THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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S.C. SUPREME COURT

Appellate Case No. 2020-000448

Pickens County,

Respondent,

vs.

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

Petitioners.

BRIEF OF RESPONDENT PICKENS COUNTY

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STATEMENT OF ISSUES ON APPEAL

I. Did the Court of Appeals correctly conclude that the Administrative Law Court erred in finding Pickens County failed to timely request a final review conference when it did not consider the impact of a misclassified modification and the requisite public notice and comment provisions mandated by regulation?

II. Did the Court of Appeals properly exercise its authority when it applied the standard of review provided by the Administrative Procedures Act and reversed because the Administrative Law Court's ruling was affected by an error of law?

INTRODUCTION

The issue presented in this appeal is a narrow one for the Court to decide—is the time frame for requesting a final review conference triggered if the Department of Health and Environmental Control (the Department) misclassifies a requested permit modification and fails to comply with the legally-mandated public notice and comment provisions? MRR Pickens, LLC (MRR) acknowledges that the underlying modification was a "non-publicly noticed decision" (Pet. Br. p. 7), which had the effect of foreclosing the County's (and the public's) awareness of the proposed modification, their ability to participate in the decision-making process, and their legally-entitled notice of such decision. The Court of Appeals rejected MRR and the Department's attempt to subvert these public notice and participation requirements and corrected the Department and the ALC's failure to properly classify the modification, which would have triggered substantial procedural safeguards. This Court should affirm that decision and require the Department to follow the law.

Pickens County and MRR entered into an agreement in 2008 for the construction of a Class Two landfill, for which the Department validly issued a permit. Approximately six years later, MRR began the process to substantially alter the design of the landfill approved in 2008, meeting privately with Department officials and neglecting to include the County (or the public). Making matters worse, the Department's treatment of the proposed modification evaded the usual notice and attendant opportunity to be heard on the proposed modification to Pickens County, adjacent property owners, and the general public. Pickens County ultimately learned of the existence of the permit modification *months after* it was issued. Despite the Department never providing the public notice and comment period required under the pertinent regulations, Pickens County requested a final review conference by the Department on March 23, 2016. The

Department denied the request, citing the expiration of the fifteen-day time frame listed in the statute, and Pickens County requested a contested case hearing before the Administrative Law Court (ALC).

In the hearing before the ALC, the Department and MRR moved to dismiss the case, relying on the County's purported failure to request a final review conference within fifteen days of the Department's decision on the permit modification while simultaneously arguing for the ALC to delay consideration of any evidence regarding whether the proposed modification was correctly classified as minor. Agreeing with MRR and the Department, the ALC dismissed the claims asserted by Pickens County without hearing testimony or accepting any evidence. However, the appropriate classification of the proposed permit modification and the resulting notice requirements is central to a determination of whether Pickens County was subject to the fifteen-day deadline.

Pickens County asserts the court of appeals correctly analyzed this issue and respectfully requests this Court affirm the decision of the court of appeals or dismiss the grant of certiorari as improvidently granted and allow this case to be remanded to the ALC for further proceedings on the validity of the permit.

STATEMENT OF FACTS

The Initial Plan for the Landfill:

In 2007, MRR was pursuing construction of a landfill at 2180 Greenville Highway in Liberty, Pickens County, South Carolina. **(R. pp. 412-21).** This pursuit included discussions and negotiations with Pickens County in order to accomplish compliance with the County's development standards and comprehensive plan. These discussions ultimately led to the parties executing a Development Agreement and Host Agreement for the landfill. **(R. pp. 412-21).** These agreements specify that MRR will develop and operate a "Construction and Demolition ('C&D') and Land Clearing Debris ('LCD') landfill" and that Pickens County will serve as the Host Local Government for such operation. **(R. pp. 402-11).** The Host Agreement requires MRR to comply with the Department's applicable rules and requirements and to simultaneously submit to Pickens County all reports submitted to DHEC. **(R. pp. 404)** ("All reports required to be submitted to DHEC by MRR Pickens, LLC must be simultaneously submitted to the County Administrator."). In both Agreements, waste disposal is limited to the types of materials designated in the Department regulations as "Class Two," such as C&D, LCD, and yard trash. **(R. pp. 404-06).**

Following execution of these agreements with the County, the Department issued MRR a Class 2 C&D landfill permit, Permit No. LF2-00003 ("2008 Permit"), on November 3, 2008. **(R. p. 422-27).** The 2008 Permit 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." **(R. 423 (emphasis added)).** 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. S.C. Reg. 61-107.19, Appendix I. Certainly, no materials akin to coal ash are listed; indeed, far less hazardous materials like tar sealant material are specifically excluded. *See id*. at note 3. The Host Agreement, Development Agreement, and 2008 Permit are consistent in terms of the nature of waste authorized for disposal.

