THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-000219
Administrative Law Court Case No. 18-ALJ-0443-CC

Colonial Pipeline Company .....Respondent,

v.

South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County .....Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The matter arises from Colonial Pipeline Company's ("Colonial") challenging the South Carolina Department of Revenue's ("DOR" or "Department") determination that Colonial is not entitled to a property tax exemption for three types of pollution control devices for the tax years 2017 and 2018. Colonial in 2017 sought a determination that its pipe coatings, cathodic protection, and automatic shut-off valves are exempt from property tax under the pollution control exemption (S.C. Const. Art. X, § 3(h) and S.C. Code Ann. § 12-37-220(A)(8), collectively, "Exemption"). The constitutional provision exempts from property tax "all facilities of *industrial plants* which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air or noise pollution." S. C. Const. Art X, § 3(h) (emphasis added). Section 12-37-220(A)(8) exempts "[a]ll facilities or equipment of *industrial plants* which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air or noise pollution, both internal and external, required by the state or federal government and used in the conduct of their business." § 12-37-220(A)(8) (emphasis added). Neither the constitutional provisions nor the statute defines "industrial plant."

DOR submitted Colonial's 2018 exemption application to the South Carolina Department of Health and Environmental Control ("DHEC") for investigation into whether the pipeline enhancements identified by Colonial qualified as pollution control equipment. DHEC replied to DOR on August 27, 2018, stating that the enhancements did qualify as pollution control equipment.

On November 19, 2018, DOR determined that Colonial is not entitled to the Exemption for the pipe coatings, cathodic protection, and automatic shut-off valves because the property claimed by Colonial is not "facilities or equipment of an industrial plant." Colonial subsequently claimed

the same pipeline enhancements as pollution control property for 2019 and again requested the Exemption. DOR also denied this application.

On December 5, 2018, Colonial requested the Administrative Law Court ("ALC") hold a contested case hearing to challenge this determination by DOR. Colonial argued that its industrial facility is an "industrial plant." On March 29, 2019, Appellants Abbeville County and Anderson County moved to intervene in the ALC case. Greenville County and York County with Abbeville County and Anderson County later moved to intervene in the case as well. Counties' motions to intervene were granted. Appellants Aiken County and Laurens County moved separately to intervene in the case of May 28. Aiken County and Laurens County motions to intervene were also granted. These counties are collectively designated as "Counties."

All parties filed motions for summary judgment on the applicability of the Exemption in December 2019. On March 6, 2020, the ALC denied all parties' summary judgment motions, finding that fact issues existed that precluded summary judgment for any party.

A hearing on the merits was held before the ALC on August 4 and 5, 2020 before Chief Administrative Law Judge Ralph King Anderson, III. The ALC issued a Final Order on December 1, 2020. R. p. 0047. Subsequently, Colonial, Counties and the Department timely filed Motions for Reconsideration. In response to the issues raised in the Motions for Reconsideration, the ALC rescinded its original Final Order on January 4, 2021, and issued an Amended Final Order on February 9, 2021. R. p. 0081. The ALC found in its Amended Final Order that the pipeline components in dispute are (1) facilities and equipment of an industrial plant; (2) designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution; (3) required by state and federal government; and (4) used in the conduct of Colonial's

business. Therefore, the ALC determined that the pipe coatings, cathodic protection, and automatic shut-off valves met the qualifications to receive the pollution control equipment exemption.

In response to the Amended Final Order, Counties and DOR timely filed notices of appeal.

STANDARD OF REVIEW

A. General

The Administrative Procedures Act establishes the standard of review for the Court of Appeals for cases decided by the ALC and is set forth in § 1-23-610(B), which provides:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> > (a) in violation of constitutional or statutory provisions;
> > * * * * *
> > (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.

"A decision of the ALC should be upheld, therefore, if it is supported by substantial evidence in the record." S.C. Code Ann. § 1-23-610(B); *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 203-04, 712 S.E.2d 428, 431 (2011). "When the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the factfinder." *A.O. Smith Corp. vs. S.C. Dep't of Health & Envtl. Control*, 428 S.C. 189, 200 833 S.E.2d 451, 457 (Ct. App. 2019).

> A reviewing court may reverse or modify an administrative decision if the findings of fact are not supported by substantial evidence. "Substantial evidence is 'evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency

> reached.'" "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

Risher, 393 S.C. at 210, 712 S.E.2d at 434 (citations omitted).

"In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010). However, the Court may only reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870-71 (2012)." *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); *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 500-01 (Ct. App. 2008).

B. Standard of Review for Tax Exemption Statutes

As the Court of Appeals recently stated in *Cromey v. S.C. Department of Revenue*, ___ S.C. ___, ___ S.E. 2d ___ (Op. No. 5842, Aug. 4, 2021) (*available at* 2021 WL 3377568):

> Although our supreme court has expressed a policy of strictly construing tax exemption statutes against the taxpayer, "[t]his rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor." *CFRE, LLC v. Greenville Cty. Assessor,* 395 S.C. 67, 74, 716 S.E. 2d 877, 881 (2011) (quoting *Se. Kusan, Inc. v. S.C. Tax Comm'n,* 276, S.C. 487, 489, 380 S.E. 2d 57, 58 (1981)). "It does not mean that [the appellate court] will search for an interpretation in [the Department]'s favor where the plain and unambiguous language leaves no room for construction." *Id.* at 74-75, 716 S.E. 2d at 881.

FACTS

A. Stipulations of Facts

The parties stipulated to a number of facts at the hearing. These are quoted in Abbeville County's Brief of Appellant at pp. 10-15 (hereinafter "Stipulations").

B. Colonial's Pipeline Operations and Practices

The following pertinent facts are undisputed. Colonial is a pipeline company that transports refined petroleum, jet fuel, gasoline, diesel, heating oil, and kerosene (collectively, "Refined Petroleum Products"). Tr. p. 95, line 22-p. 96, line 7; R. p. 1536. It receives products from approximately thirty refineries in the Gulf Coast region of the United States and has approximately 250 customers who ship through its lines. ALC Amended Final Order, Findings of Fact (hereinafter "Findings of Fact") at pp. 5-6; Tr. 121: 1-19; R. pp. 0085-86, 1562. In South Carolina, Colonial ships gasoline, ultra-low sulfur diesel, heating oil, marine diesel, jet fuel, and kerosene. Ultra-low sulfur diesel and jet fuel are shipped as finished products Tr. p. 95, line 25-p. 96, line 4; R. p. 1536.

Colonial's operations in South Carolina are comprised of 515 miles of pipeline, two tank farms, three main line booster stations, and one delivery facility spanning eleven counties in the State. Tr. p. 98, line 19-p. 99, line 22; R. p. 1539. Colonial has two main pipelines in South Carolina, Line 1 and Line 2, which were built in 1962 and the late 1970s respectively. Lines 1 and Line 2 are 40-inch pipelines, which run from Pasadena, Texas, to Greensboro, North Carolina. Tr. p. 101, lines 20-21; R. p. 1542. Of the 515 pipeline miles in the State, 203 miles are mainline miles (Lines 1 & 2), 74 are stub line miles (Line 29), 15 miles are delivery lines, and 96 miles are currently out of service. Line 1 transports gasoline, and Line 2 transports distillate, which includes jet fuel and ultra-low sulfur diesel. The pipelines are all three to six feet underground except where they come to pump stations and tank farms. Findings of Fact, pp. 5-6; Tr. p. 98, line 11-p. 102,

line 22; R. pp. 1539-43.

Colonial ships over 255 million barrels[1] of product per day nationally of which 185,000 barrels per day are delivered into South Carolina for distribution within the state. Findings of Fact, pp. 5-6; R. p. 0085-86. It ships both fungible and segregated product. In a segregated shipment (which is more expensive and limited to the transportation of blendstocks), the shipper gets the exact same molecules of the product at the end of the line that the shipper put into the pipeline at injection. However, the great majority of the products Colonial receives are moved together "fungibly," meaning similar products are interchangeable and a customer may not receive the exact same product that it injected into the pipeline. For example, a shipper that ships regular gasoline through Colonial's pipeline will receive regular gasoline at their destination, but will not necessarily receive the exact same molecules they put into the pipeline. Further, Colonial transports multiple products back-to-back through the pipe, which results in some mixing of the products where they interface. When different products mix in the pipeline, the result is called "transmix." As the Company's website states, "when products with incompatible characteristics come in contact with each other, the resulting interface is defined as transmix. Transmix is stored separately and re-processed into a useful product." Tr. p. 127, lines 14-19; R. p. 1568. Transmix does not meet the Refined Petroleum Product specifications for a product that can be sold for use. Therefore, it first must be isolated and then disposed of by either selling it or injecting it back into the system in small enough quantities that its presence in delivered product is within that products specifications. Stipulation Nos. 3 and 4; Findings of Fact, p. 6; R. pp. 0082, 0086. Lines 1 and 2 produce 15,000-16,000 gallons of transmix every 5 days. Tr. p. 130, line 8-p. 131, line 18; R. p. 1572-73.

[1] One barrel contains 42 gallons, which means Colonial ships just under 8 million gallons of Refined Petroleum Products into South Carolina per day.

However, Colonial processes transmix into a once-again saleable Refined Petroleum Product. This is a very controlled process by which Colonial isolates the product and then blends it into a sellable product. Although the mixing occurs in the pipeline, the reengineering of the transmix to produce a sellable product occurs primarily at tank farms, pump stations, and delivery facilities. Findings of Fact, p. 6; Tr. p. 149, lines 3 - 16; R. pp. 0086, 1590 .

The amount of the transmix created is a function of (1) the size of the pipeline; (2) the length of the pipeline; (3) the number of pump stations; and (4) the product being shipped. Line 1 generates 15,000 barrels of transmix per five-day day shipment; Line 2 generates 10,000-15,000 barrels per shipment; and Line 29 generates 500 barrels per shipment. Tr. p. 131, line 21-p. 132, line 10; R. pp. 1572-73.

