STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control, Price Sloan, Carolyn Sloan, Mark Tiberio, Anne Tiberio, Michael Schulte, Laura Schulte, and Northwest Properties of Hickory, LLC, Respondents.	)	Docket No. 22-ALJ-07-0082-CC **ORDER GRANTING PETITIONER'S MOTION IN PART, DENYING PETITIONER'S MOTION IN PART, GRANTING THE DEPARTMENT'S MOTION, & ISSUING AN AMENDED ORDER**

APPEARANCES:

For Petitioner:	Leslie S. Lenhardt, Esquire Emily M. Nellermoe, Esquire Amy Elizabeth Armstrong, Esquire
For Respondent DHEC:	Bradley David Churdar, Esquire Sallie Page Phelan, Esquire
For Respondents Property Owners:	John Joseph Owens, Esquire Randolph Russell Lowell, Esquire Stephen Lewis Goldfinch, Jr., Esquire

STATEMENT OF THE CASE

This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to a request for contested case hearing filed on March 8, 2022, by the South Carolina Coastal Conservation League (Petitioner), challenging a conclusion of the South Carolina Department of Health and Environmental Control (the Department or DHEC). Petitioner is specifically challenging a conclusion of DHEC's Board (the Board) that a coastal erosion research study proposed by Dr. Paul Gayes of Costal Carolina University (CCU) on the use of geotextile sandbags[1] in critical areas at DeBordieu Colony in Georgetown County was "allowed" to proceed

[1] The geotextile sandbags at issue in this matter are pillow-shaped synthetic sandbags designed and manufactured by HUESKER. Throughout the record, these bags are also referred to "geotextile systems," "geotubes," and "geosynthetic sandbags." For simplicity, the Court will refer to them as geotextile sandbags throughout this order.

pursuant to the South Carolina Coastal Tidelands and Wetlands Act and the Beachfront Management Reform Act (BMA).[2] Price Sloan, Carolyn Sloan, Mark Tiberio, Anne Tiberio, Michael Schulte, Laura Schulte, and Northwest Properties of Hickory, LLC (collectively, Property Owners) placed the geotextile sandbags at issue in this matter in the critical area without a permit as required by the Department.[3] Dr. Gayes, Director of CCU's Burroughs & Chapin Center for Marine and Wetland Studies, proposed the research study to the Department's office of Ocean & Coastal Resource Management (OCRM). Petitioner is a non-profit membership corporation organized and existing under the laws of the State with the stated mission of working to protect the health of the natural resources of the South Carolina coastal plain.

On May 10, 2022, Property Owners filed a motion to dismiss, arguing Petitioner failed to name and timely serve its request for a contested case hearing on all requisite parties—specifically, upon Dr. Gayes—in violation of the Court's rules. On May 17, 2022, this Court noticed a hearing on the motion to dismiss for July 25, 2022. Petitioner filed a response to Property Owners' motion to dismiss on May 20, 2022, challenging Property Owners' contention that the Court should dismiss this matter. The parties additionally furnished prehearing statements. On June 2, 2022, the undersigned noticed a hearing on the merits for September 13-15, 2022, should the motion to dismiss not be dispositive. On June 14, 2022, the parties filed a consent motion for expanded discovery, requesting an additional thirty days to respond to discovery requests, permission to conduct up to ten depositions per party, and permission for discovery to extend beyond the 90-day timeframe set forth in SCALC Rule 21(A); the undersigned granted the consent motion.

The hearing on the motion to dismiss was held on July 25, 2022. Subsequently, the Court granted the motion to dismiss by written order dated August 10, 2022. The Court ruled that Dr. Gayes should be a party, and was not timely served, thereby requiring dismissal, or alternatively that, if Dr. Gayes were properly considered not to be party, the matter did not present a contested case hearing, as that term is defined in the Administrative Procedures Act, depriving the Court of jurisdiction. On August 22, 2022, Petitioner filed a motion to reconsider, and DHEC filed a motion for clarification.

