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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Docket No. 22-ALJ-07-0008-CC
Appellate Case No. 2022-001126

Gullah/Geechee Fishing Association, Inc., ……Appellant,

vs.

South Carolina Department of Health and Environmental Control, and
Bay Point Island, LLC, ……Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health and Environmental Control and Bay Pointe Island, LLC, Respondents.	)	Docket No. 22-ALJ-07-0008-CC **ORDER FOR PREHEARING STATEMENTS**

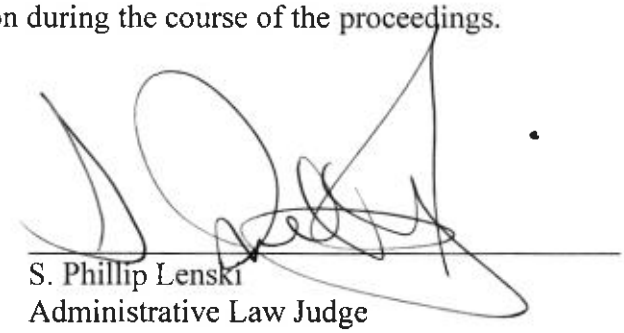
IT IS HEREBY ORDERED that each party must file with the undersigned's office a Pre-hearing Statement with the following information:

1. The nature of this proceeding;
2. The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (court) and other applicable statutes and regulations – **be specific, not general;**
3. The issues **set forth with particularity**, to be presented for determination, including any claims or defenses expected to be raised;
4. A brief summary of the facts to be presented at the hearing;
5. The action requested of the court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;
6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;
7. A list of proposed witnesses and exhibits;
8. A statement regarding the necessity for discovery, if any;
9. The estimated time required for the hearing;
10. Any dates in the next one-hundred twenty (120) days when you will **NOT** be available for a hearing; and
11. An e-mail address where you can be reached.

The State of South Carolina
FILED
FEB 15 2022
Administrative Law Court

IT IS FURTHER ORDERED that the Prehearing Statement must be filed directly with the court and served on all parties **within twenty (20) days of the date of this Order**. The parties have a continuing obligation to update the information during the course of the proceedings.

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

February 15, 2022
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Erika S. Easler, 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, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Erika S. Easler
Judicial Law Clerk

February 15, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control, and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC **ORDER GRANTING RESPONDENT BAY POINT'S MOTION TO DISMISS**

APPEARANCES: Leslie S. Lenhardt, Esq.
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For Petitioner Gullah/Geechee Fishing Association, Inc.

Sara V. Martinez, Esq.
Christopher Whitehead, Esq.
For Respondent South Carolina Department of Health and Environmental Control

Mary D. Shahid, Esq.
Lica Colwell, Esq.
For Respondent Bay Point Island, LLC

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or court) pursuant to a Motion to Dismiss and Memorandum in Support thereof (collectively, Motion) filed by Bay Point Island, LLC (Bay Point) on May 9, 2022. In its motion, Bay Point argues that the Gullah/Geechee Fishing Association, Inc. (Petitioner) failed to timely file its Request for Review (RFR) with the South Carolina Department of Health and Environmental Control's (DHEC or Department) Board of Health and Environmental Control, as well as its request for contested case hearing with this court. As such, Bay Point argues that this court lacks jurisdiction to hear the Petitioner's underlying permit challenge.

A hearing on the Motion was held on June 20, 2022, at the ALC in Columbia, South Carolina.[1] After careful consideration of the parties' arguments and the applicable law, Bay

The State of South Carolina FILED JUL 15 2022 Administrative Law Court

[1] During the hearing, the court also heard argument on cross motions for summary judgment filed by the Petitioner

Point's Motion is granted.

BACKGROUND

Bay Point is the owner of Bay Point Island, a 493-acre island located in Beaufort County, South Carolina. The island is entitled by a subdivision plan that was platted over twenty (20) years ago and approved by Beaufort County. In the past, Bay Point has proposed development of the island to support an environmentally sensitive resort and residential subdivision. However, at present, there is no proposal for large-scale development submitted by Bay Point to the Department. Instead, this matter concerns an application submitted by Bay Point on August 31, 2021, to the Bureau of Environmental Health Services (BEHS) within the Department for authorization to construct a single septic tank and drainfield to serve a single residential dwelling located on a single lot on Bay Point. More specifically, the specialized onsite wastewater system would serve a four-bedroom residence to be located at 98 Bay Point Island Drive (Lot 13), St. Helena, South Carolina in Beaufort County (proposed location). Per the application, the system as designed would handle less than 1,500 gallons per day (GPD) of domestic waste only.

Prior to the application, on July 19, 2021, the Petitioner submitted a Freedom of Information Act (FOIA) request to the "Bureau of Water, OCRM" within the Department requesting "[a]ny and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC."

The Department responded on August 3, 2021, asserting that that it had responsive documents, but none related to septic tank applications or permits; only documents and correspondence for an unrelated issue on Bay Point.

On August 31, 2021, the Department responded that it had no such materials to disclose, which prompted a second FOIA request on the same date seeking "[a]ny applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications . . . . We are also seeking specifically septic tank applications in addition to any other NPDES permits."[2] The Department again responded that it had no such

---

and the Department on May 27, 2022. Because the court's ruling on Bay Point's Motion is dispositive of this matter, the court does not reach the merits of the summary judgment motions. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (citation omitted) (holding that a court need not address remaining issues when disposition of a prior issue is dispositive).

[2] The Petitioner's second FOIA request was also directed to "Bureau of Water, OCRM."

materials to disclose on October 20, 2021.

On September 23, 2021, BEHS issued Septic Tank Permit No. 2106120 (Septic Permit) authorizing the construction of a septic tank and drainfield at the proposed location. By its specific terms, the Septic Permit authorizes construction of a specialized onsite wastewater system on a single lot on Bay Point Island for peak flows of less than 1,500 GPD.[3]

The Petitioner became aware of Bay Point's Septic Permit on October 27, 2021, through information provided by a third party.

Fourteen (14) days later, on November 9, 2021, the Petitioner submitted an RFR to the Department, some forty-eight (48) days after the Department issued its decision approving the Septic Permit.

On December 17, 2021, the Department issued a determination declining to conduct a Final Review.

Thereafter, on January 17, 2022, the Petitioner filed a request for a contested case hearing before this court arguing, among other things, that the Septic Permit should be rescinded because the Department failed to conduct a coastal zone consistency review.

STANDARD OF REVIEW

"[T]he question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction . . . ." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (citation omitted); *see also Windham v. Sanders*, 287 S.C. 170, 171, 337 S.E.2d 205, 206 (1985) ("The appellate record must affirmatively show the proper taking of all necessary steps and the existence of all the facts necessary to confer jurisdiction on the appellate court." (citation omitted)).

Due to the *de novo* nature of a contested case hearing, however, the failure to abide by the rules, regulations, and statutes governing a challenge to a Department determination at the ALC does not implicate "appellate jurisdiction"; instead, it implicates "procedural jurisdiction." *FA Logic SC, LLC, d/b/a FA Logic, v. S.C. Dep't of Revenue*, Docket No. 19-ALJ-17-0002-CC, 2020 WL 1166875, at *2 (S.C. Admin Law Ct. March 3, 2020); *see also Michael J. Finley v. Charleston Cnty. Assessor*, Docket No. 19-ALJ-17-0066-CC, 2019 WL 5866668, at *3 n.7 (S.C.

[3] In accordance with Section 201.1(3) of S.C. Code Reg. 61-56 (Supp. 2021), the minimum required size for any septic tank is a net liquid capacity of one thousand (1000) gallons, which is sufficient to serve dwellings of four bedrooms or less. Additional capacity of 250 gallons is required for each bedroom over four. As such, the Septic Permit authorizes a septic system sufficient for a single six-bedroom home.

Admin. Law Ct. Oct. 30, 2019) ("[P]revious ALC decisions have determined that a litigant's failure to properly follow intermediate administrative steps at the agency level prior to requesting a contested case hearing deprives the ALC of procedural jurisdiction." (citations omitted)); *S.C. Dep't of Health & Env't Control v. Kirby Blocker*, Docket No. 15-ALJ-07-0554-CC, 2016 WL 5867852, at *5 n.4 (S.C. Admin. Law Ct. Oct. 3, 2016) ("Other ALC case orders have employed the term 'procedural jurisdiction' to bridge the conceptual gap between the quasi-appellate posture of a contested case and the de novo trial-level nature of a contested case, as well as to distinguish the issues of timeliness from those of subject-matter jurisdiction, when determining whether the ALC had the authority to hear the matter." (citations omitted)).

"'[P]rocedural jurisdiction' may, therefore, be defined as the compliance or noncompliance with the 'rules, regulations, and statutes governing' the request for a contested case hearing at the ALC to challenge the determination of an administrative agency." *FA Logic SC, LLC*, Docket No. 19-ALJ-17-0002-CC at *2 (citation omitted).

DISCUSSION

In its Motion, Bay Point contends that the Department's September 23, 2021, staff decision to issue the Septic Permit became final on October 8, 2021, because the Petitioner failed to submit an RFR within the fifteen (15) day statutory window. It further asserts that the manner by which an affected person may request notice of such decisions is to submit a written request to the Department. Because the Petitioner did not request in writing to be notified of relevant septic tank permitting decisions, and did not lodge an RFR within fifteen (15) days of the staff decision's date of mailing, Bay Point contends that this court lacks procedural jurisdiction to hear the untimely challenge. As explained below, the court agrees.

The evidence indicates that the Department's staff decision in this matter was issued on September 23, 2021. A "staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review . . . is filed with the [D]epartment by the applicant, permittee, licensee, or affected person." S.C. Code Ann. § 44-1-60(E)(2) (2018). The Petitioner's RFR was not filed until November 9, 2021, forty-eight (48) days after the staff decision regarding the Septic Permit was issued. Thus, pursuant to Section 44-1-60, the staff decision became final on October 8, 2021. *See id.* This would mean that the Petitioner's RFR—filed thirty-three (33) days after the staff

decision had already become final—was untimely.

Nevertheless, the Petitioner argues that its RFR was timely filed because there is no uniform procedure for notifying DHEC of "affected persons" status that would entitle it to notice, and it made attempts to get the information through FOIA, the responses to which the Petitioner maintains were incomplete and untimely. If the FOIA requests had been answered accurately and in a timely manner, the Petitioner argues, it would have revealed the Septic Permit so that the Petitioner could have filed its RFR in a timely manner. The Petitioner further asserts that, pursuant to *S.C. Coastal Conservation League v. S.C. Department of Health and Environmental Control*,[4] "the fifteen-day clock to file an RFR technically never started running because [the] Petitioner was never mailed notice of the permit decision . . . ." The Petitioner argues that if the court "substitute[s] the date of actual notice for the date of mailing (October 27, 2021), [the] Petitioner timely filed its RFR within fifteen (15) calendar days (on November 9, 2021)." The Petitioner, therefore, asserts that its November 9, 2021, RFR was timely filed. The court finds this argument unavailing in view of the statutory language and established precedent.

Though the court appreciates that the Petitioner made efforts to obtain information related to the Septic Permit, allowing the Petitioner's FOIA request to supplant or augment the statutory provision that persons obtain "affected person" status by sending written notification to the Department would be problematic for a number of reasons.

First, a formal statutory procedure for an affected person to request notice of Department permitting decisions is delineated in Section 44-1-60(E)(1). That section unambiguously states that "[a]ffected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail." S.C. Code Ann. § 44-1-60(E)(1) (2018). The court is aware of nothing, that precludes the application of that procedure to septic tank permitting decisions. In fact, by its express terms, "[a]ll department decisions involving the issuance . . . of permits . . . must be made using the procedures set forth in this section," including that for affected persons to request notice. *See* S.C. Code Ann. § 44-1-60(A) (Supp. 2021). Yet, the Petitioner maintains that this "task is effectively impossible" because of uncertainty over what qualifies for "affected person" status, essentially arguing that it did not request notice using this procedure because it was not sure it could.

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[4] *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env't Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010).

However, the Supreme Court has held that the question of who qualifies as an "affected person" under Section 44-1-60 is determined using a reasonable, ordinary definition of the term. *See Pres. Soc'y of Charleston v. S.C. Dep't of Health and Env't Control*, 430 S.C. 200, 216-17, 845 S.E.2d 481, 490 (2020); *see also S.C. Coastal Conservation League*, 390 S.C. at 428, 702 S.E.2d at 252 (noting that DHEC takes an informal approach to determining which parties qualify as affected persons for notice purposes). Here, the Petitioner alleges, among other things, that it would suffer certain environmental consequences if the Septic Permit was issued. That alone creates an inference that the Petitioner was, or reasonably could be, an affected person. *See Pres. Soc'y of Charleston*, 430 S.C. at 216-17, 845 S.E.2d at 490 (noting that the petitioners' "members would suffer the environmental consequences [the] [p]etitioners allege the project will create" in finding that they qualified as "affected persons"); *see also Affect*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "affect" as "[m]ost generally, to produce an effect on; to influence in some way"). Thus, while the statutory procedure requires an inferential step, the court does not find it to be "effectively impossible" to navigate. To the contrary, the court finds the procedure to be both logical and straightforward, and the term "affected person" is interpreted rather broadly. Thus, the court does not find support for the Petitioner's argument in this regard.[5]

Second, even if the Petitioner was genuinely unsure if it qualified as an affected person for notice purposes under Section 44-1-60, its sole reliance on the FOIA requests was unreasonable under the circumstances. As explained above, a cursory analysis reveals that the Petitioner likely meets the definition of "affected person" and Section 44-1-60 delineates the proper procedure for affected persons to request notice of Department decisions. Here, however, the Petitioner never requested notice through the statutory procedure, under Section 44-1-60, when it filed its FOIA requests. Instead, it chose to rely exclusively on its requests

[5] As Bay Point notes, the Petitioner must consider itself an affected party to have acted in this matter. Otherwise, the Petitioner's argument that its FOIA requests entitled it to the same notice as an affected person under Section 44-1-60 would be nonsensical. Moreover, even if the Petitioner was unsure if it qualified, because the Petitioner was not the applicant or permittee, "affected person" status was the only avenue under Section 44-1-60 that would entitle it to file its RFR in the first place. *See* S.C. Code Ann. § 44-1-60(E)(2) (stating that an RFR may be filed with the Department by "the applicant, permittee, licensee, or affected person"). Stated another way, the Petitioner had to be an affected person to file its RFR of the decision it claims it did not receive, in part, because of uncertainty over whether it qualified as an affected person. Had the Petitioner requested notice using the express statutory procedure for affected persons, it would have been notified of the Department's permitting decision in time to file its RFR. Then, the only issue before this court, if any, would be whether the Petitioner qualified as an affected person.

through FOIA, an entirely separate statutory process used for obtaining information from a multitude of state and federal sources, which has different rules and requirements.

The Petitioner does not cite any authority suggesting that a FOIA request can serve as a substitute for the procedure set forth in Section 44-1-60, but argues, generally, that the purpose and spirit of the legislation is similar. However, this ignores the fact that the General Assembly has provided a specific statutory procedure in Section 44-1-60(E)(1) to address the issue of how persons affected by Department permitting actions can request notice of those decisions. *See Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) ("A specific statutory provision prevails over a more general one." (citation omitted)). To that end, the court finds it incongruous that the Petitioner would seek notice of a Department permitting decision to enable it to file an RFR under Section 44-1-60(E)(2) using FOIA instead of the process set forth in the immediately preceding section of the same statute. S.C. Code Ann. § 44-1-60(E)(1). *See Jowers v. S.C. Dep't of Health and Env't Control*, 423 S.C. 343, 359, 815 S.E.2d 446, 455 n.14 (2018) ("[S]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." (citation omitted)).

This court further finds that allowing FOIA to be used by anyone, regardless of whether they qualify as an "affected person," as a supplement for the procedure set forth in Section 44-1-60 is not in keeping with the legislative intent of that section. *See* S.C. Code Ann. § 44-1-60(E)(1) (providing that only "affected persons" may request notice of Department permitting decisions). Such a result would significantly expand the procedural influence of a FOIA request, and the Department's obligations related thereto. Consequently, the court finds that the Petitioner's decision to forgo use of the statutory procedure in Section 44-1-60 and instead rely only on its FOIA requests was misguided.

Third, even if the Petitioner's sole reliance on FOIA was not unreasonable under the circumstances, the FOIA requests themselves were inadequate. The Petitioner's first FOIA request was submitted on July 19, 2021, forty-three (43) days before the Septic Permit application was even filed, to the wrong Department division. The Petitioner's second FOIA request, filed on August 31, 2021, the same day the Septic Permit application was filed by Bay Point, was also sent to the wrong Department division. The court acknowledges that the Department's response to the second FOIA request appears timely and ultimately inaccurate.

However, the incorrect addressee and concurrent timing of the request with the application may have contributed to its apparent delay.[6] Regardless, it is not within this court's jurisdiction to remedy purported FOIA violations. *See* S.C. Code Ann. § 30-4-100(A) (Supp. 2021) ("A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of [FOIA] . . . ."). The court, therefore, cannot confer Section 44-1-60 notice rights with a faulty FOIA request and cannot otherwise remedy the purported FOIA deficiencies.

In any event, without a request for notice pursuant to Section 44-1-60, this court is without authority to extend the deadline to file an RFR based on a party's actual notice of the Department determination. In *S.C. Coastal Conservation League v. S.C. Department of Health and Environmental Control*, the Supreme Court explicitly rejected the idea that actual notice triggers the fifteen (15) day period to begin running, holding that:

> The clear and unambiguous language in the statute provides that the staff decision becomes final "fifteen days after notice of the department decision *has been mailed* . . . ." Had the legislature intended for the time period to begin running from the date a party receives notice of the decision, the statute would have been drafted accordingly.[7]

S.C. Coastal Conservation League, 390 S.C. at 426, 702 S.E.2d at 251-52. Moreover, that case is distinguishable because, unlike here, the petitioner had, by the Department's own admission, requested to be notified of a permitting decision, but was not notified simultaneously with the other parties. *Id.* at 427-28, 702 S.E.2d at 251. Consequently, since the Petitioner did not submit a written request to notified, and did not file its RFR within the fifteen (15) day statutory window, this court is without authority to extend the deadline to file an RFR based the Petitioner's actual notice of the Department's determination.

ORDER

---

[6] The court is troubled by the Department's late and inaccurate response to the Petitioner's second FOIA request.

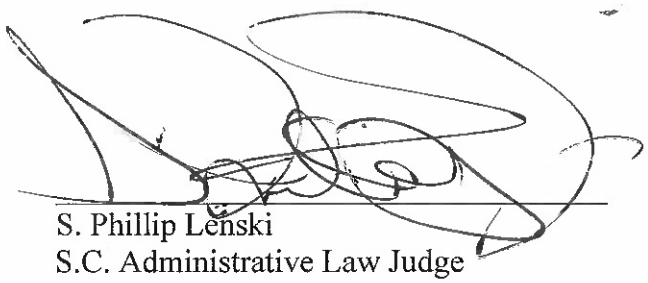
[7] This holding was recently reaffirmed by the Supreme Court:

> As we noted in SCCCL, the General Assembly chose not to include an actual notice trigger when it enacted the statutory provisions governing the procedure for bringing a contested case before the ALC. We have no authority to inject into the statute an actual notice trigger of the fifteen-day limitations period, as that would disturb the legislatively prescribed procedure for appealing permitting decisions.

Pickens Cnty. v. S.C. Dep't of Health and Env't Control, 435 S.C. 99, 105-06, 866 S.E.2d 537, 540 (2021) (citations omitted).

THEREFORE, IT IS HEREBY ORDERED that Bay Point's Motion to Dismiss is **GRANTED.**

AND IT IS SO ORDERED.

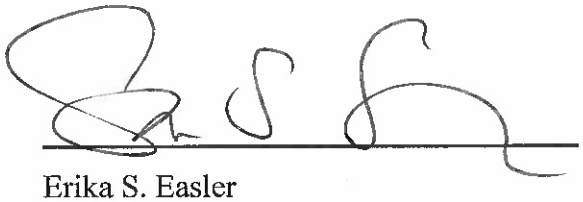


July 15, 2022
Columbia, South Carolina

S. Phillip Lenski
S.C. Administrative Law Judge

CERTIFICATE OF SERVICE

I, Erika S. Easler, 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, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Erika S. Easler
Judicial Law Clerk

July 15, 2022
Columbia, South Carolina

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

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Our Mission *To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.*

January 17, 2022

VIA U.S. MAIL

Hon. Jana E. Shealy
Clerk, SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Request for Contested Case Hearing
Bay Point Island, LLC Septic Tank P/N 2106120-Lot13

Dear Madame Clerk:

Please find enclosed a Request for Contested Case Hearing, which is being filed on behalf of the Gullah/Geechee Fishing Association, along with the filing fee. Thank you for your kind consideration.

Respectfully,

Leslie S. Lenhardt
Staff Attorney

Enclosures
cc: Sara V. Martinez, Esq.
Mary D. Shahid, Esq.

Board of Directors - Allen Grumbine, Esq., Chairperson, Lisa Allen, Barbara Burgess, Esq., Amy Fabri, Rajan Govindan, Angela Halfacre, PhD, Marilyn Hemingway, Susan Hilfer, William Holt, MD, Elizabeth Igleheart, Bess Lochocki, Esq., Justin Lucey, Esq., Clarkson McDow, Esq., Walton McLeod, Esq., Gerald Schulze
Board Member Emeriti - Frances Close, John Mark Dean, Robert Schofield

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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-_____-CC **REQUEST FOR CONTESTED CASE HEARING**

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS:

The Gullah/Geechee Fishing Association, Inc. ("Petitioner"), pursuant to S.C. Code Ann. § 44-1-60 and Rule 11 of the Rules of Procedure for the Administrative Law Court, hereby requests a contested case hearing to review the decision of the Respondent, South Carolina Department of Health and Environmental Control ("DHEC") to issue a permit to construct an onsite wastewater system ("Permit") to Respondent, Bay Point Island, LLC. DHEC staff issued the permit on September 23, 2021, a copy of which is attached as **Exhibit 1**. Petitioner submitted a Request for Final Review pursuant to S.C. Code Ann. § 44-1-60 on November 8, 2021. A copy of the request is attached as **Exhibit 2**. The DHEC Board issued its decision not to conduct a Final Review Conference on December 17, 2021, a copy of which is attached as **Exhibit 3**. This request for contested case hearing follows.

Petitioner submits that the issuance of the Permit runs contrary to a number of statutory and regulatory provisions and should not have been issued. Importantly, DHEC failed to conduct the required Coastal Zone Consistency review of this application pursuant to S.C. Code Ann. § 48-39-

80. In addition, DHEC violated the Freedom of Information Act by failing to produce documentation of the submittal of the Permit application and issuance of the Permit, thereby preventing Petitioner from receiving notification of a permitting decision that was never publicly noticed.

I. Petitioner Has a Vested Interest in Bay Point.

Petitioner was formally organized in 2010. Its headquarters are located on St. Helena Island in Beaufort County, South Carolina, but its members live and work on the sea islands and inland from Jacksonville, North Carolina to Jacksonville, Florida, including along the shores of Bay Point Island, a pristine barrier island in Beaufort County. Petitioner's mission is to advocate for the members of the Gullah/Geechee Nation whose livelihoods depend on the ocean's resources, including the fish and shellfish populations along our coast and in particular in and around Port Royal Sound, where Bay Point Island is located. Its members consist of businesses whose profits derive from the harvesting of various types of seafood around the Sea Island region including oysters, fish, shrimps, and crabs. Many members also provide interactive educational demonstrations to groups concerning Gullah/Geechee fishing traditions.

Petitioner's members are informed and believe that the development of Bay Point Island will harm the ecology of our fisheries habitat, including degradation of water quality. Not only do the businesses rely on the ocean's resources, but they, as well as other members of the Gullah/Geechee Nation, literally feed their families from the waters surrounding the Sea Islands.

The sea island of Bay Point is an ecologically and culturally significant natural resource and asset, recognized as an Audubon Important Bird Area and loggerhead sea turtle nesting habitat, as well as an historic Gullah Geechee fishing area. Bay Point Island, LLC is a development entity that intends to develop the island through the construction of a luxury resort and now initiate

construction of a series of single-family homes there. It is clear from the issuance of the Permit that the developer intends to construct the first of these homes immediately. Petitioner has been extremely involved with seeking protection of this priceless cultural and environmental asset. The failures of the Department to inform Petitioner and other members of the public of this planned development has harmed the Petitioner by excluding it from participating in the decision-making process that will directly impact its members. More specifically, DHEC's failure to conduct a review specifically designed to evaluate the impacts to coastal resources resulting from construction on a fragile barrier island like Bay Point, harms Petitioner's members, as well as the public by preventing the analysis required by the legislature.

Given that DHEC does not publicly notice septic tank permit applications, Petitioner could not have been charged with notice of the application other than through seeking documents through FOIA. Petitioner is now faced with a procedural hurdle in filing the request for final review more than 15 days from the issuance of the staff decision.

The high quality of the waters surrounding Bay Point is essential to Petitioner's members' ability to harvest fish and shellfish for sale and for personal consumption. The installation of a septic tank in this location, which contains predominantly sandy soils, will directly and adversely harm Petitioner's members because the shallow water table and the high probability for inundation, combined with the propensity for such systems in low-lying areas to release pollutants, will degrade water quality upon which they rely for sustenance, recreation and their livelihoods. The Petitioner asserts that the Bay Point Island developer intends to construct additional septic tanks on Bay Point, as well, which will further contribute to water quality degradation. Finally, the construction of a house that will be facilitated by the septic tank will be the first of multiple

intrusions into an otherwise undisturbed wildlife and bird habitat, which is enjoyed by members of the Petitioner group. For these the Petitioner challenges the issuance of the Permit.

II. DHEC Was Statutorily Required to Provide Notice Through FOIA.

DHEC failed to comply with the Freedom of Information Act ("FOIA") S.C. Code Ann. § 30-4-10, by not producing specific documents that Petitioner requested and were in DHEC's possession at the time of the request. Petitioner received information in July of 2021 that the developers of Bay Point Island were taking steps towards development on the island. Petitioner, through its undersigned attorneys, filed a FOIA request with DHEC on July 19, 2021. The FOIA request sought "[a]ny and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC." See FOIA Request Form, **Exhibit 4**. The FOIA office responded with responsive documents on August 31, 2021. There were no documents relating to the request involving any septic tank applications or permits, or any other file documents included in the response.

On that same day, August 31, 2021, Petitioner submitted another FOIA request, requesting the following documents:

> Any **applications for** permits or **permits** issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications for the following properties located on Bay Point Island:
> R300 045 000 0001 through
> R300 045 000 0043
> Owners should all be Bay Point Island LLC but these TMS numbers were not included in the earlier request that I submitted. We are also seeking specifically septic tank applications in addition to any other NPDES permits.

See FOIA Request Form, **Exhibit 5**.

It was not until October 20, 2021 that the FOIA office responded that "OCRM staff said they do not have any information responsive to the above-referenced request. We also researched the information you provided and were unable to locate any files." Email in Response, **Exhibit 6**.

The FOIA request clearly covered the Permit and the submitted application, which was issued on September 23, 2021. However, none of the requested documents were produced by DHEC on October 21, 2021. Petitioner received notice of the Permit through an email forwarded from Beaufort County on October 27, 2021. See Email Correspondence, **Exhibit 7**.

DHEC has taken the position that Petitioner's appeal is untimely because Petitioner did not obtain any notice of the Permit until after the standard 15 days set forth in S.C. Code Ann. § 44-1-60 had run. However, DHEC cannot use their failure to comply with FOIA as a shield against Petitioner's appeal of the Permit. Notably, septic tank permit applications are not placed on public notice by DHEC. Therefore, the only vehicle available to Petitioner to obtain notice that an application was submitted is to submit a FOIA request, which it did multiple times. The failure of DHEC to comply with FOIA has directly resulted in injury to Petitioner by creating a timeliness issue before this Court.

II. DHEC Failed to Conduct a Coastal Zone Consistency Review.

DHEC has failed to incorporate its specialized knowledge of coastal processes and forces, as possessed by OCRM, into its permitting of shoreline adjacent septic systems. Issues relating to coastal erosion and tidal migration are kept entirely on the sidelines when reviewing permit applications for septic systems in areas subject to these dynamics. This disconnect between DHEC's coastal authority and its septic permitting reflects a serious flaw in the agency's decision-making, which is driven in part by DHEC's failure to conduct Coastal Zone Consistency review

for septic permitting. Consistency review is mandated by statute and is intended to give weight to the unique value of natural resources on the coast, as well as the unique natural forces at play on the coast. See S.C. Code Ann. § 48-39-80. Typical residential septic permits in low-lying and dynamic coastal areas, however, have escaped this review. Consequently, while oceanfront septic systems implicate a whole host of issues and concerns that are not present with systems in other parts of the state, all septic permitting is governed by the same set of regulations. In other words, while placement of a septic system on a pristine and unique barrier island certainly warrants a closer look than the typical septic system, that review is not occurring.

The Coastal Tidelands and Wetlands Act provides plainly that DHEC shall: "[d]evelop a system whereby the department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." Id. DHEC plainly has been delegated the authority to conduct Coastal Zone Consistency review for septic tanks on fragile coastal areas like Bay Point Island and must certify them as consistent or inconsistent with the Coastal Management Plan ("CMP"). While the Coastal Management Program document (p. V-5) purports to exempt septic tanks from review, that document cannot supersede the plain language of the enabling statute.

The CMP guidelines for all projects in the Coastal Zone require DHEC-OCRM to consider:

1) The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for OCRM in implementation of its management program these being:

    a. "To promote the economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to III-3 achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

2) "the extent to which the project will have adverse impacts on the 'critical areas' (beach/dune system, coastal waters, tidelands);

5) The extent to which the project includes consideration for the maintenance or improvement of the economic stability of coastal communities;

7) The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area;

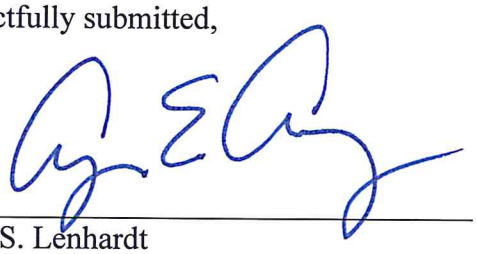
8) The extent and significance of impact on the following aspects of quality or quantity of these valuable coastal resources: i) unique natural areas -- destruction of endangered wildlife or vegetation or of significant marine species (as identified in the Living Marine Resources segment), degradation of existing water quality standards; ii) public recreational lands -- conversion of these lands to other uses without adequate replacement or compensation, interruption of existing public access, or degradation of environmental quality in these areas; iii) historic or archeological resources -- irretrievable loss of sites identified as significant by the S. C. Institute of Archeology and Anthropology or the III-4 S. C. Department of Archives and History without reasonable opportunity for professional examination and/or excavation, or preservation.

DHEC staff's failure to undertake Coastal Zone Consistency review, and its related failure to consider the appropriateness and the impacts of coastal forces on the proposed septic system, was arbitrary, capricious, and in error.

WHEREFORE, Petitioner requests that this Court conduct a contested case hearing and reverse Respondent DHEC's issuance of the Permit to Bay Point Island, LLC, or alternatively, remand to DHEC for a coastal zone consistency review.

[SIGNATURE BLOCK FOLLOWS]

Respectfully submitted,



Leslie S. Lenhardt
Amy E. Armstrong
S.C. Environmental Law Project
510 Live Oak Drive
Mount Pleasant, SC 29464
(843) 527-0078
leslie@scelp.org

Attorneys for Petitioner

January 17, 2022

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-_____-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I have served the Request for Contested Case Hearing by depositing same in the U.S. Mail to the parties addressed to:

Sara V. Martinez, Esq.
Office of General Counsel
SCDHEC
2600 Bull Street
Columbia, SC 29201

Mary D. Shahid, Esq.
Nexsen Pruet
P.O. Box 486
Charleston, SC 29402

Debbie Weiner

January 17, 2021

EXHIBIT 1

(PT) ✓

dhec

PERMIT TO CONSTRUCT
Onsite Wastewater System

File Nbr: 2021080040
County: Beaufort
Program Code: 362
System Code: 611
Water Supply: Private

Name: Bay Point Island, LLC
Type Facility: Residential - 480GPD/4BR
Subdivision: Bay Point Island
Block: Lot: 13
TM#: R300 045 000 0014 0000

Address: c/o Sam Connor
PO Box 3671
Bluffton, SC 29910

Site: 98 Bay Point Island Drive
St. Helena, SC 29920

PERMIT TO CONSTRUCT SYSTEM SPECIFICATIONS

See engineered system design and supporting documentation.

SPECIAL INSTRUCTIONS/CONDITIONS

THIS PERMIT IS SITE SPECIFIC. ANY CHANGES TO THE SYSTEM MUST BE APPROVED BY DHEC. ALTERNATIVE TRENCH PRODUCTS APPROVED UNDER STATE RULES AND REGULATIONS MAY BE SUBSTITUTED. ANY UNAPPROVED CHANGES WILL VOID THIS PERMIT.

This Permit To Construct and Operate is issued pursuant to the SCDHEC Specialized Onsite Wastewater Systems for Peak Flows less than 1500 GPD.

Issuance of this Specialized Onsite Wastewater System Permit To Construct does not relinquish the property owner of responsibility in attaining any and all necessary approvals or permits required to develop this property.

PERMIT TO CONSTRUCT

The Permit To Construct is issued upon the system design, certification, and other supporting documentation as required by this standard and supplied by:

Sam Connor
(Engineering Company)

Samuel P. Connor, P.E.
(Consulting Engineer)

S.C. No. 30716
(State and License Number)

Troy N. Smith
(Soil Classifier)

S.C. No. 74
(State and License Number)

09/16/2021
(Plan Date)

2106120-Lot13
(Project Number)

Any Permit To Construct and Operate that is issued pursuant to this Standard shall be based upon the consulting engineer's design, certification, and other supporting documentation.

Reviewed By: Kim S. Crouse

Date: 9/23/2021 9/23/2021

DHEC 1781 (01/2014)
This Permit will Expire and Become Null and Void Five (5) Years from the Issuance Date.

This Permit is Appealable Under the Administrative Procedures Act. There may be an Additional Fee for Changes in this Permit that Require a Site Reevaluation.

Information collected on this form is subject to public scrutiny or release and the Freedom of Information Act.

EXHIBIT 2

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF HEALTH AND
ENVIRONMENTAL CONTROL

The Gullah/Geechee Fishing Association,

Requestor,

v.

South Carolina Department of Health and
Environmental Control and Bay Point Island, LLC,

Respondents.

