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Administrative and Judicial Review of DHEC Environmental Decisions

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ADMINISTRATIVE AND JUDICIAL REVIEW OF DHEC ENVIRONMENTAL DECISIONS¹

SAM FINKLEA *

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I. OVERVIEW AND HISTORICAL DEVELOPMENTS

The discussion below covers present-day administrative and judicial review of environmental decisions by the staff of the S.C. Department of Health and Environmental Control (DHEC). Wherever possible, the principles of administrative procedure discussed are illustrated by cases arising from DHEC or implicating environmental issues.

Before 1994, the Board of Health and Environmental Control (Board) appointed hearing officers to hear appeals of Department staff actions.² The hearing officer took evidence and testimony and submitted a report to the Board; any party to this proceeding, including DHEC staff, could appeal to the Board.³ The Board then heard the appeal and issued its order, which may have included findings of fact that differed from those found by the hearing officer.⁴ Any appeal of the Board's decision was submitted to the circuit court, which conducted an appellate review applying the substantial evidence test.⁵ The circuit court order could be appealed to the both the S.C. Court of Appeals and the S.C. Supreme Court.⁶

The S.C. Coastal Council (Coastal Council) heard appeals of actions taken by its staff while the S.C. Mining Council (Mining Council) heard appeals of actions taken by the Department of Land Resources mining staff.⁷ Appeals from both the Coastal Council and Mining Council were taken directly to the circuit court in the same manner as appeals from the Board.⁸

The Restructuring Act of 1993 (Restructuring Act) created the Administrative Law Judge Division (later renamed the Administrative Law Court (ALC)).⁹ The Restructuring Act also transferred the Coastal Council to

² See S.C. CODE ANN. §1-23-320(A) (1993).

³ See *id.* § 1-23-610(A).

⁴ See *id.* § 1-23-610(D).

⁵ See *id.* § 1-23-380(B)(G)(5).

⁶ See *id.* § 1-23-390.

⁷ See *id.* § 1-23-610(A).

⁸ See *id.* § 1-23-380(B)(G)(5).

⁹ See 1993 S.C. Acts 181 §19 (Restructuring Act) (creating the ALJ Division); 1993 S.C. Acts 452 (postponing commencement of the Division's jurisdiction until January 1, 1994); 2004 S.C. Acts 202 (codified at S.C. CODE ANN. §1-23-500) (renaming the ALJ Division as the Administrative Law Court).

DHEC under the Office of Ocean and Coastal Resource Management (OCRM).¹⁰

Beginning in 1994, the ALC heard appeals of DHEC staff decisions, other than mining cases. The Administrative Law Judge (ALJ) conducted a hearing *de novo*, took evidence and testimony, and issued a Final Order.¹¹ This Final Order could be appealed to the Board or to the Coastal Zone Appellate Panel, as appropriate, in accordance with then Code Section 1-23-610(A).¹² The Board reviewed the administrative record, arguments, and briefs of the parties and issued a final agency decision which could then be appealed to the circuit court, the Court of Appeals, and the Supreme Court pursuant to Code Section 1-23-380(A).¹³ Former Code Section 1-23-610(D) defined the standard of review applicable to the Board's review of ALC decisions.¹⁴ Between 1994 and 2002,

¹⁰ See 1993 S.C. Acts 181 §1.

¹¹ See, e.g., *Reliance Ins. Co. v. Smith*, 489 S.E.2d 674, 677 (S.C. Ct. App. 1997) (citing S.C. CODE ANN. § 1-23-320(d) (Supp. 1996) ("The administrative law judge division shall . . . enforce by proper proceedings the attendance and testimony of witnesses."); § 1-23-320(i) (Supp. 1996) ("Findings of fact shall be based exclusively on the evidence and on matters officially noticed."); § 1-23-350 (1986) ("A final decision or order adverse to a party in a contested case shall . . . include findings of fact and conclusions of law, separately stated."); see also § 1-23-330 (1986) (discussing the receipt of evidence in contested cases, "[T]he proceeding before the ALJ is in the nature of a *de novo* hearing.").

¹² §1-23-610 ("(A) For quasi-judicial review of any final decision of an administrative law judge of cases involving departments governed by a board or commission authorized to exercise the sovereignty of the State, a petition by an aggrieved party must be filed with the appropriate board or commission and served on the opposing party not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right. A party aggrieved by a final decision of a board in such a case is entitled to judicial review of that decision by the Circuit Court under the provisions of (A) of this section and pursuant to §1-23-610(C)."). This section (before its amendment by 2006 S.C. Acts 387 and 2008 S.C. Acts 334, discussed further below) applied only to appeals of DHEC and Department of Natural Resources decisions. JEAN HOEFER TOAL, SHAHIN VAFAI & ROBERT A. MUCKENFUSS, *APPELLATE PRACTICE IN SOUTH CAROLINA* 39 (2nd ed. 2002).

¹³ See S.C. CODE ANN. §1-23-380.

¹⁴ §1-23-610(D) was renumbered as -610(C) when the previous -610(C) was deleted by 1993 S.C. Acts 387 § 5:

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal 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 has been prejudiced because of the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;

the Board sometimes rejected the findings contained in the Final Orders and Decisions of the ALC.¹⁵ However, in *Brown v. South Carolina Dep't of Health and Env'tl. Control*, the Supreme Court held that the ALC is the finder of fact.¹⁶

The Coastal Zone Appellate Panel heard appeals of Final Orders, pursuant to Code Section 48-39-150(D), and appeals of Coastal Management Plan consistency determinations.¹⁷ The Mining Council heard appeals from DHEC's Mine Permitting Program.

In 2006, the S.C. General Assembly extensively revised a number of statutes providing for quasi-judicial and judicial review of administrative actions.¹⁸ In 2008, the legislature further amended the Administrative Procedure Act (APA) to clarify the distinctions between the ALC's *de novo* review and appellate review of agency decisions.¹⁹

2006 S.C. Acts 387 (Act 387) substantially amended Code Sections 1-23-380, 1-23-600, 1-23-610, and a number of other code sections applicable to various state agencies.²⁰ The legislature amended Section 1-23-380 to provide for petitions for judicial review, after exhaustion of administrative remedies, to be taken directly to the Court of Appeals, bypassing the circuit court.²¹ The legislature also amended Code Section 1-23-610(A) to exclude DHEC from the universe of "board[s] or commission[s] authorized to exercise the sovereignty of the State" empowered to review ALC Final Orders.²² The legislature amended Code Section 44-1-50, *deleting* references to the Board's review of ALC decisions.²³ And the legislature added Section 44-1-60 to provide an opportunity for expedited review by the Board before the case goes to the

(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.

