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S.C. SUPREME COURT

THE 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

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, 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,

v.

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

RESPONDENT ROPER POND, LLC'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Columbia, South Carolina
September 11, 2013

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INTRODUCTION

Respondent Roper Pond, LLC ("Roper Pond") is the owner of approximately 13 acres of real property on Trenholm Road in an unincorporated area of Richland County ("Property"). This case involves two separate authorizations by Respondent South Carolina Department of Health and Environmental Control ("DHEC") in connection with Roper Pond's construction of a multi-family residential housing development on this Property ("Proposed Project"). By letter dated December 15, 2008, DHEC granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("State General Permit"), authorizing land-disturbing activities on 9.6 acres of the Property in association with the Proposed Project. The Proposed Project also required the filling of 0.075 acres of jurisdiction wetlands. Roper Pond provided the required notice to the U.S. Army Corps of Engineers ("Corps") to conduct this activity under a Nationwide Permit. DHEC had previously issued a 401 water quality certification for this Nationwide Permit in 2007 with general conditions which became conditions of the Nationwide Permit.

At issue in this case are these two separate DHEC authorizations—the grant of coverage to Roper Pond under the State General Permit and the 401 water quality certification for the Nationwide Permit to fill 0.075 acres of jurisdictional wetlands on the Property. While Petitioners argue that these two separate and distinct DHEC decisions are interdependent with respect to Roper Pond's Proposed Project, there is simply no statutory or regulatory basis for this argument. In this case, DHEC's authorization to grant coverage to Roper Pond under the State General Permit does not require a Corps permit as a prerequisite to such authorization. Moreover, the 401 water quality certification for the Nationwide Permit authorizing Roper Pond to fill 0.075 acres of jurisdictional wetlands on the Property was issued in 2007. Any alleged failure to satisfy a condition of the 401 water quality certification would be subject to the authority of the Corps since any such condition becomes a condition of the Nationwide Permit issued by the Corps. The Corps was aware of the excavation of the Pond when it found the Proposed Project would result in minimal individual and cumulative environmental effects and therefore could proceed under Nationwide Permit 29.

Petitioners' Petition for a Writ of Certiorari does not satisfy the grounds for certiorari review. The Court of Appeals was unanimous in its decision affirming the Administrative Law Court ("ALC"). Contrary to Petitioners' assertion, this case presents no novel question of law because the federal and state law governing DHEC's decisions in this case is clear and well-established. Additionally, while Petitioners argue that the Court of Appeals' decision contradicts the well-established law on standing in environmental cases, the Court of Appeals correctly applied the three-prong test for standing set forth in *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C.

594, 603, 550 S.E.2d 287, 292 (2001), and subsequent rulings by this Court. Petitioners advocate an interpretation of the law which confers standing in environmental cases in a manner which presumes an injury in fact and imposes no burden to satisfy the remaining prongs of the test. For the reasons set forth below, Roper Pond respectfully asks this Court to deny the Petition.

COUNTER-STATEMENT OF THE CASE[1]

This case involves DHEC's grant of coverage under the State General Permit to conduct land-disturbing activities on 9.6 acres of the Property in connection with construction of the Proposed Project. The Property is outside the corporate limits of the Town of Arcadia Lakes in an unincorporated area of Richland County. (R. p. 864). The Property includes 1.80 acres of jurisdictional wetlands and a pond ("Pond"). The Pond is man-made pond wholly within the boundaries of the Property. (R. pp. 464, 540). The Pond is approximately five feet deep at its deepest point. (Tr. p. 230, ll. 3-6, R. p. 361). The plan for the Proposed Project required the filling of 0.075 acres of jurisdiction wetlands on the Property. The Corps confirmed that this activity was authorized under a Nationwide Permit. (R. p. 760). Additionally, the stormwater management plan for the Proposed Project included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate. (R. p. 196). Neither DHEC nor the Corps require a permit for dredging of the Pond for this use.

A. Coverage under State General Permit

State regulations require a permit for stormwater discharges from land-disturbing activities associated with the Proposed Project. 24 S.C. CODE ANN. REGS. § 61-9.122.26(c). DHEC administers this permitting program pursuant to 24 S.C. CODE ANN. REGS. § 61-

[1] Additional citations to facts in the record are included in the Argument section of this Return.

9.122.26 *et seq* ("State NPDES Regulations") and 26 S.C. CODE ANN. REGS. § 72-300 *et seq*. ("State Stormwater Regulations"). Section 61-9.122.28(a)(2) of the State NPDES Regulations authorizes DHEC to issue general permits for discharges for categories or subcategories of storm water point sources. 24 S.C. CODE ANN. REGS. § 61-9.122.28(a)(2)(i). On August 1, 2006, DHEC re-issued the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities, Permit No. SCR100000 ("State General Permit"). (R. p. 481). The State General Permit covers discharges from the commencement of construction activities until final stabilization of the construction site. (R. pp. 191, 481).