Re: P/N 2106120-Lot13, File Nbr: 2021080040

REQUEST FOR FINAL REVIEW CONFERENCE

Requestor, The Gullah/Geechee Fishing Association ("Requestor" or "Fishing Association"), pursuant to S.C. Code Ann. § 44-1-60, respectfully requests that the Board of Health and Environmental Control conduct a Final Review Conference on Respondent, South Carolina Department of Health and Environmental Control's ("DHEC") issuance of a Permit to Construct an Onsite Wastewater System ("Permit"), P/N 2106120-Lot13, File Nbr: 2021080040 to Respondent, Bay Point Island, LLC ("Bay Point"). A copy of the staff decision is attached hereto as **Exhibit 1.**

Requestor was formally organized in 2010. Its headquarters are located on St. Helena Island in Beaufort County, South Carolina, but its members live and work on the sea islands and inland from Jacksonville, North Carolina to Jacksonville, Florida, including along the shores of Bay Point Island, a pristine barrier island in Beaufort County. The Association's mission is to advocate for the members of the Gullah/Geechee Nation whose livelihoods depend on the ocean's

resources, in particular the fish and shellfish populations along our coast and in particular in and around Port Royal Sound. Its members consist of businesses whose profits derive from the harvesting of various types of seafood around the Sea Island region including oysters, fish, shrimps, and crabs. Many members also provide interactive educational demonstrations to groups concerning Gullah/Geechee fishing traditions, and harvest fish and shellfish for their own sustenance.

Along these sea islands and adjacent coastal areas, people from numerous African ethnic groups linked with indigenous Americans and created the unique Gullah language and traditions from which later came the name "Geechee." The Gullah/Geechee people have been considered "a nation within a nation" from the time of chattel enslavement in the United States until they officially became an internationally recognized nation on July 2, 2000. The members of the Association are tremendously concerned about the impacts this resort will have on the ecology of our fisheries habitat. Not only do the businesses rely on the ocean's resources, but they, as well as other members of the Gullah/Geechee Nation, literally feed their families from the waters surrounding the Sea Islands.

The sea island of Bay Point is an ecologically and culturally significant natural resource and asset, recognized as an Audubon Important Bird Area and loggerhead sea turtle nesting habitat, as well as an historic Gullah Geechee fishing area. Bay Point Island, LLC is a development entity that has sought approval to develop the island through the construction of a luxury resort, and presently seeks to initiate construction of a series of single-family homes. The Fishing Association has been extremely involved with seeking protection of this priceless cultural and environmental asset and has been involved in challenging the developer's plans to construct the resort.

Requestor submits that allowing for the installation of a septic tank permit will result in a tremendously ill-conceived development on a high-risk lot that is unsuitable for such an installation.

Notice:

Requestor, through its undersigned attorneys, filed a Freedom of Information Act ("FOIA") request with Respondent DHEC on July 19, 2021, as a result of information that the developer planned to construct at least one single family home on Bay Point. The FOIA request form sought "[a]ny and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC." See FOIA Request Form, **Exhibit 2**. The FOIA office responded with responsive documents on August 31, 2021. The FOIA office provided no documents relating to the request involving any septic tank applications or permits, or any other file documents.

On that same day, August 31, 2021, Requestor submitted another FOIA request, requesting the following documents:

> Any applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications for the following properties located on Bay Point Island:
> R300 045 000 0001 through
> R300 045 000 0043
> Owners should all be Bay Point Island LLC but these TMS numbers were not included in the earlier request that I submitted. We are also seeking specifically septic tank applications in addition to any other NPDES permits.

See FOIA Request Form, **Exhibit 3**.

The FOIA office delayed until October 20, 2021, finally responding that "OCRM staff said they do not have any information responsive to the above-referenced request. We also researched the information you provided and were unable to locate any files." Email in Response, **Exhibit 4**.

The FOIA request clearly covered the Permit, which was issued on September 23, 2021. However, neither this document nor any application was produced by DHEC on October 20, 2021. The undersigned received notice of the Permit through an email forwarded from Beaufort County on October 27, 2021. See Email Correspondence, **Exhibit 5**.

Permit Review:

The failure of DHEC to provide the requested notice has placed the Requestor in the unfortunate situation of not being able to review any file documents relating to the Permit, as no documents were ever produced, including the Permit itself, which Requestor discovered through other channels. However, as it relates to DHEC's septic regulations, the DHEC staff should have reviewed and considered the unique nature of Bay Point Island in imposing the setback requirements. Requestor is informed and believes that the staff imposed only the minimum setback requirements. See R.61-56.200. The septic regulations are written to prohibit systems within 75 feet of the ocean or critical line, but nothing in the regulatory language suggests that 75 is the limit to what DHEC can require. The establishment of a minimum setback confers discretion to extend the setback based on site conditions, and under these circumstances such discretion is warranted

Coastal Review:

The Agency has failed to incorporate its specialized knowledge of coastal processes and forces into its permitting of shoreline adjacent septic systems. Issues relating to coastal erosion, sea level rise and tidal migration are kept entirely on the sidelines when the agency considers permitting septic systems that are subject to all of these dynamics. This outcome reflects a troubling disconnect between DHEC's coastal authority and expertise and its septic permitting. That disconnect is driven in part by the Agency's failure to conduct Coastal Zone Consistency

review for septic permitting. Consistency review is mandated by statute and is intended to give weight to the unique value of natural resources on the coast, as well as the natural forces at play on the coast. See S.C. Code Ann. § 48-39-80. Residential septic permits, however, have escaped this review which is particularly problematic when such permits are situated in high-risk and hazardous locations. Consequently, while oceanfront septic systems implicate a whole host of issues and concerns that are not present with systems in other parts of the state, all septic permitting is governed by the same set of regulations. In other words, while placement of a septic system on a pristine and dynamic barrier island which is currently eroding certainly warrants a closer look than the typical septic system, that review is not occurring.

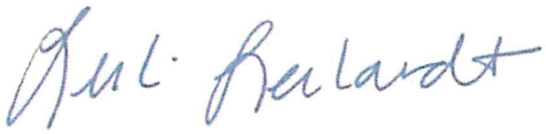
The Coastal Tidelands and Wetlands Act provides plainly that DHEC shall: "[d]evelop a system whereby the department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." Id. DHEC plainly, then, has been delegated the authority to conduct Coastal Zone Consistency review for septic tanks on fragile coastal areas like Bay Point Island and must certify them as consistent or inconsistent with the management plan. While the Coastal Management Program document (p. V-5) purports to exempt septic tanks from review, that document cannot supersede the plain language of the enabling statute.

DHEC staff's failure to review this beachfront septic permit for coastal zone consistency, as well as the Agency's overall policy of forgoing such review, is the product of a legal misapplication. We urge the Agency to revisit the question of Consistency review for septic permits, especially on the beachfront, and to reconsider the legal and technical basis on which it defers to the Management Program Document over the Act. In this particular case, the failure of DHEC staff to undertake Coastal Zone Consistency review, and its related failure to consider the

appropriateness and the impacts of coastal forces on the proposed septic system, was arbitrary, capricious, and in error.

WHEREFORE, the Fishing Association request that the Board conduct a final review conference and reverse or modify the DHEC staff decision to issue the Permit to Respondent Bay Point, or in the alternative, remand to the staff for a Coastal Zone Consistency Review.

Respectfully submitted,



Leslie S. Lenhardt
S.C. Environmental Law Project
510 Live Oak Drive
Mount Pleasant, SC 29464
(843) 527-0078
leslie@scelp.org

Attorney for Requestor

November 9, 2021

Freedom of Information Request Form

Customer Service: (803) 898-3882

Date: 7/19/2021

Internal request number: 849666

Contact information

Name: Leslie S. Lenhardt

Company/Organization:

Street address: 111 Chadwick Drive

City: Charleston

State: SC

Zip Code: 29407

Phone number: 843-527-0078

Email address: Leslie@scelp.org

Request information

I'm requesting: Specific Documents

Facility or project name: Bay Point Island LLC

Facility address: TMS R300 045 000 0009 0000

County: Beaufort

DHEC file custodian/staff contact if known: Bureau of Water, OCRM

Description of documents or files requested:

Any and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC.

Family Privacy Protection Act statement

The Family Privacy Protection Act, SC Code Section 30-2-50, prohibits any person or private entity from knowingly obtaining or using any personal information obtained from our agency for commercial solicitation directed to any person in the State. Violation of this law is a crime.

I have read and understand this statement. I am not requesting personal information for the purposes of commercial solicitation or in violation of law.

Signed:

Submit requests: Email: foi@dhec.sc.gov • **Fax:** (803) 898-3816 • **Mail:** FOI Office, 2600 Bull St., Columbia, S.C. 29201

Office Use Only: Date completed:

Billing info: Research: Time: Cost: Redaction Time: Cost:

Off-site/Archive Retrieval # Boxes: Fee:

Description:

Services:

Delivery options:

Total charge:

Freedom of Information Request Form

Customer Service: (803) 898-3882

Date: 8/31/2021

Internal request number: 851923

Contact information

Name: Leslie S. Lenhardt

Company/Organization:

Street address: 510 Live Oak Drive

City: Mount Pleasant

State: SC

Zip Code: 29464

Phone number: 843-527-0078

Email address: Leslie@scelp.org

Request information

I'm requesting: Specific Documents

Facility or project name: Bay Point Island LLC

Facility address: Beaufort County

County: Beaufort

DHEC file custodian/staff contact if known: Bureau of Water, OCRM

Description of documents or files requested:

Any applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications for the following properties located on Bay Point Island:
R300 045 000 0001 through
R300 045 000 0043

Owners should all be Bay Point Island LLC but these TMS numbers were not included in the earlier request that I submitted. We are also seeking specifically septic tank applications in addition to any other NPDES permits.

Family Privacy Protection Act statement

The Family Privacy Protection Act, SC Code Section 30-2-50, prohibits any person or private entity from knowingly obtaining or using any personal information obtained from our agency for commercial solicitation directed to any person in the State. Violation of this law is a crime.

I have read and understand this statement. I am not requesting personal information for the purposes of commercial solicitation or in violation of law.

Signed:

Submit requests: Email: foi@dhec.sc.gov • **Fax:** (803) 898-3816 • **Mail:** FOI Office, 2600 Bull St., Columbia, S.C. 29201

Office Use Only: Date completed:

Billing info: Research: Time: Cost: Redaction Time: Cost:

Off-site/Archive Retrieval # Boxes: Fee:

Description:

Services:

Delivery options:

Total charge:

DHEC 2295 (11/2013)

Instructions for Completing DHEC Form 2295

Purpose: This form is used to obtain records under of the SC Freedom of Information Act

Who completes the form: Any person seeking review or copies of public records of the Department.

Instructions:

1. Fill out the top portion of the form by providing complete contact information. We may contact you to obtain additional information necessary to fulfill your request. Please provide a telephone number where you can be reached between 8:30 a.m. to 5 p.m., Monday through Friday.
2. Provide as much information about the desired documents as possible.
3. Read and sign the Family Privacy Protection Act statement.

Submit the form: E-mail, fax or mail completed form to staff in the FOI Office.

Fee Schedule

Freedom of Information Center

1. **Search Fee**.....$20.00 per hour
2. **Redaction Fee** .....$20.00 per hour
3. **Off-site/Archive Retrieval Fee**..... $15.00 per box
4. **Copies**
   25 pages or less.....Free
   26 pages or more.....$ .10 per page

Contact Information

For additional information, contact the:
Freedom of Information Center
South Carolina Department of Health and Environmental Control (DHEC)
2600 Bull Street
Columbia, SC 29201
(803) 898-3882

FOIA Request #851923 - Bay Point Island LLC

From: Bishop, Karla Y. <bishopky@dhec.sc.gov>
To: leslie@scelp.org <leslie@scelp.org>
Subject: FOIA Request #851923 - Bay Point Island LLC
Date: Wednesday, October 20, 2021 12:31 PM
Size: 22 KB

Leslie,

I hope you're doing well! OCRM staff said they do not have any information responsive to the above-referenced request. We also researched the information you provided and were unable to locate any files. If you have any additional information that might help us in locating any records, please let me know.

We will consider your request closed.

Kindest regards,

Karla Y. Bishop, Director
Freedom of Information Office
S.C. Dept. of Health & Environmental Control
Office: (803) 898-3817
Connect: www.scdhec.gov Facebook Twitter

PRIVACY NOTICE: The information contained in this message and all attachments transmitted with it may contain legally privileged and/or confidential information intended solely for the use of the individual or entity to whom it is addressed. Access to this information by any other individual is unauthorized and may be unlawful. If the reader of this message is not the intended recipient, you are hereby notified that any reading, dissemination, distribution, copying, or other use of this message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately and delete the information without retaining any copies. Thank you.

FW: Bay Point Lot #13

From: Parker Moore <PMoore@bdlaw.com>
To: leslie@scelp.org <leslie@scelp.org>
Subject: FW: Bay Point Lot #13
Date: Wednesday, October 27, 2021 3:29 PM
Size: 28.5 MB

Parker Moore
Principal

BEVERIDGE & DIAMOND PC
O +1.202.789.6028 ~ M +1.(202) 607-8640 ~ PMoore@bdlaw.com

New Address | Please note that as of December 19, 2020, our new address is **1900 N Street, NW, Suite 100, Washington, DC 20036.** Phone numbers and email addresses remain the same.

From: Keaveny, Thomas <tkeaveny@bcgov.net>
Sent: Monday, October 25, 2021 2:14 PM
To: Parker Moore <PMoore@bdlaw.com>
Subject: Bay Point Lot #13

Parker,

In follow-up to our conversation of late Friday afternoon attached please find the zoning permit application and supporting documentation for Bay Point Lot #13.

With kind regards,

Tom

Thomas J. Keaveny, II
Deputy County Attorney

Beaufort County Legal Department
102 Industrial Village, Bldg. 1
P. O. Box 1228
Beaufort, SC 29901
Quick Access:
Mobile [preferred]: (843) 709-3721
Desk: (843) 255-2025
tkeaveny@bcgov.net

EXHIBIT 3

Healthy People. Healthy Communities.

Board:
Mark R. Elam, Chairman
Seema Shrivastava-Patel, Vice-Chair
Charles M. Joye, II, P.E., Secretary
Jim P. Creel, Jr.
J.B. (Sonny) Kinney
Richard V. Lee, Jr.
Morris E. Brown, III, MD, FAAFP
Robert R. Morgan, Jr., MD, MBA

December 17, 2021

Via Electronic Mail and US Mail Certified 9214 8969 0099 9790 1420 7768 62
Leslie S. Lenhardt, Esquire
SC Environmental Law Project
Email: leslie@scelp.org
510 Live Oak Drive
Mount Pleasant, SC 29464

Via Electronic Mail and US Mail Delivery
Mary D. Shahid, Esquire
Email: MShahid@nexsempruet.com
Nexsen Pruet
Post Office Box 485
Charleston, SC 29402

Via Electronic Mail Delivery
Sara Martinez, Esquire
Email: martinsv@dhec.sc.gov
SCHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: Docket No. 21-RFR-85, Bay Point Island, LLC
Issuance of a Permit to Construct and Onsite Wastewater System at 98 Bay Point Island Drive, St. Helena, Beaufort County. Permit Number 2021080040

Dear Counsel of Record:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

M. Denise Crawford
Clerk of the Board
S.C. Board of Health and Environmental Control

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

EXHIBIT 4

Freedom of Information Request Form

Customer Service: (803) 898-3882

Date: 7/19/2021

Internal request number: 849666

Contact information

Name: Leslie S. Lenhardt

Company/Organization:

Street address: 111 Chadwick Drive

City: Charleston

State: SC

Zip Code: 29407

Phone number: 843-527-0078

Email address: Leslie@scelp.org

Request information

I'm requesting: Specific Documents

Facility or project name: Bay Point Island LLC

Facility address: TMS R300 045 000 0009 0000

County: Beaufort

DHEC file custodian/staff contact if known: Bureau of Water, OCRM

Description of documents or files requested:

Any and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC.

Family Privacy Protection Act statement

The Family Privacy Protection Act, SC Code Section 30-2-50, prohibits any person or private entity from knowingly obtaining or using any personal information obtained from our agency for commercial solicitation directed to any person in the State. Violation of this law is a crime.

I have read and understand this statement. I am not requesting personal information for the purposes of commercial solicitation or in violation of law.

Signed:

Submit requests: Email: foi@dhec.sc.gov • **Fax:** (803) 898-3816 • **Mail:** FOI Office, 2600 Bull St., Columbia, S.C. 29201

Office Use Only: Date completed:

Billing info: Research: Time: Cost: Redaction Time: Cost:

Off-site/Archive Retrieval # Boxes: Fee:

Description:

Services:

Delivery options:

Total charge:

EXHIBIT 5

Freedom of Information Request Form

Customer Service: (803) 898-3882

Date: 8/31/2021

Internal request number: 851923

Contact information

Name: Leslie S. Lenhardt

Company/Organization:

Street address: 510 Live Oak Drive

City: Mount Pleasant

State: SC

Zip Code: 29464

Phone number: 843-527-0078

Email address: Leslie@scelp.org

Request information

I'm requesting: Specific Documents

Facility or project name: Bay Point Island LLC

Facility address: Beaufort County

County: Beaufort

DHEC file custodian/staff contact if known: Bureau of Water, OCRM

Description of documents or files requested:

Any applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications for the following properties located on Bay Point Island:
R300 045 000 0001 through
R300 045 000 0043

Owners should all be Bay Point Island LLC but these TMS numbers were not included in the earlier request that I submitted. We are also seeking specifically septic tank applications in addition to any other NPDES permits.

Family Privacy Protection Act statement

The Family Privacy Protection Act, SC Code Section 30-2-50, prohibits any person or private entity from knowingly obtaining or using any personal information obtained from our agency for commercial solicitation directed to any person in the State. Violation of this law is a crime.

I have read and understand this statement. I am not requesting personal information for the purposes of commercial solicitation or in violation of law.

Signed:

Submit requests: Email: foi@dhec.sc.gov • **Fax:** (803) 898-3816 • **Mail:** FOI Office, 2600 Bull St., Columbia, S.C. 29201

Office Use Only: Date completed:

Billing info: Research: Time: Cost: Redaction Time: Cost:

Off-site/Archive Retrieval # Boxes: Fee:

Description:

Services:

Delivery options:

Total charge:

Instructions for Completing DHEC Form 2295

Purpose: This form is used to obtain records under of the SC Freedom of Information Act

Who completes the form: Any person seeking review or copies of public records of the Department.

Instructions:

1. Fill out the top portion of the form by providing complete contact information. We may contact you to obtain additional information necessary to fulfill your request. Please provide a telephone number where you can be reached between 8:30 a.m. to 5 p.m., Monday through Friday.
2. Provide as much information about the desired documents as possible.
3. Read and sign the Family Privacy Protection Act statement.

Submit the form: E-mail, fax or mail completed form to staff in the FOI Office.

Fee Schedule

Freedom of Information Center

1. **Search Fee**.....$20.00 per hour
2. **Redaction Fee** .....$20.00 per hour
3. **Off-site/Archive Retrieval Fee**..... $15.00 per box
4. **Copies**
   25 pages or less.....Free
   26 pages or more.....$ .10 per page

Contact Information

For additional information, contact the:
Freedom of Information Center
South Carolina Department of Health and Environmental Control (DHEC)
2600 Bull Street
Columbia, SC 29201
(803) 898-3882

EXHIBIT 6

FOIA Request #851923 - Bay Point Island LLC

From: Bishop, Karla Y. <bishopky@dhec.sc.gov>
To: leslie@scelp.org <leslie@scelp.org>
Subject: FOIA Request #851923 - Bay Point Island LLC
Date: Wednesday, October 20, 2021 12:31 PM
Size: 22 KB

Leslie,

I hope you're doing well! OCRM staff said they do not have any information responsive to the above-referenced request. We also researched the information you provided and were unable to locate any files. If you have any additional information that might help us in locating any records, please let me know.

We will consider your request closed.

Kindest regards,

Karla Y. Bishop, Director
Freedom of Information Office
S.C. Dept. of Health & Environmental Control
Office: (803) 898-3817
Connect: www.scdhec.gov Facebook Twitter

PRIVACY NOTICE: The information contained in this message and all attachments transmitted with it may contain legally privileged and/or confidential information intended solely for the use of the individual or entity to whom it is addressed. Access to this information by any other individual is unauthorized and may be unlawful. If the reader of this message is not the intended recipient, you are hereby notified that any reading, dissemination, distribution, copying, or other use of this message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately and delete the information without retaining any copies. Thank you.

EXHIBIT 7

FW: Bay Point Lot #13

From: Parker Moore <PMoore@bdlaw.com>
To: leslie@scelp.org <leslie@scelp.org>
Subject: FW: Bay Point Lot #13
Date: Wednesday, October 27, 2021 3:29 PM
Size: 28.5 MB

Parker Moore
Principal

BEVERIDGE & DIAMOND PC
O +1.202.789.6028 ~ M +1.(202) 607-8640 ~ PMoore@bdlaw.com

New Address | Please note that as of December 19, 2020, our new address is **1900 N Street, NW, Suite 100, Washington, DC 20036.** Phone numbers and email addresses remain the same.

From: Keaveny, Thomas <tkeaveny@bcgov.net>
Sent: Monday, October 25, 2021 2:14 PM
To: Parker Moore <PMoore@bdlaw.com>
Subject: Bay Point Lot #13

Parker,

In follow-up to our conversation of late Friday afternoon attached please find the zoning permit application and supporting documentation for Bay Point Lot #13.

With kind regards,

Tom

Thomas J. Keaveny, II
Deputy County Attorney

Beaufort County Legal Department
102 Industrial Village, Bldg. 1
P. O. Box 1228
Beaufort, SC 29901
Quick Access:
Mobile [preferred]: (843) 709-3721
Desk: (843) 255-2025
tkeaveny@bcgov.net

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

Lawyers for the Wild Side

PO Box 1380, Pawleys Island, SC 29585 | (843) 527-0078 |

Executive Director & General Counsel
Amy E. Armstrong | amy@scelp.org

Special Counsel
Michael G. Corley | michael@scelp.org

Staff Attorneys
Benjamin D. Cunningham | ben@scelp.org
Leslie S. Lenhardt | leslie@scelp.org
Michael G. Martinez | mike@scelp.org
Lauren Megill Milton | lauren@scelp.org

Our Mission To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

March 7, 2022

VIA EMAIL & U.S. MAIL

Honorable S. Phillip Lenski
Clerk, SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Prehearing Statement
Bay Point Island, LLC Septic Tank P/N 2106120-Lot13

Dear Judge Lenski:

Please find enclosed Petitioner's Prehearing Statement in the above-referenced matter. Thank you for your kind consideration.

Respectfully,

Leslie S. Lenhardt
Staff Attorney

Enclosure
cc: Sara V. Martinez, Esq.
Mary D. Shahid, Esq.

Board of Directors - Allen Grumbine, Esq., Chairperson, Lisa Allen, Barbara Burgess, Esq., Amy Fabri, Rajan Govindan, Angela Hallacre, PhD, Marilyn Hemingway, Susan Hilfer, William Holt, MD, Elizabeth Igleheart, Bess Lochocki, Esq., Justin Lucey, Esq., Clarkson McDow, Esq., Walton McLeod, Esq., Gerald Schulze
Board Member Emeriti - Frances Close, John Mark Dean, Robert Schofield

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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I have served Petitioner's Prehearing Statement by depositing same in the U.S. Mail to the parties addressed to:

Sara V. Martinez, Esq.
Office of General Counsel
SCDHEC
2600 Bull Street
Columbia, SC 29201

Mary D. Shahid, Esq.
Nexsen Pruet
P.O. Box 486
Charleston, SC 29402

Rachel Oliver

March 7, 2022

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC **PETITIONER'S PREHEARING STATEMENT**

The Petitioner, Gullah/Geechee Fishing Association, hereby submits its Prehearing Statement in compliance with the Order of this Court filed on February 15, 2022 and SCALC, Rule 3, incorporates by reference its Request for Contested Case Hearing, filed January 17, 2022, and states as follows:

1. **The nature of this proceeding:**

This proceeding is a contested case appeal of Respondent, South Carolina Department of Health & Environmental Control's ("DHEC") issuance of a permit for an onsite wastewater system ("Permit") to Respondent, Bay Point Island, LLC.

2. **Statutory provision(s) conferring subject matter jurisdiction to this Court and other applicable statutes and regulations:**

The statutory provisions conferring subject matter jurisdiction and other applicable statutes and regulations are as follows: (1) S.C. Administrative Procedures Act, S.C. Code Ann. § 1-23-310, *et seq.*; (2) the S.C. Coastal Zone Management Act, S.C. Code Ann. § 48-39-10, *et seq.*; (3)

the South Carolina Coastal Zone Management Program ("CMP"); (4) S.C. Code Ann. § 44-1-60; (5) Pollution Control Act, S.C. Code Ann. § 48-1-10, *et seq.*; (6) S.C. Code Ann. Reg. 61-56 (Onsite Wastewater Systems); 6) South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 et seq.

3. The issues set forth with particularity, to be presented for determination, including any claims or defenses expected to be raised:

Petitioner submits that the issuance of the Permit runs contrary to a number of statutory and regulatory provisions and should not have been issued. Importantly, DHEC failed to conduct the required Coastal Zone Consistency review of this application pursuant to S.C. Code Ann. § 48-39-80. In addition, DHEC violated the Freedom of Information Act by failing to produce documentation of the submittal of the Permit application and issuance of the Permit, thereby preventing Petitioner from receiving notification of a permitting decision that was never publicly noticed. Specifically, the issues to be determined include the following:

a. Whether DHEC erred in issuing the Permit by failing to properly apply South Carolina law as described in Petitioner's Request for Contested Case and attached exhibits;

b. Whether DHEC erred in issuing the Permit in violation of S.C. Code Ann. Reg. 61-56 (Onsite Wastewater Systems);

c. Whether DHEC erred in failing to conduct a Coastal Zone Consistency Review as required by S.C. Code Ann. § 48-39-80;

d. Whether the Permit violates the policies contained in the Coastal Management Program applicable to all projects in the Coastal Zone;

e. Whether DHEC failed to comply with the S.C. Freedom of Information Act, S.C. Code Ann. § 30-4-10, by not producing specific documents that Petitioner requested and were in DHEC's possession at the time of the request.

4. The action requested of the court and a detailed statement of the law which supports the requested action, including statutory and/or case citations:

Petitioner requests that this Court reverse the issuance of the Permit to Respondent Bay Point Island, LLC. In the alternative, Petitioner requests that the Court remand the Permit to DHEC for a Coastal Zone Consistency Review.

5. A brief summary of the facts to be presented at the hearing:

Petitioner intends to present evidence that the Gullah/Geechee Fishing Association is comprised of individuals who have a vested interest in Bay Point Island and how they are impacted by the Permit and the deficient regulatory review of an activity to occur on such a pristine and vulnerable barrier island in the Lowcountry of South Carolina.

Petitioner will show that DHEC failed to comply with the Freedom of Information Act ("FOIA") S.C. Code Ann. § 30-4-10, by not producing specific documents that Petitioner requested and were in DHEC's possession at the time of the request. Petitioner filed a FOIA request with Respondent DHEC on July 19, 2021, seeking "[a]ny and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC." On August 31, 2021, Respondent DHEC provided some with responsive documents, none of which related to the request involving any septic tank applications or permits.

On that same day, August 31, 2021, Petitioner submitted another FOIA request, requesting the following documents:

> Any **applications for** permits or **permits** issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications for the following properties located on Bay Point Island:
> R300 045 000 0001 through

R300 045 000 0043
Owners should all be Bay Point Island LLC but these TMS numbers were not included in the earlier request that I submitted. We are also seeking specifically septic tank applications in addition to any other NPDES permits.

It was not until October 20, 2021 that the FOIA office responded that "OCRM staff said they do not have any information responsive to the above-referenced request. We also researched the information you provided and were unable to locate any files." Petitioner received notice of the Permit that had been issued on September 23, 2021 through an email forwarded from Beaufort County on October 27, 2021.

Petitioner will also show that Respondent DHEC failed to incorporate its specialized knowledge of coastal processes and forces, as possessed by OCRM, into its permitting of shoreline adjacent septic systems. Consistency review is mandated by statute and is intended to give weight to the unique value of natural resources on the coast, as well as the unique natural forces at play on the coast. See S.C. Code Ann. § 48-39-80. Typical residential septic permits in low-lying and dynamic coastal areas, however, have escaped this review. Consequently, while oceanfront septic systems implicate a whole host of issues and concerns that are not present with systems in other parts of the state, all septic permitting is governed by the same set of regulations. In other words, while placement of a septic system on a pristine and unique barrier island certainly warrants a closer look than the typical septic system, that review is not occurring.

Further, Petitioner will present evidence that the CMP guidelines for all projects in the Coastal Zone require DHEC-OCRM to consider:

1) The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for OCRM in implementation of its management program these being:

    a. "To promote the economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to III-3 achieve such

improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

2) "the extent to which the project will have adverse impacts on the 'critical areas' (beach/dune system, coastal waters, tidelands);

5) The extent to which the project includes consideration for the maintenance or improvement of the economic stability of coastal communities;

7) The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area;

8) The extent and significance of impact on the following aspects of quality or quantity of these valuable coastal resources: i) unique natural areas -- destruction of endangered wildlife or vegetation or of significant marine species (as identified in the Living Marine Resources segment), degradation of existing water quality standards; ii) public recreational lands -- conversion of these lands to other uses without adequate replacement or compensation, interruption of existing public access, or degradation of environmental quality in these areas; iii) historic or archeological resources -- irretrievable loss of sites identified as significant by the S. C. Institute of Archeology and Anthropology or the III-4 S. C. Department of Archives and History without reasonable opportunity for professional examination and/or excavation, or preservation.

Coastal Management Program, Ch. III.C.3.

DHEC staff's failure to undertake Coastal Zone Consistency review, and its related failure to consider the appropriateness and the impacts of coastal forces on the proposed septic system, was arbitrary, capricious, and in error.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:

Petitioner reserves its right to file any motion in accordance with the Rules of Procedure for the Administrative Law Court and the South Carolina Rules of Evidence in the event a motion or motions become necessary. Petitioner may file a motion for summary judgment following the conclusion of discovery.

7. A list of proposed witnesses and exhibits:

Witnesses:

a. Queen Quet, Chieftess of the Gullah/Geechee Nation
b. Ed Atkins, member, Fishing Association
c. Ricky Wright, member, Fishing Association
d. Any witnesses identified by Respondents
e. Any expert witnesses identified by Respondents
f. Additional witnesses identified as preparations for trial continue

Exhibits:

a. Certain documents contained in the DHEC/OCRM file for this matter including but not limited to the Permit;
b. Certain documents produced by the Petitioner in response to discovery requests;
c. Certain documents produced by the Respondents in response to discovery requests;
d. Maps, photographs, diagrams, and drawings depicting the subject property and surrounding area;
e. Studies and reports related to the proposed project;
f. Other documents generated through discovery, research, and investigation;
g. Any exhibit listed by any other party.

8. A statement regarding the necessity for discovery, if any:

Discovery will be necessary, including standard interrogatories, requests for production of documents, requests for admission and depositions beyond the limits set forth in SCALC, Rule 21(A) and beyond the time period set forth in Rule 21(A) as well.

9. The estimated time required for the hearing:

Petitioner anticipates one day for the hearing.

10. Any dates in the next one-hundred twenty (120) days when you will not be available for a hearing:

Petitioner is unaware of any unavailable dates at this stage of the proceedings

11. An e-mail address where you can be reached:

Attorneys for Petitioner may be reached at leslie@scelp.org and amy@scelp.org.

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

Leslie S. Lenhardt
Amy E. Armstrong
S.C. Environmental Law Project
510 Live Oak Drive
Mount Pleasant, SC 29464
(843) 527-0078
leslie@scelp.org
amy@scelp.org

Attorneys for Petitioner

March 7, 2022

Healthy People. Healthy Communities.

March 4, 2022

Honorable S. Phillip Lenski
Judge, SC Court of Appeals
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Re: Gullah/Geechee Fishing Association, Inc. vs. South Carolina Department of Health and Environmental Control and Bay Pointe Island, LLC
Docket No. 22-ALJ-07-008-CC

Dear Judge Lenski:

Enclosed please find Respondent *South Carolina Department of Health and Environmental Control's* ***Prehearing Statement*** for filing in connection with the above-referenced case. I would appreciate your office returning a stamped copy to our office in the self-addressed stamped envelope I have enclosed.

Should you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

Sandra R. Wessinger

Sandra R. Wessinger
Paralegal to
Christopher P. Whitehead
Assistant General Counsel

Enclosures

cc: Lesley S. Lenhardt, Esquire
Amy E. Armstrong, Esquire
Mary D. Shahid, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	)	DOCKET NO. 22-ALJ-07-0008-CC **Respondent South Carolina Department of Health and Environmental Control's *Prehearing Statement***

Respondent South Carolina Department of Health and Environmental Control ("Department") submits this Prehearing Statement pursuant to the Honorable S. Phillip Lenski's Order for Prehearing Statements filed February 15, 2022.

1. **The nature of this proceeding:** Petitioner in this case, Gullah/Geechee Fishing Association, Inc. ("Petitioner") is challenging the Department's decision to issue a Permit to Construct Onsite Wastewater System, File No. 2021080040 ("Permit"), to Bay Point Island, LLC ("Bay Point") for the construction of a specialized onsite wastewater system to serve a four-bedroom residence to be located at 98 Bay Point Island Drive, St. Helena, South Carolina in Beaufort County. Department staff issued the permit to Bay Point on September 23, 2021, a request for review of the staff decision was filed by Petitioner on November 9, 2021, and the Board of Health and Environmental Control issued its decision not to conduct a Final Review Conference on December 17, 2021.

2. **The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court and other applicable statutes and regulations:** Jurisdiction in contested cases generally is conferred pursuant to S.C. Code Ann. §§ 1-23-10 et seq. and S.C.

Code Ann. § 44-1-60. Other applicable statutes and regulations include: South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10 et seq.; S.C. Code Ann. Regs. 61-56, *Onsite Wastewater Systems*; Coastal Tidelands and Wetlands Act, S.C. Code Ann. §§ 48-39-10 et seq; and the South Carolina Coastal Zone Management Program Document, Chapter V ("CZMP").

3. **The issues set forth with particularity, to be presented for determination, including any claims or defenses expected to be raised:** Petitioner will likely argue the Department should have expanded the requirements set forth in S.C. Code Ann. Regs. 61-56 and erred in failing to conduct a Coastal Zone Consistency review before issuing the Permit. The Department will demonstrate its compliance with all statutes and regulations in issuing the Permit, with specific emphasis that state and federal law does not require a Coastal Zone Consistency review for state permits to construct wastewater treatment systems or septic tanks that handle less than 1,500 gallons per day of domestic wastewater.