1993 S.C. Acts 387 § 5.

¹⁵ See *Brown v. S.C. Dep't of Health & Env'tl. Control*, 560 S.E.2d 410, 418 (S.C. 2002).

¹⁶ See *id.* at 417.

¹⁷ See S.C. CODE ANN. § 49-39-150(D) (2001).

¹⁸ See 2006 S.C. Acts 387.

¹⁹ See 2008 S.C. Acts 344.

²⁰ 2006 S.C. Acts 387.

²¹ See S.C. CODE ANN. § 1-23-380(A) (2005 & Supp. 2009) (as amended by 2006 S.C. Acts 387 § 2).

²² 2006 S.C. Acts 387 § 5 ("For quasi-judicial review of any final decision of an administrative law judge of cases involving departments governed by a board or commission authorized to exercise the sovereignty of the State, except the Department of Natural Resources and the Department of Health and Environmental Control.").

²³ See *id.* § 47.

ALC.²⁴ The legislature further amended Code Section 1-23-610(B) to provide for appeal of contested cases “involving departments ... in which ... an administrative law judge is authorized ... to hear and decide these cases,” explicitly listing DHEC and the Department of Natural Resources,²⁵ directly to the Court of Appeals.²⁶ Several sections of the Coastal Zone Management Act, discussed more fully below, were amended.

2008 S.C. Acts 344 (Act 344) further amended the APA. The amendments’ effect was to clarify which cases could be heard by an agency and reviewed in an appellate capacity by the ALC²⁷ and which contested cases could be heard *de novo* by an ALJ.²⁸

The practitioner should proceed cautiously before relying on cases decided before the enactment of Acts 387 and 344 for principles of administrative procedure, applicability of DHEC’s regulations for conducting a contested case, or the role of the Board or the Coastal Zone Appellate Panel in conducting quasi-judicial review.

II. INITIAL REVIEW OF STAFF DECISIONS

A. Overview

Act 387 provides for a “final review conference” by the Board, a committee of three Board members, or a designee of the Board, to review staff actions.²⁹ Act 387 also authorizes DHEC to “promulgate procedural regulations for conducting final administrative review.”³⁰ Although the possibility of designating an individual to conduct the final review conference required by Code Section 44-1-60 resembles the pre-ALC practice of appointing a hearing

²⁴ See *id.* § 48.

²⁵ S.C. CODE ANN. § 1-23-600(B) (2005 & Supp. 2009) (as amended by 2006 S.C. Acts 387 § 4).

²⁶ § 1-23-610(B) (as amended by 2006 S.C. Acts 387 § 5).

²⁷ See 2008 S.C. Acts 334 §§ 3, 4, 5, 7 (amending S.C. CODE ANN. §§ 1-23-310, -320, -380, and -600(E), respectively).

²⁸ See *id.* § 1 (S.C. CODE ANN. § 1-23-505(2) defines “agency” for purposes of Article 5 of the APA to refer to the agency whose decision is being reviewed); § 3 (amends S.C. CODE ANN. § 1-23-310(2) to exclude the ALC from the definition of “agency” applicable in S.C. CODE ANN. § 1-23-380); § 7 (amending S.C. CODE ANN. § 1-23-600(A), (B), (C), (G), (H), and (I)).

²⁹ See S.C. CODE ANN. § 44-1-60(F) (2009) (added by 2006 S.C. Acts 387 § 48).

³⁰ § 44-1-60(H) (added by 2006 S.C. Acts 387 § 48).

officer³¹ in some respects, the Board has not elected to do so for any case as of March 2010. In any event, in light of the additional requirements imposed by Code Section 44-1-60 and the significant differences between the APA before and after Act 387, it is doubtful that any of the provisions of Regulation 61-72 will be invoked again.

On July 20, 2006, the Board approved procedures, Final Review Procedures, for processing requests for review of staff decisions and rendering a final agency decision.³² Where the following sections describe how a particular issue has been handled in the past under Regulation 61-72, those cases should not be taken as definitive guidance for handling similar issues in the future.

B. Board Review of DHEC Staff Decisions

The staff decision to issue, deny, renew, suspend or revoke licenses or permits, or to take “other actions ... which may give rise to a contested case” is the “initial decision.”³³ Actions imposing sanctions or compelling action or forbearance on the part of the recipient are usually considered to be “other actions[,] ... which may give rise to a contested case.”³⁴

Before making a decision on a permit, DHEC staff is directed to provide public notice according to law³⁵ and to consider the entire administrative record.³⁶ The administrative record consists of:

[T]he application and supporting exhibits, all public comments and submissions, and other documents contained in the supporting file for the permit, license, certification or other approval. The administrative record may also include material readily available at the department, or published materials[,] which are generally available and need not be

³¹ See S.C. CODE ANN. REGS. 61-72, §§ 501-02 (Supp. 2009) (last revised in 1993; most, if not all, of the provisions have been superseded by the acts applicable to the ALC and the ALC's Rules of Procedure).

³² S.C. CODE ANN. § 44-1-60(A), (C) (2009) (added by 2006 S.C. Acts 387 § 48).

³³ *Id.*

³⁴ See, e.g., S.C. Dep't of Health & Env'tl. Control v. Kozlowski, *Cert. No. 1715*, No. 03-ALJ-07-0376-CC, 2005 WL 1520470 (June 2, 2005) (stating violations of the regulation are subject respondent to fines).

³⁵ See S.C. CODE ANN. § 44-1-60(B) (2009) (added by 2006 S.C. Acts 387 § 48).

³⁶ *Id.*

physically included in the same file as the rest of the record as long as such materials are specifically referred to in the department decision.³⁷

Although this section does not define the “administrative record” pertaining to a staff decision to impose a fine or other sanction, the better practice would be to include whatever documentation, staff observations, statements from the respondent, and “material readily available at the department, or published materials which are generally available,”³⁸ which support the decision.