For the reasons set forth below, the undersigned grants Petitioner's motion in part, denies

---

[2] S.C. Code Ann. § 48-39-10 *et seq.* (2008 & Supp. 2021).

[3] Separate enforcement matters for these permitting violations are pending with the Department as of the date of this order.

Petitioner's motion in part, grants DHEC's motion, and issues an amended order that is attached to this order.

DISCUSSION

Petitioner's Motion for Reconsideration

SCALC Rule 29(D) expressly permits a party to "move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief in Rule 59, SCRCP," and as further provided by the Court's rules. Rule 59, SCRCP, permits a party to file a motion to alter or amend a judgment within ten (10) days after receipt of written notice of the entry of the order which is the subject of the motion. Rule 59(e), SCRCP. Petitioner filed its motion on August 22, 2022. The Court concludes the motion was timely filed. *See* SCALC Rule 3(A).

Rule 59 permits a court to correct factual errors in an order, *Doe v. Doe*, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996), and to reconsider arguments and issues of law, *S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004) ("A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule."); *see also Hutchinson v. Staton,* 994 F.2d 1076, 1081 (4th Cir. 1993) (explaining a motion to alter or amend a judgment under Rule 59(e), Fed. R. Civ. P., may be made on three grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice").[4] However, a party cannot use a Rule 59(e) motion to present to the court an issue that the party could have raised prior to judgment but did not. *Hickman v. Hickman*, 301 S.C. 455, 456-57, 392 S.E.2d 481, 482 (Ct. App. 1990).[5] Reconsideration of a judgment after its entry is generally considered an

[4] Petitioner's motion purports to also be made under Rule 60, SCRCP. To the extent Petitioner raises that the Court incorrectly referred to a potion of the BMA, that matter is addressed within this order. However, to the extent Petitioner raises any other grounds pursuant to Rule 60, those matters are not properly raised and asserted here. *Cf. Bodkin v. Bodkin*, 388 S.C. 203, 219, 694 S.E.2d 230, 239 (Ct. App. 2010) (stating when no fraud was alleged, a Rule 59 motion was the appropriate vehicle to raise a court's failure to address an issue or argument).

[5] Some of the arguments raised by Petitioner are arguments raised for the first time in its motion to reconsider. As a result, these arguments were not previously considered by the Court and are not properly before the Court now. The arguments not considered under this rule are as follows: equitable estoppel and the failure of Property Owners to lift the automatic stay imposed by section 1-23-600(H) of the South Carolina Code. (Supp. 2021).

extraordinary remedy which should be used sparingly. *See Pac. Ins. Co. v. American Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998).

Applying this standard, the Court will address the arguments made by Petitioner in the order in which they were raised by Petitioner.

I. Rule 19, SCRCP

Petitioner argues that the Court failed to consider its argument that Rule 19, SCRCP, is instructive. For the sake of clarity, the Court confirms that it considered Petitioner's argument, but ultimately the Court elected not to apply Rule 19, SCRCP.[6] Application of the Rules of Civil Procedure in the ALC is discretionary. *See* SCALC Rule 68 ("The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, *in the discretion of the presiding administrative law judge*, be applied to resolve questions not addressed by these rules." (emphasis added)).

In any event, application of Rule 19 does not require that Dr. Gayes be added as a party. Rule 19(a) is used to determine when a particular party should be joined. Petitioner correctly notes that subsection (a) of the rule defaults to the requirement that courts order necessary parties be added. *See* SCRCP Rule 19(a) ("If he has not been so joined, the court *shall* order that he be made a party." (emphasis added)).