4. **A brief summary of the facts to be presented at the hearing:** On August 31, 2021, the Department received a permit application, plans, and supporting documentation from Bay Point for the construction of a specialized onsite wastewater system design to serve a four-bedroom residence to be located at 98 Bay Point Island Drive, St. Helena, South Carolina in Beaufort County. On September 15, 2021, the Department requested additional information related to the engineer's plans for the onsite wastewater system. The updated plans were submitted to the Department on September 20, 2021. After finalizing its review of the application and ensuring that it met all requirements of S.C. Code Ann. Regs. 61-56, the Department's Bureau of Environmental Health Services issued the Permit.

5. **The action requested of the court and a detailed statement of the law which supports the requested action, including statutory and/or case citations:** The Department

requests the Court affirm that the issuance of the Permit complies with all lawful requirements, specifically the Department was not required to conduct a Coastal Zone Consistency review before issuing the permit.

S.C. Code Ann. § 48-39-80(B)(11) states "the Department shall have the authority to review all state and federal permit applications in the coastal zone and to certify that these do not contravene the management plan." The expression of this authority is refined in the CZMP, which lists the specific state agency permits that are subject to review and certification. The list of permits subject to review includes permits for wastewater treatment systems or septic tanks, but only those that handle more than 1,500 gallons per day or handle effluent other than domestic waste. In other words, smaller systems for the treatment of domestic wastewater are exempt from Coastal Zone Consistency review based upon the approved CZMP document. This exemption has long been in place and has been upheld as properly accounting for factors including the Department's lack of direct control or authority over sewage treatment and disposal, the sheer number of septic tank permits issued within the coastal zone, and the design of S.C. Code Ann. Regs. 61-56 "to insure that state water quality standards in adjacent water bodies must be maintained." N. Beaufort Cnty. Committee v. S.C. Dep't of Health & Envtl. Control, No. 96-ALJ-07-0117-CC (S.C. Admin. L. Ct., Oct. 28, 1996) (Kittrell, J.).

6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:** The Department will likely file a motion for summary judgment prior to a hearing and argue that the Department is entitled to judgment as a matter of law because there is no genuine issue as to any material fact. See Rule 56(c), SCRCP. As stated above, the Petitioner will likely argue the Department should have expanded the requirements set forth in S.C. Code Ann. Regs. 61-56 and erred in failing to conduct a Coastal

Zone Consistency review before issuing the Permit. These arguments are without merit, because an expansion of the legal requirements and a Coastal Zone Consistency review are not required under state or federal law. The Department reserves the right to file additional motions as allowed under the Rules of Procedure for the Administrative Law Court.

7. **A list of proposed witnesses and exhibits:** At this time, the Department would anticipate calling the following witnesses, but reserves the right to name additional witnesses:

- Kimberly Crouse – Environmental Health Manager
- Timothy Stanley – Manager of Onsite Wastewater Division
- David Vaughan – Director of Onsite Wastewater, Rabies Prevention, Vector Surveillance, and Enforcement
- Christopher Stout – Manger of Coastal Zone Consistency Section

At this time, the Department would anticipate introducing the following exhibits, but reserves the right to introduce additional exhibits:

- Documents contained in the Department's administrative file;
- Documents obtained in discovery if conducted;
- Chapter V of the CZMP

8. **A statement regarding the necessity for discovery, if any:** The Department does not intend to conduct any discovery, but reserves the right to conduct standard discovery and believes it will be sufficient in this case.

9. **The estimated time required for the hearing:** The Department believes that a hearing on the merits of this case should take no more than one (1) day.

10. **Any dates in the next one hundred twenty (120) days when counsel and Department staff will NOT be available for a hearing:** As of this date, the Department staff and counsel are <u>not</u> available on the following dates: March 14, March 16, March 22, March 24, April 6, May 4, May 5, May 16-19, June 1 and June 6-10.

11. **An e-mail address where Respondent can be reached:** The Department's

counsel may be reached at whitehcp@dhec.sc.gov and martinsv@dhec.sc.gov. In addition, the Department would request that counsel Bradley Churdar be copied on all matters regarding this case at churdbd@dhec.sc.gov, as well as the Department's paralegal, Sandra R. Wessinger, at wessinsr@dhec.sc.gov.

Respectfully submitted,

Christopher P. Whitehead, S.C. Bar #100264
Sara V. Martinez, S.C. Bar #74822
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201
Telephone: (803) 898-3350
Email: whitehcp@dhec.sc.gov
martinsv@dhec.sc.gov

March 4, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Pointe Island, LLC, Respondents.	)	Docket No. 22-ALJ-07-0008-CC **CERTIFICATE OF SERVICE**

I, Sandra Wessinger, a Paralegal with the South Carolina Department of Health and Environmental Control, hereby certify that I have this 4th day of March, 2022, served the foregoing Defendant South Carolina Department of Health and Environmental Control's ***Prehearing Statement*** on all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, at the address indicated below:

Leslie S. Lenhardt, Esquire
Amy E. Armstrong, Esquire
SC Environmental Law Project
510 Live Oak Drive
Pawleys Island, South Carolina 29464

Mary D. Shahid, Esquire
Nexsen Pruet, LLC
Post Office Box 486
Charleston, South Carolina 29401

Sandra R. Wessinger

March 4, 2022
Columbia, South Carolina

NEXSEN | PRUET

March 7, 2022

VIA EMAIL & U.S. MAIL

Honorable S. Phillip Lenski
SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Prehearing Statement
Bay Point Island, LLC Septic Tank P/N 2106120-Lot13

Dear Judge Lenski:

Please find enclosed Respondent Bay Point Island, LLC's Prehearing Statement in the above-referenced matter. I am also attaching a copy, to be time and date stamped and returned in the envelope provided. Thank you for your kind consideration.

Respectfully submitted,

Mary D. Shahid
Member

cc: Sara Martinez, Esq.
Leslie Lenhardt, Esq.

Austin
Charleston
Charlotte
Columbia
Greensboro
Greenville
Bluffton / Hilton Head
Myrtle Beach
Raleigh

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Attorneys and Counselors at Law

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No.: 22-ALJ-07-0008-CC **RESPONDENT BAY POINT ISLAND, LLC'S PREHEARING STATEMENT**

On behalf of Respondent, BAY POINT ISLAND, LLC ("BAY POINT"), the following information is submitted in response to the Court's Order for Prehearing Statements.

1. **The nature of this proceeding.**

This is a contested case initiated by Petitioner challenging the decision of the South Carolina Department of Health and Environmental Control ("SCDHEC") to issue a permit (Septic Tank Permit No. 2106120) authorizing construction of a septic tank and drainfield at 98 Bay Point Island Drive (Lot 13, Bay Point Island Drive, St. Helena, SC).

2. **Statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (court) and other applicable statutes and regulations.**

The Court's subject matter jurisdiction arises from S.C. Code Ann. §§ 44-1-60 and 1-23-600 et seq., and S.C. Code Ann. §§ 48-39-10 et seq.

Other applicable statutory and regulatory provisions include:

a) S.C. Code Ann. § 48-39-80

b) S.C. Code Reg. 61-56

c) S.C. Code Ann. § 48-1-10 et seq. (Pollution Control Act)

d) S. C. Coastal Zone Management Program Document

3. **The issues set forth with particularity, to be presented for determination, including any claims or defenses expected to be raised.**

- Whether Respondent SCDHEC correctly applied the standards for onsite waste water disposal in determining that the applicant, Respondent Bay Point Island, LLC, was entitled to issuance of a permit authorizing construction and installation of a septic tank and drainfield.
- Whether Petitioner has failed to invoke the jurisdiction of this Court by its late attempt to challenge this permit without properly invoking the procedures set forth in S.C. Code Ann. § 44-1-60.
- Whether the policies and procedures established in the CZMPD are applicable and were considered in the permit decision.
- Whether the CZMPD, as approved by the legislature and the State's governor, requires certification of domestic septic tanks.
- Whether this Court has subject matter jurisdiction to adjudicate a complaint regarding Respondent SCDHEC's FOIA policies and procedures.
- The extent of relevancy of the property owner's long-term plans for Bay Point Island.

4. **A brief summary of the facts to be presented at the hearing.**

Respondent intends to present information regarding Bay Point Island, its ownership, its development potential, and efforts and considerations related to possible development of the Island. Respondent will provide information supporting the permit that is the subject of this contested case including the types of soils present on Bay Point Island, the use of onsite wastewater disposal systems (Septic Tanks) in Beaufort County and the success of such systems. Respondent will demonstrate the suitability of conditions on Bay Point Island that will contribute to the successful functioning of the septic system as permitted. Respondent will address Petitioner's concerns related to water quality of the tidal waters surrounding Bay Pont Island. Respondent will further address the impact of coastal processes on the function of Septic Tanks and measures to mitigate any such impacts. Respondent will demonstrate that SCDHEC complied with the CZMPD in issuance of the Permit, in particular Part V-5.

By its own terms, the permit at issue, attached as Ex. 1 to Petitioner's Request, authorizes construction of a specialized onsite wastewater system on a single lot on Bay Point Island for peak flows less than 1500 GPD. Petitioner's Request seems to disregard these details, suggesting instead that Petitioner's intention is construction of a luxury resort and a series of single family homes. In accordance with Section 201.1(3) of S.C. Code Reg. 61-56, the minimum required size for any septic tank is net liquid capacity of 1000 gallons, which is sufficient to serve dwellings of four bedrooms or less. Additional capacity of 250 gallons is required for each bedroom over four. As such, the permit authorizes a septic system sufficient for a single six-bedroom home. This residential dwelling is proposed for construction on one lot, Lot 13, in a subdivision that was platted over 20 years ago and zoned a T1 natural preserve.

Further, Respondent will demonstrate that the Petitioner failed to comply with procedures of § 44-1-60 and, therefore, this Court lacks jurisdiction over this matter.

5. **The action requested by the court and a detailed statement of the law which supports the requested action, including statutory and/or case citations.**

Respondent Bay Point Island, LLC, seeks an Order of the Court affirming the issuance of the Permit which allows construction of an onsite wastewater system to support a residence on the island. Respondent will demonstrate that the permit is compliant with SCDHEC's regulations, 61-56, "License to Construct or Clean Onsite Sewage Treatment and Disposal Systems and Self –Contained Toilets." Respondent will further demonstrate, in accordance with page V-5 of the SCCZMD, that all procedures related to consistency certification for domestic wastewater were properly followed by the SCDHEC staff. The CZMPD was adopted decades ago by the S. C. General Assembly and approved by the Governor, and are treated as regulation in the State's courts. To the extent that Petitioner seeks a declaratory judgment that the CZMPD is inconsistent with the Department's regulations, this Court lacks jurisdiction to afford such relief. Finally, Petitioner's challenge to the permit is untimely and not compliant with the requirements of S. C. Code Ann. 44-1-60 and should be dismissed. Petitioner relies on the Department's policies and procedures related to FOIA as its reasons for seeking relief with this Court, and this Court lacks subject matter jurisdiction to resolve a FOIA dispute. S. C. Code Ann. § 30-4-100 requires a complaining party to seek relief in the Court of Common Pleas.

6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.**

Motion to Dismiss Contested Case.

7. **A list of proposed witnesses and exhibits.**

a. Witnesses:

Representative of Permittee Bay Point Island, LLC, to be decided

Samuel P. Connor, P.E., Consulting Engineer

Troy Smith, Soil Classifier

Kim S. Crouse, SCDHEC

Matt Slagle, SCDHEC

Witnesses named by other parties

Such additional witnesses as may be identified during discovery.

b. Exhibits:

All documents in SCDHEC file, specifically, the application for the septic permit at issue

All pleadings and other documents filed in the case

Surveys and drawings pertaining to Respondent's property

Aerial photography of Harbor Island

Soil Samples

Evidence of Septic Tank use in Beaufort County

Water Quality Data

Such additional documents as may be identified during discovery.

8. **A statement regarding the necessity for discovery, if any.**

Discovery is necessary.

9. **The estimated time required for the hearing.**

Respondent Bay Point estimates that it would require a day to present its witnesses.

10. **Any dates in the next one hundred twenty (120) days when you will not be available for a hearing.**

The undersigned is not available March 22, March 16 – 18, April 7, April 20 – 22, April 28 – 29, May 2 – 4, and June 6 – 10.

11. **An email address where you can be reached.**

MShahid@nexsenpruet.com

Respectfully submitted,

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Attorneys for Respondent
Bay Point Island, LLC

March 7, 2022
Charleston, SC

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Prehearing Statement has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 7th day of March, 2022.

Sara V. Martinez, Esq.
Office of General Counsel
SCDHEC
2600 Bull Street
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Leslie Lenhardt, Esq.
SC Environmental Law Project
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NEXSEN|PRUET

Mary D. Shahid
Member
Admitted in SC

May 9, 2022

VIA ELECTRONIC AND US MAIL

The Honorable S. Phillip Lenski, ALJ
S. C. Administrative Law Court
1205 Pendleton Street, Suite 224
Edgar Brown Bldg, Second Floor
Columbia, SC 29201

Re: Gullah/Geechee Fishing Association, Inc. v. SCDHEC and Bay Point Island, LLC
22-ALJ-07-0008-CC

Dear Judge Lenski:

Please find enclosed a Motion to Dismiss and accompanying Memorandum in Support filed on behalf of Respondent Bay Point Island. I am including a check in the amount of fifty dollars ($50.00) for the filing fee. I am also including a copy of the Motion and Memorandum and would request that it be stamped and returned to me in the envelope provided.

Very truly yours,

Mary D. Shahid
Member

cc: Sarah Martinez, Esq.
Leslie Lenhardt, Esq.

Austin
Charleston
Charlotte
Columbia
Greensboro
Greenville
Bluffton / Hilton Head
Myrtle Beach
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No.: 22-ALJ-07-0008-CC **RESPONDENT BAY POINT ISLAND, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

TO: LESLIE LENHARDT, ESQ., COUNSEL FOR PETITIONER:

YOU WILL PLEASE TAKE NOTICE that Respondent, Bay Point Island, LLC ("Bay Point" or "Respondent"), by and through its undersigned attorneys, and pursuant to Rule 19, RPALC, Rule 68, RPALC, and SCRCP Rule 12(h)(3), hereby moves the Court for an Order dismissing this action for lack of jurisdiction on the grounds set forth below and more fully explained by the Memorandum of Law in Support of Respondent's Motion being submitted herewith.

Petitioner, Gullah/Geechee Fishing Association, Inc., by and through the S. C. Environmental Law Project ("SCELP"), has attempted to initiate the above-captioned contested case to challenge the decision of the South Carolina Department of Health and Environmental Control ("DHEC") to issue a permit (Septic Tank Permit No. 2106120, "the Septic Permit") authorizing construction of a septic tank and drainfield at 98 Bay Point Island Drive (Lot 13, Bay Point Island Drive, St. Helena, S.C.).

The Septic Permit was issued on September 23, 2021. Pursuant to S.C. Code Ann. § 44-1-60(E)(2), the staff decision to issue the Septic Permit became the final agency decision on

October 1, 2021, as no written request for final review was filed with the Board of Health and Environmental Control ("Board"). Petitioner acknowleges that the Request for Final Review of the Septic Permit filed with the Board occurred more than 15 days from the issuance of the staff decision, which situation it characterizes as a "procedural hurdle." Request for Contested Case, p. 3. In fact, Petitioner's request was filed November 24, 2021, 54 days after the permit became final.

Petitioner's Request for Contested Case hearing asserts that "Petitioner could not have been charged with notice of the application other than through seeking documents through FOIA [submission of Freedom of Information Act requests to the Department]." Request for Contested Case, p. 3. Bay Point disputes this since Petitioner could have received notice of the issuance of the Septic Permit, but failed to ascertain identification of the appropriate staff and submit a written request for to receive such notice in accordance with S. C. Code Ann. § 44-1-60(E)(1). In short, Petitioner failed to follow established procedures to ensure it would receive notice of any permit issued to Bay Point. Certainly Petitioner should have been familiar with this process in light of its prior "extreme involvement in seeking protection of this priceless cultural and environmental asset." Request for Contested Case, p. 3. Petitioner has provided no explanation or justification for failing to submit such written request to the Department.

Petitioner missed the deadline provided by S.C. Code Ann. § 44-1-60(G) to properly and timely request review of the agency's decision to issue the Septic Permit. Following that, the Request for Contested Case attempting to commence the above-captioned case was not timely filed and violated the procedures for appeal of agency decisions established in S. C. Code Ann. Sec. 44-1-60. As such, Bay Point moves for dismissal of the claims stated in the Request for

Contested Case as this Court has been deprived of jurisdiction to hear this case, and more specifically, of any power to render the particular judgment requested.

Respectfully submitted,

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Attorneys for Respondent
Bay Point Island, LLC

May 9, 2022
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No.: 22-ALJ-07-0008-CC **RESPONDENT BAY POINT ISLAND, LLC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

Respondent, Bay Point Island, LLC ("Bay Point"), respectfully submits this Memorandum in Support of its Motion to Dismiss the claims asserted in the Request for Contested Case filed by the South Carolina Environmental Law Project ("SCELP") on behalf of Petitioner, Gullah/Geechee Fishing Association, Inc. ("Petitioner"). The claims are subject to dismissal because this Court lacks jurisdiction over this matter for the reasons discussed below.

BACKGROUND

Bay Point is the owner of Bay Point Island, a 493 acre island located in Beaufort County, South Carolina. In the past, Bay Point has proposed development of the island to support an environmentally sensitive resort and residential subdivision. The island is entitled by a subdivision plan that was platted over 20 years ago and approved by Beaufort County. Presently, there is no proposal for large-scale development submitted by Bay Point to the South Carolina Department of Health and Environmental Control.

Instead, this matter concerns an application made by Bay Point to the Bureau of Environmental Health Services ("DHEC-BEHS"), within the South Carolina Department of

Health and Environmental Control ("DHEC" or "the Department") for authorization to construct a single septic tank and drainfield to serve a single, residential dwelling located on a single lot on Bay Point island. The application was approved and the Septic Permit issued to Bay Point on September 23, 2021.

On behalf of Petitioner, SCELP submitted a Request for Contested Case to this Court challenging the Septic Permit. This Request for Contested Case is untimely and should be dismissed by this Court because it follows a Request for Final Review that was also untimely filed with the Board on behalf of Petitioner. In the Request for Contested Case Petitioner admits that its filing with the Board occurred more than 15 days from the issuance of the staff decision. Request for Contested Case, p. 3. Petitioner asserts that its late filing was due to a failure of the Department to comply with FOIA procedures, further asserting that the FOIA requests it submitted to the Department were the only method by which it could have received notice since there is no obligation for the Department to put septic tank permits on public notice. Request for Contested Case, pp. 3 and 5. Bay Point disagrees since Petitioner could have submitted a written request to the Department to be provided notice of any permit issued to Bay Point regarding Bay Point Island and should have to fully comply with the procedure established by South Carolina law to obtain notice of permitting decisions.

FACTS

On September 23, 2021, DHEC-BEHS issued a permit (Septic Tank Permit No. 2106120, "the Septic Permit") authorizing construction of a septic tank and drainfield at 98 Bay Point Island Drive (Lot 13, Bay Point Island Drive, St. Helena, S.C.). By its specific terms, the Septic Permit authorizes construction of a specialized onsite wastewater system on a single lot on Bay Point Island for peak flows less than 1500 GPD. In accordance with Section 201.1(3) of S.C.

Code Reg. 61-56, the minimum required size for any septic tank is net liquid capacity of 1000 gallons, which is sufficient to serve dwellings of four bedrooms or less. Additional capacity of 250 gallons is required for each bedroom over four. As such, the Septic Permit authorizes a septic system sufficient for a single six-bedroom home. The subject residential dwelling is proposed for construction on a single lot, Lot 13, in a subdivision that was platted over 20 years ago and zoned a T1 natural preserve.

Despite the vested interest Petitioner claims in Bay Point Island, and its prior "extreme involvement" in seeking protection of the island, Petitioner failed to follow the procedure set forth in S.C. Code Ann. § 44-1-60(E)(1) to submit a written request to the Department to be notified of any Department decision regarding Bay Point Island. Instead, it is completely ignoring the existence of that procedure to argue that the only method by which it could have gotten notice of the subject Septic Permit was through two Freedom of Information Act request forms ("FOIA Requests") submitted by SCELP to the Department of Health and Environmental Control.

As described in Petitioner's Request for Contested Case and confirmed by Exhibits 4 and 5 to the Request, the above-mentioned FOIA request forms were submitted to the Department on July 19, 2021 and August 31, 2021. Request for Contested Case p. 4. The second FOIA form was submitted based on the absence of any documents pertaining to septic tank applications or permits in the Department's response to the first form. Request for Contested Case p. 4. That being said, a review of Exhibits 4 and 5 confirms that only the second FOIA Request form, submitted on August 31, 2021, specifically referenced septic tank permits. Review of the forms also confirms that neither of Petitioner's FOIA requests were directed to the correct division of the Department responsible for permitted of onsite wastewater systems according to S.C. Code

Reg. § 61-56, or the Bureau of Environmental Health Services. Instead, the requests directed staff to the Office of Ocean and Coastal Resources Management and the Bureau of Water. Request for Contested Case Exhibits 4 and 5. The Department's website makes clear that neither of these is responsible for review or permitting of onsite wastewater systems.

South Carolina's FOIA statute, S.C. Code Ann. § 30-4-10 *et seq.*, allows Department Staff ten days to respond confirming receipt of the request and an additional 30 days to provide information to the requesting public. This means that Department staff had no obligation under the FOIA statute to produce documents from its septic file any sooner than October 10, 2021. As a result of this timing, the period allowed to DHEC to respond to Petitioner's FOIA request overlapped the date upon which DHEC-BEHS issued the Septic Permit. Moreover, given the status of the file being under current review at that time, the documents were likely not available on that date for production.

In accordance with S.C. Code Ann. § 44-1-60(E)(2), the agency decision by DHEC-BEHS to issue the Septic Permit became final on October 8, 2021, because no written request was submitted by anyone, including Petitioners, for final review with the Board. SCELP did not file its Request for Final Review attempting to challenge the Septic Permit was not submitted to the Board until November 9, 2021, 47 days after the Septic Permit was issued. It is inarguable that this submission was untimely and made in violation of the procedures established not only by the Board but also by South Carolina law. This has resulted in this Court being deprived of procedural jurisdiction over the claims in the Request for Contested Case filed by SCELP in an attempt to challenge the agency decision to issue the Septic Permit.

ARGUMENTS

I. JURISDICTION.

The South Carolina Supreme Court has stated on several occasions "[t]he word 'jurisdiction' does not in every context connote subject matter jurisdiction, but rather, is 'a word of many, too many, meanings.'" *In re Estate of Hover*, 407 S.C. 194, 207, 754 S.E.2d 875, 882 (2014) (quoting *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013)). "Specifically, '[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested." *Id.* at 208, 754 S.E.2d at 882 (quoting *Limehouse*, 404 S.C. at 104, S.E.2d at 572). Here, the third form of jurisdiction is at issue due to Petitioner's failure to follow the proper procedure to invoke this Court's jurisdiction.

As set forth in S.C. Code Ann. § 44-1-60(A), a challenge to a department decision to issue a permit is one of several matters that may give rise to a contested case. A contested case is defined in S.C. Code Ann. § 1-23-505(3):

> (3) "Contested case" means 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.

(eff. June 16, 2008). The jurisdiction of the Administrative Law Court is outlined in S.C. Code Ann. § 1-23-600(A): "An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-500 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10, in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases," with certain exceptions. Furthermore, S.C. Code Ann. § 1-23-600(B) requires all requests for a hearing before the ALC to be filed in accordance with the court's rules of procedure.

Neither party has disputed whether this case involves a matter over which this Court has subject matter jurisdiction to hear contested cases. Instead, the dispute centers upon whether

Petitioner appropriately followed all applicable procedures necessary to timely file a contested case with the ALC. While the filing of a Request for Contested Case is the immediate prerequesite for commencing a contested case in the ALC, S.C. Code Ann. § 44-1-60 establishes procedures for requesting board review of agency decisions that must be pursued before a contested case is failed to comply with the procedure required by S.C. Code Ann. § 44-1-60(E)(1) to submit a written request to the Department to be notified of any Department decision regarding Bay Point Island. The Request for Contested Case contains no explanation for Petitioner's failure, asserting instead that there was no method other than the FOIA Requests attempted by SCELP on behalf of the Petitioner for Petitioner to obtain notice. Yet, no authority is cited or reason is given as to why a written request under § 44-1-60(E)(1) was unavailable to Petitioner or SCELP on Petitioner's behalf, and Bay Point is unaware of any. The statute does not require actual knowledge of any existing permit application or permit to request notice; in fact, Petitioner could have made a broad request under § 44-1-60(E)(1) to be sent notice of any permit issued to Bay Point or with regard to any property on Bay Point Island in order to ensure it received notice of any potential activity.

Petitioner has argued that failure by the Department to produce the documents pertaining to Bay Point's application for the subject Septic Permit or the Septic Permit itself is the reason it did not receive notice. However, this would impermissibly shift the burden for notice on to the Department when, in this specific circumstance involving septic tank permitting, there is no requirement for the Department to give anyone any notice of septic applications or permits other than that outlined in § 44-1-60(E)(1). That is, there is no requirement for the Department to put septic tank applications on public notice as it is required to do for other types of applications. Clearly, § 44-1-60(E)(1) places the burden on Petitioner to request the notice, which is where it

should remain. Petitioner's suggestion that the FOIA Statute should be interpreted to state a requirement for the Department to provide notice of the issuance of the Septic Permit is incorrect.

Second, Petitioner's argument ignores the fact that Department staff had no obligation to respond to the FOIA Request that asked for septic applications, permits and documents in the septic application file until October 10, 2022. Petitioner admits that a response was provided by the Department on October 20, 2021. Request for Contested Case, p. 5. While the Septic Permit that is now known was issued on September 23, 2021 was not produced, Petitioner is ignoring two reasons behind this. First, as the Staff Decision documents points out, the request as phrased in the FOIA form encompassed *existing* septic tank applications and permits but did not ask for notice of any *forthcoming* decisions, *i.e.*, as of the date of the request, related to the requested materials. Staff Response to Request for Review, p. 2. "In other words, the Department's possession of a FOIA request for copies of public records (including permits and permit applications), does not constitute a request that the Department provide notice of new decision(s) at the time they are issued." *Id.*

In addition, the FOIA Request forms misdirected FOIA staff to divisions of DHEC that are not responsible for review or issuing of septic tank permits. This is why no documents were returned from inquiries made by the FOIA staff of these two divisions. Again, no reason has been given as for why a simple review of the Department's website was not done during preparation of the form to ensure that it was directed to the division actually responsible for reviewing and permitting applications for septic tank permits. This is not a case where the agency failed to comply with obligations set by the FOIA Statute or failed to provide a response. The Department did provide the results of the search that was requested within the allotted time.

This is a case where Petitioner could, and should, have followed the established, applicable procedure and submitted a written request for notice of any septic tank applications or permits regarding Bay Island but failed to do so.

II. THIS COURT LACKS JURISDICTION TO RENDER A JUDGMENT ON THIS MATTER BECAUSE PETITIONER FAILED TO FILE ITS REQUEST FOR FINAL REVIEW WITHIN 15 CALENDAR DAYS OF THE ISSUE DATE OF THE SEPTIC PERMIT.

The procedures for agency decisions giving rise to contested cases are set forth in S. C. Code Ann. § 44-1-60. The initial agency decision is the staff decision. *Id.* § 44-1-60(C). These procedures clearly state that the staff decision becomes final 15 days after notice of the department decision has been mailed to the applicant, **unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person.** *Id.* § 44-1-60(E) (emphasis added). More specifically, the applicable procedure requires notice to be sent to affected persons who have requested, in writing, to be notified. *See id.*

The staff decision becomes the final agency decision if the Board does not receive a request for final review. *Id.* § 44-1-60(F). The time period for appeals of DHEC decisions begins when notice of the final decision has been mailed to the applicant. *See Coastal Conservation League v. Dept. of Health and Envt'l. Ctrl.* 702 S.E.2d 246 (S.C. 2010). Based on the issue date of the Septic Permit and mailing of it to Bay Point, September 23, 2021, the initial staff decision became a final agency decision on October 8, 2021 in accordance with § 44-1-60(E)(2).

As such, even if the Septic Permit had been provided it to SCELP on October 20, 2021, this would still have been too late for Petitioner to have complied with the 15 day period following issuance of the permit to request a final review of the initial staff decision by the

Board. That opportunity had come and gone before DHEC's FOIA Office responded to the FOIA Request.

Petitioner's failure to invoke the proper procedure of all the steps required by S. C. Code Ann. § 44-1-60 deprived this Court of procedural jurisdiction to hear this contested case. Petitioner could have submitted a written request to the Department to have received notice of the Septic Permit at issue in this case. Petitioner failed to do that, and then missed the entire 15 day period made available by statute to request final review of the initial staff decision. As a result, the decision became a final agency decision on October 8, 2021. At that point, Petitioner not only lost the ability to timely request final review but also failed to invoke the proper procedure to request a contested case hearing with the ALC, thereby depriving the Court of procedural jurisdiction.

CONCLUSION

If Petitioner had concerns that Bay Point might seek authorization for potential development of any sort on Bay Point Island, it could have followed the procedures set by South Carolina law to request notice. Had Petitioner done so, it could have timely filed a challenge to the decision made by DHEC-BEHS to issue the Septic Permit. What it should not be allowed to do now is shift the burden for notice onto the Department in a situation where the statute clearly placed it upon Petitioner. Petitioner has not established any failure by the Department to comply with any statutory obligation imposed upon it. While the Department admittedly provided incorrect information in response to the FOIA Request, it executed on the FOIA Request as submitted in compliance with the time periods stated in the FOIA statute for its response, which misdirected FOIA staff to the wrong agency division. In addition, the FOIA Request did not create an obligation for the Department to provide notice of forthcoming decisions related to the

requested information. As previously stated, there is an established procedure to request notice which Petitioner failed to follow. Even if the Septic Permit had been provided on October 20, 2021 the initial staff decision would have already become final and Petitioner still would have been beyond the time for submitting a request for final review to the Board.

For all the foregoing reasons, Bay Point seeks dismissal of the Request for Contested Case submitted by SCELP on behalf of Petitioner as this Court lacks jurisdiction over all claims.

Respectfully submitted,

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Attorneys for Respondent
Bay Point Island, LLC

May 9, 2022
Charleston, SC

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Dismiss and Memorandum has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 9th day of May, 2022.

Sara V. Martinez, Esq.
Office of General Counsel
SCDHEC
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1071471

NEXSEN PRUET, LLC

Payee: SC ADMINISTRATIVE COURT

VENDOR #: 10011228

Date: 05/10/2022

Check #: 546146

DATE	INVOICE NUMBER	RESPONSIBLE PARTY	GENERAL LEDGER ACCOUNT	MATTER #	AMOUNT
05/10/22	051022			055970-00001	$50.00

TOTAL: 50.00

NEXSEN PRUET, LLC

Payee: SC ADMINISTRATIVE COURT

VENDOR #: 10011228

Date: 05/10/2022

Check #: 546146

DATE	INVOICE NUMBER	RESPONSIBLE PARTY	GENERAL LEDGER ACCOUNT	MATTER #	AMOUNT
05/10/22	051022			055970-00001	$50.00

TOTAL: $50.00

DOCUMENT IS PRINTED ON CHEMICALLY REACTIVE PAPER - THE BACK OF THIS DOCUMENT INCLUDES A TAMPER EVIDENT CHEMICAL WASH WARNING BOX

THE BACK OF THIS DOCUMENT INCLUDES MICROPRINTED ENDORSEMENT LINES

ORIGINAL DOCUMENT HAS RED KEYHOLE ICON THAT DISAPPEARS WITH HEAT

NEXSEN PRUET, LLC
ATTORNEYS AND COUNSELORS AT LAW
POST OFFICE BOX 2426
COLUMBIA, SOUTH CAROLINA 29202

BANK OF AMERICA ACCOUNT
COLUMBIA, SOUTH CAROLINA

CHECK NO.: **546146**

DATE 05/10/2022

NET AMOUNT ********$50.00***

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By _____
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SOUTH CAROLINA
ENVIRONMENTAL
LAW PROJECT

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Our Mission To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

May 27, 2022

VIA EMAIL & U.S. MAIL

Honorable S. Phillip Lenski
SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Motion for Summary Judgment
Bay Point Island, LLC Septic Tank P/N 2106120-Lot13

Dear Judge Lenski:

Please find enclosed Petitioner's Motion for Summary Judgment in the above-referenced matter. The original and the filing fee is being placed in the mail today. Thank you for your kind consideration.

Respectfully,

Leslie S. Lenhardt
Staff Attorney

enclosure
cc: Sara V. Martinez, Esq.
Mary D. Shahid, Esq.

Board of Directors - Allen Grumbine, Esq., Chairperson, Lisa Allen, Barbara Burgess, Esq., Amy Fabri, Rajan Govindan, Angela Halfacre, PhD, Marilyn Hemingway, Susan Hilfer, William Holt, MD, Elizabeth Igleheart, Bess Lochocki, Esq., Justin Lucey, Esq., Clarkson McDow, Esq., Walton McLeod, Esq., Gerald Schulze
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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC **PETITIONER'S MOTION FOR FOR SUMMARY JUDGMENT**

TO: ADMINISTRATIVE LAW JUDGE S. PHILLIP LENSKI, RESPONDENTS AND THEIR COUNSEL:

YOU WILL PLEASE TAKE NOTICE that Petitioner, Gullah/Geechee Fishing Association, Inc. ("GGFA"), pursuant to SCALC Rule 19 and SCRCP Rule 56(c), will move before this Honorable Court for an Order granting summary judgment in its favor. The material facts in this case are not disputed and Petitioner is entitled to judgment as a matter of law.

This case involves the application of and interplay between the Coastal Tidelands and Wetlands Act, S.C. Code Ann. § 48-39-10 et seq. (the "Act") and the Coastal Management Program (CMP), which is a part of South Carolina's "comprehensive coastal management program." S.C. Code Ann. § 48-39-80. In 1977, the General Assembly created the South Carolina Coastal Council and gave it significant regulatory duties and responsibilities within the State's "coastal zone.[1]" Act 123 of 1977, S.C. Code Ann. § 48-39-10, *et seq*. Respondent S.C. Department

[1]The Act defines the "coastal zone" as including "all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more

of Health and Environmental Control's ("DHEC") Office of Ocean and Coastal Resource Management is the administrator of the Act today. The Act created two distinct regulatory programs:

(1) a permitting program applicable to all uses and alterations of the coastal zone's "critical areas[2]," S.C. Code Ann. § 48-39-130; and

(2) a certification program, applicable throughout all of the coastal zone, and implemented through review of all state and federal permits for activities in the coastal zone. S.C. Code Ann. §§ 48-39-80 & 48-39-90.

