

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

RECEIVED

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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 III OF III**

Amy E. Armstrong
S.C. ENVIRONMENTAL LAW PROJECT
Post Office Box 1380
Pawleys Island, SC 29585
(843) 527-0078

Attorneys for the Petitioners

W. Thomas Lavender, Esquire
Joan W. Hartley, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, SC 29202

Attorneys for Respondent Roper

Stephen P. Hightower, Esquire
DHEC Legal Office
2600 Bull Street
Columbia, SC 29201

Attorneys for Respondent DHEC

July 12, 2013

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FINAL BRIEF OF APPELLANTS

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

Attorney for the Appellants

Georgetown, South Carolina

February 28, 2011

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STATEMENT OF ISSUES ON APPEAL

- I. Did the ALJ Err in Concluding that DHEC Does Not Have Authority to Review Impacts Resulting from Dredging and Excavation of the Lily Pad Pond, Despite the Plain Language of Regulation 61-101 and the General Conditions of DHEC's Certification of Clean Water Act Nationwide Permits?**
- II. Did the ALJ Err in Concluding that DHEC Properly Granted Coverage Under the NPDES Stormwater General Permit to Roper Pond When DHEC Did Not Issue a 401 Water Quality Certification Certifying that the Project Complied with DHEC's Nationwide Permit Certification Conditions and Did Not Review the Water Quality Impacts Resulting from Dredging the Lily Pad Pond?**
- III. Did the ALJ Err in Concluding that the Appellants Do Not Have Standing, Despite Testimony that the Appellants Enjoy Viewing the Lily Pad Pond, Which Would be Altered by the Proposed Project; that the Appellants Swim and Boat in Cary Lake and are Concerned About Lower Water Quality Resulting from the Proposed Project; and that the Town Has a Responsibility for Managing Stormwater and the Environmental Quality of the Town?**

STATEMENT OF THE CASE

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a storm water permit and thereby grant coverage under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") General Permit to Roper Pond, LLC. Roper Pond, LLC, requested the storm water permit and coverage under the NPDES permit in connection with the development of a high density apartment complex on a tract of land consisting of 12.75 acres, including 1.8 acres of wetlands, lying immediately adjacent to the Town of Arcadia Lakes in Richland County, South Carolina. The Petitioners challenge the issuance of the storm water permit and corresponding coverage under the NPDES permit based on Roper Pond, LLC's failure to meet all of the requirements for coverage under the NPDES permit program, including its failure to obtain the appropriate State approvals for dredging and excavation of an on-site pond.

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

On April 20, 2010, Petitioners filed a Notice of Appeal in this Court.

ARGUMENT

Overview of the Case

Roper Pond, LLC's Proposed Residential Development Project

Roper Pond, LLC, owns 12.75 acres of real property, including 1.8 acres of wetlands and waters identified by the U.S. Army Corps of Engineers as falling under the jurisdiction of the Clean Water Act. (R. pp. 534-541; 542-548; 555-562). A majority of the jurisdictional area consists of a pond, known as the "lily pad pond" or "Roper Pond," that is depicted on plans submitted by Roper Pond, LLC. (R. pp. 534-541; 542-548; 555-562). The Roper Pond property and the lily pad pond are located on Trenholm Road and are adjacent to the Town of Arcadia Lakes. The pond is visible from Trenholm Road when entering the Town of Arcadia Lakes and is covered in lily pads. (R. pp. 931-35). The pond drains through a pipe under Trenholm Road into Cary Lake, a portion of which lies within the Town of Arcadia Lakes. (R. pp. 534-541; 542-548; 555-562).

As part of its proposed development, Roper Pond, LLC plans to fill 0.075 acres of wetlands for a road crossing and a building pad. (R. pp. 555-562). Roper Pond, LLC, also plans to dredge and excavate all of the lily pad pond, which is the majority of the remaining 1.8 acres of federally jurisdictional wetlands on the property. Roper Pond, LLC, proposes to use the lily pad pond as a component of its storm water plans. The pond will be used as a water control structure, namely a retention pond. (R. pp. 580-581).

Summary of Permitting Requirements for the Proposed Residential Development

In order to undertake the proposed multi-family residential construction activities on the 12.75 acre tract, Roper Pond, LLC, has to obtain a number of approvals from the

S.C. Department of Health and Environmental Control ("DHEC") and the U.S. Army Corps of Engineers. One of those approvals is a DHEC stormwater permit for land-disturbing activities in connection with the proposed residential development.¹ See 24 S.C. Code Ann. Regs. § 61-9.122.26(c). Regulation 61-9.122.28(a)(2) authorizes DHEC to issue general stormwater permits for discharges for categories of stormwater sources. On August 1, 2006, DHEC issued such a permit, Permit No. SCR100000, entitled "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities" pursuant to Regulation 61-9.122.28(a)(2). To have a valid stormwater permit, the residential construction activities proposed by Roper Pond, LLC, require approval under this NPDES General Permit for Storm Water (hereinafter "NPDES General Permit").

To obtain approval under this NPDES General Permit, Roper Pond, LLC submitted a Notice of Intent for Stormwater Discharges seeking coverage for its land-disturbing activities under the NPDES General Permit. (R. pp. 549-550) The Notice of

¹ Prior to conducting any land-disturbing activities, an applicant must apply for a stormwater permit from DHEC. DHEC issues the stormwater permit in the form of granting coverage under the NPDES General Permit for Storm Water Discharges for Small and Large Construction Activities, in the case of Roper Pond, LLC's permit.

Section 402 of the Clean Water Act established the NPDES program and delegates authority to the States to operate the NPDES permit program. The NPDES program is the Clean Water Act's permitting system for both point and nonpoint sources of pollution. In this case, we are dealing with a permit for nonpoint source pollution in the form of stormwater and other runoff from the Roper Pond construction site.

Construction activities that disturb more than one acre are regulated under the NPDES stormwater permit program. S.C. Code Ann. Regs. § R.61-9.122.26(b)(15). Operators of these regulated construction sites are required to obtain coverage under a state NPDES permit, also called a stormwater permit. S.C. Code Ann. Regs. § R.61-9.122.26(a)(9)(B). This portion of the Clean Water Act was enacted based on recognition that stormwater runoff had become a primary source of water pollution in many areas of the country. The purpose of the NPDES stormwater permit requirement is to ensure that operators of construction sites implement stormwater pollution control measures.