Colonial has to first identify the transmix, which it does through optical interface detectors as well as gravity, temperature and pressure testing. Tr. p. 137, line 12-p. 145, line 18; R. pp. 1578-86. It then has to isolate it by pumping it into tanks at all of its facilities. Tr. p. 147, line 5-p. 148, line 7; R. pp. 1588-89. Colonial has 3 options with the transmix: (1) leave it in the line (e.g. a small amount of premium gas into regular gas); (2) sell it to transmix processors; or (3) carefully inject it back into the line. Tr. p. 148, line 10-p. 150, line 14; R. pp. 1588-90.

Colonial also has to manage the movement of product through its pipeline. To accomplish this task, in South Carolina Colonial adds over a million gallons of Drag Reducing Agents (DRA) to the product, Tr. p. 156, lines 6-7; R. p. 1597, as it is transported, which reduces the amount of friction loss. Stipulation No. 2. DRA is added at the pump stations and on Colonial's line 29. In South Carolina, DRA is injected into the pipeline from multiple additive tanks with injection pumps and measuring equipment. Findings of Fact, p. 7; Tr. p. 151, line 20-p. 152, line 5; R. pp. 1592-93. Colonial must also remove water that accumulates in and around the transported product

through a process called "sting." Colonial filters and removes "sting water" daily at the Belton and Spartanburg facilities through the use of oil and water separators, puts it into sting tanks, and disposes of it. Tr. p. 156, line 20-p. 158, line 19; R. pp. 1597-99. Colonial also regrades fuel in this State. "Regrade" is a process by which Colonial "change[s] a label of the product, the product's grade." Examples include regrading regular or premium gasoline. Tr. p. 188, line 9-p. 189, line 12; R. pp. 1629-30.

Every 50 to 60 miles along its mainlines, Colonial operates a booster station that increases pressure in the pipeline system and allows for the movement of petroleum through the pipeline. Tr. p. 108, lines 22-25; R. p. 1549. Each booster station has 15-20,000 horsepower pumps, together with three to four 5,000 horsepower pumps in order to push the petroleum product down the line. Tr. p. 108, line 22-p. 109, line 15; R. pp. 1549-50.

To ensure safety and quality control, Colonial constantly measures gravity, pressure, and temperature of the products it transports. Tr. p. 141, lines 8-18; R. p. 1582. Equipment is also used to measure and detect leaks. Tr. p. 108, lines 22-25; R. p. 1549. Additionally, there are three pump stations in South Carolina on Lines 1 and 2, typically with four to five pumps per station, and there are pumps at the tank farms. Findings of Fact, p. 7; R. p. 87.

Colonial has two tank farms in South Carolina: one in Belton, South Carolina, and one in Spartanburg, South Carolina. Stipulation No. 4. Each tank farm has a complex system of pumps, motors, valves, manifolds, injection equipment, control systems, and other industrial infrastructure necessary to move product. The two tank farms receive petroleum products from Lines 1 and 2 into tankage, and then that product is delivered out from that tankage to multiple delivery lines to customers. Belton Junction is a 130-acre above ground breakout and delivery facility located in Anderson County. Tr. p. 104, line 22-p. 105, line 8; R. pp. 1545-46. The tank farm is comprised

of twenty tanks, including twelve for gasoline, seven for distillate, and one for transmix. The facility is staffed by at least one Operator twenty four hours a day, every day of the year. Tr. p. 105, lines 9-11; R. p. 1546. Spartanburg Delivery is a 74-acre above ground breakout and delivery facility. Tr. p. 107, lines 5-22; R. p. 1548. It is comprised of twenty-two tanks, including thirteen gasoline tanks, six distillate tanks, and three tanks that are out of service. The facility is staffed as operations' schedule dictates with a minimum of one operator on shift during all product receipts and delivery operations. All the tank farms have sting systems that remove water off the tank. These facilities also have utility tanks, which are used to drain product so that Colonial can work on the facility. Findings of Fact, p. 7; R. p. 0087.

In terms of staffing, the Colonial Industrial Plant has an operations manager, and each of the two major facilities has a lead operator and 6-8 senior operators. They also have at each plant two senior technicians and 5-6 regular technicians. Colonial has 3 employees doing right of way support, a planner, support personnel, including a senior project manager, a field project manager, 6 project inspectors, corrosion technicians, environmental specialists and safety personnel. Tr. p. 115, line 2-p. 117, line 21; R. pp. 1556-58.

Colonial also provides petroleum storage services at its Belton and Spartanburg facilities for third parties. Stipulations 11 and 14; Tr. p. 110, lines 1-20; R. pp. 2463, 1551. The third parties are charged for storage services. Tr. p. 110, lines 12-14; R. p. 1551. Additionally, truck terminals, which are owned by third parties, are strategically located close to the tank farm facilities in Belton and Spartanburg to ensure timely transmission. (Findings of Fact, p. 7; Tr. p. 105, lines 3-8; Tr. p. 112, line 5-p. 113, line 2; R. pp. 0087, 1546, 1553-54.

Colonial requires a substantial and continuous team operators and technicians on a full-time basis (and an equal number of independent contractors) to oversee operations, run its

facilities, make repairs, and respond to issues as needed. The pipelines are constantly monitored 24/7/365 by employees at Colonial's facilities in South Carolina as well as its central pipeline control center, which is located in Alpharetta, Georgia. Findings of Fact, p. 7; Tr. p. 114, lines 8-18; p. 241, lines 1-11; R. pp. 0087, 1555, 1682. The South Carolina "core operations" consist of 30-35 full time employees including operators, technicians and inspectors, as well as another twelve support personnel in the immediate area consisting of project managers, project inspectors, corrosion technicians and environmental and safety specialists. The Company has approximately 300 other employees in Alpharetta, Georgia, who perform control center and "back office-type" functions. All of those employees have at least some responsibilities for the South Carolina facilities. Tr. p. 114, line 22-p. 119, line 25; R. pp. 1555-60.

The pipeline system is monitored, at various intervals, both visually and mechanically. Mechanically, Colonial's control room monitors the pipeline from its Alpharetta office twenty-four hours a day. Tr. p. 253, lines 11-20; R. p. 1694. Every two weeks, Colonial conducts an aerial inspection of the mainline pipeline corridor. Tr. p. 241, lines 20-25; R. p. 1682. Once a year, Colonial mows and clears debris from the pipeline right-of-way. Tr. p. 243, line 17; R. p. 1684. The right-of-way is inspected periodically to ensure there are no encroachments. Tr. p. 243, line 17; R. p. 1684. The pipeline system is also monitored for flooding and erosion to ensure it has not become exposed. Tr. pp. 246-49; R. pp. 1687-90. Every five years, Colonial conducts a "close interval survey." During this survey, Colonial inserts an electrode into the ground every 2.5 feet to take a polarization reading. Tr. p. 266, lines 16-25; R. p. 1707. The electrode checks voltage levels to ensure the cathodic protection system is working. Tr. p. 268, lines 11-20; R. p. 1709.

Colonial also uses devices called "smart PIGS" to identify potential anomalies in the pipeline that may require further analysis. Smart PIGS are essentially small machines that are

inserted into the pipeline. The PIGS flow along with the product and gather data that is transmitted back to Colonial. Every 200 miles or so, the PIGS are extracted using a "PIG trap." Amended Final Order at p. 9; R. p. 0089.

Rectifiers, which are part of the cathodic protection system, are checked at least six times a year and physically inspected twice a year. Tr. p. 281, lines 2-9; R. p. 1722. Rectifiers are also remotely monitored to make sure they are functioning. When Colonial detects that a rectifier is not functioning, Colonial sends out a crew to fix it. Tr. p. 282, lines 7-20; R. p. 1723.

Colonial also periodically replaces the exterior coatings on its pipelines. Colonial estimates it digs up and replaces "thousands of feet a year of pipeline" of its approximately 2,719,200 feet of pipeline. Findings of Fact, p. 9; Tr. p 288, line 23-p. 289, line 2; R. pp. 0089, 1729-30 .

Colonial was issued environmental permits from DHEC and Spartanburg Water & Sewer Authority that are designated for "industrial activities" like petroleum bulk stations and terminals.[2] Colonial's permits include an NPDES General Permit for Storm Water Discharges Associated with Industrial Activities, SCR 000000 (September 1, 2016). Section 1.1.1 of the permit, Facilities Covered, states: "To be eligible to discharge under this permit, you must (1) have a storm water discharge associated with industrial activity from your primary industrial activity." The permit specifically references "industrial plant" as follows: "Storm Water Discharges Associated with Industrial Activity – the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." Findings of Fact, p. 9; R. p. 0089.

C. Contested Equipment

The Department previously granted the pollution control exemption for wastewater and

[2] Some of these permits have expired or are no longer in place.

storm water pollution control, secondary containment and tanks internal/external floating roofs. At issue in the Hearings were: (1) pipeline cathodic protection, (2) pipeline coatings and (3) one automatic shutoff valve. Pipeline coatings and cathodic protection devices are designed to prevent corrosion in the pipeline by maintaining the structural integrity of the pipeline, thereby reducing the risks of discharge. The U.S. Department of Transportation, Pipeline & Hazardous Materials Safety Administration states as follows in Fact Sheet: Corrosion:

> **What is corrosion and why does it occur?**
>
> Corrosion is the deterioration of metal that results from a reaction with the environment which changes the iron contained in pipe to iron oxide (rust). For example, if your car develops a rust spot, that is corrosion of metal. The same process can occur in various forms on pipelines. As is the case with your car, there are effective methods for preventing and arresting corrosion damage to pipelines.
>
> - *External corrosion* occurs due to environmental conditions on the exterior surface of the steel pipe (e.g., from the natural chemical interaction between the exterior of the pipeline and the soil, air, or water surrounding it),
>
> * * * *
>
> **What are the risks from corrosion?**
>
> Corrosion can result in the gradual reduction of the wall thickness of the pipe and a resulting loss of pipe strength. This loss of pipe strength could then result in leakage or rupture of the pipeline due to internal pressure stresses unless the corrosion is repaired, the affected pipeline section is replaced, or the operating pressure of the pipeline is reduced.
>
> Pipeline corrosion creates weaknesses at points in the pipe, which in turn makes the pipe more susceptible to third party damage, overpressure events, etc. (i.e., corrosion doesn't necessarily need to cause the leak or rupture itself to increase risk).