The issue before this Court is whether DHEC can refuse to review septic tank permit applications in the coastal zone, where the CMP purports to exempt most septic tank permits from coastal zone consistency review, and where the Act has a clear and unambiguous mandate to require that review.

STANDARD OF REVIEW

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the nonmoving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Summary judgment is appropriate when there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law." *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330, 673 S.E.2d. 801, 802 (2009).

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critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown." S.C. Code Ann. § 48-39-10(B).

[2]The "critical areas" include saline coastal waters and tidelands, beaches and the beach/dune system. S.C. Code Ann. § 48-39-10(F), (G), (H) and (J).

STATEMENT OF UNDISPUTED MATERIAL FACTS

In support of this motion and to provide background, Petitioner incorporates by reference its Request for Contested Case, Prehearing Statement, and other documents filed with this Court. It is undisputed that on August 31, 2021, Respondent Bay Point submitted an application for a "specialized onsite wastewater system." **Exhibit 1**, Initial Staff Response p. 1; Prehearing Statement of Respondent DHEC filed with this Court. The permitted septic tank would be installed on Bay Point Island, an undeveloped barrier island located in Beaufort County. DHEC did not publish any notice of the application and Petitioner is informed and believes DHEC does not place any septic tank applications, within or without the coastal zone, on public notice.[3] After failing to notify Petitioner of the existence of the application following Petitioner's Freedom of Information Act request, DHEC issued the permit on September 23, 2021 (**Exhibit 2**) and similarly failed to produce a copy of the permit to Petitioner. Petitioner initiated this contested case with the DHEC Board on November 9, 2021.

DHEC concedes it did not conduct a review of the septic tank application for consistency with the CMP. In its Initial Staff Response submitted to the DHEC Board, Respondent DHEC stated:

> The CZMP document's list of permits subject to review includes permits for wastewater treatment systems or septic tanks, but only those that handle more than 1,500 gallons per day or handle effluent other than domestic waste. Smaller systems for the treatment of domestic wastewater are exempt from Coastal Zone Consistency review based upon the approved CZMP document. This exemption has long been in place, and has been upheld as properly accounting for factors including the Department's lack of direct control or authority over sewage treatment and disposal, the sheer number of septic tank permits

[3] A search of DHEC's environmental public notices site on multiple occasions did not reveal any category of notices for septic tanks, nor did it show any actual notices for septic tanks. https://scdhec.gov/permits-regulations/public-notices.

issued within the coastal zone, and the design of R. 61-56 "to insure that state water quality standards in adjacent water bodies must be maintained." *N. Beaufort Cnty. Committee v. S.C. Dept. of Envtl. Health & Control* [sic], No. 96-ALJ-07-0117-CC (S.C. Admin. L. Ct., Oct. 28, 1996) (Kittrell, J.).

Exhibit 1.

ARGUMENT

The CMP is a unique regulatory document that was created pursuant to the Act. For the certification program, the Act directed the Coastal Council to "develop a comprehensive coastal management program." S.C. Code Ann. § 48-39-80. The Act provided detailed instructions for the agency to follow in developing the coastal management program:

> The department shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter. In developing the program the department shall:
>
> (A) Provide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas.
>
> (B) In devising the management program the department shall consider all lands and waters in the coastal zone for planning purposes. In addition, the department shall:
>
> (11) **Develop a system whereby the department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan**.

Id. [emphasis added].

In 1978, the South Carolina Coastal Council, DHEC's predecessor for coastal zone permitting and consistency determinations, published the "State of South Carolina Coastal Management Program and Final Environmental Impact Statement." It was approved by the General Assembly in 1979. https://scdhec.gov/sites/default/files/docs/Agency/docs/ocrm-

regs/SC_Coastal_%20Program%20(Notes).pdf The CMP subsequently was amended in 1993. https://scdhec.gov/sites/default/files/docs/Agency/docs/ocrm-regs/CZMP_1993_Refinements.pdf

Our Supreme Court has affirmed the enforceability and validity of the CMP as its own unique regulatory animal in *Spectre v. S.C. Dept. of Health & Env. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010), but clearly the CMP is not a statute enacted by the General Assembly.

The CMP's stated scope is instructive as to how it fits within the framework of the Coastal Zone Management Act:

> The scope of the coastal management program and of the Coastal Council's authority is based on definitions of the geographic areas and specific resources which must be considered in the development of this program. 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. CMP Ch. II.

The CMP contains general policies for all projects in the Coastal Zone that require DHEC-OCRM to consider:

1) The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for OCRM in implementation of its management program these being:

    a. "To promote the economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to III-3 achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed **to protect the sensitive and fragile areas from inappropriate development** and **provide adequate environmental safeguards** with respect to the construction of facilities in the critical areas of the coastal zone;

2) "the extent to which the project will have **adverse impacts on the 'critical areas'** (beach/dune system, coastal waters, tidelands);

5) The extent to which the project includes consideration for the maintenance or improvement of the economic stability of coastal communities;

The possible long-range, cumulative effects of the project, when reviewed **in the context of other possible development and the general character of the area**;

7) The extent and significance of impact on the following aspects of quality or quantity of these valuable coastal resources: i) **unique natural areas** -- destruction of endangered wildlife or vegetation or of significant marine species (as identified in the Living Marine Resources segment), degradation of existing water quality standards; ii) public recreational lands -- conversion of these lands to other uses without adequate replacement or compensation, interruption of existing public access, or degradation of environmental quality in these areas; iii) historic or archeological resources -- irretrievable loss of sites identified as significant by the S. C. Institute of Archeology and Anthropology or the III-4 S. C. Department of Archives and History without reasonable opportunity for professional examination and/or excavation, or preservation.

Exhibit 3, CMP, Ch. III-14.

Further, the CMP makes clear how significant undeveloped barrier islands are to the coastal environment. Bay Point Island is an undeveloped barrier island located in Beaufort County and is specifically identified as such in the CMP. See **Exhibit 3,** excerpts from CMP**,** Ch. III, Section XIII Areas of Special Resource Significance, Table I (p. III-70). Chapter I of the CMP describes barrier islands as "a very important and dynamic coastal zone resource" and are so named "because they form a barrier or protection for the mainland against the relentless action of the ocean… . "Because they lie parallel to the shoreline and bear the brunt of the ocean waves, storms and flooding, barrier islands are constantly being shaped and reshaped, eroding (wearing away) and accreting (building up) in a dynamic, never-ending evolution." **Exhibit 3**, CMP Ch. I Section 2. - 17. "On [barrier] island where development has taken place without consideration or understanding of the natural forces constantly at work, tremendous problems have arisen with erosion and accretion. Slowly we are coming to understand that the forces governing barrier islands are uncontrollable. They may be predicted, but they cannot be subdued, nor should they be." I-19

Barrier islands are specifically addressed in Chapter III section XII, Activities in Areas of Special Resource Significance and have additional policies that should be applied "because of their fragile and dynamic nature and their resource value." For example, Policy 2 instructs that "because

of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for activities on barrier islands must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands). **Exhibit 3**, III-71.

Both the general policies as well as the specific policies applicable to barrier islands should have been evaluated by DHEC before a septic tank permit was issued. DHEC issued the permit without any consideration of the value of this rare and unique resource. DHEC plainly has been delegated the authority to conduct Coastal Zone Consistency review for septic tanks on fragile coastal areas like Bay Point Island and must certify them as consistent or inconsistent with the Coastal Management Plan ("CMP"). While the Coastal Management Program document (p. V-5) purports to exempt septic tanks from review, that document cannot supersede the plain language of the enabling statute.

A regulation cannot materially alter or add to a statute; if it does, it will be rendered void. *Milliken and Co. v. S.C. Dept. of Labor, Div. of Occ. Safety & Health*, 275 S.C. 264, 269 S.E.2d 763 (1980). "Although a regulation has the force of law, it must fall when it alters or adds to a statute." *S.C. Coastal Cons. League v. S.C. Dept. of Health & Env. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010).

DHEC is clearly applying the policies in the CMP as a regulation. In *Spectre v. S.C. Dept. of Health & Env. Control*, 386 S.C. 57, 688 S.E.2d 844 (2010) the Supreme Court affirmed the enforceability of the CMP and its promulgation as, essentially, a regulation. "The ALC found that the CMP is not enforceable as it is not a regulation passed in accordance with the APA. We disagree. … We find that there is no requirement that the CMP be promulgated as an APA regulation." *Id.* at 369, 850. The Court also noted in a footnote that "DHEC does argue that the

CMP is the equivalent of a regulation but does not contend that it was passed in accordance with APA procedures." Id. When considered against the statutory mandate in the Act to certify all state and federal permits in the eight coastal counties, the purported exemption in the CMP must fail.

Before the DHEC Board, the DHEC staff cited to *N. Beaufort Cnty. Committee v. S.C. Dept. of Envt'l. Health & Control*, No. 96-ALJ-07-0117-CC (Admin. Law Ct. Oct. 28, 1996) as evidence DHEC's practice involving septic tank permits has been affirmed. **Exhibit 1**. Though the undersigned was unable to locate the cited Administrative Law Court order either on the Administrative Law Court website or on Westlaw, it is rudimentary that courts are not bound by the decisions of other courts of equal jurisdiction. The power to establish precedent is lodged in courts of superior jurisdiction."); *People v. Hill*, 834 N.Y.S.2d 840, 845 (N.Y. City Crim. Ct. 2007) ("A decision of a court of co-ordinate jurisdiction is not a binding precedent."); *Nationwide Mut. Ins. Co. v. Yungwirth*, 940 A.2d 523, 528 n.5 (Pa. Super. 2008) ("While the Superior Court is bound to give due consideration to the decisions and reasoning of the Commonwealth Court, this Court is not bound to follow such decisions as controlling precedent.").

While a Court should "generally give[] deference to an administrative agency's interpretation of an applicable statute or its own regulation[...] where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (citing *Brown v. South Carolina Dept. of Health & Env. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). Put another way, when the plain language of a statute is at odds with the Department's interpretation, the Court is "free to read the statute based on its plain language without deference to the State's position." *State v. Sweat*, 379 S.C. 367, 384, 665 S.E.2d 645, 655 (Ct.App. 2008).

DHEC has failed to incorporate its specialized knowledge of coastal processes and forces, as possessed by OCRM, into its permitting of shoreline adjacent septic systems. Issues relating to coastal erosion and tidal migration and issues specific to the barrier island systems are kept entirely on the sidelines when reviewing permit applications for septic systems in areas subject to these dynamics. This disconnect between DHEC's coastal authority and its septic permitting reflects a serious flaw in the agency's decision-making, which is driven in part by DHEC's failure to conduct Coastal Zone Consistency review for septic permitting. Consistency review is mandated by statute and is intended to give weight to the unique value of natural resources on the coast, as well as the unique natural forces at play on the coast. Typical residential septic permits in low-lying and dynamic coastal areas, however, have escaped this review. Consequently, while coastal septic systems implicate a whole host of issues and concerns that are not present with systems in other parts of the state, all septic permitting is governed by the same set of regulations. In other words, while placement of a septic system on a pristine and unique barrier island certainly warrants a closer look than the typical septic system, that review is not occurring.

DHEC staff's failure to undertake Coastal Zone Consistency review, and its related failure to consider the appropriateness and the impacts of coastal forces on the proposed septic system, is the product of a legal misapplication, is arbitrary, capricious, and in error.

Petitioner also requests that this Court rule that the failure of DHEC to provide for a uniform system of public notice for septic tank permit applications is a violation of the Petitioner's procedural due process rights under the State's Constitution. "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard … and he shall have in all such instances the right to judicial review." *S.C. Const. Art. 1, Section 22.*

The South Carolina Supreme Court has held that "[t]he fundamental requirements of due process include **notice**, an opportunity to be heard in a meaningful way, and judicial review." tuCertain elements must be present, including: "**(1) adequate notice**; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; (4) the right to confront and cross-examine witnesses." Id. (emphasis added). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Ogburn–Matthews v. Loblolly Partners,* 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct.App.1998) (quoting *Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control,* 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)). "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Ogburn–Matthews,* 332 S.C. at 562, 505 S.E.2d at 603.

It is undisputed that DHEC does not provide for public notice for septic tank applications, either in the eight coastal counties or anywhere else in the State. Because Petitioner had no mechanism through any public notice process to become aware of the pendency of Bay Point's septic tank application, it had to rely on the Freedom of Information Act ("FOIA"). This turned out to be no remedy at all, because DHEC shirked its responsibility under FOIA by failing to disclose what was specifically requested.[4] This highlights the prejudice suffered by the Petitioner because there is no uniform public notice procedure.

Further, the Legislature has emphasized the importance of such a procedure. S.C. Code Ann. § 44-1-60 governs decisions of DHEC that give rise to a contested case, as this permitting decision does, and provides:

[4] Petitioner craves reference to its Request for Contested Case Hearing and its Return to Motion to Dismiss.

All department decisions involving the issuance, denial, renewal... of permits, licenses, or other actions of the department **which may give rise to a contested case. ... must be made using the procedures set forth in this section.**

B. **The department staff shall comply with all requirements for public notice**, receipt of public comments and public hearings **before making a department decision...** To the maximum extent possible, **the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings**.

C. The initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department shall be a staff decision.

D. **In making a staff decision on any permit, license, certification or other approval, the department staff shall take into consideration all material comments received in response to the public notice in determining whether to issue, deny or condition such permit, license, certification or other approval.** ...The department decision need not be issued for routine permits for which no adverse public comments have been received.

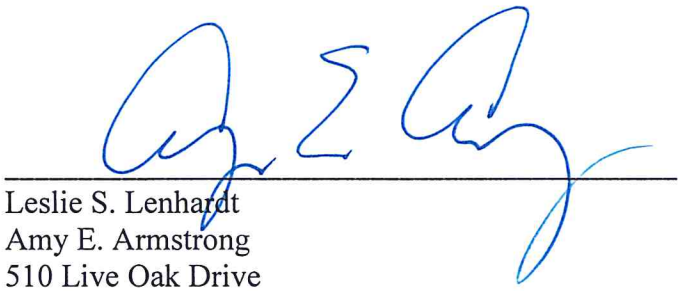
There is no dispute that the septic tank permit is a license issued by the DHEC staff that gave rise to this contested case. Therefore, DHEC should have a process for publicly noticing all such applications to provide the public with the due process protections afforded by notice.

Therefore, Petitioner respectfully requests that this Court grant this motion for summary judgment.

[SIGNATURE BLOCK FOLLOWS]

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT



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May 27, 2022

Attorneys for Petitioner

EXHIBIT 1

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
STAFF RESPONSE TO REQUEST FOR REVIEW

Docket No. 21-RFR-85

RECEIVED
DEC 01 2021
Clerk, Board of Health
and Environmental Control

Requestor:
The Gullah/Geechee Fishing Association

Summary of Staff Decision submitted by:
David R. Vaughan, Director
Division of Onsite Wastewater, Rabies Prevention, Vector Surveillance, and Enforcement

---

SUMMARY:

This Request for Review ("RFR") challenges the Permit to Construct Onsite Wastewater System ("Permit") issued by the South Carolina Department of Health and Environmental Control ("Department") to Bay Point Island, LLC ("Applicant") for the construction of a specialized onsite wastewater system ("OSWW system") to serve a 4-bedroom residence to be located at 98 Bay Point Island Drive, St. Helena, South Carolina in Beaufort County, Tax Map #R300-045-0014-0000 ("Site").

The Requestor alleges general concerns about the broader resort community where the Site is located and its impacts on the ecology of the sea island of Bay Point. As to the Permit being challenged, they specifically allege the OSWW system is being installed on a high-risk and unsuitable lot. They believe the Department should have expanded the setback requirements set forth in the regulation and conducted a coastal zone consistency review. As explained herein, the permitted OSWW system complies with the regulatory setback requirements and is not subject to a coastal zone consistency review pursuant to the Department's established regulations and policies for reviewing projects. The Department thoroughly evaluated the Permit application and issued the Permit after confirming it complies with all regulatory requirements based on the consulting professional engineer's system design, certification, and supporting documentation.

RELEVANT CHRONOLOGY:

- **August 31, 2021** – The Department received the application, plans, and supporting documentation for a specialized onsite wastewater system design from Bay Point Island, LLC. The application was assigned File Number 2021080040.

- **September 15, 2021** – After conducting a review of the initial application and supporting documentation, the Department requested additional information related to the engineer's plans for the OSWW system.

- **September 20, 2021**– The Applicant electronically provided updated plans to the Department.

- **September 23, 2021** – After finalizing its review of the application and ensuring that it met all aspects of the regulation, the Department's Bureau of Environmental Health Services

issued the Permit pursuant to and in accordance with S.C. Regulation 61-56, *Onsite Wastewater Systems*. The Permit specifically states that the OSWW system is to be constructed in exact accordance with the Approved Plan prepared by Grey Engineering dated and stamped by Zachary D. Johnson, P.E. on June 17, 2021.

- **November 9, 2021** – The Requestor filed this untimely RFR, 47 days after the Permit was issued by the Department.

RELEVANT LAW:

- *S.C. Pollution Control Act*, S.C. Code Ann. §§ 48-1-10 *et seq.*
- S.C. Code Ann. §§ 44-1-140 (2018)
- S.C. Code Ann. Regs. 61-56, *Onsite Wastewater Systems* ("R. 61-56")

JURISDICTIONAL ISSUES:

The RFR discusses the Department's delay and failure to provide a full response to a FOIA request submitted on August 31, 2021, for, amongst other things, septic tank permit applications and permits for properties located on Bay Point Island. Regardless of any inadvertent faults by the Department in processing the Requestor's FOIA request, this RFR was not submitted within the 15-day window imposed by S.C. Code §44-1-60. The Permit was issued on September 23, 2021, and this RFR was not filed until November 9, 2021, which is 47 days after the Permit was issued.

The Requestor claims to have no knowledge of the Permit issuance until October 27, 2021, impliedly related to the Department not providing the Permit in response to their FOIA request. Regardless of their actual knowledge of the Permit issuance, S.C. Code §44-1-60 does not waive the 15-day window for actual notice to persons who are not statutorily entitled to written notice by the Department. Pursuant to S.C. Code Ann. §44-1-60(E)(2), a Department decision becomes the final agency decision if a request for final review is not made within 15 calendar days after the staff decision is mailed to the applicant and any affected person who has previously asked in writing to be notified of decisions. Although Requestor submitted a FOIA request that encompassed existing Bay Point Island septic tank permit applications and permits, the Requestor did not request written notice of any forthcoming decisions related to the requested materials. In other words, the Department's possession of a FOIA request for copies of public records (including permits and/or permit applications) does not constitute a request that the Department provide notice of new decision(s) at the time they are issued. The Requestor could have requested notice of any tank permit applications and permits in conjunction with or independently of their FOIA request, but did not do so. Because no request for final review was made within 15 calendar days after the staff decision was mailed, the staff decision to issue the Permit is a final agency decision, and the Board is without jurisdiction to review this matter.

In raising this jurisdictional issue, the Department does not waive any other jurisdictional issues which may exist.

STAFF RESPONSE:

State statute charges the Department with overseeing the permitting, construction, and operation of onsite wastewater systems. The Department's onsite wastewater program, housed within the Bureau of Environmental Health Services, carries out this duty through implementation and enforcement of R.61-56. The Department's review of onsite wastewater system permit applications is conducted in accordance with applicable onsite wastewater permitting requirements set forth in R.61-56, which establishes a comprehensive framework of system standards, permit procedures, minimum conditions, and other requirements, all designed to ensure "[d]omestic wastewater can be rendered ecologically safe and public health can be protected." R.61-56, Section 100. These regulatory requirements include a range of size and material specifications, minimum site conditions, setbacks, and other provisions designed to protect the environment and public health from potential wastewater discharges. The requirements must be consistently implemented in accordance with the applicable regulatory text. The Department thoroughly evaluated the Permit application and issued the Permit after confirming it complies with all regulatory requirements based on the consulting professional engineer's system design, certification, and supporting documentation. Given the Applicant's satisfaction of R.61-56's requirements, the Department had no grounds to deny issuance of the Permit.

Without waiving the jurisdictional issue discussed above, the Department responds to the specific allegations of the Requestor as follows:

I. The Permitted Site Meets the 75-foot Setback Requirement.

R.61-56, Section 200.6 (4), covers the required setbacks for the Permit, stating that no part of a proposed septic system may be within 75 linear feet of "the mean high water (within the banks) elevation" of a waterbody for non-tidal waters, beach/dune systems and beach critical areas. In this case, the final site development plans dated September 16, 2021, clearly show that the proposed septic system is more than 75 feet from the mean high water mark. To be more specific, it appears the permitted system is located approximately 213 feet from the mean high water mark.

The Requestor alleges the Department imposed only the "minimum" setback requirement and should have used discretion to extend the setback based on the unique nature of Bay Point Island. The regulations provide the Department no clear legal basis for requiring setbacks greater than those specified under Section 200.6. "Minimum Site Conditions," as referenced in Section 200, are exactly that—minimum conditions that a site must meet for a permit to be issued. While a proposed system may be sited at a distance greater than the required setbacks, the regulations do not provide the Department with any general grant of authority to require a greater setback. Greater protective offsets are required only "when utilizing certain alternative system standards contained within th[e] Regulation," in which case, the greater offsets are specifically stated in the relevant system standard. R.61-56, Section 200.6(9); see also, e.g., R.61-56, System Standards 240/241, 260/261, 280/281, 370/371, 420/421, 431, and 601 (requiring a 125 foot setback from the critical area line or tidal waters, or from non-tidal, environmentally sensitive waters, as applicable).

II. The Permit is Not Subject to Coastal Zone Consistency Review.

Requestor alleges that the Department should have conducted a Coastal Zone Consistency review for the Permit. As explained below, such a review is not applicable to the Permit, because the permitted system handles less than 1,500 gallons per day and handles domestic waste.

Section 48-39-80 of the Coastal Tidelands and Wetlands Act directs the Department to develop a comprehensive coastal management program and to establish regulations and policies for reviewing projects both within the Department's direct critical area authority and within the Department's indirect authority in the coastal zone. Section 48-39-80(B)(11) specifically states that "the department shall have the authority to review all state and federal permit applications in the coastal zone and to certify that these do not contravene the management plan." The expression of this authority is refined in Chapter V of the S.C. Coastal Zone Management Program ("CZMP") document, which identifies specific state agency permits that are subject to review and certification. The CZMP was enacted in accordance with statutory procedures, and is "valid and enforceable" as written. *Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 370-71, 373 (2010).

The CZMP document's list of permits subject to review includes permits for wastewater treatment systems or septic tanks, but only those that handle more than 1,500 gallons per day or handle effluent other than domestic waste. Smaller systems for the treatment of domestic wastewater are exempt from Coastal Zone Consistency review based upon the approved CZMP document. This exemption has long been in place, and has been upheld as properly accounting for factors including the Department's lack of direct control or authority over sewage treatment and disposal, the sheer number of septic tank permits issued within the coastal zone, and the design of R.61-56 "to insure that state water quality standards in adjacent water bodies must be maintained." *N. Beaufort Cnty. Committee v. S.C. Dep't of Envtl. Health & Control*, No. 96-ALJ-07-0117-CC (S.C. Admin. L. Ct., Oct. 28, 1996) (Kittrell, J.).

REQUESTED ACTION:

Department staff respectfully requests the Board deny the Request for Final Review Conference or, in the event the matter is heard, the Board uphold the issuance of the Permit.

Respectfully submitted,

David R. Vaughan

David R. Vaughan, Director
Division of Onsite Wastewater, Rabies, Vector Surveillance, and Enforcement

Sara Martinez

Sara V. Martinez
Chief Counsel for Environmental Quality Control

EXHIBIT 2

(PT) ✓

dhec

PERMIT TO CONSTRUCT
Onsite Wastewater System

File Nbr: 2021080040
County: Beaufort
Program Code: 362
System Code: 611
Water Supply: Private

Name: Bay Point Island, LLC
Type Facility: Residential - 480GPD/4BR
Subdivision: Bay Point Island
Block: Lot: 13
TM#: R300 045 000 0014 0000

Address: c/o Sam Connor
PO Box 3671
Bluffton, SC 29910

Site: 98 Bay Point Island Drive
St. Helena, SC 29920

PERMIT TO CONSTRUCT SYSTEM SPECIFICATIONS

See engineered system design and supporting documentation.

SPECIAL INSTRUCTIONS/CONDITIONS

THIS PERMIT IS SITE SPECIFIC. ANY CHANGES TO THE SYSTEM MUST BE APPROVED BY DHEC. ALTERNATIVE TRENCH PRODUCTS APPROVED UNDER STATE RULES AND REGULATIONS MAY BE SUBSTITUTED. ANY UNAPPROVED CHANGES WILL VOID THIS PERMIT.

This Permit To Construct and Operate is issued pursuant to the SCDHEC Specialized Onsite Wastewater Systems for Peak Flows less than 1500 GPD.

Issuance of this Specialized Onsite Wastewater System Permit To Construct does not relinquish the property owner of responsibility in attaining any and all necessary approvals or permits required to develop this property.

PERMIT TO CONSTRUCT

The Permit To Construct is issued upon the system design, certification, and other supporting documentation as required by this standard and supplied by:

Sam Connor
(Engineering Company)

Samuel P. Connor, P.E.
(Consulting Engineer)

S.C. No. 30716
(State and License Number)

Troy N. Smith
(Soil Classifier)

S.C. No. 74
(State and License Number)

09/16/2021
(Plan Date)

2106120-Lot13
(Project Number)

Any Permit To Construct and Operate that is issued pursuant to this Standard shall be based upon the consulting engineer's design, certification, and other supporting documentation.

Reviewed By: Kim S. Crouse

Date: 9/23/2021 9/23/2021

DHEC 1781 (01/2014)
This Permit will Expire and Become Null and Void Five (5) Years from the Issuance Date.

This Permit is Appealable Under the Administrative Procedures Act. There may be an Additional Fee for Changes in this Permit that Require a Site Reevaluation.

Information collected on this form is subject to public scrutiny under the and the Freedom of Information Act.

Resp. BP 000014

EXHIBIT 3

XII. ACTIVITIES IN AREAS OF SPECIAL RESOURCE SIGNIFICANCE

The following types of areas in the South Carolina coastal zone have been identified through the resource inventory efforts of the Coastal Council and its staff as being unique and either environmentally fragile or economically significant to the coastal area and the State. These areas of special resource significance are:

-Barrier Islands
-Dune Areas (outside the critical areas)
-Navigation Channels
-Public Open Spaces
-Wetlands (outside the critical areas)

Because of this sensitivity and their role as an integral part of the coastal ecosystem, alterations in these areas are likely to have direct effects on the critical areas. Because of their value and characteristics the Coastal Council employs the additional resource policies presented in this section in review and certification of any permits associated with an activity in one of these areas. This is done in an effort to protect the value of the critical areas and of all coastal resources. The applicable policies for the individual activity which is proposed, as well as the general guidelines for evaluation of all projects, are also considered by the Council and its staff in permit and project reviews in these areas.

Management Authority

The Coastal Council has no direct permit authority in any of these areas (with the exception of critical areas of a barrier island and navigation channels, which come under the "coastal waters" category if within the critical areas boundary, and are then under the direct permit jurisdiction of the Coastal Council.) Resource policies in these areas will be implemented through the "network" of existing State agency authorities, and the Coastal Council's review and certification of the permit actions of these agencies, (as discussed in detail in the "Legal Authorities and Networking" segment of Chapter V.) The specific State agency with direct authority for each project will depend on the type of project or permit involved in the development proposal.

A. BARRIER ISLANDS

Findings

Barrier islands are elongated landforms of unconsolidated material (usually sand), situated seaward of the inland shoreline and parallel to the ocean. They are one of the most dynamic coastal ecosystems since they are constantly being reshaped by the forces of wind or waves. (A more detailed discussion of their geologic characteristics is provided in Chapter I, "The Natural Environment").

These unique, dynamic islands perform a number of roles in the coastal system. They are the location of much of South Carolina's Atlantic Ocean beach-front, and are often significant wildlife habitats. Barrier islands help to create the proper conditions for saltwater wetlands and estuaries behind them. They are also a valuable storm and erosion buffer for more inland areas, being most effective when their dunes and vegetation are well-developed and intact.

South Carolina has approximately 30 barrier islands, part of a chain along the Atlantic and Gulf coasts which extends from Maine to Florida and around to Texas. South Carolina is fortunate in that many of these islands are already under State or Federal ownership and are therefore maintained for recreational use or in a natural state as wilderness-type areas. A listing of both publically and privately-owner barrier islands is contained in Table 1, with an indication of their development status.

Policies

Because of their fragile and dynamic nature and their resource value, the Coastal Council will consider the following additional policies in review or permit proposals on barrier islands. (Within critical areas of a barrier island, the Rules and Regulations for permitting applicable to the proposed activity will apply.)

1) Construction and development on barrier islands shall retain to the extent feasible existing dune ridges, drainage patterns and natural vegetation in landscaping and construction plans in order to maintain the value of the island as a storm buffer. Intensive or high density type development may not be

TABLE 1 BARRIER ISLANDS OF SOUTH CAROLINA

ISLAND	DEVELOPMENT STATUS	PREDOMINANT OWNERSHIP
Waites	undeveloped	private
Pawleys	developed	private
North	undeveloped	State
South	undeveloped	State
Cedar	undeveloped	State
Murphy	undeveloped	State
Cape	undeveloped	Federal
Lighthouse	undeveloped	Federal
Raccoon Key	undeveloped	Federal
Bull	undeveloped	Federal
Capers	undeveloped	State
Dewees	undeveloped	private
Isle of Palms	developed	private
Sullivans	developed	private
Morris	undeveloped	private
Folly	developed	private
Kiawah	partially developed	private
Seabrook	partially developed	private
Deveaux	undeveloped	non-profit org.
Botany Bay	undeveloped	private
Eddingsville	undeveloped	private
Edisto Beach	developed	private
Pine	undeveloped	private
Otter	undeveloped	private
Hunting	undeveloped	State
Fripp	partially developed	private
Pritchards	undeveloped	private
Little Capers	undeveloped	private
St. Phillips	undeveloped	private
Bay Point	undeveloped	private
Hilton Head	developed	private
Daufuskie	undeveloped	private

SOURCES: 1) **The Status of Barrier Islands of the Southeastern Coast**, Langdon Warner, 1976, Open Space Institute and Natural Resources Defense Council

2) Coastal Council Staff Update

suitable on some barrier islands which are less stable or more prone to erosion or other hazard risks; these factors must be taken into consideration when alternative development plans are formulated.

2) Because of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for activities on barrier islands must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands).

3) New road or bridge projects involving the expenditure of public funds to provide access to previously undeveloped barrier islands will not be approved unless an overwhelming public interest can be demonstrated, for example, provision of access to a public recreation area or other facility. Preference will be given to ferry access in those instances where public funds cannot be expended for road access.

4) The extension of public services, such as sewer and water facilities, to barrier islands should only be proposed in a comprehensive approach which considers the natural "carrying capacity" of the island to support development and which integrates these facilities to parallel the level of access which is available to the island.

5) The Coastal Council encourages and supports State, local and private efforts to acquire coastal barrier islands for inclusion in preservation and protection programs. Public recreational benefit should be one primary motivation for these efforts, and where appropriate, barrier islands should be maintained for recreational use, based on the capacity of individual areas to accommodate human activity.

B. DUNE AREAS (OTHER THAN CRITICAL AREAS)

Findings

Much like the barrier islands, the beaches and dunes along the South Carolina foreshore are also dynamic ecosystems, the focus of energy where sea and land meet. The sands of the beach area are constantly in motion. As the waters of the tides ebb and flow, this wave action removes and deposits sand on the beaches. Both because of their dynamic characteristics and their value as unique recreational areas, the South Carolina General Assembly found them to need special management consideration. Beaches are identified as "critical areas" by the South Carolina Coastal Management Act of 1977, and defined as "those lands subject to periodic inundation by tidal and wave action so that no nonlithoral vegetation is established" (Section 3(H)). Within this beach critical area, the Coastal Council has direct permit jurisdiction, and the Rules and Regulations for Permitting are applied to any proposed activity.

The dunes which fall landward of the beach zones are also an active area, comprised of sands which are only partially stabilized and subject to the effects of wind and waves. Dunes serve as valuable physical storm buffers, as wildlife habitats and as recreational and aesthetic resources. They are also linked with the beach area as a reservoir of sand to replace that which is lost from the beach on severe tides or storms. Because of this interdependence with the beach system, and their fragile structure and susceptibility to disruption because of this indiscriminate building or alteration, the primary ocean-front dunes are considered "critical areas" under the South Carolina Coastal Management Act. A permit must be obtained directly from the Coastal Council for any activity on a primary sand dune, and the permitting Rules and Regulations apply in these areas.

Of concern in this section are the dunes upland from or behind the primary dune. While not as crucial as the first dune adjacent to the Atlantic, the dune fields or landward ridges of unconsolidated sand are still vital as part of the overall storm protection and sand reserve system. The Coastal Council has no direct jurisdiction over proposed activities in these areas, but does have review and certification authority with regard to the major permits of other State agencies.

Policies

In review and certification of permit applications to other State agencies for proposals in the sand dune areas, the Coastal Council will consider the following additional policies:

1) Because of their proximity to and strong physical and ecological relationship with the beach and primary sand dune critical areas of the coastal zone, project proposals in secondary sand dunes must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent

A savannah originates after low pine woods are cut and the cut-over area is burned. If the area is not burned yearly or at least once every two years, the grasslands give way to other vegetation, and the communities such as evergreen shrub bogs come into being. Thus, fire is vital to the existence of the savannah type ecosystem.

Soil of savannahs is nutrient-poor and highly acid, thus the plants found in these areas are those which can tolerate harsh soil conditions - grasses, sedges, orchids and the fascinating "insect-eating" plants such as the sundews, pitcher plants and the famous Venus fly-trap.

Many savannahs have been protected from fire, and as a result they have disappeared along with their specialized flora. In order to protect these unique areas which provide habitat for both statewide and nationally endangered species such as the Venus fly-trap and white fringed orchid, savannahs must be properly managed to provide for the annual or semi-annual burning necessary for their existence.

h. **Pocosins**

Scattered throughout South Carolina's coastal zone are wetlands known as pocosins. A pocosin is a low, flat, swampy area located in a savannah type environment such as those found in the Santee Delta area and in the pine savannahs of the Francis Marion National Forest. Pocosins consist of water-logged, peaty soil and, in wetter sections, contain a ground cover of sphagnum moss. Generally characterized by dense broad-leaved shrubs, small evergreens and thorny vines, pocosins form nearly impenetrable thickets.

The water table of pocosins fluctuates considerably and enables them to maintain their special sort of ecosystem. Invading marsh plants are eliminated during dry periods, and many types of bacteria and fungi are destroyed in the surface soil layer during high water levels. The destruction of bacteria results in an absence of decay. Thus, leaves and other debris are preserved and become peat.