Intent requires the applicant to identify all jurisdictional wetlands in the project area, whether there will be any impacts to those wetlands from the project, and the amount of wetlands proposed to be impacted.

Critically, the NPDES General Permit requires an applicant to obtain any required wetlands permit before DHEC will grant coverage under the NPDES General Permit.

The wetlands permit is a Clean Water Act §404 permit from the U.S. Army Corps of Engineers ("Corp"), which is triggered if an applicant proposes to place fill material in wetlands that are waters of the U.S. 33 U.S.C.A. § 1344(a). The Corps §404 permit in turn triggers the requirement for a §401 Water Quality Certification from DHEC that the §404 Permit is consistent with the §401 water quality regulations and State water quality standards. *See* 33 C.F.R. § 330.4 & S.C. Code Ann. Regs. 61-101, *et seq.* DHEC Regulations 61-101 govern the process and standards DHEC must follow and apply in its 401 certification review. S.C. Code Ann. Regulation 61-101.A.(2) states that "no Federal license or permit is to be granted until such [401 water quality] certification is obtained." *See also* 33 U.S.C. § 1341.

The dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC's review authority over waters of the State derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.

The Clean Water Act also authorizes categories of general permits under § 404

called Nationwide Permits for certain activities deemed to have minimal adverse environmental impacts. 33 U.S.C.A. § 1344(e)(1). If a proposed project falls under one of these NWP's, the Corps will not undertake an individual 404 review. Specific to this case, the U.S. Army Corps of Engineers issued Nationwide Permits #29 and #39 on March 12, 2007. 72 FR 11092 (11123). Nationwide Permit #29 applies to residential developments and Nationwide Permit #39 applies to commercial and institutional developments.

DHEC issued 401 water quality certifications for Nationwide Permits #29 and #39 on May 11, 2007, along with a number of other NWP's not relevant to this appeal. The certifications included general conditions that must be met in order for the DHEC §401 water quality certification to be valid and the Nationwide Permits to be effective. (R. p. 563; S.C. Code Ann. Reg. 61-101.A.). The general conditions of that certification require DHEC to consider the "over proposed project," including "all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by the NWP." (R. p. 563). The general conditions say that "Impacts to . . . adjacent waterbodies or wetlands resulting from the activity will be considered during the review of these actions." (R. p. 563).

In summary, for the Corps 404 permit to be issued and effective, the project must have a DHEC 401 water quality certification. In this case, where there is a Clean Water Act Section 404 Nationwide Permit for which DHEC has issued a 401 water quality certification with conditions, DHEC must ensure that the conditions of its 401 water quality certification have been met. (R. p. 563). In other words, DHEC must

affirmatively certify that the project meets its Section 401 water quality certification general conditions in order for the project to have an approved and effective Section 404 Nationwide Permit.

Again, the NPDES General Permit conditions expressly require that any Corps of Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 487). Section 2.1(C) of the NPDES General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective."² (R. p. 487)

Neither a §404 NWP nor a §401 water quality certification of the NWP were properly issued to Roper Pond, LLC before DHEC approval under the NPDES General Permit.

There are 1.8 acres of wetlands and waters of the United States on the subject property. As part of its development plans, Roper Pond, LLC, proposed to fill 0.075 acres of these wetlands and to dredge and excavate the lily pad pond, which composes the majority of the 1.8 acres of wetlands. Roper Pond, LLC, sought approval to fill those 0.075 acres of wetlands under the Corps' 404 NWP program; however, Roper Pond, LLC, did not disclose the dredging and excavation of the pond in its joint application and

2

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

did not seek or obtain approval for the dredging and excavation activities from DHEC.

In this case, DHEC did not conduct a review to ensure that its 401 certification conditions of the Nationwide Permit had been met, failing to issue a 401 water quality certification of the Nationwide Permit. And DHEC granted coverage under the NPDES General Permit despite the fact that Roper Pond, LLC, did not have that certification. Thus Roper Pond, LLC, does not have the required water quality certification, which is a prerequisite to obtaining coverage under the NPDES General Permit.

The ALJ compounded DHEC's error by upholding the DHEC decision; by concluding that DHEC has no authority to consider water quality impacts resulting from the dredging and excavation of the pond; and by concluding that the Appellants lack standing.

DHEC's Review of the Proposed Project

Roper Pond, LLC, submitted two applications – one to DHEC's storm water department seeking coverage under the NPDES General Permit, and one to the Corps and to DHEC's 401 water quality certification department seeking approvals under a Nationwide Permit and certification. Both of these applications were required because Roper Pond, LLC, needed both a stormwater permit and a 404 wetlands permit and certification.

Jill Stewart is the manager of the Stormwater Permitting Section at the S.C. Department of Health and Environmental Control ("DHEC"). She received the application from Roper Pond, LLC, seeking coverage under the NPDES General Permit in connection with a multi-family residential development. (R. pp. 161; 549-550).

Roper Pond, LLC's consultant, George Whatley of BP Barber, submitted Roper Pond, LLC's other application to the Corps and DHEC seeking approval of wetland impacts in the form of a Corps 404 Nationwide Permit and DHEC 401 certification of that NWP. The application identified 0.075 acres of wetland impacts. (R. pp. 553-554). Chuck Hightower in DHEC's 401 water quality certification program reviewed this 404/401 application. The application did not identify any impacts to the lily pad pond. (R. pp. 553-554). The application did not identify any dredging or excavation on the subject property. (R. pp. 553-554). In fact, at the time that George Whatley submitted the 404/401 application, he was not even aware that the applicant intended to excavate the pond. (R. p. 438). When he filled out the application, Whatley left the line identifying the area to be dredged or excavated blank, even though he admits that under the developer's current plan there will be dredging. (R. pp. 553-554; 467-468).

Roper Pond, LLC, eventually submitted engineered plans to DHEC showing that, in fact, it intended to make alterations to the pond. (R. p. 164). The alterations include excavation and dredging of the lily pad pond and lowering the water level and outfall structure to allow use of the pond for stormwater detention. (R. pp. 580-581).