Id.

Pipeline Coatings are described in the U.S. Department of Transportation Pipeline Hazardous Safety Administration Fact Sheet as follows:

Pipelines are usually buried underground to protect them from damage, and keep them from interfering with the movement of traffic. Underground, the exterior of the pipe is exposed to conditions that can lead to corrosion.

History of Corrosion Protection

The earliest pipelines were buried without any external coatings. To prevent corrosion, pipeline manufacturers and operators began applying coatings to the exterior of pipe at the time it was being installed. This required the exterior surface of the pipe to be cleaned, usually by wire-brushing, and then application of a coating to the surface. These early pipe coatings were tape wraps and coat tars.

These coatings are susceptible to disbonding, however, and pipeline operators eventually determined that coatings alone would not provide complete corrosion protection.

Disbonding refers to a condition in which the pipe coating becomes separated from the exterior pipe wall. This allows water to come into contact with the pipe wall, setting up conditions that can lead to corrosion. Pipe coatings can also be damaged by equipment, and by rocks left in the backfill during installation, as well as by subsequent excavation activities.

To enhance protection, operators began installing cathodic protection (CP) systems. By taking periodic measurements of pipe-to-soil electrical potentials along the pipeline, CP systems can detect disbondment, and the operator can make necessary repairs to the pipe coating.

Today pipe coatings are applied by the pipe manufacturer at the time the pipe is manufactured. This has obvious advantages. The coating can be applied in a consistent manner, the exterior of the pipe is clean, and application conditions can be better controlled. Exterior pipe coatings still need to be applied during construction in the field at the girth welds when pipe sections are joined together.

* * * *

Conclusion

Pipe coatings protect pipelines from corrosion-related defects. They are just one element of the total package operators employ to ensure their pipelines are well protected. Cathodic protection and integrity assessments are also used to prevent corrosion, and to detect any defects that may result from corrosion.

Id.

Pipeline Coatings are required by federal law and are on every pipeline owned and operated

by Colonial in South Carolina (and elsewhere). If there is a concern with pipeline coating, Colonial may be required to recoat the pipeline if other remediation measures are insufficient. During this process, Colonial excavates the pipeline, and then the existing coating is abrasive blasted off and replaced with a new two-part epoxy coating. After the coating has cured and been inspected, the pipeline is backfilled.

Pipeline cathodic protection devices are described by the DOT as follows:

Cathodic Protection

- *Virtually all hazardous liquid and natural gas transmission pipe in service today is made from steel. This steel – when not otherwise protected and exposed to oxygen and/or water – can corrode. Corrosion can result in small holes in the pipe, or loss of pressure-carrying capacity.*
- *Corrosion is the electro-chemical reaction of a metallic material with its environment. Pipe environments include soil, water, air and even the contents of the pipe itself.*
- *In all electrolytes (the ground, rain water, river or sea water, moisture in the air or transported product), metal atoms from the pipe go into solution as electrically charged ions. The movement of the ions causes a flow of electrical current from the metal pipe to the electrolyte (ground or water). This process causes loss of metal from the metal surface, and is commonly recognized as rust.*
- *Cathodic Protection (CP) systems help prevent corrosion from occurring on the exterior of pipes, by substituting a new source of electrons, commonly referred to as either a "sacrificial anode" or "impressed current anode". Both systems operate by imparting a direct current onto the buried pipeline, using devices call rectifiers. As long as the current is sufficient, corrosion is prevented, or at least mitigated and held in check.*
- *In most cases, coatings on the exterior of a pipe are used in conjunction with CP. Coatings have a high dielectric strength, which prevents the flow of electrons to the pipe's surroundings, thus interrupting the electro-chemical reaction of the metal with its environment.*

* * * *

What are the regulatory requirements for cathodic protection on a pipeline?

- Gas pipelines installed after July 31, 1971, and hazardous liquid interstate pipelines installed after March 31, 1970, must be properly coated and have CP. Effective dates for other categories of pipelines apply.

****

- Performance of CP Systems must be monitored regularly with tests performed at least once per year. Records must be maintained for the life of the pipeline.
- Where CP systems utilize rectifiers, each rectifier must be checked six times a year, with a maximum interval between checks of 2 ½ months.

****

- Operators must maintain records or maps of their CP systems. Records of all tests, surveys or inspections required by the regulations must be maintained.
- Pipelines that are found to have deficient CP must be remediated in a time manner (usually within 12 to 18 months after discovery).

Id.

Pipeline cathodic protection consists of nodes, power rectifiers, wire attachments and power feed, which are regularly inspected. The cathodic protection devices are typically placed at five miles apart, and in some cases closer depending on the condition of the pipeline. Federal law requires rectifier inspections six times a calendar year, not to exceed 75 days. Every rectifier has a remote monitoring unit hooked up to either a cell phone or satellite. They are constantly monitored in South Carolina by a local corrosion technician.

The automatic shut off valve at issue in this matter was installed in Gaffney, South Carolina in 2011. It is required by federal law (49 CFR 195) and must be inspected annually. The valve allows Colonial to shut off a pipeline in the event of a release of the product.

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT DID NOT ERR BY GRANTING A POLLUTION CONTROL EXEMPTION FOR FACILITIES AND EQUIPMENT OF AN INDUSTRIAL PLANT TO A TRANSPORTATION COMPANY WITH 515 MILES OF PIPELINES, TWO TANK FARMS WITH 44 TANKS, A DELIVERY FACILITY, 32 FULL TIME EMPLOYEES, WHICH PUMPS THROUGH 3 MAIN

LINE BOOSTER STATIONS 185,000 BARRELS OF DIESEL, JET FUEL AND KEROSENE PER DAY THROUGH SOUTH CAROLINA.

A. General

The primary issue before the ALC was whether the automatic shut-off valve, pipeline cathodic protection and pipeline coatings identified by Respondent in its property tax refund claim are exempt from property tax under S.C. Const. Art. X, § 3(h) and § 12-37-220(A)(8) as pollution control property. The Department's Determination (Nov. 19, 2018) states:

> "To qualify for the pollution control exemption, the claimed property must be (1) facilities or equipment of industrial plants; (2) designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution; (3) required by state or federal government; and (4) used in the conduct of their business. Here, the claimed property fails the first element because the claimed property is not a facility or equipment of an industrial plant. The Taxpayer is a pipeline company."

R. p. 0119. The Department and both sets of counties argue only whether Colonial meets the definition of "industrial plant" contained in subsection (1). They do not contest subsections (2) – (4).

B. Is the Property at Issue "Equipment of Industrial Plants"?

Accordingly, the major substantive issue before the Court is whether Colonial's operations constitute an "industrial plant" in South Carolina. Specifically, Colonial contends the automatic shut-off valves, pipeline cathodic protection, and pipeline coatings it identified in its property tax refund claim are exempt from property tax as pollution control facilities or equipment of an "industrial plant."

C. The DOR has – twice – ruled that Respondent's industrial facilities are an "industrial plant."

The short answer to this appeal is that the DOR's property tax division (now called the Government Services Division) – the experts at the DOR – have *twice* ruled that Colonial is an "industrial plant." The Department on August 15, 2017 and July 17, 2018 issued Proposed

Assessments granting the pollution control equipment for four pieces of pollution control equipment (while denying it for three others.) Stipulations 16 and 24. By definition, the Department property tax division determined that the Colonial facility was an "industrial plant."

D. What is a Plant?

Put simply: is a transportation facility composed of 515 miles of pipelines, 2 tank farms with 44 tanks, one delivery facility next to a truck offloading site, 3 main line booster stations, injection equipment, the processing and sale of transmix, the removal of sting, 32 full time employees which ships 185,000 barrels of gasoline, diesel, jet fuel and kerosene a day through South Carolina an "industrial plant?" The Department concedes that it is "industrial." (*see* Amended Final Order at p. 15 and Motions Hearing, January 6, 2020, Tr. p. 37, lines 13-23[3]; R. pp. 0095, 1363. Accordingly, the sole issue before the Court whether this combined facility constitutes a "plant." Significantly, the Department's witness who was in control of granting exemptions did not dispute that Colonial operated an industrial plant. *See* Testimony of Taylor Ingram, Tr. p. 323, lines 18-25; R. p. 1764. In fact, he granted the Exemption for other pollution control equipment during the same tax years at issue.

The Department conceded that Colonial's business can be described as "industrial,"[4] but argues that none of its property qualifies as a "plant." The Department and the Counties contend that a "plant" must have some form of production. To this end, the Department and the Counties

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[3] "MR. ANTLEY: ... The definition of "industrial", as the Department stated in its response -- or in its memo is: "Of or related to industry." That's not an issue. The issue is industrial plant and the world "plant."
THE COURT: So, you're going to define -- you'll concede it's an industry?
MR. ANTLEY: It's of or related to industry.
THE COURT: Okay. So -- but it's just not a plant?
MR. ANTLEY: Yes, Your Honor...."

[4] See Amended Final Order at p. 15; R. p. 0095.

maintain Colonial is merely a transportation company that is treated differently under the tax code than manufacturing companies and other companies that produce a product.

Similar to the Department, the Counties argue the term "industrial plant" must mean the physical location where goods or materials are actually and substantially produced. The Counties further argue that based on the statutory and regulatory scheme as a whole, it is clear the exemption was intended solely for manufacturers.