The 2008 Permit was also in accord with Pickens County's Solid Waste Management Plan ("SWMP"), which is a local planning document required by state law. *See* S.C. Code Ann. § 44-96-80. Consistency with the SWMP is a necessary prerequisite to obtaining a landfill permit. S.C. Reg. 61-107.19, Part I, D(2). Pickens County's SWMP prohibits "Special Waste" from being deposited in Pickens County and excludes all Class Three landfills (designed to accept more dangerous and undesirable wastes) from being located in the County. **(R. pp. 399-401).** The SWMP contrasts Class Two Landfills with Class Three Landfills, which are designed to receive wastes such as sludge and incinerator ash. **(R. pp. 400).** MRR had not begun construction of the approved landfill when it sought the modified permit at issue here. **(R. pp. 141-42).**

The Modification Process Between MRR & DHEC:

In 2014 and 2015, MRR and the Department conducted a series of meetings and discussions regarding modifications to the landfill design in the 2008 Permit. **(R. pp. 266).** At no time during these meetings and interactions was Pickens County, neighboring property owners, the public, or anyone outside of MRR, its consultant, and the Department aware of, much less included in, the modification process. Neither MRR nor the Department sought to verify with Pickens County whether the design modifications under discussion would conform with the Pickens County SWMP, Host Agreement, or Development Agreement. During this period, MRR's engineering consultant submitted several engineering drawings and reports to the Department that reflect a plan to effectively convert the Class 2 landfill reflected in the 2008 Permit into a Class 3

landfill.[1] **(R. pp. 266).** Those reports reflect 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."* **(Id. (emphasis added)).**

The effect of the Department's determination that this would be a "minor modification" effectively eliminated public notice, review and comment by Pickens County, and the public, of this landfill design change that was certain to be highly controversial. **(R. pp. 287, lines 13-22).** The Department's regulations require "major" permit modifications to go through a rigorous permitting process, including the requirements for public notification and participation in the decision-making process. *See* S.C. Reg. 61-107.19, Part IV, Section I.2; S.C. Reg. 61-107.19, Part I, D(2). The culmination of these public notice and comment requirements would have been the Department's notice of department decision on the permit, published and mailed to affected persons along with "instructions on how to request a final review conference and the time frame for filing such a request." *Id.* at D(2)(g). Yet none of these requirements were followed in relation to the Permit Modification. Instead, acting under the "minor modification" designation, the Department did not provide public notice of the application; did not allow the public to review and comment upon the proposed modification; did not provide contemporaneous notice in any form to any member of the public; and did not provide any form of notice of the decision to Pickens County until months after the Permit Modification had been issued. **(R. pp. 542-43; 546; 550)**.

[1]In layman's terms, Class Three landfills are the most hazardous and obtrusive of the classes provided in DHEC's landfill regulations. As a consequence, these landfills require more stringent design specifications, larger buffers between environmental resources and neighboring property, and larger buffers between each other. *See* S.C. Reg. 61.107.19, Part V. Class Three landfills must have liners because the facilities can be used for disposal of municipal solid waste, industrial solid waste, sewage sludge, and incinerator ash. *Id.*

In reality, the modifications from the 2008 Permit can only be reasonably interpreted as "major," per the Department's regulatory definition. Thus, the Department's characterization of these modifications as "minor" was clearly erroneous as the court of appeals held. "Modification," under the landfill regulations, includes any "changes to a solid waste landfill." S.C. Reg. 61-107.19, Part I, B(48). The modification is then categorized as either "minor" or "major" by definition 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.

Id. (emphasis added). Under no conception of these words could the changes authorized by the Permit Modification be considered "routine" or "administrative."

Rather, on August 10, 2015, when the Department issued the Permit Modification to MRR, it authorized significant changes from the 2008 Permit, including: the addition of a landfill liner, which is a characteristic of Class Three landfills and is not present in any other Class Two landfill in the state, **(R. pp. 326-27)**; and elimination of language prohibiting "all other wastes" and replacement of that language with an allowance for "any other waste approved by the Department," **(*cf.* R. pp. 77; R. pp. 423)**. Because the Department misclassified the proposed modification as minor, neighboring property owners, Pickens County, and the public never received the requisite notice and never had the opportunity to review and comment on the proposed modification, much less be aware of it. Instead, the Department only sent the Permit Modification to MRR and its consultants. **(R. pp. 73; 331; 513).**

Pickens County's Involvement with the Landfill Modification:

Months after the Permit Modification had been issued, Pickens County finally learned that MRR might be changing the landfill design. **(R. pp. 341-42).** Pickens County officials then submitted a Freedom of Information Act request and sought a meeting with DHEC in an attempt to learn what was going on with the landfill. **(R. pp. 342-43).** On December 15, 2015, the Department met with County officials, including Gerald Wilson, the Director of Public Works, and orally informed them that the permit had been modified four months ago. **(R. pp. 542-43; 546).** It was after this meeting that Pickens County was provided a copy of the Permit Modification for the first time, by email. **(R. pp. 550).** However, Pickens County was informed directly by DHEC personnel that, because the Permit Modification was months old, there was nothing they could do and no right to appeal, because the modification decision process was already a done deal. **(R. pp. 162, lines 16-22**).

