STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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S.C. Court of Appeals

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, . . . Petitioners/Appellants,

vs.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, ... Respondents.

PETITION FOR WRIT OF CERTIORARI

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July 12, 2013

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CERTIFICATE OF COUNSEL

Pursuant to SCRAP, Rule 242(d)(1), counsel for Petitioners certifies that a Petition for Rehearing was filed with the Court of Appeals in the case of Town of Arcadia Lakes, et al. v. SCDHEC and Roper Pond, LLC, Opinion No. 5095, on March 21, 2013. (Shearouse Adv. Sht. No. 11 at 38-55). The Court of Appeals withdrew its Opinion dated March 6, 2013, substituted and refiled a new Opinion on June 12, 2013. Op. No. 5095 (Shearouse Adv. Sht. No. 29 at 110-127).

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals erroneously apply this Court's well-established requirements for standing by:

A. Failing to confer standing despite Petitioners aesthetic and recreational interests in viewing the lily pad pond whose excavation is authorized by the challenged permit when Smiley v. DHEC, 374 S.C. 326, 649 S.E.2d 31 (2007) and Sea Pines v. SCDNR, 345 S.C. 594, 550 S.E.2d 287 (2001) both hold that purely aesthetic and recreational interests give rise to judicially cognizable injury in fact;

B. Injecting a new requirement that a plaintiff must have a property interest in the area where the challenged activity is located; and

C. Requiring proof on the merits or proof of a future permit violation in order to establish a causal connection for purposes of standing, despite the fact that the challenged activity in this case is a permit authorizing the excavation of the lily pad pond that Petitioners enjoy viewing?

II. When the Court of Appeals agreed with Petitioners that DHEC's scope of review requires it to consider the "Overall Project" and not just the area covered by the Nationwide Permit, did it err in failing to remand the decision to DHEC with instructions to consider the impacts of the "Overall Project," especially in light of information that impacts to the Lily Pad Pond, as a Water of the State, were beyond the scope of Nationwide Permit review?

III. Did the Court err in concluding that Roper Pond has valid 401 Certification when the project includes impacts beyond those reviewed and authorized by the Nationwide Permit and DHEC's 401 Certification of that permit?

IV. Did the Court Err in Concluding that Coverage Under the State Stormwater General Permit Was Proper When DHEC Did Not Review or Consider Impacts to Waters of the State Resulting in Roper Pond Not Having a Valid 401 Certification or Valid 404 Permit, as Required for Coverage Under the General Permit?

STATEMENT OF THE CASE

This case presents issues of environmental standing and the scope of the South Carolina Department of Health and Environmental Control's ("DHEC") authority to review impacts to waters of the State. The Court of Appeals issued an Opinion with two errors of law that warrant review by this Court pursuant to SCACR Rule 242.

First, the Opinion contradicts this Court's well-established law on standing in environmental cases by (1) injecting a new requirement that to establish an injury-in-fact a Plaintiff must have a property interest in the area over which the challenged activity will occur, (2) injecting a requirement that, to establish a causal connection, a Plaintiff must prove success on the merits or a future permit violation and (3) finding aesthetic and recreational interests insufficient to confer standing.

Second, the Opinion inconsistently addresses a novel issue of law in holding that DHEC's scope of review under the Section 401 water quality certification program is limited to review only of impacts that are regulated by the United States Army Corps of Engineers ("Corps") under the Clean Water Act ("CWA"). The Court of Appeals first agrees with Petitioners that DHEC has broad authority to consider the "overall project," including impacts beyond those specifically authorized by a Corps permit, but then fails to apply this conclusions to the DHEC decision at issue in this appeal. The result is that DHEC's scope of review under the 401 certification program is identical to the Corps' scope of review under the CWA.

Background

This case arises from Roper Pond, LLC's proposal to construct a high density apartment complex on a tract of land consisting of 12.75 acres, which includes 1.8 acres of wetlands and

waters identified by the Corps as falling under the jurisdiction of the Clean Water Act. (R. pp. 534-541; 542-548; 555-562). A majority of the jurisdictional waters consists of a pond, known as the "lily pad pond" or "Roper Pond," which is located on Trenholm Road. (R. pp. 534-541; 542-548; 555-562). The project is surrounded by the Town of Arcadia Lakes on three sides – Town Hall on the East, Kaminer Station on the West and Trenholm Road on the South. The pond drains through a pipe under Trenholm Road into Cary Lake, a portion of which lies within the Town of Arcadia Lakes. (R. pp. 534-541; 542-548; 555-562).

In order to undertake the proposed residential construction activities on the 12.75 acre tract, Roper Pond, LLC, has to obtain a number of approvals from DHEC and the Corps. One of those approvals is a DHEC stormwater permit for land-disturbing activities. See 24 S.C. Code Ann. Regs. § 61-9.122.26(c). To this end, DHEC had previously issued a general stormwater permit entitled "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities" ("NPDES General Permit"), and Roper Pond, LLC, sought approval under this NPDES General Permit.