C. Coastal Zone Permits and Coastal Management Plan Consistency Determinations

OCRM issues permits pursuant to the Coastal Zone Management Act³⁹ and reviews applications for state and federal permits in South Carolina’s eight coastal counties, certifying that the proposed activity is consistent with the Coastal Management Plan.⁴⁰

Two types of management authority are granted in two specific areas of the State. The Council has direct control through a permit program over critical areas, which are defined as coastal waters, tidelands, beaches and primary ocean-front sand dunes. Direct permitting authority is specifically limited to these critical areas. Indirect management authority of coastal resources is granted to the Council in counties containing one or more of the critical areas. This area is called the coastal zone and consists of the following counties along the South Carolina coast: Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Horry, and Jasper. The coastal zone includes coastal waters and submerged bottoms seaward to the State’s jurisdictional limits as well as the lands and waters of the eight coastal counties.⁴¹

Prior to Act 387, appeals were governed by S.C. Code Regulation 30-6 and Code Sections 48-39-150(D), 48-39-180, 48-39-280(A) and (E), and 48-39-290(D), which provided for a contested case hearing before the ALC and quasi-

³⁷ *Id.*

³⁸ *Id.*

³⁹ See § 48-39-130.

⁴⁰ See § 48-39-80(B)(11).

⁴¹ *Spectre, LLC v. S.C. Dep’t. Health & Env’tl. Control*, 688 S.E.2d 844, 847-48, (S.C. 2010) (citing Chapter II of the Coastal Management Plan).

judicial review of the ALC Final Order by the Coastal Zone Management Appellate Panel.⁴²

Act 387 amended Code Section 48-39-150(D), deleting the Coastal Zone Appellate Panel's authority to review decisions of the ALC.⁴³ Code Section 48-39-280(E) provides for Board review of staff decisions involving setback lines, baselines, or beachfront retreat rates in accordance with Code Section 44-1-60.⁴⁴ Code Sections 48-39-180, 48-39-280(A)(4), and 48-39-290(D)(4) were amended to delete references to the Coastal Zone Management Appellate Panel.⁴⁵ Coastal Zone consistency decisions and dock permits are issued pursuant to Code Sections 48-39-80 and 48-39-130, which were not amended by Act 387. The Supreme Court has held that Coastal Management Plan decisions are subject to APA review.⁴⁶ The Coastal Zone Appellate Panel retains its role as advisor to the Board on coastal matters.⁴⁷

D. Mining Council Review of Mining Permits

The S.C. Mining Act specifies:

An applicant for a certificate of exploration or operating permit or a person who is aggrieved and is directly affected by the permit may appeal to the council from a decision or determination of the department issuing, refusing, modifying, suspending, revoking, or terminating a certificate of exploration or operating permit or reclamation plan, or imposing a term or condition on the certificate, permit, or reclamation plan. An explorer or operator may appeal to the council from a decision or determination of the department issuing a

⁴² See S.C. CODE ANN. REGS. 30-6 (Supp. 2009); S.C. CODE ANN. §§ 48-39-150(D), 48-39-180, 48-39-280(A) and (E), and 48-39-290(D).

⁴³ See 2006 S.C. Acts 387 § 31.

⁴⁴ See *id.* § 51.

⁴⁵ See *id.* §§ 49-50, 52.

⁴⁶ See *Brown v. S.C. Dep't of Health & Envtl. Control*, 560 S.E.2d at 418 n.14 ("[T]o the extent they hold CMP certification pursuant to § 48-39-80 is not reviewable under provisions of the APA, *League of Women Voters of Georgetown County v. Litchfield-by-the Sea*, 409 S.E.2d 378 (S.C. 1991), and *Ogbum-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 505 S.E.2d 598 (Ct. App. 1998), are overruled").

⁴⁷ See S.C. CODE ANN. § 48-39-40(A) (2005).

notice of deficiencies or violations and administrative fees or assessing civil penalties.⁴⁸

Mining permit appeals are taken, after Board review, to the Mining Council with subsequent appeal to the ALC.⁴⁹ A notice of appeal must be filed within thirty days of notice of approval or denial, and a copy must be sent to DHEC.⁵⁰ Appeals are heard by the Mining Council or by an Appeals Committee on twenty days' notice.⁵¹ The procedures are set by the notice to the parties to the appeal. Procedures for appearing *pro hac vice* before the Mining Council are not well-defined.

E. How and When to File a Request for Review

The appeal of a DHEC staff decision must be initiated by filing a written request for review with DHEC within fifteen days after written notice of the staff action has been mailed to the "applicant, permittee, licensee, and affected persons who have asked to be notified...."⁵² The Court of Appeals has held that this requirement is distinguishable from earlier cases.⁵³ In earlier cases, the Court of Appeals has held that the time to appeal runs from receipt of notice of the decision and failure to request notice of a decision and failure to file a request for review within fifteen days of mailing of the notice, bars any further review.⁵⁴ The Court of Appeals has further held that promulgation of Code Section 44-1-60(E) has superseded any notice provisions in agency regulations.⁵⁵ The ALC has held, in the proceeding below, that "[n]o procedure exists which allows or provides for intervention at the Board review level.⁵⁶ Section 44-1-60(E) provides that an affected person's sole method for

⁴⁸ § 48-20-190 (as amended by 2006 S.C. Acts 387 § 29).

⁴⁹ *See id.*

⁵⁰ *See* SC CODE ANN. REGS. 89-290A (2009).

⁵¹ *See id.* at 89-290G.

⁵² S.C. CODE ANN. § 44-1-60(E) (2009) (added by 2006 S.C. Act 387 § 48).

⁵³ *See* S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't'l. Control, 669 S.E.2d 899, 910-11 (S.C. Ct. App. 2008) (distinguishing *Hamm v. S.C. Pub. Serv. Comm'n*, 336 S.E.2d 470 (S.C. 1985)).

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't'l. Control, No. 07-ALJ-0107-CC, 2007 WL 2782818 (Sept. 04, 2007).

challenging a staff decision is to timely file a request for final review with the Board.”⁵⁷

The request, which may be faxed, must be received by the Clerk of the Board by 5:00 on the fifteenth day.⁵⁸ Neither the statute nor the Final Review Procedures nor the cases state explicitly whether the day of mailing counts in counting the fifteen days. If the Board does not receive a request for review, the staff decision becomes final. Note that since Code Section 44-1-60 applies to commencement of review by the Board before quasi-judicial review by the ALC, Rule 11 of the ALC Rules of Procedure (ALC Rules),⁵⁹ which allows for thirty days to request a contested case hearing, does not apply at this stage of the proceeding.⁶⁰

F. Final Review Conference

Within sixty days of receipt of a request for review, the Board must conduct a final review conference or the staff decision becomes final.⁶¹ The Board may conduct the conference itself, or the Board’s chairman may appoint a three-member panel or designate an individual to conduct the review.⁶² All affected persons must receive notice within ten days of the conference.⁶³ Since the Board normally meets monthly, the Board chairman will provide a recommendation to the Board regarding the option to be followed for each request for review, to meet the 60-day deadline.⁶⁴ Between July 2006 and February 2009, the Board denied at least 58 requests for review; affirmed the staff in 17 cases; reversed the staff in four cases; and remanded for further action in 3 cases.⁶⁵

The Notice of Appeal Procedure, provided to those entities that have requested to be notified of the staff decision, specifies that requests for review “should” include “the grounds on which the Department’s decision is

⁵⁷ S.C. CODE ANN. § 44-1-60(E) (2009).