In issuing a stormwater permit, Ms. Stewart did not evaluate impacts to the pond or water quality resulting from the excavation. (R. p. 167). She said she just assumed the project "was in compliance with the standards and therefore have no impact on the pond." (R. p. 167, lines 12-14). Ms. Stewart was operating under the assumption that DHEC's 401 water quality certification section had issued a water quality certification, based on a letter she received from the 401 section. (R. p. 165). Further, she specifically

asked Roper Pond, LLC, whether impacts to the lily pad pond were covered under the 401 section's approval, and they told her that impacts to the pond were included in the 401 certification approval. (R. pp. 551-552; R. p. 165). When Ms. Stewart asked Roper Pond's consultant, BP Barber, whether excavation of the pond was covered under Nationwide Permit 39, the wetlands consultant "stated that lowering of the water surface elevation is included and covered under the Nationwide Permit 39." (R. pp. 166-167; 551-552; 921). Rather than determining whether there was an effective Corps permit with 401 water quality certification, Ms. Stewart relied on statements made by the applicant that there was full approval and improperly issued coverage under the NPDES General Permit. (R. p. 178).

Ms. Stewart admitted that she does not know whether excavation of the pond will cause sedimentation. (R. p. 227). She does not know whether any Best Management Practices will be used during excavation of the pond. (R. p. 227). She does not know what kind of discharge structure will be used during pond excavation. (R. p. 227). She does not know what will happen with the material dredged from the pond. (R. pp. 227-228). She does not know how excavation of the pond will affect the aquatic fauna and flora in the pond. (R. p. 228). And she does not know how excavation of the pond will affect the wetlands upstream from the pond. (R. p. 228).

Charles Hightower has been the section manager of DHEC's 401 water quality certification program since November, 2007. (R. pp. 234-235). Mr. Hightower reviewed the Roper Pond, LLC's joint state and federal application to impact waters of the U.S seeking a 404 permit and 401 certification. He said that Roper Pond, LLC, applied for

permission only to fill in 0.075 acres of federally jurisdictional wetlands. (R. p. 235; R. pp. 553-554). It did not ask for permission to impact any other wetlands or waters. (R. pp. 553-554).

As part of this 404 wetlands permit application, the Corps also requires a Pre-Construction Notification ("PCN") as a condition of Nationwide Permit #29 and #39. Based on the PCN submitted by Roper Pond, LLC, the Army Corps of Engineers issued a letter that the project meets the Corps' terms and conditions of NWP # 39. (R. pp. 237; 555-562). The drawings attached to the Corps' PCN response letter depict only impacts to the 0.075 acres of wetlands proposed to be filled. (R. pp. 555-562). DHEC received the PCN and the Corps letter and then issued its water quality certification letter for NWP #39. The water quality certification letter represents DHEC's conclusion that the project meets the general conditions of its 401 water quality certification of the NWP. Impacts to the 0.075 acres of wetlands were the only impacts that DHEC reviewed in making its certification decision on NWP #39. (R. p. 244). DHEC did not consider impacts that would result from excavation of the lily pad pond. (R. p. 254).

The Corps initially approved the Roper Pond, LLC project under the wrong Nationwide Permit. Nationwide Permit #39 applies to commercial and institutional developments. (R. p. 247). Because the Roper Pond proposal is neither a commercial nor an institutional development, NWP #39 does not apply. Later, at Roper Pond, LLC's request, the Corps issued a letter approving the project under NWP #29, which covers residential developments. (R. p. 248). Although DHEC received a copy of the NWP #29 approval, DHEC did not issue a 401 certification authorization letter for the Roper Pond

project under Corps Nationwide Permit #29. (R. pp. 248; 260). Mr. Hightower said that DHEC has to make a “specific determination” to insure that a project meets the 401 certification before it issues a certification letter. (R. p. 609). When asked why DHEC did not issue a certification letter on the NWP #29 approval, Hightower said that “we should have sent another [certification] letter,” but that “we did not do it.” (R. p. 262, lines 8-11).

In short, DHEC issued a flawed certification for Roper Pond, LLC’s first NWP, which the Corps approved in error. When the Corps corrected its error and approved the project under the applicable NWP, DHEC issued no certification at all.

In its letter responding to Roper Pond, LLC’s Pre-construction Notification letter, the Corps stated, in bold print, 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 certifications . . . If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.”** (R. pp. 555-562). Because DHEC did not issue a certification letter stating that the project meets its conditions to qualify for coverage under NWP #29, Roper Pond, LLC did not obtain and provide the Corps with such certification.

Mr. Whatley said that Roper Pond LLC, had received a letter from DHEC notifying it that the agency had reviewed the project and issued a certification for NWP #39, in compliance with the Corps notification requirement. (R. p. 474). But at the time of that review, Mr. Whatley had not notified DHEC that the applicant was proposing to

dredge or excavate the pond. (R. p. 474). He only notified the Corps of the dredging and excavation at some point after the application was submitted. (R. p. 474).

Mr. Hightower admitted that DHEC's 401 water quality certification section never reviewed nor authorized impacts to the Lily Pad Pond. (R. p. 263, lines 5-13).

Water Quality Impacts Resulting from Excavation of the Lily Pad Pond

The Petitioners asked Seth Reice, a Professor of Ecology and Biology at the University of North Carolina, to assess the impacts on water quality and the pond. Dr. Reice testified as an expert in aquatic ecology. (R. pp. 304-305). He made a site visit on June 3, 2009. (R. p. 307). He looked at biodiversity, which is a measure of the distribution and variety of organisms, and the ecological health of the pond. He observed that the pond is filled with water lilies that are aquatic plants growing about three to four feet above the bottom of the pond. (R. p. 309). He took water samples and bottom samples to look at water chemistry and aquatic organisms living in the pond. (R. p. 310). He also caught some fish in the pond. (R. p. 310).