To obtain approval under the NPDES General Permit, Roper Pond, LLC submitted a Notice of Intent ("NOI") for Stormwater Discharges. (R. pp. 549-550) The NOI requires the applicant to identify all CWA jurisdictional wetlands in the project area, whether there will be any impacts to those wetlands, and the amount of wetlands proposed to be impacted.

Critically, the NPDES General Permit requires an applicant to obtain any required CWA permit before DHEC will grant coverage under the NPDES General Permit. A CWA §404 permit is required if an applicant proposes to place fill material in CWA jurisdictional wetlands.[1] 33

[1]The dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating

U.S.C.A. § 1344(a). This §404 permit, which is issued by the Corps, in turn triggers the requirement for a CWA §401 Water Qualify Certification from DHEC. This certification considers whether the §404 permit is consistent with the state water quality regulations and State water quality standards. See 33 C.F.R. § 330.4 & S.C. Code Ann. Regs. 61-101, et seq.

The Corps does not issue all § 404 permits individually. The CWA authorizes categories of general permits under § 404 called Nationwide Permits ("NWP") for certain activities categorically deemed to have minimal adverse environmental impacts. 33 U.S.C.A. § 1344(e)(1). When these NWPs were issued, DHEC issued 401 water quality certifications for the NWPs. DHEC's certifications include general conditions that must be met in order for the project to receive DHEC 401 certification. (R. p. 563; S.C. Code Ann. Reg. 61-101.A.). The general conditions of DHEC's NWP certification **require DHEC to consider the "overall proposed project," including "all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by the NWP."** (R. p. 563). **The general conditions say that "[i]mpacts to . . . adjacent waterbodies or wetlands resulting from the activity will be considered during the review of these actions."** (R. p. 563).

For the Corps 404 permit to be issued and effective, the project must have a DHEC 401 certification. Where a Corps 404 permit takes the form of an NWP, DHEC must affirmatively certify that the project meets the general conditions of its NWP 401 certification. In turn, DHEC's NPDES General Permit expressly requires that any Corps 404 permit required under the CWA be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p.

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wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC's review authority over waters of the State derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.

487). In short, 401 certification is required for a 404 permit, and a 404 permit is required for a Stormwater NPDES General Permit.

The Petitioners challenge DHEC's issuance of the Stormwater NPDES General Permit based on Roper Pond, LLC's failure to comply with the general conditions of DHEC's 401 certification and to obtain the appropriate approvals for dredging and excavation of Roper Pond.

A hearing was conducted on September 4-5, 2009, in the Administrative Law Court ("ALC"). Administrative Law Judge John D. McLeod issued a final order and decision on January 21, 2010, affirming the DHEC decision and ruling that the Petitioners lacked standing to maintain this action. The Petitioners filed a Motion to Reconsider and For Stay on February 1, 2010. On March 23, 2010 the ALC issued an Order for Temporary Stay pending a decision on the Motion to Reconsider. On April 1, 2010, the ALC issued an Order Denying Motion for Reconsideration and For Stay.

On April 20, 2010, Petitioners filed a Notice of Appeal. The Court of Appeals heard oral arguments on May 8, 2012 and issued an Opinion on March 6, 2013, affirming the ALC's Order. The Appellants filed a Petition for Rehearing on March 21, 2013. On June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion on June 12, 2013.

Pursuant to Rule 242, SCACR the Petitioners Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown respectfully petition this Court for a Writ of Certiorari to review the Court of Appeals' Opinion No. 5059, dated June 12, 2013.

SUMMARY OF ARGUMENT

The Petitioners respectfully submit that Certiorari is warranted in this case for two reasons. First, the Court of Appeals Opinion is in direct conflict with prior decisions of this Court on Article III standing. Second, the Court of Appeals Opinion addresses a novel question of law, specifically whether DHEC is required to review impacts to waters of the State beyond the impacts authorized by a Federal Clean Water Act Permit.

The Court of Appeals' Opinion directly contradicts South Carolina Supreme Court and United States Supreme Court decisions on standing, which muddies the waters of this state's carefully crafted standing law and will likely have far-reaching implications for citizens and municipalities in their efforts to protect the aesthetic, recreational and environmental qualities of their communities. The Opinion injects a new, burdensome requirement for injury in fact that a Plaintiff have a property interest in the area over which the challenged activity will occur. The Opinion further injects a requirement for causal connection that a Plaintiff prove the merits or a future permit violation.[2] Neither of these standards has been applied by any court, and, indeed, both federal and South Carolina courts hold the contrary.