⁵⁸ See DHEC BOARD OF HEALTH & ENVTL CONTROL, PROCEDURE FOR FINAL REVIEW 1 (2006) (copy on file with the Clerk of the Board of Health and Environmental Control).

⁵⁹ See S.C. ADMIN. L. CT. R.P. 11, available at <http://www.scalc.net/pub/pubOfficialRules2009.pdf>.

⁶⁰ See S.C. CODE ANN. § 44-1-60 (2009).

⁶¹ See § 44-1-60(F) (added by 2006 Acts 387 § 48).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ Personal Communication with Carl Roberts, Jr., DHEC General Counsel (March 4, 2010) (on file with author).

⁶⁵ *Id.*

challenged and the specific changes sought in the decision” and “a statement of any significant issues or factors the Board should consider in deciding how to handle the matter.”⁶⁶

Conferences are open to the public. At the conference, DHEC staff must explain the basis for its decision and the materials relied upon.⁶⁷ The party requesting review has the burden of persuasion and has the opportunity to present evidence to support amending, modifying or rescinding the staff decision, to which DHEC may respond.⁶⁸ The conference will be recorded for transcription, provided a party requests the transcript within thirty days of receiving the Board’s acknowledgment of its request for review and agrees to be responsible for the cost of the transcript.⁶⁹

The statute does not specify procedures for conducting these conferences, and it does not specify the standard of proof or applicable rules of evidence.⁷⁰ Although Code Section 48-1-50(1) authorizing DHEC to compel attendance of witnesses has not been amended by Act 387 or Act 334, no subpoenas or other compulsory orders have been requested or issued for a review conference as of March 2010.⁷¹ Although Section 44-1-60(D) states that the agency “must base its decision on the administrative record” which may include “material readily available at the department, or published materials which are generally available,”⁷² it is not clear whether or to what extent the agency staff or the Board may rely on evidence which may not be admissible pursuant to the South Carolina Rules of Evidence. The Board’s practice is to swear all individuals planning to speak as a group if a court reporter is present.⁷³ No cases have been found in which a party has challenged the standing of another petitioner for review. Although it is certain that this issue and any other ground for appeal must be raised before the ALC,⁷⁴ it is not clear to what extent a party must raise these issues to the Board.

⁶⁶ DHEC, NOTICE OF APPEAL PROCEDURE, ¶ 3 (2006), available at http://www.scdhec.gov/environment/baq/docs/DepartmentDecisions/Notice_of_Appeal_Procedure.pdf.

⁶⁷ See S.C. CODE ANN. § 44-1-60(F)(1) (2009) (added by 2006 S.C. Acts 387 § 48).

⁶⁸ See *id.*

⁶⁹ See § 44-1-60(F)(3) (added by 2006 S.C. Acts 387 § 48).

⁷⁰ See § 44-1-60(F).

⁷¹ Personal Communication, *supra* note 64.

⁷² S.C. CODE ANN. § 44-1-60(D) (2009) (added by 2006 S.C. Acts 387 § 48).

⁷³ See *supra* note 66 and accompanying text.

⁷⁴ See *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control*, 669 S.E.2d 899, 915 (S.C. Ct. App. 2008) (“To preserve an issue for appeal, it must be: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity.”).

A written final agency decision must be mailed to all parties no later than thirty days after conclusion of the final review conference.⁷⁵ The final agency decision must explain the bases for the decision.⁷⁶

III. REVIEW BY THE ADMINISTRATIVE LAW COURT

A. *Request for Review*

Within thirty days of receipt of DHEC's final decision or of the deadline for conducting the final review conference (if the Board fails to meet the deadline), the applicant, permittee, licensee or affected person may request a "contested case hearing" before the ALC.⁷⁷ The petition must comply with the ALC's rules of procedure⁷⁸ and be served on DHEC.⁷⁹

B. *Who May Appeal*

DHEC is required to provide notice of its decision to the applicant, permittee, licensee, "and affected persons who have asked to be notified."⁸⁰ Assuming they have participated before the Board, the applicant, permittee or licensee clearly has a due process interest in the outcome of the agency decision and may appeal a permit decision or participate in a third-party appeal of a permit decision.⁸¹ Similarly, one to whom an enforcement order is issued may appeal.

Entities who are not the permit holder, the applicant, or the recipient of an order may or may not have a right to appeal.⁸² Principles of standing that emerge from U.S. Supreme Court decisions apply to determine whether a particular entity has the requisite legal interest in the decision.⁸³

⁷⁵ See S.C. CODE ANN. § 44-1-60(F)(2) (2009) (added by 2006 Acts 387 § 48).

⁷⁶ See *id.*

⁷⁷ *Id.* (after receipt of final decision); § 44-1-60(F)(1) (2009) (after missed deadline for conducting final review conference) (added by 2006 Acts 387 § 48).

⁷⁸ See S.C. ADMIN. L. CT. R.P. 7 & 11.

⁷⁹ See S.C. CODE ANN. § 1-23-600(C) (2005).

⁸⁰ § 44-1-60(E).

⁸¹ See, e.g., S.C. CODE ANN. REGS. 61-72, § 402 (2009) (in effect before enactment of 2006 Acts 387); S.C. ADMIN. L. CT. R.P. 2(H).

⁸² See S.C. CODE ANN. REGS. 61-72, § 401 (2009).