Dr. Reice examined the oxygen, salinity, conductivity, and pH of the pond water samples. (R. pp. 314-315). He said the water was very clear and clean with low pollutants. (R. p. 316). He also took the bottom samples back to his lab and identified the organisms he found living in the sediments. (R. pp. 313-314). He described the numerous organisms he identified and opined that "the presence of two species of fish and an assortment of benthic predators strongly implies that Roper Pond is a functioning aquatic system." (R. p. 319, lines 15-18). He said that "all the niches that you would expect in a pond are filled there now with the species that are present." (R. p. 353, lines

1-3). Looking at the entire system, Dr. Reice is convinced that the pond is a healthy system. (R. p. 320).

Dr. Reice said that if the pond level is dropped through excavation, the margin of the pond will be exposed to air and most of the organisms that live there will die. (R. p. 323). Organisms living in the dredged material will all die. (R. p. 353). He said it would take about ten years for the community to reestablish after the major disturbance. (R. p. 324). But even after a community reestablishes, it will not be the same type of community that exists there now because the chance that the same species will colonize the pond is "quite small." (R. pp. 325-326).

Dr. Reice also said that the upstream wetlands will be impacted. The area is in equilibrium now, but once the pond level is dropped, the wetland area will decrease. (R. p. 323). The wetland size will decrease because once the water level is lowered, upstream water will flow more rapidly downstream, drying out and removing a large amount of the upstream wetland. (R. pp. 323-324).

None of this testimony was contradicted.

In addition to the physical and chemical qualities of the water that he measured, Dr. Reice said that in order to assess the impacts of altering the pond, there are other factors that need to be evaluated. He said one would want to know the history of the pond, how it was formed, how long it has been there, the rate of sediment accumulation, how the excavation will be conducted and the extent of the excavation, as well as the nutrient loads coming into the pond. (R. p. 359-361). DHEC did not assess impacts using any of these factors.

DHEC's failure to perform the proper review in accordance with its 401 certification and the applicable regulations, and failure to issue any approval of the impacts of the excavation, means that DHEC has not issued a certification of Roper Pond's NWP # 29. Without a proper certification, Roper Pond lacks the required state approval that is an express prerequisite to the storm water permit and coverage under the NPDES General Permit.

Moreover, the testimony of Appellants' expert about impacts on the aquatic life in the pond and negative impacts on the wetlands above the pond, is uncontroverted. Given this testimony, the ALC erred in concluding that the full scope of the work proposed by Roper Pond, LLC, is in compliance with the 401 Water Quality Certification and Water Quality Standards regulations.

Summary of Argument

The issues in this appeal are 1) whether DHEC properly granted Roper Pond, LLC coverage under the NPDES General Permit for Stormwater Discharges, 2) whether Roper Pond, LLC has valid approvals for the excavation and dredging of an on-site lily pad pond and 3) whether the Appellants have standing to maintain this action.

The Administrative Law Judge's Order represents a fundamental misapplication of the law. Rather than applying the plain language of South Carolina's legal requirements pursuant to the NPDES General Permit, the 401 Water Quality Certification Regulations and the Water Quality Standards, the Order expounds on federal requirements under the Clean Water Act. The ALJ uses this long-winded discussion of federal requirements to arrive at the conclusion that the State has no regulatory authority

to review impacts resulting from the dredging of the lily pad pond at issue in this appeal. This conclusion is erroneous because the ALJ: 1) overlooks the requirement for a valid and effective 404 permit, which include an affirmative certification that the project meets DHEC's 401 certification conditions, in order to qualify for coverage under the NPDES General Permit and 2) ignores DHEC's general conditions of its NWP certification, which require DHEC to consider the impacts to all wetlands resulting from the project, including the dredging and excavation of the lily pad pond.

The ALJ justifies elimination of DHEC review of impacts to wetlands and water quality, specifically the dredging of the lily pad pond, based on lay testimony about legal requirements, rather than upon the plain language of the applicable regulations. The ALJ's conclusion on the state's regulatory authority is a misapplication of the regulations and permit conditions and is an error of law.

The Administrative Law Judge made three fundamental errors of law. First, he erred in concluding that a 401 Water Quality Certification is not required for impacts of the proposed project, in particular the dredging and excavation of the lily pad pond, despite the plain language of the regulations and the general conditions of DHEC's certification of federal Nationwide Permits. Second, the ALJ erred in concluding that the Roper Pond project qualified for coverage under the NPDES Stormwater General Permit, despite the plain language of the General Permit that requires an effective 404/401 Clean Water Act permit. Finally, the ALJ erred in concluding that the Appellants lack standing to maintain this action.

I. The ALJ Erred in Ruling that DHEC Has No Authority to Review Dredging and Excavation of the Lily Pad Pond

Both DHEC's 401 Water Quality Certification manager and its Storm Water section manager admitted that no one at DHEC examined the full scope of the impact of this project on waters and wetlands at the site, examined the impacts on the pond and the remaining wetlands above the pond, assessed the water quality impacts of the proposed excavation and alteration of the pond, assessed whether there were any feasible alternatives to the proposed impacts on the pond, or assessed whether the full project was in compliance with the Water Quality Certification regulations, R.61-101, the Water Quality Standards, R.61-68 or the general conditions of DHEC's water quality certification of the NWP. DHEC also admitted that neither the storm water permit nor the certification of NWP # 39 covered the impacts to the pond, and that no water quality certification was ever issued for NWP #29.

Yet DHEC's conditions of its NWP certification, along with the 401 water quality regulations, give it broad authority to consider all of the impact occurring on the project site as a result of the proposed activity and to assess impacts to all on-site wetlands and waters. The ALJ erred in concluding that DHEC had no such authority to review impacts to the lily pad pond.

A. The Project Goes Beyond What Is Authorized Under DHEC's Water Quality Certification of Clean Water Act Nationwide Permits

As it relates to this appeal, the State's 401 water quality regulations give the S.C. Department of Health and Environmental Control ("DHEC") broad authority to review impacts to wetlands and waters. DHEC utilizes these 401 water quality regulations to

issue certifications of federal Clean Water Act Section 404 permits issued by the U.S. Army Corps of Engineers ("Corps"). *See* S.C. Code Ann. Regs. 61-101.A.; *see also* 33 U.S.C. § 1341. Under the Clean Water Act, the Corps is authorized to issue Nationwide Permits, which act as general permits covering certain narrowly defined activities that categorically have minimal adverse environmental effects. 33 U.S.C. § 1344(e).