The Court of Appeals' Opinion also addresses a novel issue of law regarding the scope of DHEC's authority to review impacts to waters of the State when those impacts are not regulated by the Corps under the Clean Water Act. The Court of Appeals agrees with Petitioners' arguments that DHEC has broad authority to consider the "overall project," including impacts beyond those

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[2]This new standard of proving success on the merits or a future permit violation as a prerequisite to standing has already been cited in a Motion to Dismiss for Lack of Standing filed in the case of Preservation Society of Charleston v. S.C. State Ports Authority, Docket No. 13-ALJ-07-0056-CC, on July 1, 2013.

specifically authorized by a Corps Nationwide Permit, but then fails to apply its conclusions to the certification and General Permit coverage at issue in this appeal.

ARGUMENT

I. The Lower Court's Opinion Contradicts the Law of Standing Adopted by this Court

This Court has adopted the three-pronged federal test for standing enunciated in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992): First, the plaintiff must have suffered an injury in fact –an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. Smiley v. DHEC & Wild Dunes Community Assn., 374 S.C. 326, 332, 649 S.E.2d 31, 32 (2007); Sea Pines Association for the Protection of Wildlife, Inc. v. S.C. Department of Natural Resources, 345 S.C. 594, 550 S.E. 2d 287 (2001). The Court of Appeals decision is inconsistent with this well-established test in that it creates more restrictive requirements for standing that have never been adopted by this Court or any federal court.

A. The Court Injects a New Test for Injury-in-Fact

The lower court cites the correct test for standing, but then, in a rather confusing opinion, injects a new requirement that a plaintiff must have a property interest in order to establish an injury-in-fact. The court first recites all of the injuries described Linda Jackson, Elaine Starr and Richard Thomas, town mayor, acknowledging that the Petitioners will suffer some injury-in-fact[3],

[3] "The ALC found the Kaminer Station Petitioners failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and

but then concludes that the Petitioners' complaints **"primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact."**[4] (Shearouse Adv. Sht. No. 29 at 123) (emphasis added). The result is an opinion that completely diverges from this Court's holding that a plaintiff's injuries may stem from aesthetic interest in viewing private property. S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); see also Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

The lower court was presented with testimony sufficient to establish injury in fact. Indeed, the court cites to the "visual appeal of Roper Pond" discussed by Mrs. Jackson. (Shearhouse Adv. Sht. No. 29 at 122). The court acknowledges that Mrs. Jackson's aesthetic and recreational interests are exactly the type of injury that courts have found sufficient to establish standing. Id. Mrs. Jackson testified that she has walked or run past the pond "thousands and thousands" of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. (R. p. 373). She described the pond as "absolutely beautiful." (R. p. 374).

Elaine Starr, who lives on Cary Lake testified that she also enjoyed viewing the lily pad pond and said it is "absolutely gorgeous." (R. p. 400). She said there are "white blooms, pink blooms, and you can see lots of life around it, like dragonflies" and that it is an aesthetic part of the

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their alleged injuries. We agree with the ALC **to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.**" (Shearouse Adv.Sht. No. 29 at 122).

[4]The lower court applies the same requirement to the Town, rejecting the Town's interest in protecting Cary Lake, based on the fact that "the Town ha[s] no ownership interest in Cary Lake." (Shearhouse Adv.Sht. No. 29 at 121). Even applying this incorrect standard, when it comes to Elaine Starr's testimony, the Court overlooks the fact that Elaine Starr lives on Cary Lake and is a member of the Cary Lake Homeowners Association, who owns Cary Lake, the receiving water body for Roper Pond's stormwater.

community. (R. pp. 400; 413). She testified that if the pond is dredged there will be loss of a lot of life in the sediment itself and the lilies she enjoys seeing will not be there. (R. p. 401).

In citing Sea Pines the lower court appears to recognize that aesthetic and recreational interests are sufficient to establish an injury-in-fact, but it then inexplicably inserts a new standard requiring Plaintiffs to have property rights in the areas over which an environmental permit is sought, citing Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4th Cir. 1974). Costanzo stands for the proposition that an injury in fact cannot be *assumed* when the challenge involves private property. But in this case, Petitioners did not expect the court to *assume* anything. Rather, the Petitioners put forth evidence of injury in fact in the form of harm to recreational and aesthetic interests, similar to that alleged in Smiley v. SCDHEC, 374 S.C. 326, 649 S.E.2d 31 (2007); Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693 (2000); American Canoe Assn. v. Murphy Farms, 326 F.2d 505 (4th Cir. 2003). Even the court in Costanzo noted that the "claimed injury need not be great or substantial; an **'identifiable trifle'**, if actual and genuine, gives rise to standing." Id. at 501 (citing SCRAP, 412 U.S. 669, 687-689, n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

Not only did the Petitioners identify harm to their aesthetic and recreational interests, they went on to describe even more injuries that would result directly from the development project at issue in this appeal: degraded water quality as a result of the project; sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired; impact on Cary Lake because of the increased density; impact to the character of the Town; diminished property values; the environmental quality of the Town; and increased crime, traffic and congestion as a result of the

project. Certainly these allegations are more than an "identifiable trifle" needed for standing, but instead the lower court dismisses these allegations of harm with a requirement for proof on the merits or proof a future permit violation. See Section II below.