Section 3 of Article X of the South Carolina Constitution provides, in relevant part:

> There shall be exempt from ad valorem taxation . . . (h) **all facilities or equipment of industrial plants** which are designed for the elimination, mitigation, prevention, treatment, abatement or control of water, air or noise pollution.

S.C. Const. Art. X, § 3(h) (West) (2009) (emphasis added). Section 12-37-220(A)(8) governs ad valorem property tax exemptions and discusses the exemption in more detail. It provides, in part:

> (A) Pursuant to the provisions of Section 3, Article X of the State Constitution and subject to the provisions of Section 12-4-720, there is exempt from ad valorem taxation: . . . (8) *all facilities or equipment of industrial plants* which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution, both internal and external, required by the state or federal government and used in the conduct of their business.

(emphasis added). Interestingly, the sales tax exemption for pollution control equipment is limited to manufacturers (and certain other companies.) The pollution control sales tax exemption is found in § 12-36-2120(17). It exempts pollution control "machines used in manufacturing, processing, recycling, compounding, mining and quarrying." By contrast, the S.C. Const. Art. X § 3(h) property tax pollution control exemption exempts "all facilities or equipment of "industrial plants." To reiterate, the pollution control exemptions are limited as follows:

Sales Tax – "manufacturing"

Property Tax – "industrial plants"

So the General Assembly certainly knows how to limit exemptions to manufacturers. There are no statutes, regulations, or Department policy documents or rulings defining "industrial plant" under this statute. The Department conceded there was no longstanding agency interpretation regarding what is an "industrial plant." To reiterate, the Department concedes Colonial's operations are industrial. The sole issue before the court is whether they constitute a "plant."

E. Dictionary Definition

The Court of Appeals recently dealt with a somewhat similar issue in *South Carolina Public Interest Foundation v. City of Columbia*, 431 S.C. 164, 847 S.E.2d 257 (2020). At issue was whether college residential apartment complexes met the definition of an "industrial or business park" contained in S.C. Const. Art. VIII §13(D) and § 4-1-170(A). Appellants claimed that the word "industrial" controlled and that commercial residential apartments were residential rather than industrial. In holding that this economic development incentive included commercial apartments, the Court of Appeals stated:

> When a statute is unambiguous we must apply the same as it is written *See, e.g., Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Whe[n] the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.")
>
> "Whe[n] a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *Berkeley Cty. Sch. Dist. v. S.C. Dep't of Revenue,* 383 S.C. 334, 345, 679, S.E.2d 913, 919 (2009) (quoting *Lee v. Thermal Eng'g Corp.,* 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002)); *see also Centex Int'l Inc. v. S.C. Dep't of Revenue,* 406 S.C. 132, 144, 750 S.E. 2d 65, 71 (2013) (relying on *Black's Law Dictionary* and *Merriam-Webster's Collegiate Dictionary* to provide the meaning of a word not defined in the statute).

In Merriam-Webster's Online Dictionary, "plant" is defined as:

> a: the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business;

b: a factory or workshop for the manufacture of a particular product also: POWER PLANT;

c: the total facilities available for production or service;

d: the buildings and other physical equipment of an institution.

Plant, Merriam-Webster's Online Dictionary, https://www.merriamwebster.com/ dictionary/plant (last visited February 19, 2020). The definitions are broad, and only one constrains the definition of "plant" to manufacturing and production. Taken together, the definitions indicate a plant can mean the overall collection of property necessary to carry on an industrial business, manufacturing, or a service. The ALC referred to this definition in the Amended Final Order as follows:

> Here the most applicable and relevant definition to the statute is definition (a), which defines a "plant" to include the "land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business." It is the most applicable not only because is incorporates the adjective "industrial," like section 12-37-220(A)(8), but this definition describes the common conception of a plant as a collection of land, fixtures, and equipment that are utilized together, much like the statute refers to "facilities and equipment" of an industrial plant.

Amended Final Order at pp. 18-19; R. p. 0098-99.

Moreover, the definitions of "industrial" and "industry" are not limited to manufacturing. "Industrial" is defined as "of or relating to industry." *Industrial*, Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/ industrial (last visited February 19, 2020). "Industry" is defined as:

a: manufacturing activity as a whole (the nation's industry);

b: a distinct group of productive or profit-making enterprises (the banking industry);

c: a department or branch of a craft, art, business, or manufacture (especially one that employs a large personnel and capital especially in manufacturing);

d: systematic labor especially for some useful purpose or the creation of something of value.

Industry, Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/industry (last visited February 19, 2020).[5] The Department conceded that the extensive Colonial operations were "industrial." Amended Final Order at p. 15; R. p. 0095.

Wikipedia does not have an independent definition for "industrial plant." However, the term "industrial plant" is encompassed within the definition of "physical plant," which is defined as follows: "Physical plant, mechanical plant, or industrial plant (and where context is given, often just plant) refers to the necessary infrastructure used in operation and maintenance of a given facility. The operation of these facilities, or the department of an organization which does so, is called "plant operations" or facility management. *Industrial plant should not be confused with "manufacturing plant" in the sense of "a factory."* https://en.wikipedia.org/wiki/Physical_plant (last visited August 27, 2021) (emphasis added).

The American Heritage Dictionary of the English Language defines "plant" as follows:

> a. A building or group of buildings for the manufacture of a product; a factory; works in an auto plant.
>
> b. the buildings, fixtures, and equipment, including machinery, tools, and instruments, necessary for an industrial operation or an institution.

https://www.ahdictionary.com/word/search.html?q=industrial.

Thus, the dictionary definition of plant is broad enough to include the "land, buildings, machinery, apparatus, and fixtures" as well as the pipelines Colonial employs in carrying out its transportation business. Notably, the Court of Appeals of North Carolina relied on Merriam-Webster's broad definition of "plant" to find that a small, unincorporated business that manufactured pallets qualified as a manufacturing "plant." *Richards v. Jolley*, 208 N.C. App. 436, 441, 703 S.E.2d 467, 470 (2010) (citing the definition of "plant" in Merriam–Webster's Collegiate

[5] The American Heritage Dictionary (1993) contains similar definitions of "plant," "industrial," and "industry."

Dictionary 948 (11th ed.2005)). Like in this case, the statute at issue in *Jolley* did not define "plant." *See id.* Further, the dictionary definition of "plant" does not exclude companies that are not manufacturers from owning and operating plants. Nor does the definition restrict the definition of plant to those companies that produce some kind of "output."

Even considering the Department's narrow construction that a plant must be engaged in some form of production, the undisputed facts show that Colonial processes the products it transports to create an output – 185,000 barrels *per day*. Findings of Fact at p. 6; R. p. 0086. Its processing may be incidental to its primary business, which is transporting Refined Petroleum Products, but these processes ensure that a saleable product is delivered and distinguishes it from a pure transporter. Specifically, it is undisputed that Colonial processes transmix into a sellable product, changes injects DRA into the product being transported, and removes sting that occurs as a result of transportation. Colonial's activities clearly meet the dictionary definition of a "plant".

F. State Statutory and Regulatory Scheme

Regardless of the dictionary definition, the Department and Counties argue the overall statutory and regulatory scheme shows the legislature intended the exemption to be limited to manufacturers. The ALC rejected this contention as follows:

> First, the language of the exemption statute itself signifies the exemption is not limited to manufacturers. In relevant part, section 12-37-220(A)(8) instructs DHEC to investigate "the property of any manufacturer **or company**." (emphasis added). In construing a statute, we presume that no word is superfluous or without meaning. *Sweat,* 379 S.C. at 377, 665 S.E.2d at 651 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." (citation omitted)). Therefore, the words "or company" must refer to a company that is separate and distinct from a "manufacturer" or the terms would be redundant."

Amended Final Order at p. 16; R. p. 97.

And, indeed, when we look at the language of the exemption itself, it indicates the exemption is not limited to manufactures. In relevant part, the exemption statute instructs DHEC to investigate "the property of any manufacturer *or company*." § 12-37-220(A)(8) (emphasis added). In construing a statute, we presume that no word is superfluous or without meaning. *Sweat*, 379 S.C. at 377, 665 S.E.2d at 651 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." (citation omitted)). Therefore, the words "or company" must refer to a company that is separate and distinct from a "manufacturer," or else the terms would be redundant. If the General Assembly had wished to limit the pollution control exemption to manufacturers, then it certainly knows how to do so—i.e., it could have used narrower, more specific terminology than "company" similar to the language it has used in other tax statutes. *See* S.C. Code Ann. § 12-36-2120(17) (exempts pollution control "machines used in manufacturing, processing, recycling, compounding, mining or quarrying") S.C. Code Ann. § 12-43-220(a)(1) (classifying and assessing ad valorem property taxation of "[a]ll real and personal property owned by or leased to *manufacturers* and utilities and used by the *manufacturer* or utility in the conduct of the business" at ten and one-half percent of the fair market value of the property); § 12-36-2120(9) (2014 & Supp. 2020) (exempting, for example, the gross proceeds of sales, or sales price of "coal, or coke or other fuel sold to manufacturers, electric power companies, and transportation companies" for certain enumerated uses).

Appellants contend that "company" refers to utilities. If the legislature intended "company" to refer only to utilities, it would have said so. *See, e.g.*, § 12-43-220(a)(1) ("All real and personal property owned by or leased to manufacturers and utilities and used by the manufacturer or utility in the conduct of the business must be taxed on an assessment equal to ten and one-half percent of the fair market value of the property."). It is thus reasonable to conclude

the breadth of the word "company" is meant to capture those operations that do not fall within the definition of manufacturer to incentivize as many industrial polluters as possible to acquire pollution control equipment and thereby limit the possibility of environmental contamination.

Regarding whether a plant can include operations like Colonial's, see Chapter 28 of Title 12, which imposes user fees on gasoline and diesel fuel, including fuel at a "bulk plant." Section 12-28-110(7) defines "bulk plant" as "a motor fuel *storage and distribution facility* that is not a terminal and from which motor fuel may be removed at a rack." (emphasis added). Therefore, in the context of these user fees, it appears the legislature labeled a storage and distribution facility without a manufacturing component as a "plant."

