choices: (1) decline in writing to review the staff decision, (2) do nothing and