In contrast to the lower court's holding, South Carolina courts have found environmental plaintiffs to have standing, despite the fact that an activity occurs on another's private property. In S.C. Wildlife Fed'n v. S.C. Coastal Council, the Court held that the appellants adequately alleged an individualized injury in the adverse effect of a certification decision on their members' use and enjoyment of wetlands proposed for dredging on a private development site. 296 S.C. 187, 371 S.E.2d 521 (1988). In Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), the Court held that plaintiffs that live adjacent to a privately owned wetland had standing to challenge the issuance of a permit to fill the wetland because the permit would adversely affect their use and enjoyment in viewing the wetland and surrounding wildlife. 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998). In Spectre v. DHEC, the Court upheld Appellants challenge to the filling of 32 acres of "isolated" wetlands on private property. 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010).

Further, our courts have long held that precisely the type of aesthetic and recreational interests at stake here are sufficient to confer standing. In Smiley the Supreme Court held that a plaintiff must make claims as to "use and enjoyment" of an affected area. Smiley v. S. Carolina Dept. of Health & Envtl. Control, 374 S.C. 326, 333, 649 S.E.2d 31 (2007).

The lower court's holding that Petitioners' lack of property right or interests in Roper Pond (or Cary Lake) precludes an injury in fact is not only contrary to the law of standing, it leads to the result that only those with property interests have standing. The practical effect of the Opinion is that only the permit applicant/site owner would have standing to challenge this project. That cannot be and has never been the law in South Carolina.

B. As to the Town, the Court Further Misapprehends Injury in Fact

In addition to imposing the same property right requirement on the Town, the Court further misconstrues the law of standing as applied to municipalities by applying an analysis that is not supported by case law, as discussed below.

While few cases in South Carolina have addressed the law of standing as applied to municipalities, the lower court cites to Glaze v. Grooms, 324 S.C. 249 (Ct. App. 1996) for its holding that a "municipality must allege an infringement of its own proprietary interests and statutory rights" distinct from that of its individual citizens. (Shearhouse Adv. Sht. No. 29 at 120). Neither Glaze nor any other South Carolina case Petitioners have been able to uncover expands on exactly what it means for a municipality to suffer infringement of a "proprietary interest" or "statutory right" distinct from its citizens. However, reference to other jurisdictions that have applied these standing principles under circumstances similar to the ones at hand make clear that the Town's allegations are sufficient to establish an injury in fact.

"The term 'proprietary' is somewhat misleading, for a municipality's cognizable interests are not confined to protection of its real and personal property. "The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets." City of Sausalito v. O'Neill, 386 F.3d 1186, 1197-98 (9th Cir. 2004) (emphasis added). The court in City of Sausalito reached this conclusion while noting, the same as South Carolina courts, that a municipality could not simply assert the interests of its citizens and instead only had

standing to protect its own "proprietary interests." Id. at 1197. In elaborating on the type of interests that are sufficient to confer standing on a municipality the court noted as follows:

> We have recognized that a municipality has an interest in, inter alia, its ability to **enforce land-use and health regulations,** *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990), and its **powers of revenue collection and taxation,** *Colorado River*, 776 F.2d at 848-49. A municipality also has a proprietary interest in **protecting its natural resources from harm.** *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002), amending 271 F.3d 911(9th Cir. 2001). We have also found constitutionally sufficient injury to proprietary interests where "**land management practices of federal land could affect adjacent [city]-owned land.**" *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995).

Id. at 1198 (emphasis added).

The lower court recites the Town's claims that fall in line neatly with these proprietary interests. The Town's interest in "protecting the environmental quality of Cary Lake" and its interest in "maintaining its character and desirable attributes, including aesthetic appeal" are aimed at protecting natural resources from harm. (Shearhouse Adv. Sht. No. 29 at 120-121). The Town's testimony that there would be a "diminution of property values within the Town" is an interest in its powers of revenue and tax collection. Id. The Town's interest in its "ability to comply with federal law" is an interest in application and enforcement of land use regulations. Id. Each of the injuries dismissed by the lower court are sufficient to establish an injury in fact.

The lower court casually dismisses the Town's stated interest in its ability to comply with federal law, specifically the CWA's requirements for municipalities, with the court's brief analysis failing to uncover the Town's obligations under the CWA. Specifically, the Town

operates a Municipal Separate Stormwater System ("MS4") that necessitates an NPDES permit and requires compliance with NPDES standards and limitations. See (R. pp. 828, 844). The Town is legally required to prevent pollution within its MS4,[5] which includes runoff entering its storm drains and pipes from Roper Pond's development. (R. pp. 828). The court misapprehends the relationship between the challenged project and the Town's CWA obligations, and thereby dismisses exactly the type of interest identified in City of Sausalito v. O'Neill.