As Pickens County representatives were reading through the boxes of materials the Department eventually produced through FOIA, MRR filed a lawsuit in the Court of Common Pleas against Pickens County and members of the Pickens County Planning Commission on February 1, 2016. This Circuit Court case provided Pickens County with the opportunity to learn, through the deposition of Kent Coleman on March 8, 2016, that the permit modification was erroneously issued without the requisite public notice and opportunity for comment. In particular, Coleman acknowledged that the permitted landfill would be the only Class 2 landfill in the state to have a liner and the addition of the liner and the other changes in the modified permit rendered the design "very similar to a Class Three" landfill. **(R. pp. 291; 326-27)**. Coleman additionally confirmed the Department would have provided public notice in accordance with its "normal process" if the permit had been designated as a "major modification." **(R. pp. 287).**

Pickens County then requested the final review conference by the Department Board on March 23, 2016. **(R. pp. 203-14).** The Department denied the request, citing the expiration of the fifteen-day time frame listed in the statute, and Pickens County requested a contested case hearing before the ALC. **(R. pp. 200-02).** In the hearing before the ALC, the Department and MRR moved to dismiss the case under exhaustion of administrative remedy grounds, relying on the County's claimed failure to request a final review conference within fifteen days of the Department's issuance of the permit. **(R. pp. 215-221; 88-199).** Agreeing with MRR and the Department, the ALC granted the motions to dismiss. **(R. pp. 42-46).** The court of appeals reversed the dismissal, finding the ALC erred in failing to consider the Department and MRR's misclassification of the permit modification and the failure to provide the requisite public notice. **(R. pp. 9-14).** This Court granted MRR and the Department's petition for certiorari to review the court of appeals' decision.

STANDARD OF REVIEW

Under the APA, conclusions of law are reviewed *de novo* and "the 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 & Envtl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* "If the facts alleged and inferences deducible therefrom would entitle the plaintiff to

any relief, then dismissal under Rule 12(b)(6) is improper." *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012).

ARGUMENT

The primary question of law presented in this appeal is simple: whether the Department can evade the public notice and comment requirements and prevent the County—and the public—from participating in the decision-making process by intentionally misclassifying a permit modification as minor. The ALC erred in finding Pickens County failed to timely request review pursuant to section 44-1-60 without first determining if the requested permit modification was major or minor, and thus whether the Department complied with procedural safeguards of notice. The court of appeals corrected that error by concluding that the ALC erred in dismissing the County's claims without considering the Department's misclassification of MRR's permit modification and the resulting failure to provide the required statutory and regulatory public notice. Accordingly, Pickens County respectfully requests this Court affirm the court of appeals' decision.

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

The ALC's dismissal of this case was based on Pickens County's purported non-compliance with the filing limitations period set forth in section 44-1-60. **(R. pp. 42-46).** Section 44-1-60 covers the process and procedure through which Department Staff decisions (the initial decision relating to a permit or other license) can be appealed through the Department Board and then to the ALC in the form of a contested case. The ALC concluded that Pickens County did not appeal the Department's Staff decision on MRR's proposed permit modification to the Department Board within fifteen days, as required by section 44-1-60, rendering its appeal

untimely and requiring dismissal. **(R. pp. 44-45).** However, the ALC's rationale for dismissal was significantly flawed because it failed to undertake the necessary prerequisite analysis of whether the fifteen-day limitations period was triggered here. The time limitation set forth in section 44-1-60(E) is contingent on the Department's compliance with the preceding procedural and notice requirements in that section; the Department must first satisfy its obligations in noticing a permit decision under section 44-1-60 before the time limitation for challenging that permit decision is implicated. For the reasons that follow, the time limitation clearly was not triggered.

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

MRR and the Department focus their arguments on the County's actual notice of the issuance of the modified permit and erroneously assert that Pickens County received the same notice it would have received had it been classified as a major modification; this reliance on actual notice is misplaced and highlights the ALC's error in failing to conduct an evaluation of whether the modification was major or minor. **(Pet. Br. pp. 13-19).** First, section 44-1-60(B) mandates Department Staff to "comply with *all* requirements for public notice, receipt of public comments and public hearings *before* making a department decision." S.C. Code Ann. § 44-1-60(B) (emphasis added). Instead of adhering to this clear and unambiguous direction, the Department provided notice to Pickens County months after the fact and *only* of its approval of the modification to MRR's permit. **(R. pp. 73-79; 542-43; 550).**

Had the permit modification properly been treated as major, the Department's regulations would have required an extensive notice procedure to the public. First, MRR would have published notice in a newspaper of general circulation in the area of the proposed project of the filing of the *permit application* and then submitted an affidavit of publication of the public notice

to the Department. S.C. Reg. 61-107.19, Part I, D(2)(c)(1); S.C. Reg. 61-107, Part IV, Section H.3. A public notice must contain, in addition to other information, the nature of the proposed activity, a description of the proposed site or proposed major modification, and an explanation of the types of waste that will be accepted. *Id.* at Part I, D(2)(c)(2). Second, the Department would have sent by regular mail a notice of receipt of the permit application to all adjoining landowners. *Id.* at 61-107.19, Part I, D(c)(3). Next, the Department would have published a notice that the *draft permit* was ready for review in a newspaper of general circulation in the area of the proposed modified landfill and sent notice to affected persons who previously requested to be notified; the notice must list locations where the draft permit may be reviewed and the public could submit comments to the Department for a thirty-day period. *Id.* at Part I, D(e).