On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project pursuant to the provisions of the State General Permit. Roper Pond also submitted its storm water pollution prevention plan ("SWPPP") to DHEC as required by the State General Permit and the State Stormwater Regulations. (R. pp. 663-759). Jill Stewart, a licensed professional engineer in South Carolina and Manager of the DHEC's Stormwater Permitting Section, conducted the review of Roper Pond's SWPPPP. Under the State Stormwater Regulations, the SWPPP must address both the quality and the quantity of the stormwater runoff associated with a proposed project. 26 S.C. S.C. CODE ANN. REGS. § 72-307(C). In reviewing a SWPPP, the reviewing entity assesses the proposed best management practices ("BMPs") to determine if those measures are adequate to meet the requirements of the State Stormwater Regulations and the State General Permit. The SWPPP for any proposed project can be revised as needed to incorporate the appropriate combination of BMPs and implementation procedures necessary to meet the requirements of the State General Permit. (R. pp. 205-06). The SWPPP

approved by DHEC for the Proposed Project utilized a number of BMPs to control erosion and sedimentation during construction. (R. pp. 194-95). Ms. Stewart testified that the Roper Pond SWPPP, with the revisions requested by DHEC, complied with the requirements of the State General Permit and the State Stormwater Regulations. (R. pp. 188-89, 202).

Although coverage under the State General Permit terminates once the site is stabilized following the conclusion of construction activities, Section 3.4(F) of the State General Permit requires the applicant to include "a description of all post-construction storm water management measures that will be installed during a construction process to control pollutants and storm water after the construction operations have been completed." (R. p. 498). Roper Pond's post-construction stormwater design exceeded the requirements of the State Stormwater Regulations. (R. pp. 198-99). The State Stormwater Regulations also require an applicant to demonstrate that the development of the site does not result in a post-construction stormwater runoff rate that is greater than the pre-construction stormwater runoff rate. 26 S.C. CODE ANN. REGS. § 72-307(C)(4)(a). Roper Pond provided DHEC with pre-construction and post-construction runoff rates for the two-year 24-hour duration storm event and the ten-year 24-hour duration storm event in order to demonstrate that the design for development of the site met this regulatory requirement. (R. pp. 195-96). The approved design included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate. (R. p. 196). Both the State General Permit and the State Stormwater Regulations allow an existing pond to be used for control of the post-construction stormwater runoff rate on a developed site. (R. p. 180). By letter dated December 15, 2008, DHEC granted Roper Pond coverage under the State General Permit for stormwater discharges associated with construction of the Proposed

Project.

B. Corps Permit for Filling of Wetlands

The Proposed Project included the filling of 0.075 acres of jurisdictional wetlands in an area upland of the Pond. The Corps administers the permitting program for filling of wetlands under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 *et seq.*, ("Clean Water Act"). 33 U.S.C.A. § 1344. Pursuant to Section 404 of the Clean Water Act, a Corps permit is required "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C.A. § 1344(a). Section 404 of the Act authorizes Corps to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C.A. § 1344(e)(1). On March 12, 2007, the Corps published the final decision to re-issue Nationwide Permits, including Nationwide Permit 29 for Residential Developments ("NWP 29") and Nationwide Permit 39 ("NWP 39") for Commercial and Institutional Developments in the Federal Register. 72 FR 11092-01 (11123) (R. p. 243). Both NWP 29 and NWP 39 authorize the fill of up to 0.10 acres of jurisdictional wetlands. (R. p. 271).

Pursuant to Section 330.4 of the Corps Regulations, a state water quality certification is required prior to re-issuance of a Nationwide Permit. 33 C.F.R. § 330.4(c)(1). DHEC issued its 401 Water Quality Certification for the 2007 Nationwide Permits in accordance with 25A S.C. CODE ANN. REGS. § 61-101 ("State Water Quality Certification Regulations"). (R. pp. 249-50). DHEC determined that the certification of these Nationwide Permits was appropriate in light of the requirements of the Water Quality Certification Regulations

because the activities authorized under the Permits would have minimal individual or cumulative impacts. (R. pp. 249-50). Accordingly, in 2007 DHEC issued a 401 Water Quality Certification for a number of Nationwide Permits, including NWP 29 and NWP 39, with certain general conditions. (R. pp. 248-49, 273). Pre-construction notification to DHEC is not required under the 401 Water Quality Certifications for either NWP 29 or NWP 39. (R. pp. 264-66, 274).