C. Causal Connection Does Not Require Proof on Merits or Proof of a Potential Future Violation

The causal component of standing requires that "there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Smiley v. S. Carolina Dep't of Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992)). In this case, the conduct complained of is the excavation and dredging of Roper Pond without any DHEC review or approval. That excavation is "fairly traceable" to the challenged activity, which is DHEC's approval of Roper Pond's construction activities –

[5]See 33 U.S.C. § 1342(p)(4) ("the Administrator shall establish regulations setting forth the permit application requirements for [MS4] stormwater discharges . . . Any such permit shall provide for compliance as expeditiously as practicable"); see also 33 U.S.C. §§ 1311, 1312, 1314, 1316, 1317, 1318, 1342, 1343, 1362. When an MS4 operating municipality does not comply with the NPDES requirements, that municipality is subject to suit and liability under the CWA, which can be initiated by either the government or private citizens. See, e.g., Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519 (5th Cir. 2008); Natural Res. Def. Council, Inc. v. County of Los Angeles, 673 F.3d 880 (9th Cir. 2011).

including excavation of the pond – under the NPDES General Permit. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992). Instead of applying this "but for" analysis, the lower court's opinion requires that the Petitioners' injury in fact be fairly traceable to a violation or noncompliance on the part of Roper Pond. In short, the Opinion requires that the Petitioners prove the merits of the case in order to prove standing. That is not and has never been the law.

Two United States Supreme Court opinions explain the distinction between a plaintiff's injury in fact and proof of violations or inadequacy of a permit. In Allen v. Wright, the U.S. Supreme Court explained the distinction as follows:

> **The "fundamental aspect of standing" is that it focuses primarily on the party seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated,"** (citing United States v. Richardson, 418 U.S. 166, 174, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (quoting Flast, 392 U.S., at 99, 88 S.Ct., at 1952). . . . the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief. If a plaintiff presents a nonjusticiable issue, or seeks relief that a court may not award, then its complaint should be dismissed for those reasons, and not because the plaintiff lacks a stake in obtaining that relief and hence has no standing. **Imposing an undefined but clearly more rigorous standard for redressability for reasons unrelated to the causal nexus between the injury and the challenged conduct can only encourage undisciplined, ad hoc litigation**, a result that would be avoided if the Court straight-forwardly considered the justiciability of the issues respondents seek to raise, rather than using those issues to obfuscate standing analysis.

Allen v. Wright, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984).

As succinctly put in another U.S. Supreme Court case, the "relevant showing . . . is not injury to the environment but injury to the plaintiff." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

The court's misapplication of the causation principle is further illustrated by analogy to a similar case. In Duke Power Co. v. Carolina Envtl. Study Group, Inc., the merits of the case involved the validity of the provisions of the Price-Anderson Act, which limited maximum liability in the event of any single nuclear incident to $560,000,000. 438 U.S. 59 (1978). The plaintiffs, who lived near the proposed construction site for two nuclear power plants, challenged the constitutionality of that Act. Id. at 67. For purposes of standing, the plaintiffs asserted injuries related to the possibility of a nuclear accident, as well as injuries related to the normal operation of the plants. Id. at 73-74. First, the Supreme Court concluded that it need not determine whether the injuries based on the possibility of a nuclear accident were "sufficiently concrete to satisfy constitutional requirements." Id. at 73. Rather, "several of the 'immediate' adverse effects'" of the nuclear plants, including "environmental and aesthetic consequences" were of "the type of harmful effect which has been deemed adequate in prior cases." Id. at 73-74. In the same way, Petitioners have asserted immediate adverse effects resulting from completion of the permitted activity, i.e., excavation of the pond leading to loss of aesthetic enjoyment.

As to causation, the Duke Power Court applied the **but-for standard.** Id. at 74-75. The plaintiffs position on causation was that but for the Act's limitation on liability, the nuclear plants would not be constructed, and the "immediate adverse effects" would then not occur. Id. at

74. The Court found a "substantial likelihood" of this "but for" relationship, and upheld causation and standing. Note that actual operation of the nuclear plants was not an issue on the merits, yet formed the basis for plaintiffs' standing. **The plaintiffs' injuries in fact had nothing to do with the plaintiff's claims on the merits, and the Court found that no such nexus was required.** Id. at 78. In the same way, the Petitioners have identified aesthetic and recreational injuries that would not occur but for the permit at issue in this case. Those injuries form a sufficient basis for standing, apart from any reference to the merits of the case.

