

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

RECEIVED

John D. McLeod, Administrative Law Judge

JUL 15 2013

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

S.C. Supreme Court

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,

vs.

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

**APPENDIX
VOL I OF III**

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July 12, 2013

CONTENTS

1.	RECORD ON APPEAL.	1
2.	FINAL BRIEF OF APPELLANTS.	948
3.	BRIEF OF RESPONDENTS.....	1001
4.	FINAL REPLY BRIEF OF APPELLANTS.	1056
5.	HOME BUILDERS ASSOCIATION OF SC'S AMICUS CURIAE BRIEF.	1083
6.	APPELLANTS' RETURN TO AMICUS CURIAE BRIEF.....	1105
7.	COURT OF APPEALS OPINION (Filed March 6, 2013).	1118
8.	PETITION FOR REHEARING.....	1147
9.	RESPONDENT ROPER'S RETURN TO APPLICATION FOR REHEARING OF APPELLANTS.	1175
10.	COURT OF APPEALS OPINION (Withdrawn, Substituted, and Refiled June 12, 2013).....	1202

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

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Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson,
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Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, ... Appellants,

vs.

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

**RECORD ON APPEAL
VOLUME I OF II**

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February 28, 2011

000001

INDEX

Page

VOLUME I

ORDERS:

Order Denying Motion to Reconsider and for Stay, dated April 1, 2010	1
Order for Temporary Stay, dated March 23, 2010	3
Final Order and Decision, dated January 21, 2010	4
Consent Order on Roper Pond, LLC's Motion to Dismiss, dated June 17, 2009	33
DHEC Board Denial Letter, dated January 14, 2009	35

PLEADINGS:

Petitioners' Request for Final Review Conference, dated December 30, 2008	37
Petitioners' Request for Contested Case Hearing, dated February 16, 2009	43
DHEC's Prehearing Statement, dated April 3, 2009	53
Roper Pond, LLC's Motion to Dismiss, dated April 6, 2009	59
Roper Pond, LLC's Prehearing Statement, dated April 6, 2009	64
Petitioners' Prehearing Statement, dated April 7, 2009	69
Petitioners' Response to Roper Pond, LLC's Motion to Dismiss, dated May 18, 2009	76
Petitioners' Request for Final Review Conference, dated May 22, 2009	79
DHEC's Response to Petitioners' Request for Final Review Conference, dated May 27, 2009	86

Petitioners' Amended Prehearing Statement, dated June 16, 2009	100
Petitioners' Motion to Reconsider and for Stay, dated February 1, 2010	106
Roper Pond, LLC's Response to Petitioners' Motion to Reconsider and for Stay, dated February 16, 2010	110

TRANSCRIPTS:

Administrative Hearing Transcript, dated September 3 and 4, 2009	131
Opening Statement by Mr. Lavender	138
Opening Statement by Mr. Chandler	142
Testimony of Jill Stewart	161
Direct Examination by Mr. Chandler	161
Cross Examination by Mr. Lavender	179
Cross Examination by Mr. Hightower	217
Redirect Examination by Mr. Chandler	222
Recross Examination by Mr. Lavender	228
Redirect Examination by Mr. Chandler	229
Testimony of Charles Hightower	234
Direct Examination by Mr. Chandler	234
Cross Examination by Mr. Lavender	263
Cross Examination by Mr. Hightower	275
Redirect Examination by Mr. Chandler	278
Recross Examination by Mr. Lavender	292
Recross Examination by Mr. Hightower	295

Redirect Examination by Mr. Chandler	297
Testimony of Seth Reice	299
Direct Examination by Mr. Chandler	299
Cross Examination by Mr. Lavender	327
Cross Examination by Mr. Hall	347
Redirect Examination by Mr. Chandler	358
Recross Examination by Mr. Lavender	369
Redirect Examination by Mr. Chandler	371
Testimony of Linda Jackson	372
Direct Examination by Mr. Chandler	372
Cross Examination by Mr. Lavender	379
Redirect Examination by Mr. Chandler	391
Recross Examination by Mr. Lavender	392
Testimony of Elaine Starr	394
Direct Examination by Mr. Chandler	394
Cross Examination by Mr. Lavender	402
Redirect Examination by Mr. Chandler	416
Testimony of George Whatley	427
Direct Examination by Mr. Lavender	427
Cross Examination by Mr. Chandler	466

VOLUME II

OTHER MATERIALS:

Petitioners' Exhibit 3, NPDES General Permit, dated August 1, 2006	481
Petitioners' Exhibit 4, Wetland Delineation Documents, dated October 4, 2004	534
Petitioners' Exhibit 5, Corps Wetland Delineation letter, dated January 26, 2005	542
Petitioners' Exhibit 6, Notice of Intent for Stormwater Discharge, dated September 24, 2008	549
Petitioners' Exhibit 8, Email from Stephens to Stewart, dated November 19, 2008	551
Petitioners' Exhibit 9, Joint State and Federal Application Form, dated September 11, 2008	553
Petitioners' Exhibit 10, Corps letter from Hadden to Whatley, dated September 9, 2008	555
Petitioners' Exhibit 12, Letter from Rowe to Whatley, dated October 2, 2008	563
Petitioners' Exhibit 22, Guidance Document, dated June 30, 2006	564
Petitioners' Exhibit 23, Permit General Conditions Document	573
Petitioners' Exhibit 24, Deposition of Jill C. Stewart, dated May 13, 2009	574
Petitioners' Exhibit 25, Deposition of Charles Hightower, dated May 13, 2009	593
Petitioners' Exhibit 26, Deposition of Bob Mundy, dated August 20, 2009	634
DHEC's Exhibit 2, Stormwater Pollution Prevention Plan, dated June 26, 2008	663

Roper Pond's Exhibit 1, Letter from Hadden to Whatley, dated February 25, 2009	760
Roper Pond's Exhibit 6, Letter from Whatley to Bowles, dated May 5, 2008	762
Roper Pond's Exhibit 7, Email from Futter to Mundy, dated February 26, 2009	780
Petitioners' Exhibit 27, Deposition of Richard W. Thomas, dated August 19, 2009	782
Petitioners' Exhibit 7, Email from Stewart to Futter & Stephens, dated November 17, 2008	921
Petitioners' Exhibit 11, Letter from Hadden to Whatley, dated February 25, 2009	922
Petitioners' Exhibit 15, Photo	931
Petitioners' Exhibit 16, Photo	932
Petitioners' Exhibit 17, Photo	933
Petitioners' Exhibit 18, Photo	934
Petitioners' Exhibit 19, Photo	935
CERTIFICATE OF COUNSEL	936

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION**

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,

vs.

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

Respondents.

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

**ORDER DENYING MOTION TO
RECONSIDER AND FOR STAY**

FILED

APR 01 2010

SC ADMIN. LAW COURT

This matter comes before the Court on Petitioners' Motion to Reconsider and for Stay ("Motion") of a Final Order and Decision issued in this case on January 21, 2010. On February 16, Respondent Roper Pond, LLC ("Roper Pond") filed a response in opposition to the Motion. Pursuant to an Order dated March 3, 2010, a hearing on the Motion was held on March 23, 2010, in Columbia, South Carolina. On March 23, 2010, the Court issued an Order for Temporary Stay imposing a stay of the Final Order and Decision pending the ruling on the Motion.

The Administrative Law Court reviews a Motion for Reconsideration consistent with the grounds to alter or amend a final decision as set forth in Rule 59, SCRCP. Rule 29(D), SCRPALC. Having heard the arguments of the parties, I find that the Petitioners have not put forth sufficient grounds for a reconsideration of the Final Order and Decision in this matter.

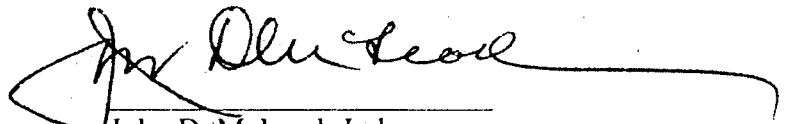
Section 1-23-380 of the APA provides that this Court may grant a stay of a final order "upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure." S.C. CODE ANN. § 1-23-380(2) (Supp. 2009). To establish a cause of action for a preliminary injunction under Rule 65, a party must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Props.*,

000007

Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). A plaintiff must establish all three elements to obtain a preliminary injunction. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009). Having heard the arguments of the parties, I find that the Petitioners failed to satisfy these requirements for a stay of the Final Order and Decision issued on January 21, 2010.

IT IS HEREBY ORDERED that Petitioners' Motion to Reconsider and for Stay is denied. It is further ordered that the stay imposed pursuant to the Order for Temporary Stay dated March 23, 2010 is lifted.

AND IT IS SO ORDERED.



John D. McLeod, Judge
S.C. Administrative Law Court

April 1, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 1 day of April, 2010
By: Anthony R. Goldman
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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.

vs.

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

Respondents.

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

ORDER FOR TEMPORARY STAY

FILED

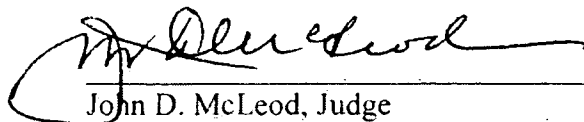
MAR 23 2010

SC ADMIN. LAW COURT

A Motion For Stay was heard on March 23, 2010 and is under consideration by this Court. Out of caution, the Court is compelled to issue a temporary stay as follows.

IT IS ORDERED that that the order issued on the merits in this case is temporarily stayed pending issuance of an order on the Motion for Reconsideration and Stay.

March 23, 2010
Columbia, SC


John D. McLeod, Judge
S.C. Administrative Law Court

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 23 day of March, 2010

By: Anthony R. Shelton
Judicial Law Clerk

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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,)

vs.)

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

Respondents.)

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

FINAL ORDER AND DECISION

FILED

JAN 21 2010

SC ADMIN. LAW COURT

Appearances:

James S. Chandler, Jr., Esquire
Amy E. Armstrong, Esquire
For Petitioners

Stephen P. Hightower, Esquire
Roger P. Hall, Esquire
For Respondent South Carolina Department of Health and
Environmental Control

W. Thomas Lavender, Jr., Esquire
Joan W. Hartley, Esquire
For Respondent Roper Pond, LLC

This matter comes before the Administrative Law Court pursuant to S.C. CODE ANN. § 1-23-310 *et seq.* (Supp. 2008) and the S.C. CODE ANN. § 44-1-60 (Supp. 2008), for a contested case hearing regarding the South Carolina Department of Health and Environmental Control's

000010

("Department") decision to authorize Respondent Roper Pond, LLC ("Roper Pond") coverage for land-disturbing activities in connection with the construction of a multi-family residential development on Trenholm Road in Richland County ("Proposed Project") pursuant to Permit No. SCR100000, issued August 1, 2006, and entitled NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities. Pursuant to notice given to all parties, a hearing was held before the ALC in this matter on September 3 and 4, 2009, in Columbia, South Carolina. After carefully weighing all the evidence, I uphold the Department's approval of coverage under the General Permit for discharge of stormwater in connection with the Proposed Construction.

I. ISSUES

1. Do the Petitioners have standing to challenge the Department's issuance of coverage under the General Permit for the Proposed Project?
2. Does Roper Pond have an effective 404 Permit for impacts to the jurisdictional wetlands associated with the Proposed Project?
3. Does Roper Pond have all necessary permits and certifications for the excavation of the Pond?
4. Did the Department's grant of coverage under the General Permit violate State water quality standards?

II. FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing conducted on September 3 and 4, 2009, and taking into consideration the burden of persuasion and credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

The Proposed Project

1. Roper Pond is the owner of approximately 13 acres of real property on Trenholm Road in an unincorporated area of Richland County ("Property"). The Property includes 1.80 acres of jurisdictional wetlands and a pond ("Pond"), the surface of which is currently

000011

substantially covered with lily pads and duckweed. Roper Pond plans to redevelop the Property as a multi-family residential development.

2. The Pond drains through a pipe which runs beneath Trenholm Road and into Cary Lake, a privately-owned lake, a portion of which lies within the Town of Arcadia Lakes. (30(b)(6) Deposition of Town of Arcadia Lakes, hereinafter "Town Dep.," p. 44, ll. 11-15). The Property is not within the incorporated limits of the Town of Arcadia Lakes. (Town Dep., p. 83).
3. By letter dated December 15, 2008, the Department granted Roper Pond coverage under the General Permit for stormwater discharges associated with construction of the Proposed Project. This coverage under the General Permit authorized land-disturbing activities on 9.6 acres in association with construction of the Proposed Project.
4. On December 30, 2009, Petitioners 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") requested review by the South Carolina Board of Health and Environmental Control of the issuance of the authorization to discharge under the General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioner filed a Request for Contested Case Hearing.
5. Petitioners 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.
6. The Property is outside of the corporate limits of the Town of Arcadia Lakes ("Town"). (Tr. p. 249, ll. 20-23). The Town contends that the Department's authorization of coverage under the General Permit to Roper Pond will cause the Town the following harm: harm to the water draining from Roper Pond to Cary Lake, harm to the aesthetic interest of the Town, and harm to the environmental interests of the Town. (Town Dep.,

000012

p. 41, l. 11 - p. 42, l. 8). Cary Lake is privately owned by the Cary Lake Homeowners Association. (Town Dep., p. 43, l. 22 - p. 44, l. 9). The Town has no ownership interest in Cary Lake. (Town Dep., p. 44, ll. 1-4). The water from Cary Lake does not drain into any other water body within the corporate limits of the Town. (Town Dep., p. 44, l. 19 - p. 45, l. 10). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (Town Dep., p. 46, l. 24 - p. 49, l. 15). The Town does not now have and has never had Town funds budgeted for the remediation of Cary Lake. (Town Dep., p. 46, l. 24 - p. 49, l. 15). The Town has never budgeted any funds for the remediation or maintenance for any of the seven lakes within its corporate limits. (Town Dep., p. 49, l. 16 - p. 50, l. 3).

7. The Kaminer Station Subdivision is adjacent to the Roper Pond Property and upgradient of the Roper Pond Property. (Tr. p. 241, l. 22 - p. 242, l. 10; p. 256, l. 11 - p. 257, l. 2). 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. (Tr. p. 243, l. 1 - p. 246, l. 15). Ms. Jackson further testified Cary Lake is privately owned, and there is no public access to Cary Lake. (Tr. p. 254, ll. 8-23). 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. (Tr. p. 250, l. 16 - p. 251, l. 7).
8. Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. (Tr. p. 263, ll. 18-23). Elaine Starr, a resident of the Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. (Tr. p. 264, ll. 6-13). Ms. Starr testified that the condition of Cary Lake has deteriorated over the years. (Tr. p. 264, ll. 6-23). Ms. Starr testified that Cary Lake has been impacted by sediment from previous development in the area. (Tr. p. 277, l. 15 - p. 280, l. 20). Ms. Starr testified that she had not reviewed the stormwater plan for the Proposed Project. (Tr. p. 276, ll. 14-18). Ms. Starr testified that any development in the area would exacerbate the condition of Cary Lake. (Tr. p. 277, ll. 7-23). Ms. Starr further testified that the stormwater from the Proposed Project will negatively impact Cary Lake even if the Stormwater Pollution Prevention Plan (SWPPP) approved by the Department is

000013

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. (Tr. p. 277, l. 24 - p. 281, l. 14).

Authorization of Coverage under the General Permit

9. Pursuant to 24 S.C. CODE ANN. REG. § 61-9.122.26 *et seq.* ("NPDES Regulations"), a permit is required for the land-disturbing activities associated with the Proposed Project. 24 S.C. CODE ANN. REG. § 61-9.122.26(c). Section 61-9.122.28(a)(2) of the Regulations authorizes the Department to issue general permits for discharges for categories or subcategories of storm water point sources. S.C. CODE ANN. REGS. § 61-9.122.28(a)(2)(i). On August 1, 2006, the Department re-issued the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities, Permit No. SCR100000 ("General Permit"). (Pet. Ex. 3). The Department administers the General Permit pursuant to the NPDES Regulations and 26 S.C. CODE ANN. REG. § 72-300 *et seq.* ("Stormwater Regulations"). The General Permit covers discharges from the commencement of construction activities until final stabilization of the construction site. (Pet. Ex. 3, Title Page) (Tr. p. 60, ll. 1-8).
10. On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project under the General Permit. Roper Pond also submitted to the Department a storm water pollution prevention plan ("SWPPP") as required by the General Permit and the Stormwater Regulations. (DHEC Ex. 2). Pursuant to the Stormwater Regulations, the Department may delegate review and approval of the SWPPP to a local government or conservation district. 26 S.C. CODE ANN. REGS. § 72-304(A)(1). Accordingly, Roper Pond's SWPPP was initially submitted to Richland County for review. (Tr. p. 51, ll. 23-25). Prior to the conclusion of Richland County's review, the Department requested transfer of the review to the Department because citizens had expressed concerns about the Proposed Project. (Tr. p. 52, l. 6 – p. 53, l. 9).

000014

11. Jill Stewart, a licensed professional engineer in South Carolina and Manager of the Department's Stormwater Permitting Section, has reviewed and approved over 500 applications for coverage under the General Permit. (Tr. p. 50, ll. 1-2). Neither the General Permit nor the Stormwater Regulations place any limitation on the size of the proposed project which may be covered under the General Permit. (Tr. p. 73, l. 18 – p. 74, l. 1). Ms. Stewart testified that the Department has issued coverage under the General Permit for land-disturbing activities for projects exceeding 200 acres. (Tr. p. 73, ll. 23-24).
12. Under the Stormwater Regulations, the SWPPP must address both quality control and quantity control of the stormwater runoff associated with a proposed project. 26 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 meeting the requirements of the Stormwater Regulations and the 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 General Permit. (Tr. p. 74, l. 24 – p. 75, l. 8).
13. The SWPPP approved by the Department for the Proposed Project utilized a number of BMPs to control erosion and sedimentation during construction. The plan included a combination of silt fences, berms, and sedimentation basins throughout the site and along the perimeter to control erosion and reduce sediment entering the Pond or leaving the construction site. (Tr. p. 63, l. 7 – p. 64, l. 7). In its review of the SWPPP, the Department requested certain revisions to the SWPPP submitted by Roper Pond. (Tr. p. 57, ll. 3-8). Ms. Stewart testified that the Roper Pond SWPPP, with the requested revisions, complied with the requirements of the General Permit and the Stormwater Regulations. (*Id.*; Tr. p. 58, ll. 16-19; p. 71, ll. 13-17). Ms. Stewart further testified that any impacts from the Proposed Project on Roper Pond or Cary Lake would be the result of a violation of the SWPPP and the conditions of the General Permit, not the authorization for coverage under the General Permit. (Tr. p. 75, ll. 19-25). Once Roper Pond begins construction activities, Section 3.10 of the General Permit requires periodic inspections of the site by a qualified inspector to ensure compliance with the SWPPP.

000015

- (Pet. Ex. 3, pp. 17-20; Tr. p. 76, l. 12 – p. 78, l. 16; p. 89, l. 16 – p. 90, l. 1. 19). Copies of the inspection reports are required to be maintained at the construction site. (Pet. Ex. 3, p. 19; Tr. p. 79, l. 6 – p. 81, l. 5).
14. Although coverage under the General Permit terminates once the site is stabilized following the conclusion of construction activities, Section 3.4(F) of the 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.” (Pet. Ex. 3, p. 15). In its review of the SWPPP, the Department recommended the use of Stormceptors®, devices designed to filter sediment and pollutants from stormwater post-construction. (Tr. p. 60, l. 13 – p. 61, l. 14). Pursuant to the Stormwater Regulations, the SWPPP for a project disturbing more than ten acres requires a removal efficient of 80 percent of suspended solids prior to discharge to a single outlet. 26 S.C. CODE ANN. REGS. § 72-307(C)(5)(b). Even though land-disturbing activities for the Proposed Project will affect fewer than ten acres, Roper Pond’s post-construction stormwater design is designed to achieve a removal efficiency of 80 percent with the installation of the Stormceptors® and thus exceed the regulatory requirements for the authorization under the General Permit. (Tr. p. 67, l. 20 – p. 68, l. 22).
15. The Stormwater Regulations also require an applicant to demonstrate that the development of the site does not create 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 the Department 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. (Tr. p. 64, l. 15 – p. 65, l. 19). 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. (Tr. p. 65, ll. 16-19).

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16. Roper Pond's SWPPP incorporated the Pond as a means to satisfy the post-construction runoff rate requirement, not as a means of satisfying the erosion and sediment control requirements of the General Permit and the Stormwater Regulations. (Tr. p. 67, ll. 15-19). Both the General Permit and the Stormwater Regulations allow an existing pond to be used for control of the stormwater runoff rate on a developed site. (Tr. p. 49, ll. 15-25).

Corps Permitting for the Fill of Wetlands

17. Section 2.1(C) of the 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 GCP until the 404 Permit has been issued and is effective." (Pet. Ex. 3, p. 4). On June 30, 2006, the Department published a guidance document for the General Permit to be issued on August 1, 2006 ("Guidance Document"). (Pet. Ex. 22). The Guidance Document noted that the new General Permit included a provision regarding the requirement of a 404 permit for the proposed activities:

Permit advises permittee about US Army Corps of Engineers 404 permit requirement. This requirement is not new, but this is the first time the permit has stated this permit must be obtained prior to issuance of coverage under this permit under certain circumstances. This is an informational item to help the permittee understand what other permits may be required before coverage can be granted.

(Pet. Ex. 22, p. 1). Roper Pond provided the Department with documentation that the fill of 0.075 acres of jurisdictional wetlands was authorized under a Corps 404 Nationwide Permit. (Tr. p. 47, ll. 3-12; p. 48, l. 23 – p. 49, l. 8).

18. The U.S. Army Corps of Engineers ("Corps") administers the permitting program for filling of wetlands under Section 404 of the Federal Clean Water 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

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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 and Nationwide Permit 39 for Commercial and Institutional Developments, in the Federal Register. 72 FR 11092-01 (11123) (Tr. p. 112, ll. 22-24). Both Nationwide Permit 29 and Nationwide Permit 39 authorizes the fill of up to 0.10 acres of jurisdictional wetlands. (Tr. p. 140, ll. 4-12).

19. Pursuant to 33 C.F.R. § 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) (“State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWP’s authorizing activities which may result in a discharge into waters of the United States.”). The Department issued its 401 Water Quality Certification for the 2007 Nationwide Permits in accordance with S.C. CODE ANN. REGS. § 61-101 (“Water Quality Certification Regulations”). (Tr. p. 118, l. 12 – p. 119, l. 5). The Department determined that the certification of these Nationwide Permits conformed to the requirements of the Water Quality Certification Regulations because the activities authorized under the Permits would have minimal individual or cumulative impacts. (Tr. p. 118, l. 12 – p. 119, l. 5). Accordingly, in 2007 the Department issued a 401 Water Quality Certification for Nationwide Permit 29 and Nationwide 39 with certain general conditions. (Tr. p. 117, l. 20 – p. 118, l. 11; p. 142, ll. 5-17). Pre-construction notification to the Department is not required under the 401 Water Quality Certifications for either Nationwide Permit 29 or Nationwide Permit 39. (Tr. p. 133, l. 12 – p. 134, l. 1; p. 135, ll. 15-18; p. 143, ll. 1-10).
20. Pursuant to the Corps regulations, some Nationwide Permits require notification to the Corps prior to conducting activities authorized by the Permit. Section 33 C.F.R. § 330.1 of the Corps regulations provides as follows:

000018

In most cases, permittees may proceed with activities authorized by NWP's without notifying the [district engineer ("DE")]. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWP's requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. **The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 30-day period.**

33 C.F.R. 330.1(e)(1) (emphasis added). Accordingly, while certain Nationwide Permits require the permittee to provide Pre-Construction Notification ("PCN") to the Corps, there is no requirement that the Corps provide an affirmative response to the PCN. (See also Tr. p. 338, ll. 16-23). Both Nationwide Permit 39 and Nationwide Permit 29 require the permittee to submit a PCN to the Corps prior to conducting activities under the Permit. (Tr. p. 135, ll. 15-22). The requirement of a Pre-Construction Notification is a Corps requirement and does not require notification to the Department. (Tr. p. 115, ll. 4-25; p. 133, ll. 6-11; p. 135, ll. 15-18; p. 143, ll. 1-10).

21. Corps regulations define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b). On January 5, 2005, the Corps issued a jurisdictional determination for the Roper Pond Property, confirming the identification of 1.80 acres of jurisdictional wetlands. (Roper Pond Ex. 6).
22. George Whatley, the wetlands scientist for Roper Pond, worked 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. (Tr. p. 299, ll. 1-12). Mr. Whatley has performed over 200 wetland delineations and has obtained approval for more than 250 permits from the Corps. (Tr. p. 298, ll. 13-22).
23. On April 30, 2008, Roper Pond submitted an application to the Corps to fill 0.075 acres of jurisdictional wetlands in association with construction of the Proposed Project. (Pet.

000019

Ex. 9). On May 5, 2008, George Whatley submitted a PCN to fill 0.075 acres of jurisdictional wetlands under a Nationwide Permit. (Roper Pond Ex. 6). The PCN for the Proposed Project did not specify the Nationwide Permit under which the activities would be conducted. (Roper Pond Ex. 6; Tr. p. 309, ll. 1-16).

24. 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." (Pet. Ex. 10). The Corps further advised that the Proposed Project must comply with the following conditions:

1. That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

(Pet. Ex. 10).

25. The Corps typically copies the Department on its verification of activities to be conducted under a Nationwide Permit. (Tr. p. 150, l. 22 – p. 151, l. 3). On September 11, 2008, the Department received a copy of the September 9, 2008 letter from the Corps to Mr. Whatley. (Pet. Ex. 10). Charles Hightower, Section Manager of the Department 401 Wetlands Section, testified that the fill of 0.075 acres as proposed by Roper Pond conforms to the conditions of the 401 Water Quality Certifications for both Nationwide Permit 29 and Nationwide Permit 39. (Tr. p. 133, ll. 12-20; p. 136, ll. 12-21). By letter dated October 2, 2008, the Department advised Mr. Whatley that the staff had reviewed the Proposed Project and that the Project was consistent with the "401 Water Quality Certification issued for Nationwide Permit Number 39 on May 11, 2007, provided the applicant adheres to all conditions of that certification (see attached)." (Pet. Ex. 12).
26. In early 2009, Mr. Whatley contacted Colt Bowles of the Corps to request clarification on the verification of the PCN for activities under Nationwide Permit 39 for Commercial and Institutional Development instead of Nationwide Permit 29 for Residential

000020

Development. (Roper Pond Ex. 7; Tr. p. 310, l. 20 – p. 312, l. 9). 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 Nationwide Permit 29. (Roper Pond Ex. 1). As with the verification under Nationwide Permit 39 on September 8, 2008, the Corps further advised that the Proposed Project must comply with the following conditions:

1. That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

(Pet. Ex. 1). Mr. Whatley testified that the references to other state certifications and authorization are merely provided as examples of other authorizations that may be required for a project. (Tr. p. 339, ll. 7-23). All applicable authorization from the state had already been provided since the only authorization required was the 401 Water Quality Certification for Nationwide Permit 29 issued in 2007. (Tr. p. 339, l. 14 – p. 340, l. 25).

27. The Corps copied the Department on the February 25, 2009 verification letter to Mr. Whatley. *Id.* The Department did not issue another concurrence letter for the Corps' verification of the authorization for the Proposed Project under Nationwide Permit 29. (Tr. p. 117, ll. 2-19). Charles Hightower testified that notification to the Department by the applicant is not required as long as the permittee meets the conditions of the 401 Water Quality Certification for the Nationwide Permit. (Tr. p. 133, l. 6 – p. 134, l. 1; p. 143, ll. 1-10). Additionally, an individual 404 permit and accompanying 401 Water Quality Certification is not required unless a proposed activity does not meet the conditions of the Nationwide Permit and the 401 Water Quality Certification issued by the Department for the Nationwide Permit. (Tr. p. 121, l. 23 – p. 122, l. 10; p. 156, l. 25 – p. 157, l. 22; p. 164, ll. 2-12).

000021

Permitting for the Excavation of the Pond

28. The post-construction design for stormwater management of the site included the use of the existing Pond as a means of satisfying the requirement for control of the post-construction stormwater runoff rate. In order to meet the requirements for control of the stormwater runoff rate, Roper Pond will excavate the Pond to a depth of approximately 3-1/2 feet greater than the current depth. (Tr. p. 240, ll. 4-11).
29. A Corps permit is required for excavation of "any navigable water of the United States" under Section 10 of the Rivers and Harbors Act. 33 U.S.C.A. § 403. The jurisdiction determination issued by the Corps on January 5, 2005, indicated that there are no "navigable waters of the United States" on the Property. (Roper Pond Ex. 6). Charles Hightower and George Whatley also testified that the Pond is not a navigable water of the United States under Section 10 of the Federal Rivers and Harbors Act. (Tr. p. 140, l. 13 – p. 141, l. 7; p. 332, ll. 5-9). Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act.
30. Mr. Whatley testified that excavation of the Pond and depositing the dredged material in an area upland from the Pond does not require a Corps permit. (Tr. p. 318, l. 19 – p. 319, l. 16; p. 327, l. 13 – p. 329, l. 5). Mr. Whatley also contacted Colt Bowles of the Corps to confirm that a Corps permit was not required for these activities. (Roper Pond Exs. 7 and 8). Mr. Bowles confirmed that no Corps permit was required for excavation of the Pond as long as the dredged material was placed in a truck or deposited onto an uplands area because the Pond is not a navigable water under Section 10 of the Rivers and Harbors Act and the proposed activity will not involve the placement of fill material in waters of the United States under Section 404 of the Clean Water Act. (Roper Pond Exs. 7 and 9).
31. The Department's 401 Wetlands Section also administers the State Construction in Navigable Waters Permitting Program. (Tr. p. 104, ll. 4-6). Mr. Hightower testified that the Pond is not a navigable water under the South Carolina Construction in Navigable Waters Permit Program, S.C. CODE ANN. REGS. § 19-450. (Tr. p. 147, ll. 16-18). Mr. Hightower further testified that there is no state permit required for a dredging of the

000022

Pond. (Tr. p. 139, ll. 2-5; p. 141, l. 8-12). Ms. Stewart also testified that the excavation of the Pond for control of the post-development stormwater runoff rate at the site does not require authorization under the General Permit. (Tr. p. 50, ll. 3-16).

32. The Petitioners offered the expert testimony of Seth Reice, Ph.D., Professor of Ecology and Biology at the University of North Carolina at Chapel Hill. On June 3, 2009, Dr. Reice conducted water chemistry testing of the Pond and collected samples to identify the aquatic life in the Pond. (Tr. p. 179, ll. 5-11). At the site, Dr. Reice measured dissolved oxygen, salinity, conductivity and pH of the Pond water. (Tr. p. 183, ll. 19-22). Dr. Reice collected six samples from the bottom of the Pond to identify aquatic life in the Pond. (Tr. p. 186, ll. 2-19). Dr. Reice's original report identified the following aquatic life collected from the Pond: *Progomphus obscurus*, *ophigomphus* sp., *hydracarina*, *chironomidae*, *zygoteran*, *hyaella azteca*, *polycentropus*, *lexingtonia*, *polycentropus*, Carolina Redhorse, and Golden Redhorse. (Roper Pond Ex. 12). The report also included Dr. Reice's opinions regarding the condition of the Pond and the effect of the excavation of the Pond. Under the heading of "Ecological Assessment of the Pond Fauna" in this original report, Dr. Reice opined that Pond "is a healthy pond." *Id.* Under the heading of "The Projected Consequences of the Proposed Dredging of this Pond," Dr. Reice further opined: "The proposed dredging of this pond will simply destroy the ecosystem that is now present." *Id.*
33. When Dr. Reice was deposed by Roper Pond, he provided a second report to Respondents. (Roper Pond Ex. 11; Tr. p. 197, ll. 4-7). This second report included an identification of aquatic life which was identical to the original report. (Roper Pond Ex. 11). However, the second report did not include the opinions provided under the headings, "Ecological Assessment of the Pond Fauna" and "The Projected Consequences of the Proposed Dredging of this Pond." *Id.* Dr. Reice testified that he deleted these opinions from his report: "I was trying to restrict myself to what I actually knew as opposed to my conjectures." (Tr. p. 200, ll. 3-19).
34. During his testimony at the hearing in this matter, Dr. Reice provided a third report on his findings. (Roper Pond Ex. 22). Dr. Reice testified that the report was revised in response

000023

to questions raised at the deposition regarding his identification of certain aquatic life collected from the Pond. (Tr. p. 198, ll. 1-3). Specifically, Dr. Reice determined that he had misidentified three of the species collected from the Pond and made the following corrections: the Lexingtonia was revised to muscularim securis; the Carolina Redhorse was revised to Silver Redhorse; and the Golden Redhorse was revised to Creek Chubsucker. (Roper Pond ex. 22; Tr. p. 197, ll. 7-14). This third version also included the opinions listed under the headings, "Ecological Assessment of the Pond Fauna" and "The Projected Consequences of the Proposed Dredging of this Pond," which had been deleted from his second report. (Roper Pond Ex. 22). However, Dr. Reice testified that he had not intended to include those opinions in the third report. (Tr. p. 200, l. 3 – p. 201, l. 5).

35. In assessing the aquatic life of the Pond and the potential consequences of the dredging of the Pond, Dr. Reice did not review the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (Tr. p. 201, l. 12 – p. 202, l. 7). Dr. Reice was not provided information on the extent or the method of the proposed excavation of the Pond. (Tr. p. 203, ll. 18-23). Dr. Reice has no training or experience as an engineer or in preparing or reviewing stormwater pollution prevention plans. (Tr. p. 202, ll. 8-21). While Dr. Reice has studied the impacts of sedimentation on aquatic life in streams and ponds, Dr. Reice has not conducted studies related to the impact of excavation on aquatic life in streams and ponds. (Tr. p. 190, l. 18 – p. 191, l. 6). With respect to the land-disturbing activities authorized under the General Permit, Dr. Reice testified that he had no opinion regarding any potential impacts of such activities on the Pond. (Tr. p. 211, ll. 2-11).

36. The Department did not consider impacts of lowering the Pond in its review of Roper Pond's SWPPP. (Tr. p. 36, ll. 15-23). Section 1.3(C)(3) of the General Permit provides as follows: "This permit does not authorize discharges that DHEC, prior to authorization under this permit, determines will cause, have the reasonable potential to cause, or contribute to a violation of any applicable water quality standard." (Pet. Ex. 3, p. 3). The State water quality standards are found in S.C. CODE ANN. REG. § 61-68. Section 4.4 of the General Permit provides that the approved SWPPP "developed, implemented, and

000024

updated consistent with Part 3.0 is considered as stringent as necessary to ensure that your discharges do not cause or contribute to a violation of any applicable water quality standard.” (Pet. Ex. 3, p. 26; Tr. p. 36, ll. 6-14). Ms. Stewart testified the the SWPPP with the revisions requested by the Department met all the requirements of the General Permit. (Tr. p. 71, ll. 13-17). Petitioners presented no evidence that the SWPPP failed to conform to any provisions of Part 3.0 of the Permit.

III. CONCLUSIONS OF LAW

Based upon the above findings of fact, I conclude the following as a matter of law:

A. Jurisdiction and Standard of Proof

The Administrative Law Court has jurisdiction over this contested case matter pursuant to S.C. CODE ANN. § 1-23-600(A) (Supp. 2008) and S.C. CODE ANN. §44-1-60(F)(2) (Supp. 2008). Petitioners, as the parties challenging the issuance of the permit for the Proposed Landfill, bear the burden of proof in this case. *See Leventis v. S.C. Dep't of Health & Env'tl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue). The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. *Nat'l Health Corp. v. S.C. Department of Health and Env'tl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). This Court reviews the evidence presented to determine “whether DHEC followed the regulatory procedures during the permit review process.” *Leventis*, 340 S.C. at 133, 530 S.E.2d at 651.

B. Standing

A fundamental prerequisite to institute an action is the requirement that the Petitioners have standing. *Blanding v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985). In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, the South Carolina Supreme Court adopted the following 3-prong test for establishing standing as set forth by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*:

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.”

000025

Second, 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."

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.* at 601, 550 S.E.2d at 291. For the reasons set forth below, Petitioners have failed to meet the burden to establish standing to challenge the Department's action in this matter.

1. The Town of Arcadia Lakes

The Town of Arcadia Lakes ("Town") cannot satisfy the first element of the standing test set forth in the *Sea Pines* case. As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation. *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996). One must be a real party in interest. *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999). "The general rule is that a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (S.C. 1996) (citing *City of Spartanburg v. County of Spartanburg*, 303 S.C. 393, 401 S.E.2d 158 (1991)). In this case, the Town has alleged no injury separate from that of its individual citizens. Cary Lake is privately owned by the Cary Lake Homeowners Association. (Town Dep., p. 43, l. 22 – p. 44, l. 9). The Town has no ownership interest in Cary Lake. (Town Dep, p. 44, ll. 1-4). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (Town Dep., p. 46, l. 24 – p. 49, l. 15). The Town does not now and has never budgeted funds for the remediation of Cary Lake. (Town Dep., p. 46, l. 24 – p. 49, l. 15). Accordingly, the Town has no proprietary interest or statutory rights which would potentially be impacted by the Proposed Project.

In *Capital View Fire District v. County of Richland*, the South Carolina Court of Appeals held that Capital View Fire District, a special purpose district, did not have standing to challenge the validity of an agreement between the city and the county for the extension of city fire-fighting services. 297 S.C. 359, 363, 377 S.E.2d 122, 124 (Ct. App. 1989). Capital View Fire

000026

District argued that it was entitled to bring a suit on behalf of its citizens who might be harmed by the agreement at issue under the doctrine of *parens patriae*, even if it failed to suffer an injury itself. The Court held that the Capital View Fire District, a political subdivision of the State, cannot bring an action on to protect the interests of its citizens:

The doctrine of *parens patriae* applies only to sovereigns asserting at least quasi-sovereign interests apart from the interests of particular private citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). Political subdivisions, such as cities and counties, however, lack the element of sovereignty that is a prerequisite to maintaining a suit under the doctrine of *parens patriae*. See *Board of County Commissioners v. Denver Board of Water Commissioners*, 718 P.2d 235 (Colo. 1986) (counties lack the element of sovereignty that is a prerequisite for *parens patriae* standing); *United States v. City of Pittsburg, California*, 661 F.2d 783 (9th Cir.1981) (only the states and the federal government may sue as *parens patriae*); cf. *Board of Supervisors of Fairfax County, Virginia v. United States*, 408 F.Supp. 556, 566 (E.D.Va.1976) ("Fairfax County, however, is not a sovereign, but rather a political subdivision whose powers are derivative of the sovereign State of Virginia.").

Id. at 362-363, 377 S.E.2d at 124. Likewise, the Town has failed to establish an injury to the Town which would establish standing to challenge the Department's decision in this matter. Accordingly, the Town lacks standing in this matter.

2. The Kaminer Station Petitioners

The Kaminer Station petitioners also failed to present evidence to establish the first and second elements of the *Sea Pines* test for standing. The Kaminer Station Subdivision is adjacent to the Roper Pond Property and upgradient of the Roper Pond Property. (Tr. p. 241, l. 22 – p. 242, l. 10; p. 256, l. 11 – p. 257, l. 2). 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. (Tr. p. 243, l. 1 – p. 246, l. 15). Ms. Jackson further testified Cary Lake is privately owned, and there is no public access to Cary Lake. (Tr. p. 254, ll. 8-23). "A private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom. '[I]t is not sufficient that he has merely a general interest common to all members of the public.'" *Florence Morning News, Inc., v. Building Comm'n*, 265 S.C. 389, 218 S.E.2d 881 (1975) (quoting *Ex parte Levitt*, 302 U.S. 633 (1937)). Ms. Jackson, on behalf of the Kaminer Station

000027

petitioners, has failed to identify any harm to these petitioners. Since Kaminer Station is upgradient from the Proposed Development, there can be no allegation that the Proposed Development will directly impact the Kaminer Station petitioners. With respect to the enjoyment of viewing the Pond and Cary Lake, the Kaminer Station petitioners do not have a property interest in either the Pond or Cary Lake. There is no public access to Cary Lake. Accordingly, the Kaminer Station petitioners' interest in the view of the Pond and of Cary Lake is nothing more than a general interest common to all members of the public.

Additionally, to the extent that the Kaminer Station petitioners could allege some potential harm from the Proposed Project, 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. (Tr. p. 250, l. 16 – p. 251, l. 7). The matter before this Court involves the Department's decision to grant coverage for the Proposed Project under the General Permit, not the enforcement of the conditions of the General Permit during the construction of the Property. As such, the Kaminer Station petitioners have failed to demonstrate a causal connection between the alleged injury and the conduct challenged. The Kaminer Station petitioners thus have no standing to bring this action.

3. The Cary Lake Petitioners

The Cary Lake petitioners have failed to demonstrate that the issuance of coverage under the General Permit will cause an actual or imminent injury. The first element of the *Sea Pines* test requires the Cary Lake residents to present evidence of the following:

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."

Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291. Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. (Tr. p. 263, ll. 18-23). Elaine Starr, a resident of the Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. (Tr. p. 264, ll. 6-13). Ms. Starr testified that the condition of Cary Lake has deteriorated over the years. (Tr. p. 264, ll. 6-23). Ms. Starr testified that Cary Lake has been impacted by sediment from previous development in the area. (Tr. p. 277, l. 15 – p. 280, l. 20). Ms. Starr

000028

testified that any development in the area would exacerbate the condition of Cary Lake. (Tr. p. 277, ll 7-23). Ms. Starr further testified that the stormwater from the Proposed Project will negatively impact Cary Lake even if the SWPPP approved by the Department 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. (Tr. p. 277, l. 24 - p. 281, l. 14).

As with the Kaminer Station petitioners, the contention assumes a violation of the General Permit and the Stormwater Regulations. The Stormwater Regulations require an applicant to demonstrate that the development of the site does not create 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). Accordingly, the SWPPP must include measure to maintain the post-development stormwater runoff at a level equal to or less than the pre-development runoff rate. Ms. Starr's concerns regarding an increase in the runoff rate would thus be the result of a violation of the General Permit, not the Department's issuance of coverage under the General Permit.

The Cary Lake petitioners have simply failed to present any evidence of an injury in fact as a result of the issuance of coverage under the General Permit. Ms. Starr testified that she had not reviewed the stormwater plan for the Proposed Project. (Tr. p. 276, ll. 14-18). Petitioners' expert opined on the potential consequences of the proposed dredging on the Pond; however, he offered no opinion on the impact of the land-disturbing activities authorized under the General Permit on the Pond or Cary Lake. (Tr. p. 203, ll. 18-23; p. 211, ll. 2-11). Petitioners offer no evidence that the sedimentation from the Roper Pond Property would impact Cary Lake. While Ms. Jackson and Ms. Starr testified that the Proposed Project might impact Cary Lake, such testimony was based on the assumption that Roper Pond would neither follow the SWPPP nor employ the BMPs as required by the General Permit and the Stormwater Regulations. The Cary Lake petitioners simply failed to meet the burden of demonstrating an injury in fact in connection with the Department's grant of coverage under the General Permit to Roper Pond. To the extent that Cary Lake petitioners contend that the Proposed Project will adversely impact Cary Lake, such contention is entirely speculative.

000029

Additionally, the South Carolina Supreme Court holding in *Smiley v. South Carolina Department of Health and Environmental Control* can be easily distinguished from the instant case. 374 S.C. 326, 649 S.E.2d 31 (2007). In *Smiley*, the petitioner challenged the issuance of a permit to remove sand from a public beach under the Coastal Zone Management Act. The petitioner alleged the following injury in fact: "I am partially disabled with paralysis of muscles in both legs as a result of a spinal cord injury in 1979. After my release from the hospital in late 1979, I began a course of rehabilitation which continues today and involves jogging on the flat hard public beach on the Isle of Palms. I use the beach in area[s] where sand will be excavated and which is the subject of this proceeding on an almost daily basis." 374 S.C. 326, 330, 649 S.E.2d 31, 33 (2007). The Court held that even though the injury to the petitioner would only be temporary, the injury was sufficient to give him a stake in the outcome of the matter. 374 S.C. at 332-333, 649 S.E.2d at 34. In contrast to the instant case, the petitioner in *Smiley* was directly impacted by the issuance of the permit because he could not run on the beach during the conduct of the work authorized under the permit. Petitioners in this matter have simply failed to present any evidence of a direct harm caused by the issuance of the coverage under the General Permit. Petitioners have presented no evidence that the BMPs and procedures authorized under the General Permit and the SWPPP are inadequate to control sediment from leaving the construction site. Instead, Petitioners merely speculate that Roper Pond will fail to follow the General Permit and the SWPPP. Such contentions do not support a showing of standing to challenge the issuance of the coverage under the General Permit. The potential harm alleged would not be caused by the issuance of coverage under the General Permit. Such harm would be the result of a violation of the General Permit. As such, the Cary Lake residents lack standing to challenge the issuance of coverage under the General Permit to Roper Pond.

However, even if Petitioners could establish standing to challenge the Department's grant of coverage under the General Permit, their claims fail for the following reasons:

C. **Roper Pond has an effective 404 Permit and 401 Water Quality Certification for the impacts to wetlands on the Property.**

Petitioners offered no evidence that the SWPPP does not require adequate BMPs to control erosion and sediment on the construction site for the Proposed Project. Indeed, the Department reviewed Roper Pond's SWPPP and requested certain revisions to the plan. (Tr. p. 57; ll. 3-8). Jill Stewart testified that the Roper Pond SWPPP with the requested revisions

000030

satisfied the requirements of the General Permit and the Stormwater Regulations. (*Id.*; Tr. p. 58, ll. 16-19; p. 71, ll. 13-17). Ms. Stewart further testified that any impacts from the Proposed Project on Roper Pond or Cary Lake would be the result of a violation of the SWPPP and the conditions of the General Permit, not the authorization for coverage under the General Permit. (Tr. p. 75, ll. 19-25). Petitioners' only expert did not review the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and offered no opinion regarding the sufficiency of such measures. (Tr. p. 201, l. 12 – p. 202, l. 7; p. 211, ll. 2-11). In fact, none of Petitioners witnesses reviewed the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (Tr. p. 201, l. 12 – p. 202, l. 7; Tr. p. 276, ll. 14-18). As such, the evidence on the record demonstrates that the SWPPP conforms to the technical requirements of the General Permit and the Stormwater Regulations. Indeed, in its Request for Contested Case Hearing, Petitioners alleged “significant defects in the construction and post-construction portions” of the SWPPP. However, Petitioners failed to offer evidence to prove such allegations at the hearing in this matter. Not only did Petitioners fail to offer expert testimony regarding the alleged defects in SWPPP, Petitioners offered no evidence at all in support of this fundamental claim.

While Petitioners make no claims with respect to the technical sufficiency of the SWPPP, they contend that the Department erred in granting coverage for the Proposed Project under the General Permit because Roper Pond does not has an effective 404 permit for the Project. The evidence on the record does not support this claim. The design for the Proposed Project includes the filling of 0.075 acres of jurisdictional wetlands. In 2007 the Corps issued Nationwide Permit 29 which authorizes the fill of up to 0.10 acres of jurisdictional wetlands. (Tr. p. 140, ll. 4-12). Nationwide Permit 29 requires a developer who intends to conduct activities under the Permit to provide a PCN to the Corps prior to conducting such activities. Accordingly, pursuant to Section 33 C.F.R. § 330.1 of the Corps regulations, the wetlands scientist for Roper Pond submitted a PCN for the filling of 0.075 acres of wetlands on April 30, 2008. (Roper Pond Ex 6). By letter dated February 25, 2009, the Corps verified that the proposed activities were authorized under Nationwide Permit 29. (Roper Pond Ex. 1). Corps further advised that the Proposed Project must comply with the following conditions:

1. That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters

000031

Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

(Pet. Ex. 1). Mr. Whatley testified that the references to other state certifications and authorization are merely provided as examples of other authorizations that may be required for a project. (Tr. p. 339, ll. 7-23). The 401 Water Quality Certification for Nationwide Permit 29 had already been issued by the Department in 2007. (Tr. p. 117 – p. 118, l. 11). A Coastal Zone Management Consistency Determination was not required for the Proposed Project because the Property is not located in any of the eight coastal counties covered by the Coastal Zone Management Act, S.C. CODE ANN. §§ 48-39-10 *et seq.* S.C. CODE ANN. § 48-39-10(B). Finally, the activities do not impact a navigable water under the State Navigable Waters Act. (Tr. p. 147, ll. 16-18). Petitioners offered no evidence to the contrary. Accordingly, Roper Pond has all state certifications and authorization necessary for the proposed activities under Nationwide Permit 29.

Petitioners further contend that the Department has not issued a 401 Water Quality Certification for the Proposed Project. This contention is without merit. In 2007 the Department conducted a 401 Water Quality Certification for the Nationwide Permit 29 in accordance with S.C. CODE ANN. REGS. § 61-101 and issued a Certification for the Permit with certain general conditions. (Tr. p. 117, l. 20 – p. 119, l. 5; p. 142, ll. 5-17). Pre-construction notification to the Department is not required under the 401 Water Quality Certification for Nationwide Permit 29 as long as the permittee meets the conditions of the 401 Water Quality Certification for the Nationwide Permit. (Tr. p. 115, ll. 4-25; p. 133, l. 12 – p. 134, l. 1; p. 135, ll. 15-18; p. 143, ll. 1-10). Accordingly, Roper Pond has an effective 404 permit and 401 Water Quality Certification for the filling of 0.075 acres of jurisdiction wetland in association with the Proposed Project.

D. The excavation of the Pond does not require a federal permit from the Corps.

Petitioners argue that the Department erred in approving coverage under the General Permit because the SWPPP incorporated the Pond in the post-construction storm water management system for the Site and Roper Pond failed to obtain a Corps permit for the dredging of the Pond. Specifically, Petitioners contend that the Department's approval of coverage under

000032

the General Permit is contrary to Section 72-307(C)(7) of the Regulations, which provides as follows:

Where existing wetlands are intended as a component of an overall stormwater management system, the approved stormwater management and sediment control plan shall not be implemented until all necessary federal and state permits have been obtained.

26 S.C. CODE ANN. REGS. § 72-307(C)(7). Additionally, Section 2.1(C) of the 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 GCP until the 404 Permit has been issued and is effective.” (Pet. Ex. 3, p. 4). Roper Pond proposes to excavate the Pond and deposit the dredged material in an area upland from the Pond. (Tr. p. 318, l. 19 – p. 319, l. 16; p. 327, l. 13 – p. 329, l. 5).

The federal government administers the permitting program for dredging and filling of wetlands pursuant to Section 404 of the Clean Water Act and Section 10 of the Federal Rivers and Harbors Act. 33 U.S.C.A. § 1344; 33 U.S.C.A. §§ 401. Section 404 of the Clean Water Act requires a permit issued by the Corps “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C.A. § 1344(a). The discharge of dredged and fill material is defined in 33 CFR 323.2, which provides in relevant part as follows:

(i) The term “dredged material” means *material that is excavated or dredged* from waters of the United States.

(j) The term “discharge of dredged material” means *any addition of dredged material into the waters of the United States*. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(k) The term “fill material” means *any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody*. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act.

000033

(l) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The terms does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 CFR 323.2 (i)-(l). It is clear that a 404 permit for "the discharge of dredged or fill material" is required only in those circumstances in which such material is being added to waters of the United States. Accordingly, contrary to Petitioners' contention, a 404 permit under the Clean Water Act is not required for the excavation or dredging of a water of the United States.

A Corps permit is required for excavation of "any navigable water of the United States" under Section 10 of the Rivers and Harbors Act. 33 U.S.C.A. § 403. Section 10 of the Act provides in relevant part:

[I]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Army] prior to beginning the same

Id. The definition of "any navigable water of the United States" in the Rivers and Harbors Act is much narrower than the terms "navigable waters" and "waters of the United States" as used in the Clean Water Act.

Under the Clean Water Act, "'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C.A. § 1362(7). The Corps' regulations implementing the Clean Water Act define "waters of the United States" to include the following:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;

000034

- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a). In contrast, the navigable waters of the United States subject to the Rivers and Harbors Act as defined in 33 C.F.R. Part 329 is limited to “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use **to transport interstate or foreign commerce.**” 33 C.F.R. § 329.4 (emphasis added).

Federal case law has recognized the distinction between “waters of the United States” under the Clean Water Act and “navigable waters of the United States” under the Rivers and Harbors Act. “The term ‘navigable waters of the United States’ as used in the Rivers and Harbors Act of 1899 has a substantially different, and more limited, meaning than the term as used in the Clean Water Act.” *1902 Atlantic Ltd. v. Hudson*, 574 F.Supp. 1381, 1392 (D.C. Va. 1983). “In contrast to the Clean Water Act, Congress did not intend the term ‘navigable waters of the United States’ to reach to the full extent of congressional power over commerce as granted by Article 1, Section 8 of the Constitution. Rather, the term is restricted to the traditional definition of navigable waters as of 1899, the time of enactment of the Rivers and Harbors Act.” *Id.* (citations omitted). Accordingly, in the instant case, the excavation of the Pond would require a permit under Section 10 of Rivers and Harbors Act only if the Pond were in fact navigable. Petitioners presented no such evidence.

The jurisdiction determination issued by the Corps on January 5, 2005, indicated that there are no “navigable waters of the United States” on the Property. (Roper Pond Ex. 6). Charles Hightower and George Whatley also testified that the Pond is not a navigable water of the United States under Section 10 of the Federal Rivers and Harbors Act. (Tr. p. 140, l. 13 – p.

000035

141, l. 7; p. 332, ll. 5-9). Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act. The evidence on the record clearly demonstrates that the Pond is not a “navigable water of the United States” and is thus not subject to permitting under the Rivers and Harbors Act.

E. Excavation of the Pond does not require a 401 Water Quality Certification.

Petitioners argue that a 401 Water Quality Certification is required for all water quality impacts for the Proposed Project, including the excavation of the Pond. There is no statutory or regulatory basis for this claim. Neither the General Permit nor the Stormwater Regulations imposes any requirement for a 401 Water Quality Certification in connection with the approval of coverage under the General Permit. The Department administers the water quality certification program pursuant to Section 401 of the Clean Water Act and has promulgated regulations governing certification at S.C. CODE ANN. REGS. § 61-101. 25A S.C. CODE ANN. REGS. 61-101(A)(1). Section 401(a)(1) of the Clean Water Act authorizes state action in connection with issuance of federal licenses and permits for discharges to navigable waters. 33 U.S.C.A. § 1341. State action on a 401 Water Quality Certification is only triggered for discharges to be authorized under a federal permit under Section 404 of the Clean Water Act or Sections 9 or 10 of the Rivers and Harbors Act. *Id.* Since the dredging of the Pond does not require a permit under the Clean Water Act or the Rivers and Harbors Act, the Department is neither required to nor has authority to conduct a 401 Water Quality Certification in connection with such activities.

F. The Department’s authorization of coverage under the General Permit does not require assessment of water quality impacts under the State Water Quality Standards.

Petitioners contend that the Department erred in granting coverage under the General Permit because the Proposed Project violates the State water quality standards of S.C. CODE ANN. REG. § 61-68 (“Regulation 61-68”). The Department’s authorization for coverage under the General Permit is governed by the S.C. CODE ANN. REG. § 72-300 *et seq.* Specifically, Section 72-307 establishes the design criteria and minimum standards for SWPPPs for land-disturbing activities for projects disturbing more than five acres. 26 S.C. CODE ANN. REG. § 72-

000036

305(B)(3). Section 72-307(B)(5) establishes the criteria for water quality protection for such projects. 26 S.C. CODE ANN. REG. § 72-307(B)(5). Section 72-307 makes no reference to the State water quality standards established in Regulation 61-68. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citations omitted). As such, Regulation 61-68 has no application in the Department’s review of Roper Pond’s request for coverage under the General Permit.

In *Responsible Economic Development v. South Carolina Dept. of Health and Environmental Control*, the South Carolina Supreme Court addressed the application of the anti-degradation provisions of Regulation 61-68 to a stormwater permit for the construction of a retail store on a 43-acre parcel of land. 371 S.C. 547, 641 S.E.2d 425 (2007). The parties challenging the issuance of the permit argued that the permit violated Regulations 61-68 and 61-69 which were promulgated pursuant to the Pollution Control Act, S.C. CODE ANN. §§ 48-1-20 *et seq.* In rejecting this argument, the Court noted that “the legislature enacted the Stormwater Management and Sediment Reduction Act to specifically deal with stormwater management and sediment reduction.” S.C. CODE ANN. § 48-14-30(A). The Court held that the Department’s review of an application for a stormwater permit must be conducted pursuant to the Stormwater Act and the regulations promulgated thereunder:

The Stormwater Management and Sediment Reduction Act (Stormwater Act) requires a person who intends to engage in a land disturbing activity to submit a stormwater management and sediment control plan to the appropriate agency and obtain a permit before engaging in the activity, unless an exemption applies. S.C. CODE ANN. § 48-14-30 (Supp.2005). The Stormwater Act further requires DHEC to promulgate regulations for the “types of activities that require a stormwater . . . permit” and for “permit application and approval requirements.” *Id.* § 48-14-50(C)(3) & (9). DHEC fulfilled that duty by promulgating, in relevant part, Regulations 72-305 and -307. Regulation 72-305 outlines the permit application and approval procedure, and Regulation 72-307 sets forth the minimum standards and specifications and the specific design criteria for projects requiring a stormwater management and sediment control plan.

000037

Id. at 547, 551, 641 S.E.2d at 427. The Court further expressly held that regulations promulgated under the Pollution Control Act are not applicable in the review of an application for the stormwater permit:

Relevant to this appeal, the regulations of the Pollution Control Act Regulations 61-68 and -69 and the regulations of the Stormwater Act Regulations 72-305 and -307 do not reference each other and are authorized by different enabling acts. In the absence of statutory authorization to apply the two acts and their corresponding regulations to each other, the regulations of the Pollution Control Act do not apply to the Stormwater Act or its regulations. **Accordingly, we conclude, as a matter of law, the case-by-case modification of regulatory requirements under the Stormwater Act cannot be invoked because of an alleged violation of the Pollution Control Act's regulations. Furthermore, a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act.** Therefore, Regulation 72-305(B)(4) does not require the denial of a stormwater permit on the ground that the anti-degradation rules have been violated because the regulations of the Pollution Control Act do not apply to the Stormwater Act.

Id. at 552-553, 641 S.E.2d at 428 (emphasis added). Accordingly, Petitioners' contention that the Department erred in failing to consider potential impacts on Regulation 61-68 water quality standards in its review of Roper Pond's application is without merit.

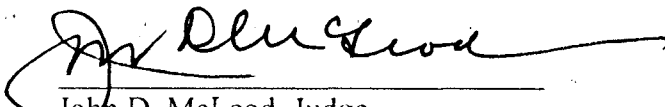
IV. ORDER

Based upon the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the South Carolina Department of Health and Environmental Control's grant of coverage to Roper Pond under the General Permit is upheld.

AND IT IS SO ORDERED.

January 21, 2010
Columbia, S.C.


John D. McLeod, Judge
S.C. Administrative Law Court

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 21 day of January, 2010
By: 
Judicial Law Clerk

000038

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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,

vs.

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

Respondents.

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

**CONSENT ORDER
ON
ROPER POND, LLC'S
MOTION TO DISMISS**

FILED

JUN 17 2009

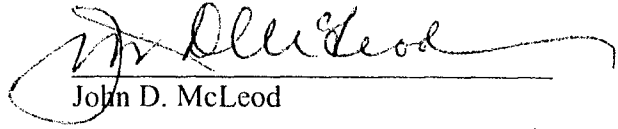
SC ADMIN. LAW COURT

The Respondent Roper Pond, LLC, has filed a Motion to Dismiss seeking dismissal of those portions of the Petitioners' appeal that are related to any requirements for approval under Nationwide Permit Number 39 issued by the U.S. Army Corps of Engineers. The parties have agreed to partial dismissal of this case, as follows:

All claims challenging the 401 water quality certification and authorization to conduct activities under United States Army Corps of Engineers Nationwide Permit No. 39 for the proposed development are dismissed. This dismissal has no effect on Petitioners' claims and Respondents' defenses in connection with the 401 water quality certification and authorization to conduct activities under United States Army Corps of Engineers Nationwide Permit No. 29, as that matter is not before this Court. The remaining claims related to the storm water permit for this project shall remain subject to this Court's review.

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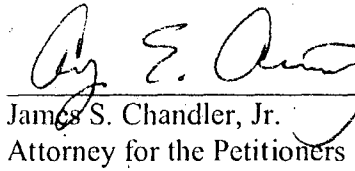
AND IT IS SO ORDERED.

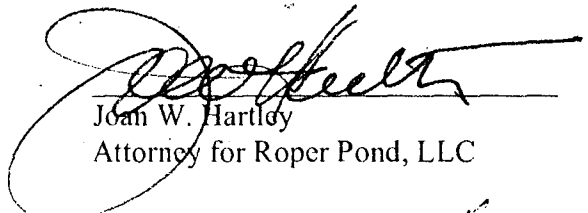

John D. McLeod

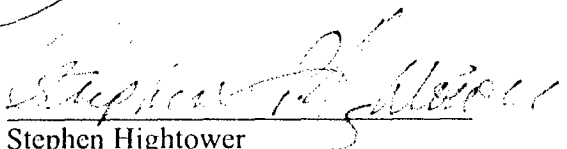
Columbia, South Carolina

June 17, 2009

WE CONSENT TO THIS ORDER:

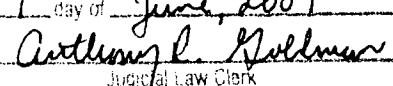
 *for Timmy Chandler*
James S. Chandler, Jr.
Attorney for the Petitioners *with permission*


Joan W. Hartley
Attorney for Roper Pond, LLC


Stephen Hightower
Attorney for DHEC

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 17 day of June, 2009
By: 
Judicial Law Clerk

BOARD:

Paul C. Aughtery, III
Chairman

Edwin H. Cooper, III
Vice Chairman

Steven G. Kiser
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:

Henry C. Scott

M. David Mitchell, MD

Glenn A. McCall

Coleman F. Buckhouse, MD

S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

January 14, 2009

U.S. Mail - CERTIFIED - Return Receipt

91 7108 2133 3935 6630 6871

Richard W. Thomas, Jr.
Mayor of Arcadia Lakes
6626A Arcadia Woods Road
Columbia, SC 29206

Via Interagency Mail Delivery

Stephen P. Hightower, Esquire
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: **Docket No. 08-RFR-148 - Request review of staff decision dated December 15, 2008, to grant approval of the Stormwater Pollution Prevention Plan for Roper Pond Apartments under NPDES General Permit for Storm Water Discharge from Large and Small Construction Activities. Project coverage number is SCR10J889.**

The S.C. Board of Health and Environmental Control decided on January 8, 2009, not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

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

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

000041

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

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

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

Sincerely,



Lisa Lucas Longshore
Clerk

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

OCG # 20027

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RECEIVED
S.C. DEPT OF HEALTH
& ENVIRONMENTAL CONTROL

December 30, 2008

2008 DEC 30 PM 4: 54

OFFICE OF THE COMMISSIONER
CHIEF OF STAFF
CLERK OF SCDHEC BOARD

HAND-DELIVERED

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, South Carolina 29201

Re: ROPER POND APARTMENTS, Richland County
File Number: 40-08-09-08
Site Location: 6837 North Trenholm Road
TMS# R16907-01-04

Dear Board Members of SC DHEC:

With regard to the referenced project, we, the undersigned affected persons and/or entities, respectfully request that the Board review the DHEC staff decision to allow a land disturbance permit to be issued for the project and to overturn the decision. The project will adversely impact the surrounding community and the environment and, in particular, Cary Lake which is in the already impaired Gills Creek Watershed. As you know, the watershed runs from Sesquicentennial State Park to the Congaree River through eight member districts of Richland County Council and is a wonderful resource that we all enjoy.

The following technical issues need to be addressed as part of our request for overturning the decision to issue the permit:

- (1) The developer sought coverage under the wrong Nationwide permit regarding wetlands;
- (2) The developer did not disclose lowering the water elevation of Roper Pond as part of the wetlands impact permit application. Lowering the pond would cause an impact to the wetlands which is part of the property;
- (3) The design engineer for the project ignored the first flush volume requirements which would affect the water quality in a developed condition;
- (4) The proposed particle size distribution is incorrect in the calculations used by the design engineer for post-development stormwater runoff.

The Notice of Intent for this project was signed by Mr. Bob Mundy. The current owner of record of the land upon which the project is to be built is Roper Pond, LLC of which Mr. Mundy was a member. According to Mr. Mundy, Roper Pond, LLC was sold to Capital

000043

Development, LLC in January of 2008. Does Mr. Mundy have the required approval to request and sign documents with this project and any permit requests?

Please contact the Mayor of Arcadia Lakes, Richard W. Thomas, Jr., in response to this appeal. The Town's address is 6626A Arcadia Woods Rd., Columbia, SC 29206. The telephone number for the Town is 782-2272. Please contact the other individuals signing on this appeal at their respective addresses.

We appreciate your time and consideration of our appeal.

Respectfully submitted by the
undersigned,

See attached sheets for Signatures and
Addresses

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SIGNATURE

ADDRESS

Charles H. Hays

6626 A Arcadia Woods Rd

Myer, Town of Arcadia, Ala, SC. 29206

Charles H. Hays

27 Huntfield CT.

Individually

Columbia, SC 29206

Robert E. Jackson

6720 Kaminer Dr. Columbia, SC, 29206

Robert E. Jackson

6720 Kaminer Dr. Columbia, SC 29206

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SIGNATURE

ADDRESS

Christie W. Murphy

6626A Arcadia Woods Rd.
Columbia, SC 29206

Robert William Do

6737 Kameron Drive
Columbia, SC 29206

Elizabeth M. Walker

40 Seawood Ct. 29206

Mary Helen Spradlin

6709 Kameron Dr. 29206

T. W. Waz

35 Huntwick Ct. Columbia
29206

Mandy D'Alborto

15 Huntwick Ct. Columbia, SC
29206

Tony Lindan

19 Huntwick Ct Columbia, SC 29206

Louis E Spradlin

6769 Kameron Dr Columbia SC 29206

000046

SIGNATURE

ADDRESS

Barbara S. Williams6737 Kaminer DriveCt. SC 29206Robert E. Williams, Jr ^{on other sheet}6737 Kaminer DriveCt. SC 29206Carson & Bette Small33 Leewood Ct Col-29206Mary & Tommy Dail6721 Kaminer Dr.Col. SC 29206E. R. Jones & Tracy Jones6708 Kaminer Dr., SC 29206Julie & Ula Wayne (Mayson)6704 Kaminer Dr. 29206

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SIGNATURE

ADDRESS

Rene J. Stan, M.D. 6819 Sandy Shores Rd. 29206

Elaine J. Stan 6819 Sandy Shore 29206-2244

Ruth L. Marcus 6921 Sandy Shore 29206

Stanford J. Marcus 6921 Sandy Shore Rd. 29206

Nancy C. Gibbs 6717 Sandy Shore Rd. 29206

Wm L. Evers 6720 Sandy Shore Road 29206

Steve Brown 6748 Cary Lane 29206

000048

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

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,

vs.