George Whatley, the wetlands scientist for Roper Pond, consulted with the design engineers for the Proposed Project to minimize the impacts to wetlands and to prepare a Corps submittal for authorization to fill jurisdictional wetlands as required by Section 404 of the Clean Water Act. (R. p. 430). On May 5, 2008, Mr. Whatley submitted a pre-construction notification ("PCN") to the Corps to fill 0.075 acres of jurisdictional wetlands under a Nationwide Permit. (R. p. 762). The PCN for the Proposed Project did not specify a particular Nationwide Permit under which the activities would be conducted. (R. pp. 440, 762). By letter to Mr. Whatley dated September 9, 2008, the Corps verified that "the activity meets the terms and conditions of Department of Army Nationwide Permit(s) #39." (R. p. 555). In early 2009, Mr. Whatley contacted Colt Bowles of the Corps to request clarification on the verification of the PCN for activities under NWP 39 for Commercial and Institutional Development instead of NWP 29 for Residential Development. (R. pp. 441-43, 780). By letter to Mr. Whatley dated February 25, 2009, the Corps verified that the fill of 0.075 acres in association with the Proposed Project was authorized under NWP 29. (R. p. 760).

Charles Hightower, Section Manager of DHEC's 401 Wetlands Section, testified that the filling of 0.075 acres as proposed by Roper Pond conforms to the conditions of the 401 Water Quality Certifications for both NWP 29 and NWP 39. (R. pp. 264, 267). Mr.

Hightower further testified that an individual 404 permit and accompanying 401 Water Quality Certification is not required unless a proposed activity does not meet the conditions of an applicable NWP and the corresponding 401 Water Quality Certification issued by DHEC for the NWP. (R. pp. 252-53; 287-88; 295).

C. The Petitioners

Petitioners in this case are the Town of Arcadia Lakes, residents of Kaminer Station, a residential subdivision which borders the Roper Pond Property, and residents of the Cary Lake subdivision. The Property lies outside of the corporate limits of the Town of Arcadia Lakes ("Town"). (R. p. 380). The Town contends that the Proposed Project will cause harm to the environmental interests of the town because Roper Pond drains into Cary Lake and the Town is responsible for the water flowing into Cary Lake. Cary Lake is privately owned and maintained by the Cary Lake Homeowners Association. (R. pp. 824-25). The Town has no ownership interest in Cary Lake. (R. p. 825). The water from Cary Lake does not drain into any other water body within the corporate limits of the Town. (R. pp. 825-26). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (R. pp. 827-30). The Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake. (R. pp. 827-30). The Town has never budgeted any funds for the maintenance of repair for any of the seven lakes within its corporate limits. (R. pp. 830-31).

The Kaminer Station Subdivision is adjacent to the Roper Pond Property and hydraulically upgradient of the Roper Pond Property. (R. pp. 372-73, 256-57, 387-88). Ms. Linda Jackson, a resident of the Kaminer Station Subdivision, testified that she enjoys the view of the Pond on the Roper Pond Property and Cary Lake during walks in the area. (R. pp. 374-77). Ms. Jackson further testified Cary Lake is privately owned, and there is no public access to Cary Lake. (R. p. 385). Ms. Jackson testified that any negative impacts to

Cary Lake would be the result of Roper Pond's failure to follow the General Permit and the SWPPP during the construction of the Proposed Project. (R. pp. 381-82).

Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. (R. p. 394). Elaine Starr, a resident of the Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. (R. p. 395). Ms. Starr testified that the condition of Cary Lake has deteriorated over the years. (R. p. 395). Ms. Starr testified that Cary Lake has been impacted by sediment from previous development in the area. (R. pp. 408-11). Ms. Starr testified that she had not reviewed the SWPPP for the Proposed Project. (R. p. 407). Ms. Starr testified that any development in the area would exacerbate the condition of Cary Lake. (R. p. 408). Ms. Starr further testified that the stormwater from the Proposed Project will negatively impact Cary Lake even if the SWPPP approved by DHEC is implemented as designed. *Id.* Ms. Starr testified that she believed that any increase in density of the Property would have a detrimental impact because the impervious surfaces, such as the roof tops, garages, pavement, and sidewalks, would increase the rate of stormwater runoff. (R. pp. 408-12).

ARGUMENT

While Petitioners acknowledge that excavation of the Pond does not require a 404 permit from the Corps, Petitioners nonetheless argue that DHEC's decision to grant coverage under the General Storm Permit requires a review by DHEC to determine whether the conditions of the 2007 certification of NWP 29 have been satisfied. Contrary to Petitioners' contentions, the Court correctly held that no additional 404 permit or 401 water quality certifications were required prior to DHEC's grant of coverage to Roper Pond under the State General Permit. While the State General Permit includes a condition that a Corps permit be

issued prior to DHEC's grant of coverage under the State General Permit, such condition is expressly limited to a Corps permit required for "permanent or temporary storm water control structures." As Petitioners have acknowledged, there is no Corps permit required for the excavation of the Pond to control the post-construction stormwater runoff rate on the Property. As such, a determination of whether the conditions of the 401 water quality certification for the NWP 29 have been satisfied is not a consideration in DHEC's decision to grant coverage to Roper Pond under the State General Permit. With respect to the 401 water quality certification for NWP 29 authorizing Roper Pond to fill 0.075 acres of jurisdictional wetlands, the Court of Appeals correctly found that the Proposed Project had 401 certification for coverage under NWP 29. Finally, the Court of Appeals applied the well-established test for standing and correctly held that Petitioners failed to meet their burden to establish all three prongs of that test.