Additionally, upon receipt of written requests from a governmental subdivision or agency, ten individuals, or an association with at least ten members requesting a public hearing during the thirty-day comment period, the Department must hold a public hearing and publish the time, date, and location where it would be held. *Id.* at Part I(D)(f)(1-2). Finally, after the close of the comment period and any public hearing, the Department issues a Staff Decision, which must be sent by regular mail to all persons who commented in writing, all persons who attended the public hearing, and affected persons who requested to be notified. *Id.* at Part I(D)(g). The Department would also publish notice in a newspaper of general circulation in the area of the proposed landfill, with instructions on requesting a final review conference and the deadline for filing the request.[2] *Id.*

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2 The preceding framework for notice applies to major permit modifications for Class 2 and Class 3 permit modifications; if the proposed permit would allow the landfill to accept municipal solid waste, additional extensive notice procedures are required. *See* S.C. Code Ann. § 44-96-470; S.C. Reg. 61-107.19 Part V, Subpart H.3.a.

These regulations requiring several separate newspaper publications and separate instances of direct notice by mail to adjoining landowners and affected parties, and occurring at all stages of the permitting process from pre-application to final decision demonstrate the tremendous level of importance placed on public notice and input and transparency of agency decisions. *See* S.C. Reg. 61-107.19, Part I, D(2)(c)-(g). The most critical aspect of these regulations is the requirement that the Department and the landfill permit applicant must alert the public that a permit application has been submitted and is under consideration, so that an affected person can *then* request notification, submit comments, appear at public hearings, and receive a mailed copy of the final decision and instructions on requesting a final review conference and the applicable deadline under section 44-1-60(E).[3] One must ignore these notice provisions to assert that the County would have received the same actual notice for a properly classified major landfill permit modification. Counsel for the Department recognized as much at the hearing before the ALC on the motion to dismiss: "The Department concedes that if it was a major modification, then [counsel for the County] is absolutely correct. The Department did not follow the correct public notice procedures, but we did not issue a major modification, it was a minor modification." **(R. pp. 154, lines 19 to 24).** This concession by counsel highlights the ALC's error in concluding the County's request for final review conference was untimely without considering the requisite notice provisions had the modification been correctly classified as

[3] This aspect is particularly significant here, given MRR's representations to the County. During the time that the Department and MRR were meeting to modify the landfill permit, MRR informed the Pickens County Planning Commission during a January 2015 meeting that the land use and development details "are just the same" as when it obtained initial approval, which was for a Class 2 construction and demolition landfill. **(R. pp. 339).** Additionally, MRR told the Commission that a liner was not required for the intended landfill. **(R. pp. 340).**

major. The Department and MRR's failure to comply with the necessary notice provisions renders the issuance of the modified permit erroneous and a violation of the statute.

Beyond the clear noncompliance with the mandatory notice provisions, Pickens County should have been independently and contemporaneously notified by certified mail of the permitting decision. Section 44-1-60(E)(1) dictates the following as to notice of final permitting decisions: "Notice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and *affected persons who have requested in writing to be notified*." (emphasis added). This Court recognized in *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, however, that the formality of the requisite request to be notified should not be applied with blind rigidity and that the Department does not and has not applied that requirement strictly. 390 S.C. 418, 702 S.E.2d 246 (2010). The ALC and the court of appeals in earlier proceedings in *Coastal Conservation League* had "found that the League failed to avail itself of the right to be notified under § 44–1–60(E) because the League failed 'to make a formal request to be notified of a decision' and 'failed to request notification of the staff decision as delineated in section 44–1–60(E).'" 390 S.C. at 427, 702 S.E.2d at 251. While the League indeed had not explicitly and formally requested to be notified, this Court nevertheless reversed the conclusion that the League was not entitled to notice under section 44–1–60(E), noting: "DHEC never stated it followed a formal procedure as to how a party acquires 'affected persons who have asked to be notified' status. To the contrary, DHEC indicated it took an informal approach in deciding which parties it notified of its decision." *Id.* at 428, 702 S.E.2d at 252. As to whether the League had met this informal standard for notification, this Court explained:

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

Id. Pickens County was involved in the initial permitting process for this landfill at least to the extent of the Coastal Conservation League in that case, and Pickens County should and would have received notice of a properly classified major permit modification under section 44-1-60(E). **(R. pp. 400-21).** To insist that the County should have submitted an additional, formal written request for notice to DHEC under these circumstances constitutes the most extreme example of form over substance. The County had been extensively involved in the Department's issuance of the landfill permit to MRR in 2008. **(R. pp. 400-21)**. The County had both a Host Agreement and Development Agreement with MRR for the landfill, facts which the Department was aware of from the permitting process. **(R. pp. 110; 400-21).** The Department and MRR have acknowledged in these proceedings that the County was on the agency's mailing list for matters related to the original landfill permit. **(R. pp. 110).** Yet, when that permit was modified, the Department and MRR applied an overly formalistic interpretation of what it means to be an affected party under section 44-1-60(E)(1). After participating extensively in the process through which the original permit was created and issued, and after receiving individual notice from the Department as to that permit decision, it would have been illogical and indeed bizarre for the County to turn around and formally ask again in writing for notifications related to that permit. Pickens County was entitled to notice of the permit modification pursuant to section 44-1-60 under the same rationale as in *Coastal Conservation League*, but it was never provided.