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

Respondents.

Docket No. 09-ALC-07-____-CC

REQUEST FOR
CONTESTED CASE HEARING

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS:

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, pursuant to Administrative Law Court Rule 11, hereby request a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control to approve a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000, together with the water quality certification issued for a US Army Corps of Engineers permit that is a part of the approval process for this project.

In support of this request the Petitioners submit the following:

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SC ADMIN LAW COURT

THE PETITIONERS

1. The Town of Arcadia Lakes is a municipality organized and existing under the laws of the State of South Carolina. The Town is located around a series of lakes within the Gills Creek watershed, and these lakes are very important to the quality of life of the citizens of the Town.

2. 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 are citizens and residents of the Town of Arcadia Lakes in Richland County, South Carolina; they own property on or near the lakes in the area, and they use and enjoy these lakes for a variety of recreational, environmental and aesthetic purposes.

THE PROJECT AND RESOURCES AT ISSUE

3. Roper Pond, LLC, is the entity that submitted an application for storm water permits and approvals for the construction of a project known as Roper Pond Apartments.

4. Representatives of Roper Pond, LLC, have stated that they plan to construct a high density apartment complex on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

5. The project includes a number of alterations to a pond lying on the property. The pond is a part of the Gills Creek watershed and drains into Cary Lake, a lake within the watershed lying within the town limits of the Town of Arcadia Lakes. The proposed alterations include filling of portions of the pond and wetlands at the edges of the pond and the excavation of a substantial portion of the pond to convert the pond from a productive shallow picturesque lily-pad pond into a typical unsightly and unproductive storm water retention basin.

6. The pond proposed for alterations presently functions as a significant bird habitat and a highly productive wetland providing significant public benefits in filtration of storm waters and improving the quality of waters within the Gills Creek basin.

7. The Gills Creek basin is currently listed as an impaired waterway under Section 303(d) of the federal Clean Water Act, and significant efforts are being made to improve the waters of the Gills Creek watershed and to remedy the problems that have impaired this watershed. Activities such as filling and excavating functional ponds in this watershed will only add to the water quality problems within the Gills Creek watershed.

THE AGENCY PROCEEDING

8. The DHEC staff decision to issue the certification and permit was made on December 15, 2008. The Petitioners filed a timely request for a final review conference before the DHEC Board, but the Board did not conduct a final review conference. Copies of the staff decision and the letter stating that the Board will not conduct a review conference are attached hereto.

GROUND FOR APPEAL

9. The 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 are informed and believe that the permit, certification and approvals were issued in violation of DHEC Regulations 61-9, 61-68 and 61-101, in the following respects:

A. Upon information and belief, Roper Pond, LLC, submitted incorrect and incomplete information to DHEC. Roper Pond, LLC's Stormwater Pollution Prevention Plan

(SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site:

(1) There are significant defects in the construction and post construction portions of Roper's SWPPP. The silt fence shown on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.

(2) The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires "Preservation of trees in the green area next to the pond." Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.

(3) Roper Pond, LLC's documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains of large buildings and from large parking lot areas.

(4) DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would "cause or contribute" to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, "Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of

the clean water act and has been cited by DHEC...And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents.” Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.

(5) Roper Pond, LLC’s calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the “first flush” stormwater runoff volume that would come from the site; and thus, the devices are not of adequate size to capture what is documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

B. The Petitioners are informed and believe that Roper Pond, LLC, submitted materially incorrect information and omitted material information in its submissions to Richland County, DHEC, and the Corps:

(1) In its pre-construction notification to the Corps, Roper Pond, LLC, failed to make it clear that it intended to construct a residential development. Roper requested a Nationwide 39 permit for a commercial development, based on filling of not more than 0.075

acres of wetlands. If a Nationwide Permit had been applicable here, Roper should have applied for a Nationwide 29 permit for residential development. Accordingly, DHEC erroneously issued a 401 water quality certification for this project, and then compounded the error by relying on the water quality certification in approving the project's storm water plan and permit.

(2) Roper Pond, LLC, however, should have applied for an Individual 404 Permit. Roper Pond, LLC, told the Corps it would only impact 0.075 acres of wetlands, but failed to advise the Corps that its design called for dredging the existing Roper Pond nor that it intended to lower the existing pond water level by 3.5 feet. The stream thread of Roper Pond exceeds 350 feet. For any stream alteration exceeding 299 feet, one must apply for an Individual 404 Permit. If Roper Pond, LLC, had properly applied for an Individual Permit, DHEC would have had to evaluate and determine whether to issue a 401 water quality Certification for this permit. DHEC would have also been required to place the project on public notice and provide an opportunity for public comments and appeal. Additionally, the Corps would have had to place the project on public notice.

(3) Roper Pond, LLC's proposed permanent lowering of the pond water level by 3.5 feet, would cause a significantly larger area of wetlands to be impacted than what Roper submitted. Sidecasting and incidental fallback of dredged material would cause the filling of some of the wetland ribbon around the pond, access of equipment into and out of the pond area would fill wetlands, and draining of wetlands, by permanently lowering the pond elevation, would have the equivalent effect of filling ribbon wetlands around the pond and in the larger wetland area upgradient of the pond. Therefore, Roper misled the Corps and both DHEC and the public were denied opportunities to participate regarding water quality by Roper's incorrect and

incomplete application.

C. The impacts of this project were considered by DHEC in a piecemeal fashion and instead should have been considered as part of the comprehensive review required by DHEC Regulation 61-101.

D. The approvals and permit were issued in reliance upon a Nationwide Permit issued by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site.

E. The approvals and permit were issued in reliance upon a DHEC 401 Water Quality Certification that was issued without any public notice or opportunity for public comment prior to the issuance of the storm water approvals; the DHEC 401 Water Quality Certification was erroneously issued for a Nationwide Permit under the Clean Water Act Section 404 program administered by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site. DHEC failed to make a comprehensive review of the project when it certified the Nationwide Permit approval; the project also violates DHEC water quality certification rules in that:

(1) the project would permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values would be eliminated or impaired, in violation of DHEC Regulation 61-101.F.5.(a) ;

(2) there are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulation 61-101.F.5(b);

(3) the proposed activity adversely impacts special or unique habitats, in

violation of DHEC Regulation 61-101.F.5.(d).

F. The project proposes to fill and make significant alterations to a water of the State, and to convert a naturalized water of the State into a storm water retention pond instead of retaining the storm water within upland constructed retention areas; this proposal violates DHEC Regulations 61-9 and 61-68;

G. The project calls for lowering the water level in order to provide storm water retention capacity, but the Department failed to take into account the fact that lowering the water level, which would be accomplished by excavating the bottom level of the pond, will result in the drainage of wetlands associated with the pond, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9 and 61-101.

H. The issuance of a 401 water quality certification without first providing public notice and opportunity for public comment violated the rights of the Petitioners to due process of law under Article I, Section 22 of the South Carolina Constitution.

I. The approved permit violates Regulation 61-9 in that the plans fail to control the first flush volumes and thus this project would have significant impacts upon water quality both within the existing pond and downstream portions of the Gills Creek watershed.

J. The approved permit violates Regulation 61-9 in that the Department gave approval to plans that include an arbitrary proposed particle size distribution in the calculations used by the design engineer for post-development storm water runoff.

K. The approved permit violates Regulations 61-9, 61-68, and 61-101 in that it fails to take into account a number of significant water quality problems associated with the high

density design of the project proposed for this site.

STANDING

10. The Town of Arcadia Lakes has its own "MS4" stormwater permit program, and the implementation of this program will be negatively affected by the proposed alterations of Roper Pond. The Roper Pond project will also have adverse impacts on the Town's efforts to improve water quality in Cary Lakes and other waters within its jurisdiction.

11. Citizens of the 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 use and enjoy the ponds and waters of the Gills Creek watershed, including the pond on the subject property and areas downstream that will be adversely impacted by this project, for a variety of recreational, environmental, and aesthetic purposes.

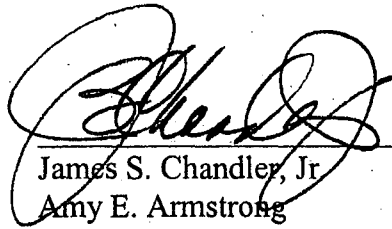
12. As a direct and proximate result of the violations set forth above, the Citizens of the Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown will suffer harm to their recreational, environmental, aesthetic and other interests.

RELIEF REQUESTED

WHEREFORE, 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 request that the Administrative Law Court conduct a contested case hearing and thereafter issue an order reversing the proposed decision to issue the permit and approvals and granting such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,



James S. Chandler, Jr.
Amy E. Armstrong

**SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT**

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Petitioners

Georgetown, South Carolina

February 16, 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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 Steve Brown,)

Petitioners,)

vs.)

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

Respondents.)

Docket No. 09-ALJ-07-0069-CC

**RESPONDENT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL'S
*PREHEARING STATEMENT***

In response to the Order for Pre-hearing Statements issued by the Honorable John W. McLeod, Administrative Law Judge issued on March 4, 2009, Respondent South Carolina Department of Health and Environmental Control ("SCDHEC" or the "Department") respectfully submits the following:

1. The nature of this proceeding:

The Petitioners are appealing the Department's December 15, 2008 decision, pursuant to the National Pollution Discharge Elimination System (NPDES) General Permit for Stormwater Discharges for Stormwater Discharges from Large and Small Construction Activities SCR100000 (2006 CGP), approving the Stormwater Pollution Prevention Plan (SWPPP) submitted by Roper Pond Apartments, Richland County.

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General Permit SCR100000 (NOI) and a SWPPP for a site located at 6837 North Trenholm Road in Richland, South Carolina (Latitude: 34° 3' 35" N Longitude: -80° 57' 30" W). The address is located in an unincorporated portion of the Town of Arcadia Lakes. As set forth in the NOI, the site consists of 12.8 acres, of which 9.6 acres is to be disturbed by land clearing activities. The site also contains delineated wetlands that are under the jurisdiction of the United States Army Corps of Engineers. The NOI indicates that 0.075 acres of the jurisdictional wetlands will be impacted by the construction activities.

Prior to applying for coverage for stormwater coverage under the State's NPDES General Construction permit, the applicant received a 401 Water Quality certification from the Department. The certification, SAC 2004-35601-6NO, was issued by the Department on October 2, 2008, and authorizes the Applicant to impact no more than 0.075 acres of United States jurisdictional waters.

The Applicant's NOI and SWPPP were reviewed by a Professional Engineer on staff with the Department. During the review process, several aspects of the proposal were modified by the Applicant to comply with the reviewer's comments. At the conclusion of this review process, the Department issued stormwater coverage under the NPDES Construction General Permit to the Applicant, SCR10J889. The Department's approved also contained the following notices to the Applicant:

Because this project impacts waters of the U.S./ State, make sure you obtain all necessary permits and certifications from the USACOE and SC DHEC 401 Water Quality Certification, Standards, I Section before land-disturbing activities begin in those areas.

You must notify this DHEC EQC Regional Office prior to starting any land-disturbing activity. The address and telephone of the EQC office are as follows:

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Any additional construction or landdisturbing activity beyond the scope of the approved plans is not authorized. Any future work for this project not shown on the stamped, approved plans will require that you submit another site plan for review and approval. All major modifications require review and approval by the Department.

This NPDES coverage should be terminated by the permittee when one of the conditions listed in Section 5.1 of the 2006 CGP [(Construction General Permit)] has been met. You must submit a Notice of Termination (NOT) to cancel your NPDES coverage under the 2006 CGP. (Emphasis in the original).

You are responsible for obtaining any other federal, state, or local permit that may be required for this project. Please note we have not sent a copy of this letter to any county or city building official. You must send a copy of this letter to these agencies, if necessary.

On December 30, 2008, the Clerk of the Board received a request for a final review conference from the Town of the Arcadia Lakes and numerous citizens. The South Carolina Board of Health and Environmental Control declined to hold a review conference and on January 13, 2009, the Clerk of the Board issued a letter to the Requestors notifying them of the Board's decision.

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

The Department respectfully requests that the Court issue an order denying Petitioners' Petition for Administrative Review in all respects and upholding, in its entirety, the Department's issuance of the stormwater coverage under the NPDES General Permit for Stormwater Discharge for large and small construction activities to Roper Pond, LLC..

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion; (In the interest of judicial expediency, all motions should be submitted to the Court at least fifteen (15) days before the date of the

000061

scheduled hearing. Returns should be submitted at least five (5) days before the scheduled hearing.):

The Department does not expect, at this time, to file any motions in this case. However, the Department respectfully reserves the right to file a motion with the Court in accordance with the Court's rules, the Rules of Procedure for the Administrative law Court and the South Carolina Rules of Civil Procedure.

7. A list of proposed witnesses and exhibits:

Witnesses:

Jill C. Stewart, P.E.
Stormwater Permitting Section
Bureau of Water, SCDHEC

Heather S. Preston, Director
Division of Water Quality

The above-named SCDHEC employee witnesses may be contacted through undersigned counsel. SCDHEC reserves the right to modify this list should the need arise:

Exhibits:

The Department proposes that its Exhibit list will include the following documents:

The Administrative files in this matter maintained by the Department (The other parties may inspect and photocopy these documents for their use by contacting the undersigned attorney to establish a mutually agreeable date and time);

Documents obtained by the Department through discovery; and

Exhibits of the other parties.

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

000062

The Department anticipates that standard discovery devices are sufficient. However, the Department respectfully reserves the right to submit a request to the Court for additional discovery if the need arises.

9. **Whether the party deems it necessary by the undersigned Judge to conduct a Pre-Hearing Scheduling Conference or issue an order regarding motions, discovery, etc.:**

At the present time, the Department does not feel it is necessary for the Court to conduct a Prehearing Scheduling Conference; however, the Department reserves the right to request a Prehearing Scheduling Conference at a later time should the need arise

10. **The estimated time required for the hearing:**

The Department estimates that it can present its case in chief in approximately **** day.

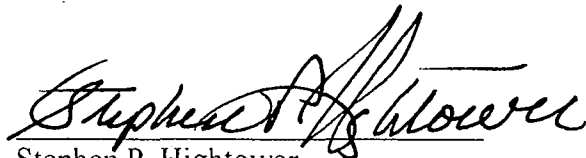
11. **A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case; and**

At this time, the Department witnesses and counsel are available for a hearing on the merits in this action any time after the second week in September 2009.

12. **An e-mail address that the Court can use for e-mail correspondence.**

The undersigned counsel may be contacted by e-mail at the following address:
hightosp@dhec.sc.gov.

Respectfully submitted,



Stephen P. Hightower
SC Bar Number 72265
Office of General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

000063

Attorney for SCDHEC

Tel.: (803) 898-3349

Fax: (803) 898-3367 (Not for Service)

hightosp@dhec.sc.gov (Not for Service)

April 3, 2009

Columbia, South Carolina

000064

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

COPY

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,

vs.

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

Respondents.

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

RESPONDENT ROPER POND, LLC'S
MOTION TO DISMISS

FILED

APR 08 2009

SC ADMIN. LAW COURT

Pursuant to Rule 68 of the Rules of Procedure for the South Carolina Administrative Law Court and South Carolina Rule of Civil Procedure 12(b)(1), Respondent Roper Pond, LLC ("Roper Pond") comes now before the Court and respectfully requests that the Court dismiss all claims challenging the 401 water quality certification and the authorization to conduct activities under a United States Army Corps of Engineers Nationwide Permit for the proposed development.

By letter dated December 15, 2008, the Department granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit"). On December 30, 2009, Petitioners 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

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L. Marcus, and Steven Brown ("Petitioners") requested South Carolina Board of Health and Environmental Control ("Board") review of the issuance of the authorization to discharge under the General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioner filed a Request for Contested Case Hearing, which included the following grounds for appeal:

B. The Petitioners are informed and believe that Roper Pond, LLC, submitted materially incorrect information and omitted material information in its submissions to Richland County, DHEC, and the Corps:

- (1) In its pre-construction notification to the Corps, Roper Pond, LLC, failed to make it clear that it intended to construction a residential development. Roper requested a Nationwide 39 permit for a commercial development, based on filling of not more than 0.075 acres of wetlands. If a Nationwide Permit had been applicable her, Roper should have applied for a Nationwide 29 permit for residential development. Accordingly, DHEC erroneously issued a 401 water quality certification for this project, and then compounded the error by relying on the water quality certification in approving the project's storm water plan and permit.
- (2) Roper Pond, LLC, however, should have applied for an Individual 404 Permit. Roper Pond, LLC, told the Corps it would only impact 0.075 acres of wetlands, but failed to advise the Corps that its design called for dredging the existing Roper Pond nor that it intended to lower the existing pond water level by 3.5 feet. The stream thread of Roper Pond exceeds 350 feet. For any stream alternation exceeding 299 feet, one must apply for an Individual 404 Permit. If Roper Pond, LLC, had properly applied for an Individual Permit, DHEC would have had to evaluate and determine whether to issue a 401 water quality certification for this permit. DHEC would have also been required to place the project on public notice and provide an opportunity to public comments and appeal. Additionally, the Corps would have had to place the project on public notice.
- (3) Roper Pond, LLC's proposed permanent lowering of the pond water level by 3.5 feet, would cause a significantly larger area of wetlands to be impacted than what Roper submitted. Sidecasting and incidental fallback of dredged material would cause the filling of some of the wetland ribbon around the pond, access of equipment to and out of the pond area would fill wetlands, and draining of wetlands, by permanently lowering the pond elevation, would have the equivalent effect of filling ribbon

wetlands around the pond and in the larger wetland area upgradient of the pond. Therefore, Roper misled the Corps and both DHEC and the public were denied opportunities to participate regarding water quality by Roper's incorrect and incomplete application.

- C. The impacts of this project were considered by DHEC in a piecemeal fashion and instead should have been considered as part of the comprehensive review required by DHEC Regulation 61-101.
- D. The approvals and permit were issued in reliance upon a Nationwide Permit issued by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, proposes to make on this site.
- E. The approvals and permit were issued in reliance upon a DHEC 401 Water Quality Certification that was issued without any public notice or opportunity for public comment prior to the issuance of the storm water approvals; the DHEC 401 Water Quality Certification was erroneously issued for a Nationwide Permit under the Clean Water Act Section 404 program administered by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site. DHEC failed to make a comprehensive review of the project when it certified the Nationwide Permit approval; the project also violated DHEC water quality certification rules in that:
 - (1) the project would permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values would be eliminated or impaired, in violation of DHEC Regulation 61-101.F.5.(a);
 - (2) there are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulation 61-101.F.5.(b);
 - (3) the proposed activity adversely impacts special or unique habitats, in violation of DHEC Regulation 61-101.F.5.(d).

* * *

- G. The project calls for lowering the water level in order to provide storm water retention capacity, but the Department failed to take into account the fact that lowering the water level, which would be accomplished by excavating the bottom level of the pond, will result in the drainage of wetlands associated with the pond, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulation 61-9 and 61-101.
- H. The issuance of a 401 water quality certification without first providing public notice and opportunity for public comment violated the rights of the

000067

Petitioners to due process of law under Article I, Section 22 of the South Carolina Constitution.

(See Request for Contested Case Hearing, pp. 5-8, attached hereto as Exhibit A). These claims as alleged by the Petitioners should be dismissed based on the following grounds.

1. Petitioners' challenge to the 401 water quality certification for the Proposed Project is untimely because the applicable 401 water quality certification for the General Permit was issued by the Department on May 11, 2007. Pursuant to S.C. REG. ANN. § 61-101.G.3, which governed appeal of 401 water quality certifications at the time of the Department decision on May 11, 2007, a party appealing the certification was required to submit a written request for an adjudicatory hearing within fifteen days of notice of the determination.

2. Petitioners' challenge to the 401 water quality certification for the Proposed Project is not properly before the Court because an October 2, 2008 letter advising Roper Pond that the work associated with the Proposed Project is consistent with the 401 Certification issued on May 11, 2007, does not constitute a Department decision which is subject to review under S.C. CODE ANN. § 44-1-60.

3. In the alternative, even if the October 2, 2008 letter were a Department decision subject to review under S.C. CODE ANN. § 44-1-60, which it is not, Petitioners failed to file a request for review by the South Carolina Board of Health within fifteen days after notice of the department decision has been mailed to the applicant as required by S.C. CODE ANN. § 44-1-60(E).

4. This Court lacks subject matter jurisdiction to hear an appeal of a decision of the United States Army Corps of Engineers ("Corps") to authorize activities under a Corps Nationwide Permit.

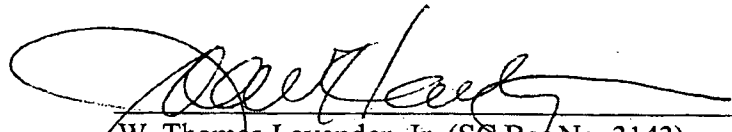
For the foregoing reasons, Roper Pond hereby requests that the Court issue an order

000068

granting dismissal of all claims and allegations related to the 401 water quality certification and Corps authorization for work under Nationwide Permit 29 in association with the Proposed Project.

This motion is based on the pleadings, the applicable law, and any memorandum of law that may be submitted at or prior to the hearing on this motion.

Respectfully submitted,



W. Thomas Lavender, Jr. (SC Bar No. 3143)
Joan W. Hartley (SC Bar No. 72735)
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Respondent
Roper Pond, LLC

April 6, 2009
Columbia, South Carolina

000069

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

COPY

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,

vs.

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

Respondents.

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

PRE-HEARING STATEMENT OF
RESPONDENT ROPER POND, LLC

FILED

APR 08 2009

SC ADMIN. LAW COURT

Respondent Roper Pond, LLC ("Roper Pond"), submits this Pre-Hearing Statement pursuant to the Order for Pre-Hearing Statements dated March 4, 2009.

1. **The nature of this proceeding:** On December 15, 2008, Respondent South Carolina Department of Health and Environmental Control ("Department") granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit"). This coverage under the General Permit authorized land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project").

2. **Statutory provision(s) conferring subject matter jurisdiction to the Court and other applicable statutes and regulations:** Jurisdiction is conferred pursuant to S.C. CODE ANN. §§ 1-23-310, *et seq.*, and S.C. CODE ANN. § 44-1-60. Other applicable statutes and

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regulations include 33 U.S.C.A. § 1342, S.C. CODE ANN. § 48-1-10 *et seq.* and S.C. CODE REGS. 61-9.122.

3. The issues to be presented for determination: This appeal raises the following issues for determination:

- (a) Whether the Petitioners have standing to bring this action;
- (b) Department properly authorized coverage for construction activities associated with the Proposed Project under the General Permit; and
- (c) Whether the Department properly determined that the Storm Water Pollution Prevention Plan conforms to Department regulations and the terms and conditions of the General Permit.

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

On November 5, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit"). Roper Pond also submitted to the Department a storm water pollution prevention plan, which was approved by Richland County and the Department. By letter dated December 15, 2008, the Department granted Roper Pond coverage under the General Permit for storm water discharges associated with construction of the Proposed Project. Roper Pond exceeded the requirements for General Permit coverage for storm water discharges associated with the construction of the Proposed Project.

On December 30, 2009, Petitioners 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") requested review by the South Carolina Board of Health and Environmental

000071

Control ("Board") of the issuance of the authorization to discharge under the General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioner filed a Request for Contested Case Hearing. Both the request for Board review and the request for contested case hearing filed with this Court raise a number of issues related to the 401 water quality certification and the authorization to impact wetlands under the United States Army Corps of Engineers Nationwide Permit 29. These issues are not properly before this Court, and Roper Pond has filed a motion to dismiss accordingly.

5. The action requested of the Court: Roper Pond requests that the Court find that the Department properly granted coverage for discharges associated with construction of the Proposed Project under the General Permit pursuant to S.C. CODE REGS. ANN. § 61-9.122.26 and the terms and condition of the General Permit. Roper Pond further requests that the Court dismiss all claims related to the 401 water quality certification and authorization under the Corps Nationwide Permit for the Proposed Project. Specific grounds for dismissal of these claims are identified in the motion to dismiss filed contemporaneously with the Court.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion: Roper Pond has separately filed a motion to dismiss claims related to the 401 water quality certification and authorization under the Corps Nationwide Permit for the Proposed Project. Roper Pond reserves the right to raise other issues by filing separate motions as may be appropriate as discovery progresses in this matter.

7. A list of proposed witnesses and exhibits: At this time, Roper Pond would anticipate calling the following witnesses:

- (a) Robert Mundy – Roper Pond, LLC;
- (b) Matt Mundy – Roper Pond, LLC
- (c) James Futter – B.P. Barber and Associates, Inc.;
- (d) George Whatley – B.P. Barber and Associates, Inc.;
- (e) Jill Stewart – South Carolina Department of Health and Environmental Control;
- (f) Ann Clark – South Carolina Department of Health and Environmental Control;
- (g) William Simon – Richland County;
- (h) Tony Magwood – South Carolina Department of Transportation;
- (i) Joel Lourie;
- (j) Joan Brady;
- (k) Richard Thomas;
- (l) Bob Bishop;
- (m) Danny Hill;
- (n) Petitioners; and
- (o) Elliott Powell.

Roper Pond reserves the right to name additional witnesses.

At this time, Roper Pond would anticipate introducing the following exhibits:

- (a) The Department's file on Roper Pond's notice of intent to conduct land-disturbing activities under the General Permit, including correspondence with Roper Pond and Petitioners;
- (b) Richland County's file on its review of the storm water pollution prevention plan;
- (c) Communications between and among Petitioners, state and local elected officials, state and county agency personnel, and Respondents regarding the Proposed Project; and
- (d) B.P. Barber's files regarding the Proposed Project.

Roper Pond reserves the right to introduce additional exhibits.

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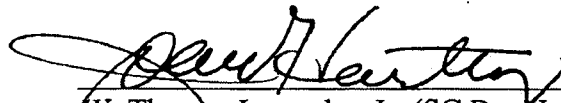
8. A statement regarding the necessity for discovery, if any: Roper Pond anticipates discovery in the form of interrogatories, requests to produce, requests to admit, subpoenas and depositions.

9. Whether the party deems it necessary to conduct a pre-hearing scheduling conference or issue an order regarding notices, discovery, etc.: Roper Pond will request expansion of discovery pursuant to Rule 21 of the South Carolina Rules of Procedure for the Administrative Law Court to allow for more than three depositions.

10. The estimated length for the hearing: Two (2) days.

11. A range of proposed dates available for a hearing on the merits: June 23, 2009 – July 10, 2009; August 10, 2009 – September 22, 2009.

12. Email addresses: wlavender@nexsenpruet.com and jhartley@nexsenpruet.com.



W. Thomas Lavender, Jr. (SC Bar No. 3143)

Joan W. Hartley (SC Bar No. 72735)

NEXSEN PRUET, LLC

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803.771.8900

Attorneys for Respondent

Roper Pond, LLC

April 6, 2009
Columbia, South Carolina

000074

ADMINISTRATIVE LAW COURT

**PREHEARING STATEMENT
OF
PETITIONERS**

The Petitioners submit the following as their Prehearing Statement:

1. The nature of this proceeding.

This proceeding is a contested case appeal of the decision of the South Carolina Department of Health and Environmental Control (“DHEC”) to issue a storm water permit (including a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000) and 401 water quality certification to Roper Pond, LLC, for the proposed construction of a project known as Roper Pond Apartments, a high density apartment complex, on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

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

Subject matter jurisdiction: (1) S.C. Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, 1-23-370, 1-23-600; (2) the Pollution Control Act, S.C. Code Ann. § 48-1-10, *et seq.*; and (3) S.C. Code Ann. § 44-1-60 2006 Act No. 387.

Other applicable statutes and regulations: (1) the Stormwater Management and Sediment Reduction Act of 1991, S.C. Code Ann. §§ 48-14-10, *et seq.*; (2) Stormwater regulations, S.C.

Code Ann. Regs. §§ 72-300 through 316; (3) S.C. Pollution Control Act, S.C. Code Ann. §§ 48-1-20, *et seq.*; (4) DHEC Regulations for NPDES permits, S.C. Code Ann. § 61-9.; DHEC Regulations for 401 water quality certifications, SC Code Ann. Regs. § R.61-101.

3. The issues to be presented for determination, including any claims or defenses expected to be raised.

A. Whether Roper Pond, LLC, submitted incorrect and incomplete information to DHEC.

B. Whether Roper Pond, LLC's Stormwater Pollution Prevention Plan (SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site because:

1. There are significant defects in the construction and post construction portions of Roper's SWPPP. The silt fence shown on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.

2. The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires "Preservation of trees in the green area next to the pond." Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.

3. Roper Pond, LLC's documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains of large buildings and from large parking lot areas.

4. DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would "cause or contribute" to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, "Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of the clean water act and has been cited by DHEC... And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents." Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.

5. Roper Pond, LLC's calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the "first flush" stormwater runoff volume that

would come from the site; and thus, the devices are not of adequate size to capture what is documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

C. Whether Roper Pond, LLC, submitted materially incorrect information and omitted material information in its submissions to Richland County, DHEC, and the Corps:

1. In its pre-construction notification to the Corps, Roper Pond, LLC, failed to make it clear that it intended to construct a residential development. Roper requested a Nationwide 39 permit for a commercial development, based on filling of not more than 0.075 acres of wetlands. If a Nationwide Permit had been applicable here, Roper should have applied for a Nationwide 29 permit for residential development. Accordingly, DHEC erroneously issued a 401 water quality certification for this project, and then compounded the error by relying on the water quality certification in approving the project's storm water plan and permit.

2. Roper Pond, LLC, however, should have applied for an Individual 404 Permit. Roper Pond, LLC, told the Corps it would only impact 0.075 acres of wetlands, but failed to advise the Corps that its design called for dredging the existing Roper Pond nor that it intended to lower the existing pond water level by 3.5 feet. The stream thread of Roper Pond exceeds 350 feet. For any stream alteration exceeding 299 feet, one must apply for an Individual 404 Permit. If Roper Pond, LLC, had properly applied for an Individual Permit, DHEC would have had to evaluate and determine whether to issue a 401 water quality Certification for this permit. DHEC would have also been required to place the project on public notice and provide an opportunity for public comments and appeal. Additionally, the Corps would have had to place the project on public notice.

3. Roper Pond, LLC's proposed permanent lowering of the pond water level by 3.5 feet, would cause a significantly larger area of wetlands to be impacted than what Roper submitted. Sidecasting and incidental fallback of dredged material would cause the filling of some of the wetland ribbon around the pond, access of equipment into and out of the pond area would fill wetlands, and draining of wetlands, by permanently lowering the pond elevation, would have the equivalent effect of filling ribbon wetlands around the pond and in the larger wetland area upgradient of the pond. Therefore, Roper misled the Corps and both DHEC and the public were denied opportunities to participate regarding water quality by Roper's incorrect and incomplete application.

4. The impacts of this project were considered by DHEC in a piecemeal fashion and instead should have been considered as part of the comprehensive review required by DHEC

Regulation 61-101..

D. The approvals and permit were issued in reliance upon a Nationwide Permit issued by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site.

E. The approvals and permit were issued in reliance upon a DHEC 401 Water Quality Certification that was issued without any public notice or opportunity for public comment prior to the issuance of the storm water approvals; the DHEC 401 Water Quality Certification was erroneously issued for a Nationwide Permit under the Clean Water Act Section 404 program administered by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site. DHEC failed to make a comprehensive review of the project when it certified the Nationwide Permit approval; the project also violates DHEC water quality certification rules in that:

1. the project would permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values would be eliminated or impaired, in violation of DHEC Regulation 61-101.F.5.(a) ;

2. there are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulation 61-101.F.5(b);

3. the proposed activity adversely impacts special or unique habitats, in violation of DHEC Regulation 61-101.F.5.(d).

E. The project proposes to fill and make significant alterations to a water of the State, and to convert a naturalized water of the State into a storm water retention pond instead of retaining the storm water within upland constructed retention areas; this proposal violates DHEC Regulations 61-9 and 61-68.

F. The project calls for lowering the water level in order to provide storm water retention capacity, but the Department failed to take into account the fact that lowering the water level, which would be accomplished by excavating the bottom level of the pond, will result in the drainage of wetlands associated with the pond, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9 and 61-101.

G. The issuance of a 401 water quality certification without first providing public notice and opportunity for public comment violated the rights of the Petitioners to due process of law under Article I, Section 22 of the South Carolina Constitution.

H. The approved permit violates Regulation 61-9 in that the plans fail to control the first

flush volumes and thus this project would have significant impacts upon water quality both within the existing pond and downstream portions of the Gills Creek watershed.

I. The approved permit violates Regulation 61-9 in that the Department gave approval to plans that include an arbitrary proposed particle size distribution in the calculations used by the design engineer for post-development storm water runoff.

J. The approved permit violates Regulations 61-9, 61-68, and 61-101 in that it fails to take into account a number of significant water quality problems associated with the high density design of the project proposed for this site.

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

Roper Pond, LLC, submitted an application for storm water permits and approvals for the construction of a project known as Roper Pond Apartments. Representatives of Roper Pond, LLC, have stated that they plan to construct a high density apartment complex on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

The project includes the proposal to make a number of alterations to a pond lying on the property. The pond is a part of the Gills Creek watershed and drains into Cary Lake, a lake within the watershed lying within the town limits of the Town of Arcadia Lakes. The proposed alterations include filling of portions of the pond and wetlands at the edges of the pond and the excavation of a substantial portion of the pond to convert the pond from a productive shallow picturesque lily-pad pond into a typical unsightly and unproductive storm water retention basin.

The pond proposed for alterations presently functions as a significant bird habitat and a highly productive wetland providing significant public benefits in filtration of storm waters and improving the quality of waters within the Gills Creek basin.

The Gills Creek basin is currently listed as an impaired waterway under Section 303(d) of the federal Clean Water Act, and significant efforts are being made to improve the waters of the Gills Creek watershed and to remedy the problems that have impaired this watershed. Activities such as filling and excavating functional ponds in this watershed will only add to the water quality problems within the Gills Creek watershed.

The Petitioners believe that this project will violate the laws and regulations set forth above and that the evidence will demonstrate these violations.

5. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citation.

The Petitioners request that the Court reverse the agency decision to issue a permit and

certification to Roper Pond, LLC.

The law which supports reversal is as follows:

- the project proposes to utilize existing waters of the State and wetlands as a component of the stormwater management system for the project, but the necessary state and federal wetlands permits and certifications have not been obtained, in violation of Storm water regulation 72-307.C.(7).

- the project violates the state stormwater management act and regulations and the SC Pollution Control Act and DHEC Regulations 61-68 and 61-9.

- the project violates the DHEC Regulations governing 401 water quality certifications, S.C. Code Ann. Regs. § R.61-9.

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

None identified to date.

7. A list of proposed witnesses and exhibits.

Individual petitioners

Petitioners will identify one or more expert witnesses as soon as possible

DHEC personnel involved in the decisions

Exhibits:

Documents from the DHEC administrative record

Maps and photographs of the proposed development site and surrounding areas within the Gills Creek watershed

Plans for the proposed development

Documents submitted by or on behalf of Roper Pond, LLC to the Corps of Engineers

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

Petitioners are serving Interrogatories, Requests for Production of Documents and

Things, and a Request for Entry Upon the development site. Petitioners anticipate at least 3 depositions. Petitioners request 120 days from the date of this prehearing statement for discovery and trial preparation.

9. Whether the party deems it necessary by the undersigned Judge to conduct a PreHearing Scheduling Conference or issue an order regarding motions, discovery, etc.

Not determined at this time.

10. The estimated time required for the hearing.

One to two days.

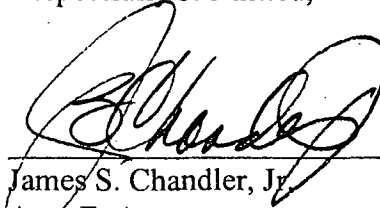
11. A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case.

September 1-4, 15-18, 22-25, 29-October 2, October 6-9, 13-16, 2009.

12. An e-mail address that the Court can use for e-mail correspondence.

Jchandler@scelp.org

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Attorneys for the Petitioners

Georgetown, South Carolina

April 6, 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

COPY

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,)

vs.)

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

Respondents.)

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

**PETITIONERS'
RESPONSE TO
ROPER POND, LLC'S
MOTION TO DISMISS**

FILED

MAY 20 2009

SC ADMIN. LAW COURT

The Petitioners respond to the Respondent Roper Pond, LLC's Motion to Dismiss as follows:

In this case, the Petitioners requested a contested case hearing on the decision of the South Carolina Department of Health and Environmental Control to approve a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000, together with the water quality certification issued for a US Army Corps of Engineers Nationwide Permit No. 39. The Motion to Dismiss seeks dismissal of "all claims challenging the 401 water quality certification and authorization to conduct activities under a United States Army Corps of Engineers Nationwide Permit for the proposed development." (Motion to Dismiss, p. 1). The motion also states that "Roper Pond hereby requests that the Court issue an order granting

000082

dismissal of all claims and allegations related to the 401 water quality certification and Corps authorization related to the 401 water quality certification and Corps authorization for work under Nationwide Permit 29 in association with the Proposed Project.”

The 401 water quality certification referenced in the Request for Contested Case Hearing was related to Roper Pond, LLC’s request for approval under Corps Nationwide Permit Number 39. The Petitioners concede that they did not request DHEC Board review of the DHEC water quality certification decision on Nationwide Permit 39 (“NWP 39”) for Roper Pond, LLC. The Petitioners did not receive notice of that decision in a timely manner, but for the purposes of this proceeding, the Petitioners hereby withdraw their allegations related to the DHEC approval of Roper Pond, LLC’s authorization under NWP 39.

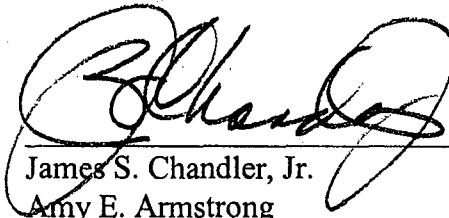
The Motion to Dismiss, however, is over-broad and seeks dismissal of claims related to the DHEC water quality certification of Nationwide Permit Number 29 (“NWP 29”). The DHEC certification of NWP 29 is not before this Court. The Petitioners just received notice of the issuance of a DHEC 401 water quality certification for NWP for Roper Pond, LLC, on Wednesday, May 13, 2009, during the deposition of the South Carolina Department of Health and Environmental Control pursuant to SCRCF 30(b)(6).

During the May 13, 2009, deposition of DHEC, the DHEC spokesmen also testified that neither the 401 water quality certification nor the storm water permit authorized or even analyzed the environmental and water quality impacts of the proposal by Roper Pond, LLC, to excavate an existing pond on the project site and to lower the normal surface elevation of the pond to allow room for storage of storm waters. Accordingly, some of the allegations of the Request for Contested Case Hearing and Prehearing Statement relating to the impacts of the pond remain

appropriate for consideration by this Court, separate from the 401 water quality certification of any Corps Nationwide Permit.

Accordingly, the Petitioners withdraw their allegations related to the certification of NWP 39, but request that the Court deny the Motion to Dismiss as to anything related to certification of NWP 29 for Roper Pond, LLC, and allow the Petitioners to file an amended prehearing statement restating the grounds for appeal separate from any 401 water quality certification.

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Attorneys for the Petitioners

Georgetown, South Carolina

May 18, 2009

RECEIVED
S.C. DEPT OF HEALTH
& ENVIRONMENTAL CONTROL

STATE OF SOUTH CAROLINA

2009 MAY 25 AM 10:28

BEFORE THE BOARD
OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF THE COMMISSIONER
CLERK OF SCDHEC BOARD

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,

Appellants,

vs.

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

Respondents.

RE: 401 Water Quality Certification issued to Roper Pond, LLC

REQUEST FOR FINAL REVIEW CONFERENCE

TO THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL:

The 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 hereby request that the Board of Health and Environmental Control conduct a Final Review Conference to review the decision of the staff of the South Carolina Department of Health and Environmental Control to approve the filling of wetlands and the granting of coverage under Corps of Engineers Nationwide Permit #29 a development proposed by Roper Pond, LLC.

The basis for this request is as follows:

THE APPELLANTS

1. The Town of Arcadia Lakes is a municipality organized and existing under the laws of the State of South Carolina. The Town is located around a series of lakes within the Gills Creek watershed, and these lakes are very important to the quality of life of the citizens of the Town.

2. 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 are citizens and residents of the Town of Arcadia Lakes in Richland County, South Carolina; they own property on or near the lakes in the area, and they use and enjoy these lakes for a variety of recreational, environmental and aesthetic purposes.

THE PROJECT AND RESOURCES AT ISSUE

3. Roper Pond, LLC, is the entity that submitted an application for approval of the filling of wetlands, and for authorization of same under Corps of Engineers Nationwide Permit No. 29, and a DHEC 401 water quality certification of same, for the construction of a residential development known as Roper Pond Apartments.

4. Representatives of Roper Pond, LLC, have stated that they plan to construct a high density apartment complex on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

5. The project includes a number of alterations to a pond lying on the property. The pond is a part of the Gills Creek watershed and drains into another pond within the watershed lying within the town limits of the Town of Arcadia Lakes. The proposed alterations include filling of portions of the pond and wetlands at the edges of the pond and the excavation of a substantial

portion of the pond to convert the pond from a productive shallow picturesque lily-pad pond into a typical unsightly and unproductive storm water retention basin.

6. The pond proposed for alterations presently functions as a significant bird habitat and a highly productive wetland providing significant public benefits in filtration of storm waters and improving the quality of waters within the Gills Creek basin.

7. The Gills Creek basin is currently listed as an impaired waterway under Section 303(d) of the federal Clean Water Act, and significant efforts are being made to improve the waters of the Gills Creek watershed and to remedy the problems that have impaired this watershed. Activities such as filling and excavating functional ponds in this watershed will only add to the water quality problems within the Gills Creek watershed.

THE AGENCY DECISION

8. The Appellants were informed for the first time on May 13, 2009, that the Department staff has issued a 401 water quality certification approval of the wetlands fill proposed by Ropber Pond, LLC. These Appellants earlier filed a Request for Final Review Conference seeking review of DHEC's decision to approve a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000. The Board did not conduct a review conference. The Appellants then filed a Request for Contested Case Hearing in the Administrative Law Court to appeal that decision, and that case is pending as ALC Docket No. 09-ALC-07-0069-CC. The Appellants served requests for file documents relating to this case on DHEC on April 6, 2009, but has yet to receive responses to interrogatories or production of documents. On May 13, 2009, the Appellants took the deposition of Chuck Hightower, DHEC's 401 Section Manager. It was during that deposition that the Appellants first learned that DHEC had approved the

residential construction plans and granted coverage under the Nationwide Permit #29 for Residential Developments, including 401 water quality certification. Mr. Hightower testified that the DHEC staff decision to issue the certification and permit was made in February, 2009. Mr. Hightower also testified that the decision was made without any public notice or opportunity for public comment or public hearing. The Appellants to date have been unable to obtain a copy of the decision document from DHEC.

9. Mr. Hightower further testified that the DHEC staff did not make any effort to examine "all potential water quality impacts of the project, both direct and indirect, over the life of the project" as required by DHEC Regulation 61-101 and that DHEC staff made no effort to examine "the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others" as required by Regulation 61-101, despite being in possession of evidence that Roper Pond, LLC, plans to make significant alterations to the pond on the development property. Another witness for DHEC testified the same day that neither the storm water section of DHEC nor any other office at DHEC examined the full water quality impacts of the proposed development.

GROUND FOR APPEAL

10. 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 permit and approvals were issued in violation of DHEC Regulations 61-9, 61-68 and 61-101, in the following respects:

a. The impacts of this project were considered by DHEC in a piecemeal fashion, with the staff knowingly ignoring significant water quality impacts of the proposed development

instead of performing the type of comprehensive review required by DHEC Regulation 61-101.

b. The 401 Water Quality Certification that was issued without any public notice or opportunity for public comment, in violation of Regulation 61-101 and Article I, Section 22 of the South Carolina Constitution.

c. The project also violates DHEC water quality certification rules in that:

(1) the project would permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values would be eliminated or impaired, in violation of DHEC Regulation 61-101.F.5.(a) ;

(2) there are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulation 61-101.F.5.(b);

(3) the proposed activity adversely impacts special or unique habitats, in violation of DHEC Regulation 61-101.F.5.(d).

d. The project proposes to fill and make significant alterations to a water of the State, and to convert a naturalized water of the State into a storm water retention pond instead of retaining the storm water within upland constructed retention areas; this proposal violates DHEC Regulations 61-9 and 61-68, and thus also violates Regulation 61-101, which requires compliance with these additional regulations.

e. The project calls for lowering the water level in order to provide storm water retention capacity, but the Department failed to take into account the fact that lowering the water level, which would be accomplished by excavating the bottom level of the pond, will result in the drainage of wetlands associated with the pond, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9,

61-68, and 61-101.

f. The approval violates Regulations 61-9, 61-68, and 61-101 in that it fails to take into account a number of significant water quality problems associated with the high density design of the project proposed for this site.

STANDING

11. Citizens of the 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 use and enjoy the ponds and waters of the Gills Creek watershed, including the pond on the subject property and areas downstream that will be adversely impacted by this project, for a variety of recreational, environmental, and aesthetic purposes.

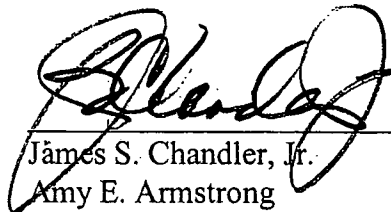
12. As a direct and proximate result of the violations set forth above, the Citizens of the Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown will suffer harm to their recreational, environmental, aesthetic and other interests.

RELIEF REQUESTED

WHEREFORE, 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 request that the Board of

the Department of Health and Environmental Control conduct a Final Review Conference and thereafter issue an order reversing the proposed decision to issue a 401 water quality certification to Roper Pond, LLC.

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Georgetown, SC 29440

Telephone (843) 527-0078

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Attorneys for the Appellants

Georgetown, South Carolina

May 22, 2009

STATE OF SOUTH CAROLINA

BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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

Requestors,

vs.

South Carolina Department of Health and Environmental Control,

and

Roper Pond, LLC,

Applicant/Permitee.

In Re: Applicant Permit ID No.: SAC 2004-35601-6NO

Applicant: B.P. Barber for Estates, Inc.

401 Certification for Authorization to Impact No more than 0.075-Acre of Water of the United States Pursuant to Nationwide Permit 39 (Commercial and Institutional Development).

**DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S
RESPONSE TO REQUEST FOR FINAL REVIEW**

TO: THE APPELLANTS ABOVE-NAMED:

In response to the Respondents' Request for Final Review of the water quality certification issued by the Department staff for Nationwide Permits, the Department staff

000092

submits that the Respondents requests are untimely and the Board should decline to hold a Final Review Conference in this matter. The salient facts are as follows.

The Water Quality Certification

On April 25, 2007, the Department staff issued Public Notice # DHEC-NWP-2007, entitled Notice of Department Decision, 401 Water Quality Certification and Consistency with the S.C. Coastal Zone Management Program (hereinafter referred to as "NWPs Water Quality Certifications"). The Public Notice contained the Department staff's determination of the appropriate water quality certifications for the reissuance of 50 existing and new United States Army Corps of Engineers (Corps) Nationwide Permits (NWPs).¹ Included in the Department staff's NWPs Water Quality Certifications are the certifications for activities authorized by the Corps under NWP No. 29 for Residential Development and NWP No. 39 for Commercial and Institutional Development, which are similar.

In accordance with the Department's appeals procedures, parties challenging the NWP Water Quality Certifications were required to file a request for a final review conference with the Clerk of the Board within 15 day of the issuance of the staff decision. While requests for final review were received for the Coastal Zone Consistency determinations for certain NWPs, no request for a final review conference was received for the 401 water quality certification for any of the NWPs and on May 11, 2007 the NWPs Water Quality Certifications became a Final Agency Decision.

The Requestors' Request

The Requestors are seeking to challenge the Department's notification to Roper Pond, LLC on October 2, 2008 of its coverage under the 2007 NWP Water Quality Certification for its construction project. The project consists of the construction of residential apartments in an

¹ A copy of the relevant portions of Public Notice # DHEC-NWP-2007 is annexed hereto as Exhibit 1.

unincorporated portion of the Town of Arcadia Lakes and will impact 0.075 acres of wetlands covered under the Corps' jurisdictional authority. As originally noticed by the Corps, the project was covered under NWP No. 39.² Subsequently in February 2009, the Corps renoticed the project as being covered under NWP No. 29. Since the NWP Water Quality Certification for a Nationwide No. 39 is the same as the NWP Water Quality Certification for a NWP No. 29, the Department declined to issue a new NWP Water Quality Certification notice to Roper Pond, LLC.

The Requestors became aware of the Department staff notice to Roper Pond, LLC of coverage of under the 2007 NWP No. 29/39 Water Quality Certifications as part of a contested case proceeding currently pending in the Administrative Law Court, Docket No. 09-ALJ-07-0069-CC. In that case, the Requestors are challenging the Department's decision approving the Stormwater Pollution Prevention Plan (SWPPP) submitted by Roper Pond Apartments under the State's National Pollution Discharge Elimination System (NPDES) General Permit for Stormwater Discharges for Stormwater Discharges from Large and Small Construction Activities SCR100000 (2006 CGP).

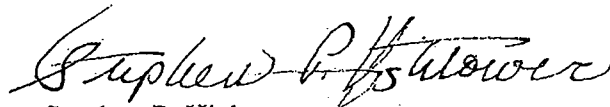
Discussion

The purpose of the Corps' NWPs is to authorize minor activities with "little delay or paperwork." Exhibit 1. Pursuant to regulations governing the issuance of State Water Quality Certifications, the Department may issue general water quality certifications for categories specified in Federal nationwide permits using the process governing the issuance of individual water quality certifications. 25A S.C. Code Ann Regs. 61-101(A)(3) (Supp. 2008). In accordance with the regulations, the Department staff followed the analytical requirements governing the issuance individual permits in the process of issuing the NWPs Water Quality

² A copy of the Department's October 2, 2008 letter and attachment is annexed hereto as Exhibit 2.

Certifications including, but not limited to the soliciting and incorporating into the certification, comments from the public and resource agencies. The Department staff also followed the procedural requirements governing the issuance of individual water quality certifications by issuing the certification as a public notice, which was sent to all parties requesting notice. Thus, since the Department staff's issuance of the NWP Water Quality Certification was issued in accordance with the regulations and the time for the challenging the certifications upon any ground expired more than two (2) years ago, the NWP Water Quality Certification is unreviewable and the Requestors challenge is untimely. Consequently, the Board should decline to grant a review conference.

Respectfully submitted,



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FAX: (803) 898-3367 (Not for Service)
Hightosp@dhec.sc.gov (Not for Service)

May 27, 2008
Columbia, South Carolina

S:\Share\LEGAL\ALL\MATTERS\20827.1 ALC Roper Pond, LLC\401 Certification

EXHIBIT 1

000096



South Carolina Department of Health
and Environmental Control

Bureau of Water
2600 Bull St
Columbia SC 29201

Public Notice # DHEC-NWP-2007

Public Notice Date: April 25, 2007

**NOTICE OF DEPARTMENT DECISION
401 WATER QUALITY CERTIFICATION
CONSISTENCY WITH THE S.C. COASTAL ZONE MANAGEMENT PROGRAM**

The Department is taking action for Water Quality Certification pursuant to Section 401 of the Federal Clean Water Act, and for certification of consistency with the S.C. Coastal Zone Management Program in accordance with 15 CFR 930, for reissuance of 43 existing and issuance of six (6) new U.S. Army Corps of Engineers' Nationwide Permits (NWP).

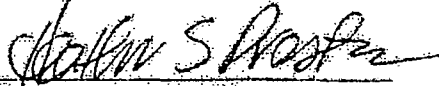
After reviewing the U.S. Army Corps of Engineers' (Corps) proposal to amend the Nationwide Permit program regulations to reissue and modify the NWPs, Department Staff determined that provided the proposed actions listed in the following table are implemented and proposed conditions are adhered to, there is a reasonable assurance that work authorized by the herein will be conducted in a manner consistent with the certification requirements of Section 401 of the Federal Clean Water Act and the Coastal Zone Management Program in accordance with 15 CFR 930. The Office of Ocean and Coastal Resource Management must issue its own permit for any activity covered by the nationwide permits in the critical areas of South Carolina's Coastal Zone. Individuals applying for Nationwide Permits should be so advised. This does not preclude compliance with 15 CFR 930 for direct federal activities.

Accordingly, the Department proposes to act on the Nationwide permits as listed in the attached table. In reference to proposed Coastal Zone Management Program consistency certifications, "Issue" means that the Nationwide Permit can be made consistent with the Coastal Zone Management Program if the proposed regional conditions are adopted by the U.S. Army Corps of Engineers.

The Corps issued the final notice in the Federal Register on March 12, 2007. The evaluation of the proposed work was conducted by the Bureau of Water and the Office of Ocean and Coastal Resource Management and a copy of the staff assessment supporting the Department decision is enclosed.

The final 401 Water Quality Certification will be issued unless there is a timely request for review of the Department Decision based on water quality or water use impacts.

The issuance of this Notice of Department Decision represents a final staff decision that may be appealed. The procedures for appeals went into effect July 1, 2006 pursuant to 2006 Act No. 387. Please see the attached page titled "Notice of Appeal Procedure" for details.


Heather S. Preston, Director
Division of Water Quality

000097

Nationwide Permit Number & Topic	401 Cert Action	CZC Cert Action
1. Aids to Navigation	N/A	Issue
2. Structures in Artificial Canals	N/A	Issue
3. Maintenance	Issue	Issue
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and	Issue	Issue
5. Scientific Measurement Devices	Issue	Issue
6. Survey Activities	Issue	Issue
7. Outfall Structures and Associated Intake Structures	Issue	Issue
8. Oil and Gas Structures on the Outer Continental Shelf	N/A	Issue
9. Structures in Fleeting and Anchorage Areas	N/A	Issue
10. Mooring Buoys	N/A	Issue
11. Temporary Recreational Structures	N/A	Issue
12. Utility Line Activities	Issue w/ Cond	Issue w/ Cond
13. Bank Stabilization	Issue	Issue
14. Linear Transportation Projects	Issue w/ Cond	Issue w/ Cond
15. U.S. Coast Guard Approved Bridges	Issue	Issue
16. Return Water From Upland Contained Disposal Areas	Deny	Deny
17. Hydropower Projects	Deny	Deny
18. Minor Discharges	Issue	Issue
19. Minor Dredging	Issue	Issue
20. Oil Spill Cleanup	Issue	Issue
21. Surface Coal Mining Operations	Deny	Deny
22. Removal of Vessels	Issue	Issue
23. Approved Categorical Exclusions	Issue w/ Cond	Deny
24. Indian Tribe or State Administered Section 404 Programs	N/A	Deny
25. Structural Discharges	Issue	Issue
26. [Reserved]	N/A	N/A
27. Aquatic Habitat Restoration, Establishment & Enhancement Activities	Issue	Issue
28. Modifications of Existing Marinas	N/A	Issue
29. Residential Developments	Issue w/ Cond	Issue w/ Cond
30. Moist Soil Management for Wildlife	Issue w/ Cond	Issue w/ Cond
31. Maintenance of Existing Flood Control Facilities	Issue	Issue
32. Completed Enforcement Actions	Issue	Issue
33. Temporary Construction, Access and Dewatering	Issue	Issue
34. Cranberry Production Activities	Deny	Deny
35. Maintenance Dredging of Existing Basins	N/A	Deny
36. Boat Ramps	Issue	Issue
37. Emergency Watershed Protection and Rehabilitation	Issue w/ Cond	Issue Issue
38. Cleanup of Hazardous and Toxic Waste	Issue	Issue
39. Commercial and Institutional Developments	Issue w/ Cond	Issue w/ Cond
40. Agricultural Activities	Issue	Issue
41. Reshaping Existing Drainage Ditches	Issue	Issue
42. Recreational Facilities	Issue w/ Cond	Deny
43. Stormwater Management Facilities	Issue w/ Cond	Deny
44. Mining Activities	Issue w/ Cond	Issue w/ Cond
45. Repair of Uplands Damaged by Discrete Events	Issue	Issue
46. Discharges in Ditches	Deny	Deny
47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs	Issue	Issue
48. Existing Commercial Shellfish Aquaculture Activities	Issue	Issue
49. Coal Remining Activities	Deny	Deny
50. Underground Coal Mining Activities	Deny	Deny

000098

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
AND DIVISION OF WATER QUALITY

Staff Assessment of application for
401 Water Quality Certification and
Consistency with the S.C. Coastal Zone Management Program

BACKGROUND INFORMATION

The U.S. Army Corps of Engineers (Corps) is proposing to change its nationwide permit regulations (33 CFR 330). This action will modify 36 of the 43 existing nationwide permits and issue six (6) new nationwide permits. The Corps published notice of this proposal in the Federal Register on September 26, 2006. This notice explained the requirement for the State to issue Water Quality Certification and Coastal Zone Consistency Certification for certain nationwide permits. The State accepted public comments related to certification but delayed taking action until the Corps incorporated comments they had received in response to the September 26, 2006, notice. The Corps issued the final notice in the Federal Register on March 12, 2007.

Nationwide permits are general permits issued on a nationwide basis to authorize minor activities with little delay or paperwork. General permits are issued for a category of activities when those activities are similar in nature and cause only minimal individual and cumulative environmental impacts or the general permit would result in avoiding unnecessary duplication of regulatory control exercised by another regulatory agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. The Corps believes that the nationwide permits generally comply with State water quality standards and the S.C. Coastal Zone Management Program.

State Water Quality Certification pursuant to Section 401 of the Clean Water Act, or waiver thereof, is required prior to issuance or reissuance of the nationwide permits which may result in a discharge into waters of the United States. The Corps has determined that the discharges associated with nationwide permits number 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50 should be reviewed by the South Carolina Department of Health and Environmental Control (SCDHEC) in accordance with provision of Section 401 of the Clean Water Act. All of the nationwide permits should be reviewed for consistency with the S.C. Coastal Zone Management Program.

SUMMARY OF PUBLIC COMMENTS

The following submitted written comments:

South Carolina Department of Natural Resources

All comments received were considered in reaching the decisions on the nationwide permits.

000099

EXPLANATION, EVALUATION, AND PROPOSED ACTION OF THE NATIONWIDE PERMITS

General Conditions: These conditions apply to all of the nationwide permits (NWP's) unless otherwise noted. A project proposed for authorization under a NWP should not be considered unless it meets all of the following general conditions plus any special conditions listed for each NWP.

1. SCDHEC considers a "single and complete project" to mean the overall project proposed or accomplished by a single owner/developer and it includes all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by each NWP request. Impacts to Geographical Areas of Particular Concern (GAPC) sites or adjacent waterbodies or wetlands resulting from an activity will be considered during the review of these actions.
2. Activities in Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), Trout Waters (as defined in R. 61-68), springheads or aquatic sites located adjacent to those areas, are not certified.
3. Activities in areas identified by SCDHEC as having impaired uses (as defined by 303(d) of the Clean Water Act) are not certified.
4. All NWP applications must be accompanied by a Corps verified wetland delineation identifying all wetlands (jurisdictional and non-jurisdictional), depressional areas or other special aquatic sites within the project area.
5. For projects requiring fill in wetlands, the applicant must demonstrate that impacts to wetlands have been avoided; unavoidable impacts to wetland areas have been minimized, and provide suitable compensation for any unavoidable wetland impacts. This sequencing should be presented in all permit applications. Additional sequencing regarding appropriate compensation (onsite, within watershed, outside watershed, etc.) must also be demonstrated. Where compensatory mitigation is required, on-site compensatory mitigation, in accordance with the provisions of the S. C. Coastal Zone Management Program in the Coastal Zone, must be pursued if at all possible. Compensatory mitigation must be determined using the Corps Standard Operating Procedure (SOP), where required by the Corps or in a Specific Condition of the 401 or CZC Certification. Compensatory mitigation plans must be included in the application submitted to the Corps by the applicant and in the package copy furnished to SCDHEC by the Corps. Proof of purchase of compensatory mitigation credits or execution of the deed restriction, restrictive covenant, or conservation easement document, if part of the submitted compensatory mitigation plan, must be submitted to both the Corps and SCDHEC prior to commencement of the activity authorized by the permit issued by the Corps. Although the permit may be issued pending resolution of a compensatory mitigation plan, the work authorized by that permit may not commence until the compensatory mitigation plan is approved and finalized, as described above.
6. Activities in the Critical Areas (as defined in 48-39-10, R 30.1(D) and R 30.10) require a direct permit from SCDHEC-OCRM. SCDHEC OCRM's action on direct critical area permits will serve as the consistency determination for the critical area activity.
7. SCDHEC's Emergency Response Team must be contacted immediately in the case of a spill.

Nationwide Permit Number 28

Section 10

CZC

Modifications of Existing Marinas. Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP.

Proposed Action: Find consistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C.3.F)

Rationale: The reconfiguration of existing docking facilities with no increase in slips or other expansions should have minimal impact on water quality or other natural resources in the area. Direct permits are required from the state for reconstructing marinas in critical areas and other waters of the State.

Nationwide Permit Number 29

Section 10 & Section 401

CZC & 401

Residential Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/4-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/4 acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with S.C. Coastal Zone Management Program. (Guidelines for the Evaluation of All Projects C.3.I, Policy I.(1)(b) and Policy XII. E. (1), and others depending on the activity.)

Rationale: The criteria for use of this NWP minimizes the impact on water quality, water uses, and wetland functions, however it still has the potential to result in adverse impacts. If the proposed conditions are approved, they will insure that there are no adverse effects from the proposed activity. The NWP is inconsistent with the S.C. Coastal Zone Management Program because it would allow alteration of wetlands without regard to the type of wetland, location or consideration of feasible alternatives. The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated with the addition of the proposed Regional Conditions and if the proposed 401 water quality certification conditions are applied to the NWPs.

Proposed Conditions for the 401 Water Quality Certification:

1. The impounding of water and creating of lakes or ponds is not authorized by this NWP.
2. On-site disposal systems, if necessary, must be permitted by SCDHEC prior to any construction of a residence in a wetland area.
3. The placement of fill in waters of the US for a single residence must be limited to 0.10 acre or 60 linear feet.
4. A compensatory mitigation plan must be submitted and approved by the SCDHEC for projects with impacts exceeding 0.10-acre or 300 linear feet.

5. If the 300 linear feet limitation is waived by District Engineer, impacts to intermittent and ephemeral stream authorized under this NWP may not exceed 500 linear.

Proposed Regional Conditions for the Coastal Zone Consistency Certification:

Provided all the conditions of the 401 Water Quality Certification, plus the following conditions, are included as Regional Conditions, the NWP will be consistent with the S.C. Coastal Zone Management Program.

1. The use of this NWP for individual lots that are not part of a larger common plan is limited to adjacent wetlands lacking a surface connection to other waters of the US (i.e. isolated wetlands less than 1 acre in size).

2. The use of multiple NWPs on one tract or land parcel is not approved in the coastal zone without SCDHEC-OCRM concurrence.

3. For all projects, the applicant must provide a Wetland Master Plan consistent with the policies and procedures of Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program. WMP policies also include the preservation of all wetlands not proposed to be impacted through approved restrictive covenants. The plan must include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.

4. A one-day newspaper notice in accordance with the provisions of the S.C. Coastal Zone Management Program, Chapter V C. 1. A., Notice of Certification must be included.

Nationwide Permit Number 36

Section 404

CZC & 401

Moist Soil Management for Wildlife. Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or disking to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies.

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Proposed Action: Issue 401 Water Quality Certification with conditions and find consistent with the S. C. Coastal Zone Management Program.

Rationale: Data obtained from the Corps indicates that during the period from 2002, through 2005, there were no activities authorized under this NWP in South Carolina. Therefore, there is limited potential for these activities to have more than minimal adverse impacts to the aquatic environment. Further, if the work is performed on the dikes or water control structures, or within a functioning impoundment, impacts will be confined within the impoundment therefore, the water quality of adjacent waters will not be permanently lowered nor will existing uses change. Additionally, if the activity is being undertaken to construct firebreaks for wildfire control and management, impacts will be minimal.

Proposed Conditions for the 401 Water Quality Certification:

1. All alterations must take place on the dikes or water control structures, etc., or within an existing functional impoundment or the activity must be undertaken to construct firebreaks for wildfire control and management.

Notes: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: These cleanup activities should be allowed to proceed in a timely manner and requirement of a Army Corps of Engineers permit and individual water quality certification could unduly delay the process with potential threats to water quality, water uses, and wetland functions. The preamble to the regulation indicates that the District Engineer can require an individual permit if the impacts are more than minimal and the applicant has not proposed compensatory mitigation to minimize the impacts. Restoration or compensatory mitigation is addressed in the General Conditions applicable to all NWP's and therefore this NWP can be found consistent with the S.C. Coastal Zone Management Program. Corps data on NWP's shows us that between 2002, and 2005, 6 NWP #38 with a total impact of 1.4 acres have been issued for this NWP. SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program.

Nationwide Permit Number 39

Section 10 & Section 404

CZC & 401

Commercial and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses, new ski areas, or oil and gas wells is not authorized by this NWP.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for the Evaluation of All Projects C.3.I, Policy IV.1 (a), (b) & (c), Policy VII.A.1, Policy VII.C.1, Policy XII.E.1 and others depending upon the activity)

Rationale: The criteria for use of this NWP attempts to minimize impacts on water quality, water uses, and wetland functions, however many of the activities have the potential to result in adverse impacts. These activities should be reviewed on an individual basis to insure that aquatic site impacts are avoided, minimized, and unavoidable impacts are adequately compensated for with appropriate and practicable mitigation. Adherence to the proposed conditions will insure that there are no adverse effects from the proposed activities. Outside the critical area, S. C. Coastal Zone Management Program policies require that wetland impacts be addressed in a manner consistent with the program refinements (Wetland Master Planning Policies). This NWP is inconsistent with the S.C. Coastal Zone Management Program because it would allow alteration of wetlands without regard to the type of wetland, location or consideration of feasible alternatives.