The Corps issued Nationwide Permits in 2007 covering certain categories of activities in wetlands or waters of the United States. The NWP's authorized only the very specific activities described in the NWP's and set forth specific requirements for authorization under those NWP's. In some of the NWP's, the Corps also included specific requirements for approval under an NWP. For NWP #29, the Corps required that the applicant provide a Pre-construction Notification ("PCN") to the Corps prior to undertaking any activity. DHEC's certification of NWP #29 was issued based on the express Corps condition that a PCN be provided. When the Corps receives a Pre-construction Notification of work authorized by NWP #29, the Corps in turn provides the PCN to DHEC, thus giving DHEC an opportunity to review the project prior to any construction activity. (R. pp. 281-282). The Corps' standard letter approving a project under NWP #29 includes a statement, in bold print, that no work can proceed until the applicant provides a copy of DHEC's certification. (R. p. 555).

When the Corps issued the Nationwide Permits, DHEC issued a public notice of its proposed decision to similarly categorically issue certifications of the activities authorized under the Nationwide Permits. (R. p. 249). Only those impacts that were specifically identified in the Corps NWP's were put on public notice. (R. p. 249).

In issuing its certification of the NWP, DHEC authorized certification under NWPs #29 and #29 only if certain general conditions are met. (R. p. 563)

DHEC issued 401 water quality certifications for some of the Nationwide Permits. (R. p. 244). When DHEC issued its 401 certifications, those certifications applied only to impacts specifically identified in the Nationwide Permits. (R. p. 244). Any alterations or impacts to wetlands beyond those defined in the NWPs were not covered by DHEC's 401 certifications of NWPs. (R. p. 603, lines 8-10). DHEC's certification of the NWPs only applies to activities in wetlands and waters specifically covered under that NWP, and any impacts not authorized under the NWP must receive an individual 401 water quality certification. (R. pp. 245-246). Indeed, the ALJ found that "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." (R. p. 15, FF #27). Inherently, DHEC must conduct a review and affirmatively conclude that the conditions are either met or not.

The filling of 0.075 acres of wetlands is authorized by Corps Nationwide Permit # 29. However, the authorization is limited to the actual filling of wetlands and does not constitute approval of related impacts. In fact, when DHEC issued its certification of the Nationwide Permits, it included a condition that DHEC must consider "the overall project proposed or accomplished by a single owner/developer" and should not consider "only the land area directly impacted by each NWP." (R. p. 563, condition #1). Roper Pond is proposing impacts to wetlands and waters, mainly the excavation of the pond,

which are not covered by NWP # 29. These additional impacts are outside the scope of NWP #29; therefore these impacts require an individual 401 water quality certification that the project complies with Regulations 61-101 and 61-68.

In reviewing and certifying Nationwide Permit # 29 in 2007, DHEC could only assess the impacts of the small amount of wetland fill allowed under that NWP. The certification of NWP # 29 in 2007 was based on the premise that a Pre-construction Notification would be provided by each applicant that would inform DHEC of the broader impacts of a project, if any. The general conditions of DHEC's 2007 certification also demonstrate that a broader review of NWP projects would be necessary. For instance, DHEC's General Conditions require the applicant to "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." (R. p. 573, #5) These general conditions also require the delineation of all wetlands on the site, and 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." (R. p. 573, #1).

B. The Project Does Not Comply with the General Conditions Under DHEC's Certification of NWPs

When DHEC issued its 401 water quality certifications for the Nationwide Permits, it included General Conditions applicable to all NWPs that were being certified. (R. p 573). In other words, even if a project meets the conditions of a NWP, it must also satisfy these general conditions to receive 401 water quality certification. The first general condition requires DHEC in considering certification to review the "overall

project” proposed by an applicant and includes “all land within the project boundary . . . It is not interpreted to mean only the land area directly impacted by each NWP request.”

(R. p. 573, para. 1, emphasis added). Thus DHEC must also consider impacts to “adjacent waterbodies or wetlands resulting from an activity” that go beyond what is authorized under the NWP. (Id.). Consideration of all land within the project area that is directly impacted by the project includes impacts caused by filling wetlands and other direct impacts such as dredging and excavating the lily pad pond.

DHEC’s certification of the activities authorized under the NWPs and its general conditions applicable to the NWPs are consistent with the manner in which DHEC reviews individual Corps 404 permits. (R. pp. 251-252). When DHEC conducts an individual certification review of an individual Corps 404 permit, it looks at all water quality impacts, including water quality impacts beyond those identified in the 404 permit, such as excavation and dredging.³ (R. pp. 251-252).

DHEC’s General Conditions require the applicant to “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.” (R. p. 573). This provision does not limit review to only wetlands being filled, but to wetlands that will be impacted. The lily pad pond is a wetland that Roper Pond, LLC, is proposing to impact through excavation. Roper Pond, LLC made no demonstration and DHEC has done no review to establish that impacts to the lily pad pond have been avoided,

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While the Army Corps of Engineers does not regulate the excavation and dredging of wetlands as proposed under this project, DHEC’s authority stems from the Pollution Control Act and Regulations 61-101 and 61-18, which the agency has historically employed in its evaluation of activities not regulated by the Corps. (R. pp. 251-252).

minimized and/or compensated for, in violation of the DHEC's General Conditions under its 401 certification of the NWP.

The Appellants have never suggested that Roper Pond, LLC needs a Corps 404 permit to dredge the lily pad pond, as the ALC concluded. (R. p. 28). Rather, the Appellants contend that to have a valid Corps 404 permit Roper Pond, LLC must have a valid 401 Water Quality Certification of that Corps permit, and because this project does not meet the General Conditions for DHEC's 401 Water Quality Certification, and the project goes beyond what is authorized under the NWP, Roper Pond, LLC does not have a valid 404 permit and does not qualify for coverage under the NPDES General Permit.

The ALC erred by concluding that there is no legal basis to require 401 Water Quality Certification for excavation of the lily pad pond. (R. p. 30). The ALC looks to the NPDES General permit and the Stormwater Regulations for this conclusion, yet fails to apply the conditions of the NPDES General Permit or the conditions of the 401 water quality certification of the NWPs

The ALJ erred in attempting to limit DHEC's scope of review under the water quality certification regulations, despite the plain language of the regulations and the conditions of the certification of the NWP, which clearly give DHEC authority to review all impacts of the projects and does not limit impacts to the Corps' jurisdiction over only the filling activities.

