

Southeastern Environmental Law Journal

Volume 3 | Issue 1

Article 7

Winter 1993

Administrative Developments

Follow this and additional works at: <https://scholarcommons.sc.edu/selj>



Part of the [Law Commons](#)

Recommended Citation

(1993) "Administrative Developments," *Southeastern Environmental Law Journal*: Vol. 3: Iss. 1, Article 7.
Available at: <https://scholarcommons.sc.edu/selj/vol3/iss1/7>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in Southeastern Environmental Law Journal by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

ADMINISTRATIVE DEVELOPMENTS

PROCEDURE FOR CONTESTED CASES

S.C. CODE REGS. 61-72

Revised Regulation 61-72, Procedures for Contested Cases, completely revises the old regulation which became effective December 14, 1976. The regulation was revised to eliminate obsolete terminology and requirements and to modernize the Department of Health and Environmental Control (DHEC) procedures in contested case to comply fully with federal and state constitutional and statutory mandates, state judicial decisions, DHEC Board decisions, and state court rules.¹

Significant changes include expanding the definition of "contested cases". Previously, a contested case was defined as a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.² The expansion reflects the fact that, following recent state court opinions,³ many agency decisions affect substantial rights even though there may not be any explicit statutory or regulatory grant of a right to a hearing.⁴

The revisions also clarify under what circumstances an appeal stays an agency decision. The general rule is that a petition for review of an order will stay that order. Matters not affected by the petition, however, will not be stayed by the filing of a petition. In addition, petitions appealing only the amount of fines or penalties shall be deemed not to affect those portions of orders imposing substantive requirements. After the commencement of an administrative review, any party may move to lift the automatic stay. At the conclusion of an administrative review, the decision of the DHEC Board shall not be stayed except upon order of the Board or a reviewing court.⁵

The revisions also address the allocation of the burden of proof and the prior requirement that the DHEC staff present its case last in any adjudicatory hearing. The moving party now bears the burden of proof to establish its assertions by a preponderance of the evidence and shall present its case first. Unless DHEC has the burden of proof, it is to present its case last.⁶ The revisions also address the definition of an Initial Pleading and the steps necessary to commence an appeal.⁷

¹ 17 S.C. State Reg. (No. 4) 75 (1993).

² *Id.* at 76.

³ *See, e.g.,* Stono River Envtl. Protection Ass'n v. Department of Health & Envtl. Control, 305 S.C. 90, 406 S.E.2d 340 (1991); Triska v. Department of Health & Envtl. Control, 355 S.E.2d 531 (S.C. 1987).

⁴ 17 S.C. State Reg. (No. 4) 76 (1993).

⁵ *Id.* at 79.

⁶ *Id.* at 83.

⁷ *Id.* at 84.

**SOLID WASTE MANAGEMENT
S.C. CODE REGS. 61-107**

Regulation 61-107 introduces a new series of solid waste management regulations promulgated pursuant to the provisions of the Solid Waste Policy and Management Act of 1991⁸ in order to achieve the purposes set forth in the Act.⁹

**SOLID WASTE MANAGEMENT:
SOLID WASTE-MANAGEMENT GRANTS, RECYCLING-EDUCATION GRANTS, AND
WASTE-TIRE GRANTS
S.C. CODE REGS. 61-107.1**

Regulation 61-107.1 establishes procedures for the disbursement of solid waste management grants, recycling-education grants, and waste-tire grants to local governments or regions for solid waste management and recycling education and to assist local governments, regions, and public school districts in meeting the requirements of the Solid Waste Policy and Management Act.¹⁰

Requests for funding are to be submitted to DHEC's Office of Solid Waste Reduction and Recycling. The regulation sets forth specific eligibility requirements in order to receive grant funds. Such requirements include: (1) a description of the project for which grant funds are requested; (2) an estimate of the quantity, source, and type of materials to be collected and recycled under the proposed program; (3) a description of all existing or proposed recycling facilities or collection centers; and (4) evidence that the grant is needed to achieve the goals set forth in the Solid Waste Policy and Management Act.¹¹ In addition, the grant application must contain a recycling plan for the entire population of the service area.¹²

Upon receipt and approval of the grant application, DHEC will determine the amount of the grant award and prepare a grant agreement. The applicant may request advance funds through the application process; however, the applicant must sufficiently document and prove such need.¹³

Each recipient of grant funds must maintain records of all expenditures of those funds, and the records must be made available to DHEC upon request. Information on

⁸ S.C. CODE ANN. § 44-96-10 to -470 (Law. Co-op. Supp. 1993).

⁹ 17 S.C. State Regs. (No. 4) 69 (1993).

¹⁰ *Id.* at 69.

¹¹ *Id.* at 71.

¹² *Id.* at 72.