Issuance of the NWP with the proposed conditions will enhance regulatory processing by eliminating areas of duplication and clarifying for all agency personnel and applicants the difference between NWP applications and

Individual Permit applications. This will allow applicants to follow the appropriate mitigation sequence of avoiding, minimizing, and compensating for unavoidable impacts such that they can receive quick approval for their proposed projects when the NWP criteria have been met or exceeded for a project. The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated if the proposed 401 water quality certification conditions are applied to the NWPs.

Proposed Conditions for the 401 Water Quality Certification:

1. A compensatory mitigation plan must be submitted and approved by the SCDHEC for projects with impacts exceeding 0.10-acre or 300 linear feet.
2. In order to properly assess cumulative impacts, projects accessing large tracts under single ownership must include a description of all related project impacts that may result from the road construction and provide an overall project plan. The plan must include an identification of all water resource impacts/activities, drainage patterns, conceptual development plans, and a compensation plan, if required in the above conditions.
3. Stream channelization or use of the permit in perennial streams is not certified under this NWP and will require separate approval through SCDHEC's individual certification process.
4. Sedimentation/sediment ponds in special aquatic sites, including wetlands, are not certified under this NWP.
5. If the 300 linear feet limitation is waived by District Engineer, impacts to intermittent and ephemeral stream authorized under this NWP may not exceed 500 linear.

Proposed Regional Conditions of the Coastal Zone Consistency Certification:

Provided all the conditions of the 401 Water Quality Certification, plus the following conditions, are included as Regional Conditions, the NWP will be consistent with the S.C. Coastal Zone Management Program.

1. The use of multiple NWPs on one tract or land parcel is not approved in the coastal zone without SCDHEC-OCRM concurrence.
2. For all projects, the applicant must provide a Wetland Master Plan consistent with the policies and procedures of Chapter III Policy Section XII B. of the S.C. Coastal Zone Management Program. WMP policies also include the preservation of all wetlands not proposed to be impacted through approved restrictive covenants. The plan must include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.
3. A one-day newspaper notice in accordance with the provisions of the S.C. Coastal Zone Management Program, Chapter V C. 1. A., Notice of Certification must be included.

Nationwide Permit Number 40

Section 404

CZC & 401

Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, unless for drainage ditches constructed in intermittent and ephemeral streams, this 300 linear foot limit is waived in writing by the district engineer.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Please turn to page
562

to view Exhibit 2
(also Petitioner's
Exhibit 12)

COPY

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

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,)

vs.)

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

Respondents.)

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

AMENDED
PREHEARING STATEMENT
OF
PETITIONERS

FILED

JUN 18 2009

SC ADMIN. LAW COURT

The Petitioners submit the following as their Prehearing Statement:

1. The nature of this proceeding.

This proceeding is a contested case appeal of the decision of the South Carolina Department of Health and Environmental Control ("DHEC") to issue a storm water permit (including a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000) to Roper Pond, LLC, for the proposed construction of a project known as Roper Pond Apartments, a high density apartment complex, on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

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

Subject matter jurisdiction: (1) S.C. Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, 1-23-370, 1-23-600; (2) the Pollution Control Act, S.C. Code Ann. § 48-1-10, *et seq.*; and (3) S.C. Code Ann. § 44-1-60 2006 Act No. 387.

Other applicable statutes and regulations: (1) the Stormwater Management and Sediment Reduction Act of 1991, S.C. Code Ann. §§ 48-14-10, *et seq.*; (2) Stormwater regulations, S.C. Code Ann. Regs. §§ 72-300 through 316; (3) S.C. Pollution Control Act, S.C. Code Ann. §§ 48-

1-20, *et seq.*; (4) DHEC Regulations for NPDES permits, S.C. Code Ann. § 61-9.; DHEC Regulations for 401 water quality certifications, SC Code Ann. Regs. § R.61-101.

3. The issues to be presented for determination, including any claims or defenses expected to be raised.

A. Whether Roper Pond, LLC, submitted incorrect and incomplete information to DHEC.

B. Whether Roper Pond, LLC's Stormwater Pollution Prevention Plan (SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site because:

1. There are significant defects in the construction and post construction portions of Roper's SWPPP. The silt fence shown on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.

2. The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires "Preservation of trees in the green area next to the pond." Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.

3. Roper Pond, LLC's documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains of large buildings and from large parking lot areas.

4. DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would "cause or contribute" to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, "Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of the clean water act and has been cited by DHEC... And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents." Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.

5. Roper Pond, LLC's calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the "first flush" stormwater runoff volume that would come from the site; and thus, the devices are not of adequate size to capture what is

documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

C. Whether Roper Pond, LLC, submitted materially incorrect information and omitted material information in its submissions to Richland County, DHEC, and the Corps, and violated DHEC Regulation 72-307.C.(7) by failing to obtain all necessary federal and state permits to allow existing wetlands to be a component of an overall stormwater management system, in that neither DHEC nor the Corps has approved Roper Pond, LLC's plan to excavate the vegetated wetlands/pond for storm water detention.

D. The project proposes to fill and make significant alterations to a water of the State, and to convert a naturalized water of the State into a storm-water retention pond instead of retaining the storm water within upland constructed retention areas; this proposal violates DHEC Regulations 61-9 and 61-68.

E. The project calls for lowering the water level in order to provide storm water retention capacity, but the Department failed to take into account the fact that lowering the water level, which would be accomplished by excavating the bottom level of the pond, will result in the destruction of vegetated wetlands, drainage of wetlands associated with the pond, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9 and 61-68.

F. The approved permit violates Regulation 61-9 in that the plans fail to control the first flush volumes and thus this project would have significant impacts upon water quality both within the existing pond and downstream portions of the Gills Creek watershed.

G. The approved permit violates Regulation 61-9 in that the Department gave approval to plans that include an arbitrary proposed particle size distribution in the calculations used by the design engineer for post-development storm water runoff.

H. The approved permit violates Regulations 61-9, 61-68, and 61-101 in that it fails to take into account a number of significant water quality problems associated with the high density design of the project proposed for this site; fails to address the wetlands and the chemical, biological and other harms to the waters of the state; will result in multiple violations of state water quality standards by destroying a balanced indigenous aquatic community of flora and fauna; and will violate the anti-degradation clause of the water quality regulations.

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

Roper Pond, LLC, submitted an application for storm water permits and approvals for the construction of a project known as Roper Pond Apartments. Representatives of Roper Pond, LLC, have stated that they plan to construct a high density apartment complex on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

The project includes the proposal to make a number of alterations to a pond lying on the property. The pond is a part of the Gills Creek watershed and drains into Cary Lake, a lake within the watershed lying within the town limits of the Town of Arcadia Lakes. The proposed alterations include filling of portions of the pond and wetlands at the edges of the pond and the excavation of a substantial portion of the pond to convert the pond from a productive shallow picturesque lily-pad pond into a typical unsightly and unproductive storm water retention basin.

The pond proposed for alterations presently functions as a significant bird habitat and a highly productive wetland providing significant public benefits in filtration of storm waters and improving the quality of waters within the Gills Creek basin.

The Gills Creek basin is currently listed as an impaired waterway under Section 303(d) of the federal Clean Water Act, and significant efforts are being made to improve the waters of the Gills Creek watershed and to remedy the problems that have impaired this watershed. Activities such as filling and excavating functional ponds in this watershed will only add to the water quality problems within the Gills Creek watershed.

The Petitioners believe that this project will violate the laws and regulations set forth above and that the evidence will demonstrate these violations.

5. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citation.

The Petitioners request that the Court reverse the agency decision to issue a permit and certification to Roper Pond, LLC.

The law which supports reversal is as follows:

- the project proposes to utilize existing waters of the State and wetlands as a component of the stormwater management system for the project, but the necessary state and federal wetlands permits and certifications have not been obtained, in violation of Storm water regulation 72-307.C.(7).

- the project violates the state stormwater management act and regulations and the SC Pollution Control Act and DHEC Regulations 61-68 and 61-9.

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

None identified to date.

7. A list of proposed witnesses and exhibits.

Individual petitioners

Seth Reice, Ph.D.

DHEC personnel involved in the decisions

Exhibits:

Documents from the DHEC administrative record

Maps and photographs of the proposed development site and surrounding areas within the Gills Creek watershed

Plans for the proposed development

Documents submitted by or on behalf of Roper Pond, LLC to the Corps of Engineers

Transcripts of the Rule 30b6 deposition of DHEC (Chuck Hightower and Jill Stewart)

Reports prepared by Dr. Seth Reice

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

Petitioners are serving Interrogatories, Requests for Production of Documents and Things, and a Request for Entry Upon the development site. Petitioners anticipate at least 3 depositions. Petitioners request 120 days from the date of this prehearing statement for discovery and trial preparation.

9. Whether the party deems it necessary by the undersigned Judge to conduct a PreHearing Scheduling Conference or issue an order regarding motions, discovery, etc.

None except those motions already heard and decided.

10. The estimated time required for the hearing.

One to two days.

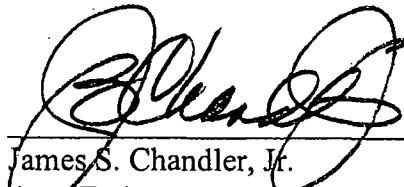
11. A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case.

Trial is set for September 3-4, 2009.

12. An e-mail address that the Court can use for e-mail correspondence.

Jchandler@scelp.org

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

**SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT**

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Attorneys for the Petitioners

Georgetown, South Carolina

June 16, 2009

COPY

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda)
Z. Jackson, Robert E. Williams, Jr., Barbara S.)
Williams, Elizabeth M. Walker, Louis E. Spradlin,)
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Petitioners,)

vs.)

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

Respondents.)

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

MOTION
TO RECONSIDER
AND
FOR STAY

FILED

FEB 01 2010

SC ADMIN. LAW COURT

TO: ADMINISTRATIVE LAW JUDGE JOHN D. MCLEOD AND THE RESPONDENTS
AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that the Petitioners hereby move the Court pursuant to SCALC Rules 29 and 68, and SCRCP Rules 52, 59, and 60, for an order reconsidering the Order of January 21, 2010, rescinding said order, altering said order in favor of Petitioners as set forth herein.

In addition, the Petitioners move the Court, pursuant to SCALC Rule 29.E., SCRCP Rule 65, SCACR Rule 225, and S.C. Code Ann. § 1-23-380 and § 1-23-600, for an order staying the Order of January 21, 2010, pending resolution of this case on appeal.

Motion to Reconsider

The Order of January 21, 2010, in Finding of Fact No. 27 on page 12, acknowledges that approval under a Nationwide Permit is appropriate only where the proposed activity meets the

conditions of the Nationwide Permit and the 401 Water Quality Certification issued by the Department for the Nationwide Permit. DHEC has admitted that the wetland impacts of the proposed development activity go beyond the limited amount of filling authorized by Nationwide Permit No. 29. As explained in the proposed order of Petitioners, the DHEC Regulations for 401 Water Quality Certifications require the Department to assess all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts, including cumulative impacts; and the cumulative impacts of the proposed activity. DHEC has admitted that it did not assess the water quality impacts of the proposed alterations to the wetlands of Roper Pond. In addition, DHEC admits that it never issued a letter certifying the project under NWP 29. The Order of January 21, 2010, justifies elimination of DHEC review of these additional wetland and water quality impacts based on lay testimony about the legal requirements rather than upon the plain language of the applicable statutes and regulations. The full explanation of these issues is set forth in the proposed order submitted to the Court by the Petitioners in November, 2009, incorporated herein by reference.

On the issue of standing, the Order of January 21, 2010, ignores the substantial case law indicating that an injury in fact sufficient to give a person standing can arise from a injury to aesthetic, recreational and environmental interests. As the United States Supreme Court has said: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693, 705, 145 L.Ed.2d 610 (2000), citing and quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d

636 (1972). The South Carolina Supreme Court has said:

According to the United States Supreme Court, "The desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing." [citation omitted]. Furthermore, South Carolina case law has specifically recognized an injury to one's aesthetic and recreational interests in enjoying and observing wildlife is a judicially cognizable injury in fact.

Sea Pines Ass'n for the Protection of Wildlife v. SC Dept. of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001). These cases demonstrate that the Order's attempt to distinguish this case from *Smiley v. DHEC* fails. Under well-established case law from the United States Supreme Court and the South Carolina Supreme Court, these Petitioners have clearly demonstrated that they have standing.

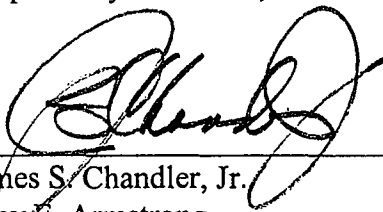
Motion for Stay Pending Appeal

The Petitioners move this court to stay the effectiveness of its decision until all appeal opportunities have been exhausted or concluded. *See* S.C. Constitution, Art. I § 22; S.C. Code Ann. §§ 1-23-380 & -600; Rule SCALC Rule 29.E; SCRCP Rule 65; SCACR Rule 225. This motion for stay is based in part on the arguments set forth above, but is also made independent of the court's decision on the motion to reconsider. There are both broad based and site specific reasons this stay is being sought. This contested case involves issues of significant public interest and legal principles of importance. The court's Order allows impacts to wetlands and water quality with no review by DHEC, and effectively eliminates any requirement that DHEC examine preconstruction notices for Nationwide Permits to determine whether wetland impacts beyond the scope of the NWP will occur. Furthermore, if the developer goes forward with its plans to excavate the pond, significant and irreparable environmental damage will occur. An

Order staying any further work is necessary to prevent degradation of the pond, wetlands and water quality before Petitioners' appeal may be heard.

WHEREFORE, for these reasons, and for the reasons stated in the proposed order submitted earlier by Petitioners to the Court, the Petitioners respectfully request that the Court reconsider its Final Order and Decision of January 21, 2010, and issue an order rescinding said order, and altering and amending its ruling by issuing an order consistent with the points made in this motion and in the Petitioners' proposed order. In addition, the Petitioners respectfully request that the Court should issue an order staying the effect of its order pending the resolution of this case on appeal.

Respectfully submitted,



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Amy E. Armstrong
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PROJECT

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Attorneys for the Petitioners

Georgetown, South Carolina

February 1, 2010

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION**

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,

vs.

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

Respondents.

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

**ROPER POND, LLC'S RESPONSE TO
PETITIONERS' MOTION TO
RECONSIDER AND FOR STAY**

Respondent Roper Pond, LLC ("Roper Pond") hereby responds to Petitioners' Motion to Reconsider and for Stay (hereinafter "Motion to Reconsider" or "Motion for Stay"), filed on February 1, 2010.

A. Petitioners' allegations regarding proposed activities under NWP 29 are not properly raised in a review of the Department's decision to grant Roper Pond coverage under the State General Permit.

Petitioners' claims regarding discharges of fill material into wetlands is not a proper consideration in the review of the Department's decision to grant coverage for discharge of stormwater under the State General Permit.¹ The U.S. Army Corps of Engineers ("Corps") is the permitting authority for the Nationwide Permits, including NWP 29, issued pursuant to Section 404 of the Clean Water Act. 33 U.S.C.A. § 1344. Unfortunately, under the Corps regulations

¹ "State General Permit" refers to Permit No. SCR100000, issued August 1, 2006, and entitled NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities

there is no right to appeal individual coverage under a Nationwide Permit. 33 C.F.R. § 331.2. Petitioners should not be allowed to appeal such coverage indirectly through an appeal of the Department's decision on coverage under the State General Permit. To the extent that Roper Pond fails to conform to the requirements of the NWP, any claims related to such failure should be raised in an action under the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 *et seq.* ("Clean Water Act").

The State General Permit is issued under the authority delegated to the State by the EPA pursuant to Section 402 of the Clean Water Act. 33 U.S.C.A. § 1342(b). The coverage under the State General Permit authorizes "discharge of pollutants" as defined by S.C. CODE ANN. REGS. § 61-9.122.2. Specifically, the State General Permit authorizes the discharge of storm water associated with construction activities. 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). This permitting requirement is separate and distinct from the Section 402 permit. A Section 402 permit authorizes the discharge of pollutants, and a Section 404 permit authorizes the discharge of dredged or fill material. In fact, the permitting program under Section 402 is administered by the State as the delegated permitting authority of the EPA, while the permitting program under Section 404 is administered by the U.S. Army Corps of Engineers. 33 U.S.C.A. §§ 1342(b) and 1344(a),(d).

Petitioners claim that the coverage under the State General Permit, a Section 402 permit, was improperly granted because the filling of wetlands associated with the project will exceed the authorization of NWP 29, a Section 404 permit. However, the Department does not administer the permitting program for Section 404 permits. The Department's involvement in the permitting for a 404 permit is limited to issuance of a 401 water quality certification to the

Corps for the Section 404 permit. Pursuant to 33 C.F.R. § 330.4 of the Corps Regulations, prior to re-issuance of a Nationwide Permit, the state must issue a water quality certification or allow the time to elapse for its determination on the certification. 33 C.F.R. 330.4(c)(1) ("State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWP's authorizing activities which may result in a discharge into waters of the United States."). The Department issued its 401 Water Quality Certification for the 2007 Nationwide Permits, including NWP 29, in accordance with S.C. CODE ANN. REGS. § 61-101 ("Water Quality Certification Regulations"). (Tr. p. 118, l. 12 – p. 119, l. 5). Petitioners do not dispute that the 401 Water Quality Certification for NWP 29 was issued in 2007. Instead, Petitioners claim that the proposed filling of wetlands associated with the Proposed Project² is not authorized under NWP 29.

The Corps is the governmental entity with authority to issue permits for the filling of wetlands under Section 404 of the Clean Water Act. Unquestionably, a determination regarding authorization to conduct activities under a 404 permit, including NWP 29, is within the purview of the Corps—not the Department. In this case, the Corps verified that the fill of 0.075 acres in association with the Proposed Project was authorized under NWP 29. (Roper Pond Ex. 1). An appeal of the Corps' verification is not allowed under the Corps Regulations. Specifically, the Corps Regulations define an "appealable action" as "an approved JD, a permit denial, or a declined permit, as these terms are defined in this section." 33 C.F.R. § 331.2. There is no provision for appeal of the Corps' verification of a pre-construction notice ("PCN") to conduct activities under a Nationwide Permit. Indeed, when the Corps published final notice of the re-

² "Proposed Project" refers to the construction of a multi-family residential development on Trenholm Road in Richland County for which the Department granted coverage under the State General Permit.

issuance of the Nationwide Permits in 2007, the notice addressed comments regarding the absence of a right to appeal in this circumstances, stating as follows:

One commenter recommended that the Corps adopt an administrative appeal process for activities authorized by NWP, which would provide for third party appeals. Another commenter said that compliance inspections should be conducted for a certain number of NWP activities per year. One commenter said that the Corps needs to do more enforcement and monitoring of activities authorized by NWPs.

We do not believe it would be appropriate or necessary to establish an administrative appeal process for the NWP program, **since the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. The administrative appeal process at 33 CFR part 331 applies only to individual permits and jurisdictional determinations, and does not provide for third party administrative appeals.**

72 F.R. 11092-01 (Mar. 12, 2007) (emphasis added). Not only does this statement confirm that the Corps Regulations do not allow an appeal of a PCN verification, but it also provides the rationale behind such decision. As discussed more fully below, the purpose of the Nationwide Permit program is to grant authorization for a category of activities which the Corps has determined will cause only minimal individual and cumulative adverse effects. Since the Corps, the permitting entity for the program, does not provide for appeal of authorization to conduct activities under a NWP, Petitioners should not be allowed to circumvent the Corps appeal process and raise this unappealable decision in an action contesting a State decision on a permit issued by the State.

While the verification of the PCN for the filling of the 0.075 acres of wetlands under NWP 29 is not appealable, there is a remedy for certain conduct outside of those authorized under the NWP. However, such action would not be raised in a review of a Department decision and thus would not be within the jurisdiction of this Court. An action seeking remedy for the filling of wetlands without a required 404 permit or failure to comply with the conditions of a 404 permit is properly brought under Section 309 or 505 of the Clean Water Act. 33 U.S.C.A. §

1319. Section 309 provides the federal government with a the full range of enforcement authority, including criminal penalties, for violations of Section 404 of the Act. *Id.* Moreover, Section 505 provides for a private cause of action when, following proper notice, the government fails to take action to remedy a violation of the Clean Water Act. 33 U.S.C.A. § 1365. Accordingly, Petitioners' allegations regarding the unauthorized filling of wetlands would be properly raised in a civil action under Section 505 the Clean Water Act and are not properly raised in this case. However, Petitioners' right to bring an action under Section 505 of the Clean Water Act does not arise until there has been a violation of the Clean Water (i.e., filling of wetlands without a permit) and subsequent notice is given under Section 505(b). Simply put, Petitioners have attempted to use the review of a permitting decision on coverage under the State General Permit, a Section 402 permit, to address a prospective and wholly speculative violation of Section 404 of the Act.

B. Even if Petitioners could properly raise claims regarding violations of Section 404 of the Clean Water Act in this action, which they cannot, such claims are without merit.

Petitioners contend that the filling of 0.075 acres of wetlands is not authorized under NWP 29 because the proposed activity does not met the general conditions of the 401 Water Quality Certification for Nationwide Permits. Specifically, Petitioners allege:

DHEC's General Conditions require DHEC to evaluate the complete project – “the overall project proposed or accomplished by a single owner/developer” – and “it is not interpreted to mean only the land area directly impacted by each NWP request.” DHEC must evaluate all land within the project area that is directly impacted by the project – impacts caused by filling wetlands and other direct impacts. In this case, DHEC failed to evaluate the direct impacts of excavation of the lily pad pond in violation of the NPDES General Permit Conditions.

(Petitioners' Proposed Order, Conclusion of Law 32). Petitioners interpret this general condition to require a full assessment of all activities associated with the Proposed Project. Such

interpretation is plainly contrary to the basic rationale for issuing Nationwide Permits. Section 404 of the Clean Water 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). In *Crutchfield v. County of Hanover, Virginia*, the Court of Appeals for the Fourth Circuit examined the authorization requirements for activities to be conducted under a Nationwide Permit. The *Crutchfield* Court explained:

The general permits at issue in this case are all Nationwide Permits (NWP). Activities falling within the scope of an NWP are automatically authorized without any individualized inquiry, although preconstruction notification of the Corps is required in some cases. 33 C.F.R. § 330.1(e) (2003). In cases where preconstruction notification is required, the Corps will verify the applicability of the NWP to the proposed activity. 33 C.F.R. § 330.1(e)(2). Since NWPs are “designed to regulate with little, if any, delay or paperwork certain activities having minimal [environmental] impacts,” NWP verification is much simpler than the individual permit process. 33 C.F.R. § 330.1(b) (2003). If the Corps has concerns about a proposed project, however, the Corps may exercise “discretionary authority” to restrict the otherwise automatic application of the NWP program while its concerns are addressed. 33 C.F.R. §§ 330.1(d), 330.5 (2003). The Corps’ regulations also direct the Corps to review any incoming individual permit application for potential eligibility under existing NWPs, even if the application itself does not so request. 33 C.F.R. § 330.1(f) (2003).

325 F.3d 211, 214-15 (4th Cir. 2003). Petitioners’ interpretation of the general condition of the 401 Water Quality Certification is directly at odds with this streamlined authorization process. Indeed, as the Fourth Circuit noted, activities authorized under a number of Nationwide Permits are authorized to proceed without any notice to the Corps—the permitting authority for these Permits. Under the Clean Water Act and the Corps Regulations, Nationwide Permits are authorized upon a determination by the Corps that a category of activities will cause only minimal impacts. Accordingly, it would be illogical to place a condition on the 401 Water

Section 330.6 of the Corp Regulations allows a developer to use more than one Nationwide Permit in a single project, but prohibits the use of the same Nationwide Permit more than once in the project. 33 C.F.R. § 330.6(c). This provision of the Regulations provides as follows:

(c) Multiple use of nationwide permits. Two or more different NWP's can be combined to authorize a "single and complete project" as defined at 33 CFR 330.2(i). However, the same NWP cannot be used more than once for a single and complete project.

Id. The general condition of the Nationwide Permits to which Petitioners refer in their Motion to Reconsider provides in full as follows:

1. SCDHEC considers a "single and complete project" to mean the overall project proposed or accomplished by a single owner/developer and it includes all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by each NWP request. Impacts to Geographical Areas of Particular Concern (GAPC) sites or adjacent waterbodies or wetlands resulting from an activity will be considered during the review of these actions.³

(Pet. Ex. 12). The reference to "single and complete project" is unquestionably a reference to a defined term. The only use of this term in the relevant federal and state law is in Section 330.6 of the Corps Regulations. As such, there can be no doubt that the Department's use of this term in the general conditions to the Nationwide Permits was a further clarification of the term as a prohibition of multiple use of the same Nationwide Permit within a single project. Accordingly, there is no validity to Petitioners' contention that this general condition requires the Department's evaluation of the impacts of the all activities associated with the Proposed Project.

³ S.C. CODE ANN. REGS. 30-1(D)(24) defines "Geographic Areas of Particular Concern" as "areas within South Carolina's coastal zone which have been identified in the State's Coastal Management Program as being of such importance as to merit special consideration during the Department review of permit applications." Accordingly, the final sentence of this general condition is inapplicable to the Proposed Project.

As long as the activities fall within the scope of NWP 29, any impacts are deemed to be minimal and no assessment by either the Corps or the Department is required.

C. **The dredging of the lily pad pond does not require a Section 404 permit from the Corps.**

As set forth in great detail in the Final Order and Decision, Petitioners failed to direct the Court to any authority requiring a state or federal permit for the dredging of the Pond. However, in Petitioners' Proposed Order, which was incorporated by reference in the Motion to Reconsider, Petitioners included the following conclusion of law:

To incorporate the lily pad pond, delineated as wetlands, into the Stormwater Pollution Prevention Plan ("SWPPP"), Roper Pond must have a valid §404 wetlands permit from the U.S. Army Corps of Engineers.

(Petitioners' Proposed Order, Conclusion of Law 26). There is neither any evidence in the record nor any legal authority to support this conclusion. Section 404 of the Clean Water Act requires a permit issued by the Corps "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C.A. § 1344(a) (emphasis added). A Section 404 permit under the Clean Water Act is not required for the excavation or dredging of a water of the United States as long as that dredged material is not subsequently discharged into the water. Roper Pond proposes to excavate the Pond and deposit the dredged material in an area upland from the Pond. (Tr. p. 318, l. 19 – p. 319, l. 16; p. 327, l. 13 – p. 329, l. 5). Accordingly, Roper Pond does not need a Section 404 permit for the excavation of the Pond. Moreover, the evidence on the record demonstrates that there is no federal permit required for the excavation of the Pond.

While a Corps permit is required for excavation of "any navigable water of the United States" under Section 10 of the Rivers and Harbors Act, Petitioners offered no evidence that the Pond is a navigable water. 33 U.S.C.A. § 403. Indeed, the evidence on the record indisputably

shows that the Pond is not a Section 10 navigable water. The jurisdictional determination issued by the Corps on January 5, 2005, indicated that there are no "navigable waters of the United States" on the Property. (Roper Pond Ex. 6). Charles Hightower and George Whatley also testified that the Pond is not a navigable water of the United States under Section 10 of the Federal Rivers and Harbors Act. (Tr. p. 140, l. 13 – p. 141, l. 7; p. 332, ll. 5-9). As such, Petitioners failed to present any evidence supporting the proposed conclusion that a federal permit is required for dredging the Pond.

D. Petitioners' claim on injury to aesthetic, recreational, and environmental interests is not sufficient to confer standing.

While injury to one's aesthetic, recreational, or environmental interests may support a showing of standing, such claim alone is not sufficient to demonstrate that a party has standing. In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, the South Carolina Supreme Court adopted the test for standing as set forth by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). 345 S.C. 594, 603, 550 S.E.2d 287, 292 (2001). The *Lujan* test for standing was recently reiterated by the Supreme Court as the following three components of the "irreducible constitutional minimum of standing":

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 . . . 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." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Smiley v. South Carolina Dep't of Health and Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) and *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources*, 345 S.C. 594,

550 S.E.2d 287 (2001)). Claiming an aesthetic interest in the subject matter under consideration is not a substitute for establishing standing under the *Lujan* test. In *Sea Pines Association*, the South Carolina Supreme Court held that a wildlife organization challenging a DNR permit did not have standing because “although Appellants have an aesthetic interest in Sea Pines’ deer and the environment, they are denied standing because they failed to satisfy the three-pronged *Lujan* test.” *Sea Pines Ass’n for the Protection of Wildlife, Inc.*, 345 S.C. at 603, 550 S.E.2d at 292 (emphasis added). Similarly, Petitioners’ have failed to satisfy the *Lujan* test to establish standing in this case.

As set forth in full in the Final Order and Decision, Petitioners failed to establish an injury in fact and a causal connection between such injury and the Department’s decision to grant Roper Pond coverage under the State General Permit—the “challenged action” in this case. Petitioners presented no evidence that the best management practices (“BMPs”) and procedures authorized under the State General Permit and the SWPPP are inadequate to control sediment from leaving the construction site. Instead, Petitioners merely speculated that Roper Pond will fail to follow the State General Permit and the SWPPP. Such contentions do not support a showing of standing to challenge the issuance of the coverage under the State General Permit. The potential harm alleged would not be caused by the issuance of coverage under the State General Permit, but by a violation of the State General Permit. As such, the Court correctly concluded that Petitioners lack standing under *Lujan* to challenge the issuance of coverage under the State General Permit to Roper Pond.

E. Petitioners cannot satisfy the statutory requirements for a stay of the Final Order and Decision.

Once the Final Order and Decision becomes final and unappealable or a party files a notice of appeal of the Order, Roper Pond is entitled to conduct the activities authorized by the

coverage under the State General Permit unless this Court or the Court of Appeals grants a stay of the Final Order and Decision. S.C. CODE ANN. § 1-23-380(2) (Supp. 2008); Rule 241, SCACR; Rule 29, SCRPA LC. Section 1-23-380 of the APA provides that this Court may grant a stay of the Final Order and Decision “upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.” S.C. CODE ANN. § 1-23-380(2) (Supp. 2008). Accordingly, the standard for evaluating Petitioners’ Motion for Stay is the same as that for a preliminary injunction under Rule 65. *cf.* S.C. CODE ANN. § 1-23-600(H)(4) (“Upon motion by any party, the court shall lift the stay **for good cause shown or if no irreparable harm will occur**, then the stay shall be lifted.”) (emphasis added). As discussed more fully below, Petitioners have failed to establish that they are entitled to a stay of the Final Order and Decision.

To establish a cause of action for a preliminary injunction, a party must show “(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.” *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). A plaintiff must establish all three elements to obtain a preliminary injunction. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009). As discussed more fully below, Petitioners cannot establish the three elements necessary to obtain a stay of the Final Order and Decision.

Petitioners’ Motion for Stay fails to identify the irreparable harm that will result if Roper Pond proceeds with the activities authorized by the grant of coverage under the State General Permit. Petitioners contends that “if the developer goes forward with its plans to excavate the pond, significant and irreparable environmental damage will occur.” (Motion to Reconsider and

for Stay, p. 3). As a preliminary matter, the Department's decision on the SWPPP and the grant of coverage under the State General Permit does not authorize the dredging of the Pond. As the Court concluded in the Final Order and Decision, Roper Pond needs no authorization from any federal or state regulatory authority to dredge the Pond. As such, Petitioners' claim of harm to the Pond cannot be considered in determining whether the Court's affirmation of the Department's grant of coverage under the State General Permit should be stayed. With respect to "irreparable harm" associated with the land-disturbing activities authorized by the coverage under the State General Permit, Petitioners presented no evidence that the BMPs and procedures authorized under the State General Permit and the SWPPP are inadequate to control sediment from leaving the construction site. Additionally, in the Rule 30(b)(6) deposition of Petitioner Town of Arcadia Lakes, Mr. Richard Thomas testified that the Town had no information outside of the pleadings to show that the SWPPP was deficient. (Pet. Ex. 1, Dep. of Richard W. Thomas, Jr., p. 118, ll. 7-13). Indeed, there is simply no evidence on the record to support a claim that allowing Roper Pond to conduct the activities authorized under the State General Permit will result in "irreparable harm" to Petitioners. Instead, Petitioners testified that any harm associated with land-disturbing activities would be the result of Roper Pond's failure to conduct such activities in accordance with the SWPPP and the grant of coverage under the State General Permit. As such, Petitioners have failed to satisfy the first element necessary to support their Motion for Stay.

With respect to the second element, the record does not support a showing that Petitioners would likely succeed on the appeal of the Final Order and Decision. Petitioners simply failed to present any evidence to support a claim that the SWPPP was technically deficient. Instead, Petitioners claimed that the Department failed to consider the excavation of

the Pond in its decision to grant coverage under the State General Permit. However, Petitioners failed to identify any legitimate statutory or regulatory basis requiring such consideration in the decision on the State General Permit coverage. Likewise, Petitioners failed to identify any state or federal permit required for excavation of the Pond. Finally, it should be presumed that any error which could be raised in an appeal of the Final Order and Decision would have been raised to the Court in the Motion to Reconsider. Yet, the Motion to Reconsider fails to identify any error in its Final Order and Decision which warrants reconsideration of the Order, much less a reversible error on appeal to the Court of Appeals. Accordingly, Petitioners have not satisfied the second element necessary to support their motion for a stay.

With respect to the third element, Petitioners unquestionably have an adequate remedy at law to address the concerns raised at the hearing. As discussed *supra*, Petitioners may bring an citizen suit to address any violation of the federal Clean Water Act. With respect to damage to Petitioners' property caused by Roper Pond's failure to conduct land-disturbing activities in accordance with the approved SWPPP, Petitioners have any number of common law claims to address such damage. Accordingly, Petitioners have an adequate remedy at law and thus are not entitled to a stay of the Final Order and Decision.

Finally, a balancing of the equities in this matter does not support Petitioners' request for a stay of the Final Order and Decision. Before granting a preliminary injunction, the court must balance the equities by assessing the particular facts of each case and the equities of each party and determining which side, if any, is more entitled to equitable relief. *MailSource, L.L.C. v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003) (citation omitted). As the record clearly shows, Petitioners' primary objective in appealing the Department's decision in this matter was not to challenge the technical sufficiency of the

SWPPP, but to stop or delay the construction of an apartment complex on the Roper Pond property.

Petitioners' own testimony indisputably demonstrates that they availed themselves of this Court solely for the purpose of delaying a project for which they believed the zoning was improperly obtained, but could no longer be challenged. For example, Petitioner Linda Jackson testified as follows:

Q: And will this affect your use and enjoyment of the area?

A: Absolutely. I mean, it will be sad not to see the pond any more, to not be able to enjoy, but then I look at what's going to happen to the Cary Folks. I mean, they've been hit with it so many times. Dent Middle School, Richland County did all they were supposed to do, and DHEC did all they were supposed to do, but Cary Lake still ended up being compromised to a great extent by that construction, and you know it's just—the Gills Creek Watershed is very much impaired. There have been huge fines assessed against Richland County. There was even an article in the paper today about it, and it's only going to get worse. And what we would like to see is something that would be an amenity to the community and something that would—people would be proud of and want to participate, and I suspect if they had put up something like they wanted to put up and had told the community they were going to put up five years ago, we wouldn't be in this courtroom today, because what they proposed five years ago was something that the community supported enough not to object to the rezoning of the multi-family high density, and they would never have not objected had that been proposed almost five years ago that they were going to put up a 204 apartment complex. The whole community would have been there objecting there at Richland County, and you know what, not one sole appeared. The only person there was Mr. Joe Walker, and they laughed. I have the minutes from the meeting. They laughed because no one was there to object.

(Tr. p. 245, l. 21 – p. 246, l. 15) (emphasis added). Ms. Jackson further testified that the zoning.

“was obtained improperly,” but could no longer be appealed. (Tr. p. 249, ll. 18-19; p. 250, ll. 1-

11). Similarly, Petitioner Elaine Starr testified:

Q: Well, if it were C-2, if I told you that it was C-2, and it would have allowed a shopping center there, what would your position have been?

A: Oh, I would have fought that, too.

Q: So, in other words, it's what they want to do with the property?

A: Right. It's the density. If they would change the density and put in some best management practice, I would say "Great, be a good neighbor."

(Tr. p. 281, l. 23 – p. 282, l. 7). Finally, Mr. Richard Thomas, the Rule 30(b)(6) designee for Petitioner Town of Arcadia Lakes, testified at great length that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. (Pet. Ex. 1, Dep. of Richard W. Thomas, Jr., pp. 77-81; 84-86). Mr. Thomas testified that "everyone was very much in favor" of the plan for "very high-end condos." (Pet. Ex. 1, Dep. of Richard W. Thomas, Jr., p. 85, ll. 15-18). The opposition to the development began upon learning that the Property would be developed as an apartment project. Mr. Thomas testified:

Q: All right. If I understand then, the organized—the organization of the group that banded together to oppose the project, that was motivated by learning that it was an apartment project?

A: Well, that group—that same—that group of individuals, town folks, and lake association folks, and Kaminer Station folks had been involved since the very beginning. Since the project was presented to us by Mr. Mundy back in the early '80s. Therefore, yes, everyone was concerned about what was going to be put in their backyards, because many of these folks back up to the development.

(Pet. Ex. 1, Dep. of Richard W. Thomas, Jr., p. 80, l. 23 – p. 81, l. 11). Similarly, Mr. Thomas further testified:

Q: During this time period, wasn't the sentiment of the individuals and the town to completely stop this project as an apartment project?

A: I don't know that that's a true statement. The majority of the concern was, one, the density of the project based on what had been presented back in the early '80s.

Q: Early '80s?

A: I mean, late 2004.

The original project of the density of 89 or however many units there were there versus 204. It was the density. It was the security issues of having a transient population versus a homeowner type situation where you have people that actually own their condos. Where you have—there were lighting issues there due to the number of parked cars that would be aimed at the subdivision, Kaminer Station. And there were several other issues there that they felt—and I can't recall all of them.

One was the potential for the sewer system to be able to handle an additional 204 units when we were having problems with this. There was concern about the ingress and egress right there at Dent Middle School on an already overloaded Trenholm Road early in the morning. Being able to get out. The safety of that. There were concerns, as I said, about safety. As far as who lives there, who doesn't live there, having a transient population next door.

There were concerns—those were additional concerns that were presented before the council, County Council.

(Pet. Ex. 1, Dep. of Richard W. Thomas, Jr., p. 102, l. 14 – p. 103, l. 22). In a December 17, 2008 email regarding the appeal of the Department's decision on the State General Permit coverage for Roper Pond, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." (Pet. Ex. 1, Dep. of Richard W. Thomas, Jr., Ex. 5). The evidence clearly demonstrates that Petitioners opposed the Proposed Project because of the proposed development as an apartment complex and simply used the appeal of the coverage under the State General Permit as a means to stop or delay the Project. Indeed, as the Court correctly found, Petitioners did not even establish standing to challenge the Department's decision in this matter.

The balance of the equities clearly favors Roper Pond in this determination. If the Court grants a stay of the Final Order and Decision, Petitioners will have once again used an appeal of

the Department's decision to further their primary objective of delaying the Proposed Project. By appealing the Department's decision to this Court, Petitioners have already received the benefit of a fourteenth month delay in the Proposed Project and yet failed to offer any evidence in support of a legitimate claim that the Department acted improperly in granting Roper Pond coverage under the State General Permit. Petitioners' Motion for Stay of the Final Order and Decision should thus be denied.

F. If the Court grants the Motion for Stay, the Court must order Petitioners to post a security bond sufficient to cover damages caused by the delay of the Proposed Project for the duration of an appeal.

Should the Court grant Petitioners' Motion for Stay, Petitioners must post a security bond to cover the damages resulting from the further delay of the Proposed Project. Section 1-23-380 of the APA provides that this Court may grant a stay of the Final Order and Decision "upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure." S.C. CODE ANN. § 1-23-380(2) (Supp. 2008). Rule 65(c) provides as follows:

Security. Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State or of an officer or agency thereof. A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of court who shall forthwith mail copies to the persons giving the security if their addresses are known.

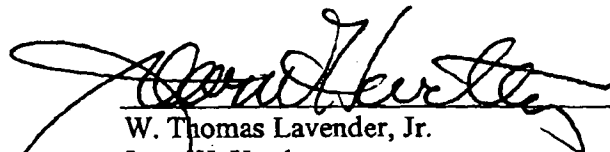
Rule 65(c), SCRCF.⁴ The South Carolina Supreme Court has held that this provision of the Rules mandates a bond in an amount sufficient to compensate the party enjoined for costs and

⁴ Similarly, the Court may order a bond as a condition of a grant of supersedeas under Rule 24(c)(2).

damages associated with the preliminary injunction if a subsequent ruling holds that the party was improperly enjoined. *See, e.g., Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007) (holding that “a nominal security bond does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper”). The Affidavit of Robert M. Mundy, Jr., attached hereto as Exhibit A, outlines the expected costs and damages associated with the delay on the Proposed Project pending a decision on an appeal by the Court of Appeals. If the Court grants Petitioners’ Motion for Stay, Roper Pond respectfully request that the Court condition a stay of the Final Order and Decision on the post of security bond in the amount of \$4,373,899.00.

II. CONCLUSION

For all the foregoing reasons, Roper Pond requests that the Court deny Petitioners’ Motion to Reconsider and for Stay. In the alternative, if the Court grants the Motion for Stay, Roper Pond requests that the Court condition the stay on the posting of bond sufficient to cover the costs and damages of delay the Proposed Project during the pendency of an appeal to the South Carolina Court of Appeals.



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Attorneys for Roper Pond, LLC

February 16, 2010
Columbia, South Carolina

Exhibit A

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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,

vs.

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

Respondents.

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

AFFIDAVIT OF CHARLES C. MICKEL

PERSONALLY APPEARED BEFORE ME Charles C. Mickel, who, after being duly sworn, deposes and says that:

1. He is the managing member of Roper Pond, LLC ("Roper Pond"). He has knowledge of the financing for and costs of the planned development of the Roper Pond property on Trenholm Road ("Property"). He also has knowledge of the anticipated revenues and profits to be generated from the planned development of the Property.

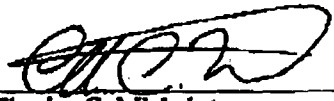
2. He has estimated the costs to Roper Pond of a delay in the planned development of the Property during an appeal to the Court of Appeals. This estimate is based on the assumption of a one-year delay if the Final Order and Decision in the matter is stayed during that pendency an appeal. The estimated total cost of delay is \$4,373,899 and is based on the following:

000135

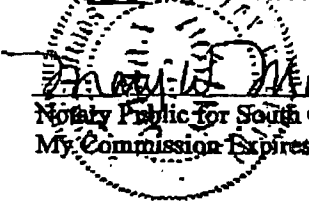
- (a) One-year loss of profits to be generated from the planned development: \$632,699;
- (b) Application and engineering costs for Richland County permits which will expire within the next year: \$20,000;
- (c) Increase in construction cost of \$10 per square foot for 204,920 square foot project: \$2,049,200;
- (d) One percent increase in interest rate for a construction loan of \$15,200,000: \$152,000;
- (e) One percent increase in interest for the long-term financing of \$15,200,000 for the 10-year term of the loan: \$1,520,000.

3. The increase in interest rates and construction costs are conservative estimate of industry and market forecasts.

FURTHER AFFIANT SAYETH NOT.


Charles C. Mickel

SWORN and subscribed to before me
this 22nd day of February, 2010.


James L. Murphy (L.S.)
Notary Public for South Carolina
My Commission Expires: 6/25/2014

Transcript of the Testimony of
ARCADIA LAKES V. SCDHEC

Date: September 3, 2009

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000137

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 09-ALJ-07-0069-CC

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,)

vs.)

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

Respondents.)
- - - - -)

- - - - -
Columbia, South Carolina
Thursday, September 3rd, 2009
10:02 a.m. - 6:37 p.m.
and
Friday, September 4th, 2009
9:14 a.m. - 10:43 a.m.
- - - - -

The Hearing before the Honorable John
McLeod was taken at the Edgard A. Brown Building,
1205 Pendleton Street, Suite 224, Columbia, South
Carolina, on the 3rd day and 4th day of
September, 2009, before Jill H. Vickers,
Certified Court Reporter and Notary Public in and
for the State of South Carolina.

1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

000138

1 2

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 13 Columbia, South Carolina 29201
 14 Attorneys for the Respondent: DHEC

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 16 Joan W. Hartley, Esquire.
 17 NEXSEN PRUET
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 19 Columbia, South Carolina 29201
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21 INDEX:

22 Page

23 PRELIMINARY MATTERS:
 24 THE COURT

7

25 OPENING STATEMENTS:

26 MR. LAVENDER
 27 MR. CHANDLER

7

11

28 PETITIONERS' WITNESSES:

29 JILL STEWART

30 Direct Examination by Mr. Chandler

31

31 Cross Examination by Mr. Lavender

49

32 Cross Examination by Mr. Hightower

87

33 Redirect Examination by Mr. Chandler

92

34 Recross Examination by Mr. Lavender

98

35 Redirect Examination by MR. Chandler

99

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1		3
2	INDEX CONTINUED:	
3		Page
4	CHARLES HIGHTOWER	
	Direct Examination by Mr. Chandler	102
5	Cross Examination by Mr. Lavender	131
	Cross Examination by Mr. Hightower	144
6	Redirect Examination by Mr. Chandler	147
	Recross Examination by Mr. Lavender	161
7	Recross Examination by Mr. Hightower	164
	Redirect Examination by Mr. Chandler	166
8		
	SETH REICE	
9	Direct Examination by Mr. Chandler	168
	Cross Examination by Mr. Lavender	196
10	Cross Examination by Mr. Hall	216
	Redirect Examination by Mr. Chandler	227
11	Recross Examination by Mr. Lavender	238
12	LINDA JACKSON	
	Direct Examination by Mr. Chandler	241
13	Cross Examination by Mr. Lavender	248
	Redirect Examination by Mr. Chandler	260
14	Recross Examination by Mr. Lavender	261
15	ELAINE STARR	
	Direct Examination by Mr. Chandler	263
16	Cross Examination by Mr. Lavender	271
	Redirect Examination by Mr. Chandler	285
17		
18	RESPONDENT'S WITNESSES:	
	GEORGE WHATLEY	
19	Direct Examination by Mr. Lavender	296
	Cross Examination by Mr. Chandler	335
20		
21	Certificate	349
22		
23		
24		
25		

4

EXHIBITS:

Page

Petitioner's Exhibits:

1. DHEC 30(b)(6) Depo. Notice
2. Letter from BP Barber to DHEC, 9/24/08
3. NPDES General Permit
4. Wetland Delineation Documents
5. CORPS Wetland Delineation Letter
6. Notice of Intent - Stormwater Discharges
7. Email from Jill Stewart, 11/17/08
8. Email from John Stevens, 11/19/08
9. Joint State & Federal Application Form
10. CORPS Letter, 9/9/08
11. CORPS Letter, 2/25/09
12. DHEC Letter, 10/2/09
13. Email from Joan Hartley, 7/1/09
14. Email from Stephen Hightower
15. Pond Photo
16. Pond Photo
17. Pond Photo
18. Pond Photo
19. Pond Photo
20. Blank Notice of Intent Form
21. Wetland Delineation Map
22. Guidance Document for NPDES Permit

1		5
2	EXHIBITS CONTINUED:	
3		Page
4	23. Nationwide Permit 401 & CZE Permit	
5	24. Depo. of Jill Stewart	29
6	25. Depo. of Charles Hightower	29
7	26. Depo of Roper Pond	102
8	27. Depo. of Town of Arcadia	290
9	28. Power Point Presentation	293
10		
11	Respondent's Exhibits:	
12	1. Letter to BP Barber 2/25/09	
13	2. Nationwide Permit 401 & CZE Spec. Con.	
14	3. Site Vicinity Map	
15	4. Letter to WPC Engineering, 1/5/05	
16	5. Joint Federal & State Application Form	
17	6. Letter to US Army CORPS, 5/5/08	
18	7. Email to Roper Pond, 2/26/09	
19	8. Letter to Peter McCoy, 5/22/09	
20	9. Letter to George Whatley, 5/29/09	
21	10. Soil Survey	
22	11. Report by Seth Reice - Version 2	
23	12. Report by Setp Reice - Version 1	
24	13. Pond Photo	
25	14. Pond Photo	
26	15. Pond Photo	
27		
28		

6

EXHIBITS CONTINUED:

Page

16. Pond Photo

17. Pond Photo

18. Pond Photo

19. Letter to Bob Mundy, 12/15/08

20. Encroachment Permit for Roper Pond, 12/08

21. SCDOT Hwy. Maint. Mgmt. Permit

22. Report by Seth Reice - Version 3 198

23. Tax Map 273

Respondent DHEC's Exhibits:

1. Site Improvements for Roper Pond Apts.

2. Stormwater Pollution Prevention Plan

3. DHEC Approval Letter

*(EXHIBITS THAT ARE LISTED IN BOLD PRINT WERE
ADMITTED INTO EVIDENCE.)

*(ALL EXHIBITS WERE RETAINED BY THE COURT.)

STIPULATIONS:

It is stipulated and agreed that this
Motions Hearing is being taken pursuant to the
rules of the Administrative Law Court and the
South Carolina Rules of Civil Procedure.

1
2 1 (Whereupon, Petitioner's Exhibits 1 - 23,
3 2 Respondent's Exhibits 1 - 21 and Respondent
4 3 DHEC's Exhibits 1 - 3 were marked prior to the
5 4 hearing for identification.)

6 5 THE COURT: My name is John
7 6 McLeod, and our court reporter is Ms. Jill
8 7 Vickers. My law clerk is Anthony Coleman.
9 8 This is Docket 09-ALJ-07-0069, a contested
10 9 case, Town of Arcadia Lakes, et al versus
11 10 South Carolina DHEC and Roper Pond, LLC.

12 11 The first order of business is Roper
13 12 Pond's Motion In Limine. Mr. Lavender?

14 13 MR. LAVENDER: Thank you, Your
15 14 Honor. As the Court knows, we filed our
16 15 Motion In Limine late last month. We have
17 16 asked for the Court to exclude evidence
18 17 relating to water quality issues. We've
19 18 set forth the arguments in our Motion.
20 19 It's predicated primarily on the previous
21 20 Motion to Dismiss and the Consent Order
22 21 which addressed a number of issues relating
23 22 to Nationwide Permit coverage under 39, and
24 23 later, Nationwide Permit 29.

25 24 We also predicate our holding on the
26 25 findings in -- or at least the basis for

1
2 1 the findings in the Deerfield case where
3 2 the Court then found, and we believe is
4 3 appropriate, that issues relating to water
5 4 quality under Regulation 61-68 and 61-101
6 5 have been consumed by the general permit
7 6 issued under Regulation 61-9.122.26 i.e.
8 7 the more specific stormwater permit. And
9 8 we will also argue during the course of
10 9 these proceedings whether or not contesting
11 10 actual individual coverage under a general
12 11 permit that was issued to cover specific
13 12 activities is even capable of being a
14 13 contested case, but in this particular
15 14 instance ---

16 15 THE COURT: Wait just a moment.
17 16 Excuse me. Ladies and gentlemen, we have
18 17 construction going on in our other
19 18 courtroom, and the sound carries, and it's
20 19 distracting, so let's just take a moment
21 20 before we start back and make sure it
22 21 doesn't happen again.

23 22 (Whereupon, a brief pause was taken.)

24 23 THE COURT: It appears he has it
25 24 under control. Let's go ahead and start up
26 25 and not wait on him.

1
2 1 MR. LAVENDER: Thank you, Your
3 2 Honor. So, as we've indicated in our
4 3 motion, we believe that the issues relating
5 4 to the nationwide permits are no longer a
6 5 subject of these proceedings.

7 6 We also would assert that issues
8 7 relating to lowering the water level, there
9 8 are a number of issues stated in the
10 9 amended pre-hearing statement that deal
11 10 with activities that we would assert are
12 11 not covered by the Construction General
13 12 Permit that is the subject of this appeal,
14 13 and we would again argue that only the
15 14 coverage of the -- under the Construction
16 15 General Permit is the subject of this
17 16 appeal and appropriate for consideration
18 17 and not issues relating to activities which
19 18 are not within that.

20 19 And I'll talk about one other issue, is
21 20 the Wal-Mart decision by Judge Kittrell.
22 21 Let me give you a site on that. It's 2001
23 22 Westlaw 1397421, and it's "Citizens for
24 23 responsible growth in Clemson", another
25 24 stormwater case, but it dealt with 401
26 25 water quality certification for activities

1
2 covered by a nationwide permit. Again, we
3 argue that 401 certification of a
4 nationwide permit does not then require any
5 separate action on the part of the
6 Department relating to the particular
7 activities sought to be undertaken pursuant
8 to a general permit which has already been
9 issued by the CORPS and certified by the
10 Department.

11 Similarly, we will argue in this case
12 that that same principle should guide these
13 proceedings insofar as the Department has
14 issued a statewide general permit for small
15 and large construction activities and
16 discharges from small and large
17 construction activities whereby the
18 applicant notifies the Department that it
19 seeks to proceed under a previously issued
20 permit. We will argue that that activity
21 can proceed only -- it only requires that
22 there be concurrence that its Stormwater
23 Pollution Prevention Plan conforms to the
24 conditions of the permit.

25 But insofar as the Motion In Limine,
26 we would ask the Court to exclude any
27
28

1 11

2 1 evidence relating to anything other than

3 2 the particulars of the Stormwater Pollution

4 3 Prevention Plan and whether or not it

5 4 conforms to the permit, assuming that the

6 5 Court allows an appeal such as that to

7 6 continue. We will make that argument and

8 7 obviously ask the Court at some point to

9 8 determine whether or not coverage is

10 9 actually appealable, the coverage itself

11 10 under the general permit, but we believe

12 11 that it's appropriate to exclude any

13 12 evidence relating to water quality issues

14 13 that are the subject of 61-68, 61-101.

15 14 THE COURT: Thank you. Mr.

16 15 Chandler.

17 16 MR. CHANDLER: Thank you, Your

18 17 Honor. Judge, let me give you a little --

19 18 I assume you know some of what this case is

20 19 about. We filed our pre-hearing

21 20 statements. This is a permit in which DHEC

22 21 has approved this project under the NPDES

23 22 general permit. All of the issues that we

24 23 seek to raise and which Mr. Lavender

25 24 seeks to exclude are all directly related

26 25 to that permit, and in fact, I'll go

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1
2 1 through in just a minute all of the
3 2 provisions of that general permit and the
4 3 regulations that go along with it that tie
5 4 in questions of water quality and wetland
6 5 impacts, and so it's all proper under that
7 6 permit.

8 7 What we've got in this case is, we've
9 8 got a tract of land, total area is a little
10 9 under 13 acres. On that tract of
11 10 land, there are wetlands. They have been
12 11 delineated as wetlands by the US Army CORPS
13 12 of Engineers. So, it's not like in the
14 13 Deerfield case where we did not have waters
15 14 of the United States. We're dealing only
16 15 with waters of the state that had not been
17 16 a delineation by the CORPS of Engineers
18 17 of any of those waters in the Deerfield
19 18 case. In this case, we've got a CORPS
20 19 delineation that includes all of the
21 20 wetlands on the property and the
22 21 delineation -- the boundaries of the
23 22 wetlands enclose an area that generally
24 23 is described as the "lily pad pond".
25 24 It's a pond that is completely covered with
26 25 vegetation in the form of lily pads and

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2 1 lily pad blooms that covers the entire
3 2 pond.

4 3 Now, the evidence that we will present
5 4 and intend to present is that -- well, let
6 5 me talk about the law a little bit before I
7 6 get into that evidence. The General Permit
8 7 itself -- on Page 3 of the General Permit,
9 8 there's a statement, "It does not authorize
10 9 discharges that contribute to a violation
11 10 of any applicable water quality standard".
12 11 So, by the very terms of the permit itself,
13 12 violation of water quality standards are an
14 13 issue for this regulation -- I mean,
15 14 under this permit. On Page 3 of the
16 15 General Permit, it states that in order to
17 16 get coverage under this General Permit, if
18 17 you need a 404 permit, a wetlands fill
19 18 permit from the CORPS of Engineers, you
20 19 must have one, and it must be effective.
21 20 It also says that if you're going to put
22 21 controls in surface waters of the state,
23 22 you've got to get all of the proper permits
24 23 for that.

25 24 In the DHEC Guidance Document for this
26 25 General Permit, it indicates the same
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1
2 1 things, that you've got to have your 404
3 2 Permit from the CORPS of Engineers and
4 3 you've got to meet the requirements of
5 4 Regulation 72-300. The main one that's
6 5 applicable here is 72-307.

7 6 Now, the instructions for the
8 7 application for coverage under this General
9 8 Permit, the General NPDES Permit, require
10 9 that you list all impacts to wetlands and
11 10 waters of the United States and waters of
12 11 the state. So, the very application, the
13 12 terms of the permit itself, the terms of
14 13 the regulations that apply, all require
15 14 that before you get a valid stormwater
16 15 permit, you must have all your permits for
17 16 dealing with waters of the United States
18 17 and for wetlands.

19 18 Now, what has happened in this case is
20 19 that DHEC granted coverage of -- under this
21 20 NPDES Permit without looking at what was
22 21 going to be done to the lily pad pond, and
23 22 we'll present the 30(b)(6) testimony of
24 23 DHEC, and we're going to put a couple of
25 24 DHEC witnesses on the stand in which the
26 25 Stormwater Section says, "We did not look

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at and we did not authorize impacts to that pond". What the developer in this case intends to do is to excavate the pond, lower its level so that it can serve to contain stormwaters. The stormwater group at DHEC says "We didn't look at that impact". So, where should it be looked at?

Well, in order to build the apartment complex that's proposed to be built on this property, the owners went to the US CORPS of Engineers, and they said, "We want approval under a nationwide permit for filling 7 1/2 100th's of an acre of wetlands up above the lily pad area. They wanted to fill in some small wetland impacts.. Well, there is a nationwide permit that covers that.

The first time they went to the CORPS of Engineers, they applied for coverage under what's known as Nationwide Permit Number 39. Nationwide 39 applies to commercial and institutional projects. This is a residential project. They've got the wrong general permit. That general permit was sent over to -- the CORPS

1
2 1 approved it, nevertheless, sent it over to
3 2 the Department of Health and Environmental
4 3 Control with their approval letter that
5 4 said that "Our approval is subject to you
6 5 getting approval from DHEC". DHEC issued
7 6 an approval of that Nationwide 39.

8 7 After we initiated this case and
9 8 pointed out that Nationwide 39 doesn't
10 9 cover the apartment complex they want to
11 10 build, that they needed Nationwide 29, they
12 11 went back to the CORPS of Engineers. At
13 12 the CORPS of Engineers, they got approval
14 13 under Nationwide 29, which is a very
15 14 similar but not identical general permit,
16 15 and it covers residential development.

17 16 The approval letter that the CORPS of
18 17 Engineers issued at that point was just
19 18 like the previous one. It said, "This is
20 19 contingent on you getting approval from
21 20 DHEC". Now, DHEC has said in this case,
22 21 and we'll show you the documents, that they
23 22 never got the second CORPS approval. They
24 23 have never reviewed the second CORPS
25 24 approval under Nationwide 29. There's also
26 25 testimony from DHEC that in their review of

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2 1 the initial Nationwide Permit which was
3 2 Nationwide 39, that they did not look at
4 3 the impacts to the lily pad pond. They
5 4 kept a very narrow focus, and you'll see
6 5 from reading the testimony in this
7 6 deposition, that they felt that all they
8 7 could look at was the one narrow issue,
9 8 and that's contrary to their regulations,
10 9 and we'll show you how it's contrary to
11 10 their regulations.

12 11 You know, back when we initiated this
13 12 appeal, we appealed the approval of the 401
14 13 certification for that Nationwide 39, and
15 14 we later agreed to dismiss that, because we
16 15 knew they were going to have to come back
17 16 and get a 29. They got a 29 from the
18 17 CORPS, but DHEC has never acted on the 29.

19 18 After we took the 30(b)(6) deposition
20 19 of the DHEC witnesses, we were told, "Oh,
21 20 they got a 29". So, we immediately filed a
22 21 request for board review of DHEC's approval
23 22 of the Nationwide 29. At that point, they
24 23 told us, "No, we didn't do a review. We
25 24 never got Nationwide 29. We have not done
26 25 a review of Nationwide 29 at all."

1
2 1 And so, under the stormwater
3 2 regulations, to get coverage under the
4 3 stormwater general permit, you must have
5 4 all of your wetland permits in a row. You
6 5 must have them. They must be effective.
7 6 They've gotten part of that from the CORPS
8 7 of Engineers. They've gotten the
9 8 Nationwide 29 from the CORPS of Engineers,
10 9 but it's contingent on a DHEC review, that
11 10 by DHEC's own acknowledgment and by the
12 11 property owner's acknowledgment, it's never
13 12 been done. They've never done it.

14 13 Now, under DHEC regulations for review
15 14 of those Nationwide Permits, they've got to
16 15 look at the overall impacts. Now, Tommy
17 16 talks a lot about -- Mr. Lavender talks
18 17 a lot about, "These are Nationwide
19 18 Permits", but they still must receive
20 19 affirmative approval from DHEC, so they are
21 20 decisions that can be appealed. They're
22 21 contested cases.

23 22 In 2007, when the CORPS issued the
24 23 latest and most current set of Nationwide
25 24 Permits, DHEC issued a set of blanket
26 25 certifications. Some of them they approved

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without any changes. Some they approved with special state conditions. Some they denied. For Nationwide 29, it was going to be subject to what's known as a pre-discharge notification.

Now, with a lot of the Nationwide Permits, you really don't have to do anything. You just can go do the work. There's already a Nationwide Permit that authorizes it. But the Nationwide 29, just as 39, doesn't operate that way. Nationwide 29 and 39 both require that before you do any work, you submit a pre-discharge notification to the CORPS of Engineers. The CORPS of Engineers, when and if it gives its approval makes it contingent on DHEC signing off on the 401. DHEC never did that, for the Nationwide 29 in this case. So, even though we -- when we took the deposition and they said "There's a 29", we assumed that DHEC had done something and approved that 29.

As it turned out later, when we got ready to file another request for a contested case hearing in this court, that

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2 1 they had never done that. And we've got
3 2 that documented as part of the list of
4 3 exhibits that we've got here in which they
5 4 say that DHEC never got it, they never gave
6 5 an approval on Nationwide 29.

7 6 And essentially, that's our case, that
8 7 they don't have the approval. This is not
9 8 a case of DHEC having reviewed the impacts
10 9 to this lily pad pond and signed off on
11 10 them and we have a disagreement about how
12 11 that review was conducted or whether the
13 12 approval was correct. This is a case about
14 13 they never did it. They never did it at
15 14 all.

16 15 And so, all their regulations saying,
17 16 "When you turn in an application for
18 17 coverage under a Stormwater General Permit,
19 18 you have to tell us all of the impacts to
20 19 wetlands, all of the impacts of waters of
21 20 the state, all of the impacts to waters of
22 21 the United States.

23 22 As you'll see from the evidence in this
24 23 case, the part about any impact to the
25 24 pond was left blank on every single
26 25 application. Nobody ever reviewed that.

1
2 1 Nobody ever gave approval to that. And the
3 2 30(b)(6) depositions from DHEC, the
4 3 stormwater folks said "We never gave
5 4 approval for the excavation of that pond".
6 5 The 401 certification folks say "We never
7 6 gave approval to the excavation of that
8 7 pond", but they do plan to excavate it if
9 8 this project is allowed to go forward after
10 9 the end of this proceeding, but it's never
11 10 been reviewed by them.

12 11 I think that, as a heart of our case,
13 12 I can understand why Mr. Lavender would
14 13 like to exclude it, but it is all relevant
15 14 and appropriate to be heard by this court.
16 15 Thank you.

17 16 THE COURT: Thank you. Briefly
18 17 in reply, Mr. Lavender.

19 18 MR. LAVENDER: Thank you, Your
20 19 Honor. First -- and I'll try to be brief.
21 20 With respect to the Consent Order resulting
22 21 from the dismissal, and we've quoted it in
23 22 our motion, and in part, the water quality
24 23 -- the 401 water quality certification and
25 24 authorization to conduct activities under
26 25 the United States CORPS of Engineers

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2 1 Nationwide Permit 29 has -- the dismissal
3 2 has no effect on Petitioner's claims and
4 3 defenses in connection with 401 as
5 4 Nationwide 29 is not before this court, not
6 5 before this court, and that was an order
7 6 that was endorsed by this court.

8 7 But Your Honor, the arguments that are
9 8 being put forth by the Petitioners get to
10 9 the heart of this entire general permit
11 10 concept, and they beg for a complete
12 11 dismantling of the general permit concept
13 12 by converting it to an individual permit,
14 13 and it should be noted that for proceeding
15 14 with an activity under a previously issued
16 15 Nationwide General Permit issued by the
17 16 CORPS of Engineers or even a Statewide
18 17 General Permit issued by the Department, as
19 18 is the case for this particular General
20 19 Permit, it merely -- it requires what's
21 20 referred to as "Notice of Intent", or
22 21 "Preconstruction Notification", not an
23 22 application, first and foremost. And
24 23 Petitioners would argue matter of factly
25 24 that it's appealable. We vigorously
26 25 contest that.

1
2 1 But again, to simply point out, if the
3 2 heart of the Petitioners' case is that the
4 3 applicant failed to get an individual 401
5 4 certification for this particular activity
6 5 to proceed under Nationwide 29, first,
7 6 that's not before this court, but secondly,
8 7 it was previously addressed in Judge
9 8 Kittrell's decision in Wal-Mart which is
10 9 simply a very good summary of the CORPS
11 10 Nationwide Permit and the relationship
12 11 between the Department's 401 certification
13 12 of the Nationwide Permit for any individual
14 13 activity, and there are 40 some odd
15 14 Nationwide Permits, but the concept simply
16 15 is that these activities have been
17 16 identified as being routine and can be
18 17 covered by a global permit that, as long as
19 18 you proceed according to the conditions,
20 19 you may proceed. Some of those permits
21 20 require Pre-Construction Notification to
22 21 the CORPS and only to the CORPS, not even
23 22 to the Department, for that matter, but
24 23 with respect to Nationwide 29, it simply
25 24 says that if your activity does not exceed
26 25 half an acre or 300 linear feet, then give
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notification to the CORPS. They don't
issue anything other than they write you a
letter concurring that your proposed
activity meets the conditions.