Appellant Abbeville County (Brief of Appellant at p. 24) quotes: "The only federal statutory definition of 'industrial plant' that Counties have found is located in the Energy Policy and Conservation Act, 42 U.S.C. § 6326(5) (November 29, 2019). Section 6325(5) states: "[t]he term 'industrial plant' means any fixed equipment or facility which is used in connection with, or as part of, any process or system for industrial production *or output*." (emphasis added). Colonial outputs 185,000 barrels *per day* of gasoline, diesel, jet fuel and kerosene.

Nevertheless, the Counties argue that to broaden the application of the exemption to all "companies" that might transport environmentally harmful products would extend the application of the exemption beyond what the legislature intended. They contend that, functionally, and for tax purposes, Colonial is no different than a railroad company, a trucking company, or a shipping company. Each of these transporters can transport petroleum products—just like Colonial. Therefore, the Counties argue that if the Court were to interpret the exemption as applying to Colonial, then there would be no reason that railroads, trucking companies, and shipping companies could not seek the exemption on their trucks, tankers, railcars, and ships as well.

Trucks, tankers, cars and ships hardly qualify as "industrial plants" similar to Colonial's huge operation. However, simply because the construction of the statute may allow other parties to utilize the pollution control exemption is not a reason to deny its use. Additionally, there is no evidence that these other transportation companies process the products they transport like Colonial. Moreover, since the purpose of the pollution control exemption provision is to encourage the installation of equipment designed to prevent pollution, extension of the exemption to instances that fulfill that purpose would not be beyond what the legislature intended in establishing the exemption. Consequently, the statutory scheme does not demonstrate a legislative intent to restrict interpretation of "companies" as narrowly as the Department and the Counties suggest.

The Counties further point to the language in the exemption that discusses dual-purpose property to suggest that it is only property used for "production" for which the exemption is intended. Specifically, the exemption provides that "[f]or equipment that serves a dual purpose of **production** and pollution control," then value of the exemption is reduced based upon a formula. § 12-37-220. However, "[a] court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." *Enos v. Doe*, 380 S.C. 295, 305, 669 S.E.2d 619, 623 (Ct. App. 2008). Following this principle, the purpose of the statute, especially in light of the broad meaning of "company," reflects that this provision should not be read as narrowly as the Counties propose.

Appellants next contend the definitions in regulation 117-1700 of the South Carolina Code of Regulations (2012), which is associated with property taxes, suggest plants are creatures of manufacturers and pipelines companies are not manufacturers. For instance, S.C. Regs. § 117-1700.4 defines "transportation companies" to include "(1) Railroad companies; (2) *Pipeline*

companies; and (3) Express companies." S.C. Regs. § 117-1700.4 (2012) (emphasis added). However, the ALC held that the need to define "transportation companies" was needed in simply determining the application of § 12-43-220(g) (2014) which provides that "[t]he department shall apply an equalization factor to real and personal property owned by or leased to *transportation companies* for hire as mandated by federal legislation." (emphasis added). Yet, in this instance Appellants seek to distinguish Colonial from the umbrella of "other companies" by inferring the existence of a statutory directive that transportation companies cannot be "other companies" because they are specifically defined in S.C. Regs. § 117-1700.4. The ALC felt that this reasoning violates the principle of Occam's Razor and the simpler explanation of the purpose of the S.C. Regs. § 117-1700.4 definition is its application to § 12-43-220(g) rather than a convoluted application to § 12-37-220(A)(8).

Finally, note that Colonial would qualify for *industrial* revenue bonds. Under § 4-29-10(3) (Supp. 2019), a "Project" eligible for industrial revenue bonds includes

> any land and any buildings and other improvements on the land including, without limiting the generality of the foregoing, water, sewage treatment and disposal facilities, air pollution control facilities, and all other machinery, apparatus, equipment, office facilities, and furnishings which are considered necessary, suitable, or useful by the following investors or any combination of them:
>
> (a) any enterprise for the manufacturing, processing, or assembling of any agricultural or manufactured products;
>
> (b) *any commercial enterprise engaged in storing, warehousing, distributing, transporting, or selling products of agriculture, mining, or industry*, or engaged in providing laundry services to hospitals, to convalescent homes, or to medical treatment facilities of any type, public or private, within or outside of the issuing county or incorporated municipality and within or outside of the State;

(emphasis added). Colonial would qualify for industrial bonds because it engages in the "commercial enterprise" of "storing, warehousing, distributing [and] transporting" refined petroleum, which is the product of industry.

G. Cases from Other States

The Supreme Court of Florida has interpreted "industrial plant" in several cases regarding tax issues. For instance in *Jacksonville Port Authority v. Florida*, 305 So. 2d 166, 168 (Fla. 1974), the court determined that a food distribution center for some 180 retail outlets constituted an industrial plant by referencing several cases and concluding that the legislature "intended the phrase to be liberally construed."

Importantly, the court noted that the term "plant" applied to facilities that render services, as opposed to processing or distributing products. To that end, the court also held that a commercial laundry facility constituted an "industrial plant." The court considered several factors in reaching this conclusion such as whether the plant contributes to the prosperity of the state, the clientele, the size of the plant, and the number of employees. *Id.* The court distinguished the commercial laundry facility at issue from an ordinary commercial laundry because "his particular facility is not designed to serve the consuming public generally, as would, for example, an ordinary commercial laundry; it will not even maintain a cash register." *Id.*

Furthermore, as noted above, in *Richards v. Jolley*, the North Carolina Court of Appeals turned to the common meaning of the word "plant" to relate it to the statute in question. The court stated that "in common usage a "plant" is defined as "the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business." *Richards v. Jolley,* 208 N.C. App. 436, 441, 703 S.E.2d 467, 470 (2010) *citing* Merriam-Webster's Collegiate Dictionary 948 (11th ed. 2005).

There are several sales tax cases in which certain machinery and equipment used by companies which shipped gas (as opposed to extracting or refining gas) were held exempt under the state's sales tax exemption statute for manufacturers. *See Great Lakes Transmission L.P. v.*

Commissioner of Revenue, 638 N.W. 2d 435 (Minn. Sup. Ct. 2002); *Southern Natural Gas Co. v. State,* 261 Ala. 222, 73 So.2d 731 (1954) and *State v. Alabama Gas Corp.*, 258 Ala. 356, 62 So.2d 454 (1952).

II. THE ADMINISTRATIVE LAW COURT DID NOT ERR BY NOT DISCOUNTING THE POLLUTION CONTROL EXEMPTION BASED ON THE DUAL PURPOSE PROVISION WHICH APPLIES TO MANUFACTURERS.

A. General

Admittedly, §12-37-220(A)(8)[6] provides that "[f]or equipment that serves a dual purpose of production *and* pollution control, the value eligible for the ad valorem exemption is the difference in cost between this equipment and equipment of similar production capacity or capability without the ability to control pollution." (emphasis added). Appellants argue that even if the property at issue qualifies as pollution control property, the functional value of the exemption is -0- because the property serves multiple purposes. However, the ALC correctly found the dual-use provision inapplicable, finding:

> The dual-purpose provision within section 12-37-220(A)(8) directly relates to the method of assessment of pollution control property when that property serves a dual purpose of production and pollution control. If the pollution control property is not used for production, then the special assessment described in this provision does not apply. Here, the equipment at issue is not used to produce a product. In fact, all the parties agree Colonial is not engaged in production. Therefore, the dual-purpose provision in inapplicable to the equipment at issue in this case.

Amended Final Order at p. 31; R. p. 0111.

South Carolina has no legislative history, but one can assume the dual use doctrine was inserted by the General Assembly as some manufacturing equipment internally contains pollution

[6] The pollution control exemption is found in the S. C. Constitution, S.C. Const. Art. X, §3(b). Importantly, the Constitution does not contain the dual use doctrine. Section 12-37-220(A)(8), however, limits or modifies the constitutional provision by providing "[f]or equipment that serves a dual purpose of production and pollution control, the value eligible for the ad valorem exemption is the difference in cost between this equipment and equipment of similar production capacity or capability without the ability to control pollution." Therefore, arguably the constitutional exemption supersedes the statutory exemption.

control equipment. Where a manufacturer purchases a $40 million boiler which contains a $2 million pollution control component, only the $2 million would be exempt – not the full $40 million.

In any event, the overriding issue is whether the Colonial Pipeline industrial plant was a production facility. (If not, the statutory subsection does not apply.) If the Court finds that Colonial's industrial plant was a production facility, the next issue is whether the equipment at issue served a dual purpose of production and pollution control.

B. Was the Colonial Industrial Plant a Production Facility?

The statute does not define "production." Dictionary definitions are as follows:

> **Oxford Dictionary[7]:**
>
> Production: The action of making or manufacturing from components or raw materials, or the process of being so manufactured.
>
> **Black's Law Dictionary (11th ed. 2019):**
>
> Production: The act or process of making or growing things, esp. those to be sold <the production of consumer goods>.
>
> **Merriam-Webster[8]:**
>
> Production:
>
> (1) something produced; product
>
> (2) (a) the act or process of producing
>
> (b) the creation of utility especially: the making of goods available for use.
>
> **MyAccountingCourse.com[9]:**

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[7] *Production*, https://www.lexico.com/en/definition/production (last visited Aug. 27, 2021).
[8] *Production,* Merriam-Webster Dictionary, https://www.merriam-webster.com/ dictionary/production) (last visited Aug. 27, 2021).
[9] *What is Production,* My Accounting Course, https://www.myaccountingcourse.com/accounting-dictionary/ production (last visited Aug. 27, 2021).