Petitioner, however, does not consider the import of subsection (b) of Rule 19. This subsection requires the Court to consider whether the party in question can actually be made a party, and if not, to consider whether the action should proceed in the party's absence. While Petitioner argues that there is no evidence that Dr. Gayes cannot be made a party, the Court has previously concluded that this argument is in error; Dr. Gayes cannot be added as a party to this

---

[6] The facts of this case make it difficult to apply Rule 19, SCRCP. For example, for Rule 19 to apply to any individual or entity, that person or entity must be "subject to service of process." Rule 19(a), SCRCP. In the Court of Common Pleas, the requirement that the person to be added be subject to service of process typically poses no problem. Timeliness of service is not an issue which ordinarily affects the availability or validity of service of process. In contrast, the jurisdiction of the ALC is limited and as a result, untimely service can be a jurisdictional defect. The Court has already concluded that service of process cannot be timely made on Dr. Gayes, calling satisfaction of the requirement that Dr. Gayes be subject to service of process into doubt. Additionally, if the failure to name Dr. Gayes as a party and serve him the request for a contested case hearing is truly jurisdictional, then the Court lacks the power to apply Rule 19 to these proceedings.

matter. Petitioner was required to serve Dr. Gayes within thirty (30) days of the Board's decision. No one, including Petitioner, has provided the Court with any authority for the proposition that the Court can alter this deadline. To the extent SCALC Rule 3(B) can be construed to grant the Court discretion to alter the timeline for service upon Dr. Gayes, the Court has previously ruled that the requirements of Rule 3(b) were not satisfied.[7] While it might have been possible for Dr. Gayes to intervene of his own volition, it is no longer possible for the Court to force Dr. Gayes to participate.

Because the Court concludes Dr. Gayes cannot be added, Rule 19, were it applied, would next require the Court to consider whether in equity and good conscience, the matter should proceed in Dr. Gayes's absence. SCRCP Rule 19(b). The Court concludes that equity and good conscience do not require that the action should proceed in Dr. Gayes's absence. The remedy sought by Petitioner, which is reversal of the Board's decision that Dr. Gayes's research study may proceed, is not adequate if Dr. Gayes is not a party because Dr. Gayes would not be bound by the Court's decision. If Dr. Gayes, the party who will conduct the study, is not bound by the Court's decision, then the Court's decision essentially becomes an advisory opinion.

In summary, had the Court applied Rule 19, it would nevertheless have dismissed the contested case.

The Court has not overlooked Petitioner's contention that Property Owners have orchestrated the study to circumvent sandbag regulations. Petitioner argues the Court was incorrect to suggest that Property Owners might be neutral or even opposed to Dr. Gayes's study. According to Petitioner, Dr. Gayes is an agent of Property Owners.

This argument misses the thrust of the Court's order. The Court did not mean to suggest that Property Owners are neutral. Indeed, it was Property Owners who filed the motion to dismiss. Property Owners' counsel also edited Dr. Gayes's proposal, at least in part, before it was submitted to the Department. None of that, however, changes the fact that Property Owners would not be legally bound by a decision on the merits were the Court to permit the case to continue in Dr. Gayes's absence. The Court presumes that Property Owners would continue to support the research study if the Court made a decision on the merits. The point made by the Court in its prior order is that Property Owners would not be legally compelled to support the study.

Petitioner also argues that the Court's conclusion that the Department looked exclusively

---

[7] Petitioner did not challenge the Court's order with respect to the application of SCALC Rule 3(B) and did not furnish any evidence of good cause.

to Dr. Gayes and/or CCU is misplaced. This conclusion is found in footnote 11 of the Court's August 10, 2022 order in a brief discussion of privity for purposes of res judicata. In that footnote, the Court expressly stated that the issue of privity "is not currently before the Court." The statement with which Petitioner takes issue is therefore by definition dicta, and not material to the outcome of the motion to dismiss.

Petitioner's final argument in the first section of its motion is that Property Owners must be estopped from arguing that Dr. Gayes is a necessary party because they failed to name him in their own request for final review before the Board. As noted in footnote five of this order, Petitioner raises equitable estoppel for the first in its motion to reconsider; thus, this argument is not proper for a motion to reconsider. However, the Court will still address Petitioner's argument.