Mrs. Jackson and Mrs. Starr testified that if the pond were excavated, their enjoyment in viewing the pond would be gone. (R. pp. 374-376 & 401). The Town asserted its interests in the attractiveness of the Town based on the aesthetics of the lily pad pond upon entering the Town, which surrounds the project site on three sides. (R. pp. 822-23). These aesthetic and recreational injuries have a but-for causal connection to the permit at issue in this case – if the permit stands, the pond will be excavated and these "immediate adverse effects" will occur. The requisite causal connection is established through uncontroverted evidence that the lily pads and wildlife will be eliminated by the excavation of the pond, coupled with the asserted use and enjoyment of viewing the pond and its wildlife. There is a direct link between the excavation of the pond and the injuries complained of by Mrs. Jackson, Mrs. Starr, and Mr. Thomas, i.e., loss or decrease of aesthetic and recreational interests.

When assessing Mrs. Starr's testimony, the Court applies a heightened test for demonstrating a "causal connection," stating that "granting coverage for Roper Pond Apartments

under the State General Permit" would not "cause an actual or imminent injury." (Shearhouse Adv. Sheet at 51). In so doing, the Court is requiring the exact type of nexus between merits and injury-in-fact that was flatly rejected in Duke Power, 438 U.S. at 78.

The lower court loses sight of the fact that a plaintiff need only show that he or she will suffer some "identifiable trifle" of injury. In applying this standard, the court in Pye v. U.S. noted that if "**the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this ... grant.**" 269 F.3d 459, 468 (4th Cir. 2001) (citing Society Hill Towers Owners' Assn. v. Rendell, 210 F.3d 168, 176 (3rd Cir. 2000)). If those who are seeking to protect the environmental quality of the areas they use do not have standing, then "the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action." Id.

Standing in Pye was not based on the regulatory or technical sufficiency of the permitted activity, but rather on a but for relationship between the permitted activity and the alleged harm. Id. at 468-69. Similarly, in this case the Petitioners do not need to offer evidence on the technical sufficiency of Roper Pond's stormwater plan in order to establish an injury in fact, they merely need to make allegations of any injury that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Smiley v. DHEC, 374 S.C. 326, 649 S.E.2d 31 (2007) (citing Lujan, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992). Petitioners did just that by alleging that they enjoy and benefit from viewing

the pond and observing wildlife, and that if the pond were excavated as will occur by way of this challenged decision, their benefit and enjoyment would be lessened.

II. Validity of the 401 Certification and General Permit Coverage

A. The Court Agrees with Petitioners that the General Conditions of the 401 Certification Authorize DHEC to Review the "Overall Project," Including Excavation of the Pond, But Overlooks the Legal Effect of Its Conclusion

As to the merits of the case, the Petitioners assert that 1) the NWPs only cover certain clearly defined activities; 2) DHEC's 401 certifications of the NWPs provide additional limitations, including general conditions; 3) in order to receive coverage under DHEC's certifications the **activity must be limited to the impacts authorized by that certification and must meet the general conditions**; 4) the general conditions require DHEC to review the "overall project," not "only the land area directly impacted by the NWP;" and 5) when a project's impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly do in this case, they are not covered by DHEC's NWP certification.

The lower court clearly recognizes DHEC's broad authority to review impacts that go beyond those authorized by the specific NWP in concluding that DHEC must review the "overall project proposed" by the developer. (Shearhouse Adv. Sht. No. 29 at 124). The Court states that

> DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement **that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.**

In order to determine whether a project meets the conditions of DHEC's NWP certification, DHEC must conduct a review and affirmatively conclude that the conditions are either met or not. (R.p. 617). The General Conditions of the NWP certifications, and Regulations 61-68 and 61-101,[6] require DHEC to review impacts beyond those authorized by the specific NWP, specifically excavation of the pond. The lower court effectively agrees with that argument, but fails to give it effect.

The lower court's Opinion correctly notes that DHEC's 401 certifications for the Nationwide Permits, "include general conditions that a given project must meet, including the requirements that DHEC . . . would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity."[7] (Shearouse Adv.Sht. No. 29 at 113). The Opinion also cites the Corps' requirement that in order for the project to be valid under NWP 39, it "had to comply with the general conditions of the NWP, regional conditions, and **certain special conditions**, . . . including 'all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification' . . ." (Id. at 114-15). The court agrees with Petitioners in holding that DHEC is required to "review the 'overall project

---

[6]Regulation 61-101 requires DHEC to consider: "whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts . . ." S.C. Code Ann. Reg. 61-101.F.(3). Regulation 61-68 water quality standards require DHEC to"maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . ." S.C. Code Ann. Reg. 61-68.A.(4).