> Production: Production is the method of turning raw materials or inputs into finished goods or products in a manufacturing process. In other words, it means the creation of something from basic inputs.
>
> **Vocabulary.com[10]:**
>
> Production: Production is the process of goods being made or manufactured.
>
> **Dictionary.com[11]:**
>
> Production: (1) the act of producing; creation; manufacture.
>
> (2) something that is produced; a product.
>
> **YourDictionary.com[12]:**
>
> Production is the process of making, harvesting or creating something or the amount of something that was made or harvested.

These dictionary definitions make plain that "production" is a manufacturing concept.

While Respondent is not aware of any South Carolina statute that explicitly defines "production", several define "manufacturing" and "processing." The SC Job Tax Credit Act, § 12-6-3360 ("JTC"), distinguishes manufacturers from processors, although both qualify for the JTC. A "manufacturer" is defined in § 12-6-3360 as follows:

> (5) "Manufacturing facility" means an establishment where tangible personal property is *produced* or assembled.

Id. (emphasis added). A "processor" in that same statute is defined as:

> (6) "Processing facility" means an establishment that prepares, treats, or converts tangible personal property into finished goods or another form of tangible personal property.

Id.

Section 12-6-3588, the South Carolina Renewable Energy Tax Incentive Program defines

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[10] *Production*, https://www.vocabulary.com/dictionary/production (last visited Aug. 27, 2021).
[11] *Production*, https://www.dictionary.com/browse/production (last visited Aug. 27, 2021).
[12] *Production*, https://www.yourdictionary.com/production (last visited Aug. 27, 2021).

"manufacturer" as follows:

> (2) "Manufacturing" means fabricating, *producing*, or manufacturing raw or unprepared materials into usable products, imparting new forms, qualities, properties, and combinations.

Id. (emphasis added)

Indeed, the thrust of the Counties' and Department's argument was that the pollution control exemption is limited to manufacturers, and Colonial is not a manufacturer, and engages in no production. The Department's Brief states at page 13: "All the parties agree ... to the fact that Colonial does not engage in production." The Brief of Aiken and Laurens Counties plainly states at page 36, "Colonial is not engaged in production." Thus, Aiken and Laurens Counties agree with the dictionary definitions cited above – that "production" equates to "manufacturing," and that Colonial engages in no form of manufacturing or production. As noted above, Judge Anderson agreed with this assessment.

In summary, Colonial, the ALC, the Counties and the Department all agree – Colonial performs no "production" as it is a transportation company, and is not a manufacturer and "production" is performed by manufacturers. As such the dual use doctrine does not apply.

C. If Colonial is a producer, does the claimed equipment serve a dual purpose?

If the Court finds that Colonial is a producer, the next question is whether the equipment at issue serves a dual purpose of production and pollution control.

1. Contested Equipment

At issue at the Hearing were pipeline coatings, pipeline cathodic protection systems and one automatic shut-off valve. As described in the Facts Section C above, pipeline coatings and cathodic protection devices are designed to prevent corrosion in the pipeline and provide no production function. The equipment at issue which helps to maintain the structural integrity of the pipeline to lessen the possibility of a leak. Both are required by federal law and are on every

pipeline used by Colonial in South Carolina (and elsewhere). Similarly, the automatic shut-off value is required by federal law to reduce the amount of spillage in a line in the event of a leak. It likewise has no production function.

The Counties strenuously argue that the exemption value should be zero as pipeline coatings, cathodic protection and shut-off valves are found on every pipeline. The Brief of Aiken and Laurens Counties states at page 39: "There is no such thing as a pipeline that does not use coatings, cathodic protection equipment, or automatic shut-off valves." That is because federal law requires them. Every coal-burning power plant has smoke stacks and other air pollution equipment. They all have them, as federal law requires them. Under Aiken's rationale, those items would not be considered exempt as "every" power plant has them.

The Counties also argue that they serve a business function of protecting and preserving Colonial's pipeline assets. While they may protect and preserve the pipelines, the dual purpose statute requires a proration *only* where the asset is involved in the dual use of production and pollution control. There is no evidence in the record that these three items are involved in production at all. (And as stated above, the Counties further strenuously argue Colonial is engaged in no "production.")

Below is the testimony regarding business vs. legal requirements:

> Q: Okay. If there a – there is a business reason for Colonial not to leak product out of its pipeline, right?
>
> A: A business reason? It costs us a lot of money. PHMSA would come down on us pretty hard, so yeah, there are a lot of consequences to product coming out of our pipeline.
>
> Q: Is it fair to say that cathodic protection pipeline coatings and automatic shutoff valves have a dual purpose of production and pollution control?
>
> A: I would say that the intent and the primary purpose of the things you mentioned are to prevent a loss of containment. Now at the

> same time they also protect assets but the intent of the Code and the primary purpose of is it to prevent a loss of containment or pollution control.

Tr. p. 284, line 22-p. 285, line 14; R. p. 1725. Other testimony was as follows:

> Q: Okay. So if you didn't have cathodic protection, you'd be violating the law, correct?
>
> A: Yes.
>
> Q: Okay. So certainly pollution control is not the company's only or primary concern with these coatings, with these cathodic protections and with these automatic shutoff valves, is it?
>
> A: It's the primary.

Tr. p. 299, lines 3-12; R. p. 1740.

Further, Texas has addressed the pollution control function of pipeline coatings, cathodic protection, and automatic shut-off valves via statute and regulation. Like South Carolina, Texas has pollution control property tax exemption under Tex. Tax Code § 11.31(a) for "all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution." To qualify, taxpayers must apply to the Texas Commission on Environmental Qualify (TCEQ) describing the purpose and benefits of the equipment.

In 2007, in an effort to provide substantive guidelines and to expedite the review of exemption requests, the Texas Legislature amended § 11.31(a) to require TCEQ to establish a three-tier review system via regulation. *See* 30 TAC § 17.1 *et seq*. Taxpayers seeking the pollution control property tax exemption must apply directly to TCEQ and identify the property as either Tier I, Tier II, or Tier III property. Tier I property is described as follows:

- **Tier I property** is designated on a list developed by the TCEQ Executive Director called the Tier I Table. The Tier I Table lists property which has been determined to be used either wholly or partly for pollution control purposes at a standard use percentage.

> According to TCEQ program guidelines, "[a]n item may be added only if there is compelling evidence that the item provides pollution control benefits and a standard use percentage can be calculated."

TCEQ Regulatory Guidance – Property-Tax Exemptions for Pollution Control Property (2011), at p. 7 (available at https://www.tceq.texas.gov/assets/public/implementation/tax_relief/rg461_program_guidelines.pdf). In other words, so long as the property is listed on the Tier I Table and used as described thereon, a taxpayer's request for property tax exemption receives an expedited review and is automatically determined exempt as the applicable percentage.

Tier II and III property is described as follows:

> - **Tier II property** is 100% used for pollution control, but is not listed on the Tier I Table. To qualify, the applicant must demonstrate to the satisfaction of TCEQ that (1) the property is exclusively used for pollution control, (2) the property has no production benefits, and (3) the property was installed to meet or exceed an applicable environmental regulation.
>
> - **Tier III property** offers environmental benefits, as well as improvements to production, safety, or other processes. It includes property that has both environmental and production elements. Because Tier III property has obvious dual use, it requires a more detailed review and determination by TCEQ.

Id. **Texas' review system is relevant case because TCEQ has designated pipeline coatings, cathodic protection, and automatic shut-off valves as Tier I property, with a standard pollution control use percentage of 100%.** This means that according to the TCEQ, 100% of the equipment at issue in this case is deemed 100% pollution control property, with no ancillary use.

As described above, because cathodic protection and pipeline coating systems are used in conjunction to protect the pipeline, these products are listed together in the Tier I Table:

Cathodic Protection

No.	Media	Property	Description	%
T-30	Water	Isolation Fittings	Dielectric bushings and fittings to separate underground piping from aboveground tanks and piping.	100
T-31	Water	Sacrificial Anodes	Magnesium or zinc anodes packaged in low resistivity backfill to provide galvanic protection.	100
T-32	Water	Dielectric Coatings	Factory installed coal-tar epoxies, enamels, fiberglass reinforced plastic, or urethanes on tanks and/or piping. Field installed coatings limited to exposed threads, fittings, and damaged surface areas.	100

Automatic shut-off valves are listed in a separate section of the Tier I Table and identified as No. T-3:

Equipment Located at Tank Installations including Service Stations

Spill and Overfill Prevention Equipment

No.	Media	Property	Description	%
T-1	Water	Tight Fill Fittings	Liquid tight connections between the delivery hose and fill pipe.	100
T-2	Water	Spill Containers	Spill containment manholes equipped with either a bottom drain valve to return liquids to the tank or a hand pump for liquid removal.	100
T-3	Water	Automatic Shut-off Valves	Flapper valves installed in the fill pipe to automatically stop the flow of product.	100
T-4	Water	Overfill Alarms	External signaling device attached to an automatic tank gauging system.	100
T-5	Water	Vent Restriction Devices	Float vent valves or ball float valves to prevent backflow through vents.	100

As described above, taxpayers may apply for an exemption for property **not** listed on TCEQ's Tier I chart using a Tier II application. However, to qualify under Tier II, "[t]he applicant is responsible for demonstrating that the property/equipment serves *100% for pollution control, has no production benefits*, and was installed to meet or exceed an applicable environmental regulation." TCEQ Regulatory Guidance – Property-Tax Exemptions for Pollution Control Property, at p. 6 (emphasis added). To reiterate, Tier I property (which includes cathodic protection, pipeline coatings, and automatic shut-off valves) qualifies for the exemption at the applicable predetermined percentage of 100%, without the need for demonstrating whether it has a role in production.

The guidance also provides a helpful example showing why the "dual use" provision in SC law simply should not apply in our case. In Texas, property with both pollution and production

use is still eligible for a partial exemption under Tier III. The guidance provides the following example of dual use property:

> Tier III property/equipment may offer environmental benefits and improvements to production, safety, or other processes, including new or modified property/equipment that has both environmental and production elements. An example is the installation of a new closed vent system used to control a highly reactive volatile organic compound (HRVOC) emission from a cooling tower. The HRVOC emissions are captured by the new closed vent system and returned to the production process. Since the captured material is returned to the production process, the closed vent system is eligible for only a partial use determination and therefore requires a Tier III application.