I. THE COURT CORRECTLY HELD THAT NO ADDITIONAL 404 PERMITS OR 401 CERTIFICATIONS WERE REQUIRED PRIOR TO DHEC'S DECISION TO GRANT ROPER POND COVERAGE UNDER THE STATE GENERAL PERMIT.

Petitioners assert that DHEC's grant of coverage under the State General Permit was not proper because Section 2.1(C) of the State General Permit requires that "any Corps of Engineers permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (Petition, p. 24) (emphasis in original). Section 2.1(C) of the State 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 no grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective.

(R. p. 487) (emphasis added). Relying on this provision of the State General Permit, Petitioners assert that "[b]ecause the project did not qualify for coverage under DHEC's NWP

certification, it is not entitled to coverage under the General Permit." (Petition, p. 24). Contrary to the Petitioners' assertions, NWP 29 authorizing Roper Pond to fill 0.075 acres of wetlands is not a requirement of Section 2.1(C) of the State General Permit Petitioners. Section 2.1(C) of the State General Permit addresses only Corps permitting required for "permanent or temporary storm water control structures." Roper Pond provided notice to Corps for coverage under NWP 29 to authorize the filling of 0.075 acres of jurisdictional wetlands for construction of buildings and sidewalks—not storm water control structures. (R. p. 553). There is simply no basis for Petitioner's contention that certification of NWP 29 was a prerequisite to DHEC's decision on coverage pursuant to Section 2.1(C) of the State General Permit.

Moreover, Section 2.1(C) of the State General Permit does not create an obligation to obtain a 404 permit where none is required under Section 404 of the Clean Water Act. Petitioners argued to the Court of Appeal that the Pond was used by Roper Pond as a water control structure and thus required a 404 permit from the Corps. The Court of Appeals correctly held that the issue had not been preserved for appeal. (Shearouse Adv. Sht. 26 at 126). However, even if it had been so preserved, the argument nonetheless fails. Section 2.1(C) of the State General Permit cannot create a requirement for a Corps permit were none is required by the federal statutes. Indeed, Petitioners have repeatedly conceded that no 404 permit is required for the excavation of the Pond. (Petition, pp. 19, 20). Yet, Petitioners continue to argue in a circular manner that DHEC improperly granted Roper Pond coverage under the State General Permit because Roper Pond did not have the Corps permitting as required by that Permit: "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 NDPES General Permit. (R. p. 487). In short, 401 certification is required for a 404 permit, and a 404 permit is required for a Stormwater NPDES General Permit." (Petition, pp. 3-4) (emphasis in original). However, it is undisputed that the only activity in connection with the Property which is regulated under Section 404 of the Clean Water Act is the proposed filling of the 0.075 acres of wetlands in connection with the construction of buildings and sidewalks. This permitting requirement is not subject to the conditions of Section 2.1(C) of the State General Permit. Therefore, any alleged deficiency related to the water quality certification for NWP 29 is not a consideration in DHEC's grant of coverage under the State General Permit and is not a legitimate basis for challenging such decision.

Moreover, Petitioners' challenge to DHEC's grant of coverage to Roper Pond under the State General Permit rested solely on their contention that Roper Pond failed to secure a Corps permit as required pursuant to Section 2.1(C) of the State General Permit. Petitioners failed to present any evidence regarding the sufficiency of the BMPs under the SWPPP approved by DHEC. Petitioners' only expert did not even review the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and offered no opinion regarding the sufficiency of such measures. (R. pp. 332-33, 342). In fact, none of Petitionerss' witnesses reviewed the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (R. pp. 332-33, 407). Accordingly, the Court of Appeals correctly held that DHEC properly granted Roper Pond coverage under the State General Permit to conduct land-disturbing activities in connection with the Proposed Project.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE PROPOSED PROJECT HAD 401 CERTIFICATION FOR COVERAGE UNDER NWP 29.

The Court of Appeals correctly held that DHEC had issued a water quality certification in 2007 for the activities authorized by NWP 29 and found that DHEC's

certification of NWP 29 was sufficient for Roper Pond to undertake the proposed filling of the 0.075 acres of wetlands without further approval from DHEC. (Shearouse Adv. Sht. 26 at 125). Accordingly, there is no merit to Petitioners' assertion that Roper Pond's authorization to conduct such activities was not authorized by NWP 29 because there was no 401 certification for activities to be conducted under NWP 29.