C. DHEC Never Certified that the Proposed Project Meets Its Conditions for Water Quality Certification of Nationwide Permit #29

There is no question that excavation of the lily pad pond is not included in the NWP or DHEC's certification of that NWP. There is no question that DHEC did not

consider the “overall” project and “all land within the project boundary,” instead limiting its evaluation to only the land directly impacted by the NWP, in contravention to its 401 Certification General Conditions. Yet the ALJ concluded that Roper Pond, LLC does have an effective 404 permit for the project, despite his finding that an individual water quality certification is required if the activity does not meet the general conditions of DHEC’s 2007 certification of the NWPs. (R. p. 25) (“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.”)

To implement this requirement for individual certification, DHEC must either affirmatively certify that a project meets its General Conditions to qualify for coverage under a Nationwide Permit or find that it does not meet the general conditions, and thus requires individual review. In fact, the Corps requires the permittee to provide a copy of the 401 certification as part of its approval process. (R. p. 555). Chuck Hightower said that DHEC issued a 401 water quality certification letter for Nationwide #39. He said he should have issued a 401 water quality certification letter for NWP #29, but did not. Thus, there is no DHEC 401 water quality certification of Roper Pond LLC’s Nationwide Permit, rendering the Corps 404 permit ineffective and the project fails to meet the conditions necessary for coverage under the NPDES General Permit.

D. DHEC Did Not Conduct the Required Review for Compliance with the Water Quality Regulations at R. 61-101 and R. 61-68

The ALJ erred in concluding that there is no statutory or regulatory basis for the Appellants claim that a 401 water quality certification is required for the dredging and

excavation of the lily pad pond. And DHEC erred in failing to review the project for compliance with its 401 Certification General Conditions, Regulations 61-68 and 61-101 and to issue a certification of the NWP.

The ALJ erroneously applied *Responsible Economic Development v. S.C. Dept. of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007), in concluding that DHEC cannot apply the water quality standards of Regulations 61-68 or the water quality certification regulations of Regulation 61-101 to this project. In that case, the Court said that the water quality standards and classifications regulations promulgated pursuant to the Pollution Control Act ("PCA") could not be applied to a stormwater permit because the Stormwater Regulations and the PCA Regulations do not reference each other.

In this case, the NPDES General Permit conditions require that all Clean Water Act 404 permits and accompanying 401 water quality certification be issued and effective. And in this case, the need for a CWA 404 permit and 401 water quality certification, which are required for impacts to on-site waters, are what trigger the applicability of Regulations 61-68 and 61-101.

As discussed above, at the time that DHEC issued its certification of the NWPs it was only authorizing the limited impacts permitted under the NWPs, nothing more. The dredging and excavation in this project go beyond the limited impacts of NWP #29 and #39, and the General Conditions established by DHEC specifically authorize DHEC to look at impacts to all of the land within the project boundary and all impacts to wetlands. That review was not done despite the express language of the General Conditions and the

regulations.

The DHEC Water Quality Certification Regulations, S.C. Code Ann. Reg. 61-101, expressly require that DHEC, prior to issuance of a certification, must consider: “whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts, including including: (1) impact on existing and classified water uses; (2) physical, chemical, and biological impacts, including cumulative impacts; (3) the effect on circulation patterns and water movement; (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.” S.C. Code Ann. Reg. 61-101.F.(3).

Regulation 61-101.C. requires Roper Pond, LLC, to give a “description of all proposed activities reasonably associated with the proposed permitted project either directly or indirectly, . . . that relate to water quality considerations.” S.C. Code Ann. Reg. 61-101.C.(1)(c). Roper Pond, LLC, did not give a description of the pond excavation, which relates to water quality considerations, in violation of this regulatory provision. Regulation 61-101.C. requires Roper Pond LLC, to give a “description of . . . any material to be dredged . . .” R. 61-101.C.(1)(d). Roper Pond, LLC, did not provide this description in violation of this regulatory provision. Regulation 61-101.C. requires Roper Pond LLC, to describe “the method of dredging or filling and specific plans for disposal and control of dredge spoils.” R. 61-101.C.(1)(e). Roper Pond LLC, did not describe how the lily pad pond would be dredged or where the spoils would go in its application in violation of this regulatory provision.

Under Regulation 61-101.F.(3), DHEC must consider whether there are feasible alternatives; 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 failed to consider whether there were feasible alternatives; the water quality impacts; and the cumulative impacts caused by excavation of the lily pad pond in violation of R. 61-101.F.(3). In fact, the uncontroverted evidence establishes that there will be significant biological and physical impacts to the lily pad pond, as described by Dr. Reice.

The ALJ made an error of law by failing to look to these applicable regulatory standards and concluding that there is no regulatory authority for assessing the impacts resulting from dredging and excavation of the lily pad pond.

A review to ensure that this project meets the water quality standards of R. 61-68 is required by Regulation 61-101, which provides that the "Department shall also certify that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards regulations. No certification will be issued if such assurance is not provided." S.C. Code Ann. Reg. 61-101.A.4. The regulations authorize DHEC to issue certifications with "limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards." S.C. Code Ann. Reg. 61-101.A.5.

As such, DHEC must make a determination of whether the applicable water quality standards of Regulation 61-68 have been met. The R. 61-68 water quality

standards require the maintenance and propagation of a balanced, indigenous aquatic community of fauna and flora. S.C. Code Ann. Reg. 61-68.A.(4). The water quality standards also require DHEC to “maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . .” S.C. Code Ann. Reg. 61-68.A.(4). The only testimony relating to the aquatic community came from Dr. Seth Reice, who testified that the indigenous aquatic community that now exists in the lily pad pond would be lost. (R. 325). Yet DHEC never evaluated whether the pond excavation was consistent with those water quality standards. (R. pp. 169-170). And the ALJ concluded that DHEC did not have authority to evaluate that excavation.