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

The court of appeals correctly analyzed the issue of the timeliness of the County's request for a final review conference within the context of the required notice outlined above. As the court of appeals held: "[N]othing 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 the applicable statutory and regulatory notice safeguards." *Pickens Cty. v. S.C. Dep't of Health & Envtl. Control*, 429 S.C. 92, 105, 837 S.E.2d 743, 750 (Ct. App. 2020), *cert. granted* Dec. 14, 2020. **(R. pp. 13).**

This reasoning is both evident from the plain language of the statute and applicable regulations and is consistent with this Court's precedent in *Coastal Conservation League*, cited above. In that case, the Coastal Conservation League filed for Department Board review under section 44-1-60 more than fifteen days after the Department Staff decision. 390 S.C. at 423, 702 S.E.2d at 249. However, the Department had not followed the statutorily required process in mailing notice to the Coastal Conservation League, causing the League to receive its legally-entitled notice after the limitations period had expired. *Id.* at 422, 702 S.E.2d 248-49. This Court determined that the Department had failed to notify the Coastal Conservation League in the manner required under section 44-1-60 and that the time limitations in that section did not start to run until the Department corrected its error.[4] *Id.* at 430, 702 S.E.2d at 253. The court of

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[4] Particularly, the Supreme Court held,

> Section 44–1–60(E) requires DHEC to simultaneously send notice of its decision to the applicant, permittee, licensee, and affected persons requesting to be notified by certified mail, and the decision becomes final fifteen days after the decision has been mailed. In this case, we find that because the League was an affected

appeals correctly recognized exactly this same principle of law when it reversed the ALC's dismissal of Pickens County's appeal.

The Department and MRR point to the League's filing of its request for final review within fifteen days of receiving actual notice as proof that *Coastal Conservation League* is unhelpful to the County. **(Pet. Br. 16).** However, they fail to account for the significant and particularly relevant distinction at play between this case and *Coastal Conservation League*: the Department here never corrected its notice failure in relation to Pickens County and other adjoining property owners,[5] instead relying upon "actual notice." Notably, in *Coastal Conservation League*, the League indicated its knowledge of the permit issuance in an email, which was then confirmed by Department staff; neither the League's existing knowledge of the permit nor the Department's confirmation *via email* satisfied the statute. *Id.* at 422-23; 702 S.E.2d at 249. Instead, the triggering event was not, in fact, the League's actual notice, but the Department's correction of its error and mailing of the decision to the League, in compliance with the statute. *See id.* at 430-31; 702 S.E.2d at 253.

The holding in *Coastal Conservation League* was based on the plain language of section 44-1-60, which clearly communicates that proper notice under the statute is required before the statutory limitations period is triggered. As discussed in further detail above, the procedures in

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> person who asked to be notified, the decision did not become final until fifteen days after DHEC mailed the decision to the League.

Coastal Conservation League, 390 S.C. at 430-31; 702 S.E.2d at 253.

[5] S.C. Reg. 61-107.19, Part I, D(2)(a)-(g) require notice to adjoining landowners, regardless of whether they request such notice. None of the adjoining landowners ever received any kind of notice from the Department or MRR, not even the late, insufficient "actual notice" that the County arguably received. **(R. pp. 428-58)**

section 44-1-60 particularly emphasize the necessity and the degree of public notification and input during the Department's evaluation of a permitting or licensing decision, as reflected by subsection (B), which mandates Department Staff "comply with all requirements for public notice, receipt of public comments and public hearings *before* making a department decision." S.C. Code Ann. § 44-1-60(B) (emphasis added). It is only after the Department issues a staff decision in compliance with procedural and public notice requirements that subsection (E) dictates the appeal of such decision to the Department Board must be filed within fifteen days. *See* S.C. Code Ann. § 44-1-60(E)(2).

It follows as a matter of precedent and statutory interpretation, and indeed as a matter of practical and logical necessity, that a Department decision issued without the appropriate public notice cannot be shielded from challenge by the time limitation in section 44-1-60(E). The alternative would create the perverse incentive for an entity to circumvent review of controversial agency decisions that would be protected from legal challenge through the conscious decision to provide deficient or contorted public notice. *See Hamm v. Pub. Svs. Comm*, 287 S.C. 180, 181-82, 336 S.E.2d 470, 471 (1985) (interpreting the statute at issue to require a thirty-day period for filing an appeal upon notice of the decision instead of upon the time of the decision to prevent an agency from precluding judicial review by concealing its decision until thirty days had expired).