The Corps issued NWP 29 in 2007, authorizing those insignificant impacts described therein. DHEC issued the 401 water quality certification for NWP 29 in 2007 with certain limited general conditions. The only requirement for authorization to fill the 0.075 acres of wetlands under the NWP was pre-construction notification to the Corps. As the Court correctly held:

> The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

(Shearouse Adv. Sht. 26 at 125). This holding acknowledges that DHEC had already issued a 401 certification for projects authorized under NWP 29. NWP 29 did not require further action or approvals by DHEC for activities within the scope of those authorized by NWP 29. As the Court of Appeals noted, the Corps was aware of the excavation of the Pond when it "determined that the project would result in 'minimal individual and cumulative environmental effects' and met the conditions of NWP 29." (Shearouse Adv. Sht. 26 at 124). As discussed below, pursuant to Corps Regulations and the State Water Quality Certification Regulations, the Corps—not DHEC—is the regulatory agency authorized to review a notification to proceed under a Nationwide Permit and to determine whether the proposed activity is consistent with the conditions of that Nationwide Permit.

Any conditions of a 401 Water Quality Certification issued by DHEC become a condition of the Corps permit. 33 C.F.R. § 330.4(c); *see also* S.C. CODE ANN. REGS. § 61-101(H)(1) ("Any certification condition is intended to become a condition of the Federal or State license or permit as specified in Federal or State law."). Pursuant to the Corps Regulations, the Corps district engineer has the discretionary authority to determine whether an activity complies with the conditions of the Nationwide Permit and whether the activities would have more than minimal impacts. 33 C.F.R. § 330.4(d). The Corps district engineer has the authority to modify the Nationwide Permit or to require an individual permit for the proposed activity. *Id.* Likewise, the State Water Quality Certification Regulations acknowledge that the agency issuing the permit is authorized to enforce the conditions of the permit: "Certification conditions which are included as conditions of such license or permit are subject to enforcement mechanisms available to the Federal or State agency issuing the license or permit." 25A S.C. CODE ANN. REGS. § 61-101.H.2 (emphasis added).[2] Although DHEC may impose conditions on its issuance of the 401 water quality certification for a Nationwide Permit, or any other federal permit affecting water quality, the authority to enforce those conditions is held by the Corps—the agency issuing the Nationwide Permit.

Finally, Petitioners contend that "DHEC has broader review authority over the 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." (Petition, p. 20). Again, this argument disregards DHEC's regulation of the Roper Pond project. The State General Permit authorizing stormwater discharges in connection with the Proposed Project is issued pursuant to the Pollution Control Act and authorizes the discharge of pollutants from

[2] In this case the agency issuing the license or permit would be the Corps, not DHEC, as DHEC is merely certifying the Corps permit.

stormwater associated with construction activities related to the Roper Pond project. (R. p. 689). Additionally, the proposed filling of the 0.075 acres of wetlands pursuant to NWP 29 is authorized by DHEC pursuant to the 2007 water quality certification. Except for the filling of the 0.075 acres of wetlands, Petitioners concede that no other 404 permit is required for the project. As such, no other water quality certification is required. Moreover, no other permit or approval from DHEC is required. In short, DHEC and the Corps have issued all required permits for Roper Pond project. DHEC has fully asserted its regulatory authority over the construction of Proposed Project pursuant to the State General Permit and all applicable state and federal statutes and regulations.

III. THE COURT'S RULING ON STANDING IS CONSISTENT WITH WELL-ESTABLISHED LAW ON THE REQUIREMENT TO OFFER EVIDENCE SUFFICIENT TO ESTABLISH STANDING.

Petitioners contend that the Court's ruling creates a new test for establishing standing. To the contrary, the ALC and the Court of Appeals correctly applied the well-established law on standing and found that the Petitioners failed to present evidence to demonstrate an injury in fact causally connected to the action challenged by Petitioners. Petitioners' contention that the Court of Appeals improperly applied well-established law on standing is based on Petitioners' failure to recognize the distinction between the sufficiency of allegations to support standing at the pleading stage and the requirement to offer sufficient evidence to prove such allegations at trial. Contrary to Petitioners' assertions, the Court of Appeals' ruling does not require the Petitioners to prove success on the merits. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme stated the three-prong standing test and held that the plaintiff bears the burden of establishing each prong of this test. 504 U.S. at 561 (citations omitted). The Court further explained that this burden increases with each stage of litigation such that "at the final stage, those facts (if controverted) must be

'supported adequately by the evidence adduced at trial.'" *Id.* (citation omitted). The Court of Appeals thus applied the proper standard in finding that evidence presented at trial, including the lack of evidence presented at trial by Petitioners, supported the ALC's ruling that the Petitioners failed to satisfy the requirements of standing to challenge DHEC's decisions related to Roper Pond's Proposed Project.