"The doctrine of equitable estoppel applies if a person, by his or her actions, conduct, words, silence amounting to a representation, or concealment of facts, causes another to alter his or her position to his or her prejudice or injury." *Rushing v. McKinney*, 370 S.C. 280, 293, 633 S.E.2d 917, 924 (Ct. App. 2006) (quoting *Hubbard v. Beverly*, 197 S.C. 476, 480, 15 S.E.2d 740, 741 (1941)).

Our supreme court has opined about the elements of estoppels as the following:

> The essential elements of equitable estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

These elements are not satisfied here. The Court struggles to see how Property Owners' failure to list Dr. Gayes as a party on their request for board review can be viewed as fraud or concealment, but even if the first element is met, there is no evidence whatsoever that Property Owners intended to cause Petitioner to omit Dr. Gayes from their request for a contested case hearing. Additionally, Petitioner at all times either knew or had the means of knowing that Dr.

Gayes should be a party to the case. Finally, Petitioner has presented no evidence, or even argument, that it relied on Property Owners' failure to name Dr. Gayes in their requests for board review as the reason they omitted Dr. Gayes from their request for a contested case hearing.

Because the requirements for estoppel are not satisfied, it would be inappropriate to apply the doctrine to Property Owners.[8]

II. Existence of a Contested Case

Petitioner next addresses the Court's conclusion that if Dr. Gayes is not required to be a party, as Petitioner contends, then this matter is not a proper contested case proceeding. Petitioner challenges both of the Court's bases for this conclusion: (1) that in Dr. Gayes's absence the proceeding does not involve the rights of a party; and (2) that neither the Department nor the Court were required by law or the South Carolina Constitution to determine this issue, both of which are definitional elements of a contested case hearing. *See* S.C. Code Ann. § 1-23-505(3) (2005 & Supp. 2021).

A. Rights of a Party

Petitioner takes issue with the Court's conclusion that it is Dr. Gayes's rights which Petitioner hopes to affect, and instead insists that which it hopes to accomplish in proceedings before this Court is to address the "*flagrant violation of the law by Property Owners.*"[9] Pet'r's Mot. to Recons. at 6. Petitioner argues that Property Owners' rights would be determined were the Court

---

[8] Petitioner makes one brief additional argument that Dr. Gayes should not be considered a party because he personally did not request a final agency review. Petitioner cites no authority for this proposition, and facially, appears to be incorrect. For example, in a civil case involving co-plaintiffs or co-defendants, only one co-plaintiff or co-defendant may file a notice of appeal. That only one party sought appellate review, however, does not mean that the co-plaintiffs or co-defendants in the case below are no longer parties to the case.

[9] This statement of Petitioner's true purpose in requesting a contested case illustrates the flaw in Petitioner's position. Petitioner is attempting to use a contested case involving a research exception to the permitting requirement as an enforcement action against Property Owners. However, as noted in the Board's determination, the Department is currently involved in a separate enforcement proceeding. The Court understands that Petitioner is frustrated by what it perceives as a violation of environmental regulations, but this matter is not an enforcement action. Petitioner is attempting to use a contested case hearing for a purpose it was not designed to achieve. If Petitioner's true purpose is to prevent Property Owners from violating Department regulations, the Court is not the proper forum. Rather, actions to enforce Department regulations involving coastal tidelands and wetlands are properly brought in the Court of Common Pleas. *See* S.C. Code Ann. § 48-39-160.

to allow the case to proceed, making this case a proper contested case.[10]

Petitioner suggests that Property Owners have rights in the research exemption that would be determined in this proceeding because:

- Property Owners first placed the sandbags at issue on the beach;
- If Property Owners had not placed the sandbags, then Dr. Gayes would have nothing to study;
- If Dr. Gayes's study is not permitted to move forward, then Property Owners would be required to remove the sandbags; and
- Property Owners commissioned the study by Dr. Gayes.

Petitioner also argues that Property Owners have rights which may be determined in connection with the pilot project exemption because Property Owners placed the sandbags on the beach and had meetings about a possible pilot project before Dr. Gayes became involved.