Furthermore, MRR misconstrues and mischaracterizes the legal authority in making its "actual notice" arguments. First, *Bursey v. S.C. Dept. of Health & Envt'l Control* is actually supportive of the County's argument: the issue involving timeliness there centered on whether and when the Department had satisfied its notice obligations under the applicable regulation for decisions relating to mining permits. 369 S.C. 176, 186-89, 631 S.E.2d 899, 905-06 (2006).

Significantly, this Court affirmed the decision of the Mining Council finding the appeals were timely filed based on substantial evidence indicating when the Department had *complied* with its regulatory notice requirements. *Id.* at 188-89, 631 S.E.2d at 906 (emphasis added). Thus, the timeliness of the appeals in *Bursey* hinged on the Department's compliance with the applicable notice requirements, which is distinguished from its failure to do so in the present case.

Second, *A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control* similarly supports the court of appeals' opinion in this case, not negates it. 428 S.C 189, 833 S.E.2d 451 (Ct. App. 2019). The court's holding rested on its determination that the final approvals A.O. Smith sought to challenge were not staff decisions subject to appeal under section 44-1-60; although Smith had timely appealed the Final Approvals, it had failed to timely challenge the earlier issuance of several permits, which *were* subject to appeal. *Id.* at 204-08, 833 S.E.2d at 459-61. MRR's assertion that the decision in *A.O. Smith* rested on "actual notice" is inaccurate, and it ignores this notable distinction with the present case: A.O. Smith never alleged the Department failed to comply with mandatory notice provisions as is present here. *Id.* at 198-99, 833 S.E.2d at 456-57. Instead, Smith acknowledged the Department "was *not obligated by the regulation*s to issue any public notice for the construction permits at issue." *Id.* (emphasis added). Furthermore, A.O. Smith waited several years despite its awareness that construction was ongoing, intentionally waiting until construction was complete because it could not determine if the new water wells could supply adequate capacity until their completion. *Id.* at 198, 833 S.E.2d at 456. Finally, before affirming the ALC's dismissal for an untimely appeal, the court of appeals aptly noted the ALC's conclusion that although "public notice was not required for the permits, [A.O. Smith] had notice and *the opportunity to make comments or request notification*

as an affected person pursuant to section 44-1-60(E) and to challenge those decisions to the board." *Id.* at 204-05, 833 S.E.2d at 460 (emphasis added).

The decisions in *Coastal Conservation League*, *Bursey*, and *A.O. Smith* all demonstrate the crucial factor in evaluating timeliness is whether the applicant and the Department complied with any applicable statutory and regulatory notice safeguards. Because the Department failed in its public notice and comment obligations in relation to MRR's permit modification, Pickens County's actual receipt of the final issued permit is insufficient to cure the prior failure and does not trigger the fifteen-day period to request a final review conference. The court of appeals correctly recognized this significant flaw in the rationale of the ALC and the Petitioners and applied this Court's precedent accordingly.

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

The Petitioners have raised the proposition that the court of appeals' opinion, if taken to its logical conclusion, would dictate either that Pickens County could have delayed indefinitely without consequence in filing its permit challenge, or that no permit issued by the Department will hereafter ever be truly final. **(Pet. Br. 17-18).** While such propositions are obviously flawed, the County does agree that, for the sake of order and administration, every Department permit must reach finality, even those that were issued without proper public notice. If the Department makes an error in noticing a permit decision, such permit decision is not forever open to challenge, and the court of appeals decision does not stand for such a proposition. Rather, the court of appeals held, as the County argued, merely that the fifteen-day limitations period under section 44-1-60 cannot be the measure of timeliness when proper notice under that statute has not been provided. **(R. pp. 9-13).** The court of appeals' holding in this case does not provide that an affected party who has been denied proper notice of a permitting decision can

unnecessarily delay in appealing that permit, but it does provide that such party is not limited to appealing within a statutory limitations period when the Department fails to provide the required statutory notice.

The court of appeals' decision in *A.O. Smith* is instructive on this point. As discussed above, A.O. Smith deliberately waited *several years* despite its awareness that construction was ongoing, intentionally waiting to challenge the permitted actions because it could not determine if the new water wells could supply adequate capacity until their completion. 428 S.C. at 198, 833 S.E.2d at 456. The ALC correctly noted this unreasonable failure to act timely and concluded that although "public notice was not required for the permits, [A.O. Smith] had notice and *the opportunity to make comments or request notification* as an affected person pursuant to section 44-1-60(E) and to challenge those decisions to the board." *Id.* at 204-05, 833 S.E.2d at 460 (emphasis added). The present case is significantly different as the County's delay was less than two months beyond the end of the fifteen-day time period triggered by the County's receipt of a copy of the issued permit modification on January 11, 2016, as suggested by Petitioners as the relevant date. **(R. pp. 542-43; 546; 550; Pet. Br. 7-8).** Notably, the County only received this notice months after the permit was issued and never had the same "opportunity to make comments" during the permitting process as A.O. Smith did. *Id.* **(R. pp. 542-43; 546; 550; Pet. Br. 7-8).**

In sum, the Petitioners' assertion that this case will prevent the finality of permitting decisions is overstated. An affected party seeking review for which it did not receive the legally required notice far beyond the deadline is likely to be uncommon. Nonetheless, our courts' precedent provides a framework for evaluating the timeliness of the party's challenge in light of the Department's failure to satisfy its obligations to provide notice and the opportunity for

comment. This is precisely the analysis the County argued for in this case and that the court of appeals correctly conducted.