Petitioners further assert that the Court "injects a new requirement that a plaintiff must have a property interest in order to establish an injury-in-fact." (Petition, p. 6). Petitioners contend that "[t]he 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." (Petition, p. 9). Petitioners mischaracterize the Court of Appeals' consideration of the fact that Roper Pond and Cary Lake are privately owned in the context of specific findings that the Petitioners failed to demonstrate standing in this case. For example, Petitioners assert that the Town has standing because of its responsibility for the environmental quality of Cary Lake. However, the evidence on the record does not support this assertion. Cary Lake is privately owned and maintained by the Cary Lake Homeowners Association. (R. pp. 824-25). The Town has no ownership interest in Cary Lake. (R. p. 825). The water from Cary Lake does not drain into any other water body within the corporate limits of the Town. (R. pp. 825-26). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (R. pp. 827-30). The Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake. (R. pp. 827-30). The Town has never budgeted any funds for the maintenance of repair for any of the seven lakes within its corporate limits. (R. pp. 830-31). As such, the absence of a property interest in Cary Lake is an appropriate consideration in the

determination of the Town's claim to standing for alleged injuries related to the environmental condition of Cary Lake.

Similarly, Petitioners contend that the Court of Appeals interpreted the proprietary interests required for the Town's standing under *Glaze v. Grooms*, 324 S.C. 249 (Ct. App. 1996), too narrowly. However, in holding that the Town failed to satisfy the requirements of standing, the Court of Appeals did not reach the issue of whether the interests asserted by the Town were "'proprietary' or not." (Shearouse Adv. Sht. 26 at 121). The Court of Appeals found that the Town failed to present evidence to show that any of its "professed interests" would result in an injury in fact to the Town or that any alleged injuries "were 'fairly traceable to the challenged action in this case." *Id.* Petitioners further contend that Town's requirements to "prevent pollution within its MS4" under the Clean Water Act is sufficient to demonstrate standing. (Petition, pp. 11-12). However, the evidence on the record does not support this contention. Indeed, Richard Thomas, Mayor of the Town, testified that the Town has delegated its responsibility for compliance with its MS4 requirements to Richland County through an intergovernmental agreement. (R. p. 845). The regulations governing MS4 permit requirements expressly provide for the Town's delegation of its compliance requirement to another MS4 through an intergovernmental agreement. As such, Petitioners' assertion that the Town's MS4 requirements support standing is contrary to the evidence on the record.

Similarly, the Court of Appeals correctly held that Petitioners failed to present evidence of an injury in fact as the result of increased sedimentation in Cary Lake from the Proposed Project. Citing to the evidence on the record, the Court of Appeals found that the current increased sedimentation in Cary Lake of which Petitioners complained was the result of "prior occurrences involving possible mismanagement" and noted that Petitioners offered

"no evidence that the project at issue here would lead to similar results." (Shearouse Adv. Sht. 26 at 123). Indeed, as the Court of Appeals noted, Elaine Starr, who testified on behalf of the Cary Lake Petitioners, "admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments." (Shearouse Adv. Sht. 26 at 123). Additionally, Petitioners contend that Ms. Starr has standing to assert an injury to Cary Lake as an owner because she is a member of the Cary Lake Homeowner Association. (Petition, p. 7, fn. 1). However, there is no evidence on the record regarding the nature of the governance or ownership of common elements under the control of the incorporated association. Accordingly, this argument could not have been considered by the Court of Appeals.

With respect to the Kaminer Station Petitioners, the Court of Appeals upheld the ALC's ruling on standing "to the extent that it found that Petitioners have failed to establish an injury that would be traceable to the permitting decision." (Shearouse Adv. Sht. 26 at 122). Contrary to Petitioners' assertions, the Court of Appeals did not hold that the aesthetic interest of the Kaminer Station could not be an injury in fact. Instead, the Court of Appeals affirmed the ALC's determination that the Kaminer Station Petitioners failed to offer evidence of a causal connection between the injuries alleged and the permitting decision at issue in this case:

> When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves. Furthermore, Reice's

> inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

(Shearouse Adv. Sht. 26 at 122-23). Fundamental to this ruling is the recognition of the conduct complained of in this action—i.e., DHEC's approval of the SWPPP and authorization of coverage to Roper Pond under the State General Permit. Most, if not all, of Petitioners' alleged injuries in support of standing would result from Roper Pond's failure to manage sediment and erosion control in accordance with the approved SWPPP and the State General Permit. With respect to these allegations, the potential injuries alleged would not be caused by the issuance of coverage under the State General Permit, but by a failure to comply with the DHEC-approved SWPPP and the State General Permit. Moreover, as the Court of Appeals correctly held, Petitioners failed to offer any evidence that "BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site." (Shearouse Adv. Sht. 26 at 121). Indeed, Petitioners' only expert had never seen the approved SWPPP and offered no opinion regarding the sufficiency, or lack thereof, of the BMPs in the approval SWPPP.