Common shrubs found in pocosins and adapted to long periods of waterlogging and drought are: fetterbush, ti-ti, honeycup, gallberry, shining inkberry, sweet pepperbush, Virginia willow, chokeberry, blueberry, and huckleberry. A number of endangered and threatened plants including the Venus fly-trap, green-fringed orchid and spring-flowered goldenrod occur in the pocosins of South Carolina's coastal zone.

i. **Carolina Bays**

Similar in many ways to pocosins, Carolina Bays are curious, elliptically-shaped depressions all of which are aligned in the same northwest-southeast direction. There is much speculation as to the geological origin of the bays which are found scattered throughout the coastal plains region of the Carolinas and northern Georgia. One theory, popular for many years, attributes their original formation to a shower of meteorites which hit the earth's surface thousands of years ago. Another theory has it that the bays were spawning beds for schooling fish at a time when the ocean covered much of the present-day coastal plain. Still another theory, which takes more factors into consideration than any of the others, is that Carolina Bays were formed by vast underground movements of water which resulted in sump action. In spite of much research and study, however, the geological phenomenon of the Carolina Bay remains a tantalizing mystery.

Biologically similar to pocosins, Carolina Bays differ mainly in their water depth, being generally deeper than pocosin communities. Whereas pocosins are relatively uniform and are usually covered by one particular community, Carolina Bays may have several different biological communities within a few yards of each other, and thus exhibit a remarkable range of habitats, for example - marsh, swamp, savannah and sand hills.

2. **Barrier Islands and Beaches**

Parallel to South Carolina's shoreline lies a very important and dynamic coastal zone resource, the barrier islands and beaches. Called barrier islands because they form a barrier or protection for the mainland against the relentless action of the ocean, these islands are part of an immense chain which stretches from Maine, down the Atlantic coast and around the Gulf of Mexico to Texas.

Barrier islands are formed by various geologic processes – in most cases, through the transportation and deposition of sand by wind, tide, wave action and ocean flooding. Because they lie parallel to the shoreline and bear the brunt of the ocean waves, storms and flooding, barrier islands are constantly being shaped and reshaped, eroding (wearing away) and accreting (building up) in a dynamic, never-ending evolution.

A typical South Carolina barrier island is thin and elongate in shape, fringed with extensive salt marsh on the landward side and having a beach and sand dune system on the front side bordering the ocean. Most of the larger, forested islands contain interior waterways and wetlands.

Barrier islands are dominated by energy stresses, that is to say, by wave force, wind and tidal energies and ocean flooding which determine their constantly changing shape. Hurricanes as well as seasonal winter storms have a great impact on barrier islands and play an equally important role in shaping them.

An initial view of the barrier island system may result in the conclusion that barrier islands are very unstable. This is true in terms of human development which is not compatible with erosion and the devastating effect of hurricanes. However, in terms of ecology, the natural stresses brought to bear on barrier islands, by wind, tides, waves and flooding, are the very things which allow them to survive.

> It is the dynamic nature of the barrier island system that makes it stable. The island beaches offer little resistance to storm waves, and effectively absorb and dissipate the tremendous forces which confront them.
>
> In the natural system, storm waves frequently breach the island dunes and flood the island. As waves wash over the dunes during storms, they carry sand and shells onto the island and distribute them across the grasslands, marshes, and even into the estuary behind. Storm overwash, therefore, actually contributes new sediments to the islands. In this fashion, overwash serves to maintain the island by supplying sand from the beach and offshore areas for new dune growth, adding to the island's elevation, and extending the island laterally into the estuary. (**Barrier Islands and Beaches**, Technical Proceedings of the 1976 Barrier Islands Workshop, Annapolis, Maryland, May 17-18, 1976, p. 2.)

Larger barrier islands contain shrubs and forested woodlands, whereas smaller frequently flooded islands are devoid of trees and are dominated by hardy grasses such as sea oats (**Uniola paniculata**) and salt meadow cordgrass (**Spartina patens**). Barrier islands usually lack a complete representation of the fauna found on the mainland. This situation is the result of the distances between the islands and the mainland along with the inability of some species to cross salt water barriers. Characteristic of some barrier islands are special populations or subspecies of animals, especially mammals, which through their isolated situation develop characteristics which distinguish them from their relatives on the mainland.

Of absolute necessity to a barrier island's existence is its beach, dune and offshore sand bar system. The beaches protect and insure the existence of the highland area of the islands by absorbing and dissipating the tremendous forces exerted on them by waves and tidal currents. Just as the highlands depend on the beaches for stability, the beaches depend on the dunes for the replenishment of sand which is washed away from them by the stresses of waves, tidal currents and periodic storms and hurricanes.

Offshore sand bars play a very significant role in the "sand-sharing" system by providing sand for the replenishment of existing dunes as well as for the forming of new ones. As sand from the bars is washed ashore, it is blown inland where it builds up and strengthens existing dunes and thus lends more protection against hurricanes and storm tides. In areas where no dunes exist, they may begin to form where flotsam and jetsam, grasses or other obstructions on the beach block the wind and cause it to drop its load of sand. In a short time grasses such as sea oats take root and anchor the sand in place with their extensive root systems. Without the anchoring assistance provided by the grasses, dunes would not be able to build up or stay intact.

One of the most important benefits provided by barrier islands is their creation of the proper conditions necessary for the development and continuing existence of salt water wetlands and estuaries. By breaking the force of the ocean waves and creating behind them semi-enclosed, protected areas of low energy stresses, barrier islands permit the mixing of ocean and fresh waters necessary to the development and maintenance of the extensive network of estuaries and wetlands.

South Carolina has a total of some forty barrier islands along its coast. A few of these are protected, state and federally-owned lands set aside for conservation and preservation purposes. Some of the islands contain no development or very sparse development; others are heavily developed or are being heavily developed as exclusive, second-home/resort areas.

On islands where development has taken place without consideration or understanding of the natural

forces constantly at work, tremendous problems have arisen with erosion and accretion. Slowly we are coming to understand that the forces governing barrier islands are uncontrollable. They may be predicted, but they cannot be subdued, nor should they be. Man must learn to respect and to live in a design with them.

3. Forested Areas

Since the beginning of the first permanent European settlement in South Carolina our coastal zone forests have been of tremendous importance. In the early days of the colony, forest products such as lumber, masts for ships, turpentine, pitch and tar were manufactured for export, and considerable fortunes were made from the forest products industry.

The coastal zone's forests remain commercially important. With 19.2 percent of the forest lands of the State, the coastal zone produced 17.0 percent of the physical volume (cords) of pulpwood and 30.1 percent of the physical volume (board feet) of other forest products produced in South Carolina in 1975. The delivered value of these forest products (at rail yard, truck yard or mill site) was $52.1 million or, 26.7 percent of the ($195.1 million) value for the whole State.

In addition to their economic value, which can be established in dollars and cents, is their inestimable value as wildlife habitat, waste treatment plants, producers of oxygen, flood and erosion controllers, and havens where man can retreat from civilization to renew his senses and perhaps find his proper place in the scheme of living things.

The eight coastal zone counties contain a total land area of some 4,392,960 acres. The 1978 U.S. Forest Service statistics show that of this total land area, 2,961,876 acres are forested land, and of this total, 2,933,734 acres are commercial forest lands. The coastal zone is endowed with a wide variety and abundance of trees. Below is a list of some of the more important commercial species as well as others which are familiar to residents of the coastal zone.

Baldcypress (Taxodium distichum): Most often associated with very watery sites such as swamps. Trunk flares out at base into a swollen, deeply-lobed buttress-like structure. Roots send up woody growths called "knees" which protrude above water; exact function of knees is not known. Fibrous bark ranges in color from light gray to brownish red; its light green leaves are alternate, two-ranked and deciduous. Important commercially. Heartwood is very resistant to decay and is used for things such as docks, bridges, greenhouses, cooling towers, vats, boats and river pilings.

Loblolly Pine (Pinus taeda): Has pale green needles 6-9 inches long. Bark is thick and bright reddish-brown in color. Bark is divided by shallow fissures into broad, flat-topped plates covered with thin scales. Tree often reaches 100 feet in height. Has tall, straight trunk. Important commercially. Wood is used mainly for building materials such as framing, sheathing, subflooring, joists and interior finish. Also used for pilings, crossties, mine timbers, pulp and paper.

Slash Pine (Pinus elliottii): Has dark green, lustrous needles. Bark is gray to reddish-brown, rough, separating on the surface into large, thin scales. Commonly grows to 100 feet in height. Tall, straight, tapering trunk. Important commercially. Wood is heavy, hard, durable. Wood used for production of naval stores, pulp and paper.

Sweetgum (Liquidambar styraciflua): Has star-shapped leaves made up of 5 deeply separated, pointed lobes; round, bur-like, hard, woody fruit. Grows best on rich bottomlands reaching height of 120 feet. Its wood is used for veneer, plywood, boxes, baskets, crates, pulpwood, etc.

Water Oak (Quercus nigra): Has variably shaped leaves 2-4 inches long which are broader at apex than at base. Is a bottomland species but also grows on upland soils. Has slender, straight trunk. Important commercially. Wood is used for rough construction lumber.

Red Maple (Acer rubrum): Leaves 3-5 lobed and have coarsely-toothed margins. Leaves 2-6 inches long; turn brilliant scarlet, orange or bright yellow in autumn. Bark thick, dark gray on old trunks and is sep-

GUIDELINES FOR EVALUATION OF ALL PROJECTS

1. In review and certification of permit applications in the coastal zone, the Coastal Council will be guided by the following general considerations (apply to erosion control and energy facility projects, as well as activities covered under Resource Policies):
   1) The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for the Coastal Council in implementation of its management program, these being:
      a) "To promote the economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
      b) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations." (Sections 2(B)(1) and (2), U.S. Coastal Management Act of 1977).
   2) The extent to which the project will have adverse impacts on the "critical areas" (beaches, primary ocean-front sand dunes, coastal waters, tidelands).
   3) The extent to which the project will protect, maintain or improve water quality, particularly in coastal aquatic areas of special resource value, for example, spawning areas or productive oyster beds.
   4) The extent to which the project will meet existing State and Federal requirements for waste discharges, specifically point sources of air and water discharge, and for protection of inland wetlands.
   5) The extent to which the project includes consideration for the maintenance or improvement of the economic stability of coastal communities.
   6) The extent to which the project is in compliance with local zoning and/or comprehensive plans.
   7) The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.
   8) The extent and significance of negative impacts on Geographic Areas of Particular Concern (GAPCs). The determination of negative impacts will be made by the Coastal Council in each case with reference to the priorities of use for the particular GAPC. Applications which would significantly impact a GAPC will not be approved or certified unless there are no feasible alternatives to the proposed project which would avoid the impact, and any unavoidable impacts are minimized to the extent practicable, and any such impacts are mitigated. Mitigation must be of the overriding public interest and demonstrable, and any such impacts or mitigation must be of the overriding public interest and demonstrable, and any such impacts or mitigation must be of the overriding public interest and demonstrable, and any such impacts or

11. "In critical areas of the coastal zone, it is Council policy that, in determining whether a permit application is approved or denied, the Council shall base its determination on the individual merits of each application, the policies specified in Sections 1 and 2 (of the Act), and be guided by the following general considerations:

1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Council prior to issuing a permit.

3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners." (Section 15(A), S.C. Coastal Management Act of 1977)

RESOURCE POLICIES

On the following pages are the Resource Policies for each of the identified Activities Subject to Management. A brief statement of findings describes why each activity is of coastal management concern. These policies are organized in three separate sections:

1) Policies for the coastal zone, including that portion outside the critical area in which the Coastal Council has indirect authority (e.g. [illegible]).

2) Policies for the critical areas, where the Coastal Council has direct permit authority. These policies are the Rules and Regulations for Permitting (R. 30-1 through 30-11, S.C. Code of Laws of 1976). Each policy or group of policies appears with a citation ("R. 30-____") for the corresponding regulation.

[illegible] are those which the Coastal Council is authorized to enforce through the authority of the coastal program and the S.C. Coastal Management Act of 1977. These policies are highlighted in the text with a bold outline along the margins.

Following the policies for each activity is a brief discussion of the management authority which will implement these policies. A matrix at the end of this section illustrates the network of implementation authorities. Chapter V(A) further documents the existing legal authorities.

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	)	Docket No. 22-ALJ-07-0008-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I have served Petitioner's Motion for Summary Judgment by depositing same in the U.S. Mail to the parties addressed to:

Sara V. Martinez, Esq.
Office of General Counsel
SCDHEC
2600 Bull Street
Columbia, SC 29201

Mary D. Shahid, Esq.
Nexsen Pruet
P.O. Box 486
Charleston, SC 29402

Debbie Weiner

May 27, 2022

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

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Our Mission To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

May 20, 2022

VIA EMAIL & U.S. MAIL

Honorable S. Phillip Lenski
Clerk, SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Return to Motion to Dismiss
Bay Point Island, LLC Septic Tank P/N 2106120-Lot13

Dear Judge Lenski:

Please find enclosed Petitioner's Return to Motion to Dismiss in the above-referenced matter. Thank you for your kind consideration.

Respectfully,

Leslie S. Lenhardt
Staff Attorney

Enclosure
cc: Sara V. Martinez, Esq.
Mary D. Shahid, Esq.

Board of Directors - Allen Grumbine, Esq., Chairperson, Lisa Allen, Barbara Burgess, Esq., Amy Fabri, Rajan Govindan, Angela Halfacre, PhD, Marilyn Henningway, Susan Hilfer, William Holt, MD, Elizabeth Igleheart, Bess Lochocki, Esq., Justin Lucey, Esq., Clarkson McDow, Esq., Walton McLeod, Esq., Gerald Schulze
Board Member Emeriti - Frances Close, John Mark Dean, Robert Schofield

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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc.,	)	Docket No. 22-ALJ-07-0008-CC
	)	
Petitioner,	)	
	)	
v.	)	
	)	
South Carolina Department of Health and Environmental Control and Bay Point Island, LLC,	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this date I have served Petitioner's Return to Motion to Dismiss by depositing same in the U.S. Mail to the parties addressed to:

Sara V. Martinez, Esq.
Office of General Counsel
SCDHEC
2600 Bull Street
Columbia, SC 29201

Mary D. Shahid, Esq.
Nexsen Pruet
P.O. Box 486
Charleston, SC 29402

Rachel Oliver

Rachel Oliver

May 20, 2022

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health & Environmental Control and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC **PETITIONER'S RETURN TO RESPONDENT BAY POINT ISLAND LLC'S MOTION TO DISMISS**

The Petitioner, Gullah/Geechee Fishing Association, ("Petitioner"), by and through undersigned counsel, hereby submits this Return to a Motion to Dismiss filed by Respondent Bay Point Island, LLC ("Bay Point"). Petitioner asserts that its claims are within the subject matter jurisdiction of this Court and are not subject to dismissal, as explained below.

BACKGROUND

Petitioner initiated this action by requesting a contested case hearing on January 17, 2022, following the December 17, 2021, decision of Respondent S.C. Department of Environmental Health and Control ("DHEC") to decline to hold a final review conference following the issuance of a septic tank permit to Bay Point. *See* Exhibit 1. Petitioner craves reference to Petitioner's Request for Contested Case as well as Petitioner's Prehearing Statement filed with this Court for a thorough recitation of the facts in this case. Bay Point filed a Motion to Dismiss for lack of Subject Matter Jurisdiction on May 9, 2022.

ARGUMENT

In its Motion to Dismiss, Bay Point asserts that this Court lacks subject matter jurisdiction because Petitioner failed to follow all applicable procedures necessary to initiate a contested case.

Bay Point's analysis is almost entirely predicated on the fact that Petitioner did not make a written request to receive notice of department decisions taking place on the subject property (Bay Point Island) pursuant to S.C. Code Section 44-1-60(E)(1), suggesting that this is fatal to Petitioner's entire case; such a contention completely overlooks the legislative intent of applicable statutory law and ignores several other factors, to include the lack of stated procedure for making such a request pursuant to Section 44-1-60(E); the fact that Petitioner, through its counsel, was actively seeking the exact same information by another valid, legal avenue; and the fact that DHEC is responsible for all of the above due to its purposeful exclusion of public when issuing septic tank permits.

A. <u>No uniform or formal procedure exists for notifying DHEC of "affected persons" status.</u>

Bay Point suggests Petitioner could have simply notified DHEC that it wanted to be notified of any agency decisions pertaining to the property in question, pointing to S.C. Code Section 44-1-60(E)(1), which provides in pertinent part:

> Notice of a department decision must be sent by certified mail, return receipt requested to . . . affected persons who have requested in writing to be notified.

While this sounds simple enough in theory, in actuality the task is effectively impossible. The Supreme Court considered the above-quoted language in 2010, stating that "the statute is not clear as to how an individual or entity acquires the status of "affected persons who have asked to be notified." *S.C. Coastal Conserv. League v. DHEC*, 390 S.C. 418, 427 (2010). The Court further noted that "DHEC never stated it followed a formal procedure as to how a party acquires 'affected persons who have asked to be notified' status[;] [t]o the contrary, DHEC indicated it took an informal approach in deciding which parties it notified of its decision." *Id.* at 428.

While the *Coastal Conserv.* Court declined to set forth a process of party notification, that same year, the South Carolina Legislature attempted to clarify procedures by adding the following language to Subsection (E)(1): "Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail." *See* Act No. 278 § 1 (2010). Petitioner contends this additional language is essentially meaningless in providing any additional direction as to how Petitioner should effectively notify a regulatory agency they qualify as "affected."[1]

Bay Point suggests in its Motion that Petitioners are inappropriately attempting to shift the burden of notifying affected parties to DHEC, but the Supreme Court has previously declined to entertain that contention where DHEC was charged with notice. *See Coastal Conserv. League* at 428 ("The record clearly establishes throughout the permit application process in this matter, the League was not an obscure or unknown party. . . . Therefore, [developer's] bold statement that DHEC should not bear the burden of 'guess[ing] which commenter or member of the public would like to know about particular decisions' is unavailing under these facts."). Petitioner submits the converse: that the burden for notification should not be shifted to an affected party to monitor every geographical area of the State where it may wish to participate in DHEC's decision-making process. The solution is extremely simple: notify the public of all septic system applications in the Coastal Zone and provide a period for public comment, just as DHEC does with every other type of permit as part of its mandatory Coastal Zone Consistency review.[2]

---

[1] A review of DHEC's website reveals no additional guidance on this process. In contrast, for example, the DHEC website provides detailed instructions on how an individual, interest group, or business entity can place their name on a mailing list to be notified about NPDES/ND permits, including the contact information they require as well as detailed contact information within the agency (staff names and email addresses, phone numbers, mailing addresses, and links). *See Mailing Lists for NPDES/ND Permits*, DHEC, *available at* https://scdhec.gov/mailing-lists-npdesnd-permits#Individual (last accessed on May 17, 2022).

[2] *See* Petitioner's Request for Contested Case Hearing at pp. 5-7 (Jan. 17, 2022).

B. Other attempts were made by Petitioner to get the same information under FOIA.[3]

In its Motion to Dismiss, Bay Point argues Petitioner's case should be dismissed due to inaction of the Petitioner; however, the argument has no basis in fact. Because DHEC has that decided septic tank permits are exempted from coastal zone consistency review under the Coastal Management Plan, Bay Point and DHEC were able to avoid public scrutiny of this specific permit, forcing Petitioner (by and through its counsel) to obtain this information via other means, specifically the Freedom of Information Act, S.C. Code Ann. Section 30-4-10, *et seq.* (FOIA).

In July of 2021, Petitioner obtained information through an outside source that Bay Point was seeking to move forward with development of individual lots on Bay Point Island. Having limited hearsay information at this stage and finding no public notices regarding the property, Petitioner through its counsel made a broad FOIA request to DHEC (Bureau of Water, OCRM) on July 19, asking for "[a]ny and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC." *See* Exhibit 2. On August 31, 2021, DHEC responded that it had no materials to disclose, which prompted a second FOIA request on the same date, seeking "[a]ny applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications . . . . We are also seeking specifically septic tank applications in addition to any

[3] The Freedom of Information Act provides that "[a] citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter . . . ." S.C. Code Ann. § 30-4-100. However, Petitioner is not attempting to obtain such relief or enforce the provisions of FOIA. Instead, Petitioner is citing its FOIA request to prove that it was actively trying to obtain documents regarding the septic permit at issue during the time period in question, and to suggest that if DHEC had timely and accurately responded to such requests as is required by statute, then Petitioner would have been able to timely respond.

other NPDES permits." *See* Exhibit 3. DHEC again responded that it had no materials to disclose on October 20, 2021.

i. DHEC failed to timely comply with disclosure of public records pursuant to FOIA.

Finding it "vital in a democratic society that public business be performed in an open and public manner," the South Carolina legislature enacted FOIA in 1987 "so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity[.]" S.C. Code Ann. § 30-4-15. To that end, FOIA provides a very specific timeline for record production that must be followed by public bodies:

> Each public body, upon written request for records . . . shall within ten days . . . of the receipt of the request, notify the person making the request of its determination and the reasons for it[.] . . . This determination must constitute the final opinion of the public body as to the public availability of the requested public record[.]

S.C. Code Ann. § 30-4-30(C). After the public body provides this 10-day final determination notice, the next clock begins to run:

> If the request is granted, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the final determination was provided.

Petitioner submitted its first written request for records to DHEC pursuant to FOIA on July 19, 2021. DHEC responded on August 3, 2021 that it had responsive documents, but none related to septic tank applications or permits; only documents and correspondence for an unrelated issue on Bay Point Island. The next communication received from DHEC was dated August 31, 2021, stating that it had no information or documents to produce. With the second FOIA request submitted to the agency on August 31, 2021, no response of any kind was provided by DHEC until October 20, 2021, fifty-one (51) days after the initial request was made.

ii. DHEC failed to accurately disclose the existence of public records in its possession pursuant to FOIA.

DHEC received Bay Point's permit application on August 31, 2021, the same date as the second FOIA request. DHEC finally responded on October 20, 2021, stating that it had no records to disclose. However, by Respondents' own admissions, we know DHEC had in its possession, at a minimum, the following: (1) Bay Point's permit application (submitted August 31, 2021); (2) DHEC's request for additional information from Bay Point (September 15, 2021); (3) Bay Point's response to the request for additional information (September 20, 2021); and (4) the finalized permit (dated September 23, 2021).

FOIA creates an affirmative duty on the part of public bodies to disclose information. *Bellamy v. Brown*, 305 S.C. 291, 295 (1991). Despite this, Bay Point claims that DHEC only had an obligation to search for records in its possession *prior to* the date of the FOIA request, i.e., documents received or generated on or before August 30, 2021. This conclusion was provided without legal authority and is contrary to the General Assembly's stated purpose of FOIA. *See* discussion *infra*. Petitioners assert that even if DHEC had no continuing obligation to disclose information through the date of its final response, it is undisputed that DHEC had at least one item in its possession—Bay Point's permit application—on the date of the FOIA request, and disclosure of that singular document would have been enough to place Petitioner on notice of these events. Bay Point acknowledges as much in its own Motion to Dismiss ("[T]he Department admittedly provided incorrect information in response to the FOIA Request[.]"). Bay Point Motion to Dismiss at 12. Had DHEC properly and timely disclosed that permit application, Petitioner would have been able to track its progress and submit a Request for Final Review pursuant to the typical time frame.

In summary, Petitioner never sat on their rights, nor is this appeal an attempt to stall proceedings or prejudice Bay Point. At each stage, Petitioner took every step they could, based on the information available to them, despite circumstances shrouded in uncertainty and non-transparency, to make the appropriate legal filings within statutory time frames.

C. Petitioner's Request for Final Review ("RFR") was timely filed.

Bay Point argues that Petitioner's case should be dismissed for Petitioner's failure to timely file an RFR. Petitioner contends that its RFR was timely filed in view of the facts and applicable law.

DHEC issued the septic tank permit at issue to Bay Point on September 23, 2021. Petitioner did not receive actual notice of Respondent's septic tank permit until an outside party provided a copy of the permit on October 27, 2021. Fourteen (14) days later, on November 9, 2021, Petitioner submitted an RFR to DHEC. DHEC issued its decision to decline a Final Review on December 17, 2021.

Section 44-1-60(E)(2) of the S.C. Code of Laws provides the following:

> The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review . . . is filed with the department by the applicant, permittee, licensee, or affected person.

The Supreme Court examined the issue of timeliness regarding Section 44-1-60(E) in *S.C. Coastal Conserv. League v. SCDHEC*, 390 S.C. 418; 702 S.E.2d 246 (2010). In that case, DHEC issued permits to the S.C. Ports Authority ("SPA") on October 30, 2006, for development of a proposed container terminal facility following multiple public hearings and public comment periods; Coastal Conservation League ("the League") participated in DHEC's decision-making process by attending hearings and providing written comments at all stages. On November 2, DHEC amended

one of the permits and sent notice of the amendment to SPA via certified mail, but did not notify the League. On November 17, the League notified DHEC that it had learned of the amended permit through an outside source, which prompted DHEC to mail the League notice. On November 20, 2006, the League received that notice and immediately filed an RFR. DHEC argued the League's RFR was not timely pursuant to 44-1-60(E) because it was filed several days after the fifteen-day time frame that began when DHEC mailed the amended notice to SPA. The Supreme Court ultimately made two relevant findings. First, because the League had "been involved in this particular permitting process from the beginning" the Court found "the League was not an obscure or unknown party" and that "SPA's bold statement that DHEC should not bear the burden of 'guess[ing] which commenter or member of the public would like to know about particular decisions' is unavailing under these facts." *Id.* at 428. Second, the Court held:

> Failing to interpret [44-1-60(E)] as requiring DHEC to mail notifications simultaneously would mean DHEC could mail notice of its decision to the applicant, and, fifteen days later, mail notice of the decision to affected persons who have asked to be notified. Under this scenario, the time period for appealing the decision would have expired by the time the affected person receives notice; thus "affected persons" could be precluded from seeking review.

Id. at 429. The Court then stated that notice should be mailed simultaneously to all parties referenced in 44-1-60(E), and, if that does not occur,

> [W]e hold that in situations where DHEC fails to simultaneously notify the applicant, permittee, licensee, and affected persons asking to be notified, the latest date of mailing controls when the fifteen day period begins to run.

Here, consistent with *Coastal Conserv. League*, Petitioner's FOIA requests put DHEC on notice that affected parties existed, and that permit was the embodiment of the staff decision. As explained, in *Coastal Conserv. League*, the Court recognized the League as an affected party by virtue of its involvement in the public commenting process; here, the FOIA requests put DHEC

on notice that it, too, was an affected party. The factor that distinguishes the League from Petitioner here is that the League provided public comment on the proposed project; however, here, Petitioner was not afforded the same opportunity because DHEC did not notify the public of the permit. The fact that Petitioner was excluded from the Bay Point septic tank permit decision-making process (and in fact had no actual knowledge of its existence) should be held against DHEC, not Petitioner.[4] Further, pursuant to the Supreme Court's holding in *Coastal Conserv. League,* the fifteen-day clock to file an RFR technically never started running because Petitioner was never mailed notice of the permit decision; however, if we substitute the date of actual notice for the date of mailing (October 27, 2021), Petitioner timely filed its RFR within fifteen (15) calendar days (on November 9, 2021).

D. <u>Bay Point's arguments ignore the intent of the General Assembly.</u>

Bay Point's arguments ignore the overall legislative intent of both § 44-1-60 and FOIA, suggesting a result (dismissal) that is contrary to the purpose and spirit of the law by allowing an agency decision made behind closed doors to go unchallenged.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5 (1993). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85 (2000). Courts must interpret a statute as a whole, "consonant with the purpose, design, and policy of the lawmakers." *New York Times v. Spartanburg Cnty. Sch. Dist.*, 374 S.C. 307, 310 (2007). "In construing a statute, this Court will

[4] Again, it is worth commenting that this problem could be wholly avoided if DHEC would apply CMP permitting guidelines to septic tank permits in the coastal zone and make such applications open to public comment.

reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222 (2008) (*citing Auto Owners Ins. Co. v. Rollison,* 378 S.C. 600, 663 S.E.2d 484 (2008)). !!

i. **The Legislature intended FOIA to protect the public from closed-door agency decisions.**

FOIA was enacted to promote transparency in government. *DomainsNewMedia.com v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 297 (2018). "The essential purpose of FOIA is to protect the public from secret government activity." *Lambries v. Saluda Cnty. Council,* 409 S.C. 1, 8-9 (2014). The FOIA statute itself is clear about the legislative intent behind its inception:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.

S.C. Code Ann. § 30-4-15. The statute goes on to state that its provisions should be applied so that citizens can "learn and report fully the activities of their public officials at a minimum cost or delay[.]" *Id.* To this end, FOIA should be *liberally construed* to carry out the purpose mandated by the legislature. *Quality Towing v. City of Myrtle Beach*, 345 S.C. 156, 161 (2001), *citing SCDMH v. Hanna*, 270 S.C. 210, 213 (1978).

Petitioner contends that in the instant case, DHEC's failure to produce a record it had in its possession on August 31 that was requested on August 31 is a clear contradiction of the stated purpose of FOIA and well-established jurisprudence that the statute should be construed liberally to promote transparency at minimal cost or delay. To find otherwise, as Bay Point suggests, would mean that public disclosure of government activity was thwarted over a technicality, or an overly-

strict statutory interpretation. Again, Petitioner raises this issue not to seek a remedy available under FOIA, but to support the contention that it should not be prejudiced in this matter due to an agency's failure to fulfill a duty required by law.

ii. The Legislature intended Section 44-1-60 to provide for public participation in agency decisions.

Administrative agencies such as DHEC are required to meet minimum standards of due process. *Stono River Env't Prot. Ass'n v. DHEC*, 305 S.C. 90, 93–94 (1991), *citing* S.C. Const. Art. 1, § 3; *Smith & Smith, Inc. v. S.C. Public Service Comm'n,* 271 S.C. 405 (1978). The South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity be heard . . . and he shall have in all such instances the right to judicial review." S.C. Const., Art. 1, § 22. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Stono River, supra, citing Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

The General Assembly codified the same when it enacted Section 44-1-60(B), which provides:

> To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings.

The purpose of this act "is intended to provide a uniform procedure for contested cases and appeals from administrative agencies." Act No. 387 Section 53. *See also Coastal Conserv. League*, *infra*, at 429 (quoting *id.* and further interpreting 44-1-60 to find that the mailing requirement "gives all parties equal opportunity to challenge a decision[.]").

It is clear that the Constitution itself as well as multiple statutes promulgated by the General Assembly envision a system of government where administrative agencies seek public input to

promote transparency and thorough decision-making. When legislative intent is subverted by an agency's failure to follow plainly stated processes and procedures, citizens are denied the rights conferred on them by the legislature and the Constitution. Such a result should not be permitted to stand, and the affected members of the public (i.e., Petitioner) should not be further prejudiced as a result.

CONCLUSION

For the reasons discussed above, this Court does in fact have subject matter jurisdiction over this contested case and requests that Bay Point's Motion to Dismiss be DENIED.

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

Leslie S. Lenhardt
Amy E. Armstrong
S.C. Environmental Law Project
510 Live Oak Drive
Mount Pleasant, SC 29464
(843) 527-0078
leslie@scelp.org
amy@scelp.org

Attorneys for Petitioner

May 20, 2022

EXHIBIT 1

(PT) ✓

dhec

PERMIT TO CONSTRUCT
Onsite Wastewater System

File Nbr: 2021080040
County: Beaufort
Program Code: 362
System Code: 611
Water Supply: Private

Name: Bay Point Island, LLC
Type Facility: Residential - 480GPD/4BR
Subdivision: Bay Point Island
Block: Lot: 13
TM#: R300 045 000 0014 0000

Address: c/o Sam Connor
PO Box 3671
Bluffton, SC 29910

Site: 98 Bay Point Island Drive
St. Helena, SC 29920

PERMIT TO CONSTRUCT SYSTEM SPECIFICATIONS

See engineered system design and supporting documentation.

SPECIAL INSTRUCTIONS/CONDITIONS

THIS PERMIT IS SITE SPECIFIC. ANY CHANGES TO THE SYSTEM MUST BE APPROVED BY DHEC. ALTERNATIVE TRENCH PRODUCTS APPROVED UNDER STATE RULES AND REGULATIONS MAY BE SUBSTITUTED. ANY UNAPPROVED CHANGES WILL VOID THIS PERMIT.

This Permit To Construct and Operate is issued pursuant to the SCDHEC Specialized Onsite Wastewater Systems for Peak Flows less than 1500 GPD.

Issuance of this Specialized Onsite Wastewater System Permit To Construct does not relinquish the property owner of responsibility in attaining any and all necessary approvals or permits required to develop this property.

PERMIT TO CONSTRUCT

The Permit To Construct is issued upon the system design, certification, and other supporting documentation as required by this standard and supplied by:

Sam Connor
(Engineering Company)

Samuel P. Connor, P.E.
(Consulting Engineer)

S.C. No. 30716
(State and License Number)

Troy N. Smith
(Soil Classifier)

S.C. No. 74
(State and License Number)

09/16/2021
(Plan Date)

2106120-Lot13
(Project Number)

Any Permit To Construct and Operate that is issued pursuant to this Standard shall be based upon the consulting engineer's design, certification, and other supporting documentation.

Reviewed By: Kim S. Crouse

Date: 9/23/2021 9/23/2021

DHEC 1781 (01/2014)
This Permit will Expire and Become Null and Void Five (5) Years from the Issuance Date.

This Permit is Appealable Under the Administrative Procedures Act. There may be an Additional Fee for Changes in this Permit that Require a Site Reevaluation.

Information collected on this form is subject to public scrutiny or release and the Freedom of Information Act.

EXHIBIT 2

dhec

Freedom of Information Request Form

Customer Service: (803) 898-3882

Date: 7/19/2021

Internal request number: 849666

Contact information

Name: Leslie S. Lenhardt

Company/Organization:

Street address: 111 Chadwick Drive

City: Charleston

State: SC

Zip Code: 29407

Phone number: 843-527-0078

Email address: Leslie@scelp.org

Request information

I'm requesting: Specific Documents

Facility or project name: Bay Point Island LLC

Facility address: TMS R300 045 000 0009 0000

County: Beaufort

DHEC file custodian/staff contact if known: Bureau of Water, OCRM

Description of documents or files requested:

Any and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC.

Family Privacy Protection Act statement

The Family Privacy Protection Act, SC Code Section 30-2-50, prohibits any person or private entity from knowingly obtaining or using any personal information obtained from our agency for commercial solicitation directed to any person in the State. Violation of this law is a crime.

I have read and understand this statement. I am not requesting personal information for the purposes of commercial solicitation or in violation of law.