II. The Court of Appeals Properly Exercised Authority under the Administrative Procedures Act.

MRR and the Department argue that the court of appeals applied the incorrect standard of review, or otherwise overreached, in considering whether the permit modification was "major" or "minor." **(Pet. Br. 20-29).** For the reasons that follow, such arguments are misguided.

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

An appellate court's role is to correct a lower court's failure to undertake all necessary inquiries in evaluating a legal standard, not, as MRR and the Department seem to argue, to identically constrain its evaluation. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011); *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 629 S.E.2d 624 (2006). While MRR and the Department rely on the substantial evidence standard of review, it ignores the existence of an additional standard of review: "[t]he decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence *or controlled by some error of law*." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (emphasis added). "Questions of statutory interpretation are questions of law, which this Court is free to decide without any deference to the tribunal below." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). Moreover, the Administrative Procedures Act, which provides the applicable standard of review here, explains that the ALC's order may be reversed if it is "in violation of constitutional or statutory provisions" or "affected by other error of law." S.C. Code Ann. § 1–23–610(C).

In considering a motion to dismiss under Rule 12(b)(6), "the trial court must base its ruling solely on allegations set forth in the complaint." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Id.*

Under the "Discovery" heading in its opinion, the court of appeals concluded that the ALC effectively converted the Petitioners' motions to dismiss under Rule 12(b)(6) to a motion for summary judgment, thereby committing an error of law. **(R. pp. 14).** The ALC plainly did not apply a Rule 12(b)(6) standard of review, instead considering evidence beyond what was presented by and in the light most favorable to the County. *See id.* at 106, 628 S.E.2d at 874 (requiring the facts and inferences to be viewed in the light most favorable to the plaintiff on a Rule 12(b)(6) motion to dismiss).

As an initial matter, Petitioners arguments regarding the court of appeals' ruling in the "Discovery" heading is unpreserved for this Court's review because they failed to raise it in the petitions for rehearing to the Court of Appeals. *Doe ex rel. Roe v. Orangeburg County Sch. Dist. No. 2*, 335 S.C. 556, 518 S.E.2d 259 (1999) (finding issue not raised in petition for rehearing to the court of appeals was not preserved for review before the Supreme Court).

With respect to the merits, the court of appeals was not constrained in its remedying of the ALC's error by undertaking the appropriate legal analysis. The court of appeals properly evaluated the motions to dismiss under the appropriate standard, considering the evidence in the light most favorable to the County—specifically, whether Pickens County's permit appeal was timely, in light of the legally insufficient notice it received. **(R. pp. 9-14).**

Before the ALC, Petitioners framed their motions to dismiss the request for a contested case hearing as one of subject matter jurisdiction under Rule 12(b)(1), SCRCP. **(R. pp. 215-221; 88-199).** Specifically, Petitioners argued the County failed to satisfy the doctrine of exhaustion of administrative remedies. **(Id.).** However, the exhaustion doctrine is not a question of subject matter jurisdiction, and the ALC made clear in its order that it had subject matter jurisdiction to hear the case. *See Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 280 n.3, 721 S.E.2d 423, 425 n.3 (2012) (holding failure to exhaust administrative remedies is not an appropriate basis for dismissal under Rule 12(b)(1)); **(R. pp. 43-44).** In light of this recognition by the ALC, it should have treated the motions to dismiss as ones under Rule 12(b)(6), but it failed to apply the appropriate standard, which was the principle behind the court of appeals' holding under its "Discovery" heading. **(R. pp. 14; 42-46).**

The ALC's decision to apply the limitations period of section 44-1-60 based on actual notice, as argued by Petitioners, and its failure to look at the statute as a whole and assess whether Pickens County had been provided the notice due under that statute, constituted an error of law. Both the ALC and the court of appeals were presented with arguments and evidence that Pickens County was denied proper notice because the landfill permit modification was misclassified. The court of appeals rightly determined that it was necessary to consider misclassification in relation to timeliness, while the ALC's failure to do so was an error of law properly reviewed by the court of appeals under the Administrative Procedures Act.