⁸³ See *id.*

South Carolina administrative review cases apply the principles established in *Sierra Club v. Morton*.⁸⁴ Decisions note that the request for an adjudicatory hearing

must allege injury in fact, which may be to aesthetic, conversational, or recreational values. The injury may be shared with others, but must be injury to the petitioner. *Florence Morning News v. Building Comm.*, 265 S.C. 389, 218 S.E.2d 881, 885 (1975). . . . Such an allegation of specific, personalized injury (or threat of injury) which is within the zone of regulatory interest implemented by DHEC is sufficient to support a finding that petitioners have standing to raise these issues.⁸⁵

In *Ogburn-Matthews v. Loblolly Partners*, the Court of Appeals held that there is sufficient injury for standing where

[a plaintiff] claims an individual injury in the adverse effect of this specific decision of the Agency on her use and enjoyment of the [w]etland, which lies adjacent to her residence. Our supreme court has found this interest to be sufficient to provide standing. . . .⁸⁶

However, the Court of Appeals went on to say that,

[plaintiff] is not the owner of the [w]etland. She has no economic interest which is directly affected by the issuance of a consistency certificate. [Plaintiff's] individual interest is her enjoyment of the wildlife and habitat. What may be ... perceived as another interest, her concern with assuring the Agency fulfills its governmental obligation to carry out the state's policy regarding property in the coastal zone, is not a property interest recognized as sufficiently individual to provide standing.⁸⁷

⁸⁴ See *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

⁸⁵ *League of Women Voters of Georgetown County v. Wachesaw Plantation*, Order 91-9-B, 1991 WL 540495 (S.C. Dep't of Health & Envtl. Control) (May 9, 1991) (adopting the hearing officer's report and recommendation, from which the quoted passage is taken.); see also *Interstate Nuclear Serv. Corp. v. S.C. Dep't of Health & Envtl. Control*, 96-ALJ-07-0558-CC, 1999 WL 155773 (Admin. Ct. 1999).

⁸⁶ *Ogburn-Matthews v. Loblolly Partners*, 505 S.E.2d at 605 (citations omitted).

⁸⁷ *Id.* at 565-66, 505 S.E.2d at 605.

The party asserting that it has standing has the burden of proof and is required to prove a legally protected interest to which a concrete, particularized injury will occur and the injury is fairly traceable to the agency action at issue.⁸⁸ It is not enough to simply allege a cognizable interest and harm; the moving party must present evidence to support the allegations. In *I-77 Properties, LLC v. S.C. Dep't of Health and Env'tl. Control*, the petitioner owned property adjacent to property for which a septic tank permit was issued.⁸⁹ The petition and supporting affidavits failed to allege an actual or imminent harm.⁹⁰ The ALC found that the petitioner failed to allege or prove that the septic tank would fail; that if it did fail, injury to petitioner's property would result; or that issuance of the septic tank permit would definitely reduce the size of petitioner's planned facility.⁹¹ The property owner's petition was denied because of the lack of injury sufficient for standing.⁹²

C. Intervention

Prior to enactment of Act 387, Regulation 61-72 and Rule 20 of the ALC Rules allowed for intervention in adjudicatory proceedings, provided the party seeking to intervene did so at the earliest possible stage.⁹³ In a 1989 case, a competitor of an applicant for a certificate of need to operate a home health agency was not a "party" for purposes of seeking judicial review under the Administrative Procedures Act.⁹⁴ Even though the competitor may have been entitled as of right to be admitted as a party to contest the application before DHEC, it never sought party status in the agency proceedings.⁹⁵

Rule 20 still applies.⁹⁶ In light of the Court of Appeals decision affirming the ALC decision in *SC Coastal Conservation League v. DHEC and SCSPA*,⁹⁷ a

⁸⁸ See *I-77 Properties, LLC v. S.C. Dep't of Health & Env'tl. Control*, ALC Docket No. 04-ALJ-07-0327-CC (Admin. Ct. 2005).

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ See S.C. ADMIN. L. CT. R.P. 20.

⁹⁴ *Home Health Serv., Inc. v. S.C. Dep't of Health & Env'tl. Control*, 379 S.E.2d 734, 736 (Ct. App. 1989).

⁹⁵ See *id.*

⁹⁶ S.C. ADMIN. L. CT. R.P. 20.

⁹⁷ See *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control*, A.L.C. Docket No. 07-ALJ-0107-CC (2007), *aff'd* *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control*, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008).

potential intervenor is probably well advised to have requested notice of the staff decision in accordance with Code Section 44-1-60.

The potential intervenor has to have standing. Rule 20(B)(1) requires that the petitioner will be aggrieved or adversely affected by the final order.⁹⁸ Although there are early cases in which the permit applicant sought leave to intervene in appeals of the permit, Regulation 61-72 and subsequently the Rules of the ALC deem the applicant to be a party in any third-party action challenging the permit decision.⁹⁹ The agency could intervene, for example, in an action by the South Carolina Department of Natural Resources to revoke the Certificate of Registration, Certificate of Title, and Hull Identification number of a floating structure in Hobcaw Creek.¹⁰⁰ OCRM moved to intervene on the basis of its permitting authority under Regulation 30-8.¹⁰¹ The intervention was granted.¹⁰²

A petition for leave to intervene could be denied if granting it would unduly delay the proceeding or cause undue hardship to one of the original parties.¹⁰³

The motion for leave to intervene should be accompanied by a proposed responsive pleading appropriate for the stage of adjudication.¹⁰⁴ The court requires this pleading because the successful intervenor takes the case as it stands at the time the motion is granted.¹⁰⁵

Ordinarily, the successful intervenor becomes a party to the adjudicatory proceeding, with all of the rights and obligations that flow from party status.¹⁰⁶ However, in at least one case in which several groups sought to intervene in an appeal that required both a public comment hearing¹⁰⁷ and an adjudicatory hearing under R.61-72, the Board directed that (1) members of the public wishing to make "comments" at the public hearing could do so without further formality; (2) parties wishing to present evidence and testimony would be required to seek full party status and their witnesses would be subject to cross-

⁹⁸ See S.C. ADMIN. L. CT. R.P. 20(B)(1). See, e.g., *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, ALC Docket No. 97-ALJ-07-0763-CC, 1998 WL 229742 (1998) (discussing whether one will be adversely affected must be judged at final disposition).

⁹⁹ See S.C. ADMIN. L. CT. R.P. 20.

¹⁰⁰ See *Barrow v. S. C. Dep't of Natural Res.*, 95-ALJ-13-0612-CC, 1996 WL 909563 (April 1, 1996).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See S.C. ADMIN. L. CT. R.P. 20(B)(3).

¹⁰⁴ See *id.* at (20)(A).