We argue, and as judge Kittrell said,
and I quote from the Wal-Mart decision,
specifically, wherein, in this case, the
area to be filled is less than --
different permit, but one-third of an
acre, as the case here, DHEC is not
required to issue an individual
certification.

So, we would contend that it matters
not whether we got any other documentation
from the Department as to the applicant's
ability to proceed under Nationwide 29 or
which originally the CORPS designated, not
us, 39, erroneously, but for 29 or 39, we
needed nothing from the Department. If the
CORPS agreed -- other than complying with
the conditions of the certification, and we
would call the Court's attention to the
certifications for Nationwide 29, none of
which are applicable to this particular
activity. So, not to mention the fact that

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2 1 the Content Order completely acknowledges
3 2 and takes out of these proceedings anything
4 3 to do with Nationwide 29 as not being
5 4 before this Court, we would contend that
6 5 Judge Kittrell set out very succinctly in
7 6 a discussion about the relationship between
8 7 401 and Nationwide permits, but it simply
9 8 gets to the heart of the basic principles
10 9 of the general permit concept, both at the
11 10 federal level and at the state level, that
12 11 if you transform every activity for which
13 12 a general permit has already been issued
14 13 into a contested case, you simply have
15 14 dismantled the general permit program
16 15 entirely, but in this particular instance,
17 16 we contend that there's absolutely nothing
18 17 appropriate with regard to Nationwide 29,
19 18 the 401 certification for activities under
20 19 the Nationwide 29 or a requirement that
21 20 a certification or any type of additional
22 21 authorization from the Department is
23 22 necessary to proceed under Nationwide 29.
24 23 THE COURT: You say then that none
25 24 of the proof that you seek to exclude
26 25 overlaps with the other issues in the case?
27
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MR. LAVENDER: I'm not really sure

I can tell you what the other issues in the case are, Your Honor, with the exception of the counsel for the Petitioners has indicated that the heart of their case lies on the validity of Nationwide 29 as it relates to the Department's requirement that coverage should not be afforded under this construction general permit unless any required impacts to wetlands resulting from the project have already been approved by the CORPS.

My argument is that, by operation of law, as long as we gave preconstruction notification of those activities, that we were entitled by law to coverage, thus we satisfied that requirement, notwithstanding what the general permit and the regulations might say, so it's of no relevance to these proceedings.

THE COURT: You pretty definitely parroted my question, but ---

MR. LAVENDER: I didn't mean to.

THE COURT: I disagree with you, and I am going to deny your motion. I

1
2 1 think it's necessary that I hear this. And
3 2 by way of explanation, we have a lot of
4 3 laymen here today, if this were a jury
5 4 matter, it would be much more critical to
6 5 go through this motion step by step in
7 6 determining what to exclude and what to let
8 7 in, but theoretically, at least a judge
9 8 looking at the whole picture will know
10 9 whether to consider some of the information
11 10 that Mr. Lavender now considers
12 11 objectionable, so we're going to go
13 12 forward on that basis.

14 13 MR. CHANDLER: Your Honor, I think
15 14 we more or less covered opening statements
16 15 with what we just did.

17 16 THE COURT: If Mr. Lavender is
18 17 satisfied with that, I certainly am.

19 18 MR. LAVENDER: Yes, Your Honor.

20 19 THE COURT: You may proceed, then.

21 20 MR. CHANDLER: Let me just say
22 21 before I do start that, for the record, I'm
23 22 Jimmy Chandler. I'm here with Amy
24 23 Armstrong, my associate. We represent all
25 24 of the Petitioners in this case, including
26 25 the Town of Arcadia Lakes, Robert L.

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Jackson, Linda Jackson and all of the
Petitioners that are listed here who are
basically all residents of the Town of
Arcadia Lakes.

Your Honor, I had all of my exhibits
pre-marked. I've got them here. I've
given opposing counsel a copy, and I've
also got another copy for the Court's
involvement. I think we're going to have
to probably go through them one by one,
Your Honor. I had the originals to give
to the court reporter and mark. I just
wanted to have those together so you can
refer to them when we get to them.

Your Honor, the first thing that the
Petitioner would like to do is we have the
originals of two deposition transcripts.
Earlier on in this case, we took
depositions of DHEC under Rule 30(b)(6) in
which we asked DHEC to name their spokesmen
on a certain list of issues that we defined
in the notice. The two witnesses that were
designated by the Department were Charles
Hightower and Jill Stewart. And I don't
have the citation of the rule at my

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2 1 fingertips, but as I understand the rule
3 2 in the use of depositions, a 30(b)(6)
4 3 deposition of a deponent can be used by
5 4 a party for any purpose, and so we'd like
6 5 to offer into evidence the entirety of
7 6 these two deposition transcripts, along
8 7 with the exhibits. Your Honor, since I've
9 8 already numbered the other exhibits, even
10 9 though they're coming first, these will be
11 10 Petitioner's Exhibits Number 24 and 25.

12 11 THE COURT: Petitioner's Exhibits
13 12 24 and 25 admitted without objection.

14 13 (Deposition of Jill Stewart was marked as
15 14 Petitioner's Exhibit Number 24 for
16 15 identification.)

17 16 (Deposition of Charles Hightower marked as
18 17 Petitioner's Exhibit Number 25 for
19 18 identification.)

20 19 MR. CHANDLER: And Your Honor,
21 20 given the nature of this trial, rather than
22 21 publishing these into the record right now,
23 22 we would just submit them into the record
24 23 as they are right now.

25 24 THE COURT: Without objection.
26 25 Thank you.

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1 MR. CHANDLER: At this point, the
2 Petitioner would call Jill Stewart.
3 (JILL STEWART, having been duly sworn, testified
4 as follows:)
5 DIRECT EXAMINATION BY MR. CHANDLER:
6 Q. Would you please give us your full name, please?
7 A. My name is Jill Cauthen Stewart.
8 Q. And where do you work?
9 A. I work for DHEC.
10 Q. What's your role at DHEC?
11 A. I am the Manager of the Stormwater Permitting
12 Section.
13 Q. And you're a Registered Professional Engineer?
14 A. I am.
15 Q. Now, as a Manager of the Stormwater Permitting
16 Section, what are your job responsibilities?
17 A. I'm responsible for overseeing the kind of
18 day-to-day operations of the staff with regards
19 to permitting from construction sites, stormwater
20 runoff from industrial activities and what's
21 known as the MS4 Program.
22 Q. Now, as part of your work, did you receive an
23 application from entity known as Roper Pond, LLC
24 for coverage under NPDES General Permit?
25 A. Yes.

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2 1 Q. I've got a document here that we've marked as
3 2 Petitioner's Exhibit Number 6. Is this the two
4 3 page form that accompanies the application?
5 4 A. That's the Notice of Intent, yes.
6 5 MR. CHANDLER: We would offer
7 6 Petitioner's Exhibit 6 into evidence.
8 7 THE COURT: Petitioner's 6
9 8 admitted without objection.
10 9 Q. Now, Ms. Stewart, what was the application
11 10 submitted in connection with, what type of
12 11 development?
13 12 A. A residential multi-family development.
14 13 Q. And how large was the tract of land to be
15 14 developed?
16 15 A. According to the Notice of Intent, 12.8 acres.
17 16 Q. Now, there's a section on this form that you've
18 17 got that's labeled Roman Numeral Number IV
19 18 entitled "Water Body Information". You've got
20 19 that in front of you?
21 20 A. Yes.
22 21 Q. And they indicated there are jurisdictional
23 22 wetlands on the site?
24 23 A. That's correct.
25 24 Q. And that there would be impacts to those wetlands
26 25 of .075 acres?
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2 1 A. That's correct.
3 2 Q. And what type of impacts were going to happen to
4 3 those wetlands?
5 4 A. It would be impacts as defined, I guess, by the
6 5 CORPS of Engineers. I don't think we
7 6 specifically say what is the term "impacts".
8 7 Q. Now, there's -- below the line for -- that's
9 8 listed under "Jurisdictional wetlands", correct?
10 9 A. That's correct.
11 10 Q. And Jurisdictional refers to the jurisdiction of
12 11 the United States Army CORPS of Engineers?
13 12 A. Correct.
14 13 Q. And then there's a listing about
15 14 "Non-jurisdictional Wetlands" that comes next,
16 15 and there weren't any of those on this property,
17 16 were there?
18 17 A. That's correct.
19 18 Q. So, all of the wetlands on this property would
20 19 have been waters of the United States?
21 20 A. According to this application, yes.
22 21 Q. Now, under Item C in that little table, we've got
23 22 "Pond", correct?
24 23 A. That's correct.
25 24 Q. And it indicates that it has been delineated,
26 25 doesn't it?
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2 1 A. That's correct.
3 2 Q. What does it say about impacts?
4 3 A. There are none listed.
5 4 Q. Now, on Item 2 under that where they describe
6 5 what type of permits have been obtained for the
7 6 impacts and activities, what does this
8 7 application say?
9 8 A. "US Army CORPS of Engineers, Nationwide Permit".
10 9 Q. Now, as part of your review of this project, did
11 10 you receive a set of the overall plans that have
12 11 been prepared by the Engineer for the property
13 12 owner?
14 13 A. I did.
15 14 Q. And did you notice on those plans that the work
16 15 included some alterations to what's come to be
17 16 known as the "Lily Pad Pond"?
18 17 A. What I noticed were alterations to the outlet
19 18 structure of the pond to lower it for detention
20 19 purposes.
21 20 Q. And did you notice that there was a listing in
22 21 there about the change in the bottom elevation of
23 22 the pond?
24 23 A. I don't remember seeing that notation.
25 24 Q. Now, as part of your review, did you ask the
26 25 property owner or its agents whether they had
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1 permits for whatever activities they wanted to
2 conduct in that pond?
3 A. I did.
4 Q. And what were you told?
5 A. That they had and they provided me with a copy of
6 a 401 Water Quality Certification. I think the
7 CORPS' letter was attached to it. I can't
8 remember specifically, though.
9 Q. So, it was a CORPS approval under a Nationwide
10 Permit?
11 A. Correct.
12 Q. And a letter from the 401 Section?
13 A. That's correct.
14 Q. And did you go back and specifically ask them
15 whether the impacts to the Lily Pad Pond were
16 covered under that approval?
17 A. I believe I did, just from my knowledge with my
18 unfamiliarity with the Nationwide Permitting
19 Program.
20 Q. And what did they tell you?
21 A. That they were, I believe.
22 Q. Now, I've got a document here that we've marked
23 as Petitioner's Exhibit Number 7. Is this one of
24 the E-Mails that you wrote as part of the review
25 and back and forth with the applicant in this

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1 matter?
2 A. It looks to be, yes.
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4 MR. CHANDLER: We would offer
5 Petitioner's Exhibit Number 8 into
6 evidence.
7 THE COURT: Without objection,
8 Petitioner's 7 admitted into evidence.
9 Q. Now, I've got another document that's two pages
10 stapled together. Is this the Email that you
11 received in response to your first Email?
12 A. I believe so.
13 MR. CHANDLER: We would offer
14 Petitioner's Exhibit 8 into evidence.
15 THE COURT: Petitioner's 8
16 admitted into evidence without objection.
17 Q. Now, Ms. Stewart, in your Email, the Exhibit 7,
18 would you read me the question that you posed in
19 Item Number 2 of your Email?
20 A. It says "Is dropping the water surface elevation
21 taken into account when determining if a site is
22 eligible for coverage under Nationwide Permit
23 39?".
24 Q. And in Exhibit 8, how was that question answered?
25 A. They stated "We talked to our wetlands
26 consultant, and he has stated that lowering of
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2 1 the water surface elevation is included and
3 2 covered under the Nationwide Permit 39".
4 3 Q. After you received that, did you do any further
5 4 investigation of this issue?
6 5 A. No.
7 6 Q. In your review of this application, did you
8 7 conduct any analysis of the impacts that would be
9 8 had to that pond?
10 9 A. What I reviewed is that the construction site's
11 10 stormwater discharges are in compliance with the
12 11 general permit, and that is the case, then
13 12 they're assumed to be in compliance with the
14 13 standards and therefore have no impact on the
15 14 pond.
16 15 Q. Now, if the lowering of the surface level of the
17 16 pond was going to happen, did you look at what
18 17 impact that would have?
19 18 A. No.
20 19 Q. You didn't look at that?
21 20 A. No.
22 21 Q. If their plans called for excavation in the pond,
23 22 did you look at that?
24 23 A. No.
25 24 Q. Your permit was issued with the understanding
26 25 that they had all the permissions they needed to
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2 1 do that work. Is that correct?
3 2 A. That is correct.
4 3 Q. Now, we've marked a document as Petitioner's
5 4 Exhibit 3. Is this the NPDES General Permit that
6 5 is applicable?
7 6 A. Yes, it is.
8 7 MR. CHANDLER: We would offer that
9 8 into evidence, Your Honor.
10 9 THE COURT: Petitioner's 3
11 10 admitted without objection.
12 11 Q. Now, Ms. Stewart, if you would, turn with me to
13 12 Page Number 3 of that ---
14 13 MR. LAVENDER: Your Honor, I might
15 14 at least point out that it appears that
16 15 Petitioner's Exhibit 3 includes a document
17 16 at the end that's not a part of the General
18 17 Permit.
19 18 MR. CHANDLER: Yes, let's take
20 19 that approval letter part out of that.
21 20 THE COURT: The last page is 50?
22 21 MR. CHANDLER: Yes, Your Honor.
23 22 It should be 50.
24 23 Q. If you would turn to Page 3 of that. Do you have
25 24 that in front of you?
26 25 A. I do.
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2 1 Q. Now, would you read for me the first sentence of
3 2 Paragraph C-3 on that page?
4 3 A. It states, "This permit does not authorize
5 4 discharges that DHEC, prior to authorization
6 5 under this permit, determines will cause, have
7 6 the reasonable potential to cause or contribute
8 7 to a violation of any applicable water quality
9 8 standard".
10 9 Q. Now, when you read the term "water quality
11 10 standard", what is your understanding of what
12 11 that refers to?
13 12 A. That requirement in Regulation 61-68.
14 13 Q. And those are the regular water quality standards
15 14 adopted by the Department of Health and
16 15 Environmental Control?
17 16 A. That's correct.
18 17 Q. And those are the kind of requirements that
19 18 require the maintenance and propagation or the
20 19 balance indigenous to an aquatic community of
21 20 fauna and flora? Are you familiar with that
22 21 term?
23 22 A. I know the term, but I believe it's somewhere in
24 23 those regs.
25 24 Q. Now, in terms of any excavation that was going to
26 25 occur in the pond, did your section review,

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2 1 obtain any evidence about or reach any
3 2 conclusions about how the excavation in that pond
4 3 would affect whether it would have any impact on
5 4 these water quality standards?
6 5 A. No.
7 6 Q. You didn't look at that?
8 7 A. No.
9 8 Q. Now, if you'll turn over to Page 4, and
10 9 Subparagraph C at the bottom of that page, would
11 10 you read that for me?
12 11 A. What it states is "If a US Army CORPS of
13 12 Engineers 404 Permit is required by section 404
14 13 of the Clean Water Act for permanent or temporary
15 14 stormwater control structures, DHEC may not grant
16 15 coverage under this General Permit until a 404
17 16 Permit has been issued and is effective".
18 17 Q. Now, what did you understand what was the purpose
19 18 of lowering the surface elevation of this pond?
20 19 A. To meet detention requirements in the State
21 20 Stormwater Regulation.
22 21 Q. This permit defines water control structures as
23 22 BMP's, doesn't it?
24 23 A. That, I don't know. I don't think it
25 24 specifically uses -- explain a little bit more,
26 25 please.
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2 1 Q. Well, I guess the more basic thing is, this
3 2 permit does not contain a definition of a
4 3 permanent or temporary stormwater control
5 4 structure?
6 5 A. No, it does not.
7 6 Q. And is that definition found in your regulations
8 7 anywhere?
9 8 A. I do not believe so.
10 9 Q. But a stormwater pond would generally be
11 10 considered a water control structure, wouldn't
12 11 it?
13 12 A. That's correct.
14 13 Q. Now, turn to page 15 for me, please. Would you
15 14 read the paragraph -- well, it's two sentences
16 15 that's lettered with a Capital G.
17 16 A. Just associated with G?
18 17 Q. Yes?
19 18 A. "Structural control measures should be placed on
20 19 upland soils to the degree practicable. Such
21 20 measures must be designed and installed in
22 21 compliance with applicable federal, state, local
23 22 or travel requirements".
24 23 Q. Now, under Item 1 right under that, would you
25 24 read the first section of that, the first
26 25 sentence of that section?

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2 1 A. "Permanent structural controls can only be placed
3 2 in surface waters of the state including
4 3 wetlands, interfemoral and intermittent streams
5 4 if the US Army CORPS of Engineers issues a permit
6 5 for the activity under Section 404 of the Clean
7 6 Water Act."
8 7 Q. What's the receiving water body in this case?
9 8 A. In this case, it was -- the Notice of Intent
10 9 lists Cary Lake.
11 10 Q. Is that the name of this Lily Pad Pond?
12 11 A. No, I do not believe so.
13 12 Q. Do you know whether the lily pad pond itself is a
14 13 water of the State of South Carolina?
15 14 A. According to the Notice of Intent, it is.
16 15 Q. And it's also a water of the United States?
17 16 A. That, I do not know.
18 17 Q. Did you receive at wetlands delineation as part
19 18 of this application?
20 19 A. I believe they were delineated on some of the
21 20 plan sheets in the approved plans, but not a
22 21 separate -- I don't know that there was a
23 22 separate delineation.
24 23 Q. You didn't receive an official letter from the
25 24 CORPS of Engineers saying what had been
26 25 delineated as waters of the United States?
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1 A. I do not recall receiving one.

2 Q. Now, I've got a document here which is a series

3 of pages. It looks like nine pages that have

4 been marked as Petitioner's Exhibit 20. Is this

5 the blank application form with the instructions

6 that come with it for when you're applying for

7 coverage under the General NPDES Permit?

8 A. I believe that is the latest one, yes.

9 Q. And other than the two pages at the start of that

10 document, are the rest of the pages in there,

11 Pages 3 through 9, the Department's instructions

12 about how that is to be filled out?

13 A. That's correct.

14 MR. CHANDLER: We would offer

15 Petitioner's Exhibit 20 into evidence, Your

16 Honor.

17 MR. LAVENDER: I guess our

18 objection would be relevance of the blank

19 form and the attachments which appear to be

20 not part of the form but simply instructive

21 in nature, but we would object to that.

22 THE COURT: Well, I overrule

23 your objection. Petitioner's 20 admitted

24 over the objection of Mr. Lavender.

25 Q. Ms. Stewart, if you would, would you turn to Page

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2 1 7 of Exhibit 20. There's a heading there in bold
3 2 print that's labeled Roman Number IV, "Water body
4 3 information"?
5 4 A. Yes.
6 5 Q. Would you read the first sentence of "A" for us?
7 6 A. "The nearest receiving water body ..." -- and the
8 7 abbreviated "RWD is nearest waters of the state
9 8 --". It says "See definition 122.2 of Regulation
10 9 61-9 -- "-- to which the site stormwater
11 10 discharges will drain".
12 11 Q. Now, the existing Lily Pad Pond is really going
13 12 to be the first water body that this stormwater
14 13 is going to go to, isn't it?
15 14 A. That's correct.
16 15 Q. Now, if you will, go down to the last paragraph
17 16 on that page -- well, let's look at the next to
18 17 last paragraph first. The instructions talk
19 18 about a delineation by the CORPS of Engineers,
20 19 don't they?
21 20 A. Or a Wetlands Consultant.
22 21 Q. And would you read that paragraph that ends on
23 22 that page and follows over to Page 8?
24 23 A. Yes. "If construction activities will occur in
25 24 and/or will impact waters of the state, then
26 25 select 'yes' for impacts, and list the amount of
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2 1 impacts to waters of the state. Provide an
3 2 additional separate plan sheet that shows all
4 3 waters of the state on the site and the impacted
5 4 areas. If there are proposed impacts to waters
6 5 of the state, please contact the Army CORPS of
7 6 Engineers", and it gives the phone number, "or
8 7 DHEC Water Qualification Certification Standards
9 8 and Wetlands Program Section", and it gives the
10 9 phone number, "to determine additional
11 10 requirements before submitting this NOI. In the
12 11 SCZC, which is the coastal zone, also contact
13 12 DHEC OCRM Wetlands Section. Please note that
14 13 it's the project owner/operator's responsibility
15 14 -- it is the project owner/operator's
16 15 responsibility to ensure that all waters of the
17 16 state are shown and identified in this SWPPP",
18 17 which is Stormwater Pollution Prevention Plan.
19 18 Q. And that following paragraph on Page 8, Number 2,
20 19 basically says that if you're going to have
21 20 impacts of waters of the US or State, you've got
22 21 to get all of your permits and certifications
23 22 first before you get your Stormwater Permit?
24 23 A. Before we can issue coverage, that's correct.
25 24 Q. Now, I've got a document consisting of nine
26 25 pages. Down at the bottom, it's got the date

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2 1 6/30/2006. We've marked it as Petitioner's
3 2 Exhibit 22. Do you recognize that as the -- sort
4 3 of the guidance document Q & A from the DHEC
5 4 website?
6 5 A. That's correct.
7 6 Q. And that's the Q & A that relates specifically to
8 7 the general permit for construction activity?
9 8 A. Yes, to the 2006 general permit.
10 9 Q. And it more or less goes through a series of
11 10 common questions that people have and gives the
12 11 Department's answer, doesn't it?
13 12 A. That's correct.
14 13 MR. CHANDLER: Your Honor, we
15 14 would offer Petitioner's Exhibit Number 22
16 15 into evidence.
17 16 MR. LAVENDER: Same objection as
18 17 to relevance, Your Honor.
19 18 THE COURT: Overruled, will be
20 19 admitted.
21 20 Q. Now, Ms. Stewart, on the first page of that
22 21 document, there's a question about "What are the
23 22 major changes in this permit?" Would you read
24 23 the short section there that is letter "A"?
25 24 A. Yes. "Permit advises permittees about US Army
26 25 CORPS of Engineers 404 permit requirement. This
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2 1 requirement is not new, but this is the first
3 2 time the permit has stated this permit must be
4 3 obtained prior to issuance of coverage under this
5 4 permit under certain circumstances. This is an
6 5 informational item to help the permittee
7 6 understand what other permits may be required
8 7 before coverage is granted."

9 8 Q. Thank you. Now, over on Page 2, we've got an
10 9 additional numbered -- or lettered paragraph that
11 10 is designated "L"?

12 11 A. Yes.

13 12 Q. Could you read that for me?

14 13 A. It states that "Permit specifies that all
15 14 projects must meet the minimum requirements of SC
16 15 Regulation 72-300 beginning July 1, 2005. It was
17 16 anticipated that the permit would be effective
18 17 prior to that date. Therefore, this requirement
19 18 is effective on the effective date, September 1,
20 19 2006. This permit has always required projects
21 20 to meet all local and state requirements. This
22 21 requirement just acknowledges the requirements of
23 22 72-300 and eliminates the permit duplication
24 23 between the State Sediment and Erosion Control
25 24 Program and the Construction Stormwater NPDES
26 25 Program. With the implementation of this permit,

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1 the Department will be issuing NPDES coverage
2 under this permit to address both regulations.
3 Q. Ms. Stewart, when you were informed by the
4 applicant that they had received approval from
5 the CORPS of Engineers, did they give you the
6 documentation of that from the CORPS?
7 A. I believe so.
8 Q. And did that documentation indicate that what the
9 CORPS was approving was .075 acres of fill of
10 wetlands?
11 A. I would have to see the document, but I assume
12 that to be the case.
13 Q. Did those CORPS documents, to your recollection,
14 deal with any impacts to the area known as the
15 "Lily Pad Pond"?
16 A. I do not recall.
17 Q. But it's no question that -- when you took action
18 on this, you relied on the statement that
19 everything was covered by the CORPS approval. Is
20 that correct?
21 A. That's correct.
22 Q. And you didn't do an independent review?
23 A. That's correct.
24 MR. CHANDLER: That's all. Thank
25 you very much.

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1 CROSS EXAMINATION BY MR. LAVENDER:
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3 Q. Ms. Stewart, did you review the Stormwater
4 Pollution Prevention Plan, and I may
5 affectionately refer to it as the "SWPPP" --
6 A. That's correct.
7 Q. -- that was submitted in connection with the NOI?
8 A. That's correct.
9 Q. Did you have any initial comments with respect to
10 the SWPPP?
11 A. Yes, I did. There were some deficiencies noted,
12 and I instructed the engineer that there were
13 some things that needed to be changed and
14 modified on the plan.
15 THE COURT: Excuse me. NOI is
16 Notice of Intent?
17 MR. LAVENDER: Yes, sir, Notice of
18 Intent.
19 THE COURT: All acronyms, at least
20 once in the record, define them, please.
21 MR. LAVENDER: And I think we've
22 talked about that in the arguments, as
23 well.
24 Q. I believe, and just to correct this, I'm not sure
25 that this was correct, but when Mr. Chandler
26 first asked you about the impacts to

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2 1 jurisdictional wetlands on the site from the NOI,
3 2 can you state again the acreage involved in that?
4 3 A. On the Notice of Intent, I think it is listed as
5 4 .075 acres.
6 5 Q. So, that's three quarters of a tenth of an acre?
7 6 A. Yeah. I think it works out to like 3,000 square
8 7 feet, something like that.
9 8 Q. Does it state which Nationwide Permit ...
10 9 A. No, it does not.
11 10 Q. Do you know anything about the Nationwide Permit
12 11 Program?
13 12 A. Just that it's there and that it covers basic
14 13 activity, but none of the specifics of the
15 14 individual Nationwide.
16 15 Q. Does anything in the Construction General Permit
17 16 or Regulation 61-9.122.26 governing stormwater or
18 17 Regulation 72-300 preclude the use of an existing
19 18 pond for volume control?
20 19 A. Not to my knowledge.
21 20 Q. Have you issued approvals in the past for using
22 21 existing ponds on developed sites for volume
23 22 control?
24 23 A. Numerous sites.
25 24 Q. Numerous sites?
26 25 A. Yes.
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1 Q. How many projects have you reviewed and approved?
2 A. In almost six years, probably well over 500.
3 Q. Do you know that -- do you know whether or not if
4 this particular applicant sought to simply drain
5 the pond, excavate the bottom, replace the outlet
6 structure and allow it to fill back up, whether
7 or not they adjusted the water level on the
8 outlet structure or not, would that require
9 coverage under your Construction General Permit?
10 A. No. That's not in the Construction General
11 Permit. That would be more 401.
12 Q. If at all?
13 A. If at all, yes.
14 Q. And you don't know whether it would require any
15 other approval?
16 A. No, I do not know.
17 Q. So, it could proceed -- that particular activity
18 as I described it to you could proceed without
19 your program area issuing any other authorization
20 for it?
21 A. That's correct.
22 Q. Notwithstanding any other site activities?
23 A. Correct.
24 Q. Mr. Chandler referred you to a guidance document
25 which I think was Exhibit 22. I think you read

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2 1 that that was -- the notice about the CORPS of
3 2 Engineers was simply informational. Isn't that
4 3 what the guidance document said?

5 4 A. Number 22, yes, and that's just -- because a lot
6 5 of times, we get in applications, and they are
7 6 showing impacts, and they haven't been to the
8 7 CORPS before going to us, just to up-front let
9 8 applicants know that "You need to make sure
10 9 you've got all of that in place before we can
11 10 issue coverage".

12 11 Q. And the SWPPP, would you describe for the Court
13 12 essentially what the SWPPP consisted of?

14 13 A. A SWPPP is a set of kind of design drawings
15 14 accompanied by sometimes other documentation
16 15 including calculations that show topography of
17 16 the site. It shows what proposed activities are
18 17 going to take place on the site. It usually
19 18 includes details for any structural controls,
20 19 silk fence, sediment basins, sediment traps that
21 20 are going to be necessary on that site during the
22 21 construction process to meet the requirements of
23 22 the NPDES Construction General Permit.

24 23 Q. Did this particular SWPPP get reviewed by anybody
25 24 else before it was reviewed by you?

26 25 A. Richland County, I believe.
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2 1 Q. Is that normal?
3 2 A. Yes. For this site, it is normal.
4 3 Q. Were you advised of the disposition of that
5 4 review?
6 5 A. What do you mean by "disposition"?
7 6 Q. Did anybody at Richland County tell you what
8 7 their review concluded?
9 8 A. No.
10 9 Q. How did it come to you?
11 10 A. It, like all other projects that are located
12 11 within the MS4 areas, is required to get approval
13 12 from that MS4 or another appropriate entity
14 13 before it comes to us to receive NPDES permit
15 14 coverage.
16 15 Q. And did that occur?
17 16 A. That occurred.
18 17 Q. It did occur?
19 18 A. Yes.
20 19 Q. And after that, did the Department make some
21 20 determination?
22 21 A. We determined that we felt that we needed to do
23 22 our own review for compliance with the
24 23 Construction General Permit.
25 24 Q. And why did you do that?
26 25 A. Because of some concerns that had been raised by
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2 1 citizens about the project.
3 2 Q. So, you received inquiries from people about the
4 3 project?
5 4 A. That's correct.
6 5 Q. How many inquiries?
7 6 A. I don't know. A couple of citizens came forward
8 7 with concerns about the project and possible
9 8 impacts, and like we do on other projects, we
10 9 decided to do our own review.
11 10 Q. Is that ordinary? Is that normal, your review of
12 11 a project?
13 12 A. Us, no. We pull some projects randomly for
14 13 review, but not typically, not every one that
15 14 goes through the MS4.
16 15 Q. So, what would the normal process had been once
17 16 you were advised that the implementing agency had
18 17 completed its review and tendered it to you, to
19 18 the Department?
20 19 A. We would have been required in the NPDES
21 20 Construction General Permit to meet the
22 21 requirements and time frames set forth within, I
23 22 believe, Section 2.2C of the permit. And it
24 23 outlines in C what's required, if you've got to
25 24 go through the MS4 or what's kind of delegated a
26 25 program under 72-300, obtain their approval, and
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2 1 then, once we have an approval letter from the
3 2 MS4, a complete Notice of Intent and a 125 NPDES
4 3 Permit fee, we're required to meet the time
5 4 frames in here. Under Section 2.1A, Number 1,
6 5 that if we don't select it -- what it states is,
7 6 "And if DHEC does not send a letter within 7
8 7 business days of the receipt of a complete NOI
9 8 authorizing coverage, denying coverage,
10 9 requesting additional information, then it's
11 10 approved by default". Typically, what our staff
12 11 does is they review and issue coverage within 7
13 12 days.

14 13 Q. And you're reading on Page 4 of the General
15 14 Permit, Section 2.1A1?

16 15 A. A1, that's correct.

17 16 Q. The last sentence of that section?

18 17 A. Yes.

19 18 Q. And as a result of these inquiries during that 7
20 19 day period, the Department exercised its review
21 20 opportunity, right?

22 21 A. I think what initially happened was the staff
23 22 member in our Columbia ECC office had sent a
24 23 letter advising the applicant and engineer that
25 24 there were some deficiencies on the NOI, so it
26 25 was incomplete, but we -- within the 7 days of

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2 1 receiving that, we selected it for review.
3 2 Q. Had you not done that, what would the consequence
4 3 of that have been?
5 4 A. It would have been issued coverage under the
6 5 General Permit.
7 6 Q. Or would you have not taken any action, what
8 7 would have occurred?
9 8 A. It would have been issued coverage under the
10 9 General Permit.
11 10 Q. Automatically without any action by the
12 11 Department?
13 12 A. Yes.
14 13 Q. That's just the way the permit reads. You didn't
15 14 really have to take any action with respect to
16 15 that?
17 16 A. That's correct.
18 17 Q. The opportunities or the inquiries that you got,
19 18 did that result in you or your staff taking any
20 19 action with respect to your review?
21 20 A. Explain that.
22 21 Q. What did you do as a result of these concerns
23 22 from citizens?
24 23 A. We requested a copy of the plans that had gone
25 24 through Richland County, the plans and
26 25 calculations, and in this case, the SWPPP Book,
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1 and we did -- I did a technical review of the
2 plans.
3 Q. Independent of the implementing agency, which
4 would have been Richland County?
5 A. That's correct.
6 Q. Did you have the occasion to meet with these
7 concerned citizens about their concerns?
8 A. We met with a couple of them, yes.
9 Q. More than once?
10 A. I think it was a couple of times. I know of at
11 least one meeting.
12 Q. Did you attempt to resolve their concerns, or did
13 you address their concerns in your comments to
14 the applicant?
15 A. I don't think I addressed any of their specific
16 concerns. It was just concerns that I would have
17 addressed with any other project.
18 Q. What do you mean, that you would have addressed
19 with any other project?
20 A. If it were a project that were located anywhere
21 else or if I had done a technical review on a
22 project that there weren't citizen complaints on,
23 the same comments probably would have come from
24 my review of the project.
25 Q. So, in other words, you were looking at the SWPPP

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2 1 objectively?
3 2 A. Yes.
4 3 Q. Did you ultimately get revisions and response to
5 4 your comments from the applicant's consultant?
6 5 A. Yes.
7 6 Q. Did they satisfy your review and concerns with
8 7 respect to the SWPPP?
9 8 A. That's correct.
10 9 Q. Mr. Chandler asked you a number of questions
11 10 about the information on the NOI?
12 11 A. Yes.
13 12 Q. Was there ever any question in your mind where
14 13 the stormwater from the property bounded -- or
15 14 identified as the "project site" first went?
16 15 A. It went through a pond on the site to Cary Lake.
17 16 Q. In that order?
18 17 A. In that order.
19 18 Q. Do you know whether the project site itself was
20 19 the entire drainage area that was going into
21 20 Roper Pond, which is the pond in question, is it
22 21 not?
23 22 A. Yes.
24 23 Q. Does the property boundary identify the area that
25 24 drains into Roper Pond?
26 25 A. Based on the topography, pretty much what -- it
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1 doesn't receive a lot of -- or any off-site
2 impact. It's just the property drains into the
3 pond and nothing else.
4 Q. Does it receive some off-site impact?
5 A. Off-site drainage, I believe maybe a little bit
6 from one side. I'd have to look at the plans,
7 but I believe so.
8 Q. But it doesn't drain -- in a pre-development
9 condition, it doesn't drain off of that site, it
10 drains into the Roper Pond today?
11 A. That's correct.
12 Q. Every time it rains today?
13 A. That's correct.
14 Q. Have you seen the outlet structure?
15 A. On the plans and just by riding by.
16 Q. Did you ultimately conclude that the SWPPP met
17 the requirements of the conditions of the
18 Construction General Permit in 72-300?
19 A. I did.
20 Q. I'm going to ask you again, is there anything in
21 either of those two documents that precludes the
22 use of Roper Pond for managing the stormwater
23 flow?
24 A. No, there is not.
25 Q. Now, then, were there any issues that you raised

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2 1 that addressed drainage -- let me take you back.
3 2 Can you describe for the Court what precisely
4 3 this Construction General Permit covered, what
5 4 type of activity this Construction General Permit
6 5 covers?
7 6 A. It covers all things that are defined as
8 7 construction activity by the General Permit which
9 8 is clearing, grading or excavating that statewide
10 9 results in one acre or more of disturbed -- of
11 10 land disturbance or construction activity. So,
12 11 anytime anyone throughout the state disturbs more
13 12 than an acre, they're required to obtain coverage
14 13 under this Construction General Permit, and in
15 14 the County, it's anything half an acre or more.
16 15 Q. Above that acre, are there different acreage
17 16 thresholds for different levels of requirements?
18 17 Is there a ten acre cutoff?
19 18 A. Not in -- the only thing, I believe, is that it
20 19 requires if you've got ten acres of disturbance,
21 20 that you need to do a sediment basin or
22 21 equivalent, and the other thing would be just
23 22 monthly reporting of the ten acres.
24 23 Q. The disturbed area for this project, did it
25 24 consist of more than ten acres?
26 25 A. No, it did not.
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2 1 Q. So, the project itself actually disturbed area
3 2 which is covered by your permit. Does the
4 3 Construction General Permit that we're talking
5 4 about cover the project after the construction
6 5 has concluded and the site is stabilized?
7 6 A. No. Once the site is permanently stabilized,
8 7 they terminate coverage under the Construction
9 8 General Permit.
10 9 Q. Is another permit required for a project of this,
11 10 this particular type of development for
12 11 stormwater?
13 12 A. No.
14 13 Q. During the course of your review of the SWPPP,
15 14 did you ask the applicant to address water
16 15 quality issues for the stormwater prior to the
17 16 stormwater -- during construction prior to the
18 17 stormwater entering Roper Pond?
19 18 A. I did.
20 19 Q. And can you describe the nature of those concerns
21 20 and how they were addressed in the SWPPP?
22 21 A. In the initial approval or initial plans, they
23 22 were using Roper Pond to capture the first half
24 23 inch of runoff from the area draining to the
25 24 pond, and we felt that there were some other
26 25 controls that could be used on this site to
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2 1 better address that. And what they did was they ,
3 2 proposed installing it all at the inlets into the
4 3 pond a proprietary -- what we call "proprietary
5 4 device" or kind of patented device called a
6 5 stormsceptor, which is something that's put in to
7 6 essentially filter and clean stormwater runoff
8 7 from the areas draining to that structure once
9 8 the site is stabilized permanently.

10 9 Q. So, that's actually a post construction measure.
11 10 Is that right?

12 11 A. That's correct.

13 12 Q. That device is to remain in place after the
14 13 project is finished and built out?

15 14 A. It is.

16 15 Q. Is that generally a requirement in a SWPPP, that
17 16 is, to put in a post construction device?

18 17 A. The only thing that the Construction General
19 18 Permit says is that the -- under Section 3.4F,
20 19 "SWPPP must include a description of all post
21 20 construction stormwater management measures that
22 21 will be installed during a construction process
23 22 to control pollutants and stormwater after
24 23 construction operations have been completed", so
25 24 post construction.

26 25 Q. Let's talk about during construction. Were there
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2 1 also measures BPM -- Best Management Practices,
3 2 acronym BMP -- is that generally -- well, let me
4 3 ask you, is that generally the type of effort
5 4 that is embodied in the SWPPP for managing
6 5 stormwater and sediment and erosion control?
7 6 A. Yes, it is.
8 7 Q. BMP's?
9 8 A. Yes.
10 9 Q. Give me some examples. Give the Court some
11 10 examples of what a BMP might consist of.
12 11 A. Usually, it's a combination of BMP's. A silk
13 12 fence is the one that is probably most common.
14 13 On this site, I think they have four -- I think
15 14 it's four, but I'd have to see the plans --
16 15 sediment basins, temporary sediment basins.
17 16 There are other measures that they can implement
18 17 on-site to control runoff; rock check dams which
19 18 go into diversion swells and ditches. I think
20 19 this plan also calls for diversion ditches that
21 20 will go kind of around the perimeter of the
22 21 construction area to direct runoff to the
23 22 sediment basins.
24 23 Q. So, let me try and make sure I understand it and
25 24 ultimately the Court understands it. With
26 25 respect to this particular project, was the SWPPP
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2 1 designed so as to use Roper Pond to control all
3 2 of the runoff and the sediment and everything
4 3 else during construction?
5 4 A. No.
6 5 Q. It was not?
7 6 A. It was not.
8 7 Q. And explain that. Were there measures beyond the
9 8 perimeter of Roper Pond that were intended to
10 9 control sediment before it entered Roper Pond?
11 10 A. If you kind of picture Roper Pond and sit back
12 11 from it, there should be a silk fence lining the
13 12 entire perimeter. Beyond that, there are
14 13 diversion berms and then sediment basins placed
15 14 at strategic locations along that perimeter that
16 15 capture everything that drains from -- in this
17 16 case, pretty much the Roper Pond boundary to
18 17 those sediment basins or a silk fence prior to
19 18 discharge into Roper Pond.
20 19 Q. Do those work in series?
21 20 A. They work in series.
22 21 Q. In other words, there are numerous degrees -- or
23 22 the extent of the BMP's are numerous in this
24 23 case? They were multiple?
25 24 A. They were multiple BMP's.
26 25 Q. And they work in series, so to speak?
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2 1 A. Yes.
3 2 Q. And so, was each one in some respects a safety
4 3 device?
5 4 A. It is. It's called a "Treatment train", is the
6 5 term that we use, that you try to keep as much
7 6 sediment back throughout the project so that you
8 7 don't end up with it at the end.
9 8 Q. So, would it be fair to say that with respect to
10 9 the coverage under the General Permit, that there
11 10 were really two concerns, sediment and erosion
12 11 control and volume control?
13 12 A. Yes.
14 13 Q. And those are different issues, are they not?
15 14 A. They're two separate issues.
16 15 Q. And what is the -- if you separate those two,
17 16 what is the nature of your review with respect to
18 17 volume control?
19 18 A. We do not regulate volume control. We regulate
20 19 stormwater runoff rates, is what is regulated
21 20 under the State Stormwater Regs. So, projects
22 21 are required to show that after a site
23 22 development is completed, that they are not going
24 23 to increase runoff rates post construction or the
25 24 two year 24 hour storm event and a ten year 24
26 25 hour storm event, which means that, generally,
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2 1 you've got to have some volume of period to do
3 2 that in.
4 3 Q. Generally referred to as the predevelopment
5 4 runoff rate and the post development runoff rate?
6 5 A. Yes.
7 6 Q. In fact, that's exactly what it's referred to as?
8 7 A. That is exactly.
9 8 Q. And what is the standard that you measure? Is it
10 9 in fact that the post development runoff rate
11 10 cannot exceed the predevelopment runoff rate?
12 11 A. That's correct, for the two and ten year storm
13 12 event.
14 13 Q. Were you provided calculations by the applicant
15 14 that addressed that issue?
16 15 A. Yes.
17 16 Q. And did they use the volume within Roper Pond to
18 17 achieve the post development runoff rate that was
19 18 required?
20 19 A. They did.
21 20 Q. Now, I think Mr. Chandler talked to you about the
22 21 planned activities for lowering the level of the
23 22 pond to make that additional volume available
24 23 above the new surface level. Is that right?
25 24 A. That's correct.
26 25 Q. Was there anything in your permit or regulations
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2 1 that required that to be permitted first?

3 2 A. No, not to lower the elevation, no.

4 3 Q. And again, based on your previous answer, it
5 4 would not have required any permit from your area
6 5 to do that without a development around it?

7 6 A. That's correct.

8 7 Q. So, they could have done that today, at least
9 8 from your perspective?

10 9 A. Without doing anything on the rest of the site.

11 10 THE COURT: May I interject a
12 11 question here? It's just not clear to me.
13 12 Are you saying that even if they're
14 13 lowering the level of the pond by going in
15 14 there and dredging out the bottom, that
16 15 they don't have to get any permission from
17 16 you?

18 17 MS. STEWART: Not from us, not
19 18 from Stormwater Permitting.

20 19 THE COURT: Thank you.

21 20 Q. Let me add to that just to make sure that it's
22 21 clear to the Court. Is that answer, so long as
23 22 they don't disturb any of the upland areas around
24 23 the pond, around the site. Is that correct?

25 24 A. That's correct.

26 25 Q. In other words, they can simply ride in there and
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2 1 dredge the pond, repair the structure, lower the
3 2 level for that matter, and it would not require
4 3 the permitting?
5 4 A. That's correct.
6 5 Q. Is that done all the time? I mean, farmers dig
7 6 ponds and change ponds a lot.
8 7 A. Yes. A lot of lakes in this state were meant for
9 8 sediment control, so you have to dredge the
10 9 sediment out to maintain that function.
11 10 Q. Do you know the difference -- you're not familiar
12 11 with Section 404 of Section 10 --
13 12 A. Not specifically.
14 13 Q. -- under "Clean water and rivers and ponds"?
15 14 A. No.
16 15 Q. Back to the sediment and erosion control issues
17 16 versus the runoff rate issue. Did you in your
18 17 review of the SWPPP allow the pond to be used for
19 18 sediment control?
20 19 A. No, never.
21 20 Q. And did you conclude that the measures that were
22 21 put in place on the SWPPP drawings would be
23 22 effective to achieve the removal efficiencies
24 23 that are required under both the reg and the
25 24 permit prior to stormwater going into Roper Pond
26 25 from the disturbed areas?
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1 A. I did.

2 Q. Did they meet or exceed those requirements?

3 A. Probably they exceeded, because I think they

4 provided calculations to show that they would

5 kind of meet the standards in the state regs of

6 80 percent design trapping efficiency for the ten

7 year storm event, which if it were -- which is

8 not required of sites that disturb less than ten

9 acres.

10 Q. So, it was not a requirement, but they did it

11 anyway?

12 A. It was not a requirement, but they did it anyway.

13 Q. And let's take it a step further. The storm

14 sectors were an add-on to those temporary

15 measures that you've just described. Is that

16 right?

17 A. That's right.

18 Q. They were in addition?

19 A. They were in addition. They actually go in once

20 the site is stabilized. I guess you could

21 preview the figurative site so you could even get

22 them in during construction.

23 Q. Was there anything about the NOI to which your

24 attention was called by Mr. Chandler that failed

25 to inform you of what the project truly consisted

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2 1 of?
3 2 A. No.
4 3 Q. Did you know good and well what this project was
5 4 intended to consist of?
6 5 A. Yes.
7 6 Q. All the land disturbing activities?
8 7 A. Yes. It's evident on the plans.
9 8 Q. Where all of the water was going to go and how it
10 9 was going to be managed?
11 10 A. Yes.
12 11 Q. How the sediment and erosion control measures
13 12 were going to be employed?
14 13 A. Yes.
15 14 Q. All the calculations that were necessary were
16 15 provided to you, and you reviewed them?
17 16 A. They were.
18 17 Q. I don't think anybody asked you this, but if you
19 18 could -- I hate to do this -- your educational
20 19 background?
21 20 A. I have a Bachelor's of Science in Civil
22 21 Engineering from the University of South Carolina
23 22 with an actual -- you don't subspecialize, but
24 23 all of my specialized classes were in water
25 24 resources; Hydrology, Hydraulics, Open Channel
26 25 Flow, Subsurface Hydrology, and I graduated in
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2 1 May of 2000.
3 2 Q. And how long have you been at the Department?
4 3 A. Since October of 2003.
5 4 Q. Where were you before that?
6 5 A. I worked for a consulting engineer in Lancaster,
7 6 South Carolina.
8 7 Q. Did you have the occasion to work on stormwaters
9 8 in that capacity?
10 9 A. When I was working there, I actually assisted the
11 10 engineer in preparing very similar plans to what
12 11 we review; subdivisions, banks, anything that was
13 12 required. I helped her do the designs and
14 13 prepare calculations.
15 14 Q. And then you got to the Department, and what role
16 15 did you assume at the Department?
17 16 A. My first position was as a planning reviewer in
18 17 the Stormwater Permitting Section.
19 18 Q. So, your entire career essentially has involved
20 19 Civic Engineering and preparation and/or review
21 20 and approval of stormwater?
22 21 A. Stormwater has been kind of my chosen specialty.
23 22 Q. And how long have you been the section manager?
24 23 I think that's the term you used.
25 24 A. Section manager, yes, since November of 2006.
26 25 Q. So, is it fair to say that all storm water
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2 1 projects come through your shop today?
3 2 A. Everything outside of the eight coastal counties,
4 3 yes.
5 4 Q. And this is obviously not one of those?
6 5 A. No.
7 6 Q. Was there again any question at the time you
8 7 issued -- actually, I think at some point in
9 8 December of '08, you actually penned a letter
10 9 that acknowledged that the Department was
11 10 satisfied that the SWPPP met the requirements of
12 11 the permit and the regs. Is that right?
13 12 A. Right, and we issued an approval letter.
14 13 Q. At that time, did you have any doubt in your mind
15 14 that this SWPPP satisfied all the requirements
16 15 for coverage under the General Permit?
17 16 A. It met the requirements of the General Permit,
18 17 yes.
19 18 Q. Actually, I think you -- did you also say that
20 19 you have achieved your registration as a
21 20 Professional Engineer in South Carolina?
22 21 A. Yes, I think I got my -- I took the exam in '04,
23 22 so my license date is like December of '04. So,
24 23 it's almost five years.
25 24 Q. And you've been in this section about that same
26 25 length of time?
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2 1 A. A little bit less, for three years.
3 2 Q. Ms. Stewart, if I could call your attention to
4 3 Page 3 of the General Permit, I think Mr.
5 4 Chandler asked you to publish, and maybe he
6 5 published, but the language from Section C-3. As
7 6 I read that sentence, and help me with it, the
8 7 first sentence says, "Does not authorize
9 8 discharges that the Department, prior to
10 9 coverage, determines will cause or have reason or
11 10 potential ..." -- did you ever make that
12 11 determination, that this project would have the
13 12 reasonable potential to cause violations of water
14 13 quality?
15 14 A. No, we did not.
16 15 Q. Were you involved in the issuance of this General
17 16 Permit?
18 17 A. I was not involved in the, I guess, negotiations
19 18 of the permit. I have been involved in the
20 19 entire implementation of the permit.
21 20 Q. This General Permit was issued August 1st of '06.
22 21 Is that right?
23 22 A. Yes.
24 23 Q. Just on the face of it?
25 24 A. Yes, August 30 and effective September 1st.
26 25 Q. And this isn't the first General Permit to cover
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2 1 construction activities, is it?
3 2 A. No. There were, I believe, two prior ones.
4 3 Q. And again, if you can, describe how -- what your
5 4 understanding of the Department's position is
6 5 with respect to issuance of a General Permit as
7 6 opposed to issuance of individual permits. Do
8 7 you also -- does your section also issue
9 8 individual permits for stormwater discharges?
10 9 A. The only individual permits that my section has
11 10 issued are to the MS4's themselves. We have
12 11 never done one for a construction site.
13 12 Q. This particular permit actually states that it is
14 13 in the Department's discretion to decide if an
15 14 individual permit is required, is it not?
16 15 A. There is a specific section in the General Permit
17 16 that outlines if an individual permit is needed
18 17 or if someone seeks to have an individual permit.
19 18 Q. How large can a project be, land disturbing
20 19 activity, and still proceed under the provisions
21 20 of this 50 page General Permit that was issued in
22 21 2006?
23 22 A. It wouldn't necessarily be nothing based on
24 23 project area. I've issued coverage for sites
25 24 that exceed 200 acres. So, there's no acreage
26 25 threshold that says that "We're going to issue
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2 1 you an individual permit".
3 2 Q. In fact, the title of the permit says it covers
4 3 large and small construction activities, doesn't
5 4 it?
6 5 A. Yes, sir.
7 6 Q. So, was there anything extremely unique about
8 7 this less than ten acre disturbed area for
9 8 purposes of coverage under this General Permit?
10 9 A. No. It was a pretty routine project.
11 10 Q. And have you issued coverage for other projects
12 11 of this nature?
13 12 A. Oh, yes, lots of them.
14 13 Q. Did they use the same types of BMP's that were
15 14 employed by this consultant in the SWPPP that was
16 15 here?
17 16 A. Yes, same thing.
18 17 Q. Isn't the consequence of not actually maintaining
19 18 -- establishing and maintaining the BMP's what
20 19 can cause violations of the permit as opposed to
21 20 not specifying them?
22 21 A. That's usually what happens. If they don't
23 22 maintain or install properly, we end up with
24 23 impacts, outside impacts.
25 24 Q. I hate to use this description, but it seems to
26 25 me that this permit is actually really -- is a
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2 1 target on the wall, and you know, you can keep
3 2 shooting with your SWPPP, but you're eventually
4 3 going to hit the target, aren't you? I mean,
5 4 it's just a matter of deciding what is going to
6 5 work?
7 6 A. The right combination of BMP's and the
8 7 implementation procedures to meet the
9 8 requirements of the General Permit, yes.
10 9 Q. And again, was there anything on these drawings
11 10 and in this SWPPP that led you to believe that
12 11 these measures wouldn't work?
13 12 A. No.
14 13 Q. And have you seen other projects where these
15 14 measures did work?
16 15 A. A lot of them.
17 16 Q. Have you seen other projects that use these BMP's
18 17 that did work?
19 18 A. Yes.
20 19 Q. So, a concern about sediment beyond what's
21 20 authorized in this permit, getting into Roper
22 21 Pond or getting into Cary Lake would not be a
23 22 consequence of issuing coverage, but a
24 23 consequence of violating the permit. Is that
25 24 correct?
26 25 A. That's correct.
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2 1 Q. And that sort of calls for some speculation to
3 2 assume that there's going to be a violation of
4 3 the permit, does it not?
5 4 A. Yes.
6 5 Q. And there is a remedy for that?
7 6 A. Usually, we do compliance assistance, write
8 7 letters, do inspections to see if the site is in
9 8 compliance, and if it's not or if it fails to
10 9 come into compliance, then the Department will
11 10 take, and has taken against sites, enforcement
12 11 action.
13 12 Q. This permit doesn't just require the applicant to
14 13 submit a Notice of Intent to proceed under the
15 14 General Permit and submit a SWPPP to you and let
16 15 you review it and say, "Yes, we agree", does it?
17 16 A. No.
18 17 Q. It requires something else, doesn't it?
19 18 A. It requires them to maintain the SWPPP and
20 19 maintain compliance with the requirements of the
21 20 permit. There are specific sections regarding
22 21 maintenance of the controls and actual
23 22 implementation of the SWPPP.
24 23 Q. Yeah. Well, let's go over to that section just
25 24 to make sure that that's clear. I think one of
26 25 the sections you're looking at is 3.6 on Page 13,
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1 isn't it?

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2 A. Yes. Section 3.6 is entitled "Maintenance of the

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3 Controls", and it pretty much says that you've

5

4 got to make -- 3.6A, "All sediment and erosion

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5 control measures identified in the SWPPP must be

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6 maintained and in effective operating order", and

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7 it allows for maintenance of -- it describes what

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8 to do if you need to modify the BMP's. It states

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9 that sediment traps and basins need to be

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10 maintained. In addition, section 3.10 deals with

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11 required inspections of stormwater BMP's. They

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12 are required to select one of the two inspection

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13 frequencies outlined in 3.10A. They have to

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14 inspect them once a week or once every 14 days

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15 and within 24 hours of the end of a half inch of

17

16 rainfall or greater.

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17 Q. So, this doesn't -- this permit and the

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18 obligations under this permit don't just leave

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19 the implementation to chance, does it?

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20 A. No.

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21 Q. With respect to -- for example, with respect to

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22 the SWPPP, did the previous permit actually

24

23 require the SWPPP to be submitted and approved by

25

24 the Department?

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25 A. I don't know. It may.

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2 1 Q. Did the previous permit -- does this permit
3 2 require that inspections be performed by a
4 3 certified inspector?
5 4 A. It requires that they be conducted by -- the term
6 5 used in this permit is "qualified individual",
7 6 yes.
8 7 Q. Qualified?
9 8 A. Yes, that's defined.
10 9 Q. Now, how has that been translated by the
11 10 Department? Are there programs that certify
12 11 inspectors?
13 12 A. Yes. Clemson University has a program that is
14 13 called -- the acronym is CEPSCI which stands for
15 14 Certified Erosion Prevention and Sediment Control
16 15 Inspector Program, and they certify thousands of
17 16 individuals who conduct these inspections.
18 17 Q. A new market sector?
19 18 A. Yes.
20 19 Q. So, in terms of the SWPPP and coverage under the
21 20 permit, there are ongoing activities that this
22 21 permit imposes upon a project?
23 22 A. Yes, sir.
24 23 Q. A land disturbing activity?
25 24 A. Yes, sir. The most important part is, after an
26 25 approval, an implementation.
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1
2 1 Q. Is that not the heart of it, whether you do what
3 2 you said you were going to do?

4 3 A. Yes. It's making sure that you keep the BMP's in
5 4 good working order and maintained and operating
6 5 and functioning.

7 6 Q. Now, how do you know if they do their
8 7 inspections?

9 8 A. They are required to maintain a copy of them with
10 9 -- the SWPPP is required to be maintained
11 10 on-site, and a copy of all of their inspections
12 11 are required to be with that.

13 12 THE COURT: Who is "their" when
14 13 you say "their" inspection?

15 14 MS. STEWART: The permittees'
16 15 inspections. They're required to provide a
17 16 qualified inspector, so when that qualified
18 17 inspector goes out and they generally write
19 18 a report, that report is supposed to be
20 19 maintained with the SWPPP at the site and
21 20 for us to see or for Richland County to see
22 21 or even EPA to see if they go out and do a
23 22 separate compliance inspection.

24 23 Q. Is that typically done, they keep a notebook,
25 24 like a permit box?

26 25 A. Yes. It's a SWPPP box, mailboxes. If they've
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1 got a construction trailer, a lot of times
2 they'll keep it in the construction trailer.
3 Q. Are there some projects that actually are
4 required to submit those inspections to the
5 Department on periodic basis?
6 A. If a project disturbs 10 acres or more, they are
7 required by this permit to submit monthly reports
8 to the Department of their inspections and
9 progress of the site.
10 Q. This particular project has less than ten acres,
11 but the permit does have provisions, then, that
12 would require a project later than this to
13 actually submit their reports to the Department?
14 A. Yes, to submit them, yes.
15 Q. But nonetheless, even this project, they're
16 required to do the inspections?
17 A. Yes.
18 Q. They're required to keep copies of them on-site?
19 A. Yes.
20 Q. They're required to make them readily assessable
21 to the Department or anybody else that comes by.
22 They have to have their permit and the SWPPP
23 visible to the public from the street. Is that
24 not right?
25 A. I don't think -- I don't know if it says "to the

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1 public", but certainly to any, what I would call,
2 regulate ---
3 Q. Visible from the road?
4 A. Yes, visible from the road, yes, so that we can
5 go and see it, evaluate it.
6 Q. Does the Department also inspect construction
7 sites that are subject to coverage under this
8 General Permit?
9 A. Yes, we inspect them.
10 Q. Do they tell you when they start the project?
11 A. They are instructed in their approval letter to
12 notify the local environmental quality control
13 office prior to the commencement of construction
14 activities, and that's outlined in our approval
15 letters. It's a standard condition.
16 Q. And that's so you know when the project actually
17 starts --
18 A. Yes.
19 Q. -- because it could be longer than ...
20 A. Yes. It could be -- there are some that are --
21 they're delays in projects that may be a year or
22 more before they actually begin construction.
23 Q. On the NOI, there is a provision in the General
24 Permit that makes reference to a TMDL. Can you
25 tell the Court what a TMDL is?

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1 A. A TMDL is a Total Maximum Daily Load.
2 Q. And what's the cleft note on that?
3 A. Pollutant allotment, is kind of, I guess, the
4 easiest -- or allocation -- is the easiest way to
5 summarize it.
6 Q. Is the TMDL a function of a known impairment?
7 A. It is.
8 Q. Meaning that there's some known contamination of
9 a water body at a monitoring station?
10 A. At a particular monitoring station, yes.
11 Q. You don't have a monitoring station at Roper
12 Pond?
13 A. No.
14 Q. You don't have a monitoring station at Cary Lake?
15 A. I don't believe we do. I don't know for sure.
16 Q. I think there is one in Forest Lake. Do you
17 recall?
18 A. The application lists a -- what the engineer
19 identified as the nearest water quality
20 monitoring station and that it's in Forest Lake.
21 Q. Did you, in your review, look and determine
22 whether or not this discharge either into Roper
23 Pond or later under Trenholm Road and into Cary
24 Lake was discharging into an impaired water body,
25 as defined by the Department?

1
2 1 A. I did not do an independent review.
3 2 Q. Have you done that since then?
4 3 A. Yes, we have, and I don't believe -- I don't
5 4 remember if it was that station, but I think
6 5 Forest Lake is the nearest one.
7 6 Q. Do you recall what that impairment was?
8 7 A. If anything in Forest lake, it was just a fish
9 8 advisor, mercury.
10 9 Q. So, you didn't have any reason to apply the TMDL
11 10 303-D level of scrutiny for this particular
12 11 project?
13 12 A. No, not from the stormwater construction
14 13 discharges, no.
15 14 Q. None of the -- and I use the word "pollutant"
16 15 because that's what's referred to as the
17 16 discharge or sediment from stormwater. None of
18 17 those pollutants were of concern in connection
19 18 with any known impairment where this water
20 19 project discharged?
21 20 A. No, not from stormwater construction runoff.
22 21 Q. Water quality -- if it's determined that some
23 22 inquiry into water quality is appropriate, is
24 23 there an issue from the Department's standpoint
25 24 with respect to whether or not this particular
26 25 project as defined in the SWPPP and approved by
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2 1 the Department and permitted under the General
3 2 Permit would contravene water quality standards?
4 3 A. No, there's not. I think the General Permit
5 4 specifically says that a SWPPP designed and
6 5 implemented is considered to be in compliance
7 6 with state water quality standards, and that's
8 7 stated in -- let me find that one. It's actually
9 8 stated in the General Permit itself, and if
10 9 you'll allow me to find that section. I'm
11 10 finding it difficult to find right now. It's
12 11 Section 4.4, and it even goes into "After
13 12 authorization" which is -- it says, "You must
14 13 select, install and implement and maintain at
15 14 your construction site -- construction site BMP's
16 15 at your construction site, but minimize
17 16 pollutants and the discharges as necessary to
18 17 meet applicable water quality standards. In
19 18 general, your SWPPP developed, implemented and
20 19 updated consistent with Part III is considered as
21 20 stringent, as necessary, to assure that your
22 21 discharges do not cause or contribute to a
23 22 violation of applicable water quality standards."
24 23 That's from the permit.

25 24 Q. So, if you do what you said you were going to do,
26 25 and you're deemed to have done what you needed to
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1 do to maintain water quality standards?
2 A. That's correct.
3 Q. A violation could contravene water quality
4 standards?
5 A. Yes.
6 Q. But everybody is expected to comply, not violate
7 the permit, right?
8 A. No. We assume everybody is going to do what
9 they're supposed to do, maintain their SWPPP,
10 update it, do their inspections and therefore
11 meet standards.
12 MR. LAVENDER: I don't have any
13 other questions.
14 THE COURT: I have one before I
15 turn you back over to Mr. Chandler. Is it
16 your contention and understanding that in
17 all the mass of regulations to protect the
18 environment and promulgated by the State of
19 South Carolina, that there's nothing that
20 would prevent a construction project from
21 going in and grubbing out the bottom of a
22 pond?
23 MS. STEWART: Nothing that I've
24 ever seen in any of the stormwater
25 regulations that I deal with on a

1
2 1 day-to-day basis, which are the 61-9 NPDES,
3 2 the State's Stormwater Regs which are
4 3 Regulation 72-300 or even in 6168, nothing
5 4 I've ever seen says they can't go in and
6 5 lower water level to use it for detention.

7 6 THE COURT: Irrespective of how
8 7 that's done?

9 8 MS. STEWART: Irrespective, yes,
10 9 that's correct.

11 10 THE COURT: Mr. Lavender, does
12 11 that raise any other question that you want
13 12 to ask her before you turn her loose?

14 13 MR. LAVENDER: No, sir, but I'm
15 14 sure Mr. Hightower or the Department might
16 15 have some questions of their own employee.

17 16 THE COURT: Yes. Mr. Hightower?

18 17 MR. HIGHTOWER: Thank you, Your
19 18 Honor. Your Honor, may I approach the
20 19 witness, please?

21 20 THE COURT: Certainly, yes, sir.

22 21 CROSS EXAMINATION BY MR. HIGHTOWER:

23 22 Q. Ms. Stewart, you testified that you reviewed the
24 23 application of Roper Pond that's at issue. Is
25 24 that correct?

26 25 A. That's correct.

1
2 1 Q. And you stated that you received documents,
3 2 including engineering drawings, from Roper Pond's
4 3 agent, BP Barber. Is that correct?
5 4 A. That's correct.
6 5 Q. I'm going to show you what is marked as
7 6 Respondent DHEC's Exhibit 1. Are you familiar
8 7 with this document?
9 8 A. Those are the approved plans for Roper Pond
10 9 Apartments.
11 10 Q. How do you know they're the approved plans?
12 11 A. The first page bears a stamp from DHEC with the
13 12 permit number, file number, issuance date and my
14 13 signature, which is standard on all approvals.
15 14 Q. And when you were asked by Mr. Lavender about the
16 15 plans, these are the plans you were talking
17 16 about?
18 17 A. That is correct.
19 18 Q. So, these plans would show the change in
20 19 elevation of the outfall and the locations of
21 20 buildings and other structures that are intended
22 21 for this project. Is that correct?
23 22 A. That is correct.
24 23 Q. I'm also going to show you what is marked as
25 24 Respondent DHEC's Exhibit 2. Are you familiar
26 25 with that document?
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2 1 A. That is titled the "Stormwater Pollution
3 2 Prevention Plan for Roper Pond", yes.

4 3 Q. Have you reviewed that plan?

5 4 A. Yes.

6 5 Q. And is that the plan that you approved?

7 6 A. That's correct.

8 7 Q. And what is -- I believe Mr. Lavender asked you,
9 8 but just to make sure, what information is
10 9 typically contained within a SWPPP?

11 10 A. A SWPPP Book generally gives basic information
12 11 about the project. Much of what's required in
13 12 the General Permit is on the plans, location of
14 13 the BMP's, topography of the site, both existing
15 14 and proposed, locations of any wetlands, waters
16 15 of the state, design details for specific BMP's,
17 16 and there's a lot of standard notes, grassing and
18 17 seeding specifications to be used during the
19 18 project, location of BMP's.

20 19 Q. Is the Stormwater Pollution Prevention Plan, is
21 20 that the document that you said has to be located
22 21 on site?

23 22 A. Yes.