[7]The Court takes a limited view of the "activity," apparently interpreting "activity" to mean only the fill, yet the General Permit Coverage is a Stormwater Permit for construction activities, and is not limited to review of wetland fill.

proposed by a single owner/developer,' 'includ[ing] all land within the project bound by single ownership,' and is not confined to 'the land area directly impacted by each NWP request.'"[8] (Shearouse Adv. Sht. No. 29 at 124). The court further agrees with the Petitioners "that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site or determined if feasible alternatives were available," as required by the certification conditions. (Id.) But then the court's Opinion fails to take the next logical step, which is that Roper Pond does not qualify for NWP certification because its project includes impacts on the overall project site that exceed the NWP certification.[9]

Instead of taking the next logical step, the Opinion begins a discussion of federal law, and appears to make the assumption that because no CWA approval is needed for excavation of the lily pad pond, there is no requirement for State review and approval. The lower court is correct in that the CWA permit is not needed for excavation. However, this Court has directly addressed the question of whether State authority to regulate wetlands and waters exceeds Federal regulation under the CWA, and has expressly ruled that "federal [CWA] jurisdiction is not essential to [State] consistency review." Spectre, LLC v. S. Carolina Dept. of Health & Envtl. Control, 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010); Georgetown Cnty. League of Women

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[8]This Court's statement that "the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit" (Shearhouse Adv. Sht. at 54), is in direct conflict with the Court's conclusion that DHEC must look at the overall project site, not just the lands covered by the NWP, and that it failed to do so.

[9]Even DHEC admits that a "specific determination" is required to insure that a project meets the conditions of its NWP certification. (R. p. 617). If a project does not meet the conditions of the NWP certification DHEC requires an individual certification. (R. p. 253).

Voters v. Smith Land Co., Inc., 393 S.C. 350, 352-53, 713 S.E.2d 287, 288 (2011) (Corps' jurisdiction "has no impact on DHEC's ability, as a state agency" to regulate waters of the State). While Spectre involved DHEC's regulatory authority under the S.C. Coastal Zone Management Act and this case presents the question of DHEC's regulatory authority under the S.C. Pollution Control Act, the parallel is that our Supreme Court has expressly ruled that South Carolina law can and does give DHEC broader regulatory authority than the CWA.

The dredging and excavation of wetlands are not activities regulated under Section 404 of the CWA; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC has broader review authority over waters of the State that derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.[10] And in this case, the conditions of DHEC's NWP certification expressly retain the agency's authority to review those impacts.

The court simply overlooks this argument which presents the novel question of whether the DHEC 401 certification program is broader than the Corps' NWP approval. The Opinion points out that Petitioners have not argued that alterations to the pond resulted from filling of the

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[10]Even DHEC's Chuck Hightower testified that the Water Quality Certification regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (R. p. 252; R. 61-101.F). Dr. Reice provided uncontested testimony that it will take ten years for the community to reestablish after the major disturbance, describing in detail the types of impacts that will result from the excavation on pp. 12-14 of Appellants Final Brief.

wetlands, and the court is correct. This statement shows a fundamental misunderstanding of how the 404 and 401 programs relate to each other. They are two separate regulatory programs with two separate regulatory criteria and, in this case, present two separate sets of conditions imposed on NWPs by each agency.

Indeed, the CWA Section 1341(a)(1) cited in the Opinion specifically states that the State must certify that a discharge complies with "applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."[11] 33 U.S.C. § 1341(a)(1). The CWA further states that "[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. § 1341(b). Yet that is exactly what the ALC and the lower court have done – allow the Corps' NWP to act as a limitation on DHEC's authority to require compliance with State water quality requirements, despite the CWA's clear language that it not be construed to limit State's authority to include additional water quality requirements.

The lower court acknowledges that DHEC did not conduct the overall review required by the NWP certification conditions, but does not hold DHEC accountable for its failure. If DHEC does not conduct some review to ensure that the project meets the conditions of the NWP 401 Water Quality Certification, and DHEC does not consider "all land within the project boundary

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[11]Section 1313 requires states to adopt water quality standards, and DHEC has promulgated those regulations in S.C. Code Ann. Reg. 61-68. 33 U.S.C. § 1313. DHEC also promulgated water quality certification regulations at S.C. Code Ann. Reg. 61-101.

under single ownership," then the conditions applicable to the NWPs will be rendered superfluous.

The fact that the lower court agrees that DHEC does have authority to review the "overall project" should warrant reversal of ALJ's conclusion to the contrary (holding that DHEC has no authority to review the excavation portion of the project). (ALC Order, R. p. 30). In addition to the internal conflict within the ALC's Order, there is a direct conflict between the ALC's Order and the lower court's Opinion on the question of DHEC's authority.

Given the lower court's agreement that DHEC is required to review the overall project, including all lands within the project area and not just the specific land impacted by the NWP, and the court's agreement that DHEC failed to undertake this review, the court should have further concluded that the project fails to comply with the 401 Certification of NWP 39 and remanded the case back to DHEC to undertake a review of the impacts resulting from excavation of the lily pad pond and to impose any conditions necessary to protect water quality and the aquatic ecosystem of that State waterbody.