These arguments all rest on what appears to be Petitioner's primary complaint—that Property Owners are using the study by Dr. Gayes to commit what Petitioner argues is a flagrant violation of the law. Petitioner notes Property Owners were the ones who initially installed the sandbags, that Property Owners will have to remove the sandbags if the study is not permitted to proceed, and that Property Owners commissioned the study.

Were this an enforcement proceeding, the Court would agree with Petitioner that Property Owners have rights which would be determined herein and its conclusion regarding the existence of a contested case would have been different. However, despite the fact that Petitioner is clearly attempting to use this proceeding to enforce the Department's regulations against Property Owners, this matter is not an enforcement proceeding. The Board decision below specifically refers to the separate, pending enforcement action by the Department and concludes that the enforcement action is not moot. It explicitly authorizes the Department to proceed with the enforcement action.

Assuming the matter were to proceed to the merits, the questions before this Court were focused on whether the proposed study meets the requirements for one of the two exceptions to the permitting process. The prehearing statement filed by Petitioner includes a list of nine separate

[10] Petitioner's statement that the pilot project approval "does not involve Dr. Gayes in any way" borders on the absurd. Dr. Gayes is the person who submitted the research proposal and would undertake the project if authorized.

issues to be presented for determination.[11] All of the issues presented by Petitioner in this list focus on the propriety of the research exemption. None of the issues presented in this lengthy list ask this Court to determine whether the sandbags should be removed or whether Property Owners should be punished for violating the Department's regulations.

In the Court's view, Petitioner has failed to identify any rights of Property Owners which would be determined by a ruling on whether the Board correctly granted approval for a research study conducted by Dr. Gayes and/or CCU. Property Owners are very likely to cooperate with the study, but an order of the Court in this matter would not require them to do so.

Petitioner also asserts that it has a right, privilege, or duty related to the Board's approval. Essentially, Petitioner argues that it is an affected person with a right to a hearing not only under statutory law but also under the due process clause of the South Carolina Constitution because the impacts of the proposed new technology should be considered in the context of the environmental impacts and that the activities will cause material harm to flora, fauna, physical, or aesthetic resources of the area. Petitioner cites section 48-39-130(D) to support this argument.

This argument is flawed. Petitioner has not responded in any way to the Court's conclusion that the interests it stated were impacted are interests which are not entitled to due process protection. Moreover, Petitioner's citation to section 48-39-130(D) does nothing to change the

---

[11] The prehearing statement filed by Petitioner identified the following issues to be presented for determination: (a) whether it was proper for the Board to undertake a review of a request for a permit exemption when there was no permitting decision to review; (b) whether the DHEC staff correctly concluded that the proposed activities did not qualify for a permit exemption for research purposes; (c) whether the Board's decision to authorize the placement and covering of sand bags is arbitrary and capricious; (d) whether the Board's FAD was issue in error by citing to not one but two separate and distinct statutory provisions as a basis for its order; (e) whether the Board arbitrarily cited to section 48-39-320(c) of the South Carolina Code as a basis for its approval; (f) whether Dr. Gayes was in fact acting as an agent for Property Owners in seeking a research exemption, when Property Owners were responsible for the illegal placement of the sand bags over a year before the research request was sent to DHEC—presumably Petitioner contends that if Dr. Gayes was an agent of Property Owners, then the research study was not submitted by an educational institution and would therefore not qualify for the exemption—; (g) whether the permanent placement of sand bags and their covering with sand qualifies as research such that it did not require a permit; (h) whether an alteration of the critical area that is subject to enforcement proceedings and cannot be legally permitted can serve as a research project that is exempt from the Act's permitting requirements; and (i) whether the Act's amendments to replace a policy of retreat with a policy of beach preservation can serve as support for approving illegal alterations to the critical area.

Court's analysis. This section merely states the legal requirement that for a study to qualify for an exemption to the permit process it must not cause material harm to the area, its wildlife, or vegetation. This section does not purport to vest anyone, let alone Petitioner, with any rights which are protected by due process.