The water quality standards also require that “existing water uses and the level of water quality necessary to protect these uses shall be maintained.” R. 61-68.D.(1). As discussed above, the existing uses would be lost if the lily pad pond were excavated, in violation of this regulatory provision.

The ALJ found that the “Department did not consider impacts of lowering the Pond in its review of Roper Pond, LCC’s SWPPP.” (R. p. 18, FF #36). The ALJ 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. (R. p. 15). Yet 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. The ALJ’s conclusion that the project has the required approvals, despite his finding that the

project must meet DHEC's conditions of its NWP certifications and DHEC's admission that the NWP only covers the 0.075 acres of fill, is an error of law.

The ALJ also concluded that the Corps verified that Roper Pond, LLC's activities were authorized under NWP 29, but that the "permittee must obtain and provide the Corps 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)." (R. pp. 25-26). In this case, it is undisputed that the Nationwide Permit #29 does not cover dredging of the Lily Pad Pond, that Roper Pond, LLC did not request approval for dredging of the pond, that DHEC did not review dredging of the pond, and that DHEC did not issue a certification of NWP #29. It is undisputed that the pond is a delineated wetland/water, and that it will be excavated as part of Roper Pond, LLC's proposed development.

The ALJ erred in concluding that Roper Pond, LLC has an effective 404 permit and 401 water quality certification for wetland impacts.

The ALJ concluded that DHEC had issued a 401 Water Quality Certification for NWP # 29. (R. p. 26). The ALJ erred in concluding that "Roper Pond has all state certifications and authorizations necessary for the proposed activities under Nationwide Permit 29." (R. p. 26). The undisputed testimony from Chuck Hightower is that he did not issue a certification letter.

The ALJ concluded that Pre-construction notification to DHEC is not required "as long as the permittee meets the conditions of the 401 Water Quality Certification for the Nationwide Permit." (R. p. 26). However, in this case, the permittee does not meet the

conditions of the 401 Water Quality Certification of the NWP's because the applicant is proposing impacts that go beyond what is authorized under the NWP and DHEC's certification of that NWP. The conditions specifically require DHEC to consider the impacts to "all land within the project boundary . . . It is not interpreted to mean only the land area directly impacted by each NWP request." (R. p. 573, para. 1, emphasis added).

According to Mr. Hightower, the 401 Water Quality Certification regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (R. p. 252; R. 61-101.F). Mr. Hightower admitted that DHEC is not "locked into" its NWP certification determination simply because part of a project falls under a Nationwide Permit (R. p. 277). He said that DHEC could have taken other steps, such as requiring public notice and an individual 401 review, if it wanted to. (R. p. 277). In this case, however, DHEC did not take any steps to assess the water quality impacts resulting from excavation of the pond. (R. p. 253). Mr. Hightower did not look at where the spoil disposal would go. (R. p. 254). He did not look at whether any Best Management Practices would be used during excavation. (R. p. 254). He did not look at how excavation was going to affect the aquatic life in the pond. (R. p. 254). He did not look at the impacts excavation would have on existing and classified water uses. (R. pp. 254-255). And he did not look at whether the excavation would have impacts on upstream wetlands. (R. p. 256).

Mr. Hightower testified that he believes that DHEC has no regulatory authority over the excavation of Roper Pond. Likewise, Mr. Whatley gave opinions related to the

U.S. Army Corps of Engineers' jurisdiction over dredging and excavation in waters of the U.S. This testimony was allowed at trial over Petitioners' objection. The testimony, however, is of no value in determining a conclusion of law – specifically, DHEC's regulatory authority over the excavation of the pond in question. The determination of legal conclusions is within the exclusive province of the court, and requires review of the applicable statutes and regulations, not testimony. *See Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978); *Catawba Indian Tribe of SC v. The State of SC*, 372 S.C. 519, 642 S.E.2d 751 (2007).

Rather than applying the conditions of the NWP and the NPDES General Permit and the plain language of the water quality regulations at 61-101, 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.

II. The ALJ Erred in Concluding that Roper Pond, LLC Qualifies for Coverage Under the NPDES General Permit for Storm Water

As discussed in the description of the required permits above, in order to qualify for coverage under the NPDES General Permit and obtain a stormwater permit, Roper Pond, LLC must meet the conditions of the NPDES General Permit. The ALJ failed to evaluate the project for compliance with those conditions, specifically whether Roper Pond, LLC has been issued an effective 404 Clean Water Act permit, which is a prerequisite to coverage under the NPDES Permit.

A. The NPDES Construction General Permit for Stormwater Discharges Requires an Effective Clean Water Act Permit

The NPDES General Permit expressly requires that any Corps of Engineers 404 permit be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 481). The Corps requires DHEC to provide a copy of the state certification in order for the Corps 404 permit to be effective. (R. pp. 555-562; 922-30). Documents available on DHEC's website describing the process for obtaining NPDES coverage also confirm that a Corps permit must be obtained prior to NPDES coverage. (R. p. 564). As discussed above, DHEC did not issue a certification letter for this NWP #29, thus the Corps permit, and in turn the NPDES Permit coverage, are not effective.

B. The General Permit Requires a Clean Water Act Permit to Use the Lily Pad Pond as a Component of the Stormwater Management System

The excavation of the lily pad pond would lower the water levels so that the pond could hold a greater volume of water and be used for stormwater detention. Ms. Stewart said that a stormwater detention pond would be considered a water control structure. (R. p. 171). Under the terms of the NPDES General Permit, water control structures are required to be placed on upland to the maximum degree practicable. (R. p. 498). If the water control structure is to be placed in waters of the State, the Corps must issue a 404 permit. (R. p. 498). As discussed above, in order for the Corps 404 permit to be effective, DHEC must issue a 401 water quality certification of the 404 permit. And as discussed above, no 401 water quality certification has been issued for the dredging and excavation of the pond and/or its use as a water control structure.

The DHEC general NPDES Permit specifically requires compliance with DHEC's

stormwater regulations, including S. C. Code Ann. Regs. § R.72-301.C.(7). (R. p. 487). DHEC's stormwater regulations, specifically Section 72-307.C.(7), require that 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." S. C. Code Ann. Regs. § R.72-301.C.(7).