Signed:

Submit requests: Email: foi@dhec.sc.gov • **Fax:** (803) 898-3816 • **Mail:** FOI Office, 2600 Bull St., Columbia, S.C. 29201

Office Use Only: Date completed:

Billing info: Research: Time: Cost: Redaction Time: Cost:

Off-site/Archive Retrieval # Boxes: Fee:

Description:

Services:

Delivery options:

Total charge:

EXHIBIT 3

Freedom of Information Request Form

Customer Service: (803) 898-3882

Date: 8/31/2021

Internal request number: 851923

Contact information

Name: Leslie S. Lenhardt

Company/Organization:

Street address: 510 Live Oak Drive

City: Mount Pleasant

State: SC

Zip Code: 29464

Phone number: 843-527-0078

Email address: Leslie@scelp.org

Request information

I'm requesting: Specific Documents

Facility or project name: Bay Point Island LLC

Facility address: Beaufort County

County: Beaufort

DHEC file custodian/staff contact if known: Bureau of Water, OCRM

Description of documents or files requested:

Any applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications for the following properties located on Bay Point Island:
R300 045 000 0001 through
R300 045 000 0043

Owners should all be Bay Point Island LLC but these TMS numbers were not included in the earlier request that I submitted. We are also seeking specifically septic tank applications in addition to any other NPDES permits.

Family Privacy Protection Act statement

The Family Privacy Protection Act, SC Code Section 30-2-50, prohibits any person or private entity from knowingly obtaining or using any personal information obtained from our agency for commercial solicitation directed to any person in the State. Violation of this law is a crime.

I have read and understand this statement. I am not requesting personal information for the purposes of commercial solicitation or in violation of law.

Signed:

Submit requests: Email: foi@dhec.sc.gov • **Fax:** (803) 898-3816 • **Mail:** FOI Office, 2600 Bull St., Columbia, S.C. 29201

Office Use Only: Date completed:

Billing info: Research: Time: Cost: Redaction Time: Cost:

Off-site/Archive Retrieval # Boxes: Fee:

Description:

Services:

Delivery options:

Total charge:

Healthy People. Healthy Communities.

May 27, 2022

Honorable S. Phillip Lenski
Judge, SC Court of Appeals
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Re: Gullah/Geechee Fishing Association, Inc. vs. South Carolina Department of Health and Environmental Control and Bay Pointe Island, LLC
Docket No. 22-ALJ-07-008-CC

Dear Judge Lenski:

Enclosed please find Respondent ***South Carolina Department of Health and Environmental Control's Notice of Motion and Motion for Summary Judgment*** for filing in connection with the above-referenced case. I would appreciate your office returning a stamped copy to our office in the self-addressed stamped envelope I have enclosed.

Should you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

Sandra R. Wessinger

Sandra R. Wessinger
Paralegal to
Sara V. Martinez
Chief Counsel, EQC

Enclosures

cc: Lesley S. Lenhardt, Esquire
Amy E. Armstrong, Esquire
Mary D. Shahid, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC **RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

NOW COMES Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC"), pursuant to Rule 19 of the South Carolina Rules of Procedure for the Administrative Law Court and Rule 56 of the South Carolina Rules of Civil Procedure, and respectfully moves this Court for an Order granting summary judgment in its favor.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. See Rule 56(c), SCRCP; Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock, 381 S.C. at 329-30, 673 S.E.2d at 802. Even when viewed in the light most favorable to Petitioner, there is no genuine issue of material fact and the Department is entitled to judgment as a matter of law. In support of its motion, the Department offers the following:

1. On August 31, 2021, the Department received an application, plans, and supporting documentation for a specialized onsite wastewater system design from Bay Point

Island, LLC ("Bay Point") to serve a four-bedroom residence to be located at 98 Bay Point Island Drive, St. Helena, South Carolina in Beaufort County. Per the application, the system as designed would handle less than 1,500 gallons per day and handle only domestic waste. See Exhibit 1.

2. After finalizing its review of the application and ensuring that it met all aspects of the regulation, the Department's Bureau of Environmental Health Services issued the onsite wastewater permit to Bay Point ("Permit") in accordance with S.C. Code Ann. Regs. 61-56.

3. Petitioner submitted a Request for Final Review of the issuance of the Permit on November 8, 2021.

4. The Board of Health and Environmental Control issued its decision not to conduct a Final Review Conference on December 17, 2021.

5. Petitioner filed its Request for Contested Case Hearing on January 17, 2022, arguing that the Permit should be rescinded because the Department failed to conduct a coastal zone consistency review.

6. As a matter of law, a coastal zone consistency review is not required for an onsite wastewater system that handles less than 1,500 gallons per day and handles domestic waste only. See Exhibit 2, Affidavit of Christopher M. Stout

7. S.C. Code Ann. § 48-39-80 of the Coastal Tidelands and Wetlands Act directs the Department to develop a comprehensive coastal management program and to establish regulations and policies for reviewing projects within the coastal zone. Specifically, "the Department shall have **the authority** to review all state and federal permit applications in the coastal zone and to certify that these do not contravene the

management plan." (emphasis added). Of note, the Department is not ***required*** to review all permits.

8. The Department exercises its authority to review permits as expressed and refined in Chapter V of the South Carolina Coastal Zone Management Program ("CZMP") document, which identifies the specific state agency permits that are subject to review and certification.

9. The CZMP document's list of permits subject to review includes permits for wastewater treatment systems or septic tanks, but only those that handle more than 1,500 gallons per day or handle effluent other than domestic waste. Smaller systems for the treatment of domestic wastewater are exempt from coastal zone consistency review based upon the approved CZMP document. This exemption has long been in place and has been upheld as properly accounting for factors including the Department's lack of direct control or authority over sewage treatment and disposal, the sheer number of septic tank permits issued within the coastal zone, and the design of S.C. Code Ann. Regs. 61-56 "to insure that state water quality standards in adjacent water bodies must be maintained." N. Beaufort Cnty. Committee v. S.C. Dep't of Health & Envtl. Control, No. 96-ALJ-07-0117-CC (S.C. Admin. L. Ct., Oct. 28, 1996) (Kittrell, J.).

10. In its Request for Contested Case Hearing, Petitioner's sole argument as to the merits of the Permit issuance is that the Department failed to conduct a coastal zone consistency review for the onsite wastewater system permit.[1] Petitioner did not argue

[1] Petitioner presents an argument regarding a FOIA violation and due process to preempt any timeliness arguments Respondents may argue. This argument is not consequential to this Motion for Summary Judgment. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (determining that additional issues need not be addressed when "disposition of prior issue is dispositive.").

that the issuance of the Permit was otherwise inappropriate or that the Department did not properly follow S.C. Code Ann. Regs. 61-56.

11. Here, it is not contested that the Permit was issued for a four-bedroom residence which handles less than 1,500 gallons per day and handles domestic waste. Pursuant to applicable law, a coastal zone consistency review is not required as part of the Permit review. Therefore, the Department is entitled to summary judgment as a matter of law.

WHEREFORE, Respondent South Carolina Department of Health and Environmental Control respectfully requests the Court to enter summary judgment in its favor.

Respectfully Submitted,

Sara V. Martinez, S.C. Bar #: 74822
Christopher P. Whitehead, SC Bar #100264
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201
Tel.: (803) 898-3349
Email: martinsv@dhec.sc.gov
whitehcp@dhec.sc.gov

May 27, 2022
Columbia, South Carolina

Exhibit 1

(to the Notice of Motion and Motion for Summary Judgment)

Discover 1225406221 07-815073

07-2021 08 0040
Application #:

dhec
SC Department of Health and Environmental Control

Onsite Wastewater System Application

Bureau of Environmental Health Services

Bayfront Island LLC
c/o I, Sam Connor (Name), PO Box 3671 (Mailing Address)

Bluffton (City/Town), SC (State), 29910 (Zip Code), samconnor@hargray.com (Email Address)

Phone No.: 843-368-5051 ☑ Mobile ☐ Home ☐ Work Alternate Phone No.: ☐ Mobile ☐ Home ☐ Work

hereby make application for a Permit to Construct an Individual Sewage Disposal System to serve a:

House: ☑ Mobile Home: ☐ Other (Specify): ☐

If in subdivision, give name: Bay Point Island, Lot #: 13

Property Address: 98 Bay Point Island Drive City: Beaufort

County: Beaufort Tax Map/Property Identification #: R300-045-000-0014-0000

Check all that apply:

Public Water: ☐ **Well:** ☐ Public ☑ Private ☐ Existing ☐ Proposed **Public Sewer Accessible:** ☐

If residential establishment, answer following:

No. Bedrooms: 4 Basement: ☐ Full ☐ Partial ☑ None Plumbing in Basement: ☐

If commercial establishment, answer following:

Type of Business: _____ Number of Occupants: _____ Number of Employees: _____

Public Restrooms: _____ Number of Hours of Daily Operation: _____ Other: _____ (i.e., seating capacity, meals per day)

Lot Identification and Preparation

In order for your application to be processed, stake the corners of the proposed building and property corners with distinctive markers. In clear, sealed bags, place the site location card at the front of the property in a conspicuous location and place the septic location card at the proposed septic location. A legal description (plat, deed, surveyor site plan, etc.) with dimensions of the property must also be submitted with the application. Contact the regional EA office to activate your application when the lot has been staked, house site located, and lot posted. The lot should also be properly prepared by clearing all underbrush, thick vegetation, and any other features that may inhibit the site evaluation within a 150 ft radius of the proposed septic location.

Please give exact directions to lot: See attached location map.

I understand that the property must be properly prepared for evaluation and that I must confirm property preparation to activate the application. I also understand a reevaluation fee may be assessed if the above parameters for lot identification and preparation are not met. I certify to the best of my knowledge that the information submitted in this document is true and accurate. Permission and authority is hereby granted for DHEC representatives to enter the above-described property at reasonable hours for the purpose of onsite wastewater system inspection and/or site evaluation.

Property will be ready for activation/evaluation by DHEC on 12/01/2021 (Date).

08/31/2021 (Date)

(Applicant/Representative Signature)

Personal information provided on this form is subject to public scrutiny or release.

07 October 2020

RLC

Mr. Stewart Dixon
Terracan
Stewart.Dixon@terracon.com

Subject: **High Intensity Soil Study**
Bay Point Island / Lot 13
Beaufort County, South Carolina (32.25886°, -80.62684°)

RLC# 20-101.1

Dear Mr. Dixon:

On 28 April 2020 Resource & Land Consultants (RLC) conducted a High Intensity Soil Study on the above listed property located in Beaufort County, South Carolina (32.25886°, -80.62684°). A South Carolina Professional Soil Classifier advanced 8 hand auger borings within a portion of the property proposed for an individual sewage treatment system (Figure 1). The soil study was conducted using current South Carolina DHEC regulations for onsite wastewater systems (R.61-56). The soil classifier does not design onsite wastewater systems but rather delineates soil types with similar properties, referenced as soil map units in this letter. This letter and its attachments are intended to describe current soil conditions on the subject property as they relate to South Carolina DHEC regulations for onsite wastewater systems. Its purpose is to aide DHEC and/or a consulting engineer in the design of onsite wastewater systems. While the soil classifier can certify the soil conditions described in this report, he cannot not insure that a septic system can be permitted and installed within any given area.

It is the opinion of the soil classifier that the areas displayed as Map Unit A on the attached Figure 1, has a zone of saturation (ZOS) approximately 30-40 inches below the existing soil surface. Map Unit B has a ZOS of approximately 20-29 inches below the existing soil surface while Map Unit C has a ZOS between 10-19. The most limiting soil texture encountered within all areas was Loamy Sand (Group I soils). Therefore, a loading rate of 0.9 ga/da/ft2 is proposed. Because of drastic changes in elevation and inconsistent map units, it is the opinion of the soil classifier that Map Units A B and C should be considered for a "Specialized Onsite Wastewater System" (I.E. engineered system, Sections 415 Appendix O of DHEC R.61-56).

It is the recommendation of the soil classifier that a consulting engineer design an onsite wastewater system for this application. The engineer will provide system requirements, limitations, and sizing of any potential septic systems. A minimum 12-in separation between the ZOS and the bottom of the trench is recommended if the drainfield is to be utilized for the secondary treatment of the wastewater, however this can be reduced if the consulting engineer sees fit. If needed, SC-DHEC Class 1 material (sand or loamy sand textured soil) should be used to create minimum separation between the ZOS and trench bottom.

It is recommended that surface water and shallow sub-surface water control measures be installed and remain in place for the lifetime of the onsite wastewater treatment system. Surface water from up gradient inputs and the proposed structure should be directed away from the absorption field area. Earth moving in and adjacent to the absorption field must be completed in a way as not to damage the soil structure by causing compaction and/or rutting. The absorption fields should not be installed during wet or rainy periods which could result in reduced system performance due to damage of the soil structure.

No existing wells were located adjacent to the soil study area. If any adjacent ells exist, they should be located. A 75-foot setback is required from a private well and 100-foot from a public well.

Table 1. Soil Boring Summary

Boring Number	Depth to ZOS (in)	Depth of Surface Horizon (in)	Depth to Restrictive Horizon (in)	Most Restrictive LTAR Class	Most Restrictive Soil Texture	Depth to Most Restrictive Soil Texture (in)	Soil Map Unit	LTAR (ga/da/ft2)	Y	X
13-1	13	6	>50	1	LS	26	C	0.9	32.25875	-80.62676
13-2	38	n/a	>40	1	LS	38	A	0.9	32.25875	-80.62689
13-3	40	n/a	>50	1	LS	>50	A	0.9	32.25873	-80.62697
13-4	14	4	>50	1	LS	30	C	0.9	32.25886	-80.62684
13-5	33	n/a	>50	1	LS	42	A	0.9	32.25882	-80.62691
13-6	12	4	>50	1	LS	28	C	0.9	32.25893	-80.62676
13-7	18	n/a	>50	1	LS	32	B	0.9	32.25889	-80.62688
13-8	14	4	>50	1	LS	26	C	0.9	32.25888	-80.62697
T3	18	5	>50	1	LS	28	C	0.9	32.25901	-80.62664
T4	22	3	>50	1	LS	30	B	0.9	32.25857	-80.62643

Table 2. RLC Relative Surface Elevation Data

Boring Number	ZOS Below Existing Surface (in)	ZOS Below Soil Surface (ft)	Rod Reading (ft)	Correction Factor (ft)	Approximate Elevation (ft)	ZOS with Correction Factor (ft)
13-1	13	1.08	5.00	3.92	96.08	95.00
13-2	38	3.17	2.23	1.15	98.85	95.69
13-3	40	3.33	2.10	1.02	98.98	95.65
13-4	14	1.17	4.58	3.50	96.50	95.33
13-5	33	2.75	3.28	2.20	97.80	95.05
13-6	12	1.00	4.93	3.84	96.16	95.16
13-7	18	1.50	4.32	3.24	96.76	95.26
13-8	14	1.17	4.10	3.02	96.98	95.81
T3	18	1.50	n/a			
T4	22	1.83				
ref elev	n/a	n/a	1.08	n/a	100	n/a

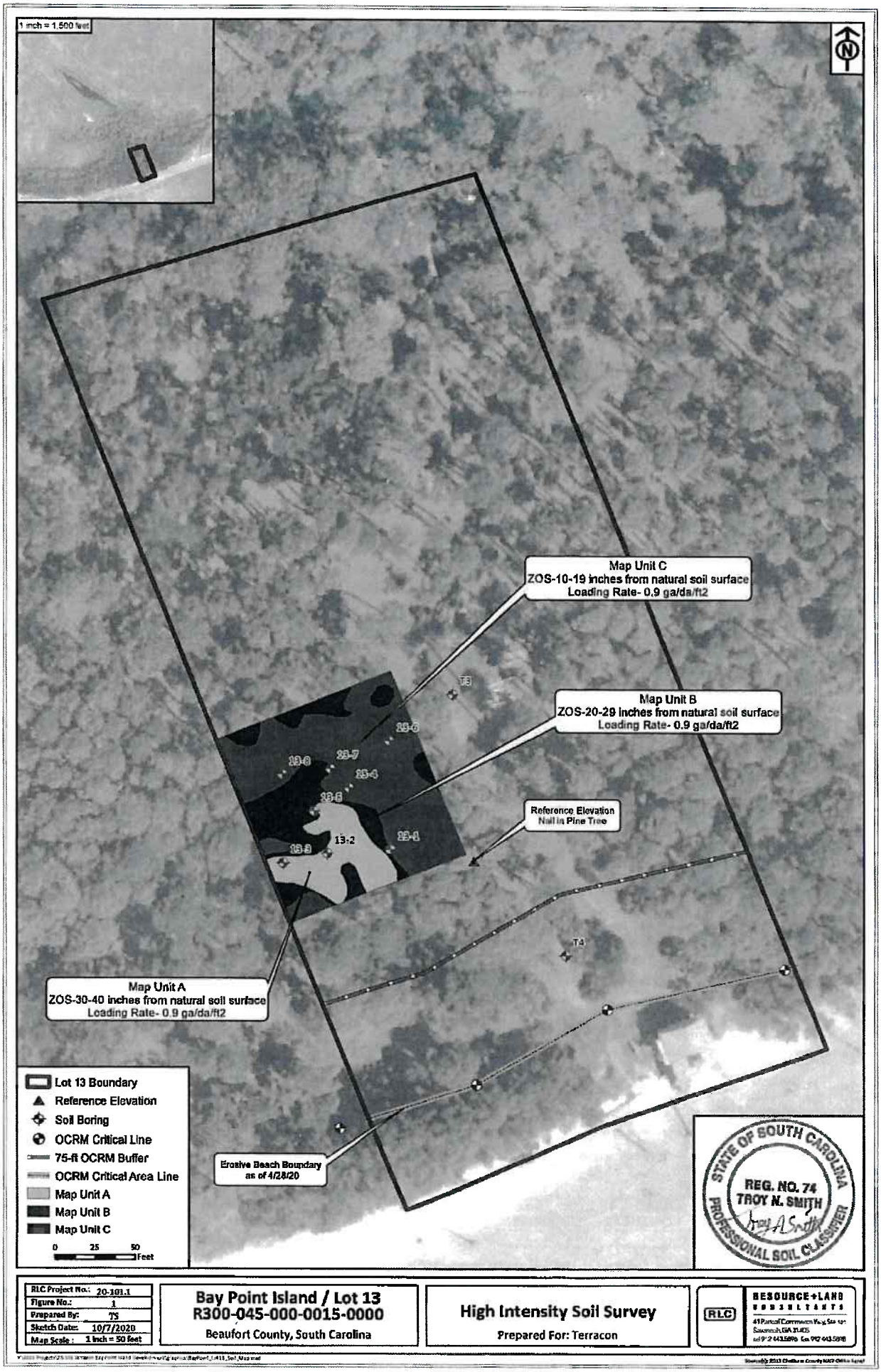
Provide this report and its attachment to a SC certified consulting engineer, they will design a septic system specifically for your needs and soil limitations. After engineered design is complete you will need to provide this soil report and the engineers report to DHEC for the final permitting of the individual sewage treatment and disposal system. We greatly appreciate the opportunity to provide assistance with this project. If you have any questions, please contact us at (912) 443-5896.

Sincerely,

STATE OF SOUTH CAROLINA
REG. NO. 74
TROY N. SMITH
PROFESSIONAL SOIL CLASSIFIER

Troy N. Smith
South Carolina Professional Soil Classifier Reg. No. 74
Resource & Land Consultants

Enclosures: 1. Figure 1
2. Site and Soil Evaluation Forms


1 inch = 1,500 feet
N
Map Unit C
ZOS-10-19 inches from natural soil surface
Loading Rate- 0.9 ga/da/ft2
Map Unit B
ZOS-20-29 inches from natural soil surface
Loading Rate- 0.9 ga/da/ft2
Reference Elevation
Nail in Pine Tree
Map Unit A
ZOS-30-40 inches from natural soil surface
Loading Rate- 0.9 ga/da/ft2
Erosive Beach Boundary
as of 4/28/20
TB
T4
19-5
19-6
19-7
19-4
19-3
19-8
19-2
19-1
13-2
Lot 13 Boundary
Reference Elevation
Soil Boring
OCRM Critical Line
75-ft OCRM Buffer
OCRM Critical Area Line
Map Unit A
Map Unit B
Map Unit C
0 25 50
Feet
STATE OF SOUTH CAROLINA
REG. NO. 74
TROY N. SMITH
PROFESSIONAL SOIL CLASSIFIER
RLC Project No.: 20-101.1
Figure No.: 1
Prepared By: TS
Sketch Date: 10/7/2020
Map Scale: 1 Inch = 50 feet
Bay Point Island / Lot 13
R300-045-000-0015-0000
Beaufort County, South Carolina
High Intensity Soil Survey
Prepared For: Terracon
RLC
RESOURCE+LAND CONSULTANTS

Site and Soil Evaluation for Onsite Wastewater Treatment and Disposal

County: Beaufort		Land Use / Earth Cover: Mature Forest	Soil Classifiers Embossment / Stamp:
Parcel #: R300-045-000-0015-0000		Landform: Islannd Terrace	
Property Address:	94 Bay Point Island Road Saint Helena Isalnd Road, SC 29920	Hillsope / Profile Position: Multiple	
		Percent Slope: 0-8	
Location / Subdivision: Bay Point Island		Slope Shape: Multiple	
Lots: Lot 13		Slope Aspect: Multiple	
Applicant Name: Stewart Dixon		Weather Conditions: Sunny 75 deg	
Mailing Address:	2201 Rowland Avenue Savannah, GA 31404	Soil Classifier Company: Resource + Land Consultants	
		Soil Classifier Name: Troy N. Smith	
Email Address: sadixon@terracon.com		Soil Classifier Address:	41 Park of Commerce Way, Suite 101 Savannah, GA 31405
Phone #: 912-629-4000			
Date of Field Work: 4/28/2020		Soil Classifier Phone #: 912-220-1631	Soil Classifiers Signature:

STATE OF SOUTH CAROLINA
REG. NO. 74
TROY N. SMITH
PROFESSIONAL SOIL CLASSIFIER

Test Hole #: 13-1		Latitude: 32.25875			Longitude: -80.62676							Method: Auger
Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure		Consistence (Moist)	
Horizon	Depth (inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Stickl Class	Plastic. Class	Grade	Type (Shape)		
			Concentrations	Depletions								
A	0-6	10YR 5/3	-	-	1	LS	SO	PO	1	gr	fr	70% uncoated sand grains
E1	6-13	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	13-22	10YR 6/6	10YR 6/8	10YR 6/2	1	LS	SO	PO	1	gr	fr	
E3	22-26	2.5Y 4/4	-	10YR 6/2	1	LS	SO	PO	1	gr	fr	
Cg	26-50+	10YR 6/1	10YR 6/6	-	1	LS	SO	PO	0	sg	l	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
				C	
Zone of Saturation	13	Overburden / Fill Material	n/a	Vegetation Observed	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	low density mature pines	
Restrictive Horizon	>50	Free Water	34		

Test Hole #: 13-2	Latitude: 32.25875	Longitude: -80.62689	Method: Auger

Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure		Consistence (Moist)	
Horizon	Depth (Inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)		
			Concentrations	Depletions								
E1	0-24	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	24-38	2.5Y 6/3	-	-	1	LS	SO	PO	1	gr	fr	
E3	38-50+	10YR 6/6	-	10YR 6/2	1	LS	SO	PO	1	gr	fr	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
				A	
Zone of Saturation	38	Overburden / Fill Material	n/a	Vegetation Observed	
Clean Saprolite	>40	Loading Rate ga/da/ft2	0.9	low density mature pines	
Restrictive Horizon	>40	Free Water	>50		

Test Hole #: 13-3	Latitude: 32.25873	Longitude: -80.62697	Method: Auger

Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure		Consistence (Moist)	
Horizon	Depth (Inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)		
			Concentrations	Depletions								
E1	0-23	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	23-40	2.5Y 6/3	-	-	1	LS	SO	PO	1	gr	fr	
E3	40-50+	10YR 6/6	-	10YR 6/2	1	LS	SO	PO	1	gr	fr	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
				A	
Zone of Saturation	40	Overburden / Fill Material	n/a	Vegetation Observed	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	low density mature pines	
Restrictive Horizon	>50	Free Water	>50		

Test Hole #: 13-4	Latitude: 32.25886	Longitude: -80.62684	Method: Auger

Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure			
Horizon	Depth (inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)	Consistence (Moist)	
			Concentrations	Depletions								
A	0-4	10YR 5/3	-	-	1	LS	SO	PO	1	gr	fr	70% uncoated sand grains
E1	4-14	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	14-22	10YR 6/6	10YR 6/8	10YR 6/2	1	LS	SO	PO	1	gr	fr	
E3	22-30	2.5Y 4/4	-	10YR 6/2	1	LS	SO	PO	1	gr	fr	
C	30-50+	2.5Y 5/3	10YR 6/6	-	1	LS	SO	PO	0	sg	l	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
				C	
Zone of Saturation	14	Overburden / Fill Material	n/a	Vegetation Observed	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	low density mature pines	
Restrictive Horizon	>50	Free Water	28		

Test Hole #: 13-5	Latitude: 32.25882	Longitude: -80.62691	Method: Auger

Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure			
Horizon	Depth (inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)	Consistence (Moist)	
			Concentrations	Depletions								
E1	0-26	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	26-33	10YR 5/6	-	-	1	LS	SO	PO	1	gr	fr	
E3	33-42	2.5Y 4/4	-	10YR 6/2	1	LS	SO	PO	1	gr	fr	
Cg	42-50+	2.5Y 5/3	10YR 6/6	-	1	LS	SO	PO	0	sg	l	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
				A	
Zone of Saturation	33	Overburden / Fill Material	n/a	Vegetation Observed	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	recently cleared	
Restrictive Horizon	>50	Free Water	48		

Test Hole #: 13-6	Latitude: 32.25893	Longitude: -80.62676	Method: Auger

Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure		Consistence (Moist)	
Horizon	Depth (inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)		
			Concentrations	Depletions								
A	0-4	10YR 5/3	-	-	1	LS	SO	PO	1	gr	fr	50% uncoated sand grains
E1	4-12	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	12-28	2.5Y 6/3	10YR 6/8	10YR 6/2	1	LS	SO	PO	1	gr	fr	
Cg	28-50+	2.5Y 5/2	10YR 6/6	-	1	LS	SO	PO	0	sg	l	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
				C	
Zone of Saturation	12	Overburden / Fill Material	n/a	Vegetation Observed	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	Juvenile Pines	
Restrictive Horizon	>50	Free Water	26		

Test Hole #: 13-7	Latitude: 32.25889	Longitude: -80.62688	Method: Auger

Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure		Consistence (Moist)	
Horizon	Depth (inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)		
			Concentrations	Depletions								
E1	0-6	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	6-18	10YR 5/6	-	-	1	LS	SO	PO	1	gr	fr	
E3	18-32	2.5Y 4/4	-	10YR 6/2	1	LS	SO	PO	1	gr	fr	
Cg	32-50+	2.5Y 5/3	10YR 6/6	-	1	LS	SO	PO	0	sg	l	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
				B	
Zone of Saturation	18	Overburden / Fill Material	n/a	Vegetation Observed	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	Juvenile Pines	
Restrictive Horizon	>50	Free Water	30		

Test Hole #: 13-8	Latitude: 32.25888	Longitude: -80.62697	Method: Auger

Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure			
Horizon	Depth (inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)	Consistence (Moist)	
			Concentrations	Depletions								
A	0-4	10YR 5/3	-	-	1	LS	SO	PO	1	gr	fr	60% uncoated sand grains
E1	4-14	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	14-26	2.5Y 6/3	10YR 6/8	10YR 6/2	1	LS	SO	PO	1	gr	fr	
Cg	26-50+	2.5Y 5/2	10YR 6/6	-	1	LS	SO	PO	0	sg	l	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
Zone of Saturation	14	Overburden / Fill Material	n/a	C	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	Vegetation Observed	
Restrictive Horizon	>50	Free Water	26	Juvenile Pines	

Test Hole #: T3	Latitude: 32.25901	Longitude: -80.62664	Method: Auger

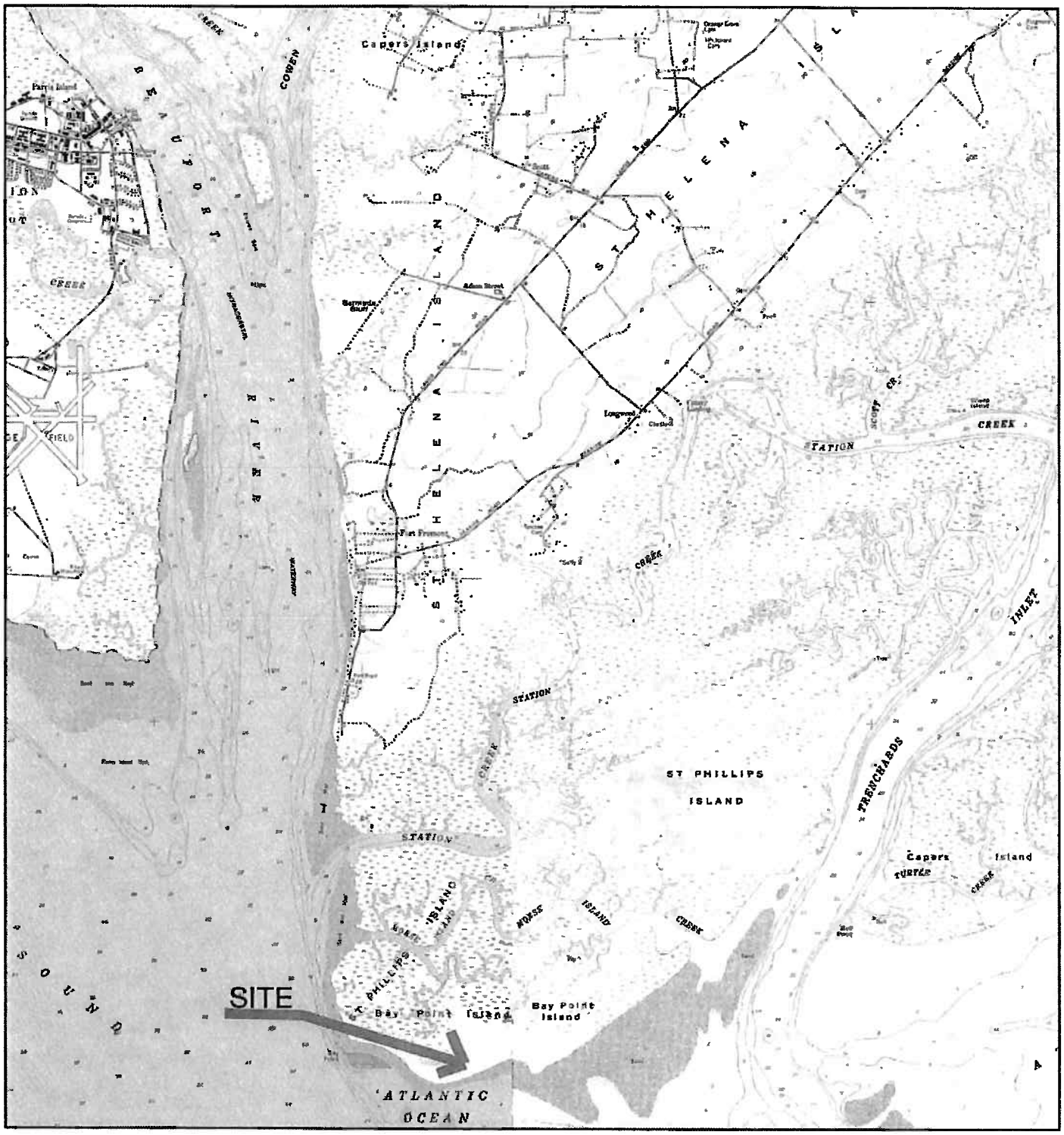
Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure			
Horizon	Depth (inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)	Consistence (Moist)	
			Concentrations	Depletions								
A	0-5	10YR 5/3	-	-	1	LS	SO	PO	1	gr	fr	60% uncoated sand grains
E1	5-18	2.5Y 6/4	-	-	1	LS	SO	PO	1	gr	fr	
E2	18-28	10YR 6/4	10YR 6/8	10YR 6/2	1	LS	SO	PO	1	gr	fr	
Cg	28-50+	10YR 6/2	10YR 6/6	-	1	LS	SO	PO	0	sg	l	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
Zone of Saturation	18	Overburden / Fill Material	n/a	C	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	Vegetation Observed	
Restrictive Horizon	>50	Free Water	28	Juvenile Pines	

Test Hole #: T4		Latitude: 32.25857			Longitude: -80.62643							Method: Auger
Soil Profile		Estimating Soil Saturation			Estimating Soil Permeability							Comments and Other Pertinent Soil Features
		Munsell Color (hue, value, chroma)			Texture				Structure			
Horizon	Depth (inches)	Matrix Color	Redoximorphic Features / Mottles		LTAR Class	USDA Class	Sticki Class	Plastic. Class	Grade	Type (Shape)	Consistence (Moist)	
			Concentrations	Depletions								
A	0-3	10YR 5/3	-	-	1	LS	SO	PO	1	gr	fr	60% uncoated sand grains
E1	3-18	2.5Y 6/4	-	-.	1	LS	SO	PO	1	gr	fr	
E2	18-30	10YR 6/4	10YR 6/8	10YR 6/2	1	LS	SO	PO	1	gr	fr	
C	30-50+	10YR 7/3	10YR 6/6	10YR 6/2	1	LS	SO	PO	0	sg	l	

Most Limiting Soil Conditions	Depth (in) & Description	Most Limiting Soil Conditions	Depth (in) & Description	Map Unit	Comments / Recommendations
				B	
Zone of Saturation	22	Overburden / Fill Material	n/a	Vegetation Observed	
Clean Saprolite	>50	Loading Rate ga/da/ft2	0.9	Juvenile Pines	
Restrictive Horizon	>50	Free Water	33		

Location Map - Lot 13 Bay Point Island



8/9/2021, 9:10:23 AM

1:72,000

0 0.5 1 2 mi

0 1 2 4 km

WHEREAS, a plat of Bay Point Subdivision was previously filed in Plat Book 67 at Page 136 in the Office of the Register of Deeds for Beaufort County, South Carolina; and

WHEREAS, the filing of said plat was thereafter contested by the South Carolina Coastal Conservation League in an appeal to the Beaufort County Zoning Board of Appeals; and

WHEREAS, while the appeal to the Zoning Board of Appeals was being reconsidered, a second plat was filed in Plat Book 69 at Page 175 in the Office of the Register of Deeds for Beaufort County, South Carolina; and

WHEREAS, the South Carolina Court of Appeals has affirmed the ruling of Judge Thomas Kemmerlin, which dismissed the appeals of the South Carolina Coastal Conservation League and in effect validated the initial plat recorded in Plat Book 67 at Page 136; and

WHEREAS, it is the desire of the owners of Bay Point Subdivision to vacate the plat recorded in Plat Book 69 at Page 175 and to reaffirm the plat recorded in Plat Book 67 at Page 136;

NOW, THEREFORE, this plat previously recorded at Plat Book 67 at Page 136 is being re-recorded to abandon the plat recorded in Plat Book 69 at Page 175 in the Office of the Register of Deeds for Beaufort County, South Carolina.