B. Determination Required by Law

Petitioner also asserts that both the Department and the Court are required to make a determination in this matter.[12] It argues that the Coastal Tidelands and Wetlands Act requires the Department to make determinations under both claimed exemptions in this case. With respect to the research exemption, Petitioner claims that the section 48-39-130(D)(2) requires that the Department determine that the proposed activities cause no material harm to flora, fauna, or the physical or aesthetic resources of the area. Section 48-39-130(D)(2) provides in pertinent part:

> (D) It shall not be necessary to apply for a permit for the following activities:
>
> (2) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law; the conservation, repletion and research activities of state agencies and educational institutions or boating or other recreation provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area.

With respect to the pilot project exemption, Petitioner argues that section 48-39-320(C) requires the Department to determine whether the project will be reasonably successful in addressing beach erosion or dune area. This section states:

> (C) Notwithstanding any other provision of law contained in this chapter, the board, or the Office of Ocean and Coastal Resource Management, may allow the use in a pilot project of any technology, methodology, or structure, whether or not referenced in this chapter, if it is reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area. If success is demonstrated, the board, or the Office of Ocean and Coastal Resource Management, may allow the continued use of the technology, methodology, or structure used in the pilot project

[12] The requirement that the Department or the ALC be required to make a determination of rights is a separate definitional requirement for a contested case. A contested case is proper only where both the rights of a party are to be determined and an agency of the ALC is legally required to make a determination of rights.

location and additional locations.

Neither of these statutes contain mandatory language directing the Department to make determinations regarding the applicability of permit exemptions. It is, of course, reasonable to assume that in some cases, the Department will be called on to make such determinations. For example, the Department may be called upon to make a determination regarding the applicability of a permit exemption in the context of an enforcement proceeding. Someone against whom an enforcement proceeding is commenced by the Department may assert that there is no permit violation because the activities in question are exempt from the permitting requirement. If an exemption is raised as a defense in an enforcement proceeding, the Department would be required to make a determination regarding the applicability of the exemption.

Again, however, this case is not an enforcement proceeding. Dr. Gayes sought the Department's position on the exemption *before* undertaking the study. In such cases, the Court believes that section 48-39-355 controls. This section provides:

> *A permit is not required for an activity specifically authorized in this chapter. However,* the *department may require documentation before the activity begins from a person wishing to undertake an authorized construction or reconstruction activity.* The documentation must provide that the construction or reconstruction is in compliance with the terms of the exemptions or exceptions provided in [s]ections 48-39-280 through 48-39-360.

§ 48-39-355 (2008) (emphasis added). This section specifically addresses the Department's role before an activity that does not require a permit begins. Notably, it does not require the Department to make a determination about the applicability of an exception to the permit requirement before the activity begins. It does not even require the Department to request documentation about an activity before it begins. The Department "may" do so but is not required to do so.

Petitioner also argues that the ALC is required to make a determination in this matter.[13] Petitioner relies on section 44-1-60 for this conclusion. It states that this provision "allows for 'affected persons' to 'file a request for a contested case hearing within thirty days after the final agency decision.'" Pet'r's Mot. to Recons. at 11. This statement is an unsupported conclusion. The text of section 44-1-60 does not provide that it "allows" anyone to file a request for a contested

[13] The Court agrees with Petitioner that section 48-39-180 is not part of the BMA, and the Court's statement in this regard is incorrect. Thus, the Court will amend its order as to this point.

case hearing; it merely describes the procedure that must be followed for persons who are entitled to contested case hearings. Section 44-1-60 is procedural, not substantive, and does not independently authorize contested case hearings. Instead, the authority to request a contested case hearing is found in other statutes, and the persons authorized by these statutes must follow the procedures outlined in section 44-1-60.

Petitioner also points to the definition of a contested case in the Administrative Proceedings Act. A contested case hearing is defined as:

> [A] proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.

S.C. Code Ann. § 1-23-505(3) (2005 & Supp. 2021). Petitioner highlights the fact that, under this definition, contested case hearings are not restricted to cases involving ratemaking, price fixing, and licensing.