24 23 Q. And so, that tells the permittees' inspectors
25 24 what they're supposed to be looking at and what
26 25 they're supposed to be maintaining. Is that

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1
2 1 correct?
3 2 A. It shows the contractors what they're supposed to
4 3 install, and then it shows the inspectors what
5 4 they're -- to compare what's in the field to
6 5 what's on the plan. So, it's their basis for
7 6 comparison.
8 7 Q. Okay. I'm going to show you what's marked as
9 8 Respondent DHEC's Exhibit 3. Are you familiar
10 9 with that document?
11 10 A. That is our approval letter for coverage under
12 11 the Construction General Permit.
13 12 Q. When you say "our approval letter", are you
14 13 referring to the approval letter that you issued
15 14 to the Respondent, Roper Pond, LLC?
16 15 A. Yes, DHEC's.
17 16 Q. And I believe you testified earlier in response
18 17 to Mr. Lavender's questions that that letter
19 18 explains what a qualified person for inspection
20 19 is. Is that correct? I'm specifically looking
21 20 at the first page.
22 21 A. Yes. And in the second paragraph, it outlines
23 22 who, and it lists five different individuals or
24 23 groups of individuals that are, by the General
25 24 Permit, deemed qualified to do sediment and
26 25 erosion control inspections.
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1 Q. And those persons have to take a course to
2 actually become certified. Is that correct?
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4 A. If they're not a Professional Engineer, Landscape
5 Architect or Land Surveyor, they are required --
6 or not an individual that works directly under
7 one of those, they are required to take a course
8 and to pass an exam.
9
10 Q. In addition to your Professional Engineer's
11 License, have you taken such courses?
12
13 A. I have taken the inspector course, yes, to
14 become certified.
15
16 Q. And based on your knowledge of being a
17 Professional Engineer and having basically your
18 entire working experience in stormwater
19 structures, prevention plans and reviewing, would
20 you say that the course would provide someone who
21 is not as well qualified as you with knowledge
22 sufficient to implement that SWPPP?
23
24 A. Yes.

25 MR. HIGHTOWER: At this time, Your
26 Honor, the Department would move that
27 Respondent DHEC's Exhibits 1, 2 and 3 be
28 admitted into evidence.

THE COURT: Without objection,
Respondent DHEC's 1, 2 and 3 admitted.

1
2 1 MR. HIGHTOWER: No further
3 2 questions, Your Honor.

4 3 THE COURT: I suggest that we
5 4 break for lunch now. We've reached the,
6 5 noon hour. Then we'll let Mr. Chandler
7 6 take up after lunch.
8 7 (Whereupon, a lunch break was taken from 12:00
9 8 noon to 1:15 p.m.)

10 9 THE COURT: Mr. Chandler?

11 10 MR. CHANDLER: Thank you, Your
12 11 Honor.

13 12 REDIRECT EXAMINATION BY MR. CHANDLER:

14 13 Q. Ms. Stewart, in terms of the number of permits
15 14 that you have to issue in any given year, have
16 15 you got any estimate of how many permits you have
17 16 that represent projects that are under
18 17 construction at any one time?

19 18 A. I don't know that we have an estimate of under
20 19 one time. I do know the last time that I ran the
21 20 numbers permitted since this permit went into
22 21 effect, which was probably in the last six
23 22 months, we had issued over 3,000 coverages under
24 23 the Construction General Permit since September
25 24 of '06.

26 25 Q. And how many inspectors do you have?
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2 1 A. I don't know those specific numbers. We have
3 2 them located throughout the state in regional
4 3 offices and a couple in the Bureau of Water.
5 4 Q. Do you have any idea of how many projects each
6 5 inspector has to be responsible for?
7 6 A. I don't have any idea of specific numbers, not to
8 7 cite.
9 8 Q. Now, essentially, if I understood right, all of
10 9 the permits that you issued for construction
11 10 activities, large and small, are covered by this
12 11 general permit?
13 12 A. That is correct.
14 13 Q. And I think you said that very rarely, if ever,
15 14 that you go into an individual permit?
16 15 A. Since my time at DHEC, we have not issued an
17 16 individual permit for a construction site in five
18 17 years.
19 18 Q. And these approvals under the General Permit,
20 19 they do get appealed sometime. This isn't the
21 20 first one you've had, is it?
22 21 A. It's the first one I've had that's gone to --
23 22 I've had a couple to be appealed that have either
24 23 been settled or dropped, but only two or three of
25 24 the 500 that I've issued.
26 25 Q. They get appealed, just not all of them go to
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1 trial?

2 A. This is the first one.

3 Q. Now, this particular project, you don't do an

4 individual review of all of them that come from

5 something like Richland County, but you do pick

6 out some?

7 A. We do. Our permitting engineers have some based

8 on random selection and some based on other water

9 quality concerns that they can select to review.

10 Q. And despite the fact that this project had

11 already been reviewed by Richland County, you

12 still had a few deficiencies that had to be

13 corrected?

14 A. Yes, I did.

15 Q. Now, in terms of water quantity control, is the

16 pond going to be part of the quantity control

17 system?

18 A. It is going to be part of the quantity control

19 system, yes.

20 Q. And so, is the pond going to have a greater

21 volume of discharge after development than it's

22 been having before the development?

23 A. Volume, probably. Rate of discharge, which is

24 what we regulate, no, it should not, not for the

25 two and ten year storm event.

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2 1 Q. And when you talk about that, you're really
3 2 talking about pre and post construction peak
4 3 flow?
5 4 A. Peak flow rates.
6 5 Q. The overall volume represented by the bell curve
7 6 or as it comes up to its peak and goes down is
8 7 going to be greater?
9 8 A. It's going to be greater, but we don't regulate
10 9 volume.
11 10 Q. Now, the permitting program you run is for
12 11 disturbances on land?
13 12 A. That's correct.
14 13 Q. And you don't regulate the disturbances within
15 14 the waters of the state or the waters of the
16 15 United States?
17 16 A. Not my permitting program.
18 17 Q. But under the program, you do run -- in order to
19 18 get coverage under that General Permit, an
20 19 applicant must meet all the requirements that are
21 20 set forth in that permit?
22 21 A. That's correct.
23 22 Q. And that's what your review is, to check off to
24 23 see whether they do that?
25 24 A. That's correct.
26 25 Q. And they must meet the requirements that are set
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2 1 out in the Stormwater Section of Regulation of
3 2 61-9?
4 3 A. That's correct.
5 4 Q. And they've got to meet the requirements of the
6 5 regulations that are set forth like 72-307?
7 6 A. That specific design of standards of the State
8 7 Regs.
9 8 Q. Now, when you talked a little bit earlier about
10 9 permit requirements for excavation of this pond,
11 10 you weren't speaking for the entire Department of
12 11 Health and Environmental Control, were you?
13 12 A. No. I was speaking from my permitting program.
14 13 Q. And so, as to whether there is some other permit
15 14 or certification or other approval, that's
16 15 something that's just outside of your scope,
17 16 correct?
18 17 A. That's correct.
19 18 Q. Now, in this case, you had some questions about
20 19 whether they were covered for work on the pond by
21 20 the CORPS permit --
22 21 A. Yes.
23 22 Q. -- because you needed to check that off, didn't
24 23 you?
25 24 A. That's correct.
26 25 Q. And they told you it was, and so you assumed that
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1 was correct, and that was part of your decision?

2 A. That was part of my decision, that's correct.

3 Q. So, once you got that, you didn't go into those

4 assessments, because that was beyond the bounds

5 of your particular permit?

6 A. That's another permitting area, yes.

7 Q. And so, as a result of that, you don't know how

8 the excavation of this pond might affect

9 sedimentation within the pond itself, do you?

10 A. No.

11 Q. And you don't know what kind of controls or Best

12 Management Practices might be used in the

13 excavation of this pond, do you?

14 A. I don't know what typically are used when they do

15 that type of work.

16 Q. And you don't know what kind of discharge

17 structure they might construct within this area

18 when they do the work on the pond, either, do

19 you?

20 A. No.

21 Q. And you don't know what they're going to do with

22 the dredge spoil, either, do you?

23 A. If it's during -- not if it's done outside -- if

24 it's going along with the -- I guess alongside

25 activity of the Construction General Permit, we

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1 would -- as with anything, they just need to make
2 sure it's maintained and put in upland areas and
3 protected, like soil stock piles on a regular
4 construction site.
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6 Q. Is there anything in your permit that addresses
7 that specifically with regard to this pond?
8 A. No.
9 Q. And you haven't done an assessment, so you don't
10 know how this excavation might affect the aquatic
11 fauna and flora within this pond, do you?
12 A. I have not. I don't know.
13 Q. And you don't know how the lowering of the water
14 level in this pond might affect the wetlands that
15 are upstream from the pond, either, do you?
16 A. I do not.
17 MR. CHANDLER: Thank you.
18 THE COURT: Mr. Lavender?
19 MR. LAVENDER: I just have one
20 question, Your Honor.
21 RECROSS EXAMINATION BY MR. LAVENDER:
22 Q. On the issue of water quality, Ms. Stewart, I
23 think you were asked by counsel for the
24 Petitioners early on about this, and you were
25 again just now, but didn't, in fact, your review
26 of the SWPPP and in particular the BMP's that

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2 1 were employed to trap sediment before it entered
3 2 Roper Pond address water quality? I mean, aren't
4 3 those there to address pollutants, which sediment
5 4 is a pollutant, and pollutants entering Roper
6 5 Pond would be a water quality issue, right?
7 6 A. Just like with any other site, we're looking at
8 7 -- it's got to be -- BMP's have to be
9 8 appropriately sized before they discharge, yes.
10 9 Q. And those BMP's are actually reviewed by you to
11 10 ensure that they don't impair water quality in
12 11 Roper Pond, in this particular case?
13 12 A. Yes.
14 13 THE COURT: Mr. Hightower?
15 14 MR. HIGHTOWER: No questions, Your
16 15 Honor.
17 16 MR. CHANDLER: Just one brief
18 17 follow-up.
19 18 REDIRECT EXAMINATION BY MR. CHANDLER:
20 19 Q. And all those BMP's are designed to deal with
21 20 what's coming off the construction on the land
22 21 itself?
23 22 A. That's correct.
24 23 MR. CHANDLER: Thank you.
25 24 THE COURT: You may step down.
26 25 Thank you.
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2 1 MR. LAVENDER: Your Honor, just if
3 2 I might note that we've identified Ms.
4 3 Stewart as a witness for us, so we would
5 4 at least like to reserve the right to call
6 5 her again if necessary.

7 6 THE COURT: Yes, sir.

8 7 Next witness, Mr. Chandler.

9 8 MR. CHANDLER: Your Honor, before
10 9 I call the next witness, I want to offer
11 10 into evidence the 30(b)(6) deposition
12 11 of Roper Pond, LLC. The witness they
13 12 designated was Joseph Walker, II.
14 13 Yesterday, we sent around a designation of
15 14 specific pages and lines within this
16 15 deposition, and if I could find a copy of
17 16 that on my desk -- it outlines the specific
18 17 pages and lines that we actually want to
19 18 offer into evidence. Now, we have not
20 19 received the original of that deposition
21 20 yet. The deposition was taken not that
22 21 long ago. I have a copy of it. I've also
23 22 got an electronic copy so that I can
24 23 reproduce another transcript for my own
25 24 use, and so I don't mind marking the copy
26 25 that I have. I've talked to Mr. Lavender.

1 100
2 1 I don't think I've talked to Mr. Hightower
3 2 about this, but subject to anything else,
4 3 what I would like -- if I could just find
5 4 that -- here it is. What we propose is to
6 5 offer Pages 1, 2 and 3, all of it, then
7 6 Lines 1 through 9 in Exhibit 1 from Page 4,
8 7 Page 9, Lines 5 through 25, all of Pages
9 8 10 through 14, and Exhibits 2 and 3 to the
10 9 deposition, Page 15, Lines 1 through 21,
11 10 Page 21, Lines 20 to 25, Page 22, Line 1.
12 11 And I would -- I guess just listing of the
13 12 excerpts that we have, we could perhaps
14 13 attach it to the deposition and make it
15 14 part of this exhibit, as well, so that we
16 15 have that specified. I don't have a
17 16 redacted version of this in which I've
18 17 taken out the stuff that we're not
19 18 proposing.

20 19 THE COURT: Mr. Lavender?

21 20 MR. LAVENDER: No objection, Your
22 21 Honor. I think Mr. Chandler and I both
23 22 face the problem of the reporter not having
24 23 gotten to us the original deposition
25 24 transcript, and we spoke about this, and I
26 25 think Mr. Chandler has indicated to the

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2 extent that we don't have the original
3 transcript of his expert, but we don't have
4 electronic copies of that, too. So, we
5 have no objection.

6 MR. HIGHTOWER: No objection.

7 THE COURT: With that being said,
8 will it necessary for me to hold the record
9 open to get a copy of the original?

10 MR. CHANDLER: I mean, we can
11 always substitute that original at a later
12 date, if that's acceptable.

13 MR. LAVENDER: We can do that.

14 THE COURT: As long as you two
15 agree on it, then ...

16 MR. LAVENDER: I don't we have a
17 problem. We agree -- I don't know that
18 yours is read and signed yet, and I think
19 we need to hold it open, and to the extent
20 that we're all comfortable closing the
21 record on reading and signing, because I
22 don't think that's been done, we have no
23 objection to proceeding with the transcript
24 as we have it.

25 THE COURT: Very well. If we
26 hadn't received it by the close of business
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2 1 tomorrow, we'll hold the record open to
3 2 receive it. Let me deal with that a little
4 3 bit further, though. As to those specific
5 4 lines he -- the pages and lines he's
6 5 mentioned, you have no objection to that?
7 6 MR. LAVENDER: No, sir, Your
8 7 Honor.
9 8 THE COURT: Thank you. Then it's
10 9 so admitted.
11 10 (30(b)(6) Deposition marked as Petitioner's
12 11 Exhibit Number 26 for identification.)
13 12 MR. CHANDLER: In order to make
14 13 the record flow, I would also -- well, the
15 14 exhibits that were included with that
16 15 deposition as Exhibits 1, 2 and 3 are
17 16 what is in the package that we have marked
18 17 1, 4 and 5 of the pre-marked exhibits that
19 18 we had. I did a little bit of duplication,
20 19 so they're in that book as 1, 4 and 5, and
21 20 for ease of reference at any time in the
22 21 future, I would like to just put these in
23 22 as separate exhibits with those numbers, as
24 23 well. They're already attached to the
25 24 deposition, and I have a little bit of
26 25 duplication, but it's not that much.
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2 1 THE COURT: Mr. Lavender:
3 2 MR. LAVENDER: No, sir, I don't
4 3 have any objection.
5 4 THE COURT: Mr. Hightower?
6 5 MR. HIGHTOWER: No problem, Your
7 6 Honor.
8 7 THE COURT: Without objection,
9 8 Petitioner's 1, 4 and 5 admitted without
10 9 objection.
11 10 MR. CHANDLER: With that, the
12 11 Petitioners would call Mr. Charles
13 12 Hightower to the stand.
14 13 (CHARLES HIGHTOWER, having been duly sworn,
15 14 testified as follows:)
16 15 DIRECT EXAMINATION BY MR. CHANDLER:
17 16 Q. Good afternoon. Give the court reporter your
18 17 full name?
19 18 A. Charles Wesley Hightower.
20 19 Q. And where are you employed?
21 20 A. The South Carolina Department of Health and
22 21 Environmental Control.
23 22 Q. And what's your position?
24 23 A. I'm the Section Manager of the 401 Wetlands
25 24 Section.
26 25 Q. And in that position, you are responsible for all
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1 of the 401 work quality certifications issued by
2 the Department?
3 A. Yes, sir.
4 Q. And you also handle the Navigable Waters
5 Permitting Program?
6 A. Yes, sir, that's correct.
7 Q. How long have you had that position?
8 A. I've had that position since November of 2007.
9 Q. Now, in your work at DHEC, have you had
10 responsibility for an application for an approval
11 requested by a company known as Roper Pond, LLC
12 with regard to a Nationwide permit?
13 A. Yes, sir.
14 Q. And what specifically was Roper Pond, LLC
15 applying for permission to do?
16 A. They were applying for permission to fill .075
17 acres of federally jurisdictional wetlands.
18 Q. Were they asking to do anything else?
19 A. The original letter that we acted on, that was
20 the only thing in there that they were asking for
21 authorization.
22 Q. Now, I've got a document that has been marked --
23 a two page document that's been marked as
24 Petitioner's Exhibit Number 9. Is this something
25 you've seen before?

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2 1 A. Yes, sir. It's a joint Federal and State
3 2 application for activities -- Federal waters of
4 3 the US or critical areas of the State of South
5 4 Carolina.
6 5 Q. And that's the request that was submitted for the
7 6 filling of the .075 acres, or at least a part of
8 7 the form that has to be filled out?
9 8 A. Yes, sir, I assume so. These are submitted to
10 9 the Army CORPS of Engineers.
11 10 MR. CHANDLER: We would offer
12 11 Petitioner's Exhibit 9 into the record.
13 12 MR. LAVENDER: I guess the
14 13 question is, is that the entirety of the
15 14 document?
16 15 MR. CHANDLER: It's probably not,
17 16 but we've got another exhibit we're getting
18 17 ready admit that would have the drawings
19 18 and things.
20 19 THE COURT: Mr. Hightower, none
21 20 from you?
22 21 MR. HIGHTOWER: No objection, Your
23 22 Honor.
24 23 THE COURT: Without objection,
25 24 Petitioner's 9 admitted into evidence.
26 25 Q. Now, from Hightower, in addition to the document
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2 1 that we've marked as Petitioner's Exhibit Number
3 2 9, did your section of DHEC receive this document
4 3 that we've marked as Petitioner's Exhibit 10?
5 4 A. Yes, sir.
6 5 Q. And what is that document?
7 6 A. It's a Pre-Construction Notification from the
8 7 Department of Army CORPS of Engineers.
9 8 Q. And what's the date on that?
10 9 A. It's dated September 9, 2008.
11 10 Q. All right. And what Nationwide permit does it
12 11 specify from the CORPS of Engineers?
13 12 A. Army Nationwide Permit Number 39.
14 13 MR. CHANDLER: We would offer this
15 14 document into evidence as Petitioner's
16 15 Exhibit 10.
17 16 THE COURT: Mr. Hightower?
18 17 MR. HIGHTOWER: No objection, Your
19 18 Honor.
20 19 THE COURT: Without objection,
21 20 Petitioner's 10 admitted into evidence.
22 21 Q. Mr. Hightower, do you see a paragraph numbered
23 22 "Number 1" at the bottom of the first page that
24 23 appears to be in bold print in that letter?
25 24 A. Yes, sir.
26 25 Q. Could you read that for me?
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2 1 A. "Prior to beginning the authorized work, the
3 2 permittee must obtain and provide the CORPS with
4 3 a copy of all appropriate state certifications
5 4 and/or authorizations, i.e. 401 Water Quality
6 5 Certifications, Coastal Zone management
7 6 consistency of determination, State Navigable
8 7 Waters Permit. If the permittee fails to obtain
9 8 his necessary state certification and/or
10 9 authorizations prior to beginning work, this
11 10 would be considered a willful and knowing
12 11 violation of the Clean Water Act, and appropriate
13 12 forceful action will be taken."
14 13 Q. Now, attached to this document are several sheets
15 14 that appear to be drawings starting with the
16 15 fourth page of this document. Have you got those
17 16 in front of you?
18 17 A. Yes, sir. Start with the fourth page?
19 18 Q. Yes, sir. There's a page numbered Page 1 of 6
20 19 that's a location map.
21 20 A. Yes, sir.
22 21 Q. And that just shows where the project is, right?
23 22 A. Page 4 of 6?
24 23 Q. 1 of 6.
25 24 A. 1 of 6. I'm sorry. That's correct.
26 25 Q. And the next page shows some circles that are
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1 labeled with things, "Wetland Impact 1, Wetland
2 Impact 2 and Wetland Avoidance Area". Is that
3 correct?
4 A. Yes, sir.
5 Q. And so, then we've got on the next page ---
6 MR. LAVENDER: Your Honor, if I
7 might ask, it appears that the copy we've
8 got from counsel does not have Page 2 of 6
9 in what I'm looking at. I don't know
10 about his.
11 A. I apologize. Mine does not have 2 of 6, either.
12 MR. HIGHTOWER: Neither does the
13 Department's.
14 MR. CHANDLER: That must have been
15 a glitch in our copying process, Your
16 Honor.
17 THE COURT: Do you have an
18 original available?
19 MR. CHANDLER: The original would
20 be in the CORPS of Engineers' file. I
21 mean, the closest we've got to the original
22 would be the DHEC file. I don't know
23 whether it's in the court file.
24 THE COURT: Let's get everybody's
25 copies of it before we start talking

1
2 1 about it.

3 2 MR. CHANDLER: Okay. Sorry about
4 3 that, Your Honor. We tried to get them all
5 4 right, but it's a lot of documents.

6 5 THE COURT: I understand.

7 6 Q. Now that we have that page that's numbered as 2
8 7 of 6, it shows wetland impact areas and wetland
9 8 avoidance areas within circles. Is that right,
10 9 Mr. Hightower?

11 10 A. Yes, sir, that's correct.

12 11 Q. And then on the following page, it has a little
13 12 more detail of a Wetland Impact Number 1?

14 13 A. That's correct.

15 14 Q. And that wetland impact is going to be a fill of
16 15 that wetland, correct?

17 16 A. Yes.

18 17 Q. And then, Wetland Impact Number 2 is shown on
19 18 Page 4 of 6 on that exhibit, and again, that's a
20 19 fill, isn't it?

21 20 A. That's correct.

22 21 Q. Are there any other wetland impacts shown on this
23 22 package of drawings?

24 23 A. I don't see any here, sir.

25 24 Q. Do you recall receiving any other drawings
26 25 showing impacts other than what is depicted on
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1 these pages?

2 A. No, sir.

3 Q. Now, on that page that was marked 2 of 6, is

4 there anything shown on there about any impacts

5 to the pond?

6 A. No, sir.

7 Q. Now, did the Department receive a Wetland

8 Delineation on this property?

9 A. To be honest, I'm not sure that -- I don't know

10 the answer to that. I'd have to look in the

11 file. I don't recall.

12 Q. All right. Wouldn't you normally require a

13 Wetland Delineation if you were giving approval

14 under one of these Nationwide Permits that

15 requires a Pre-discharge Notification?

16 A. I would say yes, sir, most of the time, we would.

17 Q. And in fact, with the letter that was sent by

18 your section in response to this request back in

19 October of 2008, you attached a list of

20 Nationwide 401 and CZC General Conditions that

21 says that all NWP applications must be

22 accompanied by a CORPS verified Wetland

23 Delineation identifying all wetlands, doesn't it?

24 A. Yes, sir.

25 Q. And the letter that you approved it with that

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2 1 attachment, we've marked as Petitioner's 12. Is
3 2 that a copy of your approval letter?
4 3 A. Yes, sir.
5 4 Q. But you don't know whether you received a Wetland
6 5 Delineation or not?
7 6 A. I assume that we did. I can't say 100 percent.
8 7 MR. CHANDLER: We would offer
9 8 Petitioner's Exhibit 12 into evidence.
10 9 MR. LAVENDER: No objection.
11 10 MR. HIGHTOWER: No objection, Your
12 11 Honor.
13 12 THE COURT: Petitioner's 12
14 13 admitted into evidence without objection.
15 14 Q. Now, do you know whether you've ever seen
16 15 Petitioner's Exhibit 5 before?
17 16 A. I don't know that I've personally seen it.
18 17 Q. Do you know whether anybody in your Department or
19 18 your section has received that or reviewed it?
20 19 A. I can't say for sure.
21 20 Q. And Petitioner's Exhibit 4 which appears to be a
22 21 cover letter and documents requesting a Wetland
23 22 Delineation, do you know whether you or anybody
24 23 in your Department has ever seen that document
25 24 before?
26 25 A. I couldn't say for sure.
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2 1 Q. Now, Petitioner's Exhibit Number 4 included a
3 2 page that has a -- it's got a bate stamp at the
4 3 bottom of it, "RP0089". Have you ever seen that
5 4 before?
6 5 A. No, sir.
7 6 Q. That appears to be a Wetland Delineation Map,
8 7 doesn't it?
9 8 A. Yes, sir.
10 9 Q. And the wetlands that are delineated on that map
11 10 include the pond, don't they?
12 11 A. They do.
13 12 THE COURT: Well, now, we've been
14 13 talking about more than one pond here
15 14 today. I assume you're talking about the
16 15 pond in question that abuts North Trenholm
17 16 Road.
18 17 MR. CHANDLER: Yes, sir, the pond
19 18 known as either Roper Pond or the Lily Pad
20 19 Pond.
21 20 Q. That's accurate, isn't it, Mr. Hightower?
22 21 A. Yes, sir.
23 22 Q. Now, CORPS Nationwide Permits were last issued in
24 23 2007. Isn't that correct?
25 24 A. Yes, sir.
26 25 Q. And the purpose of the Nationwide Permits is to
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2 1 set out a list of specific types of projects that
3 2 either individually or cumulatively don't have a
4 3 large impact. Is that an accurate statement?
5 4 A. Have minimal impact, yes, sir.
6 5 Q. And in this case, what came to you was a proposal
7 6 for approval under Nationwide Number 39, these
8 7 two little fills of wetlands that total .075
9 8 acres. Is that correct?
10 9 A. The provisional letter we got from the Army CORPS
11 10 of Engineers was the authorization to fill .075
12 11 acres.
13 12 Q. Now, those were the only impacts you looked at.
14 13 Isn't that correct?
15 14 A. Yes, sir.
16 15 Q. And when the CORPS issued these Nationwide
17 16 Permits in 2007, your section of the Department
18 17 of Health and Environmental Control also issued a
19 18 certification decision on those Nationwide
20 19 Permits, didn't they?
21 20 A. Yes, sir.
22 21 Q. And when you issued that certification in 2007,
23 22 you were only certifying the impacts specifically
24 23 listed in those Nationwide Permits, each
25 24 individual one. Isn't that correct?
26 25 A. Can you rephrase the question? I'm sorry. Ask
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1 it again. I'm sorry.

2 Q. Well, when the Department issued a certification

3 of the Nationwide Permits, you went through them

4 one by one and looked at Nationwide Number 1, and

5 you either certified it or you denied it, right?

6 A. We either certified, denied it or certified it

7 with conditions.

8 Q. And you also put some specific general conditions

9 on all of the Nationwide Permits, didn't you?

10 A. We put some general conditions on all the

11 Nationwide Permits.

12 Q. And the public notice that went out to the public

13 when the Department was taking that action said

14 "We're only approving these impacts and these

15 impacts alone", didn't it?

16 A. That's correct.

17 Q. And so, if a project had impacts that went beyond

18 one of those Nationwide Permits, you weren't

19 certifying those impacts, were you?

20 A. Say that again.

21 Q. If the project had wetland impacts that went

22 beyond what was narrowly defined in each of those

23 Nationwide Permits, you were not certifying those

24 additional impacts?

25 A. If an activity was going to have additional 404

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2 1 permits requiring 401 certification, we typically
3 2 would not issue a Nationwide General Permit for
4 3 an individual activity.
5 4 Q. Now, some of the Nationwide Permits require a
6 5 Pre-discharge Notification, don't they?
7 6 A. Pre-Construction, yes, sir.
8 7 Q. And what does that mean?
9 8 A. It means that they have notified the CORPS before
10 9 they begin the -- as far as I know, they require
11 10 -- that's a CORPS of Engineers requirement. They
12 11 submit PCN to them as part of that Nationwide
13 12 Permit.
14 13 THE COURT: What is a PCN?
15 14 MR. HIGHTOWER: A Pre-Construction
16 15 Notification.
17 16 Q. On some other types of Nationwide Permits, all
18 17 you have to do is just go do the work. Isn't
19 18 that right?
20 19 A. That's correct.
21 20 Q. But some you have to do a Pre-Construction
22 21 Notification which the CORPS looks at to see
23 22 whether it really does meet the requirements of
24 23 that Nationwide Permit?
25 24 A. I believe that's correct. That's an Army CORPS
26 25 of Engineers' requirement.
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2 1 Q. And in this particular case, the only impacts
3 2 that approval was asked for was for the fill of
4 3 .075 acres of wetlands?
5 4 A. The provisional letter or Pre-Construction
6 5 Notificaiton that I got from the CORPS was to
7 6 authorize .075 acres.
8 7 Q. Now, at the time your section at the Department
9 8 got this notification from the CORPS of
10 9 Engineers, you got that letter from the CORPS
11 10 that we marked as Exhibit 10. Is that right?
12 11 A. That's correct.
13 12 Q. And it had that paragraph in bold print that we
14 13 read a minute ago?
15 14 A. That's correct.
16 15 Q. Now, what does Nationwide Permit Number 39 deal
17 16 with?
18 17 A. Nationwide Permit Number 39 is for commercial and
19 18 institutional developments.
20 19 Q. But that's not what was proposed on this site,
21 20 was it?
22 21 A. I'm not sure I know how to answer that question.
23 22 I know -- if you're asking me, did the CORPS
24 23 re-issue their Nationwide, they reissued it under
25 24 Nationwide 29 after relooking at it again.
26 25 Q. And when did they do that?
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2 1 A. I'm not sure of the date of that letter.
3 2 Q. Did you receive a copy of the notice from the
4 3 CORPS on that second one, Number 29?
5 4 A. I believe we did, yes, sir.
6 5 Q. You did?
7 6 A. Yes, sir, I believe we did.
8 7 Q. Did you issue another decision?
9 8 A. I'm sorry. Can you rephrase the question?
10 9 Q. Did you receive a letter from the CORPS approving
11 10 this project under Nationwide 29?
12 11 A. We received a provisional letter on it.
13 12 Q. And did you issue another decision?
14 13 A. We did not issue another -- to my knowledge, we
15 14 did not issue another authorization letter. In
16 15 hindsight, we probably should have issued another
17 16 letter. There's nothing in our general permit
18 17 that requires that we issue an authorization
19 18 letter. We probably should have, but like I
20 19 said, there's no requirement that we do that.
21 20 Q. Did you issue any kind of public notice either
22 21 when you got the Nationwide 39 or the Number 29
23 22 that you had these projects in your section and
24 23 were reviewing them?
25 24 A. No, sir. There's no requirement for public
26 25 notice. We public noticed our certification of
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2 1 these Nationwide Permits for 2007, stated just
3 2 what you said before, that we were authorizing
4 3 these activities at minimal individual or
5 4 cumulative impacts. We put those out on public
6 5 notice, and they were subsequently certified on,
7 6 I believe, May 11th, 2007.

8 7 Q. And that public notate and the certification that
9 8 went with that public notice was limited just to
10 9 the specific fill authorized by those particular
11 10 Nationwide Permits. Isn't that correct?

12 11 A. Yes, sir.

13 12 Q. Now, the 401 Program operates under a set of
14 13 regulations that are codified as Regulation
15 14 61-101. Isn't that correct?

16 15 A. Yes, sir.

17 16 Q. And under those regulations, you are required to
18 17 assess all of the water quality impacts of a
19 18 project, aren't you?

20 19 A. Yes, sir.

21 20 Q. Now, you're also to determine whether or not
22 21 there are feasible alternatives?

23 22 A. Well, again, you're going back to an individual
24 23 permit. We reviewed -- when we certified these
25 24 Nationwides, we certified them in accordance with
26 25 61-101, and we put it out on public notice that

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2 1 we were going to issue coverage under a
3 2 Nationwide General Permit for these activities
4 3 because they had minimal individual or cumulative
5 4 impacts. So, we certified them and said that
6 5 that's what we certified, under 61-101.
7 6 Q. Well, let me ask you this. Did the property
8 7 owners' engineers send you a set of plans either
9 8 this big or a smaller set at the time?
10 9 A. Yes, sir, I believe they did.
11 10 Q. And did these plans show that they planned to
12 11 change the water level and perhaps do some
13 12 excavation in the pond?
14 13 A. I believe it did.
15 14 Q. And you've seen on that Wetland Delineation that
16 15 the pond had been delineated as a wetland?
17 16 A. That's correct.
18 17 Q. So, they were going to have some impacts on that
19 18 pond, weren't they?
20 19 A. Well, they were going to excavate -- they were
21 20 going to excavate the pond. Again, I don't issue
22 21 permits, Mr. Chandler. I issue certifications.
23 22 Subsequently, I double checked with the Army
24 23 CORPS of Engineers ---
25 24 Q. Well, don't tell us what the CORPS of Engineers
26 25 said, Mr. Hightower.
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1 A. Okay. I did not issue a certification for any
2 activity in the Roper Pond.
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4 Q. Now, back 19 -- in 2007, when the Department put
5 out the public notice for the certification of
6 Nationwide 29 and Nationwide 39 and all the other
7 Nationwide Permits, did you say, "We're
8 certifying activities that will fill wetland and
9 excavate ponds"? Did any notice say that?
10
11 A. No, sir.
12
13 Q. But at the time this project came in, you knew
14 they were going to do more than just fill
15 wetlands, didn't you?
16
17 A. Not under Nationwide 29.
18
19 Q. Well, you were asked to certify -- well, let me
20 ask you this. When you get a project in for
21 individual certification, you look at all the
22 water quality impacts, whether they're fill or
23 excavation or whatever those impacts are, don't
24 you?
25
26 A. If they're requiring a 404 Permit for the
27 activity, we require 401 Certification.
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29 Q. And in that 401 Certification, you're going to
30 look at all the water quality impacts, and you
31 might go beyond the bounds of just what is in the
32 404 Permit in assessing those impacts, don't you?

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2 1 A. In assessing the impacts of that particular
3 2 activity, yes.
4 3 Q. And in fact, that's the stuff that I started
5 4 going through here. You'll look and see whether
6 5 there are feasible alternatives. You'll look at
7 6 all potential water quality of impacts of the
8 7 project, both direct and indirect over the life
9 8 of the project. Doesn't that, just what I just
10 9 read, come straight out of Regulation 61-101,
11 10 Subsection F?
12 11 A. If you don't mind, I'll turn there. You're
13 12 reading Subpart F, Part C?
14 13 Q. Yes, sir.
15 14 A. "Potential water quality impacts of a project,
16 15 both direct and indirect, over the life of the
17 16 project, including ..." -- and then it has four
18 17 subsets that it includes.
19 18 Q. And one of those subsets in there is the
20 19 "cumulative impacts of the proposed activity and
21 20 reasonably foreseeable similar activities of the
22 21 applicant and others". Pretty broad, isn't it?
23 22 A. It's pretty broad.
24 23 Q. Now, on occasion, your section gets a request for
25 24 the Department to sign off on a Nationwide Permit
26 25 that you decide to require a separate individual
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2 1 401 Certification, don't you?
3 2 A. Yes, sir, that's possible.
4 3 Q. And you have the discretion to require that,
5 4 don't you?
6 5 A. No, sir. I don't think I have the discretion. I
7 6 think if it doesn't meet one of the specific or
8 7 general conditions, then we're required to go get
9 8 an individual permit, but if it meets those
10 9 conditions, then I don't have the discretion to
11 10 put it out on an individual public notice.
12 11 Q. So, what if one includes -- if a project says
13 12 "Well, we want to fill .075 acres of wetlands,
14 13 and we want to excavate some other wetlands",
15 14 that's going beyond the fill authorized by the
16 15 Nationwide Permit, isn't it?
17 16 A. If the Army CORPS of Engineers sends me a letter,
18 17 and they tell me that's the only jurisdiction
19 18 impacts on the site, and it required a 401
20 19 Permit, that's the only impacts that I have to
21 20 certify through the 401.
22 21 Q. So, that's what you did in this case?
23 22 A. Yes, sir.
24 23 Q. You looked only at the fill and didn't look at
25 24 the excavation?
26 25 A. I certified .075 acres to be filled under
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1 Nationwide Permit 39 -- well, actually Nationwide
2 29.
3 Q. Did you assess the water quality impacts of
4 excavation of the pond?
5 A. No, sir, I did not.
6 Q. You didn't do that?
7 A. No, sir.
8 Q. You didn't look at what was going do be done with
9 the spoil?
10 A. No.
11 Q. And you didn't look at how they were going to
12 accomplish that work and what kind of Best
13 Management Practices or anything else that was
14 going do be done in excavating that pond, did
15 you?
16 A. No, sir.
17 Q. And you didn't look at how that was going to
18 affect that pond, did you?
19 A. No, sir.
20 Q. You didn't look and see how it was going to
21 affect the aquatic life in that pond, did you?
22 A. No, sir.
23 Q. And you didn't look at the impact that it would
24 have on existing and classified water usage, did
25 you?

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1 A. I did -- excavation does not require a 401
2 Certification.

3 Q. Well, how do you define "activity"? Don't you
4 define that broader than just the specific fill?

5 A. I don't know how you would describe an activity
6 -- if you're certifying an activity and the
7 activity is to fill .075 acres, I don't know how
8 you would say that that is not the activity that
9 you're certifying.

10 Q. Well, let's say they wanted to fill some other
11 wetlands, but they didn't list that on there, but
12 you knew that was part of their plans. Would you
13 say, "No, this doesn't qualify"?

14 A. If they were going to require a -- the intent is
15 that you don't piecemeal a project with
16 Nationwide Permits. If I knew that they were
17 going to require -- if the CORPS was going to
18 require a 404 Permit for those extra impacts, I
19 would not certify each one individually. I would
20 ask that they come in altogether as a group.

21 Q. So, is your position and your view of these rules
22 and these regulations that you are strictly
23 limited to just what the CORPS says they are
24 dealing with and you ignore any other water
25 quality impacts that may be on the table. Is

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1 that what you're saying?

2 A. No, sir. I'm saying that I look at water quality

3 impacts from the activity that I'm certifying.

4 Q. And in this case, that was .075 acres of fill?

5 A. That's correct, yes, sir.

6 Q. If the level of this pond is lowered by say three

7 feet, three-and-a-half feet, is it going to have

8 an impact on the wetlands upstream?

9 A. I couldn't answer that question.

10 Q. You don't know, but it's going to change the

11 hydrology in those wetlands, don't you think?

12 A. I don't know. I didn't review that.

13 Q. You don't know. You didn't look at that, did

14 you?

15 A. No, sir.

16 Q. But you knew that that's what they were planning

17 on doing?

18 A. Yes, sir.

19 Q. And that was going to be an impact possibly on

20 those upstream wetlands?

21 A. That activity did not require a Federal 404

22 Permit. Therefore, I had nothing to certify.

23 Q. But you do have your regulations that require

24 that you look comprehensively at the whole

25 project, doesn't it?

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1 A. Not when I've issued a Nationwide General Permit
2 that says that activity will have minimal
3 impacts. It's certified under that Nationwide.

4 Q. So, your position is that the laws create a
5 loophole that allows the pond to just slip
6 through the cracks?

7 A. I'm not saying that there's a loophole in the
8 law. I'm just simply telling you that because
9 only the CORPS of Engineers -- I don't issue --
10 again, I don't issue permits. I certify 404
11 Permits that are required by the Army CORPS of
12 Engineers. If the Army CORPS of Engineers
13 determines that they don't require a 404 Permit
14 for the excavation of that pond, then I cannot
15 assert a 401 Certification for a permit that I
16 don't have before me.

17 Q. Well, does only the CORPS of Engineers have to go
18 by Regulation 61-101?

19 A. No, sir.

20 Q. You're the only one that has to do that, right?

21 A. And we did that when we issued these Nationwide
22 Permits or Nationwide 29.

23 Q. Did you assess the water quality impact of
24 lowering the pond?

25 A. No, sir. That was not the activity that was

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2 1 permitted under this Nationwide for this
3 2 activity.
4 3 Q. Do you know of anybody at DHEC who looked at the
5 4 impacts of lowering that pond?
6 5 A. No, sir, I don't.
7 6 Q. Do you know of any at DHEC, any in the Department
8 7 at DHEC that looked at the impacts of excavating
9 8 the pond?
10 9 A. No, sir, I don't.
11 10 Q. Have you ever been out to the pond?
12 11 A. No, sir, I have not.
13 12 Q. And you didn't analyze how it's going to affect
14 13 the physical, chemical and biological character
15 14 of that pond, did you?
16 15 A. No, sir. I had no permit for any activity in
17 16 that pond to certify.
18 17 Q. But you knew there was going to be activity?
19 18 A. Yes, sir.
20 19 Q. And you operated under the belief, right or
21 20 wrong, that that was outside your scope and that
22 21 you couldn't look at that. Is that right?
23 22 A. That's right. If the Army CORPS of Engineers
24 23 said that that activity is non-jurisdictional, I
25 24 don't have any regulatory authority under a 401
26 25 to have a permit before me to certify.
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2 1 Q. Show me what you had in your file when you issued
3 2 an approval that the CORPS of Engineers said that
4 3 pond was non-jurisdictional?
5 4 A. I never said the pond was non-jurisdictional.
6 5 Q. So, what did the CORPS tell you? Did the CORPS
7 6 come tell you, "We're looking at only this fill,
8 7 and don't look at the pond"?
9 8 A. It's my understanding that the CORPS does not
10 9 have the regulatory authority to require a 404
11 10 Permit for the dredging of that pond.
12 11 Q. Okay. But you have authority if somebody came in
13 12 with an individual permit to fill part of these
14 13 wetlands, if the overall activity they were going
15 14 to do was going to be at the building of a
16 15 apartment complex and they were going to excavate
17 16 a pond and an individual permit, you would have
18 17 authority to look at the impacts of that
19 18 excavation, wouldn't you?
20 19 A. I don't think so. I would look at it the same
21 20 way as a non-jurisdictional isolated wetland. We
22 21 have individual permits all the time that have
23 22 impacts to isolated Federally non-jurisdictional
24 23 wetlands, and again, I have no regulatory
25 24 authority over those.
26 25 Q. So, when does the assessment of all water quality
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2 1 impacts over the life of the project come into
3 2 play? How can this ever come into play if you're
4 3 required to limit your review strictly to how
5 4 they define it, and where does it say in here you
6 5 ignore the other quality impacts?
7 6 A. I don't -- it doesn't say that I ignore the water
8 7 quality impacts, but I don't consider the
9 8 excavation of this pond to be a water quality
10 9 impact of the Nationwide that was issued for .075
11 10 acres of fill.
12 11 Q. But there's no doubt when you got the notice on
13 12 Nationwide 29 that you didn't issue a new
14 13 approval letter, did you?
15 14 A. We did not issue a subsequent letter, no, sir.
16 15 Q. Even though you got another letter from the
17 16 CORPS?
18 17 A. That's right.
19 18 Q. Why not?
20 19 A. Like I said, I don't know why we didn't. In
21 20 hindsight, we probably should have, but again,
22 21 we're not required by the General Permit to send
23 22 out an authorization letter of any kind. And it
24 23 wouldn't have changed anything in the conditions
25 24 of both 39 or 29. It wouldn't have changed
26 25 anything as far as our certification.
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2 1 Q. But if you had issued that letter, you would have
3 2 had to send me a copy, wouldn't you, because we
4 3 had this case going at the time that came in
5 4 front of you, didn't you?

6 5 A. I don't know that I'm required to -- I don't know
7 6 that I'm required to send you a copy of ---

8 7 Q. Well, maybe your attorney would have been
9 8 required to send it to me. If you had written
10 9 out a letter, he would have had to send it to me
11 10 as an update to his document production, wouldn't
12 11 he?

13 12 A. I can't answer for my attorney. I don't know.

14 13 Q. But you didn't issue another approval. You
15 14 didn't do anything that would trigger the
16 15 possibility of another appeal, did you?

17 16 A. I did not issue another authorization letter.

18 17 Q. So, at this point, Roper Pond, LLC does not have
19 18 an authorization letter from DHEC regarding this
-20 19 project for Nationwide 29, does it?

21 20 A. No, sir, nor are they required to get an
22 21 authorization letter from DHEC. There's no
23 22 requirement of that General Permit that we
24 23 authorize in writing that they're granted
25 24 coverage.

26 25 Q. What does it say in that letter?

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2 1 A. It says that -- it does say -- it says that we've
3 2 looked at it, and we've concurred that they have
4 3 coverage, but it's not a requirement.
5 4 Q. But back in October, your Department wrote a
6 5 letter?
7 6 A. We did, yes, sir.
8 7 Q. And you did a review?
9 8 A. And we should have sent another letter subsequent
10 9 to that --
11 10 Q. But you haven't done it?
12 11 A. -- but we did not do it.
13 12 Q. And if you had sent a letter, there could have
14 13 been an appeal of that, couldn't there?
15 14 A. To be honest with you, Mr. Chandler, I didn't
16 15 know that coverage under a General Permit could
17 16 be appealed.
18 17 Q. Well, if there's a legal issue of whether or not
19 18 ---
20 19 A. I guess my answer to the question is, the phone
21 20 didn't ring in my mind that I was not sending
22 21 another letter in fear of an appeal. That had
23 22 nothing to do with it, or I never even gave that
24 23 a thought, because I didn't know that you could
25 24 appeal a Nationwide General Permit.
26 25 Q. What did you do with the letter from the CORPS
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2 1 when you got it?
3 2 A. I believe we put it in the file.
4 3 Q. Did you tell your attorney about it?
5 4 A. That, I can't answer. I don't remember.
6 5 Q. Just to make sure that I'm clear, nothing that
7 6 you have done nor any other section of DHEC that
8 7 you know of has specifically reviewed the impacts
9 8 of the pond nor issued an authorization for those
10 9 impacts?
11 10 A. I can't speak for other parts of the Department.
12 11 I can just -- but we did not review the impacts
13 12 or potential impacts or the activity of dredging
14 13 that pond.
15 14 MR. CHANDLER: Thank you, sir.
16 15 CROSS EXAMINATION BY MR. LAVENDER:
17 16 Q. Mr. Hightower, has the Department issued a 401
18 17 Certification for Nationwide Permit 39?
19 18 A. Yes, sir.
20 19 Q. Has the Department issued a 401 Certification for
21 20 Nationwide Permit 29?
22 21 A. Yes, sir.
23 22 Q. Do either of those -- did the Department include
24 23 conditions for each of those permits with its
25 24 certification? Do you have those?
26 25 A. Yes, sir.
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2 1 Q. I gather you brought something up there with you.
3 2 I figured you had a copy of what I had.
4 3 A. Yes, sir.
5 4 Q. Let's look at it.
6 5 A. Where are you starting?
7 6 Q. Let's start with 29, and we'll go numerically.
8 7 Is there any condition in your certification of
9 8 Nationwide Permit 29 that requires the applicant
10 9 to give you notice before they proceed under the
11 10 Nationwide Permit?
12 11 A. Not that I'm aware of.
13 12 Q. Okay. Is there any condition in there with
14 13 respect to the planned activities in this
15 14 particular project -- and we'll start with the
16 15 fill of .075 acres, three quarters of one-tenth
17 16 of one acre. Does that proposed fill in the two
18 17 areas that were noted in the application fall
19 18 within the confines of the conditions of your 401
20 19 Certification?
21 20 A. Yes, sir, it does.
22 21 Q. Having determined that, would an applicant need
23 22 to tell you that it does that, to proceed?
24 23 A. I don't think there's a requirement that they do
25 24 that. If they meet these conditions when we
26 25 certify this, only those conditions, the
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2 1 activities certify.
3 2 Q. Do you have Exhibit 12 which is your October 2nd,
4 3 2008 letter with respect to the 39. ?
5 4 A. Exhibit 12?
6 5 Q. Exhibit 12, October 2nd, '08. This is your
7 6 letter to BP Barber dated October 2nd.
8 7 A. Do I still have a copy of that?
9 8 Q. I don't know. I'm kind of boxed in, so I can't
10 9 tell you for sure.. I know Mr. Chandler admitted
11 10 it or showed it to you. Well, let me ask you to
12 11 take a look at this. Here's my copy. Can you
13 12 look at that and tell me if anywhere it says that
14 13 the Department is issuing a 401 Water Quality
15 14 Certification for the individual activity?
16 15 A. No, sir, it does not.
17 16 Q. Would it be fair to say then that this is simply
18 17 for the benefit of the applicant so that they
19 18 have some assurance that what they're planning to
20 19 do falls within the conditions of your permit of
21 20 your 401 Certification?
22 21 A. I would say that's exactly what it is.
23 22 Q. And the words in this letter -- and I'd like,
24 23 Your Honor, since it's only two sentences, if I
25 24 could just publish it. "South Carolina
26 25 Department of Health and Environmental Control
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2 1 has reviewed the above referenced project and
3 2 determined that the impacts will be minimal and
4 3 existing and classified uses will be maintained.
5 4 The proposed work is consistent with the 401
6 5 Water Quality Certification issued for Nationwide
7 6 Permit 39 on May 11, 2007, provided the applicant
8 7 adheres to all of the conditions of that
9 8 certification (See attached)". Now, again, when
10 9 you look at the conditions of Nationwide 39,
11 10 because I think you just looked at 29, are there
12 11 any conditions in Nationwide 39 that fall outside
13 12 the confines of the .075 acres of fill proposed
14 13 by the applicant?
15 14 A. No, sir.
16 15 Q. Now, again, is there any condition in Nationwide
17 16 39, 401 Certification that requires notification
18 17 to the Department?
19 18 A. No, sir.
20 19 Q. The Pre-Construction Notification to which you
21 20 referred earlier, is that a requirement of the
22 21 401 Certification or of the Nationwide Permit?
23 22 A. It's a requirement of the Nationwide Permit.
24 23 Q. Let's look at that, and that was Exhibit 10. Do
25 24 you have that one?
26 25 A. I do.
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2 1 Q. You do?
3 2 A. Yes, sir.
4 3 Q. And if you would, just publish the first two
5 4 sentences. This is a letter dated September 9th,
6 5 2008 to Mr. Whatley. Is that correct?
7 6 A. Yes, sir. "This letter is response to a
8 7 Pre-Construction Notification, PCN, dated May
9 8 5th, 2008, which was received on May 13th, 2008.
10 9 By submittal of the PCN, you requested
11 10 verification of a proposed project as authorized
12 11 by the Department of Army Nationwide Permit."
13 12 Q. So, are you familiar with the Nationwide Permits?
14 13 A. Yes, sir.
15 14 Q. Most all of them? You're familiar with 39?
16 15 A. Yes, sir.
17 16 Q. And you're familiar with 29?
18 17 A. Yes, sir.
19 18 Q. Is it your recollection that the .075 acres also
20 19 met the conditions of 29 and 39 in terms of the
21 20 number of acres of fill?
22 21 A. Right, in terms of the acres of fill.
23 22 Q. There's a question about whether it was supposed
24 23 to be 39 or 29?
25 24 A. Right.
26 25 Q. If you would, look at Exhibit Number 9. Do you
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2 1 have that one? It's a two page document.
3 2 A. I don't believe I was given Exhibit 9.
4 3 Q. I'll let you look at this one. Have you seen
5 4 that before -- or maybe Mr. Chandler asked you,
6 5 and you said you had not. Well, while you've got
7 6 it in your hand, let me just ask you if you're
8 7 familiar with that form?
9 8 A. Yes. It's a joint application with the Army
10 9 CORPS of Engineers and DHEC for Federal
11 10 Permitting.
12 11 Q. Is there anywhere on that application where it
13 12 indicates that the applicant is seeking
14 13 permission to proceed under any particular
15 14 Nationwide Permit?
16 15 A. I don't see where they did, no, sir.
17 16 Q. Is there anything on that application that
18 17 suggests to you that it doesn't describe the
19 18 project as you understand it, and looking
20 19 particularly in Sections 10, 11 and 12? I mean,
21 20 it describes the location, the directions to the
22 21 site in Exhibit 10, right?
23 22 A. Yes.
24 23 Q. And Section 11, is that still consistent with
25 24 what you understand the project -- the vertical
26 25 construction portion of the project, not the
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2 1 impacts or the fill impacts? It says "A multi
3 2 family housing development on a 12.75 acre site",
4 3 right?
5 4 A. Yes.
6 5 Q. And it talks about fill of jurisdictional areas
7 6 to buildings and sidewalks, right?
8 7 A. Yes, sir.
9 8 Q. Mr. Chandler kept asking you about excavating the
10 9 pond. Have you ever certified a 404 Permit for
11 10 excavating a private pond?
12 11 A. For excavating a private pond?
13 12 Q. Right.
14 13 A. Not to my knowledge.
15 14 Q. Are you familiar with any permitting by the
16 15 Department for excavating of a private pond?
17 16 A. Not to my knowledge, not for a private pond, no,
18 17 sir.
19 18 Q. Isn't there a distinction first of all between
20 19 wetlands and jurisdictional waters? Isn't one
21 20 inundated and one necessarily not? They're both
22 21 jurisdictional, right?
23 22 A. Well, yes, but I would not want to answer that
24 23 question, because I don't make jurisdictional
25 24 determinations.
26 25 Q. So, you don't make jurisdictional determinations?
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2 1 A. No, sir.
3 2 Q. Is there anything within your purview with
4 3 respect to the 401 Program that you know of that
5 4 requires your approval to excavate the pond?
6 5 A. No, sir.
7 6 Q. Now, with respect to telling you before they
8 7 undertake work at the site, aren't there
9 8 conditions in some of your 401 Certifications --
10 9 I think Mr. Chandler already asked you this --
11 10 that require notification to the Department
12 11 before proceeding under one or more of the
13 12 certifications of the 401?
14 13 A. Right.
15 14 Q. For example, under Nationwide 37, you're required
16 15 to submit a restoration mitigation plan. Do you
17 16 have that one?
18 17 A. Yes, sir. And even though on some of the other
19 18 ones, if you're impacting over a set amount,
20 19 you're to submit ---
21 20 Q. Over a tenth of an acre or 300 linear feet --
22 21 A. Right.
23 22 Q. -- you've got to provide mitigation -- you've
24 23 then got to come to the Department for an
25 24 individual ---
26 25 A. You've got to submit a Mitigation Plan.
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2 1 Q. -- authorization to proceed, including
3 2 mitigation?
4 3 A. Yes.
5 4 Q. Is that a condition of Nationwide 29 or 39?
6 5 A. Nationwide -- well, on Nationwide 29, if it's
7 6 over a tenth of an acre, you're required to
8 7 submit it, but only if it's over a tenth of an
9 8 acre. In this case ---
10 9 Q. That's 39?
11 10 A. It's 29.
12 11 Q. But 39 also requires that, then, does it not?
13 12 A. Right.
14 13 Q. These impacts, this fill, now, what's the
15 14 difference, if you know, between a 404 permit for
16 15 fill and a Section 10 Permit? Do you do 401
17 16 Certification for Section 10 Permits?
18 17 A. It's required to do a 401 Certification of a
19 18 Section 10 Permit.
20 19 Q. Do you know what that is?
21 20 A. Section 10 is Federal Navigable Water under
22 21 Section 10 of the Rivers and Harbors Act.
23 22 Q. Do you know whether Roper Pond is navigable water
24 23 under either South Carolina or US Navigable
25 24 water?
26 25 A. That is State Navigable water. It's not Section
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2 1 10 Navigable water.
3 2 Q. Would you hazard a guess whether it's a Section
4 3 10 Navigable water?
5 4 A. As I say, it's not a Section 10.
6 5 Q. So, it would not require a Section 10 Permit to
7 6 dredge?
8 7 A. That's correct.
9 8 Q. You know of no other state permit that would be
10 9 required to dredge, do you?
11 10 A. For this particular activity, no, sir.
12 11 Q. Or for this pond, to dredge this pond --
13 12 A. Not that I'm aware of.
14 13 Q. -- not the fill of .075 --
15 14 A. Right.
16 15 Q. -- but are you aware of any permit program in the
17 16 Department?
18 17 A. I'm not aware of any, no, sir.
19 18 Q. How long have you been with the Department?
20 19 A. I've been with the Department going on about 14
21 20 years.
22 21 Q. And you've worked in other program areas?
23 22 A. Yes.
24 23 Q. What's your background? What's your educational
25 24 background?
26 25 A. I have a BS in Biology from the University of
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2 1 South Carolina.
3 2 Q. Do you know whether the work has started at the
4 3 site?
5 4 A. I do not.
6 5 Q. But in the CORPS letter they issued on 39, the
7 6 reference down at the bottom about getting a 401
8 7 Certification, would that be necessary if the 401
9 8 -- if the activity has already been certified
10 9 under the General Permit? There's nothing else
11 10 required, right?
12 11 A. No, sir.
13 12 Q. And clearly, Nationwide Permit 29 has been issued
14 13 by the CORPS and certified by the Department?
15 14 A. It has.
16 15 Q. Nationwide 39 has been issued by the CORPS and
17 16 certified by the Department?
18 17 A. It has.
19 18 Q. Do you know why the CORPS wrote the second letter
20 19 changing it from 39 -- the coverage -- concurring
21 20 that the coverage should go under 29 instead of
22 21 39?
23 22 A. I think it was merely the semantics of
24 23 residential development versus
25 24 commercial/institutional for the type of
26 25 Nationwide.
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2 1 Q. But if an applicant submits the PCN, the
3 2 Pre-Construction Notification to the CORPS, and
4 3 the CORPS concurs, is any further action by the
5 4 Department required if the activity has already
6 5 -- if the General Permit, Nationwide Permit has
7 6 already been certified and no other conditions
8 7 apply? It does not require anything else from
9 8 you?
10 9 A. That's right. It's not a requirement that we
11 10 send any type of authorization.
12 11 Q. Do you know what incidental impacts are in
13 12 connection with excavations?
14 13 A. Incidental impacts? I think that's a term the
15 14 CORPS uses when they're evaluating.
16 15 Q. You're not familiar with that?
17 16 A. No. That's under their purview.
18 17 Q. You haven't had any dealings with that?
19 18 A. No.
20 19 MR. LAVENDER: Your Honor, I don't
21 20 think I have any other questions for Mr.
22 21 Hightower.
23 22 THE COURT: Mr. Hightower?
24 23 MR. HIGHTOWER: Thank you, Your
25 24 Honor.
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1 CROSS EXAMINATION BY MR. HIGHTOWER:
2 Q. Mr. Hightower, on direct, you were asked a
3 question concerning the CORPS' interpretation of
4 this project, and you stated that you had spoken
5 to the CORPS to double check. Do you remember
6 that?
7 A. Yes, sir.
8 Q. Without stating what the CORPS told you, based on
9 the information that you received from the CORPS,
10 do you still believe that the Department's
11 issuance of coverage under the Nationwide General
12 Permit 29 was proper?
13 MR. CHANDLER: I object, Your
14 Honor. He's assuming facts not in
15 evidence. He's asking this question to
16 speculate and give hearsay about what the
17 CORPS told him.
18 THE COURT: I think he's gotten
19 past the hearsay part of it and ...
20 MR. HIGHTOWER: It's just whether
21 or not he believes that -- based on
22 information he was told, whether or not he
23 still believes that the Department's
24 issuance of coverage under Nationwide
25 Permit 29 was still correct. That's not
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2 1 saying what he was told. It's just whether
3 2 or not he believes the Department needed to
4 3 take any other step.

5 4 MR. CHANDLER: But he's also
6 5 testified that he never issued that
7 6 coverage for 29.

8 7 MR. HIGHTOWER: Well, no. He
9 8 stated, if I remember correctly, that the
10 9 Department's letters tell you that it is
11 10 consistent with it. It does not -- the
12 11 certification is already out there. This
13 12 is not an issuance of an individual
14 13 certification. This is just telling you
15 14 that your project is covered by a
16 15 pre-existing certification. And while it
17 16 would be better for Roper Pond to have a
18 17 letter saying under Nationwide Permit 29,
19 18 that also might be consistent, the
20 19 Department, which is the party that would
21 20 be able to enforce this has already
22 21 determined that the 29 be -- that it's
23 22 consistent under 29, just like it was
24 23 consistent under 39, because there's no
25 24 difference between the certifications. And
26 25 so, I believe that without Mr. Hightower

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divulging the substance of his conversation
with the CORPS, he can state what he did
based upon that information. That's his
actions.

THE COURT: He was starting to say
what he did and to get around to what he
believes, so let him state what he did.

Q. Based on your conversation with the CORPS, what
actions, if any, did you take with regard to the
certification of this project under Nationwide
Permit 29?

A. There were no actions necessary.

Q. So, the Department hasn't done anything?

A. Right.

Q. Could you have reached a different conclusion
based on the information you received, or were
you already just locked into this because you
issued it as a 29?

A. I don't believe we were locked into anything.

Q. So, the Department could have taken other steps
if it had felt ...

A. Yes, sir.

Q. And the Department didn't?

A. Correct.

Q. Mr. Hightower, isn't it true that 61-101 states

1
2 1 that any applicant for a federal license or
3 2 permit to conduct any activity which during the
4 3 construction or operation may result in any
5 4 discharge to navigable water is required by
6 5 Federal Law to first obtain a Water Quality
7 6 Certification from the State?
8 7 A. That's correct.
9 8 Q. In this case, is there any discharge into
10 9 navigable waters?
11 10 A. No, sir.
12 11 Q. And I believe you stated in response to Mr.
13 12 Lavender's question that, under Federal Law,
14 13 Roper Pond is not a navigable water. Isn't that
15 14 correct?
16 15 A. It is not Section 10 navigable water.
17 16 Q. And it similarly is not a navigable water under
18 17 the State Navigable Waters Act?
19 18 A. It is not.
20 19 MR. HIGHTOWER: No further
21 20 questions.
22 21 THE COURT: Mr. Chandler,
23 22 redirect?
24 23 REDIRECT EXAMINATION BY MR. CHANDLER:
25 24 Q. Mr. Hightower, the CORPS of Engineers has
26 25 jurisdiction over these waters, don't they?
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1 A. Yes, sir, they do.

2 Q. They've got jurisdiction over the wetlands that

3 were involved in this certification and over the

4 pond, don't they?

5 A. I believe they are jurisdictional waters of the

6 US.

7 Q. Which means that they connect to navigable waters

8 and they have potential impacts on navigable

9 waters, don't they? You don't know, do you?

10 A. I don't know the answer to that question.

11 Q. You don't know. That's a question of Federal Law

12 which Mr. Hightower asked you and that I'm asking

13 you. You really don't know the answer to that,

14 do you?

15 THE COURT: Mr. Chandler, if

16 you'll ratchet it down just a little bit,

17 please, sir.

18 MR. CHANDLER: I'm sorry, Your

19 Honor.

20 Q. You don't really know these answers to these

21 questions about Federal Law, do you?

22 A. Rephrase the question. I know the Army CORPS of

23 Engineers has determined that this is not a

24 Section 10 navigable water.

25 Q. But they've determined that it is a water of the

1
2 1 United States?
3 2 A. Yes, sir. I believe that is the case.
4 3 Q. And it's connected to other waters of the United
5 4 States?
6 5 A. That, I can't answer.
7 6 Q. It's not an isolated water that is
8 7 non-jurisdictional?
9 8 A. It is a jurisdictional water.
10 9 Q. But you don't know how it got to be
11 10 jurisdictional?
12 11 A. I don't make jurisdictional determinations, no,
13 12 sir.
14 13 Q. Now, at the time the Nationwide permits were put
15 14 out on public notice by the CORPS of Engineers in
16 15 2006-2007, the CORPS said that "For 29 and 39,
17 16 we're going to require a Pre-Discharge
18 17 Notification", didn't they?
19 18 A. Again, I'm assuming they did. Again, I don't
20 19 know the Federal requirements. I know the State
21 20 requirements. I don't necessarily know the
22 21 Federal requirements.
23 22 Q. But I mean, in fact, in this case, Roper Pond
24 23 decided they needed to submit a Pre-discharge
25 24 Notification, didn't they?
26 25 A. They submitted a Pre-Construction Notification to
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1
2 1 the Army CORPS of Engineers.
3 2 Q. Another term for a Pre-discharge Notification?
4 3 A. Sir, I've never heard it termed that way.
5 4 Q. So, they're submitting a Pre-Construction
6 5 Notification, and that's in the actual Nationwide
7 6 Permit issued by the CORPS of Engineers, totally
8 7 separate and apart from your certification,
9 8 right?
10 9 A. Yes, sir.
11 10 Q. And does the CORPS of Engineers, when it puts it
12 11 out on public notice saying "We're going to
13 12 require a Pre-Construction Notification", they
14 13 also let the State know that there's going to be
15 14 a chance to review this project Pre-Construction,
16 15 don't they?
17 16 A. Again, I -- potentially. I don't know really how
18 17 to answer your question. If the Army CORPS of
19 18 Engineers requires a Pre-Construction
20 19 Notification, it doesn't mean the State is going
21 20 to be copied on that Pre-Construction
22 21 Notification.
23 22 Q. You don't know what the CORPS -- how they
24 23 determine this Pre-Construction Notification?
25 24 You're not familiar enough with their permitting
26 25 program to know whether they -- once they give an
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2 1 approval, they send it over to DHEC?
3 2 A. I know we get a copy of the provisional letter of
4 3 Pre-Construction Notification, yes, sir.
5 4 Q. And didn't they tell you back in 2006-2007 that
6 5 that's the way this particular Nationwide Permit
7 6 is going to operate?
8 7 A. Yes, sir.
9 8 Q. You did get a chance to review it before
10 9 construction?
11 10 A. That's correct.
12 11 Q. And so, since the CORPS was already requiring a
13 12 Pre-Construction Notification and requiring
14 13 review by the CORPS and since they were routinely
15 14 sending it to you, the Department of Health and
16 15 Environmental Control had no need to add its own
17 16 provisions requiring a Pre-Construction review,
18 17 because it was already in the Nationwide Permit,
19 18 wasn't it?
20 19 A. It was in the Federal part of the Nationwide
21 20 permit.
22 21 Q. It was in the Federal part, and that's what was
23 22 approved and certified by the Department in 2007,
24 23 to approve this permit on the condition that
25 24 there was going to be a Pre-Construction
26 25 Notification?
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1 A. Yes, sir.

2 Q. So, when you issued your certification, you

3 weren't blanket certifying every project. You

4 were blanket certifying the idea that, you were

5 going to get a Pre-Construction review, weren't

6 you?

7 A. We certified that if you met these conditions

8 that we put on these Nationwides, that you would

9 be granted coverage under that Nationwide.

10 Q. And those conditions are actually attached to

11 that letter that your section wrote in October of

12 2008, Petitioner's Exhibit 12, about explanation,

13 evaluation and proposed action of the Nationwide

14 Permits? Let me get you a copy so you can be

15 sure about your answer here. This is Exhibit 12.

16 A. What was the question?

17 Q. You attached to that letter your explanation of

18 the 401 Certification?

19 A. We attached a copy of our conditions.

20 Q. And would you read for me -- I mean, these

21 represent -- these were additional conditions put

22 on what the CORPS of Engineers had already put in

23 place for all of these Nationwide Permits. Isn't

24 that right?