The most important step in the legal analysis undertaken by the lower courts in this case was determining the applicable limitations period for evaluating timeliness. As discussed above, the ALC resolved that the fifteen-day period in section 44-1-60 applied, regardless of whether the Department complied with the notice requirements in that section, because Pickens County

received actual notice. **(R. pp. 42-46).** The Court of Appeals, on the other hand, recognized the import of this Court's holding in *Coastal Conservation League* and that the limitations period in section 44-1-60 is only triggered after the public notice required by that section has been provided. **(R. pp. 9-14).** If the Department and MRR erroneously classified the permit modification as minor, thereby eliminating the required notice provisions, the limitations period in section 44-1-60 does not apply.[6] It is legally necessary, then, for any court evaluating timeliness to determine the legitimacy of the "minor modification" designation. The ALC's failure to do so does not reflect its weighing or application of evidence in a manner that is entitled to deference but, rather, reflects that the ALC's decision is controlled by an error of law.

In short, the court of appeals properly accepted the evidence in the light most favorable to the County and correctly concluded the ALC erred in granting Petitioners motion to dismiss on exhaustion of administrative remedy grounds. In doing so, the court of appeals corrected the ALC's error of law, a function entirely within its appellate review. The court of appeals' review in this case properly exercised its authority under the Administrative Procedures Act, and the court of appeals owed no deference to the ALC's flawed legal interpretation of notice and timeliness.

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

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

Petitioners have also argued that the court of appeals should have remanded the case to the ALC in order for that court to evaluate the major/minor distinction and determine timeliness for purposes of their motions to dismiss. **(Pet. Br. 21-26).** These arguments misapprehend the court of appeals' ruling, which held that the ALC erred in granting the motion to dismiss by failing to apply the appropriate standard for a Rule 12(b)(6) motion, as discussed above. **(R. pp. 14).** The court of appeals' decision simply applies the appropriate standard, correctly concluding that dismissal is inappropriate and remanding for further proceedings, including discovery. **(R. pp. 14).** It is unnecessary and contrary to the notion of judicial economy for the court of appeals to remand for the ALC to consider the same issue and effectuate the correct standard it ruled upon in its opinion.[7] Accordingly, because the court of appeals correctly resolved the timeliness issue by applying the appropriate standard and did not engage in factual findings, remand is unnecessary.

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

Relatedly, the court of appeals did not fail to give deference to the Department by evaluating whether the permit modification at issue here is actually "minor." As discussed above, because the court was evaluating whether the ALC erred in granting the motion to dismiss under Rule 12(b)(6), the court of appeals owed no deference to the Department's interpretation of its own regulations in the context of a preliminary judicial determination of timeliness. The Petitioners have attempted to conflate the deference that would be owed to the Department in

[7] Notably, the County is unable to find any cases within this Court's jurisprudence where a statute of limitations or timeliness determination was appealed from a lower court and then remanded without ultimate resolution of that issue.

considering the merits of its permitting decision with the present context wherein the court of appeals has simply endeavored to evaluate the timeliness of a filing in the context of a motion to dismiss. The Department is owed deference as to its regulatory interpretation in relation to permitting decisions. *See, e.g., Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) (reversing ALC's failure to defer to agency interpretation of scope of permitting analysis); *Bruning v. S.C. Dep't of Health & Envtl. Control*, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (Ct. App. 2016) (distinguishing that while a court "generally gives deference" to an agency's interpretation of its own authority, statutory interpretation remains a question of law for the court.); *Converse Power Corp. v. S.C. Dep't of Health & Env't Control*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) (discussing agency deference in the context of reviewing substantive permitting decision); *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) (same). The Department is not owed deference as to its regulatory interpretation in relation to the normal judicial function of determining whether a case has been timely filed. In the context of the preliminary judicial inquiry at issue here, the court of appeals owed no more deference to the Department than is laid out above in relation to the ALC.

As a result, the circumstances here, then, are entirely dissimilar to those cases and principles cited by the Petitioners that call for agency deference or judicial restraint in the context of a merits review. The preliminary issue in this appeal is simply not the context in which the type of agency deference cited by the Petitioners is implicated. Once again, the *Coastal Conservation League* case is instructive. In that case, this Court did not once mention the issue of agency deference in its analysis of timeliness, even though such analysis touched on the Department's interpretation of its own statutes and regulations, just as in the present case.

For these reasons, the court of appeals properly exercised its authority under the administrative procedures act to correct errors of law, apply the appropriate standard, and remand for further proceedings on the permit modification.

III. Conclusion

This Court should affirm the decision of the court of appeals and remand this case for further proceedings. The court of appeals correctly applied its standard of review in concluding the ALC erred when it dismissed the County's appeal for timeliness under the wrong standard without properly considering MRR and the Department's failure to comply with the statutory and regulatory notice safeguards. The extensive public notice and comment procedures disregarded here serve the important role of informing the public of a proposed project and creating an avenue for input regarding potential adverse effects. The timeliness of the County's request for a final review conference can only properly be evaluated after consideration of whether the requisite notice was provided. Because MRR and the Department failed to first satisfy their obligations in noticing a permit decision, the time limitation for challenging that decision was not implicated. For that reason, Pickens County respectfully requests this Court affirm the decision of the court of appeals and remand this case for further proceedings.

Respectfully submitted,

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