Petitioners rely on the holding in *Smiley* for the holding that generalized aesthetic and recreational interests are sufficient to confer standing. However, *Smiley* can be easily distinguished from this case. The petitioner in *Smiley* challenging the beach renourishment project, alleging an injury based on the interruption of his use to a "**public** beach on the Isle of Palms." *Smiley v. South Carolina Dep't of Health and Envtl. Control*, 374 S.C. 326, 330, 649 S.E.2d 31, 33 (2007) (emphasis added). Such is not the case here. The Court of Appeals correctly recognizes that the Pond on the Roper Pond property is a man-made pond wholly within the boundaries of the Property. Citing to the holding in *Conservation Council of N.C.*

v. Costanzo, 505 F.2d 498 (4th Cir. 1974), the Court notes that an injury in fact will not be assumed when property at issue is privately owned. In *Costanzo*, the Fourth Circuit held as follows:

> To the extent that standing is predicated upon plaintiffs' recreational use as either a licensee or a trespasser, this Court finds little difficulty in holding that they have suffered no injury due to any impairment of their use of the highlands. There is no indication that Carolina Cape Fear Corporation will permit a continuation of such use and without the possibility of future use, the challenged construction cannot harm the plaintiffs.

Id. at 502. The Kaminer Station Petitioners offered no evidence that they had previously used the Roper Pond property for recreational purposes and make no claim to have the right or expectation of permission to do so in the future. Accordingly, unlike the plaintiff in *Smiley*, Petitioners cannot claim a recreational injury resulting from the land-disturbing activities on the Roper Pond property. Petitioners also cite to *Spectre, LLC v. South Carolina Department of Health and Environmental Control* as a case allowing a "challenge to the filling of 32 acres of 'isolated' wetlands on private party." (Petition at p. 7 (citing *Spectre, LLC v. South Carolina Dep't of Health and Envtl. Control,* 386 S.C. 357, 361, 688 S.E.2d 844, 846 (2010)). However, the party challenging DHEC's action in *Spectre* was the property owner who had been denied a permit to fill wetlands on its property. While third-parties intervened in the action, the holding does not address these third parties' right to intervene, the standard for which would have been determined pursuant to Rule 24, SCRCP.

Additionally, Petitioners oversimplify the test for standing based on a claim to an aesthetic and recreational interest in the challenged action. In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), the Fourth Circuit Court of Appeals examined the requirement for standing based on aesthetic or recreational interests:

> In most kinds of litigation, there is scant need for courts to pause over the standing inquiry. One can readily recognize that the victim of an automobile

> accident or a party to a breached contract bears the kind of claim that he may press in court. In other sorts of cases, however, the nexus between the legal claim and the individual asserting the claim may not be so self-evident. Standing inquiry in environmental cases, for example, must reflect the context in which the suit is brought. In some instances, environmental injury can be demarcated as a traditional trespass on property or tortious injury to a person. In other cases, however, the damage is to an individual's aesthetic or recreational interests. The Supreme Court has made it clear that such interests may be vindicated in the federal courts. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 705, 145 L.Ed.2d 610 (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. at 562-63, 112 S.Ct. 2130 (purely aesthetic interest is cognizable for purposes of standing); *Sierra Club v. Morton*, 405 U.S. at 734, 92 S.Ct. 1361 ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society ... deserving of legal protection through the judicial process."); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (interest supporting standing "may reflect aesthetic, conservational, and recreational as well as economic values" (internal quotation marks omitted)). But because these and other noneconomic interests may be widely shared, the Supreme Court has cautioned that environmental plaintiffs must themselves be "among the injured." *Sierra Club v. Morton*, 405 U.S. at 735, 92 S.Ct. 1361. If it were otherwise, the Article III case or controversy requirement would be reduced to a meaningless formality.
>
> Courts must therefore examine the allegations in such cases "to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752, 104 S.Ct. 3315. **Such scrutiny is necessary to filter the truly afflicted from the abstractly distressed.** Courts discharge this duty by asking such questions as: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Id.* If the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and an adjudication of his rights.

Id. at 154-55 (emphasis added). Petitioners interpret aesthetic interest so broadly as to confer standing on any party who has "enjoyed viewing" the property which is the general subject of the challenged action. Moreover, Petitioners have failed to present evidence as to how the DHEC decision at issue in this case negatively impacts its enjoyment of viewing the Roper

Pond property in an actionable manner. Accepting Petitioners' standing argument would suggest that they could assert standing if Roper Pond constructed a fence obstructing the view of the pond from the public roadway; however, such action would clearly not be actionable. Indeed, Petitioners' claims to potential harm resulting from any deprivation of the enjoyment of the view of Roper Pond can be no more than a claim of being "abstractly distressed." Petitioners' interpretation of the test for standing based on aesthetic interests would unquestionably reduce the standing requirement "to a meaningless formality."