TCEQ Regulatory Guidance – Property-Tax Exemptions for Pollution Control Property, at p. 7. The productive element in this example returns additional emissions to the production process, thereby increasing productivity and eventual output. It is logical that when property increases the efficiency of a production process by increasing output, it should not be eligible for a property tax exemption – that is the intent of South Carolina's dual use provision. But to completely negate a tax exemption for property clearly required by federal and state law to abate pollution based on any conceivable ancillary use runs contrary to the intent of the exemption.

In 2016, a Texas county challenged TCEQ's grant of the pollution control property tax exemption for pipeline coatings, cathodic protection, and automatic shut-off valves, which was owned by DCP Southern Hills Pipeline, LLC. *See* TCEQ Docket Nos. 2016-0055-MIS-U, 2016-0056-MIS-U, 2016-0057-MIS-U, and 2016-0058-MIS-U. The property owner in this matter filed for Tier I 100% positive use determination for, *inter alia*, three automatic shut-off valves, pipeline coating, and cathodic protection. TCEQ granted the requests, and Wise County, TX appealed TCEQ's determination. In response, the Executive Director of TCEQ filed a response to Wise

County before the Commission. The filing makes the following arguments with respect to each piece of equipment:

> Automatic Shut-Off Valves
>
> Application 19538 designated property under Tier I Table category No. T-3 "Automatic Shut-off valves" and cited U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) regulation in 49 CFR § 195.260(c)[13] that requires valves to be installed to minimize pollution from accidental discharge....
>
> Use Determination 19538 applies to three 8-inch automatic shut-off valves for the pipeline located in Wise County. Automatic shut-off valves are installed to prevent or mitigate the release of pipeline products and fluids from leaking or discharging into the environment. Automatic shut-off valves are specifically included on the Tier I Table in 30 TAC § 17.14(a) and are determined by rule to be used wholly for pollution control purposes.
>
> Pipeline Coatings and Cathodic Protection
>
> Application 19543 designated property under Tier I Table category No. T-32 "Dielectric Coatings" and cited PHMSA regulations 49 CFR §§ 195.557(a) and 195.563(a) that require the installation of pipe coatings and cathodic protection....
>
> Use Determination 19543 applies to the cathodic protection; fusion-bonded epoxy; adhesive for top coat; and top coat consisting of polyethylene or polypropylene. Cathodic protection and pipeline coatings are used to minimize corrosion of the pipeline; corrosion of the pipeline materials could lead to leaks or discharge of pipeline product or fluids into the environment. Dielectric coatings are specifically included on the Tier I Table in 30 TAC § 17.14(a) and are determined by rule to be used wholly for pollution control purposes....
>
> The commission has previously considered appeals on similar pollution control property and upheld the Executive Director's determinations that cathodic protection and pipeline coating . . . are pollution control properties eligible for positive use determinations...On April 23, 2008, the commission issued an order that denied appeals and affirmed the Executive Director's positive

[13] Note with respect to each piece of equipment, TCEQ cites the identical federal regulations as Respondent to demonstrate the property is required by federal law for the elimination or mitigation of pollution.

> use determinations for property including dielectric coating (cathodic protection) on portions of a natural gas pipeline in Rusk and Panola Counties.
>
> CONCLUSION
>
> After careful review of the issue raised in the appeals, the Executive Director respectfully recommends that the commission deny the appeals and affirm the Executive Director's positive use determinations. The Executive Director reviewed DCP Southern Hill's applications, found that the applications met the requirements of 30 TAC Chapter 17, and determined the subject properties are used for the control of air, water, or land pollution. The Executive Director's determinations should be affirmed.

Id. (citations omitted). Less than one week after the response was filed, the County dropped its appeal. *See* TCEQ Integrated Database (*available at* https://www14.tceq.texas.gov/epic/eCID/).

In sum, other states have recognized in published guidance that pipeline coatings, cathodic protection, and automatic shut-off valves serve an exclusive, 100% pollution control function. Incidentally, and perhaps of no relevance, but Colonial did not claim as exempt the 512 miles of pipeline in South Carolina as exempt under the pollution control exemption. In fact, Respondent only claimed the exemption for the capitalized costs of recoating existing pipeline that needed to be repaired.

2. Although Colonial contends that the dual use doctrine is inapplicable, research has uncovered several dual use cases, all dealing with manufacturers.

In *Commonwealth Edison Co. v. Department of Local Government*, 425 N.E.2d 817 (Ill. 1981) at issue under a unique statute was whether 12 pollution control facilities owned by a manufacturer were properly assessed. The Court noted that the statute in that case looked at whether the pollution control equipment at issue (1) results in the production of a commercially saleable by-product; or (2) increases the production; or (3) reduces the production costs of the products or services otherwise sold.

Recoating Colonial's pipeline (1) does not result in the production of commercially

saleable by-products; (2) does not increase production; and (3) does not reduce production costs of the products being sold (other than by stopping leakage.)

In *International Paper Co. v. Board of Environmental Protection*, 737 A.2d 1047 (Me. 1999) the Maine Supreme Court rejected the Environmental Board's refusal to consider whether the installation of certain equipment was the primary purpose of the installation once it determined that the system's basis function was to increase production. The Court noted that "[n]ew equipment may have a primary function of production, but that production equipment change may qualify for the exemption if the applicant can demonstrate that the primary purpose of its installation was to reduce pollution rather than improve production." *Id.* at 1051-52. Colonial's primary purpose in recoating the pipeline was to comply with federal law, which required such repairs.

See also Weyerhaeuser Co. v. St. Dep't of Ecology, 545 P.2d 5 (Wash. 1976) and *Mont. Belvieu Caverns, LLC v. Texas Comm'n on Envtl. Quality*, 382 S.W.3d 472 (2012).

III. THE AMINISTRATIVE LAW COURT DID NOT ERR BY LIMITING THE SCOPE OF THE CONTESTED CASE HEARING TO THE THREE TYPES OF POLLUTION CONTROL EQUIPMENT IDENTIFIED IN THE PROPOSED ASSESSMENT AND DEPARTMENT DETERMINATION.

The Department attempted to broaden the scope of the matter before the ALC by amending its Prehearing Statement to deny for the first time previously-granted property tax exemptions for wastewater pollution control, storm water pollution control, secondary containment and tank floating roofs (the "Previously-Exempted Equipment") claimed by Colonial for the 2017 and 2018 tax years. The ALC denied the Department's Motion to Amend its Prehearing Statement, finding that although "the Department has a right to change its mind as to its interpretation of the law, ... that does not mean it can drag a taxpayer into court years later for a prior tax exemption that was

not contested just because the Department has changed its mind as to the application of the law." Order Denying Motion to Amend Prehearing Statement at p. 7.

A. Background

Colonial filed property tax returns in 2017 and 2018. It claimed the pollution control exemption for seven items. The DOR granted the claimed exemptions for the Previously-Exempted Equipment in both 2017 and 2018. Colonial also claimed exemptions for pipeline re-coatings, cathodic protection devices and shut-off valves in both 2017 and 2018. The DOR denied these three items both years.

The property tax appeal system works as follows:

1. Taxpayers file a property tax return with the DOR Property Tax Division (now called Government Services Division) each year by April 30.

2. The DOR Property Tax Division reviews the returns and issues a proposed assessment. The taxpayer has 90 days to appeal the proposed assessment.

3. If the taxpayer agrees with the proposed assessment (i.e. does not file an appeal) the DOR forwards the Proposed Assessment (along with distribution information) to the counties in which the taxpayers have property and the counties prepare and send tax bills to the taxpayer.

4. If the taxpayer appeals the assessment, the matter goes to the DOR appeals section who hears the appeal. If the appeal is not settled, the appeals section sends the file to the DOR's Office of Legal Counsel.

5. If the DOR's legal division agrees with the Proposed Assessment, they issue a Department Determination (sometimes called a DD and sometimes Final Agency Decision (FAD)).

6. The Department Determination is served on the taxpayer who has 30 days to file an appeal with the ALC.

7. Once an appeal has been filed, the case goes to trial based upon the ALC Rules of Procedure.

8. The ALC Rules require a prehearing statement to be filed by both parties. The Prehearing Statement outlines what both sides contend the issues to be for the upcoming trial.

As stipulated by the parties:

15. On April 19, 2017, the Department's Government Services Division received a 2017 application for an ad valorem tax exemption based on § 12-37-220(A)(8). In its letter and accompanying application, the Taxpayer reported a pollution control exemption on pipe coatings, cathodic protection, automatic shut-off valves, wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs.

16. The Government Services Division evaluated the exemption application based on whether the property was designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution. On August 15, 2017, based on its evaluation, the Government Services Division issued a Property Assessment Notice granting the exemption application as to wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs for property tax year 2017 but denying the Taxpayer's exemption application as to pipe coatings, cathodic protection, and automatic shut-off valves.

17. On September 7, 2017, the Taxpayer protested the proposed assessment for 2017. Exhibit A is a true and accurate copy of the protest that the Taxpayer submitted to the Department.

...

24. On July 27, 2018, the Government Services Division issued a Property Assessment Notice denying the Taxpayer's exemption application as to pipe coatings, cathodic protection, and automatic shut-off valves but granting the exemption application as to wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs for property tax year 2018.

25. The Government Services Division received correspondence postmarked August 13, 2018, from the Taxpayer protesting the proposed assessment for property tax year 2018.

...