¹⁰⁵ See *id.* at (20)(D).

¹⁰⁶ See *id.*

¹⁰⁷ Public comment hearing required by R. 61-79, Hazardous Waste Management, section 124.12.

examination; and (3) parties not wishing to present testimony, but wishing to cross-examine the witnesses of other parties would be required to seek intervenor status.¹⁰⁸

D. Representation

Pursuant to *In re Unauthorized Practice of Law*, natural persons may represent themselves or may be represented by an attorney; however, all other parties must be represented by an attorney.¹⁰⁹ Attorneys not admitted in South Carolina may file a petition for admission *pro hac vice* with the ALC.¹¹⁰ Procedures for appearing *pro hac vice* before the Mining Council are not well-defined.

E. Effect of a Request for Contested Case Hearing

The fundamental premise of the Pollution Control Act is that discharges to the environment require a permit.¹¹¹ Other environmental statutes supplement or extend this premise to address specific topics. For example, the Hazardous Waste Management Act requires a permit for treatment, storage, or disposal of hazardous waste.¹¹² The Safe Drinking Water Act requires a permit to construct or operate a public drinking water supply system.¹¹³ And finally, the Infectious Waste Management Act,¹¹⁴ Solid Waste Management Act,¹¹⁵ Atomic Energy and Radiation Control Act,¹¹⁶ and Mining Act¹¹⁷ all require a permit before engaging in their respective regulated activities.¹¹⁸

¹⁰⁸ Energy Research Found., Order 87-2-B, 1987 WL 275536 (S.C. Dep't of Health & Envtl. Control, March 19, 1987).

¹⁰⁹ See *In re Unauthorized Practice of Law*, 309 S.C. 304, 422 S.E.2d 123 (1992); Rule 404, SCACR; S.C. ADMIN. L. CT. R.P. 73 (stating that there is an exception not relevant to environmental law for parties represented by an accountant in tax cases).

¹¹⁰ See S.C. ADMIN. L. CT. R.P. 73.

¹¹¹ See S.C. CODE ANN. § 48-1-90 (2005).

¹¹² See § 44-56-50.

¹¹³ See § 44-55-40.

¹¹⁴ See § 44-93-10 -240.

¹¹⁵ See § 44-96-10 -470.

¹¹⁶ See § 13-7-10 -1020.

¹¹⁷ See S.C. CODE ANN. § 48-20-10 -310 (2005).

¹¹⁸ Note that although for clarity we refer here to "permits," the same considerations apply to licenses, certifications, certificates, and other forms of permission except where specific exceptions are given in the text.

Considerable time may elapse between submission of a complete permit application and issuance of the permit, and in the event of an appeal, more time will elapse before the appeal is finally resolved. A frustrated applicant often wishes to proceed with construction during the pendency of the appeal.

Permits to discharge define the limits and conditions under which a discharge can occur.¹¹⁹ These conditions often depend on the assimilative capacity of the receiving medium.¹²⁰ For example, a permit to discharge wastewater to surface waters of the State must be conditioned on the physical, chemical, hydrological, and biological characteristics of the receiving water body and on the impacts resulting from other dischargers to the same water body.¹²¹ Permits to discharge air contaminants depend on the existing air quality.¹²² Discharge parameters may be, and often are, changed as a result of administrative review on appeal.¹²³ In turn, the details of the pollution control equipment, which are the subject of the permit to construct, depend in major part on the final discharge permit limits. Without knowing the final limits, the facility design cannot be properly evaluated.

In the past, DHEC staff and the Board have taken the position that construction may not proceed until appeals of the permits are final and until receipt of a petition challenging a permit decision stays the portions of the permit that are appealed.¹²⁴ For example, in two cases heard before the ALC was created, applicants for permits under appeal petitioned the Board for permission to proceed with construction while the appeal was pending.¹²⁵ The Board denied the requests.¹²⁶

The applicants offered to proceed at their own risk.¹²⁷ However, the Board declined to determine which impacts of the construction would not irrevocably alter resources or to risk a subsequent finding that a completed facility should

¹¹⁹ See generally Clean Water Act, 33 U.S.C. 1251 § 402 (2008).

¹²⁰ See *id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *id.*

¹²⁴ See S.C. CODE ANN. REGS. 61-72 § 205 (Supp. 2009); *In re Ridgeway Mining Co.*, Order 87-19-B, 1987 WL 275552 (S. C. Dep't of Health and Env'tl. Control, Oct. 2, 1987); *In re Foster v. S.C. Dep't of Health & Env'tl. Control*, Order 91-11-B, 1991 WL 540501 (S.C. Dep't of Health & Env'tl. Control, Sept. 18, 1991).

¹²⁵ See *In re Ridgeway Mining Co.* and *In re Foster v. S.C. Dep't of Health & Env'tl Control*, *supra* note 124.

¹²⁶ See *In re Ridgeway Mining Co.* and *In re Foster v. S.C. Dep't of Health & Env'tl Control*, *supra* note 124.

¹²⁷ See *In re Foster v. S.C. Dep't of Health & Env'tl. Control*, *supra* note 124.

be allowed to operate because of the investment it represents.¹²⁸ In cases where after-the-fact permits have been sought to ratify unpermitted construction, restoring certain resources to their pre-alteration condition has proven difficult. In addition, the Board has declined to allow any alteration until the appeals process resolves all technical and legal questions.¹²⁹

ALJs who consider petitions that would allow applicants to proceed, pending resolution of appeals, have resolved them in various ways.¹³⁰ Act 387 amended the APA to provide that:

A request for a contested case hearing for an agency order stays the order. A request for a contested case hearing for an order to revoke or suspend a license stays the revocation or suspension. A request for a contested case hearing for a decision to renew a license for an ongoing activity stays the renewed license, the previous license remaining in effect pending completion of administrative review. A request for a contested case hearing for a decision to issue a new license stays all actions for which the license is a prerequisite; matters not affected by the request may not be stayed by the filing of the request. Requests for contested case hearings challenging only the amount of fines or penalties must be deemed not to affect those portions of orders imposing substantive requirements.¹³¹

Whether a particular action is a “matter not affected by the request” will undoubtedly depend on whether the advocate is the applicant seeking to challenge specific provisions of the permit while retaining the benefit of the permit itself, or a third party objecting to the permitted activity. The use of the word “may” in the second clause raises other questions. Applying the usual rules of statutory construction, “may” implies that the stay is discretionary. But

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See, e.g.,* *Piedmont Med. Ctr. v. S.C. Dep’t of Health & Envtl. Control*, 00-ALJ-07-0210-CC, 2000 WL 986349 (June 22, 2000) (holding that a DHEC procedural regulation had no applicability in proceedings before the ALC); *Slovic vs. S.C. Dep’t of Health & Envtl. Control*, 99-ALJ-07-0196-CC, 1999 WL 988662 (Oct. 7, 1999) (lifting the automatic stay without commenting on the fact of its existence); *Greenville Metro Treatment Ctr. vs. S.C. Dep’t of Health & Envtl. Control*, 97-ALJ-07-0143-CC, 1998 WL 166271 (Mar. 27, 1998) (petitioning for review acts as automatic stay).