Additionally, Petitioners advocate a broad interpretation of the requirement for demonstrating a causal connection between the alleged injuries and the proposed development. Citing to the United States Supreme Court holding in *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), Petitioners contend that "but-for standard" should be applied to causation under the test for the standing. (Petition, p. 14). In *Duke Power Company*, individuals who lived and worked in proximity to the sites of two planned nuclear power plants filed suit against Nuclear Regulatory Commission, challenging the constitutionality of the Price-Anderson Ac. *Id.* at 62. The Act set a monetary cap on damages recoverable in consequence of nuclear accidents. The plaintiffs asserted a number of injuries resulting from the construction of the power plants, including exposure to radiation, thermal impacts to two lakes used for recreational purposes, reduction in property values, and fear of exposure to radiation and nuclear accident. *Id.* at 73. While the Court did not determine whether all the alleged injuries were "sufficiently concrete to satisfy constitution requirements," the Court held that "it is enough that several of the 'immediate' adverse effects were found to harm appellees." *Id.* At trial, the plaintiffs have put forth testimony from Duke Power officials at the trial level to demonstrate that they would have had to consider

withdrawing their plans for the new nuclear plants in the absence of the act. *Id.* at 76-77. Based on that testimony, the district court "discerned a 'but for' causal connection between the Price-Anderson Act, which appellees challenged as unconstitutional, 'and the construction of the nuclear plants which the [appellees] view as a threat to them.'" *Id.* at 74. In upholding the district court's finding of standing, the Court held that the "but for" determination supporting the finding of standing was not clearly erroneous. *Id.* at 73-74, fn. 19. This could hardly be characterized at the adoption of a "but for" standard on the second prong of the standing test. Moreover, while concurring in the judgment, Justices Stewart and Stevens wrote separately on the standing issue—in particular, criticizing the "but for" standard. *Id.* at 95, 102-103. Therefore, contrary to the Petitioners' assertion, it cannot be stated that the *Duke Power* Court adopted a "but for" standard for standing. The Court merely held that the district court's "but for" finding was not clearly erroneous. Based on the strong arguments in the concurring opinions, it certainly cannot be argued that a "but for" standard as to the second prong of the standing test was adopted by the Court. As such, there is no basis for the application of a "but for" standard in this case.

Petitioners further contend that the Court of Appeals disregards the other injuries alleged: "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." (Petition, p. 8-9). With respect to allegations regarding the character of the Town, property values, and increased crime and traffic, Petitioners offered no credible evidence that the proposed development would result in the harm alleged. These concerns are

nothing more than mere speculation based on the perceived character and behavior of the residents of the multi-family residential development to be constructed. More significantly, such allegations are clearly unrelated to DHEC's decision at issue in this case, and therefore, not an injury in fact which is causally connected to the challenged agency action.

To the extent that Petitioners have alleged injuries which are at least generally related to DHEC's grant of coverage to Roper Pond under the State General Permit, the Court of Appeals noted that the Petitioners' expert failed to opine that the land-disturbing activities authorized under the State General Permit would adversely impact Roper Pond:

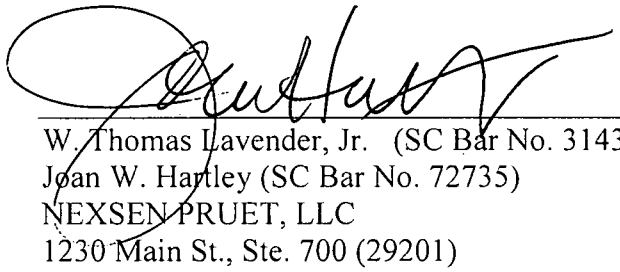
> When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

(Shearouse Adv. Sht. 26 at 117). As both the ALC and the Court of Appeals recognized, Petitioners failed to present any evidence that the activities authorized by the DHEC decision at issue in this case would result in the injuries alleged by Petitioners. Under South Carolina and federal case law, Petitioners bear the burden of proof at trial to present such evidence. The Court of Appeals correctly held that Petitioners failed to meet this burden.

CONCLUSION

For the forgoing reasons, Respondent Roper Pond, LLC respectfully requests that the Court deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,



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September 11, 2013

THE 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

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, 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,

v.

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

PROOF OF SERVICE

I certify that I have served Respondent Roper Pond, LLC's Return to the Petition for Writ of Certiorari on all parties by depositing a copy of it in the United States Mail, postage prepaid, on September 11, 2013 addressed to their attorneys of record, as indicated below:

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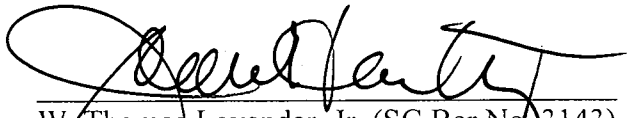

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