25 A. Yes, sir.

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2 1 Q. Okay. Read for me Number 1.
3 2 A. "SC DHEC considers a single or complete project
4 3 to mean the overall project proposed or
5 4 accomplished by a single owner/developer, and it
6 5 includes all the project under single ownership.
7 6 It is not interpreted to mean only land area
8 7 directly impacted by each Nationwide Permit.
9 8 Impacts of geographical areas of particular
10 9 concern or sites or adjacent water bodies or
11 10 wetlands resulting from an activity will be
12 11 considered during the review of these actions."
13 12 Q. So, it specifically says that the Department, in
14 13 issuing this certification, does not consider the
15 14 single and complete project to mean only the land
16 15 area directly impacted by each NWP Permit?
17 16 That's what it says right there, doesn't it?
18 17 A. Yes, sir.
19 18 Q. And it also says that impacts -- skipping over to
20 19 "geographical areas of particular concern",
21 20 that's a coastal term, isn't it?
22 21 A. I believe -- I'm not sure. I don't know what
23 22 that ...
24 23 Q. So, "Impacts to adjacent water bodies or wetlands
25 24 resulting from an activity will be considered
26 25 during the review of these actions". That's what
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1 it says, doesn't it?

2 A. That is what it says, and the reason we put that

3 condition on there, my understanding is, we were

4 having applicants come in and they would apply

5 for a coverage under a Nationwide Permit, and

6 then they would get that one, and then as they

7 developed a project in phases, they would come

8 back for another Nationwide, and they would come

9 back for another nationwide, and they would come

10 back for another nationwide, and the intent was

11 that we'd look at all the jurisdictional

12 activities that required 404 Permits at one time

13 rather than piecemeal the projects.

14 Q. But that's not what it says here, the actual

15 words of what you just read a minute ago?

16 A. I believe that's the intent. I don't believe it

17 actually says that.

18 Q. Were you involved in the writing of this?

19 A. I was not.

20 Q. Now, Number 4 also says that "All NWP

21 applications must be accompanied by a CORPS

22 verified wetland delineation", doesn't it?

23 A. Yes, sir.

24 Q. -- "identifying all wetlands, jurisdictional and

25 non-jurisdictional, depressional area or other

1
2 1 spacial aquatic sites within the project area".
3 2 Is that ...
4 3 A. Yes, sir.
5 4 Q. So, I take it, then, that up there under Number 1
6 5 where it says "Impacts to geographic areas of
7 6 particular concern, sites or adjacent water
8 7 bodies or wetlands resulting from an activity
9 8 will be considered during review of these
10 9 actions", you only -- you interpret that to mean
11 10 only those impacts that are covered by another
12 11 permit. Is that right?
13 12 A. Only if the activity in those wetlands requires a
14 13 404. That's the only way that I -- again, I
15 14 don't issue permits. I issue certifications. If
16 15 the CORPS doesn't require a permit for that
17 16 activity, then I don't have a permit to certify.
18 17 Q. But in this case, you did have a permit to
19 18 certify, didn't you?
20 19 A. I had a Nationwide Permit for .075 acres of fill.
21 20 Q. And there were going to be impacts to adjacent
22 21 water bodies or wetlands that were separate from
23 22 the fill, wasn't there?
24 23 A. Yes, sir.
25 24 Q. But you didn't consider that during your review,
26 25 did you?
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1 A. I considered that I didn't have regulatory
2 authority to require anything for those, because
3 the Army CORPS of Engineers considered it a
4 non-jurisdictional activity.

5 Q. Well, how are you going to know that for any
6 project, whether the CORPS is going to require a
7 permit, unless you do a little bit of thinking
8 about it? How are you going to automatically
9 say, "Well, this is all the CORPS sent me on
10 this", so how are you going to ever implement
11 that section?

12 A. By corresponding with the CORPS of Engineers.

13 Q. So, between the time that you got their
14 Pre-Construction Notification and the time you
15 issued a letter in this project, did you
16 communicate with the CORPS and ask them about
17 this excavation?

18 A. Mr. Chandler, I personally did not do the review
19 on this, so I can't answer whether the Department
20 did that or not, but subsequently, I have done
21 that, and it is a non-jurisdictional permitted
22 activity.

23 MR. CHANDLER: There's not a
24 question on the floor, Mr. Hightower.

25 Q. Now, you do have projects that come in for review

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2 1 on a Pre-Construction Notification that the
3 2 Department has and in fact very presently has
4 3 required an individual 401 Certification that
5 4 goes out on public notice and for public
6 5 comments? You do that on occasion?
7 6 A. We do that for projects that don't meet these
8 7 conditions.
9 8 Q. And in fact, you did that recently for a project
10 9 up in Pickens County about a school that was
11 10 going to have some impacts, and you required an
12 11 individual certification, didn't you?
13 12 A. Yes, sir, I believe that that's correct.
14 13 Q. And so, you retain that discretion to look at the
15 14 potential impacts to other wetlands during your
16 15 scope, and you can require an individual permit,
17 16 can't you?
18 17 A. Again, I don't believe I'm given the discretion.
19 18 I've been given specific conditions, and if it
20 19 doesn't meet those specific conditions, then we
21 20 move to an individual permitting process.
22 21 Outside of that, I don't have the discretion to
23 22 decide about an individual permit.
24 23 Q. Well, there are going to be impacts beyond a fill
25 24 here, aren't there?
26 25 A. Not jurisdictional impacts that would require a
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1 permit.
2 Q. That's your -- that's Chuck Hightower's
3 interpretation of Federal Law overlaid by Chuck
4 Hightower's understanding of the 401
5 Certification Regulation?
6 A. That's in conversation with the Branch Chief of
7 the Army CORPS of Engineers.
8 Q. So, somebody else told you?
9 A. The Branch Chief of the Army CORPS of Engineers
10 said no 404 Permit was required for the
11 excavation of that project.

12 MR. CHANDLER: Your Honor, I would
13 ask that that last answer be stricken. It
14 was not responsive to my question. My
15 question was, was it his interpretation,
16 and he ended up giving a hearsay of what
17 somebody else told him.

18 THE COURT: Well, I'll know that.
19 I'm going to let it in as it were. It
20 certainly goes to weight, which is very
21 little.

22 MR. CHANDLER: Thank you, Mr.
23 Hightower.

24 THE COURT: Mr. Lavender, recross?

25 MR. LAVENDER: Just briefly, Your
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2 1 Honor. And if I could, we've probably
3 2 talked around this issue way too long, and
4 3 I'd like to at least call your attention,
5 4 Your Honor, if I could, and ask you to take
6 5 judicial notice of the provisions of
7 6 Section 10 of the Rivers and Harbors Act
8 7 which is codified in 33 US Code Section
9 8 401 and -- actually 403. Section 10 is in
10 9 403. It's 33 US Code Section 403, I
11 10 believe, in Section 10, which clearly
12 11 shows that the Federal Government and
13 12 Congress knew how to use the word
14 13 "excavate" for purposes of Section 10. And
15 14 I would also like to call your attention to
16 15 the provisions of Section 404 of the Clean
17 16 Water Act which is codified in 33 US Code
18 17 1344, and again, that's the 404 Permit
19 18 about which we -- it's Section 404 of the
20 19 Federal Water Pollution Control Act
21 20 codified in Title 33 that talks about
22 21 the discharge of dredge or fill material
23 22 into navigable waters. The point is, we've
24 23 talked all around, and it's been
25 24 insinuated, and I just want to make sure
26 25 that Your Honor takes judicial notice of
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2 1 the appropriate statutory provisions
3 2 relating to that. We will obviously argue
4 3 in our proposed order or whatever and
5 4 closing, if you ask for those, that there
6 5 are no applicable provisions, and it's
7 6 merely an impropriety.

8 7 THE COURT: You have no objection?

9 8 MR. CHANDLER: Let me just say
10 9 that we've never made any contention as to
11 10 Section 10 as to the Rivers and Harbors Act
12 11 of 1899 applies to this. We argue in this
13 12 case under State Law under the State 401
14 13 Regulations, and we would provide all our
15 14 legal argument under that section. And if
16 15 we're taking notice of 404, I don't mind
17 16 the Court taking notice of it. It's in the
18 17 law books, but as long as we're doing that,
19 18 I would ask that the Court also take notice
20 19 of the provisions and we'll provide copies
21 20 of what was actually published in the
22 21 Federal Register with regard to these
23 22 Nationwide Permits, and we'll provide that
24 23 at the appropriate time, as well.

25 24 THE COURT: No problem with that,
26 25 Mr. Lavender?

MR. LAVENDER: We'll argue the
same one.

THE COURT: If you will write down
for me, please, those sections that you
want me to notice, and then I'll read them
into the record so there will be no mistake
about it.

MR. LAVENDER: Do you want to do
that now?

THE COURT: After the break.

MR. LAVENDER: I'll proceed
briefly with Mr. Hightower.

RE CROSS EXAMINATION BY MR. HIGHTOWER:

Q. Mr. Hightower, you have indicated that you had
your own opinion about the applicability of
Federal Law with respect to the excavation of
this pond. Is that right?

A. Yes, sir.

Q. And you've suggested that, as Mr. Chandler
described it, you know, Chuck Hightower on
Federal Law didn't require a permit for
excavating this pond; hence, you had no
requirement or activity to certify under 401,
right?

A. Right.

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1 Q. I mean, is that correct?

2 A. Yes, sir.

3 Q. I've understood that in order for you to feel
4 more comfortable about Chuck Hightower on Federal
5 Law, that you consulted with other authorities.
6 Is that right?

7 MR. CHANDLER: Your Honor, I think
8 all he's doing is leading him into hearsay
9 here.

10 MR. LAVENDER: Your Honor, I'm not
11 asking him what the guy told him.

12 THE COURT: Overruled.

13 Q. Did you talk to the Branch Chief that you said --
14 that you've already indicated to Mr. Chandler
15 that you talked to?

16 A. Yes, sir, I talked to him.

17 Q. Did it change Chuck Hightower on Federal Law by
18 virtue of that conversation?

19 A. No, sir, it did not.

20 Q. Is it still your opinion that there is no Federal
21 Permit required for excavating Roper Pond. Is
22 that right?

23 A. Yes.

24 MR. CHANDLER: Your Honor, if I
25 could put another objection on the record.

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2 1 Even Professor Freeman is not allowed to
3 2 testify as to what is the applicable law
4 3 and how that law should be applied. That's
5 4 for the Court to decide, and so this is not
6 5 probative evidence.

7 6 MR. LAVENDER: Your Honor, Mr.
8 7 Chandler elicited Chuck Hightower on
9 8 Federal Law the first time and
10 9 characterized it that way, and I believe
11 10 that given the fact that he is with the
12 11 Department, that at least the Department's
13 12 belief, through their own witness, has at
14 13 least given some deference in these
15 14 proceedings, so ...

16 15 MR. CHANDLER: Well, the case law
17 16 says that the Department's Board is
18 17 entitled to deference, not the individual
19 18 staff members' opinions. In fact, the last
20 19 case that came out on that specifically
21 20 said that the individual staff members'
22 21 interpretations are not entitled to
23 22 deference.

24 23 THE COURT: Out of caution, I'm
25 24 going to sustain that objection.

26 25 MR. LAVENDER: Thank you, Your
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Honor.

Q. Just one more thing, Mr. Hightower, to make sure I understand it. Mr. Chandler asked you about some case in Pickens. Is it your understanding that the Department has already certified activities under Nationwide Permit 29 and 39, and that as long as the activity meets those conditions, that you, through your section, do not exercise independent discretion to expand on those conditions?

A. That's right. If you meet these conditions, then you are certified on the 401.

MR. LAVENDER: No further questions.

THE COURT: Mr. Hightower?

RE CROSS EXAMINATION BY MR. HIGHTOWER:

Q. Mr. Hightower, since you've been a member of the 401 Water Quality Section, has the Department ever issued a Water Quality Certification for dredging or lowering the level of a pond on a private piece of property?

A. Not to my knowledge.

Q. And who is your supervisor? Do you have a supervisor with the Department?

A. Yes, I do.

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2 1 Q. And it would be fair to say that it is the job of
3 2 that supervisor to review your work, as well as
4 3 the work of others in the Section. Is that
5 4 correct?
6 5 A. That's correct.
7 6 Q. As the supervisor of the Water Quality
8 7 Certification, do you occasionally review the
9 8 work done by people that you supervise?
10 9 A. Yes, sir.
11 10 Q. And isn't it true that if this was an individual
12 11 401, you actually would have been a party who
13 12 signs off on the staff assessment? Isn't that
14 13 correct?
15 14 A. Yes.
16 15 MR. CHANDLER: Your Honor, all of
17 16 this is not in response to anything I asked
18 17 on my questioning.
19 18 MR. HIGHTOWER: Your Honor, I'm
20 19 getting to a point where Mr. Chandler had
21 20 basically cut off the witness with regard
22 21 to his going out and investigating whether
23 22 or not his understanding and in fact how
24 23 the Department has been issuing Water
25 24 Quality Certifications to make sure that he
26 25 was not somehow missing a point of law,
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1
2 1 because the Petitioner's are arguing that
3 2 somehow, despite what a 404 Permit says,
4 3 that we should look ---

5 4 THE COURT: Wait just a minute.
6 5 Excuse me. Mr. Chandler, don't you agree
7 6 that he can call him as his own witness
8 7 later on and ask him this question, and if
9 8 that's the case, it's harmless to ask him
10 9 now?

11 10 MR. CHANDLER: Well, I'll wait and
12 11 see what the question is.

13 12 Q. Based on your conversation with the -- I guess it
14 13 was the Branch Chief of the Army CORPS of
15 14 Engineers -- has the Department changed the way
16 15 it has looked at Nationwide Permits, specifically
17 16 Permits 39 and 29?

18 17 A. No.

19 18 MR. HIGHTOWER: No further
20 19 questions.

21 20 THE COURT: Anything finally, Mr.
22 21 Chandler?

23 22 REDIRECT EXAMINATION BY MR. CHANDLER:

24 23 Q. Does anybody, including the General in charge of
25 24 the CORPS of Engineers, have any authority to
26 25 tell you how to run the 401 Program?

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1 A. Tell me how to run the 401 Program?

2 Q. Yes, sir.

3 A. No, they don't.

4 Q. And they don't tell you how to interpret your

5 regulations, do they?

6 A. No, sir.

7 Q. You're charged with carrying out the regulations

8 that were promulgated by your Department and

9 approved by the General Assembly, and those are

10 the rules you operate under?

11 A. In certifying Federal Permits.

12 Q. And you follow -- you carry out the conditions

13 that have been put on the Nationwide Permits,

14 including the condition that were attached to

15 your letter in this case?

16 A. Yes, sir.

17 MR. CHANDLER: Thank you.

18 THE COURT: Mr. Lavender?

19 MR. LAVENDER: No further

20 questions.

21 THE COURT: Mr. Hightower?

22 MR. HIGHTOWER: No further

23 questions, Your Honor.

24 MR. CHANDLER: That's it for this

25 witness.

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2 1 THE COURT: You may step down, Mr.
3 2 Hightower. Thank you.
4 3 MR. CHANDLER: Your Honor, would
5 4 this be an okay time to take a brief
6 5 recess?
7 6 THE COURT: Yes, it will. We'll
8 7 come back at ten minutes after 3:00. It
9 8 looks like about two or three minutes
10 9 before the hour now.
11 10 (Whereupon, a short break was taken from 2:57
12 11 p.m. to 3:18 p.m.)
13 12 MR. CHANDLER: At this time, the
14 13 Petitioner's call Dr. Seth Reice to the
15 14 stand.
16 15 (SETH REICE, having been duly sworn, testified as
17 16 follows:)
18 17 DIRECT EXAMINATION BY MR. CHANDLER:
19 18 Q. Would you please give us your full name?
20 19 A. Dr. Seth Robert Reice.
21 20 Q. And where do you live?
22 21 A. Chapel Hill, North Carolina.
23 22 Q. And how are you employed?
24 23 A. I'm a Professor of Ecology and Biology at the
25 24 University of North Carolina.
26 25 Q. And how long have you been at the University of
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2 1 North Carolina?
3 2 A. 37 years.
4 3 Q. And you're in Chapel Hill at the main campus?
5 4 A. Yes.
6 5 Q. What sort of educational background do you have?
7 6 A. I have a Bachelor's Degree in Biology from the
8 7 University of Rochester and a Ph.D. from Michigan
9 8 State University.
10 9 Q. And what subjects are your degrees in?
11 10 A. My Bachelor's Degree was in Biology. My Ph.D.
12 11 was in Zoology, but there was no degree in
13 12 Ecology, so I was doing Ecology and getting a
14 13 degree in Zoology.
15 14 Q. And in your teaching career, what sort of courses
16 15 have you taught?
17 16 A. I teach Field Ecology, General Ecology, Global
18 17 Ecology, Conservation Biology and Sustainable
19 18 Development.
20 19 Q. And in addition to your role as a teacher, do you
21 20 do scientific research?
22 21 A. I do.
23 22 Q. And what types of research projects have you done
24 23 over the years?
25 24 A. I've worked primarily on the regulation of
26 25 Biodiversity and Leaf Litter Decomposition in
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1 streams, ponds, wetlands, salt marshes.

2 Q. Explain to me what you mean by that.

3 A. Materials fall into streams. Leaves fall into

4 streams, and they break down and they form the

5 basis of a whole food chain of organisms that

6 feed on those leaves. The leaves develop

7 bacteria and fungi which grow on them, and then

8 the animals eat those and shred up the leaves,

9 and that's why we don't end up with five feet of

10 leaves every winter. We only end up with a

11 little veneer on the forest floor, because all

12 the rest has been broken down.

13 Q. Now, when you talk about the Field of Ecology,

14 what does that really mean?

15 A. Ecology is the study of interactions of organisms

16 and their environment.

17 Q. And you say in your research, you've done work in

18 streams and lakes and other water bodies?

19 A. And ponds, right.

20 Q. And what specific kind of things have you looked

21 at in your research?

22 A. I'm primarily interested in what controls

23 biodiversity, the varieties of organisms that

24 live there. I'm interested in sedimentation, and

25 I published a book on natural disasters called

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2 1 "The Silver Lining, the Benefits of Natural
3 2 Dissasters".
4 3 Q. What is biodiversity?
5 4 A. Biodiversity is the variety of types of organisms
6 5 that exist in any one place. It also includes
7 6 the evenness of distribution of those organisms.
8 7 So, if you had two communities, one that had 100
9 8 individuals, and there were 10 each of 10 kinds,
10 9 that would have a higher diversity of the one
11 10 that was kind of other individuals, 99 of the one
12 11 and one of another. So, by biodiversity measures
13 12 both the evenness and variety of organisms.
14 13 Q. Now, have you had on occasion in your work
15 14 examined things like streams and ponds to
16 15 determine what we would call the ecological
17 16 health of these areas?
18 17 A. Absolutely. I do that all the time.
19 18 Q. And how would you define the ecological health of
20 19 a stream or pond or other body of water?
21 20 A. A very good measure of that is the biodiversity
22 21 of that system and its functioning. So, for
23 22 instance, I did a major study for -- in North
24 23 Carolina on the impact of development of
25 24 communities within streams, and we used two main
26 25 measures to measure the health along with the
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2 1 variety, the biodiversity of the organisms and
3 2 the other was the rate of litter decomposition.
4 3 Q. Now, have you ever testified in a court
5 4 proceeding as an expert witness?
6 5 A. Yes, I have.
7 6 Q. Were you qualified as an expert in those cases?
8 7 A. I think so. They certainly accepted me as such.
9 8 Q. You were allowed to give your scientific opinions
10 9 on topics?
11 10 A. Yes.
12 11 Q. And what sorts of topics were you allowed to give
13 12 opinions on in those other cases?
14 13 A. There were two different cases, both having to do
15 14 with biodiversity. One of them was the --
16 15 Fishing Creek, South Carolina was about to
17 16 receive four million gallons of sewage ethilon,
18 17 and I went in and analyzed the impact of the one
19 18 million gallons it was presently receiving and
20 19 found that, already, it had lost almost all of
21 20 its diversity below the outfall, so I was able to
22 21 make the case that increasing it would only make
23 22 it worse.
24 23 The other case was in Connecticut on
25 24 the Shepaug River, and it had to do with
26 25 dewatering of the river, of lowering of the
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2 1 river, what would happen in the future.

3 2 MR. CHANDLER: Now, we would offer

4 3 Dr. Reice as ---

5 4 Q. Let me back up and ask you this question. If you
6 5 had considered yourself an expert in any one
7 6 field of science, what would it be?

8 7 A. Aquatic ecology.

9 8 Q. And that would be the ecology and diversity of
10 9 species within an aquatic environment, meaning in
11 10 a water?

12 11 A. Yes.

13 12 MR. CHANDLER: We would offer
14 13 Dr. Reice as an expert in aquatic ecology.

15 14 THE COURT: Mr. Lavender?

16 15 MR. LAVENDER: Your Honor, if I
17 16 were only confident that Dr. Reice were
18 17 going to be asked to opine just about the
19 18 aquatic ecology of this pond and go nowhere
20 19 further, I would consent to that, but we
21 20 have some concerns about whether he might
22 21 go beyond the bounds of that. I don't know
23 22 how you would like us to proceed with
24 23 that, but to the extent that the expertise
25 24 to which he seeks to opine is limited to
26 25 aquatic ecology and a condition of this

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2 1 pond at the time he inspected it, we might
3 2 not object to that qualification, but to
4 3 the extent that that qualification --
5 4 because I've read the dictionary
6 5 definitions of ecology, and to the extent
7 6 that you can even make sense out of the
8 7 dictionary definition, and I heard
9 8 Dr. Reice describe the interrelation
10 9 between organisms and their environment,
11 10 and I can't put a bound on what that might
12 11 allow him to testify to, but that's why
13 12 I'm saying, I don't know where you want to
14 13 go. We can question him now, or we can
15 14 wait and object to him going beyond that
16 15 later, but if what he's provided us, which
17 16 is -- and actually over there is a lot
18 17 different than what we got at the
19 18 deposition -- if what he provided us and in
20 19 his written report, his second written
21 20 report, amended report, is what he intends
22 21 to testify or be offered to testify to and
23 22 nothing beyond that, then we will consent
24 23 to that, stipulate to that. If he's going
25 24 to be asked about the consequences of this
26 25 project, we think he's not qualified.
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THE COURT: Well, let me handle it
this way. I'm going to overrule your
objection and qualify him as an expert with
an understanding that if he goes beyond the
limits of what you think is proper, that
you will object, and I think that's a more
orderly way of handling it.

MR. LAVENDER: Thank you, Your
Honor.

Q. Dr. Reice, have you served on any special study
committees or things of that sort as part of your
work?

A. I've been Chairman of the Curriculum in Ecology
at UNC-Chapel Hill for 10 years, and I was
reappointed last year on an interim basis. I'm
also a member of the Technical Advisory Committee
of the Sedimentation Control Commission of the
State of North Carolina, and I've been on that
for four years.

Q. Now, what is the Sedimentation Control
Commission?

A. They're responsible for making sure that no
sediments get into the waters of North Carolina.
That's what their job is. So, they have a series
of Sediment Control Officers, and our panel is

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2 1 the one that makes the rules that those Control
3 2 Officers follow.
4 3 Q. And what, specifically, do you do in connection
5 4 with that role?
6 5 A. I offer my insight into aquatic ecology to help
7 6 make sure that the rules we make are sensible.
8 7 Q. And in that role, do you look at the impacts of
9 8 development on the aquatic communities?
10 9 A. Almost every time we meet, because most of the
11 10 projects are projects of development, of land
12 11 disturbance, and when there's land disturbance,
13 12 that's when the sedimentation laws kick in, just
14 13 as they are here in South Carolina.
15 14 Q. Now, this particular case that we're dealing with
16 15 today involves a pond known either as -- both as
17 16 Roper Pond or the Lily Pad Pond. Have you ever
18 17 been to this pond?
19 18 A. Yes, I have.
20 19 Q. And when was that?
21 20 A. That was June 3rd.
22 21 Q. Of this year, 2009?
23 22 A. 2009.
24 23 Q. And what caused you to come to this pond?
25 24 A. You hired me, and you said "Why don't y'all
26 25 come", and I came.
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1 Q. Now, I've got a series of photographs that have
2 been marked as Petitioner's 15, 16, 17, 18 and
3 19. Have you seen these photographs before?
4 A. I saw them five minutes ago. I haven't seen them
5 before that, but this certainly looks like the
6 pond that I visited.
7 Q. Do those photographs appear to be an accurate
8 depiction of the way the pond looked on the day
9 that you visited?
10 A. Yes.
11 MR. CHANDLER: We would offer
12 Petitioner's Exhibits 15 through 19 into
13 evidence, Your Honor.
14 MR. LAVENDER: I'm not sure I
15 heard Dr. Reice correctly, but I think he's
16 only seen them five minutes ago.
17 DR. REICE: I saw them a few
18 minutes ago, but I remember the pond.
19 MR. LAVENDER: He evidently didn't
20 take them, but I'm just trying to make
21 sure that there were sufficient landmarks
22 for him to properly identify these
23 photographs in a big period of time here.
24 THE COURT: He said it accurately
25 depicted the scene as he saw it when he was

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1 there. I'm going to admit Petitioner's 15,
2 16, 18 and 19.

3 Q. Now, I want you to take a look at Number 15, and
4 what do you see in that photograph?

5 A. I see the -- well, what I can't see is the road
6 which is right on this side of the picture, and
7 looking back into the ---

8 THE COURT: Excuse me, Dr. Reice.
9 When you say "this side of the picture",
10 somebody subsequently reading the record of
11 this case -- do you mean the left side or
12 the right side?

13 A. The bottom. On the bottom is where the road
14 comes by, and that is looking across the pond
15 into where there is a drainage that comes in here
16 of where the pond -- this is the water source of
17 the pond coming in from the forest back there.

18 Q. And what is that vegetation within the pond?

19 A. Those are water lilies..

20 Q. Now, what type of plants are water lilies?

21 A. Water lilies are aquatic plants. They grow about
22 three feet or maybe four feet above the surface.
23 They float on the surface, and that's where
24 they're flowering, and there happened to be a
25 particularly lovely display of water lilies that

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2 1 day.
3 2 Q. And the other photographs that we've admitted, 16
4 3 through 19, they also show these water lilies?
5 4 A. Yes.
6 5 Q. Now, when you were at the site on that date back
7 6 in June, what did you do?
8 7 A. I took water chemistry and samples of five
9 8 different chemical constituents of the pond, and
10 9 I also took six bottom samples to identify the
11 10 aquatic life that lived there, and I also caught
12 11 some fish.
13 12 Q. Now, when you talk about the samples that you
14 13 took, tell me exactly how you collected these
15 14 samples?
16 15 A. I used what's called -- well, which ones?
17 16 Q. Let's start out with the water samples?
18 17 A. Water samples I had meters that I just dipped in
19 18 the water and I could dial up whatever parameter
20 19 I wanted. Turbidity samples, I simply took a
21 20 clear jar and filled it with water and looked in
22 21 it. And with the benthic samples, the bottom
23 22 samples, I used an Eckman Dredge which is a grab
24 23 type device. It grabs a six inch by six inch
25 24 chunk of the bottom, and I sieved that through a
26 25 Number 60 sieve which is a half millimeter
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1 opening, and anything bigger than that, I caught.
2 Okay.

3 MR. CHANDLER: Your Honor, we've
4 got a Power Point Presentation with some
5 photographs and some narrative about the
6 testing that Dr. Reice did that day.
7 Unfortunately, when I left my office
8 yesterday, I did not put my projector in
9 the car, and we do not have a hard copy of
10 that. So, I've talked to Mr. Hightower and
11 Mr. Lavender about going through and
12 putting this computer up on the counter
13 here so that you and the attorneys can
14 observe this Power Point and go through
15 here, and what I would request is that we
16 do that with the idea that, at the end of
17 this hearing, we will produce hard copies
18 of each of the slides within this show that
19 we will present to the other attorneys for
20 their review to make sure it accurately
21 reflects what we show the Court today, and
22 we'll put those hard copies in the record
23 at that later date.

24 THE COURT: And Dr. Reice will be
25 available then for any cross examination

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2	1	they want on that?
3	2	MR. CHANDLER: Well, he'll be
4	3	available today for cross examination on
5	4	the show we have here on the computer.
6	5	THE COURT: I understand, but for
7	6	the purposes of producing it at the
8	7	hearing to make sure it's correct, that's
9	8	your problem.
10	9	MR. CHANDLER: Well, if we do have
11	10	any dispute over that, then I would agree
12	11	that we would have to produce Dr. Reice if
13	12	there were any follow-up questions on
14	13	that, but we will provide counsel with the
15	14	copies of these things so that they can
16	15	review that.
17	16	THE COURT: Well, that's fine with
18	17	me as long as we lawyers can agree to it.
19	18	MR. LAVENDER: Your Honor, I don't
20	19	thing that we've discussed it far enough
21	20	along to understand that we were not going
22	21	to get a copy until after the conclusion of
23	22	the hearing. I think we would like to have
24	23	a hard copy. We understand that it is
25	24	different from what we were provided at the
26	25	deposition. We've gone through it. We've
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2 1 seen what those differences are, but I
3 2 don't know that I'm in a real good position
4 3 to finish cross examination of Dr. Reice
5 4 without a copy in my hand. If we can break
6 5 or when we break -- and I don't know how
7 6 long Mr. Chandler is going to take, but
8 7 I've now polled the audience, and we have a
9 8 thumb drive, and if we can, at some point,
10 9 very quickly at the conclusion of the break
11 10 get in on a thumb drive, I think if we need
12 11 to run it over to our office, we can make
13 12 copies and get it back over here.

14 13 MR. CHANDLER: That's fine with
15 14 me.

16 15 MR. LAVENDER: I mean, if we want
17 16 to go ahead and get the thumb drive going
18 17 now, we can do that.

19 18 THE COURT: Let's do it in the way
20 19 that's most efficient for you men and
21 20 ladies.

22 21 Q. Dr. Reice, as a result of the -- or after --
23 22 let's say following your visit to the site, did
24 23 you prepare the results of the test that you did?
25 24 A. Of course. I mean, I took the samples back to my
26 25 lab. I sorted through every animal and
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2 1 identified all of them except the Chironomids,
3 2 because the Chironomids take forever, and rather
4 3 than run up the bill, I just lumped the
5 4 Chironomids.
6 5 Q. And what are Chironomids?
7 6 A. Chironomids are Dipteran Larvae. They're most
8 7 closely related to Mosquitos. They're probably
9 8 the most common species in every aquatic system
10 9 except the oceans. And in the fresh water,
11 10 they're common in ponds, they're common in
12 11 streams, often representing 50 percent or more of
13 12 the species.
14 13 Q. When you took the water chemistry samples, that's
15 14 what you did with a probe?
16 15 A. Right, with a probe and meter.
17 16 Q. And you dialed up on that meter different
18 17 parameters, I think is what you said?
19 18 A. Right, and there's a slide about that.
20 19 Q. And what types of parameters? What kind of
21 20 things did you measure with your probe?
22 21 A. Dissolved oxygen, salinity, conductivity and PH.
23 22 Q. And what does dissolved oxygen tell you about
24 23 this water body?
25 24 A. Dissolved oxygen has to be at least 6 parts per
26 25 million in order to support life in a pond or in
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1 a stream. Streams are really not a problem
2 because they're so turbulent that they take up a
3 lot of oxygen, but ponds can get very stagnant,
4 and this one was in the low normal range, about
5 6.8, 6.9.
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7 Q. And the other parameters, one was PH?
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9 A. PH is the acidity of this pond, and the PH was
10 slightly acidic, about 6.5 to 6.8 where neutral
11 is 7. Conductivity was very low, and salinity
12 was zero.
13
14 Q. What is conductivity?
15
16 A. Conductivity is the capacity of a water body to
17 conduct an electric current. So, it was very
18 very low. In streams and ponds that are
19 polluted, you have high concentration of metals,
20 and so they can conduct electricity.
21
22 Q. And what was the last parameter?
23
24 A. Salinity, which was zero.
25
26 Q. And have you took the results of your work that
27 day and the study when you got back to your lab
28 together in a Power Point Presentation?
29
30 A. Yes, I have.
31
32 Q. And you have that with you here today?
33
34 A. Yes, right up there.
35
36 Q. Would you come up and let's walk through that for

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2 1 the Court and the other attorneys, and if you
3 2 could just start out and then kind of step to the
4 3 side, and let's talk about what we ...

5 4 A. This is basically just a statement of what I did,
6 5 that on June 3rd, 2009, I visited and sampled the
7 6 pond bordering the proposed Roper Apartments in
8 7 Arcadia Lakes, South Carolina. The pond is
9 8 covered in water lilies. This reflects the
10 9 general shallowness of the pond, since water
11 10 lilies rarely colonize ponds deeper than 4
12 11 meters. And that's just a picture of water
13 12 lilies.

14 13 The Water Chemistry data, I took four sets
15 14 of water samples. The water was very clear and
16 15 reflected the low turbidity. Dissolved oxygen
17 16 was in the low normal range, about 6.5 parts per
18 17 million. The PH was slightly acidic. PH was 6.5
19 18 to 6.8 where neutral PH is 7. Salinity was
20 19 always zero. Conductivity was very low. It
21 20 ranged from .12 to .14 micromhos. This indicates
22 21 very clean water with very low conductivity and
23 22 low pollutants.

24 23 Benthic Samples, I took six Eckman dredge
25 24 samples ---

26 25 Q. Let me back you up just a minute. When you say
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"Benthic" ...

A. Benthic means the bottom of the pond. And this dredge is a brass device that has jaws that, when you lower it to the bottom, they snap close, and they take a 6 by 6 inch chunk of the bottom. Samples were collected between 2 and 6 meters from the shoreline, along the road and along the left axis of the pond.

All samples were preserved in 70 percent ethanol, ethyl alcohol, and transported back to my laboratory at the Department of Biology at the University of North Carolina, Chapel Hill.

I washed them through a Number 60 Tyler Series sieve to retain any particle with a minimum diameter of at least 25 microns or a quarter or a millimeter.

They were washed into finger bowls and hand sorted by me under a 6.4 magnification Wild dissecting microscope.

The next set of pictures are pictures of the animals that I actually found. Here are two Dragonflies, Progomphus obscurus and Omphigomphus, left and right. Argia moesta which is a Damselfly. This is very common. There were probably a thousand of them flying around the

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2 1 pond. Hyalella azteca, which is very abundant.
3 2 It's an amphipod, a freshwater shrimp that's too
4 3 tiny to eat, so don't get excited. It feeds on
5 4 algae and consumes detritus and associated
6 5 bacteria and fungi. There were abundant
7 6 Chironomids, and this is just some examples of
8 7 what Chironomids look like. And this is a detail
9 8 of one, so this is the head end. This is the
10 9 tail end. Chironomidae are Dipteran larvae and
11 10 constitute the base of the food chain in this
12 11 pond, for the Odonates, that is the Dragonflies,
13 12 and the Tricoptera and the fishes. These are
14 13 Hydracarina. They're tiny arachnids. They're
15 14 related to spiders, but they're totally aquatic.
16 15 And this is Polycentropus, which is a caddisfly.
17 16 This is a free living one. It doesn't have a
18 17 case.

19 18 And the reason I redid this Power Point was
20 19 because I was challenged in my deposition that I
21 20 had previously identified this clam as
22 21 Lexingtonia, but Lexingtonia turns out it's only
23 22 found in the Pee Dee River. So, I had to take it
24 23 home and consult with John Alderman who said "No,
25 24 no, it couldn't possibly be Lexingtonia", and
26 25 then he told me what it was, which is Musculium

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1 securis, which is the Pond Fingernail Clam. And
2 I had Moxostoma collapsum -- I was correct that
3 it was a Moxostoma, but I didn't realize that it
4 was this particular one which is the notchlip
5 redhorse and the piedmont redhorse and the v-lip
6 redhorse. The one that I caught was only 1.5
7 inches long. It was very small. And the other
8 species which I had mistakingly identified as
9 Moxostoma is Erimyzon ablongus which is a Creek
10 Chubsucker. Probably its larger population is
11 upstream of the pond. It's typical of muddy
12 ponds and soft bottom streams.

13 And my conclusions were that "Roper Pond is
14 a healthy aquatic community with a wide variety
15 of aquatic species. The presence of two species
16 of fish and an assortment of benthic predators
17 strongly implies that Roper Pond is a functioning
18 aquatic ecosystem."

19 Q. Now, when you say that the pond is a "functioning
20 aquatic ecosystem", can you kind of put that in
21 terms that I can relate to perhaps as a
22 non-biologist?

23 A. This community has every constituent species
24 that's necessary for a system to function, so
25 it's got the fishes, which are the top predators.

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2 1 It's got the Damselflies and two species of
3 2 Dragonflies which are also predators. It has
4 3 this Caddisfly population, lots of Chironomids
5 4 and lots of water mites.
6 5 So, looking at the entire system -- and I
7 6 didn't look at the bacteria and the fungi, but
8 7 they obviously are there, because all these
9 8 animals are dependent on that basis of the
10 9 community, I'm convinced that this is a healthy
11 10 normal system. It's got all the necessary parts
12 11 to function well.

13 12 Q. Now, in your work and in your research and in
14 13 your study of aquatic ecology, have you had the
15 14 occasion to look at the impacts of various
16 15 man-made occurrences and how they affect the
17 16 natural aquatic systems?

18 17 MR. LAVENDER: Your Honor, we're
19 18 going to object to this line of questioning
20 19 to the extent that Mr. Chandler seeks to
21 20 elicit Dr. Reice's opinion beyond what he's
22 21 indicated both in his Power Point as well
23 22 as what he indicated to us multiple times
24 23 in his deposition about what he intended to
25 24 testify about, and that was the condition
26 25 of the pond. We're going to talk now, and

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2 1 Mr. Chandler, you know, is asking him about
3 2 studying the effects beyond the condition
4 3 of this pond, and it's going to go to the
5 4 area that we have already expressed our
6 5 concern, and that is, getting his opinion
7 6 now of what effects this project will have
8 7 on this pond, and we will continue to
9 8 object to him being qualified to offer that
10 9 testimony.

11 10 THE COURT: I'm going to overrule
12 11 your objection, Mr. Lavender. He
13 12 testified, I think, that the development is
14 13 very much part of what he considers in
15 14 everything that -- almost everything that
16 15 he does. So, proceed.

17 16 Q. Do you remember my question?

18 17 A. Not exactly.

19 18 Q. Have you had an opportunity to study the impacts
20 19 of things that man does to the land and how they
21 20 affect the aquatic communities?

22 21 A. I spent the better part of the last four years
23 22 studying sedimentation effects on aquatic life,
24 23 particularly in streams.

25 24 Q. Now, have you had occasion to study the impacts
26 25 of excavation of these types of areas and how

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1 that affects the aquatic systems?

2 A. No, because all the projects that I've studied
3 are on the shore and the stuff that runs into the
4 stream or the pond that has the impact. The
5 excavation is something I have no direct
6 experience with. It doesn't sound good, though.

7 Q. Now, in terms of your experience in dealing with
8 these systems and man-made changes to these
9 systems, do you have an opinion on what would
10 happen if the level of this pond is changed
11 through excavation?

12 MR. LAVENDER: Again, Your Honor,
13 I don't think the ground work has been
14 laid or the factual basis has been laid
15 for offering this opinion. So far, he's
16 talked about sedimentation. He's indicated
17 he didn't know anything about excavation
18 impacts, and I don't believe he's indicated
19 anything about lowering the water level of
20 this pond.

21 THE COURT: Mr. Lavender, I will
22 be amazed if he were not to testify about
23 the lowering of the water level.

24 MR. LAVENDER: Your Honor, I would
25 agree with you wholeheartedly, because I

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2 1 elicited from Dr. Reice the response that
3 2 he would be glad to answer any question of
4 3 him.

5 4 THE COURT: Yes, sir. I'm going
6 5 to overrule your objection.

7 6 A. If the pond level is dropped, which I understand
8 7 is three or four feet, first of all, that will
9 8 expose the entire margin of the pond to the air,
10 9 and therefore, all the organisms that live there
11 10 will either migrate or die. Most of them can't
12 11 move fast enough to be able to get away. The
13 12 other thing I think is most likely to happen is
14 13 that it will impact the upstream area, because
15 14 the difference between the pond level now, which
16 15 is in equilibrium with the discharge coming in
17 16 from that upstream wetland, once that pond is
18 17 dropped, I would expect the area of the wetland
19 18 to decrease.

20 19 Q. Now, why would -- I want you to go into a little
21 20 more detail explaining why lowering the pond is
22 21 going to affect that wetland up there.

23 22 A. One of the standard things that we say in aquatic
24 23 ecology is that water flows downhill. So, if we
25 24 drop the water level by say lowering the outfall
26 25 by three or four feet, then all the water that's

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2 1 upstream will flow more rapidly downstream, and
3 2 that should remove a large amount of the area
4 3 that is the wetland that's upstream.
5 4 Q. So, it's basically only going to dry it out?
6 5 A. Yes.
7 6 Q. Now, the impacts to the area that's excavated in
8 7 the pond, are these going to be short-term
9 8 impacts or long-term impacts?
10 9 A. I think they would last in the vicinity of ten
11 10 years. It takes a fairly long time to
12 11 reestablish a community once you've had a major
13 12 disturbance to it, and that's something that I
14 13 discuss in my book, but the recovery period
15 14 should be quite long. I would expect probably
16 15 you'd get some animals back in within a year or
17 16 two, but by the time -- in order to get the full
18 17 community back again, it will probably take ten
19 18 years. That's a guess. Nobody knows how rapidly
20 19 those animals will disburse. The fish will be
21 20 the last ones to come in.
22 21 Q. And if in the process of lowering the pond we
23 22 have dried out the wetlands up above, is that
24 23 going to have an impact on what's in the pond at
25 24 this new lower level?
26 25 A. I think so, because a lot of the animals that are
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2 1 in the pond probably originated in the upstream
3 2 level. There are only a handful of animals that
4 3 migrate upstream. Lots migrate downstream.
5 4 That's the whole concept of stream drift. About
6 5 one percent of the whole stream fauna drifts down
7 6 every night, so I would expect that some of those
8 7 species that are presently in the pond originated
9 8 in the upstream regions.
10 9 Q. Now, have you ever heard the term "a balanced
11 10 aquatic community of flora and fauna", "a
12 11 balanced indigenous aquatic community of flora
13 12 and fauna"?
14 13 A. I heard you say it this morning. The concept is
15 14 clear enough. I think the one thing that we can
16 15 be pretty sure of is that water lilies are not
17 16 indigenous, that they colonize. They're an
18 17 exotic species. They're lovely, but they're
19 18 exotic. I think that the rest of the community
20 19 is balanced and indigenous. All the organisms
21 20 that I discussed are normal for this region of
22 21 the world.
23 22 Q. Now, in terms of what would happen after the
24 23 excavation and other impacts of the pond, would
25 24 it have a balanced indigenous aquatic community
26 25 after that work is done?
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1 A. Not immediately. It would take some years to
2 recover.
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4 Q. Is that what you said would take about ten years
5 to recover?
6 A. But I mean, again, the ten years is a guess. It
7 might be 7. It might be 15.
8 Q. And would it end up being the same as it is now?
9 A. That's unlikely, because the chance that all the
10 same species would colonize is quite small.
11 Probably there will be other species there, as
12 well.
13 Q. Now, would you consider this pond an ecosystem in
14 and of itself right now?
15 A. Certainly.
16 Q. And why do people care about whether or not this
17 pond is a healthy ecosystem or not?
18 A. Well, I don't know how many mosquitos they have
19 in that area, but a lot of those fishes that are
20 in there are holding down the mosquito
21 population. I think there's also just the
22 aesthetic qualities of the pond. I mean, it's a
23 beautiful spot. While we were out there
24 sampling, one young woman stopped just to take
25 pictures of it, and I think the people who walk
26 by it every day are enriched by it. I think that
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2 1 in terms of the balance of nature, it's probably
3 2 just one other pond of many many ponds in this
4 3 region.

5 4 MR. CHANDLER: Thank you,
6 5 Dr. Reice. Please answer any questions the
7 6 other attorneys may have.

8 7 THE COURT: Mr. Lavender?

9 8 MR. LAVENDER: We are still
10 9 waiting for a copy of that Power Point, and
11 10 I would certainly like to make sure that I
12 11 get a copy of that before I conclude my
13 12 cross examination.

14 13 CROSS EXAMINATION BY MR. LAVENDER:

15 14 Q. Dr. Reice, during the course of these
16 15 proceedings, did you also, in addition to at
17 16 least two versions of a Power Point, have the
18 17 occasion to prepare a written report?

19 18 A. I did.

20 19 Q. Two version of that, as I recall?

21 20 A. You have an earlier version. I can -- the main
22 21 change to the report is the change of the names
23 22 of the species that I misidentified.

24 23 Q. Well, I'm going to ask you if you could identify
25 24 what we've marked as Respondent's Exhibit 12?

26 25 A. Yes. That's the report that I shared with you at
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1 the deposition.
2 Q. That's essentially Version I of your report?
3 A. I don't know which version ---
4 Q. Can you identify that as Version I? Let me also
5 show you Exhibit 11 and see if you can confirm
6 that that's the second version?
7 A. Yes, that's the second version. The only changes
8 to the third version are the changes of the names
9 of the species, particularly the replacing of the
10 Carolina Redhorse, Moxostoma anisurum, with the
11 Silver Redhorse and the Golden Redhorse with the
12 Creek Chubsucker, Erimyzon, and the freshwater
13 clam, Lexingtonia, as I mentioned, is really
14 Musculium securis.
15 Q. Hang on a second. What third version? Is there
16 a third version of this written report? You gave
17 me two versions. You identified two versions of
18 this report, the two I've just given you, at the
19 deposition. Is there now a third version of the
20 report?
21 A. There it is. It's not been copied or
22 distributed.

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24 MR. LAVENDER: May I approach the
25 witness, Your Honor?

26 THE COURT: Yes, sir.
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1 A. And Mr. Lavender, I would suggest that the reason
2 that there is a third version is the questions
3 that you raised in the deposition.

4 Q. I'll take that as a compliment. Thank you.

5 A. I think you should.

6 MR. LAVENDER: Your Honor, if I
7 could have this version which Dr. Reice
8 provided me and have it marked as
9 whatever our next exhibit is.

10 (Report by Seth Reice - Third Version marked as
11 Respondent's Exhibit Number 22 for
12 identification.)

13 THE COURT: And that is the third
14 version?

15 MR. LAVENDER: It appears to be.

16 Q. Do you have a copy of this in your hands now, or
17 is this your only copy?

18 A. I have -- it's close enough. I can certainly
19 discuss it.

20 Q. Okay. Well, let's go back and start with Version
21 I, which I believe is Exhibit 12. Now, when we
22 got this one, it contained two sections on the
23 bottom of the first page with headings -- first
24 heading, "Ecological Assessment of the Pond
25 Fauna"?

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2 1 A. Right.
3 2 Q. Fauna would be what?
4 3 A. Fauna is all the animals that live in the pond.
5 4 Q. And the second heading is "The Projected
6 5 Consequences of the Proposed Dredging of this
7 6 Pond"?
8 7 A. Right.
9 8 Q. Now, let me call your attention to Version 2 that
10 9 you provided to us at your deposition which is
11 10 now marked as Exhibit 11. It doesn't contain
12 11 those two headings, does it?
13 12 A. No, it does not.
14 13 Q. Now, I think I asked you at your deposition why
15 14 you had deleted that. Do you recall that?
16 15 A. I don't recall that particular question, but I
17 16 can tell you the answer.
18 17 Q. Well, let me tell you what your answer was in
19 18 your deposition and then see if you disagree with
20 19 your answer today.
21 20 MR. LAVENDER: And Your Honor,
22 21 I'm reading from Dr. Reice's deposition on
23 22 Page 42, beginning on Line 24 with the
24 23 question.
25 24 Q. I'll publish this, "But you took out of your
26 25 second version ..." -- let me go back to 17 to
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2 1 make sure that its context is clear. In your
3 2 first version, I'm reading starting on 17,
4 3 Question: "In your first version, you have a
5 4 heading, 'Projected Consequences of Proposed
6 5 Dredging of the Pond', so I figured you might
7 6 have done ..." -- Answer: "Let me just see what
8 7 I wrote". Line 21, Question: "And I think that
9 8 version is marked as Exhibit 5. I'm handing you
10 9 that one that's not marked." Answer: "Yeah,
11 10 okay. I don't disagree with that." And Line 24,
12 11 "But you took that out of your second version.
13 12 Is there a reason the whole section is not in the
14 13 second version?" Your answer that begins on the
15 14 top of Page 43 on Line 2, "I was trying to
16 15 restrict myself to what I actually knew as
17 16 opposed to my conjectures". Now, is that still
18 17 your answer with respect to why that section is
19 18 not in Version 2?
20 19 A. Yes.
21 20 Q. Okay. Now, let me call your attention to Version
22 21 3 that you've just given us which is Exhibit 22.
23 22 "It's back there. How did it miraculously come
24 23 back to the table? You've quit conjecture?"
25 24 A. Can I see my Version 3?
26 25 Q. Yes, sir. I'm sorry. I thought you had a copy
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1 of it, Exhibit 22.

2 A. The main point of my revision was to correct the

3 species' names, and I was not sensitive to

4 leaving that section in. I probably should have

5 taken it out.

6 Q. Well, I'm a bit sensitive to it since you've

7 opined about it, so my question then, is, is it

8 still conjecture, because that's what you said it

9 was during the course of your deposition?

10 MR. LAVENDER: I'll withdraw that

11 question.

12 Q. Were you provided a copy of the NPDES

13 Construction General Permit which is the subject

14 of this appeal?

15 A. I was not.

16 Q. Were you provided a copy of the The Stormwater

17 Pollution Prevention Plan, the SWPPP, in

18 connection with this?

19 A. No. I'm glad to know what SWPPP stands for,

20 though.

21 Q. So, you do not have any personal knowledge of the

22 particular Best Management Practices that are

23 authorized and to be employed in these land

24 disturbing activities associated with this

25 project?

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2 1 A. Not beyond what I heard this morning.
3 2 Q. And so, you didn't have any of that information
4 3 at the time of your visit?
5 4 A. That's correct.
6 5 Q. And you didn't have any of it before you got here
7 6 today?
8 7 A. That's correct.
9 8 Q. Now, I think I learned from you previously that
10 9 you are also not a Registered Professional
11 10 Engineer?
12 11 A. No. I'm an ecologist, not an engineer. Give me
13 12 a break.
14 13 Q. And you're not a licensed land surveyor?
15 14 A. I'm not a land licensed land surveyor.
16 15 Q. You're not a licensed landscape architect?
17 16 A. No. I'm not a landscape architect. I'm an
18 17 ecologist. I never claimed to be anything else.
19 18 Q. I just want to make that clear. So, you're not
20 19 in the business of preparing and submitting
21 20 Stormwater Pollution Prevention Plans?
22 21 A. No, but I've seen several.
23 22 Q. Just not this one?
24 23 A. Just not this one.
25 24 Q. Now, did you have any information, or have you
26 25 inquired into the nature of the proposed dredging
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2 1 in this pond?
3 2 A. All I have heard about it is that it's expected
4 3 to take the pond down three to four feet.
5 4 Q. And you testified that your expertise really
6 5 isn't in the excavation area?
7 6 A. Right.
8 7 Q. It's really in the sedimentation --
9 8 A. Right.
10 9 Q. -- which is the movement of solid particles in
11 10 the water?
12 11 A. Yes, but if you dredge, you're also going to move
13 12 solid particles, correct?
14 13 Q. You're going to stir them up.
15 14 A. You sure will, but ...
16 15 Q. Not necessarily deposit them. They just go back
17 16 to where they were?
18 17 A. They have to go somewhere.
19 18 Q. They do, but you don't know the nature and extent
20 19 of the proposed activities other than that they
21 20 might just lower the outfall structures. You
22 21 only testified to what you thought would be the
23 22 impact of lowering the water level?
24 23 A. Yes. That's right. Yes.
25 24 Q. What is the function of a ditch, if you dig a
26 25 ditch in a field?
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1 A. It's to -- they do it a lot in the Midwest. It's
2 to take water off the land.

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3 Q. Does it also have the function of dewatering from
4 the land as well as off the surface?

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5 A. Taking water off the land and dewatering are
6 synonyms.

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7 Q. You started -- I think Mr. Chandler asked you
8 about the pond and the aesthetics of the pond.

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9 That really wasn't the scope of your
10 investigation, though, was it? It was really, as

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11 I understood you, and what your ultimate
12 conclusion on your last slide is, was that this

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13 was a healthy pond. Is that right?

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14 A. Yes.

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15 Q. Now, if this were a recreational pond, would you
16 consider this particular flora growth on the
17 surface desirable? I mean, are you going to swim
18 and boat in it?

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18 A. It's not a good swimming hole right now. It's a
19 very difficult swimming hole.

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20 Q. Same with boating?

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22 A. Yes. So, if you couldn't swim, you could get a
23 canoe, and that would make the navigability
24 easier.

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24 Q. Maybe not. I guess that's navigability according
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1 to Dr. Reice, though?

2 A. I think it's probably fictionary, too.

3 Q. You can't get out of it, though, can you?

4 A. You can't get out of the canoe?

5 Q. Out of the pond with the canoe.

6 A. I think you can go upstream and get out.

7 Q. Not far. The slides that you gave us, you gave

8 us these slides at you're deposition. We've

9 marked those, but you've now changed that Power

10 Point Presentation?

11 A. Yes.

12 Q. We've been through that this morning. I'm not

13 really having any luck with that, but you

14 mentioned that you have changed it for one reason

15 or another. Can you go into some detail about --

16 I think you referred to the clam and the

17 Redhorse. How about give us a bit more

18 elaboration about that.

19 A. In the deposition, you challenged my

20 understanding of the Redhorse, so I went back to

21 find out if I had made a mistake, and there was a

22 fellow from DHEC who questioned a verification of

23 the Lexingtonia, so I went back to see if I made

24 a mistake on that, and I found out I had made

25 mistakes, then I corrected the mistakes.

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1 Q. So, you ---

2 A. I was close, very close.

3 Q. That's what the science of ecology is, isn't it,

4 just getting close, isn't it?

5 A. No. We can do better than that.

6 Q. When you gave us your first report, you offered

7 some conclusions in there. You've now testified

8 -- you did testify then and now today that you

9 took that section out to limit your report to

10 what you knew and not conjecture, and it's back

11 in there -- I think you now say that that's

12 probably not what you intended to do, is that

13 correct, in your final report? Is this your

14 final report, the Version 3, Exhibit 22?

15 A. I would prefer to type it, but yes.

16 Q. Meaning the handwritten notations about the

17 species on the second page. Is that right?

18 A. Yes.

19 Q. Which are the -- I can't pronounce -- the

20 Lexingtonia, and that's the clam that Mr.

21 Chandler asked you about and the Silver Redhorse

22 that I asked you about during your deposition.

23 Is that right?

24 A. Right.

25 Q. Well, the lily pads, let me ask you about a

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1 picture that Mr. Chandler has gotten into. Do
2 you have Exhibit 15 --
3 A. Yes.
4 Q. -- which is photographed there?
5 A. Yes.
6 Q. And you say you were able to identify that. What
7 was it that helped you identify that as the pond
8 that you saw?
9 A. The border that -- the grassy border that
10 paralleled the street, that outreach of a
11 left-hand forest with that log of -- source, and
12 the abundant water loads.
13 Q. What is it in the back left corner of that
14 picture that gives the appearance of a more of a
15 homogeneous green surface?
16 A. That's duckweed. It's a pond weed that makes a
17 thick scum.
18 Q. That makes the pond healthy, too, doesn't it?
19 A. Well, I mean, the animals eat it, yeah.
20 Q. Beg your pardon?
21 A. Animals do eat it.
22 Q. Animals eat it. Do others consider it a nuisance
23 plant?
24 A. Some do.
25 Q. How about water lilies, do some consider water

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2 1 lilies a nuisance plant?
3 2 A. If they want to be using the area for something
4 3 else, then the water lilies could be considered a
5 4 nuisance.
6 5 Q. So, in terms of the presence of the water lilies,
7 6 for example, or the duckweed, it's really a
8 7 matter of preference, whether you want them there
9 8 or not want there, depending on how you want to
10 9 use the pond. Isn't that right?
11 10 A. I would think that there's hardly anybody who
12 11 likes duckweed. There are a lot of people who
13 12 like water lilies.
14 13 Q. Well, it's a pretty good picture?
15 14 A. Yes.
16 15 Q. Have you been involved in activities where people
17 16 sought to control invasive or nuisance plants
18 17 such as water lilies and duckweed?
19 18 A. I had not personally been involved in that.
20 19 Q. So, you don't know ---
21 20 A. I've planted water lilies in my pond, my personal
22 21 pond.
23 22 Q. You put gold fish in it, too, probably?
24 23 A. Yeah, you bet.
25 24 Q. However, are you familiar with the Federal Exotic
26 25 Species List or the State Invasive Plant List,
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1 either in North Carolina or South Carolina? I
2 know you're more familiar in North Carolina.
3 A. Do I have the list in my head, no. I know that I
4 can find it.
5 Q. And do you know what either of these species
6 might be considered by either the Federal
7 Government or either your state or mine, south of
8 the border?
9 A. I know that water lilies are considered invasive.
10 I don't know -- I can't imagine the duckweed
11 would be considered invasive, because it's
12 everywhere.
13 Q. But you know, then, that people who have ponds
14 make some attempts to control it by using some
15 approved herbicide?
16 A. I don't know that.
17 Q. You don't know that? So, you've never been
18 involved in any control of nuisance or invasive
19 plants? Is that what you're saying?
20 A. I have friends who have tried to control
21 Hydrilla.
22 Q. Was there any Hydrilla in this pond?
23 A. I didn't see any.
24 Q. So, you really don't know about -- you talked
25 about the sedimentation and your study of

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2 1 sediment movement and the impacts on water
3 2 bodies?
4 3 A. Right.
5 4 Q. That work in the context of what in North
6 5 Carolina, because -- tell me again what role you
7 6 played on some committee?
8 7 A. I'm on the Technical Advisory Committee for the
9 8 Sedimentation Control Commission.
10 9 Q. And in that role -- and does that Commission find
11 10 itself attempting to establish means by which to
12 11 control sediment from development projects?
13 12 A. Sure.
14 13 Q. And do those activities include examination of
15 14 Best Management Practices that should be employed
16 15 in balancing the development and the environment?
17 16 A. They actually make recommendations for practices
18 17 to be used.
19 18 Q. Now, you said you have not looked at the SWPPP
20 19 for this particular project?
21 20 A. Right.
22 21 Q. So, you really aren't, then, in a position to
23 22 know or opine whether or not those Best
24 23 Management Practices have been employed in the
25 24 approval of that SWPPP for this project?
26 25 A. I have not seen the SWPPP, and I have not seen
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2 1 what practices were suggested.
3 2 Q. So, with respect to the development itself --
4 3 forget the excavation or the lowering of the
5 4 pond. With respect to the development itself,
6 5 you don't really -- you're not trying to offer an
7 6 opinion that the development of the project i.e.
8 7 the land disturbing activities that are being
9 8 conducted outside the pond will have any adverse
10 9 impact on this pond?
11 10 A. I'd be surprised if they didn't, but I'm not
12 11 offering that as a particular opinion.
13 12 Q. But your role in connection with -- again, I
14 13 apologize, but the group in North Carolina, is to
15 14 examine the types of Best Management Practices
16 15 and to recommend those practices for purposes of
17 16 employing them and permitting for stormwater or
18 17 other types of projects. Is that correct?
19 18 A. To help them set the guidelines for permitting,
20 19 correct.
21 20 Q. And do you understand that most construction or
22 21 stormwater discharges from development, that
23 22 those are not so much end of point numeric
24 23 numbers, but management practice at the site of
25 24 development? Do you know the difference between
26 25 how a permit -- well, you said you worked on a
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2 1 discharge on Fishing Creek involving a ---
3 2 A. Sewage outfall.
4 3 Q. -- sewage outfall where it was going to increase?
5 4 A. Right.
6 5 Q. That's a point source discharge, right?
7 6 A. Right.
8 7 Q. It's a point source discharge?
9 8 A. Yes.
10 9 Q. That one had numeric limits at the end of the
11 10 pipe for the point source from the sewer plant
12 11 treated (sic), right?
13 12 A. Right.
14 13 Q. And you were examining what that increase flow
15 14 would do?
16 15 A. Right.
17 16 Q. To the pond?
18 17 A. Right.
19 18 Q. I mean, to Fishing Creek, right?
20 19 A. Right.
21 20 Q. The difference between that and this is, is this
22 21 is not necessarily a point source discharge into
23 22 Roper Pond, is it?
24 23 A. Which makes it that much more difficult to
25 24 control.
26 25 Q. Which is the purpose of Best Management
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1 Practices, right? That's what they're for? I
2 mean, you're studying it in North Carolina, so
3 you should know. That's what it's for, right?
4 A. Right.
5 Q. So, those are the methods by which progress can
6 occur and balance it with nature.. Is that not
7 right?
8 A. That's pretty optimistic.
9 Q. Ecology?
10 A. You're making a judgment by calling it
11 "progress", but development and progress is not
12 synonyms.
13 Q. I guess that's a matter of opinion for the
14 property owner, though, isn't it? It depends on
15 whose property it is, doesn't it?
16 A. I don't know.
17 Q. Let's just say, then, development instead of
18 progress, to allow a landowner to use his
19 property the way presumably he's allowed to use
20 it, land use wise, but protect the environment
21 according to, in this case, Best Management
22 practices to ensure appropriate water quality
23 from the development? That's what you're
24 studying in North Carolina, is it not?
25 A. Yeah. That's the idea.

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1 Q. I mean, your not studying how to keep people from
2 doing anything?

3 A. No. That's the idea, to try to assure that
4 sediment from any project does not reach the
5 water level.

6 Q. Is your goal, and do you believe that the goal in
7 North Carolina is a zero sediment?

8 A. As close to zero as it can get.

9 Q. But they're still allowing projects to discharge
10 employing Best Management Practices, stormwater?

11 A. I would not want to be the one who says that
12 that's what North Carolina is trying to do.

13 Q. You're not in the regulating business, are you?

14 A. No.

15 Q. You're not involved in the regulatory program.
16 You're involved in an evaluation of Best
17 Management Practices and how they might be
18 improved and making those recommendations?

19 A. Right.

20 Q. That's what you said?

21 A. Right.

22 Q. And again, you don't know what they are for this
23 project?

24 A. No. I mean, I heard somebody saying it was a
25 storm scepter. I don't know what that is. It

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2 1 sounded cool.
3 2 Q. You don't know whether there are any deficiencies
4 3 in the permit?
5 4 A. I have not seen what the project design is. I'm
6 5 in the pond looking out rather than on the edge
7 6 looking in.
8 7 MR. LAVENDER: It might be a good
9 8 place for me to stop for me if I had any
10 9 sense. I think I will, Your Honor. Thank
11 10 you.
12 11 THE COURT: Mr. Hightower?
13 12 MR. HIGHTOWER: Your Honor, my
14 13 co-counsel, Roger will cross examine Dr.
15 14 Reice.
16 15 MR. LAVENDER: I would at least
17 16 like to -- since we don't have the slides,
18 17 to at least -- oh, I apologize. They snuck
19 18 up behind me. Let me make one ...
20 19 THE COURT: I thought you knew
21 20 that you had them.
22 21 MR. LAVENDER: I didn't. I was
23 22 focussed on Dr. Reice's body language. I'm
24 23 sorry. Let me just quickly compare it to
25 24 what I saw. Okay. I think I'm going to
26 25 quit.
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1 CROSS EXAMINATION BY MR. HALL:
2 Q. How are you doing, Dr. Reice?
3 A. Okay.
4 Q. Is it ever appropriate to dredge a pond to remove
5 sediment?
6 A. If you put the sediment in there, yes, it's
7 appropriate.
8 Q. Would it affect the diversity of the pond?
9 A. Dredging will almost always have a negative
10 impact on the diversity of a pond, but if you
11 have allowed sediment to get into a pond, then
12 excavating that sediment and taking it out is the
13 very thing that we do with stormwaters, detention
14 waters.
15 Q. Do you know anything about the history of Roper
16 Pond?
17 A. No.
18 Q. Do you know if it was ever deeper than it is now?
19 A. I don't think it was there originally. I think
20 it's a function of the road and the small culvert
21 that was put in there.
22 Q. I might disagree with that, but I won't speculate
23 on that. Do you know how deep the pond is now?
24 A. I know it was deeper than I could walk, so it was
25 at least four -- one-and-a-half meters deep and
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1 probably deeper.

2 Q. You didn't measure the depth of the pond?

3 A. No.

4 Q. Is the depth of the pond not an important

5 function of the ecology of the pond?

6 A. Useful to know, but that wasn't what I was hired

7 to do.

8 Q. You were hired to look at the ecology and the

9 potential diversity of the pond --

10 A. Right.

11 Q. -- instead of the amount of habitat, the depth of

12 the pond, the amount of water, the space around

13 the lilies and ...

14 A. No one asked me to calculate how many individuals

15 were in the pond, only to assess the diversity of

16 the pond, and I also didn't have a boat to get

17 out there.

18 Q. So, in your opinion, if Roper Pond -- say it was

19 built, that it's not a natural pond, it's a

20 man-made pond, and it had filled in with sediment

21 over the years allowing these lily pads to grow,

22 would it be appropriate to remove the sediment

23 that was allowed to get in?

24 A. That's a very tricky question, because all ponds

25 and all lakes fill. There's no such thing as a

1
2 1 lake that stands, except Lake Superior perhaps,
3 2 but all lakes receive sediments, and they
4 3 eventually fill in. Should we go in with dredges
5 4 to dig out every pond or every lake, I don't
6 5 think.
7 6 Q. How do you decide which ones are appropriate,
8 7 which ones you should dredge and which ones you
9 8 shouldn't?
10 9 A. Fortulàtey, it's not my decision.
11 10 Q. We've hinted on one of the goals of the
12 11 Department of Health and Environmental Control is
13 12 to maintain a balanced indigenous community. Do
14 13 you think that's a good goal to have?
15 14 A. Yes, sounds fine.
16 15 Q. You've also testified that the lilies are not
17 16 indigenous?
18 17 A. Yes.
19 18 Q. So, do you know where they came from?
20 19 A. Where they originally came from, I think from
21 20 Europe, but I'm not sure.
22 21 Q. But you don't know how they got into that pond?
23 22 A. Somebody probably stuck them there.
24 23 Q. So, if the goal was to maintain the natural
25 24 existence of ponds, then those lilies shouldn't
26 25 be there?
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1 A. If that's your call, I mean, it's all right with
2 me.
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4 Q. You testified that maintaining a natural
5 diversity in order of the pond's sediment level
6 is probably a good goal?
7 A. Right.
8 Q. So, therefore, if it had to fill in to remove
9 some of that sediment, it would be better than
10
11 A. I think that to remove the sediment from that
12 pond will destroy the bionomic community that's
13 in it. Now, you can play games with me on this,
14 and clearly, if you have evidence that that
15 sediment has accumulated over a hundred years and
16 now you want to take it out all in one afternoon,
17 it's going to be a big big change.
18 Q. Did you know that one of the goals of the
19 developer is to maintain that pond, maintain the
20 beauty of that pond, to use it as an amenity to
21 the apartment complex or where they build?
22 A. I didn't know anything about what the developer's
23 plans were.
24 Q. Well, it is.
25
26 MR. CHANDLER: Your Honor, it's
27 improper for him to testify as to what the
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goals of the developer are in this case.