28. The Department issued its Determination in this matter on November 19, 2018.

29. The Taxpayer timely requested a contested case hearing on December 5, 2018.

To reiterate the procedural history of this matter specifically, Respondent timely filed applications for exemption with the Department for the 2017 and 2018 tax year seeking property tax exemptions for seven types of equipment. *See* Stipulation Nos. 15 & 22. In response, the

Department issued Property Assessment Notices on August 15, 2017 for the 2017 tax year and on July 27, 2018 for the 2018 tax year. Stipulation Nos. 16, 24. Those assessments listed the proposed taxable value of Respondent's property. The Proposed Assessment Notices expressly excluded the values of the Previously-Exempted Equipment, but included the values for pipe coatings, cathodic protection, and automatic shut-off valves. This means the 2017 and 2018 Property Assessment Notices granted Respondent's exemption request for the Previously-Exempted Equipment, but denied exemptions for the remaining equipment. Thereafter, Respondent timely protested *those denials*, Stipulation Nos. 17 & 25, by filing a statutory appeal, which is required under § 12-60-1730 ("A property taxpayer may appeal any property tax assessment or denial of exemption if a written protest is filed in accordance with this article.").

Because the Property Assessment Notices granted Respondent's exemption request for the Previously-Exempted Equipment, the only issue for Respondent to appeal was the denial of the exemption for the remaining equipment. In sum, the Department's 2017 and 2018 Proposed Assessments granted property tax exemptions for Respondent's Previously-Exempted Equipment based on Respondent's original application for exemption. The Proposed Assessments, which form the basis of this litigation, identified a taxable value of property that excluded the value of the Previously-Exempted Equipment. The Department Determination, issued in response to Respondent's protest of the Proposed Assessments, also made no mention of the Previously-Exempted Equipment because they were not part of the dispute.

B. The Department's Proposed Amendment to its Prehearing Statement Should be Denied Based on Rule 18, SCALCR.

The Department filed a motion to amend its prehearing statement on September 4, 2019. By contrast, Colonial filed Appeals on September 7, 2017 (Stipulation No. 17) for the 2017 tax year and on August 13, 2018 for the 2018 tax year (Stipulation No. 25). The DOR Department

Determination was issued on November 19, 2018 (Stipulation No. 28), and Colonial appealed to the ALC on December 5, 2018 (Stipulation No. 29). The second amended prehearing statement declared that the Previously-Exempted Equipment were no longer exempt. Rule 18, SCALCR, provides:

> Any document filed with the Court may be amended at any time upon motion and for good cause shown, *unless the amendment would prejudice any other party* in the presentation of its case.

Id. (emphasis added). Under the plain language of the Rule, if the amendment serves to prejudice any other party in the presentation of its case, it may not be amended, even upon motion. In this case, the addition of the Previously-Exempted Equipment obviously prejudiced Colonial. Therefore, the motion to amend was properly denied in full.

The only relevant case applying Rule 18, SCALCR, is *International Paper Company, Inc. v. South Carolina State Energy Office*, Docket No. 12-ALJ-30-0086-CC (filed Dec. 19, 2012). In that case, the ALC found that International Paper's protest of a S.C. State Energy Office's decision regarding the biomass fuel credit was not properly before the Court as a contested case under § 1-23-600(A), but could have been heard as an appeal of a final decision under § 1-23-600(D). The Court rejected International Paper's request to apply Rule 18 to amend the original request for contested case hearing into a procedurally-effective appeal. The Court found that "to apply Rule 18(C), SCALCR, would go beyond a mere amendment of a pleading, paper, or document, and would instead allow substitution of an entirely different document and implicate entirely different procedural rules." In a footnote, the Court noted: "Not only could this lead to abuse of the rules but it would also undermine the timeliness safeguards of the Court's appellate procedure."

Similarly, the Department's retroactive denial of a previously-granted exemption by means of an amended prehearing statement could surely lead to similar abuses. For example, as discussed

above, the Department originally granted the pollution control property tax exemption for the 2017 and 2018 tax years. Under Department's proposal, it can simply ignore other procedural bars (as described below) and the statute of limitations to bring previously-exempt equipment within this dispute. Further, the Department's auditors in charge of issuing Proposed Assessments and lawyers in charge of issuing Department Determinations could simply agree to avoid complex or troublesome issues at the agency level, and then spring those issues onto the taxpayer once the matter progresses to the ALC.

C. The Department's Approach Violates the Revenue Procedures Act.

S.C. Code Ann. § 12-60-20 provides:

> It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue and a dispute concerning property taxes. The South Carolina Revenue Procedures Act must be interpreted and construed in accordance with, and in furtherance of, that intent.

This "straightforward procedure" is described in Article 5 of the Revenue Procedures Act. As outlined above, under § 12-60-420(A) of the Revenue Procedures Act, the Department is authorized to send a proposed assessment to the taxpayer when it determines there is a deficiency in a state or local tax administered by the Department. That proposed assessment must "explain the basis for the . . . proposed assessment." Next, § 12-60-450(A) authorizes the taxpayer to appeal a proposed assessment by preparing a written protest containing certain information, including a statement of facts and law supporting the position and outlining the reasons for appeal. The Department then prepares a Determination in response to the taxpayer's protest pursuant to § 12-60-450(E). Finally, § 12-60-460 provides that "A taxpayer may seek relief from the department's determination by requesting a contested case hearing before the Administrative Law Court."

The appeals procedures outlined in the Revenue Procedures Act are designed to be straightforward and to promote predictability. The Department's use of an amended prehearing statement to retroactively deny a previously-granted exemption is anything but straightforward—it is an end-around the statutory assessment and appeal procedure. Taxpayers should be afforded the opportunity to know with specificity and precision the nature of the tax dispute. Whether Petitioner is entitled to the Prevoously-Exempted Equipment for the 2017 and 2018 tax years was never before the ALC. Respondent sought and the Department granted an exemption for that property when it filed its 2017 and 2018 property tax returns. Respondent never addressed that property in its protest of the Department's Proposed Assessment because the Department agreed with Respondent at the time that the property was exempt as pollution control property.

IV. THE ALC DID NOT ERR IN FINDING THAT COLONIAL ESTABLISHED THAT ITS PROPERTY QUALIFIED AS POLLUTION CONTROL WHEN DHEC SO DETERMINED.

The Counties (but not the Department) argue that because Colonial failed to elicit a "department determination" from **DHEC** (as opposed to **DOR**/the Department), Colonial failed to exhaust its administrative remedies. The Counties' argument is based on § 12-37-220(A)(8), which allows the Department to seek DHEC's expertise. It states, in relevant part:

> At the request of the Department of Revenue, the Department of Health and Environmental Control shall investigate the property of any manufacturer or company, eligible for the exemption [for pollution control equipment] to determine the portion of the property that qualifies as pollution control property. Upon investigation of the property, the Department of Health and Environmental Control shall furnish the Department of Revenue with a detailed listing of the property that qualifies as pollution control property.

In effect, the Counties argue that before Colonial could challenge the Department's decision, it had to force DHEC to issue a department determination and exhaust its administrative remedies with DHEC.

In this case, because Colonial was seeking a tax exemption with the Department of Revenue, and because the Department of Revenue had denied its exemption request, the Department of Revenue was the only administrative agency from which a final decision could be challenged. Importantly, DHEC merely served in a consultation rule—which is evident in this case, considering the Department ultimately ignored DHEC's conclusion that "the listed technologies can be fairly described as pollution control equipment."[14]

"The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Storm M.H. ex rel. McSwain v. Charleston Cty. Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012). Importantly, the exhaustion principle applies to the remedies available within the agency whose decision is challenged. *See Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct. App. 2002) ("If this were an appeal from the denial of the permit through the administrative process in which DHEC was the appropriate fact finder, [Petitioner] would clearly be required to exhaust its administrative remedies prior to bringing suit. . . DHEC is not the

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[14] One wonders why Colonial would appeal DHEC's letter in the first place, considering it so overwhelmingly and convincingly found in favor of Colonial's position. In finding the property at issue constituted "pollution control equipment," the DHEC letter found:

> Colonial has specifically listed three items purported to be pollution control equipment that remain at issue in the 2017 and 2018 property tax determination: (1) pipeline cathodic protection, (2) pipeline coatings, and (3) automatic shut-off valves. In the context of USTs, each of these technologies would be characterized by [DHEC] as pollution control equipment. UST's are designed to store petroleum products, and corrosion protection is required for all UST systems to prevent petroleum releases into the environment. Cathodic protection is one method to meet the corrosion protection standard for USTs. Shear valves (considered an automatic shut-off valve) are installed to prevent, or limit the extent of, a petroleum release into the environment. Pipeline coatings are designed to isolate the pipeline to prevent corrosion. While releases from petroleum pipelines would not generally be directly to "water" but more likely to the ground surface, any release of sufficient size from a petroleum pipeline is likely to impact groundwater and may under certain conditions contribute contamination to surface waters via overland flow or groundwater seeps. Therefore, [DHEC] believes the listed technologies can be fairly described as pollution control equipment.

Joint Ex. 16; R. pp. 1940-41.

appropriate fact finder to answer this question."). In this case, there is no dispute that Colonial exhausted all administrative remedies with respect to the Department of Revenue, which is all that was required in this case.

CONCLUSION

Based on the foregoing, Colonial respectfully requests that this Court affirm the ALC's Amended Final Order granting the Pollution Control Exemption available under S.C. Code Ann. § 12-37-220(A)(8) for Colonial's pipeline re-coatings, cathodic protection, and automatic shut off valves for the 2017 and 2018 tax years. Further, Colonial requests that this Court find that the ALC properly disallowed the Department's attempt to circumvent its own appeal procedures by attempting to re-litigate a previously-granted exemption by means of an Amended Prehearing Statement. Finally, Colonial requests this Court find Colonial appropriately exhausted its administrative remedies by protesting the denial of the tax exemption at issue with the Department of Revenue, and that there was no need to appeal an opinion provided by DHEC as a consulting agency.

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November 16, 2021
Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-000219
Administrative Law Court Case No. 18-ALJ-0443-CC

Colonial Pipeline Company .....Respondent,

v.

South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County .....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Final Brief of Respondent** complies with Rule 211(b), SCACR.

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November 16, 2021