¹³¹ S.C. CODE ANN. § 1-23-600(H)(2)(2005 & Supp. 2009).

at whose discretion, and according to what standard? This will have to be judicially resolved.

F. Burden of Proof

In general the proponent of an issue has the burden of proof.¹³² Therefore, in general, an applicant for a permit or a permit modification will have the burden.¹³³ However, in cases in which a non-agency party petitions for review of an agency order imposing sanctions, the agency has the burden of proof.¹³⁴ ALC judges routinely issue orders realigning the parties so that the caption lists the party with the burden as the petitioner.¹³⁵

G. Evidentiary Rules and Rules of Procedure

Code Section 1-23-330 applies to evidentiary questions.¹³⁶ Section 1-23-330(1) provides that “[e]xcept in proceedings before the [Worker’s Compensation Commission,] the rules of evidence as applied in civil cases in the court of common pleas shall be followed.”¹³⁷

Rules 9 through 32 of the ALC Rules of Procedure apply.¹³⁸ Where the ALC Rules of Procedure do not specifically address an issue, the S.C. Rules of Civil Procedure may be applied.¹³⁹ For example, a contested case may be

¹³² Hoffman v. County of Greenville, 129 S.E.2d 757, 760 (S.C. 1963) (“The burden of proof is upon the party who by the pleadings has the affirmative on the issue. One who pleads an affirmative defense has the burden of proving it.” (internal citations omitted)); 2 AM. JUR. 2D *Administrative Law* § 360 (1994).

¹³³ See 3A C.J.S. *Public Administrative Law & Procedure* § 128 at 35 (1983) (“In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue.”).

¹³⁴ See S.C. ADMIN. L. CT. R.P. 29(B).

¹³⁵ See S.C. Dep’t Of Health & Env’tl. Control vs. Hughey 00-ALJ-07-0190-CC, 2002 WL 31133065 (August 26, 2002) (“Since the agency imposed a civil penalty, it bears the burden of proof and the caption was amended as set out above by my Order dated April 20, 2000.”).

¹³⁶ See S.C. ADMIN. L. CT. R.P. 25(A).

¹³⁷ S.C. CODE ANN. § 1-23-330(1) (2005).

¹³⁸ S.C. ADMIN. L. CT. R.P. 9-32.

¹³⁹ S.C. ADMIN. L. CT. R.P. 68.

dismissed at the close of the petitioner's case pursuant to Rule 41(b) of the S.C. Rules.¹⁴⁰

H. *Standard of Proof*

The ALJ issues a final decision with findings of fact and conclusions of law.¹⁴¹ In making its findings of fact, the ALC applies the preponderance of the evidence standard.¹⁴² The preponderance of the evidence is defined as "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."¹⁴³ In *S.C. Dep't of Ins. v. Fast Freddie's Bail Bonds, Inc.*, the ALC goes on to further define the standard as "[t]he preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in the mind the belief that what is sought to be proved is more likely true than not true."¹⁴⁴

The findings of fact reflect the ALJ's view of the preponderance of the evidence introduced in the contested case hearing. However, the ALJ "shall give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge."¹⁴⁵ In prior practice, decisions of the

¹⁴⁰ See, e.g., *Miller v. S.C. Dep't of Health & Envtl. Control*, ALC Docket No. 04-ALJ-07-0328-C, 2005 WL 1220382 (2005) (stating that the ALC may dismiss case for failure to show right to relief; must make findings of fact pursuant to Rule 52, SCRCP); *Keil v. S.C. Dep't of Health & Envtl. Control*, ALC Docket No. 03-ALJ-07-0206-IJ, 2005 WL 1676645 (2005) (holding that the ALJ may weigh evidence at conclusion of petitioners' case and dismiss for failure to meet burden). For a more complete discussion of contested case hearings, see Chapter 3 of *SOUTH CAROLINA ADMINISTRATIVE PRACTICE AND PROCEDURE* (Randolph R. Lowell ed., South Carolina Bar-CLE Division 2d ed. 2008).

¹⁴¹ See S.C. CODE ANN. § 1-23-350 (2005).

¹⁴² See *Anonymous v. State Bd. of Med. Exam'rs*, 496 S.E.2d 17, 20 (S.C. 1998) (holding that the Administrative Procedures Act does not impose a standard of proof and therefore the preponderance of the evidence is constitutionally sufficient).

¹⁴³ *S.C. Dep't of Ins. v. Fast Freddie's Bail Bonds, Inc.*, ALC Final Order 01-ALJ-09-0035-CC, 2001 WL 761921 at 6 (2001) (citing BLACK'S LAW DICTIONARY 1201 (7th ed. 1999)).

¹⁴⁴ *Id.* (citing SANDERS ET AL., TRIAL HANDBOOK FOR S.C. LAWYERS (2000)).

¹⁴⁵ S.C. CODE ANN. § 44-1-60(F)(2) (Supp. 2009) (as added by 2006 Acts. 387 § 48); see also *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 353 S.E.2d 132, 133 (S.C. 1987) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons."); *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341, 346 (S.C. Ct. App. 2002) ("The construction of a regulation by the agency charged with executing the regulations is entitled to the

governing Board were judged by a different standard than were staff decisions: "The Panel, not OCRM staff, is entitled to deference from the courts."¹⁴⁶ Where the Board has interpreted statutes, regulations, or policy, whether in the context of a final decision review or in instructions to staff, those interpretations should be given appropriate deference.