THE COURT: I realize it's cross examination, but I think that's beyond the scope of this hearing.

MR. HALL: Well, it's in the deposition, Mr. Chandler.

MR. CHANDLER: It might be in the deposition, but it doesn't make it evidence in this hearing.

MR. HALL: That's fine.

Q. Would the nutrient level in the pond be a function that of allowing so many lily pads to cover the surface of the pond?

A. Certainly. I mean, the lily pads are sucking up nutrients. If you destroy them or you just plow them under, then those nutrients are going to be released and I expect you'd have probably another problem.

Q. Could too many nutrients lead to this condition?

A. Could too many nutrients lead to the abundance of lily pads? Is that the question?

Q. Yes.

A. It's quite possible.

Q. Did you sample the pond -- did you check the nutrient level in the pond?

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2 1 A. No.
3 2 Q. Does the level of nutrients of the pond affect
4 3 the ecology of the pond?
5 4 A. Of course.
6 5 Q. And again, you were asked to look at the aquatic
7 6 ecology of the pond?
8 7 A. Yes.
9 8 Q. But all you looked at was PH dissolved oxygen,
10 9 conductivity and salinity?
11 10 A. And turbidity.
12 11 Q. And turbidity. How did you judge the turbidity?
13 12 A. Visually.
14 13 Q. Visually?
15 14 A. Yes.
16 15 Q. Is that an accepted practice for judging
17 16 turbidity of ponds?
18 17 A. Well, when it's clear, it's fine.
19 18 Q. You said that biodiversity was a function of
20 19 evenness and variety. Is one more important than
21 20 the other?
22 21 A. Generally speaking, variety is more important.
23 22 Q. Do the particular species that you found, are
24 23 those species necessary for a diverse pond, the
25 24 particular ones that you found?
26 25 A. I mean, you could substitute other species that
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1 filled the same niche, but basically, all the
2 niches that you would expect in a pond are filled
3 there now with the species that are present.
4 Q. And dredging -- the removing sediment and falling
5 back where it was is going to destroy the
6 diversity of the pond in your opinion, is what
7 you testified to?
8 A. When you dredge out the sediment, you're going to
9 take out the animals. I mean, where are they
10 going to go?
11 Q. Is it the sediment or the dredge itself?
12 A. The sediment is collecting -- is being collected
13 by the dredge. I mean, the dredge takes a big
14 chunk of sediment out and puts it someplace.
15 Q. Is it possible to remove sediment, to dredge the
16 pond without -- and minimize the amount of
17 sediment -- and not create the amount of sediment
18 that will destroy the diversity of the pond?
19 A. I don't think so.
20 Q. Have y'all looked at that on your committee, the
21 different techniques that can be used to remove
22 sediment and whether there are different degrees
23 of success in minimizing sediment?
24 A. There are manufacturers who come and try to tell
25 us that they can get the sediment out of a stream

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1 with a machine, but I haven't seen any that work.

2 Q. So, would you say that all dredging of ponds will

3 destroy the diversity of the pond?

4 A. It depends on how much of the pond you dredge. I

5 mean, if you dredge one percent, it's going to

6 destroy much less than if you dredge 50 percent.

7 Q. And you don't know what extent of the dredging of

8 this pond is?

9 A. I don't know.

10 Q. So, we can't say for sure what the effect of the

11 diversity is going to be?

12 A. It's not going to be good.

13 Q. But you don't know the extent of it?

14 A. Right.

15 Q. What effect do the lilies have on the dissolved

16 oxygen of the pond?

17 A. The lilies are complex organisms, and they're

18 adding oxygen through photosynthesis into the

19 water. The decomposing lilies are using up

20 oxygen as they decompose, so I don't know what

21 percentage, whether it's a net gain or a net

22 loss.

23 Q. When would the lilies decompose?

24 A. During the winter.

25 Q. When did you sample the pond?

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2 1 A. In June.
3 2 Q. Did you sample it at any other season?
4 3 A. No.
5 4 Q. So, as far as the health of the pond, I guess, in
6 5 June, it was a healthy pond?
7 6 A. It was a healthy pond in June.
8 7 Q. Is it possible that in the winter when those
9 8 lilies die off that there is either some fish
10 9 killed or depletion of oxygen that might affect
11 10 the aquatic life of that pond?
12 11 A. Very unlikely, because the pond is sufficiently
13 12 shallow that any wind would mix the surface and
14 13 add oxygen to the water. I don't think it would
15 14 be a problem.
16 15 Q. At what depth does that -- does the wind affect
17 16 ---
18 17 A. It depends on the land contours of the pond. I
19 18 don't know. In this particular case, I'm sure
20 19 that pond is fully mixed well with it.
21 20 Q. But you didn't look at that?
22 21 A. No, I didn't.
23 22 MR. HALL: That's all I have.
24 23 THE COURT: All right. Before we
25 24 go any further, how long do you y'all want
26 25 to run today? If we're going to go after
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2	1	5:00, which is fine with me, but I need to
3	2	let the security guard know something so he
4	3	can arrange to be here.
5	4	MR. CHANDLER: I'm willing to go
6	5	as late as anybody else wants to go.
7	6	THE COURT: Mr. Lavender?
8	7	MR. LAVENDER: My football doesn't
9	8	start until 6:00 on Saturday, Your Honor,
10	9	so ...
11	10	THE COURT: And just while we're
12	11	on this subject, if we go to 6:00 today,
13	12	how does that affect us for tomorrow?
14	13	What's your anticipation?
15	14	MR. CHANDLER: If we go to 6:00
16	15	today, I anticipate -- I mean, certainly,
17	16	we'll be finished with Dr. Reice. The only
18	17	other thing that we have to offer to the
19	18	Court is witnesses on the question of
20	19	standing, and so, we've got 17 parties, I
21	20	believe, that are Petitioners. I
22	21	understand that we may have to put all 17
23	22	of them on the witness stand to establish
24	23	their individual standings. I'm not sure
25	24	how long that would take, but we'll get
26	25	started this afternoon and move it just as
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quickly as we can.

THE COURT: Mr. Lavender?

MR. LAVENDER: Yes, sir?

THE COURT: You're not going to stipulate to standing?

MR. LAVENDER: We're not prepared to stipulate to standing, Your Honor. I am prepared to discuss with Mr. Chandler a way to consolidate, because I believe, if you talked about the number, most -- many, if not all of those are households, so that would cut it in half almost. I think what we're talking about is half or fewer than that. One is a municipality. Maybe we can talk about that, because there was a 30(b)(6) on that. We can potentially offer up the 30(b)(6) on the municipality, depending on ...

THE COURT: Suffice it to say, you think that we'll finish with that this afternoon?

MR. CHANDLER: No, sir. I don't think we'll finish all of those today.

THE COURT: That being so, what witnesses do you have for tomorrow?

MR. LAVENDER: We may not have but

one. And I don't know whether the

Department will have more than one.

REDIRECT EXAMINATION BY MR. CHANDLER:

Q. Dr. Reice, Mr. Hall just asked you a bunch of very interesting questions about how we assess the impacts of the proposed alteration to the pond, and I want to follow up on that a little bit. Now, I guess if we're assessing the impacts of excavating this pond, you might first want to know what the history of the pond is, wouldn't you?

A. It would be useful to know.

Q. So, if the Department of Health and Environmental Control didn't do any investigation at all, they should have -- would you guess they should have -- I mean, would it be your opinion that they could have at least determined what the history of it was?

MR. LAVENDER: Your Honor, I would object. I think that calls for speculation on the part of Dr. Reice. He's already said he's not in the regulating business, and I think it calls for pure speculation on what the Department of Health and

Environmental Control in South Carolina
should have done.

MR. CHANDLER: Well, let me just
rephrase the question.

Q. If you were going to do an assessment of the
wisdom or the need or the impacts of making an
alteration to this pond, would it be useful from
a scientific investigation to know the history of
the pond?

A. Yes. I'd like to know how it was formed in the
first place and how long it's been there.

Q. And would you want to know the rate at which any
sediment has built up in this point?

A. Yes, but I think that would be very hard to do,
because probably nobody has measured the depth of
the pond on a routine basis.

Q. When you were out there, did you see any evidence
of recent sedimentation?

A. No.

Q. Now, would it also be useful to know how the
excavation is going to be carried out?

A. Certainly.

Q. And if you don't have the information on how the
excavation is going to be carried out, would you
be able to assess what the impacts were going to

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1 be?

2 A. I have the small piece of information that part
3 of the pond, and I don't know how much of the
4 pond, is to be excavated to a depth of three or
5 four feet. That's a lot of sediment to come out
6 of a pond. That's a lot of change of the contour
7 of the bottom of the pond, and it would change
8 the benthic community a lot. How much of it, if
9 it's a few feet, fine. If it's a thousand square
10 feet, it's not fine. I mean, I can't know that
11 without knowing what the plans are for that pond.

12 Q. Okay. Let's take a look at the plan sheets that
13 have been marked as DHEC Exhibit Number 1 and
14 turn to the page that is marked as the "Storm
15 Drainage Plan", and ---

16 MR. LAVENDER: Your Honor, could
17 I ask that Mr. Chandler share with us what
18 the drawing number is in the bottom right
19 corner?

20 MR. CHANDLER: C-6.

21 MR. LAVENDER: Thank you.

22 Q. Now, in the area of what's known as the lily pad
23 pond, does it indicate an existing pond water
24 level or water elevation.

25 A. It says it's the proposed water elevation, 211.6.

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2 1 The ten year storm elevation is between 50 and
3 2 .06.
4 3 Q. And right above that in that bold print, does it
5 4 indicate the existing pond water elevation?
6 5 A. Yes. It goes from like 209 at the shallowest to
7 6 214 ---
8 7 Q. I'm talking about right above where it says
9 8 "proposed water elevation", what does it state?
10 9 A. Oh, "Existing pond water level estimate is 215.1
11 10 ..." -- what are those units?
12 11 Q. Is this an indication of feet?
13 12 A. There's no way it's 215 feet at that point.
14 13 Q. I mean, a difference in the existing and the
15 14 proposed elevation is how much?
16 15 A. The existing water level is 215. The proposed
17 16 water elevation is 211, so it's 4 feet, just
18 17 under 4 feet.
19 18 Q. All right. Is there anything on that plan that
20 19 indicates how large an area will be taken down?
21 20 A. This is a hard drawing to understand, but it
22 21 looks like. The lower half of the pond. To say
23 22 "The limits of disturbance are shown here", that
24 23 suggests that it's most of the pond that's
25 24 presently visible.
26 25 Q. Now, so we need to know the extent of the
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1 excavation. We need to know something about the
2 history. We need to know something about how
3 much sediment has come into this pond recently.
4 Is that correct?
5 A. Yes.
6 Q. Now, if you were going to look at all potential
7 water quality impacts of a project -- let me back
8 up a minute. When we talk about water quality
9 and water quality impacts, are we talking about
10 something narrowly defined? How would you define
11 water quality?
12 MR. LAVENDER: Your Honor, I don't
13 want to belabor the point, but I'm not sure
14 that this isn't beyond the scope of cross.
15 THE COURT: I'm going to overrule
16 the objection.
17 A. You define water quality by the physical and
18 chemical qualities of the water. So, you would
19 want to measure the things I measured. You'd
20 want to measure nutrient loads. You'd want to
21 measure the day and night variety of variants in
22 carbon dioxide. There are a whole host of water
23 quality measures that would be valuable.
24 Q. And does that include the biological makeup of
25 what's in the water?

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1 A. Basically, water quality is the chemistry and
2 physics of the water, not the biology, though,
3 clearly, the water quality has a big impact on
4 the biology.
5
6 Q. Dr. Reice, you made a few changes to your report
7 over time?
8
9 A. Yes.
10
11 Q. Can you tell me in terms of the species list and
12 other things that were changed in that report,
13 what's the significance of those changes?
14
15 A. It's right now, and it was wrong before. That's
16 one main one. I misidentified the species of the
17 Moxostoma, so I had one species and now I have a
18 different one. And then I had to change the
19 species of the other species of Moxostoma to a
20 Creek Chubsucker which looks a whole lot like it.
21
22 Q. Now, these organisms that you're trying to
23 identify, how large are they?
24
25 A. The biggest one was an inch-and-a-half. The
26 small ones are well under an eighth of an inch.
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28 Q. Now, in terms of the overall impact on the
conclusions you drew about the quality of the
water and the health of the pond, did any of
these changes in the species list change any of
your opinions?

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1 A. No. It was just, you know, getting the correct
2 names down.

3 Q. Now, in your deposition, you used the term
4 "conjecture". When you give your opinions as to
5 the quality of the pond and potential impacts,
6 are you giving those opinions with a reasonable
7 degree of scientific certainty?

8 MR. LAVENDER: Your Honor, I think
9 the question needs some clarity, and we
10 object to the broadness of the question,
11 because as I recall, Dr. Reice testified
12 that he could not offer his opinion about
13 impacts of the excavation because he didn't
14 have any expertise in that, but just on the
15 sedimentation issues, the material coming
16 into the pond. I believe that's what he
17 testified during direct examination, and I
18 believe that to the extent that question
19 was just posed doesn't restrict to that.
20 It asks him to go beyond what he said his
21 expertise was.

22 THE COURT: Well, let's go through
23 this slowly. Don't you agree with what he
24 said? Didn't Dr. Reice limit his comments
25 to what Mr. Lavender just said?

MR. CHANDLER: Well, I asked

Dr. Reice about the impacts of this dredging on this water body, and an objection was made, and it was my understanding it was overruled, and he was allowed to give his opinions about those things. Then he was asked about whether those were conjectures, and this is redirect going to the question of whether those opinions he gave were what he would call conjecture or whether these were opinions based on his training, knowledge, study and expertise.

THE COURT: Well, I agree that you may ask that question. I overrule it to that extent.

MR. LAVENDER: Your Honor, to the extent that I might add, the context in which I was objecting was that during the direct examination by Mr. Chandler of Dr. Reice on his qualifications as he took him through that, he said "I have not done any particular studies on excavations or impacts of excavation", so he's indicated that he has no particular expertise in that

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2	1	area. He's not done any field of study in
3	2	that area. He said that his field of study
4	3	has been limited to the study of ecology,
5	4	biodiversity and sedimentation.
6	5	THE COURT: Aquatic ecology.
7	6	MR. LAVENDER: Aquatic ecology and
8	7	sedimentation, but he had not done any
9	8	study on excavation.
10	9	THE COURT: Well, just out of
11	10	caution, I want to ask Mr. Chandler to ask
12	11	him the question about his expertise in
13	12	the field of excavation again so I might be
14	13	better advised.
15	14	MR. CHANDLER: About his
16	15	experience in excavation, Your Honor?
17	16	THE COURT: That's what he
18	17	testified to before.
19	18	Q. You gave some earlier testimony about your
20	19	opinion about the impacts of this excavation. Do
21	20	you recall that?
22	21	A. Yes.
23	22	Q. And you recall what opinion you gave?
24	23	A. I think it's going to be a disaster.
25	24	Q. And in what way?
26	25	A. In that the animals that are living in that pond
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1 will largely be eliminated.
2 Q. And why do you believe that?
3 A. Because of my experience with sedimentation, that
4 when you excavate, you're going to generate a
5 whole lot of sediment in the water column, and
6 it's going to settle back on the animals and bury
7 them.

8 THE COURT: I don't believe that's
9 what I was asking for, nor what Mr.
10 Lavender was trying to get at. His
11 comment, if it was one, and I frankly don't
12 remember about whether or not he had any
13 experience with excavation. Is that
14 correct, Mr. Lavender?

15 MR. LAVENDER: Yes, sir, Your
16 Honor, and I believe Dr. Reice testified he
17 did not, nor had he done any study in the
18 area of excavation and impacts of
19 excavation.

20 THE COURT: Ask him whether or not
21 those statements are true.

22 Q. Dr. Reice, what experience do you have in
23 examining the impacts of excavation?

24 A. Zero.

25 Q. Now, the opinions that you have given about the

1
2 1 impacts of this excavation, what are those
3 2 opinions based on?
4 3 A. Based on my studies of sedimentation, which I
5 4 spent the last five years studying, and
6 5 sedimentation has a very negative impact. It's
7 6 the single greatest limitation to biodiversity in
8 7 streams and ponds that there is.
9 8 Q. And the opinions that you have given on that and
10 9 the opinion you just expressed, is that opinion
11 10 based on your background, your knowledge and your
12 11 study of these issues?
13 12 A. And my experience, yes, all of those.
14 13 THE COURT: Before we go any
15 14 further, I certainly feel he's qualified to
16 15 testify about what the removal of
17 16 sedimentation would be, if he's spent five
18 17 years studying it, and that certainly
19 18 includes excavation, maybe not in the sense
20 19 that precisely we're thinking about it
21 20 here, but it just seems to me that's within
22 21 the scope of what his knowledge would allow
23 22 him to testify to.
24 23 MR. LAVENDER: If you would note
25 24 our objection, because I believe that what
26 25 he's testified to is about the impact of
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2 1 sediment coming into the pond, and that's
3 2 where his field of study was, and that's
4 3 where his study has been, is the movement
5 4 of particles into the water body and not
6 5 the removal or the stirring up of it, the
7 6 impact.

8 7 THE COURT: Your objection is
9 8 noted.

10 9 Q. Now, as to the use of the word "conjecture", have
11 10 you given any opinions here today that are not
12 11 based on your scientific judgment, based on your
13 12 experience and knowledge and training?

14 13 A. No.

15 14 MR. CHANDLER: Thank you. That's
16 15 all I have.

17 16 THE COURT: Anything else from the
18 17 Respondent?

19 18 MR. LAVENDER: I just have a
20 19 couple and based from redirect only.

21 20 RECROSS EXAMINATION BY MR. LAVENDER:

22 21 Q. I think Mr. Chandler asked you about whether or
23 22 not you saw any evidence of recent sedimentation.
24 23 Did you do any core samples to be able to examine
25 24 the strata to any depth in the pond?

26 25 A. No, I did not.

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2 1 Q. Would that have been a means by which to
3 2 determine the historical pattern of sedimentation
4 3 build-up in the pond?
5 4 A. It's possible, certainly.
6 5 Q. You also talked about, in response to one of his
7 6 questions -- well, let me go back. It's possible
8 7 that that's one way to do it?
9 8 A. It's a standard way of measuring the layering of
10 9 sediment in a pond or a lake, but it doesn't tell
11 10 me whether or not there's been recent
12 11 sedimentation. That's where I said it's
13 12 possible, because if there had been recent
14 13 sedimentation, you'd be able to see that, but if
15 14 it's been going on slowly, slowly, slowly over
16 15 time, you would.
17 16 Q. But the standard way would have been to take a
18 17 core sample?
19 18 A. Right.
20 19 Q. You made some comment in response to Mr. Chandler
21 20 about the digging, and you said "That's not
22 21 fine". That's not fine in whose opinion? You
23 22 said "If you dig the pond out, that's not fine".
24 23 It's a quote I wrote down, "not fine". Not fine
25 24 in whose -- is that a relative term?
26 25 A. "Fine" is a comparative term, and it clearly is
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1 relevant. I mean, any time you make a
2 comparison, it's relevant. Something else is
3 relevant to something else.
4 Q. And one last question, just to make it clear, you
5 said that the difference in the pond elevations
6 on Drawing C-6, and if you need to refer to it
7 again, it said -- I think the existing pond
8 elevation was 215.1?
9 A. Right, and now it was down to 211.6.
10 Q. That's three-and-a-half, just to be correct?
11 A. That's fine.
12 Q. A little precision.
13 A. That's fine.
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15 MR. LAVENDER: Thank you. Nothing
16 further.
17 MR. HALL: Nothing from DHEC.
18 REDIRECT EXAMINATION BY MR. CHANDLER:
19 Q. Would your opinions be affected whether it was
20 taken down three feet or three-and-a-half feet?
21 A. No.
22 MR. CHANDLER: Thank you. That's
23 all I have.
24 THE COURT: You may step down.
25 MR. CHANDLER: Can we take
26 just about five minutes to let me see which
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2 1 order I want to do these standing
3 2 witnesses, Your Honor?
4 3 THE COURT: We'll take ten.
5 4 (Whereupon, a break was taken from 5:02 p.m. to
6 5 5:15 p.m.)
7 6 MR. CHANDLER: The Petitioners
8 7 call Linda Jackson.
9 8 (LINDA JACKSON, having been duly sworn, testified
10 9 as follows:)
11 10 DIRECT EXAMINATION BY MR. CHANDLER:
12 11 Q. Would you please give us your name?
13 12 A. My name is Linda Jackson.
14 13 Q. And where do you live?
15 14 A. I live at 6720 Kaminer Drive in Kaminer Station.
16 15 Q. And is that in the Town of Arcadia Lakes?
17 16 A. It is.
18 17 Q. And how are you employed?
19 18 A. I'm an attorney.
20 19 Q. And you practice here in Columbia?
21 20 A. I do with my husband, Bob Jackson, Robert L.
22 21 Jackson.
23 22 Q. Now, where is your home in relation to the
24 23 property that we've been talking about today that
25 24 is owned by Roper Pond, LLC?
26 25 A. Well, the subdivision is directly adjacent to the
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2 1 pond. In fact, I did the title work on Roper
3 2 Pond property and the Kaminer Station property
4 3 many years ago and found a title defect along the
5 4 Roper property line, never dreaming that I would
6 5 be living there some day. So, as you go into
7 6 Kaminer Station, there are homes on either side
8 7 of Kaminer Drive, and I believe that the Williams
9 8 are on the right, the first right, and they have
10 9 an extra lot, and then that's where the line is
11 10 for the Roper pond property.
12 11 Q. Now, living in that neighborhood, do you have
13 12 occasions -- I mean, how do you get your
14 13 exercise?
15 14 A. I'm a power walker, and I used to be a runner.
16 15 Q. And where do you walk around?
17 16 A. Well, I've actually lived in the community 37
18 17 years. I lived in Forest Lake. I lived in
19 18 Forest Acres, and Trenholm has been a major
20 19 thoroughfare for me. I have probably been by
21 20 Roper Pond thousands and thousands of times
22 21 running and walking. I've also been that many
23 22 just riding in a car, and I see it quite
24 23 frequently, most every day.
25 24 Q. And when you say "Roper Pond", can you give me
26 25 your description of Roper Pond?
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2 1 A. Well, when you're standing in front of the pond,
3 2 and I believe everybody has probably seen a
4 3 picture, the first thing you notice are the
5 4 sounds. It's just very -- you hear nature's
6 5 sounds, and it's very very pleasant. It's
7 6 beautiful. It's absolutely beautiful. And when
8 7 you come in to Arcadia Lakes, the Town of Arcadia
9 8 Lanes from Decker Boulevard, you come onto
10 9 Trenholm, and you see the Arcadia Lakes sign, and
11 10 then you see the pond, and what's unusual in this
12 11 case is the Roper Pond property is like a
13 12 doughnut hole, and it's surrounded by Arcadia
14 13 Lakes, and yet it's Richland County property.
15 14 But it's sort of like the gateway to Arcadia
16 15 Lakes, and it's just been there for many many
17 16 years. I have lived in the community 37 years.
18 17 It's always been there, and there are other
19 18 people that could probably better tell you how
20 19 much longer than that, but it's been there for
21 20 generations.
22 21 Q. And to enjoy these things that you mentioned
23 22 about the pond, do you have to actually go on the
24 23 property?
25 24 A. No, not really. I have not actually physically
26 25 been on the property. I've attempted, but I've
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1 seen "no trespassing" signs, so I don't go on it,
2 but I've actually walked by, admired it, and it's
3 just always been there, and it's very special to
4 everybody in the community.

5 Q. And do you have concerns about the impacts that
6 this project will have on your enjoyment of this
7 area?

8 A. Absolutely. Because I'll also walk Cary Lake,
9 which is downstream, I have seen the
10 sedimentation, just on a very small development,
11 just down from Kaminer Station, just one lot into
12 Cary Lake, and any development of this property
13 to the magnitude of which they plan to do it is
14 going to be a huge impact on what's going to go
15 under Trenholm Road into Cary Lake. I have
16 walked Cary Lake. I've run Cary lake on certain
17 parts, and I have actually seen the garbage.
18 I've seen what comes into the lake, and I have no
19 compunction that there won't be lots more once
20 this development goes up during construction and
21 post construction. We already have problems with
22 stormwater right now when it rains. I mean,
23 Trenholm Road around Kaminer Station floods. And
24 we've seen that repeatedly. We have had pictures
25 taken of it. We actually had an aerial

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2 1 photographs taken of the sedimentation just from
3 2 that one lot into Cary Lake, and I can tell you
4 3 from my experience of seeing the property and
5 4 living in this area, that there will be a huge
6 5 impact.

7 6 Q. And will this affect your use and enjoyment of
8 7 the area?

9 8 A. Absolutely. I mean, it will be sad not to see
10 9 the pond any more, to not be able to enjoy, but
11 10 then I look at what's going to happen to the Cary
12 11 Folks. I mean, they've been hit with it so many
13 12 times. Dent Middle School, Richland County did
14 13 all they were supposed to do, and DHEC did all
15 14 they were supposed to do, but Cary Lake still
16 15 ended up being compromised to a great extent by
17 16 that construction, and you know, it's just -- the
18 17 Gills Creek Watershed is very much impaired.
19 18 There have been huge fines assessed against
20 19 Richland County. There was even an article in
21 20 the paper today about it, and it's only going to
22 21 get worse. And what we would like to see is
23 22 something that would be an amenity to the
24 23 community and something that would -- people
25 24 would be proud of and want to participate, and I
26 25 suspect if they had put up something like they

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2 1 wanted to put up and had told the community they
3 2 were going to put up five years ago, we wouldn't
4 3 be in this courtroom today, because what they
5 4 proposed five years ago was something that the
6 5 community supported enough not to object to the
7 6 rezoning of the multi-family high density, and
8 7 they would never have not objected had that been
9 8 proposed almost five years ago that they were
10 9 going to put up a 204 apartment complex. The
11 10 whole community would have been there objecting
12 11 there at Richland County, and you know what, not
13 12 one sole appeared. The only person there was Mr.
14 13 Joe Walker, and they laughed. I have the minutes
15 14 from the meeting. They laughed because no one
16 15 was there to object.

17 16 Q. Now, are you familiar with the other people who
18 17 are petitioners in this case?

19 18 A. I am.

20 19 Q. And do some of those live in Kaminer Station, as
21 20 well?

22 21 A. Yes, they do.

23 22 Q. And which ones live in Kaminer Station?

24 23 A. Okay. I kind of know it by memory. I actually
25 24 wrote this list for you. In fact, most of these
26 25 people were here today, but due to the length of

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2 1 this hearing and other obligations, they just
3 2 couldn't stay. I'll go through the ones that
4 3 were here to begin with. Obviously, the Town of
5 4 Arcadia Lakes, Dr. Rick Thomas is present. Me
6 5 and my husband are here. Barbara Williams, and I
7 6 don't see her here now, and her husband is Robert
8 7 Williams. He could not be here. He had a
9 8 previous commitment, one that he could not get
10 9 out of. Elizabeth Walker, I believe that she had
11 10 to leave. Louis Spradlin could not come. His
12 11 wife, Mary Spradlin is here today. Thomas Hutto
13 12 Utsey was here, but he had to leave due to the
14 13 lateness. He Had a commitment. Tony Sinclair,
15 14 also the same, he was here most of the day. He
16 15 had to leave. Aaron Small could not come. He
17 16 had something that he could not get out of. His
18 17 wife, Bet Small, is here in the courtroom today.
19 18 Gene Starr -- these are people -- the next ones
20 19 I'm going to mention are actually Cary Lake
21 20 folks, but Gene Starr and her husband, Dr. Starr
22 21 are here. Ruth and Sanford Marcus could not
23 22 come. Mr. Marcus was out of town, and Ruth
24 23 Marcus teaches real estate seminars and could not
25 24 get out of her obligations. And final person is
26 25 Steve Brown who is here. He is by the way the
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1 President of the Homeowners Association for Cary
2 Lake homeowners.
3 Q. Now, have you had community meetings about this
4 project in which you've heard the expressions of
5 concern by the community?
6 A. Many times.
7 Q. And so, have you heard enough to feel comfortable
8 saying whether the other Petitioners share your
9 concerns?
10 A. Absolutely, very much so.
11 MR. CHANDLER: Thank you. Please
12 answer any questions there may be under
13 cross examination.
14 CROSS EXAMINATION BY MR. LAVENDER:
15 Q. Ms. Jackson, are you familiar with the Stormwater
16 Permit that we've been talking about?
17 A. I am somewhat, but I would certainly defer to the
18 experts, Mr. Lavender, and perhaps you know much
19 more about it than I do.
20 Q. Are you familiar that this particular proceeding
21 involves authorization for the land disturbing
22 activities and the stormwater resulting from them
23 that will ultimately be controlled?
24 A. Yes, sir.
25 Q. Not what is being built on the property?

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2 1 A. What is being built on the property, I believe
3 2 because of the stormwater permitting and all of
4 3 that, is certainly something quite different than
5 4 what we had expected some five years ago, and I
6 5 don't -- rephrase your question and maybe I can
7 6 answer it better.
8 7 Q. No. I'm just trying to get to the heart of the
9 8 matter. I'm trying to understand if your
10 9 particular concern about this permit is what's
11 10 going to be done on the property and not how the
12 11 stormwater is going to be managed?
13 12 A. I would say that the stormwater management is
14 13 probably the biggest issue, because obviously,
15 14 that is what is going to impact all of us.
16 15 Q. So, if the stormwater is properly managed, then
17 16 it really doesn't matter what's on the property
18 17 if it conforms to the zoning, right?
19 18 A. Well, that's a whole other issue. The zoning, we
20 19 believe, was obtained improperly.
21 20 Q. Right. That's your opinion, but let me ask you
22 21 this, is the Roper Pond property in the Town of
23 22 Arcadia Lakes?
24 23 A. It is not.
25 24 Q. Is it in the unincorporated area of Richland
26 25 County?
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2 1 A. It is.
3 2 Q. Is it zoned for multi-family?
4 3 A. Yes, it is.
5 4 Q. And as far as you know, there's been no appeal or
6 5 contesting of that or no proceeding pending in
7 6 court anywhere that contested the current zoning?
8 7 A. No.
9 8 Q. I mean, you are a lawyer. You'd know what I'm
10 9 talking about.
11 10 A. Yeah, I know what it means. There was nothing.
12 11 Too much time had lapsed.
13 12 Q. I'm going to go back to the question of -- you
14 13 said the management of the stormwater is the most
15 14 important thing?
16 15 A. At this point, yes.
17 16 Q. And the question is, if the stormwater for the
18 17 land disturbing activities for which this
19 18 authorization was given is managed properly and
20 19 in accordance with the DHEC requirements, then
21 20 what injury is it that you will suffer?
22 21 A. Well, I'm not going to answer the question from
23 22 the standpoint that we don't know how it's going
24 23 to be managed. We just know what we have seen
25 24 over the years, 30 something -- in my case, 37
26 25 years, that notwithstanding stormwater practices,
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2 1 Cary Lake has been hugely impacted. So, you
3 2 know, if I were to say that this particular
4 3 project, if it's properly managed, will be fine.
5 4 I can't say that.
6 5 Q. But you've been speculating that this particular
7 6 project won't be managed properly, right?
8 7 A. I am.
9 8 Q. That's what you're doing. So, that being -- all
10 9 of these other instances, the lot to which you
11 10 referred, and I don't know where that lot is, but
12 11 the lot, the single family lot to which you
13 12 referred that caused some damage, did that lot
14 13 get a permit from DHEC? Was it stabilized? Was
15 14 it managed? Did you see silk fence?
16 15 A. I think Mr. Thomas would have to address that. I
17 16 don't know exactly, because he was responsible
18 17 for it.
19 18 Q. Was there enforcement relating to?
20 19 A. I really don't know.
21 20 Q. You said there was enforcement against Richland
22 21 District 2 with respect to the Dent Middle school
23 22 Project. Is that right?
24 23 A. I have to believe that there was some
25 24 enforcement. We don't know that.
26 25 Q. Well, I thought you just referred to fines being
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1 levied?

2 A. Oh, that's been over a long period of time, but

3 Dent Middle School -- and I think there's

4 somebody that lives on Cary Lake that can address

5 that more properly than I can, but I have seen

6 it. I've seen the impact of construction around

7 Cary Lake, and I'm sure that Richland County DHEC

8 had to have been involved, or they wouldn't have

9 gotten their construction permit.

10 Q. So, if there was enforcement, does that not

11 suggest to you that there were violations of the

12 permit or requirements that they should have

13 adhered to?

14 A. Yes.

15 Q. So, in other words, that, then, was the result of

16 not conforming to the requirements for the

17 development, properly managing ---

18 A. I can only say that the fines have been levied,

19 because Richland County hasn't properly managed

20 them.

21 Q. Or that particular developer didn't do what they

22 were supposed to?

23 A. I can only speculate on that.

24 Q. So, back to the question when you made some

25 comment about it would be a shame for the pond to

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1 go away, you understand from what you've heard
2 today that the pond is actually supposed to
3 remain there. There will be a pond there, right?
4 A. We've been told that there's a pond that will
5 remain. The pond that's there now won't be the
6 same pond.
7 Q. But you're looking at it from the sidewalk,
8 right?
9 A. I'm looking at it from the sidewalk.
10 Q. But from a water quality standpoint and for the
11 purposes of what your injury is and what you
12 talked about Cary Lake, that presumes that they
13 won't manage the stormwater the way DHEC is
14 requiring them to manage it?
15 A. I can't speculate. I can only tell you what I've
16 seen from other developments.
17 Q. Now, you live on Kaminer Drive. Which side of
18 Kaminer Drive?
19 A. On the left-hand side.
20 Q. On the left-hand side, so you're across Kaminer
21 Drive from the properties that border the
22 property?
23 A. Correct.
24 Q. There are some on either side of that road and
25 some around the corner, too?

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1 A. There's a small cul-de-sac, and then, you go in,
2 and there's another cul-de-sac, and it goes all
3 the way back around.
4 Q. I'm actually very familiar with it. And with
5 respect to Cary Lake, have you done any title
6 work on properties around Cary Lake?
7 A. I haven't.
8 Q. Is it a private lake. Is it privately
9 maintained, do you know?
10 A. As far as I know, it's private. They've got an
11 association.
12 Q. They do?
13 A. Yes.
14 Q. So, it's not really a public access lake?
15 A. No. You have to be -- actually, I'd have to let
16 somebody that lives on the lake speak to that. I
17 know you have to pay dues or something like that.
18 It's an association.
19 Q. So, the town doesn't have a boat landing over
20 there. The town doesn't have anything that you
21 know of, that you're aware of? You haven't heard
22 about it?
23 A. No.
24 Q. With respect to -- and Mr. Chandler asked you
25 about the group of you or the Petitioners. I

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2 1 would characterize it -- would you agree that,
3 2 generally speaking, there are a group of
4 3 individual homeowners from the Kaminer Station
5 4 area which are on the left side of Trenholm Road
6 5 going out, is that right, on the left side going
7 6 out of town?
8 7 A. Yes.
9 8 Q. Kaminer Station is on the left?
10 9 A. Yes.
11 10 Q. And then, beyond that, is the Roper Pond
12 11 property, as you go ...
13 12 A. It's right contiguous.
14 13 Q. But continuing in, I think, a northerly
15 14 direction?
16 15 A. Yes.
17 16 Q. On the right-hand side, you've got Cary Lake --
18 17 A. Correct.
19 18 Q. -- among the other lakes over there, but
20 19 immediately proximate to Trenholm Road and
21 20 Kaminer Station and the Roper Pond property on
22 21 the other side of Cary Lane and Cary Lake. Is
23 22 that right?
24 23 A. Correct.
25 24 Q. So, you've got three households, I think,
26 25 represented in your group. If you can look at
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1 the list, do you know which three are the three
2 households?
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4 A. You mean on the lake?
5 Q. On Cary Lake, the Cary Lake category of
6 Petitioners.
7 A. Okay. We've got Doctor and Mrs. Starr, Gene and
8 Elaine Starr, Sanford and Ruth Marcus and Steven
9 Brown.
10 Q. So, two different categories?
11 A. Yes.
12 Q. As far as you know, there is no stormwater
13 impacts to Kaminer Station from this project,
14 right -- I mean, the drainage -- you've heard
15 some testimony about the drainage from this
16 property goes through a number of devices and
17 into Roper Pond?
18 A. But until it's actually up there, we don't know
19 what's going to happen.
20 Q. Are you suggesting that it's going to go uphill
21 to Kaminer Station?
22 A. Not at all. We know it comes down from North
23 Trenholm.
24 Q. I'm talking about onto the property that's known
25 as Kaminer Station. You're not expecting that
26 the water from the property Roper Pond, LLC owns
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2 1 is going to flow uphill to Kaminer Station?
3 2 A. I would not think so.
4 3 Q. Good, because Dr. Reice says it flows downhill.
5 4 A. Yeah. To me, water flows down. But also, I
6 5 don't know what properties are on the contiguous
7 6 side that have -- they're down below the Roper
8 7 Pond property. If they're contiguous to it, the
9 8 houses that are on that side of Kaminer Station,
10 9 there could possibly be, and there may be
11 10 property that's a higher level than the Kaminer
12 11 Station property and then the property that there
13 12 would be stormwater going down into it .
14 13 Q. But you're speculating? You don't know that for
15 14 sure?
16 15 A. Believe me, I have not walked on the property.
17 16 Q. And you haven't looked at the stormwater plans?
18 17 A. Actually, I have looked at them, but you know,
19 18 I'm not ---
20 19 Q. But you heard Ms. Stewart testify that the
21 20 requirements from DHEC is to manage all of the
22 21 stormwater on the Roper Pond property through the
23 22 devises and into Roper Pond and out the outer
24 23 structure? You heard her say that?
25 24 A. I did.
26 25 Q. You don't know anything to the contrary?
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2 1 A. Not at this time.
3 2 Q. So, back to the question, then. With respect to
4 3 the group of people, the group of property owners
5 4 that live in Kaminer Station, your concern, is it
6 5 more an aesthetic concern, then? I mean, I'm
7 6 talking about to you. You don't live on Cary
8 7 Lake. You don't have access to Cary Lake unless
9 8 you're invited to Cary Lane, as I understood you.
10 9 You're not a member of the Cary Lake Homeowners
11 10 Association, are you?
12 11 A. No, but I walk the roads around it.
13 12 Q. And those roads would be Cary Lane, public roads?
14 13 A. Yeah, public roads, and I walk across the dam all
15 14 the time.
16 15 Q. But those, again, are public roads in most cases
17 16 with residences on either side of them?
18 17 A. No on the dam, they're not.
19 18 Q. Well, not on the dam, but that's a road across
20 19 the dam?
21 20 A. Yes.
22 21 Q. It's a public road across the dam?
23 22 A. Yes.
24 23 Q. You don't swim in Cary Lake?
25 24 A. I don't swim there, but I have been fishing on
26 25 Cary Lake, and I've sat on a dock there.
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2 1 Ms. Roper has a little boathouse, and I think
3 2 everybody who walks or runs will stop there just
4 3 to rest, and I've sat on that dock hundreds of
5 4 times.
6 5 Q. And you've done that since you moved to Kaminer
7 6 Station?
8 7 A. Oh, yeah.
9 8 Q. So, you've done that all in the span of time
10 9 since all these other projects have occurred and
11 10 impacted to whatever extent Cary Lake, right?
12 11 A. What do you mean? I've been walking Cary Lake
13 12 for a long time.
14 13 Q. Right, but you said you fished and you sat on the
15 14 dock since then. Is that after the Dent Middle
16 15 School Expansion, because that was a long time
17 16 ago?
18 17 A. Yes, and I can tell you, I've seen the change in
19 18 Cary Lake, and it's pretty horrible.
20 19 Q. But with respect to the Roper Pond project,
21 20 you're not saying that you know that they won't
22 21 do what they're supposed to do, so it's going to
23 22 cause a problem for Cary Lake, and that's going
24 23 to affect your property in Kaminer Station?
25 24 A. Yes.
26 25 Q. Are you saying that you're absolutely certain
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1 that the project is not going to proceed as
2 required and as permitted by DHEC, and that as a
3 result, that stormwater, which is authorized, is
4 going to have an impact on you in your use and
5 enjoyment of your property in Kaminer Station?
6 A. I don't know how to answer that question.
7 Q. You don't know?
8 A. I don't know.
9 MR. LAVENDER: I don't have any
10 other questions.
11 THE COURT: Mr. Hightower?
12 MR. HIGHTOWER: No questions, Your
13 Honor.
14 THE COURT: Mr. Chandler?
15 REDIRECT EXAMINATION BY MR. CHANDLER:
16 Q. Aside from your concerns about the stormwater and
17 its effects downstream, do you have concerns
18 about the pond itself that's on the Roper Pond
19 property?
20 A. Oh, yeah. I mean, it would be pretty bad to not
21 be able to see it in its present state ever
22 again, and that's what we're expecting.
23 Q. And do you have concerns about the review that's
24 been conducted of the alterations to that pond?
25 A. The review that's been conducted by DHEC?

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2 1 Q. Yes.
3 2 A. Yes, I do.
4 3 Q. And what are those concerns?
5 4 A. In my opinion, they should have taken into
6 5 consideration the impact of this construction,
7 6 this property development on the pond, and that
8 7 was not done.
9 8 MR. CHANDLER: Thank you. Okay.
10 9 MR. LAVENDER: May I ask
11 10 something with response to those?
12 11 THE COURT: Yes, sir.
13 12 RECROSS EXAMINATION BY MR. LAVENDER:
14 13 Q. Ms. Jackson, you indicated that you have those
15 14 concerns with DHEC. Did you meet with DHEC?
16 15 A. No. I attended two deposition. I attended Mr.
17 16 Hightower's and Ms. Stewart's.
18 17 Q. You never met with DHEC during the course of
19 18 their review of this project? You never talked
20 19 to DHEC about your concerns?
21 20 A. No. Other people did that.
22 21 Q. You didn't go to any meetings where DHEC was
23 22 involved and express your concerns to DHEC
24 23 directly?
25 24 A. No, I did not. Other people did.
26 25 Q. You said you did the title work on Roper Pond.
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2 1 Mr. Chandler asked you about the pond and your
3 2 concerns about the pond?
4 3 A. No. I did the title work on the line between
5 4 Kaminer Station and Roper ...
6 5 Q. Just on the line?
7 6 A. Yeah, just on the line.
8 7 Q. Not on the origin of title of the Roper Pond
9 8 parcel?
10 9 A. Well, actually, I did do some title work once I
11 10 got involved in the case. I don't have any of
12 11 that with me.
13 12 Q. But the pond itself is encompassed by one parcel
14 13 all the way around except for the Trenholm Road?
15 14 A. Except for Trenholm Road. It's been there a very
16 15 very long time.
17 16 Q. Did your work indicate that the pond bottom was
18 17 also part of the property? It was not -- it was
19 18 owned by the property owner of the upland areas,
20 19 too, wasn't it?
21 20 A. Oh, yeah.
22 21 MR. LAVENDER: That's all I have.
23 22 MR. CHANDLER: That's all I have.
24 23 THE COURT: Thank you, Ms.
25 24 Jackson. You can step down.
26 25 MR. CHANDLER: The Petitioners
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1 call Elaine Starr.
2 (ELAINE STARR, having been duly sworn, testified
3 as follows:)
4 DIRECT EXAMINATION BY MR. CHANDLER:
5 Q. Would you please give us your name?
6 A. Elaine Starr.
7 Q. And where do you live?
8 A. I live on Sandy Shore Road, and that's on Cary
9 Lake.
10 Q. And does your husband live there with you?
11 A. Yes, he does.
12 Q. And he is also -- you're one of the Petitioners
13 in this action?
14 A. He is a Petitioner, as well.
15 Q. And how long have you lived there?
16 A. We've lived there 38 years. We moved there in
17 1971.
18 Q. And where is your property in relation to Cary
19 Lake and the Roper Pond property?
20 A. Our property is on Cary Lake, and it is the
21 opposite side -- it's on Sandy Shore, so it's
22 opposite to the Trenholm Road side of the
23 property of Cary Lake.
24 THE COURT: Wait a minute. You've
25 got me confused. Cary Lake is on the

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1 opposite side of Trenholm from Rope Pond.

2 Isn't that right?

3 MS. STARR: Yes.

4 THE COURT: Now, I understand.

5 Thank you.

6 Q. Now, in the time that you've lived there, have
7 you spent much time at Cary Lake?

8 A. Absolutely. We have four children. We raised
9 four children, and they've been swimmers since
10 they were two years old. So, we've swam, we've
11 boated, we've skied, we've fished, and now I'm
12 doing the same things with my grandchildren,
13 except water quality is not the same.

14 Q. And when you say water quality is not the same,
15 what do you mean?

16 A. There's lots of sediment on the bottom. The
17 clarity is not there. You can take a Succi Dish
18 and measure turbidity, and at one time, we could
19 walk out on our dock, and we could see six feet
20 down, you could see fish on the bottom, you could
21 see clam shells on the bottom, and you could see
22 lots of life on the bottom because the water was
23 clear and pristine. It's not that today.

24 Q. You mentioned what kind of dish?

25 A. A Succi Dish.

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1 Q. And what do you use that for?

2 A. That's used to measure turbidity. You put it

3 down in the water, and when you no longer see it,

4 you measure the rope that's going down into the

5 water and, you can tell the depth that you can

6 see clearly. It measures water clarity, is

7 actually what it does. Another name for that is

8 turbidity.

9 Q. And do you have any background or training or

10 knowledge in this or of water quality?

11 A. Yes, I do. I have a Bachelor's Degree from the

12 College of Charleston in Biology. I have studied

13 at the University of South Carolina and have a

14 Master's in Secondary Science there. I've done

15 graduate work in wetlands and coastal resources,

16 and so my training has been in water quality and

17 biology.

18 Q. And so, you know how to measure things like

19 turbidity and the other water quality parameters?

20 A. Right.

21 Q. Have you participated in any organizations

22 concerned about water quality in that area?

23 A. Yes, I have. South Carolina Science Council,

24 Biology Teacher Associations, Gills Creek

25 Watershed. I have had students that have done

1 ongoing studies in the Gills Creek Watershed,
2 which includes Cary Lake. I've been very active
3 in that organization and also coastal
4 organizations that have to do with the quality.

5 Q. You mentioned Gills Creek. I think that's the
6 first time Gills Creek has actually come up in
7 this hearing. Where is Gills Creek?

8 A. Gills Creek runs from Wildewood at
9 Sesquicentennial Park, and it's almost like a V
10 shape above Wildewood and Spring Valley all the
11 way down to the Congaree River. So, there's a
12 system of Lakes in Columbia, and Cary Lake is
13 only one of those systems or one of those lakes
14 in the system.

15 Q. And you say Cary Lake is part of the Gills Creek
16 Watershed?

17 A. Right. And right now, we have been trying to
18 clean up Gills Creek Watershed for years and
19 years since 1994, so it's been ongoing for a long
20 time, and the problem is, most of -- I guess a
21 lot of people in the community want to look at
22 everything piecemeal. You can't do that. You
23 have to look at the total thing. And I know
24 water is not going to run uphill from the Roper
25 Pond development, but it will affect lakes that

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1 are downstream from Cary Lake. So, we can't just
2 say that it's going to affect Cary Lake, but
3 anything down stream, it will affect.

4 Q. Okay. And as part of your concerns about this,
5 have you undertaken any studies of your own to
6 look at the impacts of Cary Lake and where they
7 came from?

8 A. Yes, I have. I began with students back in the
9 late '80s and early '90s, and this was probably
10 one of the field trips or field studies that we
11 did at least once a week so we could compare
12 analysis. And then after I retired from
13 teaching, I continued to take samples, and we
14 even have a team of people on Cary Lake that have
15 been part of the water quality team which have
16 taken samples, and at one time, DHEC did our
17 testing for us, and then, they no longer did
18 that, so we had to go to a private laboratory to
19 get results taken.

20 Q. And are you still monitoring things like that and
21 look at those results?

22 A. I have not -- this summer, we have not monitored
23 it at all, and one of our main concerns is that
24 the E. coli count in the lake, and of course, we
25 know that can change from hour to hour. Wherever

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2 1 you're testing on the lake, it can change, as
3 2 well. So, we have a standard rule that you don't
4 3 swim or you don't have water contact after a 24
5 4 hour period of time. Give sunlight a chance.
6 5 It will kill surface bacteria, but of course, it
7 6 doesn't affect anything that's down deep into the
8 7 sediment.

9 8 THE COURT: What do you mean about
10 9 a 24 hour period of time, Ms. Starr?

11 10 MS. STARR: It's just a standard
12 11 period of time. I would be very cautious
13 12 -- in fact, I'm cautious to tell our lake
14 13 owners, homeowners and their guests, you
15 14 know, "Be cautious about swimming.

16 15 THE COURT: 24 hours after what?

17 16 MS. STARR: After a rainfall,
18 17 because we know that after a rainfall, the
19 18 runoff is there, and everything that's, you
20 19 know, all around is going -- you know, the
21 20 pavement is all going to get scoured, the
22 21 land is going to get scoured, and it's all
23 22 going to go into the lake, and the water
24 23 quality is certainly damaged from that.
25 24 So, give it 24 hours, and if any surface
26 25 bacteria is there, the sunlight should kill

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2 1 it, but not all of it, but you know, the
3 2 danger of swimming is lessened then, I
4 3 would say.
5 4 Q. Now, are you familiar with the -- what's been
6 5 called the Lily Pad Pond or Roper Pond?
7 6 A. Yes. I've enjoyed that pond as a person that
8 7 travels on Trenholm Road. It's just absolutely
9 8 gorgeous. A couple of weeks ago, I was there
10 9 with one of the TV reporters from WACH-57, and I
11 10 really walked around and got to see the pond, and
12 11 right now, it's a heyday. It's just beautiful,
13 12 because there's white blooms, pink blooms, and
14 13 you can see a lot of life around it, like
15 14 dragonflies. You can hear the frogs croaking in
16 15 the pond. And I know that there's lots of
17 16 mammals that come there, too, like your deer,
18 17 your wildcat. You know, your larger animals
19 18 visit probably earlier in the morning than I was
20 19 there or late in the evening, but it supports the
21 20 wildlife.
22 21 Q. Now, do you feel that your use and enjoyment of
23 22 the Lily Pad Pond or Roper Pond at Cary Lake will
24 23 be affected if this project goes forward as
25 24 proposed?
26 25 A. Oh, definitely. You cannot take a 204 apartment
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2 1 unit, plus the garages, plus all the pavement and
3 2 not know that it's -- you know that it's going to
4 3 affect stormwater runoff. It's going to scour
5 4 everything. Right now, the property has
6 5 beautiful trees, shrubs, grasses. All of this
7 6 gives water an opportunity to circulate down into
8 7 the soil, and the trees uptake the water sending
9 8 it back into the atmosphere. Once you put all
10 9 this pervious stuff, the water will have no place
11 10 to go except rush into that pond and wherever it
12 11 might be piped over into Cary Lake. So, it will
13 12 have a detrimental effect.

14 13 Q. And other than the stormwater itself, do you have
15 14 any concerns about what is proposed for the Lily
16 15 Pad Pond itself?

17 16 A. Yes, I do. I do know that dredging will have an
18 17 effect on what's there. You can't take off the
19 18 bottom sediment. There's lot of life that is in
20 19 the sediment itself, and we know that -- you
21 20 know, it depends on how deep the dredging is
22 21 going to be whether or not the lilies are going
23 22 to be alive, because if their rise zones or root
24 23 systems get damaged or taken away, you know, they
25 24 may not be there. Something else may come and
26 25 colonize, but it might not be the lily pads. I

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1 think we're going to lose the aesthetic view of
2 the pond.
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4 MR. CHANDLER: Thank you very
5 much. Please answer the questions the
6 other attorneys may have.
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8 THE COURT: Mr. Lavender?
9 MR. LAVENDER: Thank you, Your
10 Honor.
11 CROSS EXAMINATION BY MR. LAVENDER:
12 Q. Mrs. Starr, help me again with exactly where you
13 live and how far around Sandy Shore Road your
14 house is on Cary Lake?
15 A. Okay. The far side of Cary Lake is Sandy Shore
16 Road. I'm probably in the middle of Sandy Shore.
17 Sandy Shore at one time had an outlet on Decker
18 Boulevard. We worked long and hard to get a road
19 -- our street was dirt at one time.
20 Q. That's the one by Pep Boys?
21 A. Right, by the Pep Boys, right. So, we worked
22 long and hard to get a very narrow street,
23 because we needed everything that came off of
24 that pavement would be going right into our lake.
25 So, yes, that's the street that I live on.
26 Q. And how far down from Decker is your house along
27 Sandy Shore from Decker before you make the turn?
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1 A. It's probably maybe a half mile. I think the
2 total road is seven-tenths of a mile, so maybe
3 we're almost a half mile from Decker.
4 Q. So, almost -- at least two-thirds of the way off
5 from Decker. You're closer to the inside than
6 toward Decker?
7 A. Yes, and of course, our street is paralleled
8 longer ...

9 THE COURT: Excuse me, Mr.
10 Lavender. Are you referring to an aerial
11 photograph?

12 MR. LAVENDER: I have one of my
13 own, Your Honor, and I'll be glad to show
14 Mr. Chandler. This came off the Tax Map,
15 and we've been using it for our own
16 edification. I'll be glad to let Mr.
17 Chandler look at it.

18 MR. CHANDLER: I don't have a
19 problem with it. It looks like this is an
20 aerial photograph that has been colored up
21 and is not ...

22 MR. LAVENDER: This came straight
23 off of a website.

24 MR. CHANDLER: Yeah, and it was
25 taken off of a website with the listed

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2 1 purpose of orienting the Court on where
3 2 Ms. Starr lives. I don't have any problem
4 3 with that.

5 4 MR. LAVENDER: Your Honor, we
6 5 printed it off the Richland County
7 6 Geographic Information System website.

8 7 THE COURT: Are you going to admit
9 8 that?

10 9 MR. LAVENDER: We can. I'll have
11 10 it marked. Are you okay with that?

12 11 MR. CHANDLER: I'm okay with that.
13 12 (Tax Map marked as Respondent's Exhibit Number 23
14 13 for identification.)

15 14 Q. Mrs. Starr, if I could let you look at this map
16 15 and get your bearings and see if you can just
17 16 sort of point ...

18 17 A. I would say we're here, because this is the cove.
19 18 We have a cove on our property.

20 19 Q. If you could maybe just make an X as close as you
21 20 can get. We're just trying to get an idea. If
22 21 you can make it big enough so we can all see it
23 22 without reading glasses or magnifying glasses.

24 23 A. (Witness complied.)

25 24 THE COURT: Is Ms. Jackson's
26 25 property shown on there, also?

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1 Q. Do you know generally where Ms. Jackson lives?

2 A. She's in Kaminer Station, so she's over here, and

3 I believe she's on the lake.

4 Q. You don't know exactly where she lives?

5 A. No, I do not.

6 MR. LAVENDER: I don't have a

7 problem, Mr. Chandler, if we want to mark

8 the locations.

9 MR. CHANDLER: Yes, we can do

10 that.

11 THE COURT: Let the record reflect

12 that Ms. Jackson was briefly recalled to

13 mark the location of her dwelling on

14 Exhibit 23.

15 Q. Mrs. Starr, with respect to that map and where

16 you've marked there, do you know where the outlet

17 from Roper Pond under Trenholm Road comes into

18 Cary Lake?

19 A. Yes, I do. It will come in at the Clowney's

20 residence.

21 Q. Clowney?

22 A. The Clowney's residence.

23 Q. Do you know generally where that is?

24 A. That is right near Dent Middle School.

25 Q. If you could, as best you can, mark that again,

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1 please.

2 THE COURT: Mark it with a "C".

3 A. Okay. It's in this general vicinity, and my
4 husband, Gene, may be able -- he's better at
5 this.

6 Q. Well, he's not on the stand?

7 A. He's directly across. He's the second house, I
8 think, from the schoolhouse, so it would be --
9 what is that? What is that marked over here? I
10 don't know, but it's where -- because I first
11 thought that it would empty into the cove where
12 Steve Brown, and he said, "No". I was corrected
13 on that matter. So, I think the Clowney property
14 may be the third house over there, but it will go
15 into -- right under his property.

16 Q. Is it likely, then, that what you're talking
17 about is somewhere in this area?

18 A. Well, it will eventually come into this area of
19 the lake here.

20 Q. And can you just mark that, as the judge said,
21 with a C?

22 A. (Witness complied.)

23 Q. And your X is over across Cary Lake off of Sandy
24 Shore, and Ms. Jackson's X is about on the "E"
25 under the word "Kaminer" on Kaminer Drive.

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1 Now, do you know anything about the
2 Stormwater Permit for this project? Have you
3 reviewed the plans?
4 A. I have not reviewed the plans.
5 Q. And you don't know what the plans are for
6 managing the stormwater?
7 A. I know that new stormwater plans, because I've
8 some input with that, will not affect this
9 property, and it's too bad that it doesn't,
10 because I think we're in a step in the right
11 direction. We're not there yet, but ...
12 Q. You're talking about something prospective?
13 A. Yes, prospective.
14 Q. But with respect to the permitted drawings and
15 the management practices for stormwater that are
16 required under the permit that's being contested,
17 you're not familiar with them?
18 A. Not presently.
19 Q. And with respect to the conditions of the lake
20 that you refer to, those conditions took place
21 before this project started, right?
22 A. Yes. This has been ongoing.
23 Q. Do you think those conditions resulted from
24 projects that did what they were supposed to do
25 or didn't what they were supposed to do?

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2 1 A. They were probably terminated by DHEC.
3 2 Q. But you don't know whether they violated the
4 3 permit or not violated the permit?
5 4 A. All I know is the lake is tilting. We have a
6 5 great deal of problem with that. It's changed
7 6 the lake bottom completely.
8 7 Q. You don't know, then, whether or not if this
9 8 project proceeds according to the permit and does
10 9 everything that they're supposed to do according
11 10 to the permit, whether it will cause any impact
12 11 to Cary Lake?
13 12 A. Oh, yes, it will, definitely.
14 13 Q. You do know that?
15 14 A. I do know that.
16 15 Q. And how do you know that?
17 16 A. From experience, because I've seen -- I've seen
18 17 Columbia Mall, Decker Village, even the highway,
19 18 the Trenholm Road Extension.
20 19 Q. All of those were permitted how long ago, 30
21 20 years?
22 21 A. 30, but even those that are being permitted today
23 22 will have an effect simply because of the
24 23 density.
25 24 Q. Well, if this project were something different
26 25 but it still had the same degree of impervious
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2 1 surface with larger town homes and parking lots
3 2 but the same roof top and impervious surface,
4 3 okay, the same three -- I'm asking you a
5 4 hypothetical question -- and use the same
6 5 stormwater controls, would your answer be the
7 6 same?
8 7 A. You would still have some -- you know, you would
9 8 need to have -- whatever is pre-development,
10 9 post-development, that needs to be equal,
11 10 whatever, you know, the rates for stormwater.
12 11 Q. Were you here all day?
13 12 A. I think I've been here all day.
14 13 Q. You heard Ms. Stewart testify that she reviewed
15 14 these plans. She's an engineer, and she reviewed
16 15 these plans at DHEC and determined that those
17 16 pre-development and post-development runoff rates
18 17 met those requirements, did you not?
19 18 A. No.
20 19 Q. Do you know anything to the contrary?
21 20 A. I can tell you that some of the rules and
22 21 regulations within the county as well as within
23 22 the state definitely affect stormwater and
24 23 definitely affect our lake system.
25 24 Q. You're not saying, though, that you know anything
26 25 to the contrary from what Ms. Stewart testified
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2 1 to this morning about the calculations and the
3 2 requirements that they approve?
4 3 A. I do not know about her calculations. I can tell
5 4 you about Dent Middle School. Would you like to
6 5 hear about that?
7 6 Q. Sure, go ahead. Tell me about it. I'd love to
8 7 listen.
9 8 A. Dent Middle School was completed two years ago,
10 9 and while they ---
11 10 Q. The most recent changes to it?
12 11 A. Yes, the most recent. And one of my neighbors
13 12 alerted me to -- this was a Cary Lake resident.
14 13 She said "Just go out and look at the huge
15 14 stormwater system that they're putting in", so I
16 15 did, and I thought, "How in the world can anybody
17 16 do this?" They're sitting on the upper pond of
18 17 Cary Lake. I called DHEC, even the head of DHEC.
19 18 The lady says, "I'm sorry, but my hands are
20 19 tied". She said, "You know, until we change
21 20 state law, nothing is going to change".
22 21 Q. Who did you talk to? Did you talk to anybody at
23 22 DHEC about Roper Pond?
24 23 A. No. Right now, I'm just telling you about my
25 24 experience with Dent Middle School. You know, if
26 25 we were a coastal county, we would be protected ,
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1 because you couldn't go in and ---
2 Q. Did you go in and talk to somebody? Did you look
3 at the plans? Did you ask them if they were
4 doing what they were supposed to do with Dent
5 Middle School?
6 A. No, I did not.
7 Q. Did you talk to anybody at Richland 2 about Dent
8 Middle school?
9 A. Yes. I have since had meeting with District 2.
10 Q. And was there any indication there that they did
11 something that -- Ms. Jackson -- I thought I
12 understood Ms. Jackson to say that there had been
13 fines levied against Richland 2 for Dent Middle
14 School?
15 A. I do not know that, but I do know that we are
16 getting the stormwater that's coming from
17 Columbia Place Mall, they've got a new name,
18 comes into the storm drains at Dent Middle School
19 and empties into the upper pond, and it's having
20 a terrific effect on our lake.
21 Q. What is it about this project if it proceeds
22 according to plans and does everything it's
23 supposed to do that will cause you injury?
24 A. It's the density and the stormwater. From the
25 day one that I met with the Planning Council,

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1 Richland County Planning Council and several
2 meetings after that and also with Richland
3 County, you know, I had proposed "Please accept
4 some best management practices", and I don't see
5 any best management practices.
6
7 Q. You're talking about the use of the property, not
8 the stormwater best management practices. Is
9 that right?
10 A. No. I am talking about -- I'm talking about the
11 stormwater, but it goes back to all of the
12 impervious surfaces that are there, roof tops,
13 garages, pavement, sidewalks, taking away trees
14 so that you can do the buildings. If you change
15 the whole landscape, then you'll have a problem.
16 Q. Do you know what the property was zoned before
17 this project was proposed?
18 A. I suppose, multi-family.
19 Q. No, before this property, what -- you weren't
20 involved in any discussions about the rezoning?
21 A. No. Had I known that this property was being
22 rezoned, however many years ago that was, I would
23 have been on my soapbox.
24 Q. Well, if it were C-2, if I told you that it was
25 C-2, and it would have allowed a shopping center
26 there, what would your position have been?
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1 A. Oh, I would have fought that, too.

2 Q. So, in other words, it's what they want to do

3 with the property?

4 A. Right. It's the density. If they would change

5 the density and put in some best management

6 practice, I would say "Great, be a good

7 neighbor".

8 Q. But you heard Ms. Stewart describe the multitude

9 of best management practices that are being

10 required of this project to manage stormwater,

11 didn't you? You did hear that?

12 A. I probably heard some of the things, but I think

13 I would go a little bit further than that.

14 Q. Well, you heard her talk about a number of things

15 that she thought did go beyond what the

16 requirements were, did you not?

17 A. I don't remember.

18 Q. Let's talk about the pond. You said you drive by

19 the pond, and you think it should stay like it

20 is?

21 A. Yes, it's beautiful. It's an aesthetic part of

22 the community.

23 Q. Is your view of the pond like that any different

24 from mine? I mean, I drive by there, too, and I

25 see it. I come and go that way.

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1 A. It's gorgeous. It's better than cement, I
2 promise you.
3
4 Q. Better than cement?
5
6 A. Right.
7
8 Q. Well, the pond is not going to be covered up by
9 cement. You heard that, too, right?
10
11 A. Yes.
12
13 Q. You understand that the pond is going to stay
14 there as a pond, right? You understand that?
15
16 A. I have heard that.
17
18 Q. You've seen that from the plans?
19
20 A. I've seen the plans, but I am not convinced that
21 that pond can be a detention or a retention pond,
22 and I'm not familiar with scepters. I do know
23 that that's been discussed this morning.
24
25 Q. But your view of what concerns you about the
26 aesthetics of the pond is no different from mine
27 or Ms. Jackson by walking by? That's a general
28 view of ---
29
30 A. Right, it's beautiful.
31
32 Q. -- everybody's. It's not unique to you. I mean,
33 your concern about that is not just unique to
34 you, it's what everybody sees driving by?
35
36 A. Right. I think the whole community sees that.
37
38 Q. Now, with respect to what the Roper Pond

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1 discharge -- the stormwater that's permitted by
2 this project, I'm trying to understand how you
3 believe that that particular stormwater from this
4 less than ten acres of disturbed area is going to
5 impact you on the other side of Cary Lake?
6 A. It's going to impact the lake, not necessarily my
7 little 200 feet of property. It will impact the
8 whole lake, because it will eventually move down,
9 get into the stream and be carried to the lake,
10 and then it will be carried over the dam into
11 other lakes downstream.
12 Q. And that's where the stormwater from Roper Pond
13 is going now, too, isn't it?
14 A. Yes, but ---
15 Q. It's taking the same path?
16 A. It's taking the same path, but most of the water
17 today on Roper Pond property is being absorbed
18 into the soil. It's being absorbed by shrubs,
19 trees. It's not a runoff. We're going to have a
20 runoff once you put cement there and rooftops and
21 pavement.
22 Q. But you've heard Ms. Stewart testify that the
23 calculations, the engineering calculations are
24 clear to her that the management practices that
25 are to be employed, including the storm scepters

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2 1 and including the capacity of that pond, will
3 2 manage stormwater to the pre-development runoff
4 3 rate? Did you not hear her say that?
5 4 A. She said that.
6 5 Q. And you're not an engineer, so you can't
7 6 contradict that?
8 7 A. That's right. I can't address that. I'm not an
9 8 engineer.
10 9 MR. LAVENDER: I don't have any
11 10 other questions.
12 11 THE COURT: Mr. Hightower?
13 12 MR. HIGHTOWER: No questions,
14 13 Your Honor.
15 14 THE COURT: Mr. Chandler?
16 15 REDIRECT EXAMINATION BY MR. CHANDLER:
17 16 Q. Ms. Starr, did you hear Ms. Stewart say anything
18 17 about her review of the pond that gave you any
19 18 comfort?
20 19 A. I heard her speak about the pond, but as far as
21 20 specifics, I'd have to look back over the
22 21 transcript to respond to that.
23 22 Q. Do you recall whether Ms. Stewart or Mr.
24 23 Hightower did any assessment of the impacts on
25 24 the Roper Pond itself?
26 25 A. She mentioned it, but, you know, if you're
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1 talking about people that are examining, you
2 know, doing an assessment, you know, many times
3 later, it's not until after the project is
4 finished that we have the problem. So, you know,
5 I say correct it before it's begun.