B. The Lower Court Arrives at the Nonsensical Conclusion that Roper Pond is the Proper Party to Object to Its Compliance or Noncompliance with DHEC's General Conditions

The lower court cites to DHEC's general conditions that "Roper was required to (1) demonstrate that impacts to wetlands have been avoided and that unavoidable impacts to wetland areas have been minimized; and (2) provide suitable compensation for any unavoidable impacts." (Shearouse Adv. Sht. No. 29 at 125). The court's recitation of these two general conditions is

accurate, but it's conclusion on how these conditions are applied and by whom they are enforced is entirely without logic or reason. The court states that "Roper, as owner of the property on which the pond is located,[12] would be the proper party to object to impacts that have not been avoided or minimized and to enforce compensation for any unavoidable impacts." The court seems to recognize that it would be an "illogical position" to place Roper Pond as the fox guarding the hen house, but then fails to undertake the logical analysis of who would be the party to object to impacts or require compensation. It should go without saying, but DHEC has the authority to ensure compliance with those conditions, to ensure that Roper is avoiding and minimizing impacts and to require compensation for unavoidable impacts. And when DHEC fails to ensure compliance with the conditions, Petitioners, as persons with a personal stake in the aesthetic and other qualities of the area, have the right to seek administrative and judicial review of the permitted activity.

C. The Lower Court Overlooks the Requirement for a Certification Decision

It is precisely because DHEC was required to undertake some review of the "overall project proposed by" the developer, including review of "all land within the project boundary under single ownership," which is not confined to "the land area directly impacted by each NWP request, that DHEC necessarily had to arrive at some decision regarding compliance with those NWP certification conditions. DHEC's failure to conduct the review, make a formal

[12]Petitioners note that even in discussing the merits the court continues to misplace reliance on ownership of the property.

determination of whether the project meets the NWP conditions and qualifies for coverage and issue a certification letter is fatal, and Roper Pond thus lacks 401 certification.

D. The Lower Court's Conclusions Overlook the Implications on the Stormwater General Permit Coverage

Section 2.1(C) of the NPDES General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective."[13] (R. p. 487) **If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act."** (R. pp. 555-562). The NPDES General Permit conditions expressly require that any Corps of Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 487). Because the project did not qualify for coverage under DHEC's NWP certification, it was not entitled to coverage under the General Permit. Thus, the Court erred in failing to conclude that DHEC improperly granted coverage under the General Permit for its failure to comply with the conditions of the NWP certification and consider the "overall project," specifically the excavation of the pond.

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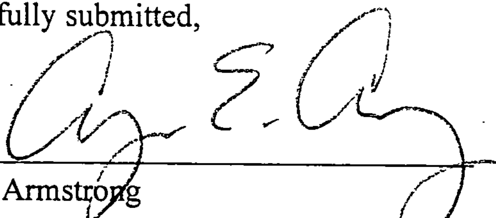
[13] On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 ("Guidance Document"). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

CONCLUSION

WHEREFORE, the Petitioners respectfully request that this Court issue a Writ of Certiorari to the Court of Appeals, hear this appeal and reverse the opinion of the lower court.

Respectfully submitted,



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Georgetown, South Carolina

July 12, 2013

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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.

July 12, 2013

RECEIVED
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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk of Court
S. C. Court of Appeals
1015 Sumter Street
Columbia, S. C. 29201

Re: Town of Arcadia Lakes, et al. v. SCDHEC & Roper Pond;
Appellate Case No. 2010-159446

Dear Ms. Kitchings:

Enclosed please find a copy of our Petition for Certiorari in the above-referenced case, along with my certificate of service.

Yours very truly,

Amy E. Armstrong

cc: W. Thomas Lavender, Esquire
Joan W. Hartley, Esquire
Stephen Hightower, Esquire

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July 12, 2013

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211

RECEIVED
JUL 15 2013
SC Court of Appeals

Re: Town of Arcadia Lakes, et al. v. SCDHEC & Roper Pond;
Appellate Case No. 2010-159446

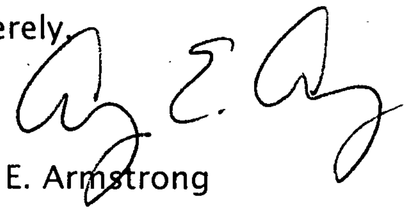
Dear Mr. Shearouse:

Enclosed for filing please find one (1) unbound original and six (6) bound copies of the Petition for Writ of Certiorari to the Court of Appeals, one (1) unbound and one (1) bound copy of the Appendix, along with my certificate of service and firm check in the amount of $100 in the above-referenced case.

Please return a clocked-in copy of the Petition in the enclosed postage-paid envelope.

Thank you very much for your kind cooperation and assistance.

Sincerely,



Amy E. Armstrong

cc: W. Thomas Lavender, Jr., Esquire
Joan W. Hartley, Esquire