¹³ *Id.* at 70.

expenditures must also be included in a quarterly report on the status of the grant.¹⁴

DHEC has the right to terminate a grant award and to demand a refund of grant funds for noncompliance with the terms of the award or this regulation. Upon termination, the local government, region, or school district will be declared ineligible for further grant funds until that entity complies with the terms of the grant or this regulation.¹⁵

Any party aggrieved by a grant decision may apply in writing within thirty days of the decision to the State Solid Waste Advisory Council for review. Within forty-five days of the original grant decision, DHEC will inform the aggrieved party of a hearing established to review the decision. Under the regulation, the State Solid Waste Advisory Council must review the DHEC decision within sixty days of the original grant decision.¹⁶

**MUNICIPAL SOLID WASTE LANDFILLS:
SITING, DESIGN, CONSTRUCTION, & OPERATION
S.C. CODE REGS. 61-107.258**

Regulation 61-107.28 establishes minimum criteria under the South Carolina Solid Waste Policy and Management Act of 1991,¹⁷ and other applicable federal regulations for siting, design, construction, and operation of all municipal solid waste landfills (MSWLF) (including landfills used to dispose of sewage sludge).

The regulation became effective October 9, 1993 and applies to owners of new MSWLF units, existing MSWLF units, and lateral expansions, subject to certain exceptions. MSWLF units that stop receiving waste before the effective date are exempt from the requirements with the exception of the closure criteria and post-closure requirements. DHEC may allow vertical expansion of an existing MSWLF unit for a period not to exceed two (2) years after the effective date of the regulation. Such determination will be made on a case-by-case basis.

Under the regulation, no MSWLF shall be operated in the state of South Carolina without a written permit from DHEC. For the purposes of state solid waste management planning, any MSWLF unit failing to satisfy the criteria set forth in the regulation will be considered an open dump, which are prohibited by the Resource Conservation and Recovery Act of 1976.¹⁸ In addition, any MSWLF unit containing sewage sludge which

¹⁴ *Id.* at 71.

¹⁵ *Id.*

¹⁶ *Id.* at 75.

¹⁷ S.C. CODE ANN. § 44-96-10 to -470 (Law. Co-op. Supp. 1993).

¹⁸ 42 U.S.C.A. §§ 6901-6991 (West 1986 & Supp. 1993).

fails to satisfy the criteria in the regulation will be considered in violation of the Clean Water Act.¹⁹

**SOLID WASTE MANAGEMENT:
RESEARCH, DEVELOPMENT, & DEMONSTRATION PERMIT CRITERIA
S.C. CODE REGS. 61-107.10**

Regulation 61-107.10 establishes the minimum standards for the proper operation and management of solid waste management facilities (SWMF).²⁰ The regulation applies to SWMFs which propose to utilize an innovative or experimental solid waste management technology or process.²¹

The general provisions of the regulation provide that DHEC may issue a research, development, and demonstration permit for any SWMF that proposes to use a solid waste technology or process for which permit standards have not been promulgated. Any permits issued shall be for a period not to exceed two years and shall include such terms and conditions necessary to assure protection of human health, safety, and the environment.²²

**STORM WATER MANAGEMENT
S.C. CODE REGS. 72-405 TO -445**

Regulations 72-405 to 72-445 establish minimum standards for controlling stormwater runoff, erosion, and sedimentation for land-disturbing activities which are under the control of the South Carolina Department of Highways and Public Transportation.²³ Land disturbing activities are defined as changes in the natural cover that may cause erosion and alter the quality and quantity of stormwater runoff.²⁴ All plans prepared for the Highway Department must include designs using state-of-the-art practices.²⁵ Specific provisions provide guidance for design criteria and minimum standards for site-specific plans.²⁶ The Highway Department may grant waivers in certain cases.²⁷

¹⁹ 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1993).

²⁰ 17 S.C. State Reg. (No. 6) 167 (1993).

²¹ *Id.*

²² *Id.* at 168.

²³ 17 S.C. State Reg. (No. 5) 161 (1993).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 162-166.

DAMS AND RESERVOIRS
S.C. CODE REGS. 72-105 TO -145

Regulations 72-105 to 71-145 incorporate changes made to the Dams and Reservoirs Safety Act²⁸ by the 1992 General Assembly. The owners of any "high hazard" dam or "significant hazard" dam must notify the Land Resources Conservation Commission within thirty days of the transfer of ownership of the dam or reservoir.²⁹ The Commission has the authority to issue orders to dam owners mandating remedial measures necessary to protect life and property.³⁰ Owners of high hazard and significant hazard dams must provide a current Emergency Alert Notification Plan.³¹ The Commissioner has the authority to assess administrative fines for violations of the Act or regulations.³²

HAZARDOUS WASTE MANAGEMENT
S.C. CODE REGS. 61-79

New regulation 61-79 removes, amends, and adds subject matter to the original regulation. The regulation moves regulations for on-specification used oil from the Hazardous Waste Management Act³³ to the authority of the South Carolina Solid Waste Policy and Management Act of 1991^{34, 35}

Generators who have provided DHEC with information that becomes outdated or inaccurate are under a duty to notify the Department and update or correct such information.³⁶ As a new record-keeping requirement, generators must retain a copy of each manifest, Quarterly Report, Exception Report, testing result, and waste

²⁷ *Id.* at 162.