The Court generally agrees with this statement, but Petitioner ignores the remaining requirements found in this definition. To be a contested case, a case involving ratemaking, price fixing, licensing, or even some other matter, must still be one in which: (1) the legal rights, duties or privileges of a party are (2) required to be determined by an agency or the ALC. These additional requirements were the bases of the Court's prior ruling.

Finally, Petitioner questions the Court's reliance on *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 403 S.C. 576, 743 S.E.2d 786 (2013). Petitioner attempts to distinguish the facts of this case from those of *Amisub*, relying primarily on the fact that in *Amisub*, there was no requirement that Department staff provide written approval and no such written approval was given. Petitioner is, of course, correct that in this case, unlike in *Amisub*, the Department issued a written staff decision and a FAD.

This distinction, however, is immaterial to the Court's conclusion. In *Amisub*, the South Carolina Supreme Court did not hold that a written staff decision or even a FAD triggers the right to a contested case hearing. Rather, it held that the existence of a legal duty on the part of the Department to issue a staff decision is what triggers the right to a contested case hearing. The court in *Amisub* specifically stated the following:

> *Since there was no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case, there was no corresponding obligation that Piedmont be afforded a contested case hearing before the ALC.* Accordingly, we hold Piedmont may not utilize the contested case review process where it has not been authorized by the General Assembly.

Id. at 596, 743 S.E.2d at 797 (emphasis added).

As discussed in the Court's prior order and in this order, there was no legal duty on the part of the part of the Department to issue a staff decision on the proposed study before the study began. The Department had discretion to take certain actions prior to the commencement of the study, but it was not required to do so.

The Department's Motion for Clarification

While section 48-39-80 of the South Carolina Code charges the Department with the development, enforcement, and administration of a comprehensive coastal management program, and its interpretation of statutes related to this program are to be provided deference, interpretation of a statute is a question of law for this Court. *See generally S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations *unless there is a compelling reason to differ*." (emphasis added)). The Department avers that there is no language limiting its ability to "ensur[e] that the activities [occurring in critical areas] cause no material harm to the flora, fauna, physical or aesthetic resources of the area" pursuant to section 48-39-320(C). However, because this specific issue is not before this Court, and is outside of the scope of this proceeding, the Court declines to issue a ruling on the breadth of the Department's authority.

For purposes of this decision, and by way of clarification of the Department's authority as to the specific question currently before this Court, the Court reiterates that the Department was not required to make a decision regarding, or to otherwise grant prior approval for, Dr. Gayes proposed research study.[14] Based on the record before this Court, Dr. Gayes voluntarily requested

[14] In its motion for clarification, the Department inexplicably conflates section 48-39-130(D)(2)'s research study exemption and section 48-39-320(C)'s pilot project exemption. However, as the language of neither section *requires* the Department to make a determination prior to activity being undertaken under either exemption, the Court will not address each exemption separately.

the Department's input as to his research study prior to initiating it, and the Department provided a discretionary response. In sum, as indicated in the prior order, the Department was *not required* to make a determination regarding the research study, and therefore, the Court's holding that this matter is not a proper contested case before this Court remains unchanged. In the amended order, this Court has removed the language indicating the Department's authority is limited to requesting documentation as it is immaterial to the Court's decision.

IT IS THEREFORE ORDERED that to the extent Petitioner argued that the Court should not have cited section 48-39-180, Petitioner's motion to reconsider is **GRANTED**. In all other respects, Petitioner's motion is **DENIED**.

IT IS FURTHER ORDERED that the Department's motion for clarification is **GRANTED**.

IT IS FURTHER ORDERED that the Court's prior opinion is hereby amended, and the amended order attached hereto is substituted in place of the Court's prior order.

IT IS SO ORDERED.

Robert L. Reibold
Administrative Law Judge

September 19, 2022
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, James Smith Harrison, III, hereby certify that I have this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

James Smith Harrison, III
Judicial Law Clerk

September 19, 2022
Columbia, South Carolina