GENERAL NOTES:
REFERENCE PLATS BY:
LOCATION MAP
SUBDIVISION PLAT
BAYPOINT ISLAND, BEAUFORT COUNTY
BEAUFORT REALTY
DAVIS & FLOYD

SITE DEVELOPMENT PLANS
FOR

LOT 13 BAY POINT ISLAND SUBDIVISION

BEAUFORT COUNTY, SC

PREPARED FOR

BAY POINT ISLAND LLC

PERMIT SET: NOT FOR CONSTRUCTION

PROJECT NUMBER 2106120-LOT13

PREPARED BY:

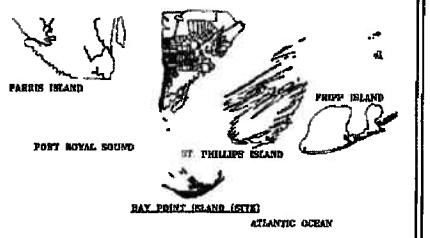
SAM CONNOR, PE
P.O. BOX 3671
BLUFFTON, SC 29910
843-368-5051
samconnor@hargray.com

SCDHEC-OCRM CERTIFICATION:
"I HAVE PLACED MY SIGNATURE AND SEAL ON THE DESIGN DOCUMENTS SUBMITTED SIGNIFYING THAT I ACCEPT RESPONSIBILITY FOR THE DESIGN OF THE SYSTEM. FURTHER, I CERTIFY TO THE BEST OF MY KNOWLEDGE AND BELIEF THAT THE DESIGN IS CONSISTENT WITH THE REQUIREMENTS OF TITLE 48, CHAPTER 14 OF THE CODE OF LAWS OF SC, 1976 AS AMENDED, PURSUANT TO REGULATION 72-300 ET SEQ. (IF APPLICABLE), AND IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF SCR100000."

NO.	DESCRIPTION	DATE
A	RELEASED FOR PERMITTING	
B		
C		
D		

RELEASE SCHEDULE

VICINITY MAP (NOT TO SCALE)



PROJECT DATA

DEVELOPER:	BAY POINT ISLAND LLC 5 WATERWAY LANE HILTON HEAD ISLAND, SC 29926
24 HOUR CONTACT TELEPHONE EMAIL:	ART KREBS (XXX) XXX-XXXX art.krebs@whitestonefholding.com
JURISDICTION TAX MAP # 911/STREET ADDRESS PROPERTY OWNER OF RECORD:	BEAUFORT COUNTY, SC R300 045 000 0014 0000 98 BAY POINT ISLAND DRIVE BAY POINT ISLAND LLC
NPDES DISTURBED AREA:	0.35 ACRES
APPROXIMATE LOCATION OF SITE: LONGITUDE: LATITUDE:	W 80° 37' 36" N 32° 15' 33"

☒ NOT FOR CONSTRUCTION
☐ RELEASED FOR CONSTRUCTION

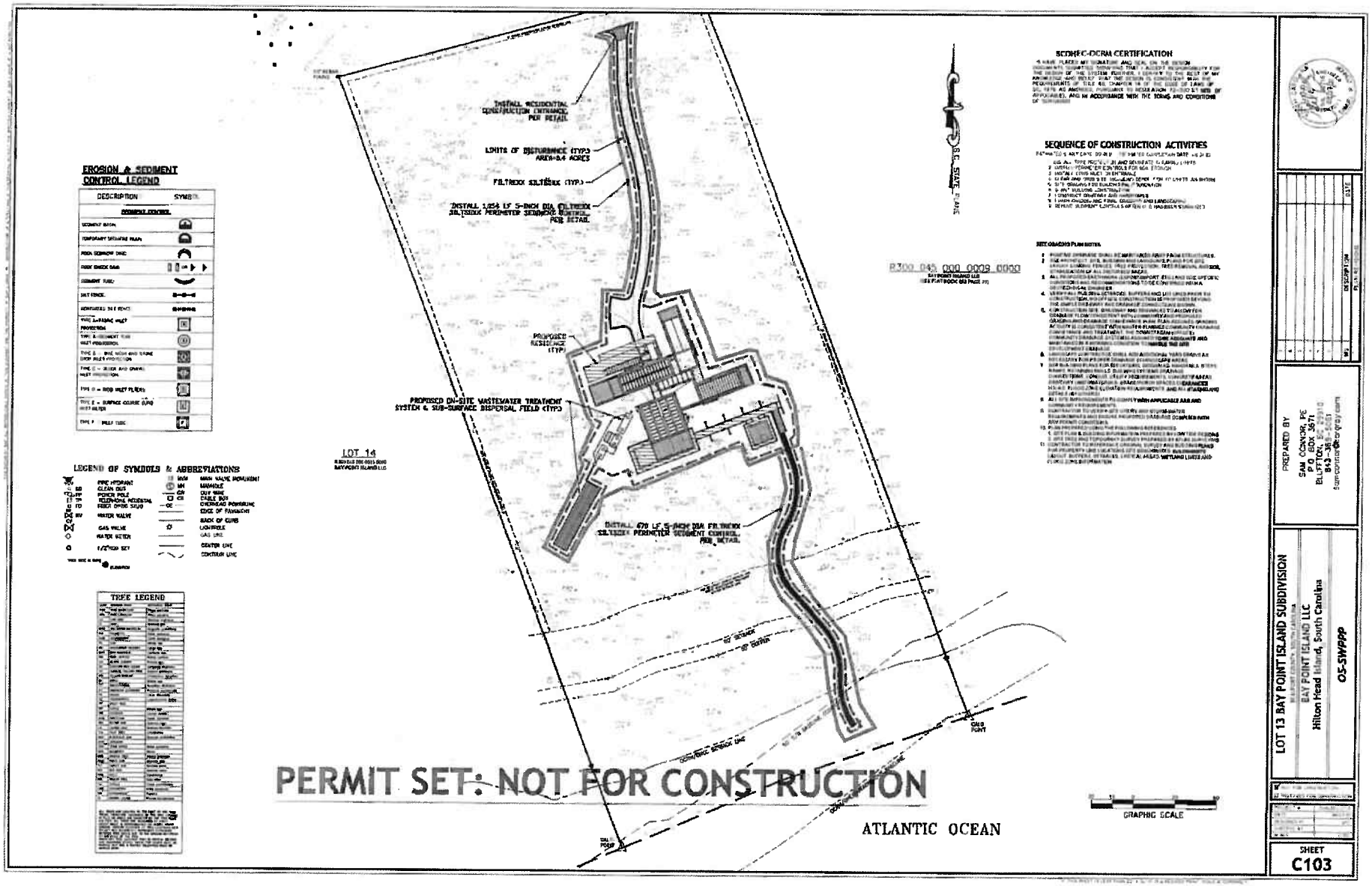
VERTICAL DATUM: NAVD 88

SCHEDULE OF DRAWINGS

SHEET NO.	DESCRIPTION
C101	COVER SHEET (THIS SHEET)
C102	EXISTING CONDITIONS PLAN
C103	ON-SITE STORMWATER POLLUTION PREVENTION PLAN
C104	OS-SWPPP CONSTRUCTION DETAILS
C105	SPECIALIZED ONSITE WASTEWATER SYSTEM PLAN
C106A-B	SPECIALIZED OWS CONSTRUCTION DETAILS

PROJECT #:2106120-LOT13

LOT 13 BAY POINT ISLAND SUBDIVISION



PREPARED BY
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P.O. BOX 3671
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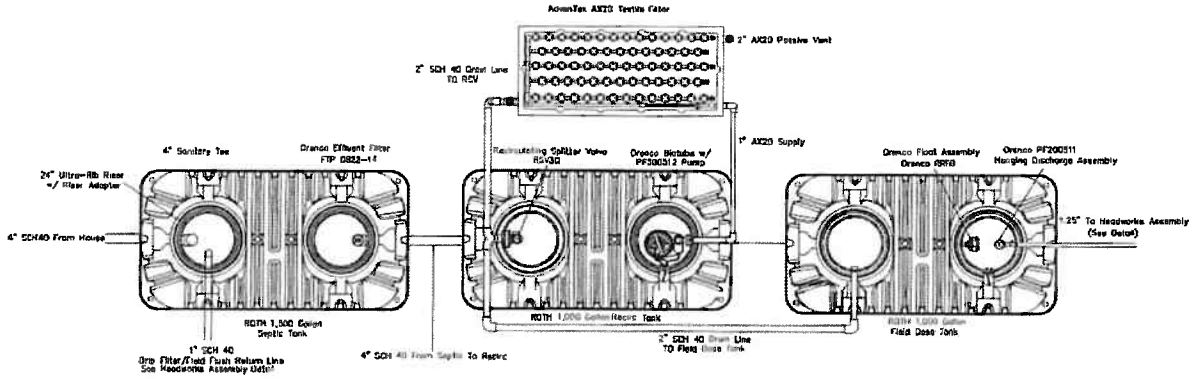
843-368-8003
sam@hiltonheadengineering.com

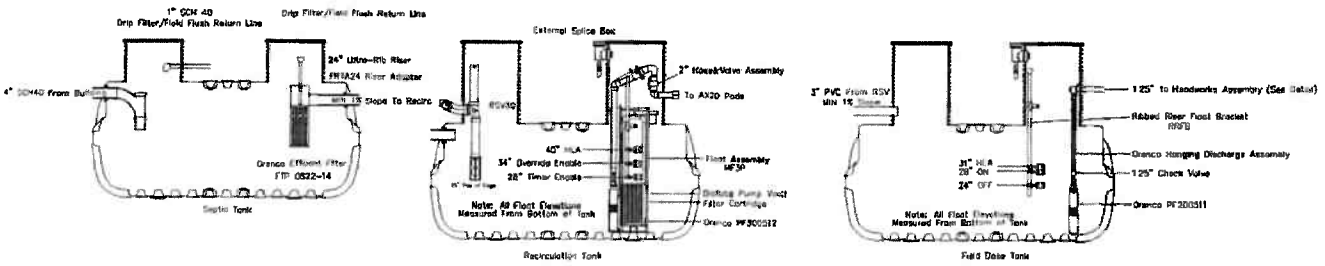
LOT 13 BAY POINT ISLAND SUBDIVISION
BAY POINT ISLAND LLC
Hilton Head Island, South Carolina
OS-SWPPP

SHEET
C103

159



ON-SITE WASTEWATER TREATMENT SYSTEM - TOP VIEW



ON-SITE WASTEWATER TREATMENT SYSTEM - SIDE VIEW

PREPARED BY
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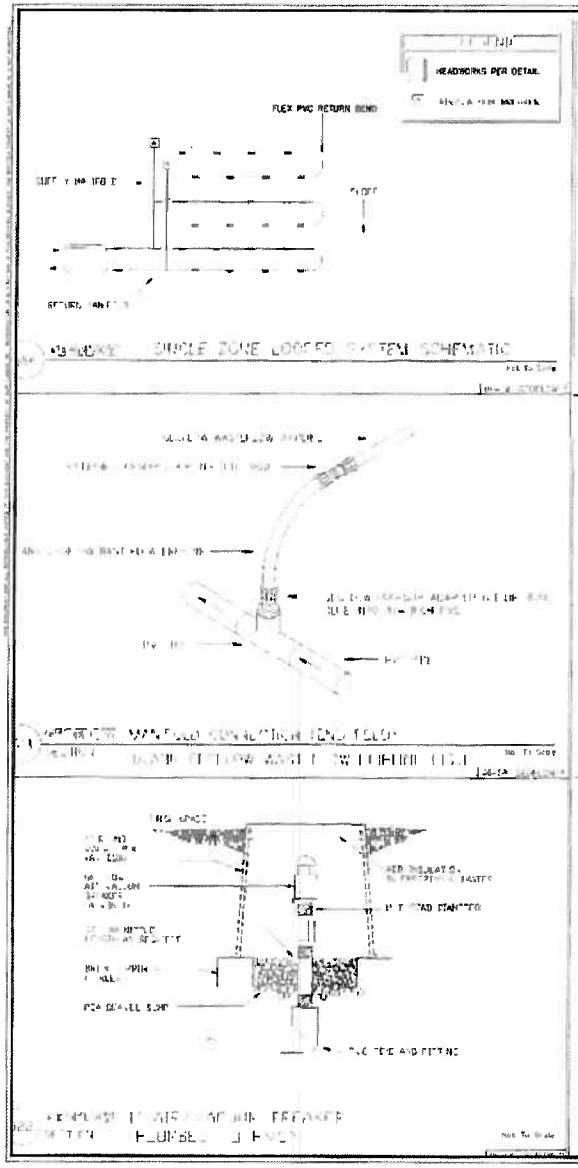
P.O. BOX 3621
BLUFFTON, SC 29910
843-368-5051
samconnor@ctsipco.com

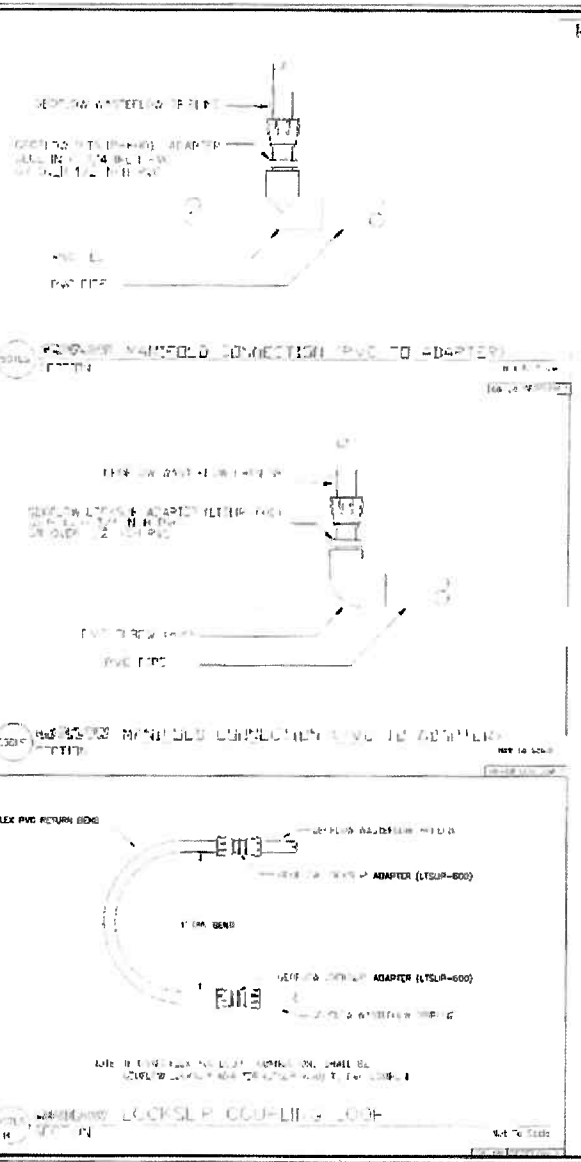
DESCRIPTION | DATE

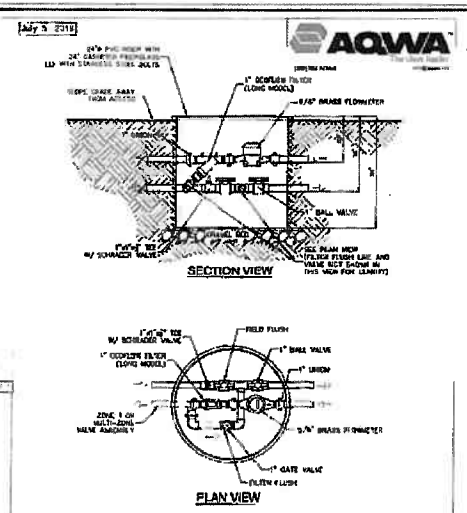
LOT 13 BAY POINT ISLAND SUBDIVISION
BAY POINT ISLAND LLC
Hilton Head Island, South Carolina

SPECIALIZED OWS CONSTRUCTION DETAILS

SHEET
C106A







SINGLE ZONE MANUAL HEADWORKS

LOT 13 BAY POINT ISLAND SUBDIVISION
BAY POINT ISLAND LLC
Hilton Head Island, South Carolina

SPECIALIZED OWS CONSTRUCTION DETAILS

PREPARED BY
SAM CONRAD, PE
P.O. BOX 3871
BLUFFTON, SC 29910
843-368-5051
samconrad@sbcglobal.com

SHEET
C106B

GEOFLOW

SUBSURFACE DRIP

Updated Mar 2015

FIELD FLOW

Job Description:	*Lot 13 Bay Point Island Subdivision*
Contact:	
Prepared by:	*Sam Connor, P.E.*
Date:	*8/27/21*

Worksheet 1- Field Flow

Total field

	Total Quantity of effluent to be disposed per day	480	gallons / day	note
	Hydraulic loading rate	0.9	gallons / sq.ft. / day	note
	Minimum Dispersal Field Area	533	square ft.	note
	Total Dispersal Field Area	600	square ft.	note

Flow per zone

	Number of Zones	1	zone(s)	note
	Dispersal area per zone	600	square ft.	note
	Choose line spacing between WASTEFLOW lines	1	ft.	note
	Choose emitter spacing between WASTEFLOW emi	1	ft.	note
	Total linear ft.per zone (minimum required)	600	ft. per zone	note
	Total number of emitters per zone	600	emitters per zone	note
	Select Wasteflow dripline (16mm)	Wasteflow PC - 1/2gph	dripline	note
		Wasteflow Classic		
		Wasteflow PC - 1/2gph		
		Wasteflow PC - 1 gph		
	Pressure at the beginning of the dripfield	30	psi	note
	Feet of Head at the beginning of the dripfield	69.3	ft.	note
	What is the flow rate per emitter in gph?	0.65	gph	note
	Dose flow per zone	6.50	gpm	note

Note: A few States or Counties require additional flow for flushing. Please check your local regulations.

Flush velocity calculation below is for PC dripline. Classic dripline requires less flow to flush than PC.

Please refer to Geoflow's spreadsheet "Design Flow and Flush Curves" at www.geoflow.com or call 800-828-3388.

	If required, choose flush velocity	2	ft/sec	note
	How many lines of WASTEFLOW per zone?	3	lines	note
	Fill in the *actual* length of longest dripline lateral	205	ft.	note
	Flush flow required at the end of each dripline	1.48	gpm	note
	Total Flow required to achieve flushing velocity	4.44	gpm	note
	Total Flow per zone- worst case scenario	10.94	gpm	note

Select Filters and zone valves

	Select Filter Type	Vortex Screen Filter		note
	Recommended Filter (item no.)	AP4E-1.5F	n Screen Filter 0-20gp	note
	Select Zone Valve Type	None	0	note
	Recommended Zone Valve (item no.)	0	0	note

Dosing

Dosing willl be demand dosed

GEOFLOW
SUBSURFACE DRIP

PUMP SIZING

Job Description:	*Lot 13 Bay Point Island Subdivision*
Contact:	*0*
Prepared by:	*Sam Connor, P.E.*
Date:	*8/27/2021*

Worksheet - Pump Sizing

Section 1 - Summary from Worksheet 1		
Flow required to dose field	6.50	gpm
Flow required to flush field	4.44	gpm
Flow required to dose & flush field	10.94	gpm
Filter	AP4E-1.5F	
No. of Zones	1	zones
Zone valve	-	
Dripline	Wasteflow PC - 1/2gph	
Dripline longest lateral	205.00	ft.

Section 2	Ft of head	Pressure
A. Flush line - Losses through return line		
Select Pipe from dropdown menu	PVC schedule 40	
Select Flush Line Diameter	1" inch	
Length of return line	69 ft.	
Equivalent length of fittings	32.4 ft.	
Elevation change. (if downhill enter 0)	0 ft.	
Pressure loss in 100 ft of pipe	1.40 ft.	0.61 psi
Total pressure loss from end of dripline to return tank	*1.4 ft.*	0.61 psi
B. Dripline - Losses through Wasteflow dripline		
Length of longest dripline lateral	240 ft.	
Minimum dosing pressure required at end of dripline	23.10 ft.	10.00 psi
Loss through dripline during flushing	30.03 ft.	13.00 psi
Total minimum required dripline pressure	*53.13 ft.*	23.00 *psi*
A+B. Minimum Pressure required at beginning of dripfield		
CALCULATED pressure required at beginning of dri	*54.55 ft.*	23.61 *psi*
SPECIFIED pressure at beginning of dripfield (from	**69.3 ft.**	30.00 *psi*
Great! SPECIFIED Pressure is greater than CALCULATED Pressure requirement. Go to next step		
C. Drip components - Losses through headworks		
Filter	5.0 ft.	3.90 psi
Zone valve pressure loss (not in diagram)	- ft.	- psi
Flow meter pressure loss (not in diagram)	16.17 ft.	7.00 psi
Other pressure losses	- ft.	- psi
Total loss through drip components	**21.17 ft.**	10.90 psi
D. Supply line - Minimum Pressure head required to get from pump tank to top of dripfield		
Select Pipe from dropdown menu	PVC schedule 40	
Select Supply line diameter	1-1/4" inch	
Length of supply line	30 ft.	
Equivalent length of fittings	40.5 ft.	
Height from pump to tank outlet	4 ft.	
Elevation change. (if downhill enter 0)	2 ft.	
Pressure loss/gain in 100 ft. of pipe	1.96 ft.	0.85 psi
Total gain or loss from pump to field	*7.4 ft.*	3.19 psi
Total dynamic head	**97.9 ft.**	42.36 *psi*
Pump capacity * - Field Flush Flow	**10.9 gpm**	42.36 *psi*
- Field Dose Flow	**6.5 gpm**	
- Filter Flush Flow	**- gpm**	*- psi*
Pump Model Number	**PF2005-11**	
Voltz / Hp / phase	**120/.5/1**	

CONNOR CONSULTING SERVICES, LLC
ENGINEERING · DESIGN · PROJECT MANAGEMENT

August 31, 2021

Property Owner
98 Bay Point Island Dr.
Beaufort, SC

RE: Specialized Onsite Wastewater System - Operation & Maintenance

Dear Owner,

The management and maintenance of your specialized onsite wastewater treatment system is the sole responsibility of the property owner and must be maintained by a manufacturer certified operator according to the manufacturer's guidelines. Operation and maintenance support for your system is available through the local authorized Advantex Dealer, "AWQA" by contacting them at 252-243-7693, or the system manufacturer, "Orenco Systems" by contacting them at 800-348-9843.

The enclosed documents provide you with the information needed to properly operate and maintain your specialized onsite wastewater treatment system including:

- EPA Homeowners Guide to Septic Systems
- Orenco Systems Onsite Wastewater System Homeowner's Manual
- Orenco Systems AdvanTex Homeowner's Manual Supplement
- Orenco Systems AdvanTex Service Agreement Guidelines
- Orenco Systems AdvanTex Operation & Maintenance Manual - Part 1
- Orenco Systems AdvanTex Operation & Maintenance Manual - Part 2
- Orenco Systems AdvanTex Operation & Maintenance Manual - Supplemental
- Geoflow Sub-surface Drip Design Installation & Maintenance Manual
- SC Regulation R.61-56: Onsite Wastewater Systems

Sincerely,

Sam Connor, PE

10 PINCKNEY COLONY ROAD, SUITE 502 | BLUFFTON, SC 29909 | 843-368-5051 | connorconsultingsc@gmail.com
www.connorconsultingsc.com

Exhibit 2

(to the Notice of Motion and Motion for Summary Judgment)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Pointe Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC **Affidavit of Christopher M. Stout in Support of Respondent Department of Health and Environmental Control's Motion for Summary Judgment**

PERSONALLY appeared before me, Christopher M. Stout, Manager of the Coastal Zone Consistency Section in the Office of Ocean and Coastal Resource Management at the South Carolina Department of Health and Environmental Control ("Department"), being duly sworn, avers and states that:

1. My name is Christopher M. Stout, and I am submitting this affidavit in support of the Department's Motion for Summary Judgment.

2. I have worked for the Department since March 2008 in the Office of Ocean and Coastal Resource Management ("OCRM"). In 2018, I was made the Manager of the Coastal Zone Consistency ("CZC") Section.

3. The CZC Section reviews projects for consistency with the polices of the South Carolina Coastal Zone Management Program ("CZMP"). In my capacity as the Manager of the CZC Section, I am familiar with the law and policies governing coastal zone consistency reviews, including but not limited to the following: the Coastal Tidelands and Wetlands Act (S.C. Code Ann. §§ 48-39-10 et seq.) and the CZMP document.

4. The Coastal Tidelands and Wetlands Act directs the Department to develop a comprehensive coastal management program and to establish regulations and policies for reviewing projects within the Department's critical area authority and within the Department's indirect authority in the coastal zone. The Department has developed such a program which is established in the CZMP document.

5. The CZMP document was enacted in 1979 in accordance with stringent statutory procedures and has been upheld by the South Carolina Supreme Court as valid and enforceable.

6. In Chapter V of the CZMP document, the Department identifies which specific state agency permits are subject to review and certification.

7. The list of permits in the CZMP which are subject to review only includes those permits for wastewater treatment systems or septic tanks that handle more than 1,500 gallons per day or handle effluent other than domestic waste. In other words, the CZC Section does not review permit applications for a wastewater treatment system or septic tank that handles less than 1,500 gallons per day unless it handles effluent other than domestic waste.

8. Based upon my review of Department records, the Department received an application for a specialized onsite wastewater system from Bay Point to serve a four-bedroom residence to be located at 98 Bay Point Island Drive, St. Helena, South Carolina in Beaufort County (the "project").

9. The CZC Section did not evaluate the project for consistency with the policies of the CZMP, because it is a small system that is not listed in Chapter V of the CZMP document as being subject to review and certification.

10. I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.

Further the deponent sayeth not.

Christopher M. Stout

SWORN TO BEFORE me this
27th day of May, 2022.

Sandra R. Wessinger (L.S.)
Notary Public for South Carolina
My Commission Expires: 02-03-2025

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Pointe Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC **CERTIFICATE OF SERVICE**

I, Sandra Wessinger, a Paralegal with the South Carolina Department of Health and Environmental Control, hereby certify that I have this 27th day of May, 2022, served the foregoing ***Respondent South Carolina Department of Health and Environmental Control's Notice of Motion and Motion for Summary Judgment*** on all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, at the address indicated below:

Leslie S. Lenhardt, Esquire
Amy E. Armstrong, Esquire
SC Environmental Law Project
510 Live Oak Drive
Pawleys Island, South Carolina 29464

Mary D. Shahid, Esquire
Nexsen Pruet, LLC
Post Office Box 486
Charleston, South Carolina 29401

Sandra R. Wessinger

May 27, 2022
Columbia, South Carolina

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

Lawyers for the Wild Side

PO Box 1380, Pawleys Island, SC 29585 | (843) 527-0078 |

Executive Director & General Counsel
Amy E. Armstrong | amy@scelp.org

Special Counsel
Michael G. Corley | michael@scelp.org

Staff Attorneys
Benjamin D. Cunningham | ben@scelp.org
Leslie S. Lenhardt | leslie@scelp.org
Michael G. Martinez | mike@scelp.org
Lauren Megill Milton | lauren@scelp.org

Our Mission To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.

June 6, 2022

VIA EMAIL & U.S. MAIL

Honorable S. Phillip Lenski
SC Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Return to DHEC's Motion for Summary Judgment
Bay Point Island, LLC Septic Tank P/N 2106120-Lot13

Dear Judge Lenski:

Please find enclosed Petitioner's Return to DHEC's Motion for Summary Judgment in the above-referenced matter. Thank you for your kind consideration.

Respectfully,

Leslie S. Lenhardt
Staff Attorney

enclosure
cc: Sara V. Martinez, Esq.
Mary D. Shahid, Esq.

Board of Directors - Allen Grumbine, Esq., Chairperson, Lisa Allen, Barbara Burgess, Esq., Amy Fabri, Rajan Govindan, Angela Halfacre, PhD, Marilyn Hemingway, Susan Hilfer, William Holt, MD, Elizabeth Igleheart, Bess Lochocki, Esq., Justin Lucey, Esq., Clarkson McDow, Esq., Walton McLeod, Esq., Gerald Schulze
Board Member Emeriti - Frances Close, John Mark Dean, Robert Schofield

Printed on recycled paper

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health & Environmental Control and Bay Point Island, LLC, Respondents.	)	Docket No. 22-ALJ-07-0008-CC **PETITIONER'S RETURN TO RESPONDENT DHEC'S MOTION FOR SUMMARY JUDGMENT**

In its Motion for Summary Judgment, DHEC states without citing any legal authority that the phrase "shall have the authority" in S.C. Code Ann. § 48-39-80(B)(11) does not mean it is "required" to review permit applications. This interpretation fails in a number of ways.

I. Rules of Statutory Construction Mandate That A Statute Must Be Considered as a Whole In Light Of Its Legislative Intent, And DHEC's Interpretation Is Contrary to the Legislative Intent of the CZMA.

First, DHEC's argument ignores the preceding text of the statute, which must be read in context with subsection (B)(11):

> The department *shall develop* a comprehensive coastal management program, *and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter* and any rules and regulations promulgated under this chapter. In developing the program the department *shall*:
>
> (A) Provide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas.
>
> (B) In devising the management program the department *shall* consider *all lands and waters* in the coastal zone for planning purposes. In addition, the department *shall*:
>
> > (11) Develop a system whereby the department *shall* have the authority to review all state and federal permit

> applications in the coastal zone, and to certify that these do not contravene the management plan.

S.C. Code Ann. § 48-39-80 (emphases added).

"The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260 (2005), citing *Jackson v. Charleston County School Dist.,* 316 S.C. 177, 181 (1994). "It is well-established that this Court will not construe a statute by concentrating on an isolated phrase." *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox,* 308 S.C. 171, 174 (1992) ("In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent."). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260 (2005).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature." *Johnston v. LLR*, 365 S.C. 293, 296 (2005), citing *Hodges v. Rainey,* 341 S.C. 79 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85 (2000), citing Norman J. Singer, *Sutherland Statutory Construction*, § 46.03 at 94 (5th ed. 1992). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Amisub of S.C. v. DHEC*, 407 S.C. 583, 597–98 (2014), quoting *State v. Sweat,* 386 S.C. 339, 350 (2010). DHEC's interpretation of its obligations under the state is contrary to the language and legislative intent for the CZMA.

II. DHEC's Interpretation Is Not Shielded By the Deference Doctrine Because It Is Arbitrary, Capricious, and Manifestly Contrary to the Statute.

"As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" *Kiawah Dev. Partners, II v. DHEC*, 411 S.C. 16, 34 (2014), quoting *Coastal Conserv. League v. DHEC,* 363 S.C. 67, 75 (2005). "Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation *absent compelling reasons*. We defer to an agency interpretation *unless it is "arbitrary, capricious, or manifestly contrary to the statute*." *Id.* at 34-35, quoting *Chevron v. Nat. Resources Defense Council,* 467 U.S. 837, 844 (1984) (emphases added).

Here, DHEC's unsupported interpretation of the CZMA is both arbitrary and capricious, because it is manifestly contrary to the clear language of the statute. Black's Law Dictionary defines "authority" as "[a]n official organization or government department with particular responsibilities and decision-making powers." AUTHORITY, *Black's Law Dictionary* (11th ed. 2019). As such, the use of the word "authority" simply refers back to the previous text of the same section of the statute providing that the tasks enumerated in the CZMA are to be overseen by DHEC and no other administrative, regulatory, or other governing body, i.e. "[t]he department shall . . . thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter[.]" Case law supports this contention. *See, e.g.*, *Kiawah Dev. Partners, II v. DHEC*, 411 S.C. 16, 35 (2014), citing S.C. Code Ann. § 48-39-80 (2008) ("Under the CZMA, DHEC was required to develop a comprehensive coastal zone

management program—the CZMP—for the coastal zone, and was given responsibility to enforce and administer the CZMP.").

The words in the preceding and following clauses are also instructive: "[DHEC] shall . . . [d]evelop a system . . . to review all state and federal permit applications[.]" The word "shall" is used seven (7) times within § 48-39-80, and five (5) times in the context of Subsection (B)(11). Black's Law Dictionary further defines "shall" as "[h]as a duty to; more broadly, is required to." SHALL, *Black's Law Dictionary* (11th ed. 2019). The term "shall" in a statute means that the action is mandatory. *Johnston v. S.C. LLR*, 365 S.C. 293, 296–97 (2005), citing *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100 (2003); *Charleston County Parents for Pub. Schools v. Moseley*, 343 S.C. 509 (2001). This contention is also supported by case law. *See, e.g., Spectre v. DHEC*, 386 S.C. 357, 360 (2010) ("In developing the CMP, DHEC was required to develop a system whereby it was authorized to review all State and federal permits for compliance with the CMP.").

Based on the foregoing, Petitioner respectfully request this Court deny Respondent DHEC's Motion for Summary Judgment.

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

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June 6, 2022

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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, v. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	)	Docket No. 22-ALJ-07-0008-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I have served Petitioner's Motion for Summary Judgment by depositing same in the U.S. Mail to the parties addressed to:

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June 6, 2022

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc.., Petitioner, vs. South Carolina Department of Health and Environmental Control and Bay Point Island, LLC, Respondents.	Docket No.: 22-ALJ-07-0008-CC **RESPONDENT BAY POINT ISLAND, LLC'S RETURNTO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Respondent Bay Point Island, LLC ("Bay Point") and respectfully submits this Return to the Motion for Summary Judgment filed by Petitioner.

As Petitioner did with the Response it filed to Bay Point's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Petitioner has now used a Motion for Summary Judgment to register complaints about the septic tank permitting process currently used by DHEC. Bay Point completely agrees with the point raised by DHEC's Motion for Summary Judgment that Petitioner's sole argument as to the merits of the Permit issuance here is an alleged failure by DHEC to conduct a coastal zone consistency review. While Petitioner may not agree with S.C. Code Reg. 61.56, it has not alleged that DHEC failed to properly follow it. That is supposed to be the basis of Petitioner's challenge.

Petitioner has not made such allegation because there is no basis in this case for it. As argued by DHEC in its Motion for Summary Judgment, though the plain language of S.C. Code § 48-39-80(B)(11) confers authority upon DHEC to all review permit

applications, it does not state any requirement for DHEC to do so. As DHEC's Motion explains, it exercises the authority so conferred upon it pursuant to the guidance of Chapter V of the South Carolina Coastal Zone Management Program document, which identifies permits subject to DHEC's review.