Act 387 repealed former Code Section 1-23-380(A)(3), which required the agency whose decision is to be reviewed to transmit the record below to the appellate court.¹⁴⁷ However, Rule 36 of the ALC Rules of Procedure requires the agency "with possession of the Record" to file it with the ALC.¹⁴⁸

IV. APPEALS OF MINING DECISIONS

A. *Appeals of Mining Staff Decisions*

The Mining Council elects a standing Appeals Committee annually.¹⁴⁹ An applicant for a mining permit, a person seeking review of a staff decision to issue, deny, revoke, or modify a permit or a reclamation plan, or a person challenging a notice of deficiency or violation may appeal to the Mining Council by filing a written request within 30 days of the decision.¹⁵⁰ The initial request may include a request for the appeal to be heard by the entire Mining Council¹⁵¹ or by a Hearing Panel of one or more individuals agreed to by all parties.¹⁵² The Mining Council may agree to a request for a hearing before the full Council or may assign the hearing to the Appeals Committee.¹⁵³

most respectful consideration and should not be overruled without cogent reasons."'). *But see* Brown v. S.C. Dep't of Health & Envtl. Control 560 S.E.2d at 415 ("While the Court typically defers to the Board's construction of its own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation.").

¹⁴⁶ S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 610 S.E.2d 482, 486 (S.C. 2005) (referring to the pre-Act 387 procedure whereby the Coastal Zone Appellate Panel, analogous to the governing board of a regulatory agency, reviewed staff decisions).

¹⁴⁷ See 2006 S.C. Acts 387 § 2 (repromulgating Code Section 1-23-380 and omitting former subsection (A)(3)).

¹⁴⁸ S.C. ADMIN. L. CT. R.P. 36.

¹⁴⁹ See S.C. CODE ANN. REGS. 89-290(D) (Supp. 2009).

¹⁵⁰ See *id.* at 89-290(A)-(B).

¹⁵¹ See *id.* at 89-290(F).

¹⁵² See *id.* at 89-290(E) (appointment of Hearing Panel).

¹⁵³ See *id.* at 89-290(F).

All parties must receive at least twenty but not more than forty days' notice of a hearing pursuant to Code Section 48-20-190.¹⁵⁴ Appeals stay the effective date of the order.¹⁵⁵ Hearings are conducted in accordance with the APA.¹⁵⁶

The Board believes that since the mining program staff is part of DHEC¹⁵⁷ and since Act 387 was intended to provide a "uniform procedure for contested cases,"¹⁵⁸ existing statutes and regulations notwithstanding, mining decisions should be reviewed by the Board before they are reviewed by the Mining Council.¹⁵⁹ It remains to be seen whether and how the statutory deadlines of Act 387 and the Mining Act can be reconciled.

B. Appeals of Mining Council Decisions

Appeals of final decisions of the Mining Council must be filed with the ALC in accordance with Code Sections 1-23-380(B) and 1-23-600(D).¹⁶⁰ Code Section 1-23-600(E) invokes the ALC's appellate jurisdiction.¹⁶¹

The ALC reviews these decisions in its appellate jurisdiction and in the same manner, and with the same authority, as the Court of Appeals.¹⁶² Part III of the ALC Rules of Procedure applies since the ALC hears these contested cases as appellate matters.¹⁶³ Review is confined to the record,¹⁶⁴ although the ALC can remand a case to the Mining Council for receipt and consideration of additional evidence¹⁶⁵ or correction of procedural irregularities.¹⁶⁶ The ALC applies the substantial evidence standard to the Mining Council's decision.¹⁶⁷

¹⁵⁴ See *id.* at 89-290(G).

¹⁵⁵ See S.C. CODE ANN. § 48-20-160(B) (Supp. 2009).

¹⁵⁶ See S.C. CODE ANN. REGS. 89-290(H) (Supp. 2009).

¹⁵⁷ See S.C. CODE ANN. § 44-1-60(A) (Supp. 2009) ("All department decisions . . . which may give rise to a contested case shall be made using the procedures set forth in this section . . .").

¹⁵⁸ 2006 Acts 387 § 53.

¹⁵⁹ Personal communication, Carl Roberts, Jr., DHEC General Counsel, Aug. 2, 2006 (on file with author).

¹⁶⁰ See S.C. CODE ANN. § 48-39-200 (2005).

¹⁶¹ See TOAL, *supra* note 12 at 40.

¹⁶² See S.C. CODE ANN. § 1-23-380(B) (2005).

¹⁶³ See S.C. ADMIN. L. CT. R.P. 33-41.

¹⁶⁴ See S.C. CODE ANN. § 1-23-380(A)(4) (2005).

¹⁶⁵ See § 1-23-380(A)(3).

¹⁶⁶ See § 1-23-380(A)(4).

¹⁶⁷ See *Bursey v. S.C. Dep't of Health & Envtl. Control*, 600 S.E.2d 80, 85 (S.C. Ct. App. 2004), *aff'd*, 631 S.E.2d 899 (S.C. 2006).

V. JUDICIAL REVIEW

A. *Commencement*

Petitions for review of ALC decisions must be served and filed with the Court of Appeals, as provided in the South Carolina Appellate Court Rules in civil cases, and served on the opposing party not more than thirty days after the party receives the ALJ's final decision and order.¹⁶⁸

B. *Effect of Petition for Judicial Review*

Petitions for review do not act as automatic stays. The proponent of a stay must file a motion with the ALC¹⁶⁹ or the Court of Appeals.¹⁷⁰

C. *Standard of Review*

The ALC decision will be affirmed unless it is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.¹⁷¹

¹⁶⁸ See S.C. CODE ANN. § 1-23-610(B) (2005); 2006 S.C. Acts 387, § 31 also amends Code § 48-39-150(D) to provide for appeal of ALC decisions involving Coastal Zone permits in accordance with § 1-23-610.

¹⁶⁹ See S.C. CODE ANN. REGS. 61-72, 205(D) (Supp. 2009).

¹⁷⁰ See S.C. CODE ANN. § 1-23-380(A)(2) (2005).

¹⁷¹ § 1-23-380(5).

In characterizing "substantial evidence," the S.C. Supreme Court has stated "[s]ubstantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached.' The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence."¹⁷² The Court further stated, "the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence."¹⁷³

¹⁷² *Waters v. S.C. Land Res. Conservation Comm'n*, 467 S.E.2d 913, 917 (S.C. 1995) (quoting *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 319 S.E.2d 695, 696 (S.C. 1984)).

¹⁷³ *Id.* at 917 (citing *Hamm v. AT&T*, 394 S.E.2d 842 (S.C. 1990)).