6 Q. And that's why you want this thing properly
7 reviewed?

8 A. Say that again.

9 Q. And the idea of protecting it before it's done is
10 why you want this project properly ---

11 MR. HIGHTOWER: Objection,
12 leading, Your Honor.

13 THE COURT: Sustained.

14 A. I don't know that an assessment or an inventory
15 was every made ---

16 MR. HIGHTOWER: Your Honor, you
17 sustained the objection?

18 THE COURT: I did.

19 MR. HIGHTOWER: Could you have the
20 witness's answer stricken?

21 THE COURT: Well, I'll know how to
22 treat it when I see it, but I'm not going
23 to strike it.

24 Q. Now, Ms. Starr, this picture that Mr. Lavender
25 put into evidence that says "Respondent's Exhibit

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2 1 23", it's got a red line where Two Notch Road is.
3 2 Two Notch Road is not really bright red, is it?
4 3 A. It might as well be with all the junk that's
5 4 there. It's awful.
6 5 Q. But in fact, this isn't a photograph that shows
7 6 up the true color of that road?
8 7 A. Right.
9 8 Q. And this boundary of, I guess, what are the
10 9 proposed roads around Roper Pond, that's not red
11 10 right now, either, is it?
12 11 A. No.
13 12 Q. And all of these ponds and other water bodies,
14 13 they're not bright blue like it's shown here,
15 14 either?
16 15 A. No. They were clear at one time, but now they're
17 16 muddy. It would be brown if you wanted to give
18 17 them a color.
19 18 Q. And that's from construction runoff in the area?
20 19 A. That's from runoff and development all through
21 20 the corridor, all up through Northeast Richland.
22 21 Q. And has that affected your use and enjoyment of
23 22 your property?
24 23 A. Absolutely. I used to be a swimmer, and I'd swim
25 24 every day when the water was warm. I haven't
26 25 swam in years. I do canoe, and I still enjoy
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1
2 1 fishing. My grandchildren and I catch and
3 2 release. We don't eat the fish, but we catch
4 3 them for fun, and then we throw them back in so
5 4 somebody else can catch them.

6 5 Q. And you're doing your best to help clean up that
7 6 area and prevent it from being getting worse,
8 7 right?

9 8 A. Yes. Every week, there's a big garbage can full
10 9 of litter that's picked up, and I try my best to
11 10 keep our neighbors, homeowners advised of
12 11 problems that are there, too.

13 12 MR. CHANDLER: Thank you,

14 13 Ms. Starr.

15 14 THE COURT: If there's nothing
16 15 further from the Respondents, you may step
17 16 down.

18 17 MR. LAVENDER: Your Honor, Mr.
19 18 Chandler and I were just discussing -- we
20 19 were talking about in order to further the
21 20 flow of the proceedings, at least with
22 21 respect to the standing issue of, I guess,
23 22 the various categories we talked about
24 23 before, after your inquiry about how the
25 24 proceedings would go and then in terms of
26 25 how to maybe shorten the time frame we
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1
2 1 talked about, looking at the Kaminer
3 2 Station area and the Cary Lake area as
4 3 unique units, I think we're prepared to
5 4 at least stipulate that there's some
6 5 similar -- enough similarities with respect
7 6 to Ms. Jackson's testimony, I think, that
8 7 we would stipulate that her testimony would
9 8 be representative of those individuals in
10 9 the Kaminer Station area, which is across
11 10 Trenholm Road, and Ms. Starr's testimony
12 11 would be representative of those three, I
13 12 think, property owners on Cary Lake. And
14 13 then, there's a third category which is the
15 14 Town of Arcadia Lakes, and I think we've
16 15 talked about just with respect to that,
17 16 tendering the 30(b)(6) deposition of the
18 17 Town, that would be any standing questions
19 18 for the Town.

20 19 THE COURT: And who is offering
21 20 it, now?

22 21 MR. CHANDLER: We'll make it the
23 22 Petitioner's Exhibit, whatever is the next
24 23 number in the row, and I guess we'll
25 24 address the issue of standing in proposed
26 25 orders or whatever down the road.

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THE COURT: Yes, sir, but to satisfy my curiosity, why wasn't the standing issue raised at the very outset?

MR. LAVENDER: Well, we didn't do a lot discovery, I guess, until the last couple of months, and we were more focussed on these issues after we were unable to settle.

(30(b)(6) Deposition of Town of Arcadia marked as Petitioner's Exhibit Number 27 for identification.)

THE COURT: Petitioner's 27 admitted without objection.

MR. CHANDLER: With that, Your Honor, the Petitioners -- I don't have the exact -- I mean I have a Pre-hearing Statement in front of me ...

MR. LAVENDER: Your Honor, we talked last night electronically, and we did reach an agreement with respect to -- and I'm reading from the Amended Pre-Hearing Statement on Page 2, Mr. Chandler's Pre-hearing Statement. Paragraph 3-B-1 which addresses an issue about a silk fence on Drawing C-2 intruding

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2 1 into the wetland buffer, we will stipulate
3 2 to the extent that it's necessary that all
4 3 silk fence will be removed from beyond
5 4 outside the boundary of the wetland buffer
6 5 as depicted on the drawing. That's not an
7 6 issue.

8 7 Whatever drawing may have shown a --
9 8 this is the next item, Item 2, "Whatever
10 9 is wrong may have shown a 26 foot wide
11 10 road", we stipulate that all the drawings
12 11 -- all the approvals we've gotten from
13 12 Richland County and all the drawings that
14 13 should have been approved by DHEC should
15 14 show 24, and wherever they're not, it will
16 15 be a 24 foot driveway. And we'll stipulate
17 16 that whatever drawings need to be
18 17 corrected. I'm not sure we found out -- I
19 18 don't know the drawings we've got, but
20 19 we'll look at it, and we'll stipulate that
21 20 it's 24 feet.

22 21 MR. CHANDLER: So, basically, what
23 22 that does is resolve B-1 and B-2 by those
24 23 stipulations. As to 3, we'll just withdraw
25 24 that as a ground of appeal in this case.

26 25 THE COURT: Which one is that?
27
28

Excuse me.

MR. CHANDLER: B-3 as well as B-4, which is specifically hinged on the Richland County MS4 Program. We're going to withdraw that, as well as B-5.

So, basically on the engineering drawing and technical arguments, we're withdrawing.

Now, in terms of the other numbered items, item F and G, we will withdraw those grounds. And so, our case is going forward, and we think the evidence supports us on the other grounds that are left in this case.

And with that, the Petitioners rest.

THE COURT: Thank you.

MR. CHANDLER: Oh, I forgot to mention one thing. Have you got an extra hard copy of the Power Point Presentation that we can put into evidence to reflect what was shown today?

MR. LAVENDER: Yes.

MR. CHANDLER: So, then, we'll make Dr. Reice's Power Point Presentation Petitioner's Exhibit 28.

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2 1 THE COURT: Exhibit 28 admitted
3 2 without objection.
4 3 (Power Point Presentation marked as Petitioner's
5 4 Exhibit Number 28 for identification.)
6 5 MR. CHANDLER: Let me inquire
7 6 about one more thing. We marked as
8 7 Petitioner's Exhibit 21 a larger size
9 8 drawing of the Wetland Delineation Map,
10 9 because the other one had been a reduced
11 10 drawing that wasn't clear. Do y'all have
12 11 any problem with adding this larger size
13 12 map, which is marked as Petitioner's
14 13 Exhibit 21?
15 14 MR. LAVENDER: No objection.
16 15 THE COURT: Petitioner's 21
17 16 admitted without objection.
18 17 MR. LAVENDER: Your Honor, I would
19 18 love to finish tonight, but given both the
20 19 hour and the opportunity to at least confer
21 20 with my client before we start -- I will
22 21 say this -- I would like to ask that we
23 22 break, because I'm not sure we could finish
24 23 by 7 o'clock at this point, but I don't
25 24 believe we will have more than two and
26 25 possibly only one witness in the morning,
27
28

1 so if we can start bright and early ...

2 THE COURT: Would you like to
3 start at 9 o'clock?

4 MR. LAVENDER: Sure. That's fine.

5 THE COURT: We'll start at 9
6 o'clock in the morning. I hope that
7 doesn't inconvenience anybody, but we're
8 approaching a holiday and people need to
9 get on their way.

10 THE COURT: All right. Then we'll
11 be in recess until 9 o'clock in the
12 morning.

13 (Whereupon, the hearing recessed at 6:37 o'clock
14 p.m. on 9-3-09.)

15 (Whereupon, the hearing reconvened at 9:14
16 o'clock a.m. on 9/4/09.)

17 THE COURT: Mr. Chandler, I
18 believe you had rested, had you not?

19 MR. CHANDLER: Yes, sir.

20 THE COURT: Mr. Lavender?

21 MR. LAVENDER: Yes, sir, and I had
22 a few clean-up items, if I could address
23 those. I'll ask Mr. Chandler to
24 confirm this, but I think your Petitioner's
25 Exhibit Number 10 that was admitted

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2	1	yesterday was an unsigned copy, and we have
3	2	a signed copy of this.
4	3	MR. CHANDLER: Yeah, I have no
5	4	problem with that, Your Honor.
6	5	MR. LAVENDER: Your Honor, if we
7	6	can substitute, if we can locate it -- I
8	7	found it. We can substitute the signature
9	8	page. That's a signed signature page of
10	9	the September 9th, 2009 letter to
11	10	Mr. Whatley.
12	11	And there were two other clean-up
13	12	issues. I know we talked a bit about
14	13	-- our Respondent's 11, 12 and 22 were the
15	14	Versions 1, 2 and 3 of Dr. Reice's report
16	15	that were marked, and I believe we checked
17	16	with the reporter, and they were not
18	17	admitted, and we'd like to offer them at
19	18	this time.
20	19	MR. CHANDLER: I have no
21	20	objection.
22	21	THE COURT: Without objection,
23	22	Respondent's -- and that's what numbers?
24	23	MR. LAVENDER: 11, 12 and 22.
25	24	THE COURT: Respondent's 11, 12
26	25	and 22 will be admitted without objection.
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MR. LAVENDER: We'd like to call

Mr. George Whatley to the stand, Your

Honor.

(GEORGE WHATLEY, having been duly sworn,
testified as follows:)

DIRECT EXAMINATION BY MR. LAVENDER:

Q. State your full name for the Court, please.

A. George Orion Whatley.

Q. You might want to spell the middle one.

A. O-R-I-O-N.

Q. And if you could, describe your education and
experience, field of work.

A. Yes, sir. I have an Associate Degree from
Midlands Technical College in Civil Engineering
Technology, and I've applied that education for
all of my adult life with an engineering company.
Additionally, I have roughly 12 wetland courses
that deal with delineation permitting, endangered
species and anything that might be associated
with correspondence and submittals to me from the
CORPS of Engineers.

Q. Do you also hold an Undergraduate Degree?

A. Yes.

Q. In addition to the Associate Degree?

A. Yes. I have a Bachelor of Science in Education

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2 1 from the University of South Carolina. I have
3 2 several teacher certifications, which include
4 3 General Science and Biology.
5 4 Q. Okay. And how long have you been working in this
6 5 particular field?
7 6 A. In this particular field for the CORPS of
8 7 Engineers, approximately eight years, a little
9 8 over eight years.
10 9 Q. And how would you generally describe that field
11 10 of work, your title or ...
12 11 A. Wetland Scientist.
13 12 Q. Wetland Scientist. Okay. What does that
14 13 involve? What does your work involve?
15 14 A. I do work in support of our engineering projects.
16 15 Many of our engineering projects have issues that
17 16 relate to wetlands or other waters of the United
18 17 States. I act as our consultant on behalf of our
19 18 clients to obtain any concurrences, applications,
20 19 delineations or anything associated with
21 20 jurisdiction of the CORPS of Engineers.
22 21 Q. And did I understand you to say that you've had a
23 22 number of training courses in this field, as
24 23 well?
25 24 A. Yes, sir.
26 25 Q. Generally, describe those.
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1 A. They are soil courses. I don't want to go off on
2 a tangent, but basically wetland is -- one of the
3 indicators for wetlands is soil. You tell by the
4 characteristics of the soil whether you're in
5 wetlands or out of wetlands, vegetation,
6 hydrology, endangered species and permitting
7 issues.
8 Q. Permitting issues, too?
9 A. Yes.
10 Q. You've had courses on permitting? Have you dealt
11 with the CORPS of Engineers on permitting issues?
12 A. Yes.
13 Q. Have you performed wetland delineations yourself?
14 A. Yes.
15 Q. Can you approximate how many?
16 A. Over 200.
17 Q. How about permitting to the CORPS of Engineers?
18 A. More than 250, I'm sure. There would be more
19 permits than delineations, just because, as with
20 this project, the delineation was done by someone
21 else, and I worked directly with the CORPS with
22 the permitting issues?
23 Q. So, you didn't do the delineation on this
24 project?
25 A. No, sir.

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1 Q. How did you become involved in this particular
2 project?

3 A. Our engineers brought the project to me, and I
4 began work on it on behalf of our client.

5 Q. And what did that work involve?

6 A. Our engineers did a layout of the project and
7 determined what impact there would be to wetlands
8 or other waters of the United States on the site,
9 and then I worked with them to minimize impacts
10 and to prepare a submittal package to the CORPS
11 of Engineers so that we could obtain concurrence
12 that we were covered under a PCN.

13 THE COURT: Under a what? I
14 didn't understand the last part.

15 MR. WHATLEY: A Pre-Construction
16 Notification, a PCN.

17 Q. Have you attended any workshops hosted by the
18 CORPS of Engineers?

19 A. Yes, sir. They have workshops annually, and I
20 always attend those. In fact, we have a two-day
21 workshop this month.

22 Q. And what are the subjects of those workshops?

23 A. It's a wide array of items. They have regulatory
24 changes on a very regular basis. They reveal to
25 us what those regulatory changes are. They also

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1 have different procedures. It's kind of an
2 evolving process all the time. So, so from
3 year-to-year, they like to communicate clearly to
4 us exactly what has changed from the prior year.
5
6 Q. And in that context, have you come to understand
7 what you believe were the roles of the permitting
8 process or the functions of the permitting
9 process and what activities you believe required
10 permits and did not require permits?
11 A. Yes. I'm well prepared for that.
12 Q. Can you put your hands -- I think it's right
13 there on the ledge to your right, is the
14 Petitioner's Exhibit we just provided.
15 A. Yes.
16 Q. And can you describe that document -- it's
17 Petitioner's Exhibit 10, isn't it?
18 A. Yes.
19 Q. Is that a letter that you received?
20 A. Yes. This is -- after submittal to the CORPS of
21 Engineers, this is the confirmation letter that
22 they sent back that we are covered under a
23 Nationwide Permit.
24 Q. Does that letter indicate a particular Nationwide
25 Permit?
26 A. Yes, sir, Nationwide Permit Number 39.
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2 1 Q. You were here yesterday, so you heard a lot of
3 2 testimony, I presume, about Nationwide 29 and 39,
4 3 did you not?
5 4 A. Yes, sir.
6 5 Q. Were you involved in the preparation of the
7 6 application for permit coverage from the CORPS of
8 7 Engineers for this project?
9 8 A. Yes, I was.
10 9 Q. And I think right there to your right may be
11 10 Petitioner's Exhibit Number 9. Does that look
12 11 familiar? Is that it?
13 12 A. Yes.
14 13 Q. It's a two page CORPS Application?
15 14 A. Yes.
16 15 Q. Did you prepare that application?
17 16 A. Yes, sir.
18 17 Q. Is this the form from the CORPS of Engineers?
19 18 A. Yes, it is.
20 19 Q. Now, did -- in the course -- is that all you
21 20 submitted to the CORPS of Engineers?
22 21 A. No, sir. There's a package with other data which
23 22 includes sketches of the impact, a site plan for
24 23 the entire site or a location map. There are
25 24 other supporting documents such as RQ drawings
26 25 which include soil maps, aerial photography.
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2 1 It's a fairly good submittal.
3 2 Q. Mr. Whatley, I'm going to ask you if you can
4 3 identify what's been marked as Respondent's
5 4 Exhibit Number 6?
6 5 A. Yes, sir. This looks like what I submitted to
7 6 the CORPS of Engineers in my letter dated May
8 7 5th, 2008.
9 8 MR. LAVENDER: Your Honor, we'd
10 9 like to offer that.
11 10 MR. CHANDLER: No objection.
12 11 THE COURT: Without objection,
13 12 Respondent's Exhibit 6.
14 13 Q. Mr. Whatley, let me call your attention -- well,
15 14 on the first page, you mention in the bottom of
16 15 the first paragraph, you refer to a
17 16 Jurisdictional Determination. Do you see that --
18 17 A. Yes.
19 18 Q. -- right at the end of the first paragraph?
20 19 A. Yes, sir.
21 20 Q. Can you describe generally what that is, a
22 21 Jurisdictional Determination, JD?
23 22 A. Yes. One thing that's necessary is to establish
24 23 the wetland boundaries. This like many has
25 24 uplands and wetlands. That boundary has to be
26 25 set. And based upon soils, hydrology and
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2 1 vegetation, a consultant such as myself goes out
3 2 and flags those Jurisdictional Boundaries. They
4 3 submit it to the CORPS of Engineers and request
5 4 that the CORPS of Engineers confirm that these
6 5 boundaries are correct, and that's what a
7 6 Jurisdictional Determination is.

8 7 THE COURT: How does the CORPS
9 8 determine whether they're correct or not?
10 9 Do they send somebody out to physically
11 10 inspect, or do they have pre-existing
12 11 maps or aerial photographs?

13 12 MR. WHATLEY: They have lots of
14 13 information, and much of the information
15 14 that we submit is very helpful to them.
16 15 They sometimes check the site, and
17 16 sometimes they don't, but we provide
18 17 adequate information so that there's a
19 18 basis for why we set the line.

20 19 Q. The CORPS doesn't actually certify wetland
21 20 consultants or scientists, though, do they?

22 21 A. No, they don't.

23 22 Q. Do they identify -- in the past, have they
24 23 identified those that they know have prerequisite
25 24 training, like on their web site?

26 25 A. Yes, sir. They post that on their web site.
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1 Q. Are you identified there, do you know?
2 A. Yes, sir, I am.
3 Q. And sort of a follow-up to what the judge asked
4 you in terms of how the CORPS does that. What
5 type of information would have been reviewed in
6 connection with a delineation that would be first
7 made, because the delineation is made by a
8 wetland scientist like you. Is that correct?
9 A. That's correct.
10 Q. And in that respect, what type of information do
11 you first look at? You didn't do this particular
12 delineation?
13 A. No, sir, but if I had, what I would do is I would
14 first use the Soil Conservation Service Mapping.
15 There are certain soils identified as hydrant
16 soils. Those are wetland soils. Those appear in
17 that document, and even though some of these maps
18 are very old, they're surprisingly accurate. In
19 most cases, they're correct, and before even
20 entering the site, you're able to identify
21 approximately where it's likely that they're
22 going to be wetlands. After that, you go to the
23 site and look at vegetation. Certain vegetation
24 will grow well in wetlands. Other vegetation
25 cannot grow in wetlands, because it's too wet,

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2 1 and it would be on the upland. So, the
3 2 vegetation is one of the considerations that
4 3 helps you determine where that line is going to
5 4 be. And then, of course, there are other
6 5 considerations such as surface water. Sometimes
7 6 there's no vegetation. The water surface comes
8 7 right up to an upland boundary, and there's
9 8 nothing else to identify it except water. So,
10 9 there's a number of criteria that are used, but
11 10 it's a good objective way to find the line.
12 11 Q. Are there several components of a wetlands or
13 12 jurisdictional determination that you would
14 13 consider? You mentioned soils. Are there
15 14 others?
16 15 A. Soils, vegetation, hydrology.
17 16 Q. And you talked about jurisdiction. Does the
18 17 jurisdictional boundary include more than just
19 18 wetlands? When I say "wetlands", I mean
20 19 something that you looked at from a soil
21 20 standpoint. Can it also include a water body?
22 21 A. Yes. It can include streams, rivers, ponds, as
23 22 we have on this site. Wetlands -- the way the
24 23 CORPS separates it is they refer to water such as
25 24 this pond as waters of the United States;
26 25 whereas, the upland side where the water moves
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2 1 down into the pond area would be considered a
3 2 wetland, but it's all jurisdictional.
4 3 Q. Did you have the Jurisdictional Determination in
5 4 your hands when you began preparation of the
6 5 Application?
7 6 A. Yes, I did.
8 7 Q. It consists of the two pages -- well, it's
9 8 actually a part of the May 5th letter, isn't it?
10 9 A. That's right. When I submitted it to the CORPS
11 10 of Engineers, I included a copy for their use of
12 11 their Jurisdictional Determination.
13 12 Q. In this Application, did you describe the impacts
14 13 of the project as you understood them to be?
15 14 A. Yes, sir.
16 15 Q. Did you make a determination from those impacts
17 16 what you felt like required a permit from the
18 17 CORPS?
19 18 A. Yes.
20 19 Q. Now, in doing so, what did you consider the
21 20 impacts that would be -- that would need to be
22 21 covered by a CORPS of Engineer's authorization?
23 22 A. There were two areas, very small areas, less than
24 23 a tenth of an acre, 0.075 acres to be exact, that
25 24 the plan building footprint on one of them
26 25 required a small amount of fill so that there
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2 1 would be room to place that building. That was
3 2 kind of in the upper portion of the wetland area.
4 3 The other area is a small retaining wall and fill
5 4 for a sidewalk that's near the wetland and pond
6 5 area.
7 6 Q. Are those all described on the drawings that
8 7 follow your September 5th letter?
9 8 A. Yes, they are. We also identified one avoidance
10 9 area where we were able to do a foot bridge over
11 10 a wetland area to avoid impacts.
12 11 Q. Is that depicted, as well?
13 12 A. Yes.
14 13 Q. Did you -- when you described these areas, were
15 14 you aware that the property owner also intended
16 15 to dredge or excavate a portion of the pond?
17 16 A. I'm sorry?
18 17 Q. At the time you prepared this, were you aware
19 18 that the property owner intended to dredge or
20 19 excavate a portion of the pond?
21 20 A. As I began the permit, I didn't, but I soon found
22 21 out, yes.
23 22 Q. Would that have changed -- had you known it at
24 23 the beginning, would that have changed the
25 24 content of your application for purposes of
26 25 needing authorization from the CORPS or your
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1 belief that you needed authorization from the
2 CORPS?
3 A. No. You don't need authorization from the CORPS
4 for dredging.
5 Q. Did that subject ever come up later?
6 A. Yes.
7 Q. Let me ask you if you can look at Petitioner's
8 Exhibits 7 and 8 over there. They're two Emails.
9 A. Okay.
10 Q. Have you seen those?
11 A. No, sir.
12 Q. So, you weren't aware of an exchange with respect
13 to excavation -- an exchange of Emails with the
14 Department from your company with respect to the
15 Emails?
16 A. Between my company and DHEC?
17 Q. It looks like those Emails, a portion of the
18 subject of those Emails deals with excavation of
19 the pond?
20 A. Yes. I haven't seen these until this morning.
21 Q. Then, let me ask you back to your Application.
22 Would you consider your May 5th letter a PCN? Is
23 that what it was intended to be, your May 5th
24 letter?
25 A. Yes, sir. I notified the CORPS.

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1 Q. Did you ask for coverage under any particular
2 Nationwide Permit?
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4 A. No. I never do that. I asked for coverage under
5 a Nationwide Permit, and the CORPS assigns that
6 number. They made a mistake.
7 Q. Why do you not ask for a particular permit? Why
8 do you not make reference to a particular
9 Nationwide Permit?
10 A. In one of my classes, I was advised not to do
11 that.
12 Q. By whom?
13 A. I feel well qualified, and we do our best to keep
14 up with any changes that may take place with the
15 CORPS, but it's safer to let the CORPS tell us
16 that we're covered by the correct permit, and
17 they sent us a 39 which should have been a 29.

18 THE COURT: While Mr. Lavender is
19 looking at that, let me ask you, is this
20 addressing the issue of why it was issued
21 for a commercial venture rather than a
22 residential one?

23 MR. WHATLEY: I think so, yes,
24 sir.

25 Q. Let me follow up on that to make sure that I
26 understood what you said. Did your May 5th

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2 1 letter identify any -- make reference to any
3 2 particular or specific Nationwide Permit under
4 3 which you sought coverage for this project?
5 4 A. No.
6 5 Q. At some point, during the course of your
7 6 involvement with this project, did it come to --
8 7 well, you got a letter from the CORPS of
9 8 Engineers which is Petitioner's Exhibit 12,
10 9 right?
11 10 A. Yes, that's correct.
12 11 Q. Did it, in fact, indicate a particular Nationwide
13 12 Permit for which coverage was confirmed or
14 13 verified?
15 14 A. Yes. The letter state's, "Furthermore, the
16 15 activity meets the terms and conditions of the
17 16 Department of Army Nationwide Permit Number 39".
18 17 Q. Is that the first time that 39 came to your
19 18 attention?
20 19 A. Yes, sir.
21 20 Q. Do you remember at what point that particular
22 21 reference came to your attention, and what did
23 22 you think of it when it did?
24 23 A. I actually did not discover it myself. Our
25 24 engineers brought it to our attention and said
26 25 that they did not think this was the right
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1 permit. At that point, I started making efforts
2 to make it right with the CORPS.
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4 Q. Beg your pardon? The last part, I didn't hear
5 the last part.
6 A. At that point, I started my efforts to make it
7 right with the CORPS by requesting to them that
8 they issue the correct Nationwide Permit.
9 Q. And what action did you take?
10 A. More correspondence.
11 Q. I'm going to show you what's been previously
12 marked as Respondent's Exhibit 7 and see if you
13 can identify this Email, a portion of it. Does
14 this include an Email attached to a string from
15 you --
16 A. Yes.
17 Q. -- at the bottom?
18 A. Yes.
19 Q. Can you identify the date of that Email?
20 A. At the bottom, January 6, 2009, 8:15 a.m.
21 Q. I guess I'm looking toward the middle where it
22 says "Original message". February 25th is the
23 date I'm -- do you see that date?
24 A. Yeah, but that's at the top of the page, yeah.
25 Q. Well, it's in the middle first.
26 A. Oh, you're right. Okay.

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2 1 Q. What's that original -- what's identified in the

3 2 middle as a message? Can you describe what that

4 3 string contains?

5 4 A. Yes. I contacted Colt Boles, the CORPS of

6 5 Engineers Project Manager and asked him for

7 6 clarification. Let me read this. Yes, I asked

8 7 him to issue a corrected letter to identify the

9 8 impacts that are covered under a Nationwide 29

10 9 rather than a Nationwide 39.

11 10 Q. Is that first Email there where it says "Good

12 11 morning, Colt" -- can you sort of publish what

13 12 that says and at least put it in context?

14 13 A. Sure.

15 14 MR. CHANDLER: Wait a minute.

16 15 You're asking him to read from his Email to

17 16 Colt?

18 17 MR. LAVENDER: Yes, from his Email

19 18 to Colt dated February 25th.

20 19 A. I say, "Good morning, Colt. Below is a copy of

21 20 an Emessage that I sent you on January 6th, 2009.

22 21 I'll also send you a copy of my request dated

23 22 February 4th, 2009, so you will not have to

24 23 search for or Email correspondence. We have also

25 24 had several telephone conversations relating to

26 25 the items listed below. We are requesting the

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2 1 following from you: Please issue a corrected
3 2 letter which indicates the impacts are covered
4 3 under a Nationwide Permit Number 29 rather than a
5 4 Nationwide 39.

6 5 MR. CHANDLER: Your Honor, if he's
7 6 going to read any further, he's going to
8 7 read statements about what was said to him
9 8 by somebody else, and I object to that as
10 9 hearsay.

11 10 MR. LAVENDER: Your Honor, we're
12 11 going to get to that. We're going to offer
13 12 correspondence from the CORPS of Engineers
14 13 just like the Petitioner's offered
15 14 correspondence from the CORPS of Engineers,
16 15 and whether it's an Email correspondence or
17 16 otherwise, we believe that it falls under a
18 17 number of exceptions, not the least of
19 18 which is a public records exception, and
20 19 secondly, the CORPS of Engineers is not
21 20 subject to the subpoena power of this
22 21 Court. So, we can't produce them to come
23 22 testify in person. And we believe that it
24 23 falls under a multiple exceptions, but it's
25 24 of public record. This Email above that is
26 25 a ---

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2 1 Q. Does the string above your response consist of an
3 2 Email communication that you received from the
4 3 CORPS of Engineers?

5 4 A. Yes. They responded to the things that I
6 5 presented to them.

7 6 THE COURT: What do you say, Mr.
8 7 Chandler?

9 8 MR. CHANDLER: It's still hearsay,
10 9 Your Honor. I don't agree that it comes
11 10 under a public records exception or
12 11 anything else. The documents that we
13 12 offered were not objected to. They were
14 13 documents that directly related to the
15 14 permitting matters. This is just an
16 15 exchange of correspondence between two
17 16 people that may have been involved in the
18 17 case, but it's not -- you know, an Email
19 18 giving advice on what is or is not required
20 19 is not -- doesn't fall within the public
21 20 records exception, and still, it is
22 21 hearsay, and we don't have a statement here
23 22 to cross examine.

24 23 THE COURT: Are you offering it
25 24 for the truth of it or just to show that he
26 25 acted on it?

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2 1 MR. LAVENDER: We will first offer
3 2 it to show that he acted on it. We will
4 3 later in correspondence offer that it
5 4 responded to and addressed one of the
6 5 salient issues raised by the Petitioners in
7 6 this case, and yes, we will offer it at
8 7 that point for the truth of it or at least
9 8 in the form of a letter from the CORPS of
10 9 Engineers to Mr. Whatley in response to a
11 10 letter from Mr. Whatley to the CORPS of
12 11 Engineers, official correspondence from
13 12 the person that signed those other letters
14 13 offered by the Petitioners on the issue
15 14 specifically that has been the subject of a
16 15 day of testimony yesterday about excavation
17 16 and whether or not it should have been
18 17 covered by a CORPS of Engineers Permit, and
19 18 if it's not relevant, then nothing
20 19 yesterday that occurred is relevant or
21 20 admissable.

22 21 MR. CHANDLER: The actual issue
23 22 before the Court is whether or not the DHEC
24 23 401 Certification Section should have
25 24 looked beyond just what was on the
26 25 Nationwide Permit under their own

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2 1 regulations which requires them to look at
3 2 the entire activity. That is the issue,
4 3 not what is required of the CORPS of
5 4 Engineers, and so -- we have not claimed
6 5 that -- and we can't claim it, as we know.
7 6 We've litigated in the Court before issues
8 7 that had a State and Federal interface
9 8 here. We're not asking you to rule that
10 9 the CORPS of Engineers did or did not have
11 10 jurisdiction over anything. Our issue is
12 11 whether DHEC properly reviewed this under
13 12 Section 401 of the Clean Water Act.

14 13 MR. LAVENDER: Will counsel
15 14 stipulate, then, that the excavation
16 15 activities and the lowering of the pond and
17 16 the repair and replacement of the outfall
18 17 structure do not require a permit or
19 18 authorization from the CORPS of Engineers?

20 19 MR. CHANDLER: Well, these things
21 20 have been described as Section 10 Waters
22 21 by the CORPS of Engineers. Now, are they
23 22 talking about replacing an outfall
24 23 structure? Nobody has asked for a permit
25 24 from the CORPS to replace an outfall
26 25 structure. That's not here. I will
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2 stipulate that the CORPS regulates fills
3 and not dredging. It doesn't mean that 401
4 has a similar limitation over their
5 jurisdiction at DHEC.

6 MR. LAVENDER: I like that part of
7 it. We take issue with Mr. Chandler's
8 statement that this pond has been described
9 as a Section 10 Water Body. In fact, the
10 only testimony yesterday was elicited from
11 Mr. Chuck Hightower that is was not either
12 Section 10 or a South Carolina Navigable
13 Water, Section 10 being Federally Navigable
14 Water. And I can ask Mr. Whatley that
15 question, too, and ask him what the CORPS
16 of Engineers' Jurisdictional Determination
17 said.

18 MR. CHANDLER: Essentially, what
19 Chuck Hightower said yesterday was he
20 didn't know about Federal Jurisdiction, and
21 so I don't think this is responsive or
22 related to anything that Mr. Hightower
23 said, and he made it pretty clear that he
24 doesn't know what the rules are governing
25 the CORPS of Engineers.

26 THE COURT: Let's go forward, and
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2 1 when we get to the issue, I'll rule on it.
3 2 MR. LAVENDER: Very well, Your
4 3 Honor.
5 4 A. Should I continue reading?
6 5 THE COURT: Yes, sir.
7 6 A. Okay.
8 7 MR. CHANDLER: Your Honor, just to
9 8 bring us back to where we started, he's
10 9 getting ready to read a statement that I
11 10 object to as hearsay.
12 11 THE COURT: Overruled.
13 12 MR. LAVENDER: I haven't asked him
14 13 to read the part on the top yet, but we'll
15 14 keep going, unless you're talking about
16 15 something else in this letter.
17 16 MR. CHANDLER: Well, in Number 2,
18 17 it does.
19 18 MR. LAVENDER: Then he might.
20 19 Q. I'm trying to find out if you contacted
21 20 Mr. Boles and how many times you contacted
22 21 him on this letter?
23 22 A. Yes. This will show that I did. Let's see. We
24 23 had just covered Item 1 which was asking him to
25 24 change the Nationwide 39 to a 29. Number 2,
26 25 "Also, I called you after I learned that the
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2 1 owner plans to lower the elevation of the pond
3 2 and asked you if that was an impact. You
4 3 indicated that the pond could be lowered or the
5 4 dam could be actually breached, and this would
6 5 not be an impact." 3, "We also discussed removal
7 6 of soil and sediment from the bottom of the
8 7 pond", and then in parenthesis, "Material to be
9 8 discharged into uplands, in which you also
10 9 indicated that this would not be an impact".
11 10 Q. Now, Mr. Whatley, I asked you earlier if you had
12 11 known these -- known that these activities were
13 12 also planned by the property owner, would that
14 13 have changed the content of the Application that
15 14 you submitted on May 5th of '08?
16 15 A. No, because you don't have to have authorization
17 16 from the CORPS to dredge a pond.
18 17 Q. And for what purpose did you later contact Mr.
19 18 Boles? Was it to get that answer or what?
20 19 A. Yes. I wanted there to be no question that that
21 20 is correct.
22 21 Q. Okay,
23 22 MR. LAVENDER: Your Honor, we
24 23 would like to offer this, please.
25 24 MR. CHANDLER: Same objection,
26 25 Your Honor. This is hearsay. It's
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2 1 statements made by somebody who is not
3 2 here. This Email included an Email from
4 3 Colt Boles from the CORPS of Engineers,
5 4 and it's hearsay.

6 5 THE COURT: Well, I'm going to
7 6 overrule you, and I'm going to admit it
8 7 on the premise that it is an official
9 8 record. It's clearly not a record in the
10 9 usual sense that I would think of it, but
11 10 given the fact that we can't subpoena the
12 11 employees or the CORPS of Engineers in
13 12 here, I think it's appropriate it be
14 13 admitted.

15 14 MR. LAVENDER: Thank you, Your
16 15 Honor.

17 16 Q. Mr. Whatley, I'm going to show you another
18 17 document that's marked as Respondent's Exhibit
19 18 Number 1 and ask you if you can identify this
20 19 document?

21 20 A. Yes, sir. This is a letter from US Army CORPS of
22 21 Engineers signed by Colton Boles, the Project
23 22 Manager for the CORPS of Engineers dated February
24 23 25th, 2009, which indicates that the project is
25 24 covered under a Nationwide 29.

26 25 Q. Now, just briefly, if you could put your hands
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2 1 again on Petitioner's Exhibit Number 10. It's
3 2 the September letter?
4 3 A. Yes.
5 4 Q. And I think we just recently added a signature
6 5 page to that exhibit. Is there a signature on
7 6 that letter?
8 7 A. Yes, sir.
9 8 Q. And do you recognize that signature?
10 9 A. Yes, sir. It's the signature of Colton Boles,
11 10 the Project Manager.
12 11 Q. Is that the same individual that you contacted on
13 12 a number of occasions prior to and on February
14 13 28th as evidenced by your Email?
15 14 A. Yes. The CORPS of Engineers assigns a Project
16 15 Manager to each project, and you do all your
17 16 correspondence with him. They indicate that to
18 17 you early on so you'll know who you can direct
19 18 your questions and submittals to.
20 19 Q. Was that Mr. Boles on this project?
21 20 A. Yes.
22 21 Q. And can you describe what's been marked as
23 22 Petitioner's Exhibit 1, which is the February
24 23 25th, '09 letter? I know I'm shuffling you
25 24 around.
26 25 A. Yes. That's the one where the CORPS of Engineers
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1 issued another letter indicating a Nationwide
2 Permit 29.
3 Q. Can you describe the context of how this letter
4 came to you? Is that in response to something
5 you did?
6 A. Yes. I contacted the CORPS and asked them to
7 respond.
8 Q. Is that one of -- Item Number 1 here that you
9 mentioned in your Email exchange?
10 A. Yes.
11 Q. One of those items in your Email exchange?
12 A. Yes.
13 Q. And again, Mr. Boles signed that letter?
14 A. Yes.
15 Q. Now, did he address your other questions that you
16 asked him about, the other activities, which is
17 the excavation?
18 A. In the Email?
19 Q. No -- well, in this letter, did he address those?
20 A. Not in this letter.
21 MR. LAVENDER: Your Honor, we
22 would like to offer Respondent's Exhibit 1,
23 please.
24 THE COURT: Respondent's 1
25 admitted without objection.
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2 1 Q. So, after having received this letter, did you
3 2 take any other steps to get answers to any other
4 3 questions?
5 4 A. Yes. I wrote a letter to CORPS of Engineers
6 5 asking for clarification.
7 6 Q. If I could ask you to see if you can identify
8 7 what's been marked as Respondent's Exhibit 8?
9 8 A. Yes. That's my letter to the Branch Chief there,
10 9 Mr. Brice McCoy.
11 10 Q. Now, this isn't on your letterhead, so how is
12 11 this letter maintained by you?
13 12 A. How is it maintained by me?
14 13 Q. Right.
15 14 A. This is my file copy of it.
16 15 Q. So, you normally maintain a photocopy with the
17 16 letterhead and signature?
18 17 A. Right.
19 18 Q. Can you read this and confirm that this is your
20 19 letter?
21 20 A. I can verify that this is my letter that I wrote.
22 21 Q. Now, if you know, what is the relationship
23 22 between Brice McCoy and Colt Boles?
24 23 A. Brice McCoy is the Branch Chief. Colt Boles is a
25 24 Project Manager that works under the supervision
26 25 of Mr. McCoy.
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1 Q. And why did you direct this letter to Mr. McCoy?
2 A. Because I felt like he was the most qualified to
3 answer the question.
4 Q. And what was your question that you were asking
5 in this letter?

6 MR. CHANDLER: Your Honor, I
7 want to object to this. This is a letter
8 written May 22nd, 2009 while we were well
9 into this case, and it's obviously a very
10 self-serving attempt to try to get some
11 backup in this case. It's just -- it's not
12 pertinent to the issues we have about what
13 and how DHEC -- what DHEC should have
14 done and how they did their job in this
15 case.

16 MR. LAVENDER: Your Honor, again,
17 I'll tell you. If we're getting a
18 stipulation that the planned activities for
19 excavating the pond, repairing and
20 replacing the outlet structure and lowering
21 the water level of the pond were not
22 subject to the jurisdiction of the CORPS of
23 Engineers, then maybe we can forgo this,
24 but we haven't gotten there yet. We spent
25 all day yesterday talking about excavation

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2 1 and what was required by permit. We
3 2 brought to your attention the Federal
4 3 Statutory Provisions. I've got one more
5 4 exhibit that responds to this, and we're
6 5 done with this issue.

7 6 THE COURT: Well, doesn't Mr.
8 7 Whatley know of his own knowledge? Can't
9 8 he testify to that?

10 9 MR. LAVENDER: He does and he has
11 10 already, that's correct, and what I
12 11 understand he was doing was he was assuring
13 12 himself that his answer was correct.

14 13 THE COURT: Well, forgive me, but
15 14 I'd like to hear him testify about it
16 15 again, what he knows of his own knowledge.

17 16 MR. LAVENDER: I'll ask him that
18 17 question.

19 18 THE COURT: All right.

20 19 MR. CHANDLER: Your Honor, I just
21 20 want to be clear here. What he's talking
22 21 about is what this gentleman knows or at
23 22 least thinks he knows about Federal Law and
24 23 Federal requirements, and there's not any
25 24 Federal Law question in front of this
26 25 Court. I mean, if they're asking you to
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2 1 make a ruling on what the jurisdiction of
3 2 the US Army CORPS of Engineers is, I think
4 3 that goes way beyond the bounds of the
5 4 issues that are before the Court.

6 5 THE COURT: Well, let me perhaps
7 6 explain, although I don't think I'm
8 7 required to. I came into this case
9 8 believing that somewhere in the State
10 9 Regulations or the Federal Regulations,
11 10 there would be something that limited or
12 11 prohibited the dredging that you're
13 12 complaining about to lower that pond out
14 13 there, and I've pretty well been disabused
15 14 of that notion. I'm going to give you the
16 15 opportunity to convince me otherwise, but
17 16 that's what why I want to hear what this
18 17 witness has to say, what he knows of his
19 18 own knowledge, and I want him to state to
20 19 me unequivocally.

21 20 MR. CHANDLER: All right, sir.
22 21 The only thing I would say, and we'll deal
23 22 with this in however you want us to present
24 23 arguments on this, but the question of
25 24 what is required by the CORPS of Engineers
26 25 and what is required under the DHEC

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2 1 Regulations, that they do issue a 401
3 2 Certification of a CORPS Permit, are two
4 3 separate things.

5 4 THE COURT: I hear what you
6 5 say, but you must realize that I handle
7 6 cases ranging from inmate grievances all
8 7 the way up to cases of this level and
9 8 dignity, and I can't possibly keep up with
10 9 all of it without hearing it from the
11 10 stand. That's when I am able to focus on
12 11 it, and so that's the reason that we've got
13 12 to go into it, in my opinion.

14 13 Q. Mr. Whatley, of your own knowledge, what does
15 14 your knowledge tell you about whether or not a
16 15 permit from the CORPS of Engineers is required
17 16 for dredging, excavating, whatever term you want
18 17 to call it, lowering of the pond level through
19 18 replacement and repair and replacement of the
20 19 outlet structure?

21 20 A. Okay. The CORPS of Engineers does not require a
22 21 permit for dredging in a project such as this.
23 22 It's well established. It's done quite often.
24 23 We've had projects where it's been done before.
25 24 The CORPS of Engineers has reviewed the project
26 25 with the full knowledge of what we were doing,
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1 and they have not chosen to regulate that.
2 Q. Under what circumstances could that type of
3 activity or the resulting effects of it come
4 under jurisdiction of the CORPS of engineers?
5 A. The dredging, if you're not going to do it as a
6 permitted activity, there are certain
7 requirements. For example, the fill that's being
8 excavated has to be put directly on a truck or
9 directly discharged into the uplands rather than
10 double-handling. You can't get out there with a
11 bulldozer and push it up in a big pile and leave
12 it for some period of time and then later come
13 back and haul it away. The CORPS allows what
14 they call incidental fallback. In other words,
15 if a clamshell bucket or something is picking up
16 sediment from the bottom of the pond, a small
17 amount of incidental material will fall back, and
18 they allow for that, and they do not consider
19 that an impact or a pollutant. So, there are
20 guidelines. There are some things that you have
21 to do.

22 THE COURT: If it's not a
23 permitted activity?

24 A. If it's not a permitted activity.

25 THE COURT: But this is a

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2 1 permitted activity, what we're talking
3 2 about here today, is it not?
4 3 A. Only the 0.075 acres which is not the dredging of
5 4 the pond is a permitted activity. This is not a
6 5 permitted activity.
7 6 THE COURT: Thank you.
8 7 MR. LAVENDER: I don't think
9 8 Number 8 was admitted, and I'd like to
10 9 offer Number 8.
11 10 Q. It's a letter from you to CORPS of Engineers. Is
12 11 that correct?
13 12 A. Yes.
14 13 THE COURT: Any objection?
15 14 MR. CHANDLER: You're talking
16 15 about this May 22nd, 2009 letter?
17 16 MR. LAVENDER: Yes, I do object to
18 17 that. That was what we were talking about
19 18 just a few minutes ago.
20 19 THE COURT: Well, that's Mr.
21 20 Whatley's letter. Is that right?
22 21 MR. LAVENDER: Yes, sir, that's
23 22 right.
24 23 THE COURT: I'm going to overrule
25 24 your objection.
26 25 Q. Mr. Whatley, I've got one more exhibit I want to
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1 ask you if you can identify that's been marked as
2 Respondent's Exhibit Number 9?
3 A. Yes, sir. I recognize this letter. It's a
4 response from Colt Boles, the Project Manager of
5 the CORPS of Engineers.
6 Q. And this is a letter dated May 29 of '09?
7 A. Yes, sir.
8 Q. Now, what's the context of this letter as it
9 relates to the previous exhibit?
10 A. Well, the previous exhibit is my request for a
11 determination or comment for the questions that I
12 asked about removing the sediment from the pond,
13 and in the letter, he says, "This is in response
14 to your recent letter wherein you inquired as to
15 the necessity of obtaining a Department of Army
16 Permit?
17
18 MR. CHANDLER: Your Honor, I
19 object.
20
21 THE COURT: Same objection?
22 MR. CHANDLER: Same objection.
23 THE COURT: Overruled.
24 A. I'll start over. "This is in response to our
25 recent letter wherein you inquired as to the
26 necessity of obtaining a Department of Army
27 Permit for proposed excavation of an existing
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2 1 pond located at 6837 North Trenholm Road in the
3 2 Town of Arcadia Lakes, Richland County, South
4 3 Carolina. A review of the information you
5 4 provided indicates that the work will not involve
6 5 work in a navigable waters of the United States,
7 6 nor will it entail placement of fill material in
8 7 wetlands or waters of the United States.
9 8 Therefore, a Department of Army Permit is not
10 9 required, and you may proceed with the project."
11 10 And then, there's a paragraph about any future
12 11 correspondence, refer to, you know, so and so,
13 12 project number.
14 13 Q. So, back to what you know now, again, in
15 14 follow-up to what the Court asked you,
16 15 distinguish between filling and excavating under
17 16 the CORPS jurisdiction?
18 17 A. Okay. Filling is what we actually -- what
19 18 actually is under the jurisdiction of the CORPS,
20 19 and that's the two impact areas that I discussed
21 20 earlier. That's where fill material from uplands
22 21 is being placed into the wetlands. That is an
23 22 impact. Dredging -- you asked about and
24 23 dredging?
25 24 Q. I asked about dredging or excavating. Dredging
26 25 is the CORPS term, I think?
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1 A. Right. Dredging is just a removal. Dredging is
2 not an impact, so. So, the way I described
3 picking up material and moving it to an upland
4 location is not an impact.

5 Q. That's under Section 404. Are you commenting
6 about Section 10 of the Rivers and Harbors Act
7 under "Navigable Waters"? Did you also conclude
8 whether this was a navigable water in your mind?

9 A. Yes. I knew it was not a navigable water.

10 Q. Did the Jurisdictional Determination also
11 indicate that?

12 A. Yes.

13 Q. Did you have the occasion -- even though you
14 didn't do the delineation, did you have the
15 occasion to go back and look at the soil
16 conservation maps for this area?

17 A. Yes, I did.

18 MR. LAVENDER: I'm not going to
19 offer this, Your Honor, but at this point,
20 if I could just get Mr. Whatley here to
21 identify it.

22 MR. CHANDLER: I don't think I've
23 been provided any information on that.

24 MR. LAVENDER: I'm not saying I'm
25 offering anything. I just wanted to

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2 1 indicate what source he referred to. This
3 2 is a Soil Conservation Federal Publication.
4 3 I just want to know if he's looked at the
5 4 maps and what source he used. That's all I
6 5 want to know.

7 6 MR. CHANDLER: You haven't listed
8 7 any expert witnesses, either, so are you
9 8 getting ready to ask him an opinion?

10 9 MR. LAVENDER: No. I'm not going
11 10 to ask him an opinion at all.

12 11 A. Yes. There's one for every county in the state,
13 12 I guess in the nation, and it is the bible for
14 13 wetland consultants. It's a very valuable
15 14 resource.

16 15 Q. Did you look at that resource in reviewing for
17 16 this project?

18 17 A. Yes, sir.

19 18 Q. And did you note anything on that Soil Map
20 19 relative to this feature on the map?

21 20 A. Yes, sir. It showed the pond. It showed a
22 21 circle with a vertical slash through the circle
23 22 in the middle of the pond. I went to the legend
24 23 to see what that means. The legend in the book
25 24 indicated that that is a dug pond, a man-made dug
26 25 pond.

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2 1 Q. You looked at that and made that determination on
3 2 your own --
4 3 A. Yes.
5 4 Q. -- from referencing that map?
6 5 A. Yes, sir.
7 6 MR. CHANDLER: Your Honor, lastly,
8 7 we'd just like to offer Exhibit 9.
9 8 THE COURT: Before you do that, I
10 9 want to put in the record the name and
11 10 description of the publication number of
12 11 what he referred to.
13 12 MR. LAVENDER: The title of the
14 13 book on it's cover is "Soil Survey of
15 14 Richland County, South Carolina", and the
16 15 bottom indicates, "United States Department
17 16 of Agriculture, Soil Conservation Service,
18 17 in cooperation with the South Carolina
19 18 Agricultural Experiment Station and South
20 19 Carolina Land Resources Commission". It
21 20 says on the inside it was issued September
22 21 of 1978, but I don't see a Federal
23 22 Government Docket Number which probably
24 23 predated the GPO index.
25 24 And lastly, I don't think you admitted
26 25 Number 9, and I'd like to just offer Number
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THE COURT: And that is?

MR. LAVENDER: Number 9 is the May 29 letter to Mr. Whatley that he identified from Colton Boles which was a response to his May 22nd letter.

THE COURT: I think I overruled his objection and it was still admitted, Respondent's 9.

MR. LAVENDER: I don't have any other questions for Mr. Whatley.

MR. CHANDLER: Does Mr. Hightower have any questions?

MR. HIGHTOWER: No question, Your Honor.

CROSS EXAMINATION BY MR. CHANDLER:

Q. At the time you originally submitted an application to the CORPS of Engineers, did you know that there were plans to excavate the pond? I believe you said you didn't know that at first, right?

A. Right. During the process of submitting it to the CORPS, I did.

Q. Now, on Petitioner's Exhibit Number 9, this form that you submitted to the CORPS, now that was

1 336

2 1 dated April 30th, '08, the signature line on the

3 2 second page?

4 3 A. Yes, sir.

5 4 Q. And up on the second page at the top over on the

6 5 right-hand side, there is a table there about the

7 6 type and quantity of impacts to US waters,

8 7 including wetlands, and you filled in the line

9 8 about filling 0.075 acres?

10 9 A. That's correct.

11 10 Q. And down on the -- three notches down from that,

12 11 there's a space for filling in for dredging or

13 12 excavation. Do you see that?

14 13 A. Number 17, is that what you're asking?

15 14 Q. No. I'm talking about on Number 14.

16 15 A. Yes, sir, I see that.

17 16 Q. And you left that blank?

18 17 A. Right.

19 18 Q. Did you know at the time you filled this out that

20 19 you were going to be doing dredging or

21 20 excavation?

22 21 A. I'm fuzzy on the timing. I don't think that

23 22 matters. My response wouldn't have been

24 23 different either way. At some point, I learned

25 24 that we were doing dredging, but at the very

26 25 beginning, for a fact, I know I didn't know.

27

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2 1 Q. Okay. And all your conversations with Colt
3 2 Boles, these Emails and this correspondence with
4 3 his supervisor, those were all months and months
5 4 after this form was filled out in April of '08.
6 5 Isn't that correct?
7 6 A. Right.
8 7 Q. So, either you didn't know that they were going
9 8 to be dredging impacts or excavation impacts or
10 9 you just left it off for whatever reason, right?
11 10 A. Right.
12 11 Q. And also, there's a line a couple lines down for
13 12 draining of waters to US, and you also left that
14 13 blank?
15 14 A. Where are you referring to?
16 15 Q. The same thing up there in 14. It's got a whole
17 16 list. "Filling" is the first category. You
18 17 filled that out?
19 18 A. Right.
20 19 Q. And then there's "Backfill and Bedding", and you
21 20 left that blank, because there's not any of that.
22 21 Land clearing, you left that blank, because you
23 22 don't have that. Dredging or excavation, you
24 23 left that out, even though there is going to be
25 24 dredging or excavation, right?
26 25 A. Yes, there's going to be dredging.
27
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2 1 Q. And then, below that, there's "Flooding", which
3 2 is blank, and there's "Draining", which is blank,
4 3 but in your later letter, you knew that the thing
5 4 was going to be drained for this work?
6 5 A. Temporarily, yes. A lot of this is the
7 6 interpretation of how you understand it, and the
8 7 pond is not permanently drained.
9 8 Q. I understand, but these impacts were not put on
10 9 this application?
11 10 A. Right, but you know, we weren't required to get
12 11 anything from the CORPS for this. It's a
13 12 non-regulated activity, so, you know, this
14 13 doesn't matter.
15 14 Q. That's your legal opinion?
16 15 A. That's my opinion in my work, yes.
17 16 Q. You had to get a Nationwide permit to do the
18 17 filling?
19 18 A. We only had -- no, we had to notify CORPS of
20 19 Engineers. We didn't have to get anything from
21 20 them.
22 21 Q. Well, you had to notify them, and you had to get
23 22 a response back from them?
24 23 A. No. We didn't have to get a response back.
25 24 Q. Well, you got a response, and what did they tell
26 25 you about the Department of Health and
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1 Environmental Control?

2 A. What did they tell me about the Department of

3 Health and Environmental Control?

4 Q. Yes.

5 A. The CORPS?

6 Q. Yes.

7 A. I don't think they told me anything about them.

8 Q. Well, let's take a look at the letter that they

9 sent you in September. What does that last

10 paragraph on the page -- what's that exhibit

11 number?

12 A. This is Number 10.

13 Q. Number 10, Petitioner's Exhibit 10. Didn't they

14 tell you you needed to go get DHEC approval?

15 A. Okay. I know what you're talking about now.

16 Yeah, this -- there's a statement, Your Honor, in

17 bold here that's placed -- my understanding is

18 it's placed there by the CORPS of Engineers so

19 that there's a full opportunity for inner-agency

20 review. Some of these things that they suggest

21 that you need to obtain did not apply to certain

22 projects, but they list them as examples of other

23 possible permits that may be needed.

24 Q. And since you are knowledgeable about these

25 Nationwide Permits, do you know whether or not

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1 you have to get a 401 Certification from the
2 agency when there's a Pre-Discharge Notification?
3 A. As Mr. Hightower said yesterday, for both the 39
4 and the corrected 29, there is a certification.
5 There is a 401 Certification.
6 Q. The CORPS of Engineers told you you needed to get
7 documentation of that. It's a Pre-Construction
8 Review, isn't it?
9 A. It's a what?
10 Q. It's a Pre-Construction Review of your submittal,
11 isn't it?
12 A. Sure. They review everything that we submit.
13 Q. Did they tell you in that paragraph that if you
14 proceed without getting confirmation from the
15 Department of Health and Environmental Control,
16 it's going to be considered a willful violation
17 of the Clean Water Act, doesn't it?
18 A. Well, first of all, we haven't proceeded, and
19 second of all, there is a certification.
20 Q. And that certification is of a Nationwide Permit
21 that only covered the fill?
22 A. That's correct, because that's what the CORPS --
23 That's what the CORPS regulates.
24 Q. That's what the CORPS regulates?
25 A. Yes, sir.

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1 Q. But you don't know what DHEC regulates other than
2 what you heard from Mr. Hightower yesterday?
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4 A. I think Mr. Hightower was pretty clear yesterday.
5
6 Q. Well, I understand that he might have been clear
7 about his opinion about that, but are you
8 familiar with the DHEC 401 Regulations?
9
10 A. Generally.
11
12 Q. Now, the letter that you sent to Mr. Peter McCoy
13 laying out how the work was going to be done in
14 the pond, was this information ever provided to
15 the Department of Health and Environmental
16 Control?
17
18 A. I did not provide that to them. The CORPS often
19 communicates with the 401 Water Quality Section.
20 I don't have access to know whether they did or
21 not.
22
23 Q. This letter you wrote in May of 2009, was this
24 the first time you provided this specific
25 information to the CORPS of Engineers?
26
27 A. No, sir. I had talked to Mr. Boles on the phone
28 about it earlier in the project.
29
30 Q. Now, when you talk about impacts and whether
31 something would be an impact, you're really
32 talking about what the CORPS considers to be a
33 regulated impact, aren't you?

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1 A. Would you ask that again? I didn't quite follow
2 you. I'm sorry.

3 Q. You made several statements in response to
4 questions you were asked earlier that dredging
5 would not be an impact. Were you talking about
6 that that would not be a regulated impact at the
7 CORPS of Engineers?

8 A. The CORPS doesn't claim jurisdiction over it.
9 So, for our purposes, it's treated as no impact
10 by the CORPS of Engineers -- well, that's not
11 completely correct. They don't treat it, period.
12 They just walk away from it. They don't comment.
13 They'll say like they did in their answer to my
14 letter what they don't do, but they're not going
15 to say what they do with it.

16 Q. Okay. And so, when you say "no impacts", you're
17 just saying they don't regulate it, they don't
18 look at it, they don't care what you do?

19 A. Sure, they care. They care, because as I told
20 Your Honor, you know, that they have a specific
21 way that that dredge material may be removed.
22 They can't just go out there and do anything.

23 Q. And if you don't follow that thing, then you are
24 going to be considered to be having an impact
25 that comes under their rules?

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2 1 A. That's correct.
3 2 Q. But at the time this thing went over to the
4 3 Department of Health and Environmental Control --
5 4 was a letter sent to you from DHEC saying "We
6 5 approve this under a 401 Certification"?
7 6 A. For the 39?
8 7 Q. Yes.
9 8 A. Yes.
10 9 Q. So, they had reviewed the project?
11 10 A. They had reviewed the project.
12 11 Q. Back in October?
13 12 A. Right.
14 13 Q. And at that time, had you provided DHEC with the
15 14 specific information that you were going to be
16 15 dredging or excavating this pond?
17 16 A. No. I provided it to CORPS.
18 17 Q. But not to DHEC?
19 18 A. Right. And as Mr. Hightower said yesterday, it
20 19 wouldn't have mattered with them, either.
21 20 Q. Well, I understand what he said.
22 21 A. Me, too.
23 22 Q. Now, you got a letter from DHEC regarding
24 23 Nationwide 39 in October. Did you ever get a
25 24 follow-up letter from DHEC on Nationwide 29?
26 25 A. From DHEC?
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2 1 Q. From DHEC.
3 2 A. No, not DHEC, from the CORPS.
4 3 Q. But you didn't get one from DHEC on Nationwide
5 4 29?
6 5 A. And I'm not' required to.
7 6 Q. That's a matter of opinion, but as a matter of
8 7 fact, you didn't get one, right?
9 8 A. Respectfully, I'm not sure it's a matter of
10 9 opinion. I'm not required to.
11 10 Q. Did you receive one? That's a simple question.
12 11 A. No, I didn't.
13 12 MR. CHANDLER: That's all I have,
14 13 Your Honor. Redirect.
15 14 THE COURT: Redirect?
16 15 MR. LAVENDER: We don't have any
17 16 further questions of Mr. Whatley.
18 17 THE COURT: You may step down.
19 18 MR. LAVENDER: Can we have just a
20 19 few minutes before moving forward?
21 20 THE COURT: Yes, sir.
22 21 (Whereupon, a break was taken from 10:32 a.m. to
23 22 10:37 a.m.)
24 23 MR. LAVENDER: We don't have any
25 24 further witnesses. We rest at this time.
26 25 THE COURT: Mr. Chandler, he's
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2 1 rested. Do you have anything in reply?
3 2 MR. CHANDLER: DHEC is not going
4 3 to put up any witnesses?
5 4 MR. HIGHTOWER: The Department is
6 5 going to rest, too.
7 6 MR. CHANDLER: Well, I don't think
8 7 I'm going to offer anything in reply, Your
9 8 Honor. We do have -- I mean, I understand
10 9 what you said a little while ago in terms
11 10 of the state requirements. We have legal
12 11 arguments that I will be glad to outline
13 12 today, or we can outline them in proposed
14 13 orders.
15 14 THE COURT: I'd prefer you do it
16 15 in proposed orders. I would ask that you
17 16 be very specific. You, in the course of
18 17 the trial, brought out, I think, a number
19 18 of the things that you considered
20 19 deficiencies. It would be helpful to me if
21 20 you tabulated those and refer to a specific
22 21 code section or regulation section.
23 22 Furnish that to Mr. Lavender so he may take
24 23 that and make a response so that I will
25 24 have that before me when I'm trying to make
26 25 a decision about this. Do you understand?
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2	1	MR. CHANDLER: Yes, Your Honor.
3	2	If we're going to do that where I submit --
4	3	do you want a brief or a proposed order?
5	4	THE COURT: Well, I want a brief
6	5	in the form of a proposed order, but
7	6	separate from that, I want a tabulation
8	7	that I can look at without having a lot
9	8	of verbiage. I just want it all, you
10	9	understand.
11	10	MR. CHANDLER: Yes, sir. And if I
12	11	submit that to Mr. Lavender and Mr.
13	12	Hightower and they respond, I'd like a
14	13	brief time to reply to whatever they
15	14	submit.
16	15	THE COURT: That will be fine. As
17	16	far as timing, Ms. Vickers says that she
18	17	will have the transcript within about two
19	18	weeks, so 30 days after you get the
20	19	transcript, which I assume all of you are
21	20	going to order -- is that correct?
22	21	MR. LAVENDER: Yes, Your Honor.
23	22	MR. HIGHTOWER: Yes, sir.
24	23	MR. CHANDLER: Yes, sir.
25	24	MR. LAVENDER: If I might, get
26	25	from a sequencing standpoint, the table, I
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2 1 guess, you call it. How is that going to
3 2 play with the 30 days on the order thing?

4 3 THE COURT: Submit it at the same
5 4 time, unless you want to try to get it in
6 5 ahead of that, of course, and it may save
7 6 one of you the trouble of doing a brief and
8 7 a proposed order.

9 8 MR. CHANDLER: I may be able to do
10 9 that a little bit sooner. I know that
11 10 today, finishing kind of my trial schedule
12 11 over a little while, but I've got a huge
13 12 briefing schedule back in my office, and so
14 13 I'm going to need to clear those other
15 14 things out before I can really focus on
16 15 this, but ...

17 16 MR. LAVENDER: If we could get
18 17 that 30 days and maybe 10 more days to have
19 18 the proposed orders in, then we don't have
20 19 to respond. We can -- I mean, because
21 20 otherwise, we might have to go back around
22 21 on the proposed orders if we get this
23 22 table and have some input into it if we did
24 23 not address it in our proposed order that's
25 24 going to come in at the same time. That's
26 25 the only thing I'm trying not to do.

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THE COURT: All of you understand
clearly what I'm wanting in tabulated form
are the salient issues and the statutes?

MR. CHANDLER: Yes, sir, and would
it be possible to do that in 20 days and
then we do the proposed orders in 30, so if
we have a response just to the table, we
can offer that, but at the same time, we're
still on the 30 day schedule? Would that
be possible?

THE COURT: You all can work it
out. Anything further?

(No one responded with anything further.)

THE COURT: All right. Then, I'd
like to say that the folks in the gallery,
I appreciate your courtesy and attention.
I wish every group was as courteous. That
being said, we'll adjourn. Thank you.

(Whereupon, the hearing adjourned at 10:43
o'clock a.m.)

1
2 STATE OF SOUTH CAROLINA)

3 : C-E-R-T-I-F-I-C-A-T-E

4 COUNTY OF RICHLAND)

5 I, Jill H. Vickers, Certified Court
6 Reporter and Notary Public, certify that I did
7 have the Hearing before me at 10:02 a.m. on
8 Thursday, September 3rd, 2009, and at 9:14 a.m.
9 on Friday, September 4th,, 2009, at the Edgar A.
10 Brown Building, 1205 Pendleton Street, Suite 224,
11 Columbia, South Carolina; that the witnesses were
12 sworn to tell the truth, the whole truth, and
13 nothing but the truth; that the foregoing pages
14 constitute a true and accurate transcript of the
15 testimony given and proceedings held at that time
16 and place.

17 I further certify that I am not of
18 counsel or kin to any of the parties to this
19 cause of action, nor am I interested in any
20 manner in its outcome.

21 IN WITNESS WHEREOF I have hereunto set
22 my hand and seal this 15th day of September,
23 2009.

24
25 Notary Public for South Carolina.
My commission expires July 5th, 2016.

1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

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