²⁸ S.C. CODE ANN. §§ 49-11-110 to -260 (Law. Co-op. 1987 & Supp. 1993).

²⁹ 17 S.C. State Reg. (No. 5) 157 (1993).

³⁰ *Id.* at 156.

³¹ *Id.* at 152.

³² *Id.* at 157.

³³ S.C. CODE ANN. §§ 44-56-10 to -210 (Law. Co-op. 1985 & Supp. 1993).

³⁴ S.C. CODE ANN. §§ 44-96-10 to -235 (Law. Co-op. Supp. 1993).

³⁵ 17 S.C. State Reg. (No. 5) 2, 12 (1993).

³⁶ *Id.*

analysis at the facility for three years.³⁷ Storage vessels, temporary storage containers, and pretransport containment storage will have uniform labeling placed on a visible outer surface for tracking and identifying waste from generation to off-site disposal.³⁸

New provisions allow an owner or operator to satisfy the financial assurance of closure requirement by establishing a standby trust fund. These provisions replace the federal requirement of an unsecured trust fund.³⁹ Permittees must adjust the cost estimates for post-closure care each year to account for inflation.⁴⁰ As a general permit application requirement, a site-specific inspection checklist for conducting DHEC compliance inspections must accompany new applications and all permit modification requests.⁴¹ For the convenience of those applying for permit modifications, an appendix of commonly requested changes is available that arranges each requested change to correspond to a relative administrative response.⁴²

The regulations also govern the burning of hazardous waste in industrial boilers or furnaces to use as processing material or to recover heat energy.⁴³ Owners and operators may qualify for interim status if such equipment is presently operating or if plans for construction of such equipment were approved before August 21, 1991.⁴⁴ These interim-status facilities must comply with air quality emission standards which restrict the quantity of off-vented organics,⁴⁵ particulate matter,⁴⁶ metals,⁴⁷ and noxious gases.⁴⁸ Those facilities that destroy or dispose of hazardous waste through burning are not subject to this subsection.⁴⁹ Small quantity and low-risk burners are exempted from this

³⁷ *Id.* at 3.

³⁸ *Id.* at 2,3.

³⁹ *Id.* at 3-5.

⁴⁰ *Id.* at 5-11.

⁴¹ *Id.* at 316,317.

⁴² *Id.* at 317-319.

⁴³ *Id.* at 12-13.

⁴⁴ *Id.* at 24-43.

⁴⁵ *Id.* at 43-47.

⁴⁶ *Id.* at 47.

⁴⁷ *Id.* at 47-53.

⁴⁸ *Id.* at 53,54.

⁴⁹ *Id.* at 12.

regulation.⁵⁰

**SOLID WASTE MANAGEMENT:
MUNICIPAL SOLID WASTE PROCESSING FACILITIES
S.C. CODE REGS. 61-107.6**

Regulation 61-107.6 establishes the requirements for the proper operation and management of all municipal solid waste management and processing facilities.⁵¹ Municipal solid waste management and processing facilities encompass those facilities that store, collect, transport, treat, process, or dispose of solid waste.⁵² Recycling or resource conservation facilities, however, are exempted from this regulation.⁵³

All owners or operators of existing waste processing facilities must submit as-built plans of the existing facility to DHEC by November 28, 1993.⁵⁴ Existing facilities that receive municipal solid waste for processing must conform to the standards of this regulation by May 28, 1994.⁵⁵ A permit for construction or expansion of an existing processing facility may issue if DHEC approves a Demonstration of Need request in accordance with S.C. Code section 44-96-290.⁵⁶

Prior to any construction, modification, or start-up operation for a waste processing facility, an owner or operator must submit an application and receive a permit from DHEC.⁵⁷ New or expanding waste processing facilities must conform to specific design criteria, location requirements, and operations criteria. For example, leachate and washwater from the processing facility may not drain or discharge into waters of the State unless DHEC approves a land application or an NPDES permit.⁵⁸ In addition, all new facilities must create a financial responsibility mechanism to ensure satisfactory closure and post-closure care.⁵⁹

⁵⁰ *Id.* at 54-58.

⁵¹ 17 S.C. State Reg. 216 (1993).

⁵² *Id.* at 218.

⁵³ *Id.* at 216.

⁵⁴ *Id.* at 218.

⁵⁵ *Id.*

⁵⁶ *Id.* at 218.

⁵⁷ *Id.* at 219.

⁵⁸ *Id.* at 223.

⁵⁹ *Id.* at 224.