Apparently, because S.C. Code § 48-39-80 lacks the actual language Petitioner wants, most of Petitioner's Motion for Summary Judgment is an attempt to distract attention from this fact with argument about what it wants the procedure to be while ignoring what it is. Again, it is imperative to keep in mind that the issued permit is for a single four-bedroom residence proposed for construction on a single lot on Bay Point Island, which involves a system that would handle less than 1,500 gallons of domestic waste per day. The applicable procedure did not require DHEC to do a coastal zone consistency review as part of the application process, and Petitioner's Motion fails to show how any of the plain language of S.C. Code § 48-39-80, and particularly subparagraph (B)(11), which it reproduced with emphasis, must be interpreted as requiring it.

Finally, Bay Point has already refuted Petitioner's arguments regarding public notice in the Reply to Petitioner's Response to Bay Point's Motion to Dismiss. While Bay Point's application was not subjected to publication of notice to the general public, there is a clear procedure established by the General Assembly by which Petitioner could have requested notice. This procedure certainly is an avenue for the general public to obtain adequate notice in full satisfaction of the fundamental requirements of due process. Petitioner has not shown this established, statutory procedure to be inadequate. Here, again, Petitioner has ignored the plain language of the authority to which it has cited, which refers only to "notice." Petitioner uses the term "public notice" and then conflates

that to publication of notice, even though Petitioner has no authority establishing any such requirement.

As Bay Point has already explained in its Reply, Petitioner could have used the existing procedure to request notice, as any member of the general public affected by the permit could have done. Bay Point has previously pointed out that Petitioner could have submitted this request to DHEC in addition to its FOIA requests. In short, current procedure did afford Petitioner and the public a method for obtaining notice. Petitioner has failed to demonstrate any violation of its due process rights.

For all the foregoing reasons, Bay Point respectfully requests that this Court deny Petitioner's Motion for Summary Judgment.

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June 6, 2022

Charleston, South Carolina

Transcript of the Testimony of
Gullah / Geechee v SC DHEC

Date: September 13, 2022

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 22-ALJ-07-0008-CC

Gullah/Geechee Fishing Association, Incorporated,
Petitioner,
v.
South Carolina Department of Health and Environmental Control and Bay Point Island, LLC,
Respondents.

MOTIONS HEARING

****

Monday, June 20, 2022
10:09 a.m. - 10:59 a.m.

The motions hearing before the Honorable S. Phillip Lenski was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Columbia, South Carolina, on the 20th day of June, 2022 before Nadine A. Garrett, Court Reporter and Notary Public in and for the State of South Carolina.

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EXHIBITS

(No exhibits were marked during this hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.

CALL TO ORDER:
THE COURT: Good morning. I am Phil Lenski, the Administrative Law Judge assigned to this case. And this is the matter of Gullah/Geechee Fishing Association, Incorporated, Petitioner, versus the South Carolina Department of Health and Environmental Control and Bay Point Island, LLC. Docket Number 22-ALJ-07-0008-CC. And 20th of June.
Representing the parties today for the Petitioner we have Ms. Lenhardt.
MS. LENHARDT: Yes.
THE COURT: How are you?
MS. LENHARDT: Good morning.
THE COURT: Good, good. And with you today?
MS. LENHARDT: This is Emily Nellermoe. She's one of my colleagues.
MS. NELLERMOE: Good morning, Your Honor.
THE COURT: Good morning. How are you doing?
All right. And then on behalf of Bay Point today we have Ms. Shahid. How are you doing?
MS. SHAHID: Nice to see you.
THE COURT: And do you have someone with you or ...
MS. SHAHID: Angelica Colwell.

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BYTHE COURT: Okay. How are you? Welcome.
And then for the Department, good morning.
MS. MARTINEZ: Hello, Your Honor.
THE COURT: Ms. Martinez, right?
MS. MARTINEZ: Yes, Your Honor. And I have Christopher Whitehead as well.
THE COURT: How are you? Good to see you again.
MR. WHITEHEAD: How you doing, Your Honor?
THE COURT: All right. Everybody okay? Do we -- my understanding, we had this scheduled for a hearing, but with all the motions, this is just going to be a hearing on the motions at this time. That was -- my understanding, that's what the parties all agreed, because we have three motions, as I understand. We have a motion to dismiss, then we have some cross motions for summary judgment. So do the parties have a preference how we take those up? I mean, take them up in the order they were filed or how do you want -- does anybody have a thought on that or what?
MS. LENHARDT: Haven't consulted on that. But it would seem to me to be logical to handle the motion to dismiss first, since it ---
THE COURT: That seemed logical to me, as well.

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Although, if you wanted to do it a different way, I would certainly be flexible and do it. Then let's go with that, then. We'll take the motion to dismiss first. Is everybody ready to proceed? Okay.
MOTION TO DISMISS BY MS. SHAHID:
MS. SHAHID: And, Your Honor, I'm the moving party in the motion to dismiss. I represent Bay Point Island, LLC. The island itself is located in Beaufort County, and it's a large sea island. Not the size of Hilton Head or Fripp, not that kind of large, but it's a big island. It's privately owned, and I represent the owner.
And the owner -- there's some by-right development rights, but I don't want to stray into that, because another lawyer handled some zoning issues for them with Ms. Lenhardt, and she might be way better versed on what the zoning rights are now. But I know under the county rules, there's an ability to put several residential lots out there. All that my client has done is he's seeking approval for one individual septic tank for one planned residence.

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And he obtained a permit for a septic tank, those are issued by the Bureau of Environmental Health within DHEC. Sometimes the Bureau of Environmental Health is a field office, so it would be located in Beaufort. Sometimes it's Columbia. I'm not sure, with all the changes in state budgeting, how that works now. But at one point I do know that Beaufort had a field office.
And the purpose -- the septic tank purpose is for DHEC to go out and assess a residential lot that has no available sewer connections and make sure that the soils are suitable to do on-site wastewater by way of a septic tank. Septic tanks are a pretty ubiquitous use in areas that are rural, that, where sewer lines haven't made it to certain areas, of course there'd be either septic tanks or your own wastewater system on some of these islands are required. But it's a common use in the state of South Carolina. I would say tens of thousands of homes are dependent on septic tanks because, even when sewer becomes available, when the lot -- when there's more development and the line comes to your street,

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you don't have to tie in, unless everybody on the street wants to connect. So it's a common method of wastewater collection, treatment, and disposal. And DHEC probably issues tens and tens of thousand of permits a year for new septic tanks.
So our client obtained a permit for a septic tank. It was issued September -- for one residence, Your Honor, for less than -- about a thousand gallons per day collection. And it was issued September 23rd, '21st -- 2021. According to the procedures set forth in 44-1-60, you have a 15-day window where the permit is in limbo, it's not final. And it's during that 15 days that you can invoke your administrative procedures and challenge the permit. At the conclusion of 15 days, if nobody has challenged the permit, it becomes final. There's finality -- it's a final Agency decision. And as a final Agency decision, it can no longer be challenged administratively. It's possible there may be certain judicial challenges that could be brought or -- I don't even know if that's the case, Your Honor, but I know there's administrative finality. I

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mean, there might be a trespass or a nuisance case or something that could be envisioned outside of permitting, but ...

So administrative finality is an important context because you cannot perform a permitting action, issue a permit, and then have this sort of indefinite limbo where nobody knows if an administrative challenge, you know, is going to be made or not. Nobody can go ahead and implement the permit without administrative finality, so it's a very important concept. And we had administrative finality as of October 8th, 2021. The Gullah/Geechee Fishing Association did not attempt to challenge this case until 57 days later, on January 24th, '21. Well, that might be '22, Your Honor. January 24th, 2022. And that's when they filed the contested case, Your Honor.

So prior to that, they attempted to file with the Board of Health of Environmental Control, because that, of course, is the starting point for a challenge. And the Board, of course, denied review. We filed in response to their filing with the Board and we've made the same arguments to you, that the Board

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didn't have jurisdiction after the 15 days were up and the 15 days were up. Your Court, the Administrative Law Court, doesn't have jurisdiction once there's administrative finality. And what the Gullah/Geechee Association -- Fishing Association says is, we invoked FOIA procedures, we had pending FOIA request with DHEC to make sure we got notice of any issuance of a septic tank permit. And I would argue, Your Honor, that 44-1-60 has a process which pushes -- puts the burden on interested parties to contact DHEC to obtain notice of a permitting decision. And a FOIA request is not the same thing as seeking specific notification under 44-1-60 of a permitting decision. A FOIA request is a request for information, but not for purposes of pursuing administrative remedies. 44-1-60 is for an interested party to contact DHEC and say in writing, please give me notification of any decision you have on that. And the Gullah/Geechee Fishing Association did not do that. Instead they relied on FOIA.

The interesting thing about FOIA for that purpose is it's not suited to that purpose.

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The FOIA statute allows the Agency ten days to respond to receipt of the statute and say we're working on it, and then 30 more days to work on it. So you've got a 40-day window, and they're not required to respond any earlier than that 40-day window.

And then there's other things about FOIA statute that were not properly invoked by the Gullah/Geechee Fishing Association. If you're going to rely on FOIA for notice, the form itself says, let me know the appropriate division within the Agency that would handle this permitting, identify that division. And that's because DHEC is the largest agency in the state of South Carolina and it's administering multiple functions, including health and environmental functions, so it asks for a little help. Don't just name one of our thousands of employees. Tell us who would be processing this. And in this instance, instead of identifying the Bureau of Environmental Health, the Gullah/Geechee Association identified the Bureau of Water, which does nothing with septic tanks, and the Office of Ocean and Coastal Resource Management, which

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does nothing with septic tanks.

So putting aside the fact that there was no right of reliance on FOIA to get notice of a permitting decision for purposes of a timely appeal, putting that aside, there wasn't even a proper invocation of FOIA upon which to rely for timely notice, because the forms were sent to the wrong offices, so we don't believe this contested case can proceed. We believe administrative finality is an important function that dictates whether this Court has jurisdiction or not. And that the administrative remedies were lost by an extremely late filing of a notice for review by the Board and then notice of request for a contested case, Your Honor. We ask that this Court dismiss the case.

THE COURT: Thank you.
MS. LENHARDT: I don't know if DHEC had any.
THE COURT: Did the Department have anything to add to that or ...
MS. MARTINEZ: Not at this time, Your Honor.
THE COURT: Okay. Thank you.
MS. SHAHID: Your Honor, I did give you a bad date.
THE COURT: Okay.

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MS. SHAHID: The request for a contested case was filed 11/24/21, not 1/24/21, but 11 ---
THE COURT: November, not -- okay.
MS. SHAHID: I couldn't read my writing.
THE COURT: That's all right. Got it. Thank you. All right. Ms. Lenhardt.
RESPONSE TO MOTION TO DISMISS BY MS. LENHARDT:
MS. LENHARDT: Thank you, Your Honor. Leslie Lenhardt on behalf of the Petitioner today. If you'll indulge me, I'd like to give you kind of a hypothetical example of how not only this situation occurred and the prejudice to us, but also how it can be a slippery slope where you could have this happen and have a lot of damaged people and injury to people more than just this case.
So let's just say that my mother-in-law bought her property in the Lowcountry in a very low-lying area in Charleston County and her house is situated on the far side of her lot. She has, as they do, many in rural South Carolina, she has a small pond in front of her house that she uses, her grandchildren fish and swim in. And she also has a well and she's got a septic tank system. And she's lived there

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for 40 some odd years and then -- you know, the next door property is undeveloped. And she hears from a neighbor down the road that somebody has bought the property and that they're intending to build a house. And she knows from years of living in the Lowcountry the problems that septic tanks bring. Generally the soils are sandier, you have a big storm, and septic tanks fail all the time. People don't even, you know, maintain them properly in many cases. And so she's concerned.
So she knows that DHEC issues septic tanks, so she calls over to DHEC, somebody she knows, and says I want to find out about a septic tank. They say submit a FOIA request, so she does that. And they wait almost two months and then DHEC says they don't have any for that lot. So she says, well, I guess they're not going to do -- they're not going to develop it or the plans have changed or whatever. And then construction shows up next door and they install a septic, tank and the house is situated right next to her lot, and she doesn't let her grandchildren swim in the

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pool (sic), because she's worried about the damage of a failing septic tank system, and she tried to get knowledge of it and she wasn't able to do it. And someone like her is not going to know that you have to -- or not even that you have to, but, you know, to say pursuant to 44-1-60 specifically. But she wanted to know whether or not there was one, and she asked under FOIA to get notified. And that is many similarities of what we have here in this case with the Bay Point septic tank.
And it's a series of failures on DHEC's part that brings us here today and not because of the Petitioners. The Petitioners made good-faith efforts to protect its constitutional rights to due process for notice and an opportunity to be heard and judicial review, and this all happened at a point at which they had no way to know and no knowledge of any steps that were being taken by the developer. And Ms. Shahid's correct, that there is -- Bay Point Island's a large island and there is -- and this is a public record, that the developer had plans to develop a luxury resort. It was a 50-acre portion of the

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property.
There was a zoning decision denying approval. And the Fishing Association intervened and that has been affirmed by Judge Dukes in Beaufort County. But there are also over a dozen individual lots that are platted. And they do have, you know, certain rights to do what -- you know, build single family homes on the property. But at the time, in the summer of 2021, there was no way to know if they were going to develop them in a phase, if they were going to develop them one by one, and so there was a number-one FOIA request.
And so -- actually, go back. I mean, we -- I think there was maybe a possibility or -- the Respondents have raised the possibility that we should have said to DHEC, we want you to be notified -- we want to be notified pursuant to 44-1-60. For what; for any and all permits issued to Bay Point that had been or will be in the future? Who do you send that to? Do you send it to the director? Is there a land disturbance permit? We didn't know. So under a very valid legal avenue, the Petitioner asked for permits for, at that point, land

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disturbance, any certifications. Did not mention septic tanks, admittedly. And DHEC responded and said, we have some things, but it had to do with an old fishing camp house that was falling in the water, it didn't have anything to do with development of new lots.

So then there was another FOIA request. And at this point DHEC knows that the Fishing Association is asking for this stuff. And we say, we want septic tank permits. And there has -- Ms. Shahid has argued that the form -- it sounds like she was arguing that the form requires you identify the particular bureau. However, the form says identify the bureau or agency if known. The Bureau of Environment Health was not identified, but for a member of the public to know all of the numerous and many bureaus contained within DHEC, a member of the public should not be charged with that. That was DHEC's responsibility. And it wasn't like we asked for one employee's work. We asked for septic tanks. And if the FOIA office can't be responsible for identifying the portion of the Agency that's responsible for septic tanks, then that's -- we feel like that's not

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appropriate to put the burden on the property owner.

So again, as for septic tanks specifically -- and that was done in -- on August 31st of 2021. On August 31st, 2021 Bay Point submits a septic tank application. So it was received the same day in the Agency's possession. We get zero response within the ten-day window. And on October the 20th, which was almost a month after, the septic tank was actually issued on September 23rd. We get a FOIA response saying we don't have anything.

Now, from the time that the application was submitted and the FOIA request was submitted, there were at least four documents. There was a request for additional -- there was the application request for additional information, a response from Bay Point and the permit. And even after the time frame, they told us they didn't have anything. So we found out about the permit from Beaufort County when we were looking to find a building permit from them. And we found that out on October the 27th, so a week after. They said they don't have anything, and then we filed a request for

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final review 14 days after that, actually in November. That was the -- with the Board. So we initiated our appeal in November and not January, and then we came to you in the time frames we have -- we complied with.

So in many situations in which I think a member of the public would be charged with notice or would be charged with constructive notice, as you are well aware, there are procedures for public notice of applications. Many, many, many of -- the vast majority, I would say, are placed on public notice, they're published on their website, they're published in newspapers, you have an opportunity to discover that. And many of the permits are put on DHEC's website, where you can do a GIS location search. And the Fishing Association was monitoring and trying to find out what was happening, because they were involved in the zoning. It was publicize. It was a big, news-worthy matter. But DHEC doesn't put septic tanks on public notice, so there was no way for the -- I believe there's no legal way to charge Bay Point with knowing that or requesting going through the process that is

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required by 44-1-60. We had a choice of sending a broad, nonspecific, vague request to be notified under a statute that doesn't require you to site the statute or go through FOIA, which is what anyone would do if you were to ask for public documents.

So I think the basic -- the more to-the-point point that we want to make is, we cited to the Coastal Conservation League versus DHEC case in our brief, Ports Authority case in which the Supreme Court noted and declined to set forth a procedure where you become an affected person who's requested in writing to be notified. I know -- you know, the practice is -- certainly for someone who's represented by counsel who does that, to cite it, because that -- you know, that's a good practice, but it's not required, and so there's no definition of how or procedure for how you become an affected person. We take the position that you can become an affected person under 44-1-60 without citing to the statute. And DHEC knew that we were asking to be notified of these decisions through FOIA. And, Your Honor, I would give you the cite, but we've cited that

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case in our ---
THE COURT: In your brief.
MS. LENHARDT: --- in our brief. Yes, Your Honor.
And one thing that was raised in the brief that Bay Point highlights, it says that the Petitioner cites to nothing, establishing that documents are considered as existing or in the possession of the Agency as of the day of receipt. I don't think that needs any proof. I mean, the process that happens with FOIA, they receive a request and then they go to the Agency and ask for it. Well, it was there. So, you know, while we understand that Your Honor cannot declare or issue a remedy under FOIA, that would be for the Circuit Court, what we're arguing is that you do still have jurisdiction, because when -- we should have been sent notification and we were not.
And then let me see if I have any responses to -- I think I've covered everything. And we certainly do rely on our return to the motion and any briefs.
THE COURT: Of course.
MS. LENHARDT: Thank you.
THE COURT: Thank you.

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Any response?
REPLY TO MOTION TO DISMISS:
MS. SHAHID: I few things, Your Honor. And also I think Mr. Martinez would like to respond to, based on ---
THE COURT: Of course.
MS. LENHARDT: --- some of the arguments that came out in response.
You'll notice that the whole hypothetical is premised upon failed septic tanks. And first of all, that's a factual issue. But I think another way to look at this is the use of septic tanks is an acceptable use when sewer is not available to handle wastewater. The ability to handle wastewater is criterion for getting your lot approved and getting your building permit issued. So it's just this building block of, you know, making sure that you're complying with all applicable ordinances. You can't come into this discussion on the premise that this is a failed septic tank. My understanding is that septic tanks that are maintained and that are -- where the soils are determined appropriate, is a very passive and environmentally friendly way to

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handle wastewater, as opposed to a direct discharge into a water body. So I don't think we can premise our arguments on somebody should have gotten notice, because this is a major environmental concern, because I don't think that's accurate. I think it is undisputed that, if you don't maintain, you could run into problems. But properly maintained are appropriate ways to handle wastewater.
And all I'm saying is, I think that if you want notice of a prospective or current ongoing review permit decision, you utilize 44-1-60, you write to the bureau or division within DHEC that is handling the permit, and you ask to receive notice. If they fail to give you notice, I think we're in a different position. But we're in that position, Your Honor. They didn't invoke that remedy, they relied on FOIA for something that it's not intended to be used for, which is making sure you timely file an appeal. And I know that Ms. Martinez wants to add to my arguments. Thank you, Your Honor.
THE COURT: Yes. Absolutely.
RESPONSE TO MOTION TO DISMISS BY MS. MARTINEZ:
MS. MARTINEZ: Thank you, Your Honor. May it please

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the court. I just want to do an add-on a little bit of context from a DHEC standpoint.
The Petitioner's alleging that they're not required to request notice pursuant to 44-1-60, because these aren't -- they did a FOIA, right, and they say DHEC knew. As Ms. Shahid said, that just misses the point, that 44-1-60 requires an affected party. However, you know, nobody's arguing whether they are or they aren't at this point an affected party, but it requires an -- let's just assume they are. It requires an affected party to request written notice of the permit pursuant to 44-1-60. It doesn't say submit a FOIA request.
And I just want to point out that, if this Court were to require us to treat -- DHEC to treat every FOIA request as a request for notice of any permits issued, that would lead to an absurd result. And I think that there's clear case law that -- you know, there's an interpretation of a statute that's unpractical and unreasonable, that the Court should go against it. And I think that's the issue here.
I mean, I -- if you want to throw out hypotheticals, I'll through out some too, just

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questions. You know, what about the exorbitant amount of FOIA requests that we get all the time for -- we want -- we're doing a phase 1 assessment of this property and we want every document related to this site? And sometimes they don't say they're doing a phase one, they just say we want all documents related to this site. I get tens of thousands of those. I mean, I get a weekly report now from our FOIA department because there's so many FOIAs that come in, just strictly environmental. And the number of those alone or, you know, what are the septic tanks on this site, we want everything on this site because we're looking at septic tanks, I can't treat all those as a request for notice of a permit. You know, how are we supposed to track these requests if they come in and they say, I want a FOIA request? You know, they came in on the same day. The time here is interesting, because the FOIA request came in on the same day as the permit app. You know, how are we supposed to track every FOIA request that's ever come in? Just how long are we supposed to track that, for years? Five years? Ten years? It just would

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be absurd. I think that's why 44-1-60 is its own separate process that -- it says, written request for notice of permit. And if you get that to DHEC, we'll abide by it.

You know, she mentions public -- you know, the Petitioner mentioned public notice of septic permits. There's tens of thousands of these, as Ms. Shahid said. You know, that issue's kind of already been talked about by the ALC alone that we don't put those on -- there's no requirement to put those in public notice. We have several statutory and regulatory programs that require public notice. You know, the MRR Pickens case was a landfill case that went up to the Supreme Court. And in that case it was a distinction between a minor modification and a major modification permit, because if it's major we let you know, but if it's minor, we don't public notice those. And nobody challenged that we don't public notice minor modifications. But you know what the MRR Pickens case said, it said actual notice isn't a trigger. So in that case they never requested a written notice of any permitting decision. So even if it were major, did they

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request that notice? They have now, but, you know, the MRR Pickens said 15 days is 15 days. Actual notice wasn't a trigger.

Because CCL was one where they requested it -- the Court actually went the other way and said, no, you know, actual notice isn't a trigger, so when you find out -- that was the one where they said, you know, we found out that ten days later that this permit was done, so we didn't know about it to challenge. Well, in MRR DHEC tried to use it ourselves to say, you know, actual notice should have triggered this, because they did have notice and they didn't file until 200 days after a notice. And the Supreme Court said, no, we already told you in CCL and now we're telling you again, actual notice was not a trigger. So I think that's kind of off the table that, you know, when they found out from, you know, Greenville -- I mean, from Beaufort County that there was a permit here.

I just -- it's very important to DHEC that these issues don't become a thing where, you know, we have to treat anybody calling or talking to anybody, particularly FOIA, which is

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a completely separate department that processes thousands of these things, to be treated as a written request for notice under 44-1-60, Your Honor.

THE COURT: Thank you.

MS. MARTINEZ: Thank you.

THE COURT: Ms. Lenhardt.

REPLY TO MOTION TO DISMISS BY MS. LENHARDT:

MS. LENHARDT: Just a couple in response to Ms. Martinez. I would just say that I don't think the Petitioner's arguing or that we're asking this Court to say that under every circumstance that a FOIA constitutes a request under 44-1-60. I think what we are faced with here is a permitting program that does not notify the public. And we had not even -- we did not even know what -- almost didn't know what we were looking for. We were afraid of different permits being -- so we did that process.

And I would -- you know, I would also say that, if DHEC is saying, well, there are a lot of FOIA requests and there are lots of septic tank permits, it's just going to be too much trouble, then I don't think that's a basis to not comply with -- the whole purpose of FOIA

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is, again, to be transparent and to provide public documents to the public. So I think that's it. Thank you.
THE COURT: Thank you. I think that concludes argument on our Motion to Dismiss. So shall we move to the Summary Judgment motions at this time?
In terms of order -- of the time in order, I believe it was -- the Petitioners had filed their Motion for Summary Judgment first in time. I mean, do we want to handle them one at a time or combine them? It doesn't matter to me how we do that, but ...
MS. MARTINEZ: I don't think they're cross motions. I think we can talk and -- I mean, you're going to present your motion in response to my motion. I'm going to present my motion in response to your motion, so I think that either way, you know, if you want to go first, Leslie.
MS. LENHARDT: We don't need to say it all twice, I guess.
THE COURT: That makes sense to me as well, although I want to make sure that that was -- that everybody was comfortable with that. So, yes, let's just go ahead and -- we have cross

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motions for Summary Judgment.
And, Ms. Lenhardt, since you were the -- since your client was the person who filed -- the group that filed the first motion, you want to go ahead and make your argument?
MOTION FOR SUMMARY JUDGMENT BY MS. LENHARDT:
MS. LENHARDT: Certainly. Thank you, Your Honor.
So if we survive the motion to dismiss, I think we -- there is no dispute as to the basic facts in this case. There was a septic tank permit issued. There was no coastal zone consistency certification and there was no public notice of the application. And what we are taking the position here today -- and, again, we rely on our briefs, but we take the position that the Coastal Management Program was created pursuant to the Coastal Tidelands and Wetlands Act, also known as the Coastal Zone Management Act. And it was a mandate to create two separate programs. One is a direct regulatory permitting program for direct impacts to the critical area. And then the legislature, recognizing that, outside of the critical area, but in the eight coastal counties there needed to be a process whereby

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DHEC is to review all state and federal permits that are issued because of the policies in the Act, which identify and recognize the unique environmental issues that come with being in the Lowcountry and in the eight coastal counties.
The -- and it is true that the Coastal Management program does purport to exempt consistency review for septic tanks under, I think, 1,500 gallons. But our position today is that the Act requires them to certify those. And the language that DHEC relies on to say that they don't have to have to do it, they can certify whatever they want, is contrary to the intent of the legislature. The statute says shall develop -- the Department shall develop a comprehensive coastal management program and thereafter have the responsibility for enforcing and administrating the program in accordance with the provisions of the chapter. And then it says, where -- you create a program where DHEC shall have the authority to review all state and federal permits. And what DHEC is saying is, well, authority equates to discretion or they may or they may not and they

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can just ignore those -- that permitting program. And I would like to say as a matter of why this is so important and why the provision, which is --
You know, the Coastal Management Program is a very unique animal. It wasn't created pursuant to the APA. You have this Spectre case where it went all the way -- you know, lots of debate about its enforceability. And it is enforceable, but it's not a statute, because the statute is the one that brought it through. So I don't think that the mere fact that the program exempts septic, doesn't mean that -- it can conflict with the statute and the statute would trump.
I also would just point out there was an affidavit filed from Christopher Stout, who is the coastal zone consistency manager. And he said, well, we've never done it with this. That's how we've always done it. I don't think that's a valid argument to support their own Motion for Summary Judgment.
But going back to the statute. The statutory framework is there is a mandate, shall is used, there's also a may. May is used

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over a hundred times. They give DHEC a lot of discretion in certain circumstances. They give DHEC discretion in enforcement matters. They give DHEC discretion to issue a pilot project on the beach. They have all kinds of general considerations that they tell the Agency has to consider. But they can -- they're not a, you know, do or die mandate if one of them is not met.

So that's our legal argument and then I just want to point out the reasons why this is so critical. I take issue with Ms. Shahid's statement that septic tanks are generally understood as being safe. You know, that would be a merits thing, right, we would be talking about that. But there is no dispute sea level rise and climate change. They're creating new problems. And so despite, you know, the Agency's practice of doing it one way, doesn't mean that, you know, we're out of line in raising a legal issue now, because they're just -- it's becoming more and more of an issue. I think you're going to see more and more of them.

And the program document specifically --

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and I attached this as exhibits to my brief -- highlights areas of special resource significance. And chapter three, you know, talks about -- well, it's actual -- I don't know how to read this. It's 369 at the bottom, but then it has section 12, activities in areas of special resource significance. And it specifically has language addressing barrier islands and how they play the role of providing buffers in storms. They really bring a lot of special environmental protections to the coast. And so they are very specifically significant as opposed to another area on the -- you know, in the inlands, which is also -- could -- may or may not be important. But if you're going to put a septic tank on a barrier island, the program provides for policies where they should be reviewed of these things. And it actually -- the table on the following page specifically identifies Bay Point Island. So it is pulling out that property as something that deserves its own set of policies.

So that's basically the legal argument. We feel like the statute requires them to do it, they haven't done it. The statute trumps

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the program document. And the polices should be applied for a matter of policy. Thank you.

THE COURT: Thank you.

Ms. Martinez.

MOTION FOR SUMMARY JUDGEMENT BY MS. MARTINEZ:

MS. MARTINEZ: Thank you, Your Honor. Despite the factual dispute, you know, on the merits, whether septic tanks as a whole are a good or a bad thing, you know, as Ms. Shahid pointed out, this case is about one on site wastewater permit and whether the issuance of that permit complies with all applicable requirements under state law.

You know, while we cover FOIA violations and due process, you know, when we were talking about the timeliness on our Motion to Dismiss -- on the Motion to Dismiss earlier, I just want to point out that those complaints aren't consequential to Summary Judgment in this case. I think that, you know, we -- that the challenge here is that the permit's not in accordance with law and we argue that it is, and we think that the Summary Judgment's clear there.

Deference, DHEC deference was thrown out.

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This case isn't about deference. This case is about applicable -- the application of a statute and thus call it a regulation, because that's what Spectre called it, that clearly set forth the principles that DHEC applied in this case. DHEC conducted review of the on site wastewater permit application pursuant to the only applicable regulation, which is South Carolina code regulation 61-56. And 61-56 actually does a little bit more than Ms. Shahid said -- she mentioned us looking at soil suitability. But, you know, 61-56 is designed to ensure that the state water quality standards and adjacent water bodies are maintained. That's what it's designed to do. It looks at zone of saturation, it looks at depth of the system, it looks at set setbacks from water bodies. It does all those things to maintain the water quality in the state. And we conducted that review and determined that the permit meets all the requirements of that regulation. And the Petitioner hasn't raised any allegations that the permit doesn't comply with the requirements in 61-56. As she pointed out, it's whether or not we did this coastal

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zone consistency.
And our argument is, I think, very clear that state or federal law does not mandate any further review of on site wastewater systems, including a coastal zone consistency review. They argue that -- the Petitioner argues that state law, specifically the Coastal Zone Management Act, mandates a coastal zone consistency review, but that's not accurate. You know, as we attached in the affidavit of Chris Stout, you know, that's not what's happening here. She points to 48-39-80 and she says that DHEC is required, mandated. She says that, you know, we argue that authorize equals a may. Well, I mean, doesn't it, because doesn't shall equal must? You know, it directs us -- it gives us the authority to review all permits is what it says.
It says you -- but what it really does is it says, DHEC, you have to have a program, you shall have a program. And we do. And it says you shall have a program that, and it lists some considerations. And one of those considerations is DHEC has the authority to review. And so we have that program, we have

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authority to review permits. What we've done is, in this Coastal Zone Management document, is -- in chapter five of the Coastal Zone Management document, there's a list of permits that we review. And that list of permits includes systems that are greater than 1500 gallons. And as Ms. Shahid pointed out, this system is less than 1500 gallons. I think that's plain, that's black and white. DHEC followed a black-and-white statute that says have a program, and we do. We follow that program, which says review septic tanks that are greater than 1500 gallons. We do. We review septic tanks that are greater than 1500 gallons and ones that do anything other than domestic waste. This is a domestic waste system, less than 1500 gallons.
We review permits for consistency with the Coastal Zone Management in accordance with that list. I think it's clear that we did that here. I think, if you go from A to B to C, I think we've satisfied all our requirements. I think the Spectre case said that our coastal zone consistency document's a valid reg. I think it's important to note that that -- that

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this coastal zone consistency document was approved by the legislature and it was signed on by the Governor, and I think that it -- the document itself, also in chapter five, sets forth a procedure for amending this document. And, you know, the policy arguments -- if the policy argument is that septic tank -- let's start there, that septic tank systems are bad and we should be reviewing all these, and our Coastal Zone Management documents should be amended to include more reviews, that's something that should have to go through our legislature and our Governor who sign on to change this document, not DHEC. This isn't DHEC's interpretation of the document. This is a document that's approved. And I think the Petitioner's asking the Court to usurp the power of the legislature and the Governor that signed on this, that have the ability to amend this, and telling us that, you know, the intent of the Coastal Zone, when they told you -- that the legislature told you to have a program, is to review all permits. Well, I think that legislature signing on and the governor signing onto this document is clear evidence is what

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they intended, which is what we think, which is we are authorized, which means we may review permits and these are the one we're going to review. Thank you, Your Honor.
THE COURT: Thank you.
Ms. Shahid, did you have anything to add to that or ...
RESPONSE TO MOTION FOR SUMMARY JUDGEMENT BY MS. SHAHID:
MS. SHAHID: Your Honor, I'm assuming that this document is attached to Ms. Martinez's brief. If not, I can show it to you on the Elmo.
THE COURT: I think it is. It is.
MS. SHAHID: It's just that what Ms. Lenhardt is requesting is a legislative change. It's a -- the Agency formulate new policies and get them adopted, Your Honor. Currently the policies as they exist except anything less than 1500 gallons.
THE COURT: Okay. Thank you. Ms. Lenhardt, response?
RESPONSE TO MOTION FOR SUMMARY JUDGEMENT BY MR. LENHARDT:
MS. LENHARDT: Well, I think honestly our dispute is pretty basic. Either you find that the statute

requires it or not. And, you know, I -- we did not raise any allegations as to the merits of the septic tank. And that is due in part because the septic tank regulations are so basic. Ms. Martinez outlined depth setbacks and, you know, there's not a lot there.
THE COURT: That's the 61-56 reg, right?
MS. LENHARDT: Yes, Your Honor. But the issues that we would review would be because of the unique nature of the barrier island and it being on the coast. So that's it.
COURT REPORTER: I'm sorry. Repeat the last of that sentence.
MS. LENHARDT: The issues are because of the -- it being a barrier island and it being on the coast, on the beachfront. Thank you.
THE COURT: Thank you. Anything further from the parties?
MS. MARTINEZ: The only thing I guess I forgot to say, Your Honor, is that we request summary judgment be granted on behalf of the Department.
THE COURT: I assume you did. Thank you. I got that.
Well, thank you very much. Both of you --

all three parties presented the arguments very well. I've been considering this prior to the hearing. I've read everything that you've submitted. So I'm going to take what I've heard today and apply that and I will have a decision on all of this very quickly. I know we need to move quickly, so I'm going to get you a decision just as quickly as possible. Again, thank you very much for being here today and for making these arguments -- making it very easy for me to understand your positions on the matter. Thank you. All right. We're adjourned.
(There being nothing further, the hearing concluded at 10:59 a.m.)

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Docket No. 22-ALJ-07-0008-CC
Appellate Case No. 2022-001126

Gullah/Geechee Fishing Association, Inc., ……Appellant,

vs.

South Carolina Department of Health and Environmental Control, and
Bay Point Island, LLC, ……Respondents.

CERTIFICATE OF COUNSEL

I certify that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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