DHEC's approval of the stormwater permit is expressly conditioned on obtaining DHEC 401 water quality certification approval of this specific project. Because DHEC did not issue a 401 water quality certification for the proposed project, Roper Pond, LLC does not have valid approvals for all of the impacts to wetlands and waters on site.

III. The Petitioners Have Standing to Maintain This Appeal

A. The Individual Residents Have Standing

The ALJ erred in concluding that the individual Appellants do not have standing. The ALJ's conclusion is not supported by the evidence. The ALJ's findings give a cursory review of the Appellants' testimony, ignoring the uncontested testimony of the Appellants. The ALJ misconstrues the law of standing by concluding that the Appellants must have a "property interest in either the Pond or Cary Lake" to have standing.

In *Sea Pines Association v. SC Dept. of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001), this Court adopted the basic legal test for standing announced in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). See also *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003). The three-pronged test arising from *Lujan* is as follows:

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.'

Lujan, 112 S. Ct. at 2136 (internal citations omitted).

The ALJ erred by concluding, without any supporting evidence, that Linda Jackson's interest in the view of the Pond is a "general interest common to all members of the public," and thus does not give rise to an injury-in-fact. (R. p. 7). It is true that an environmental plaintiff must have a "personal stake" in the subject matter of the case, such that the injury is not "merely a general interest common to all members of the public." (R. p. 21, citing *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)). However, in this case, the ALJ failed to give proper consideration to case law indicating that an injury can be common to a great many members of the public, and still be sufficiently personal to a specific individual to give the individual standing to sue. See *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

It is a well settled legal principle that the fact that a plaintiff is part of a large class of potential appellants is no reason to deny standing. As the United States Supreme Court noted in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), while all citizens have the right to use public resources, not all citizens suffer an impact from a project affecting those resources:

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort.

405 U.S. at 735, 92 S. Ct. at 1366. The difference between those who have standing and those who do not, the Court concluded, was **actual use of the affected area**.

The *Sierra Club v. Morton* Court ruled that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.” *Id.* at 734. See also *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992); *Federal Election Comm’n. v. Akins*, 524 U.S. 11, 118 S. Ct. 1777 (1988) (where a harm is concrete, though widely shared, the Court has found “injury in fact.”).

The principles from *Sierra Club v. Morton* have been repeatedly affirmed and elaborated on in federal courts. The Fourth Circuit ruled that “[w]hile it is true that the Court has stressed that a generalized grievance shared by the population at large cannot be a basis for standing, . . . it is equally true that merely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . ***So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury.***” *Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) (internal citations omitted).

In this case it matters not whether others share the injuries alleged by the

Appellants, it matters only that these Appellants will suffer an injury to their aesthetic and recreational interests.

The court in *Pye* also reaffirmed the principle that “aesthetic and environmental injuries can constitute an injury in fact sufficient to support a plaintiff’s standing.” *Id.* at 469. (citing *Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000); *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361 (1972); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 73-4, 98 S.Ct. 2620 (1978)). The court in *Pye* noted that if those who are seeking to protect the environmental quality of the areas they use do not have standing, then “the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action.” *Pye v. U.S.*, 269 F.3d 459, 468 (4th Cir. 2001) (citing *Society Hill Towers Owners’ Assn. v. Rendell*, 210 F.3d 168, 176 (3rd Cir. 2000); *see also, Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, concurring) (“injury to all is injury to none” theory would “deny standing to every citizen such that no matter how badly the whole may be hurt, none of the parts could ever have standing to go to court to cure a harmful violation.”); *U.S. v. SCRAP*, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973) (“To deny standing to persons who are in fact injured because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion.”)).

Next, the ALJ erred in concluding that the Appellants “failed to identify any harm.” (R. p. 22). The Appellants Linda and Robert Jackson live on Kaminer Road,

which is adjacent to the lily pad pond and Roper Pond, LLC's property. Ms. Jackson has walked or run past the pond "thousands and thousands" of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. (R.p. 373). She said the pond is very special to the community and it is "absolutely beautiful." (R. p. 374). She also walks around Cary Lake, which is downstream from the lily pad pond. (R. p. 375). She has seen sedimentation and garbage coming from upstream, as well as witnessed flooding associated with stormwater problems in that area. (R. p. 375). She said that if the pond were excavated, she would be sad not to see and enjoy the pond any more. (R. p. 376). She is also concerned about more sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired. (R. p. 375). Ms. Jackson knows the other Appellants, has participated in community meetings regarding the proposed project, and said that the other Appellants share her concerns. (R. p. 379).

Elaine and Gene Starr have lived on Sandy Shore Road, which is on Cary Lake, for 38 years. (R. p. 394). The Starrs swim, water ski, boat and fish with first their four children and now their grandchildren on Cary Lake. (R. p. 395). Ms. Starr said that the water in Cary Lake is not as clear as it used to be and that there is a lot of sediment in the lake. (R. p. 395).

The ALJ's conclusion that "Ms. Starr's concerns regarding an increase in runoff rate would thus be a result of a violation of the General Permit, not the Department's issuance of coverage under the General Permit" has no factual support. (R. p. 23). Ms. Starr said that based on her experience living on Cary Lake, a residential development

will have an impact on the lake because of the increased density, regardless of whether the project proceeds according to the permit. (R. pp. 407-408). The ALJ concluded that Ms. Starr alleged that the proposed project would “negatively impact Cary Lake even if the SWPPP approved by the Department is implemented as designed” and that “increased density . . . would have a detrimental impact . . .” (R. p. 23). She said that “if you change the whole landscape, then you’ll have a problem” with stormwater, which is her primary concern. (R. p. 412). In her experience, it is better to correct potential problems before they arise, rather than after the project is finished, which was not done in this case. (R. p. 417).

The ALJ erred in dismissing Ms. Starr and the Cary Lake Appellants as “entirely speculative.” (R. p. 23). The ALJ provides scant explanation of this conclusion, and ignores the uncontradicted testimony of the Appellants. The Appellants testified that their ability to enjoy recreational activities, along with their aesthetic interests, would be harmed by the proposed project. The Appellants use and view the area proposed to be impacted on a regular and frequent basis, and have definite plans to continue doing so.

Ms. Starr has also enjoyed viewing the lily pad pond and said it is “absolutely gorgeous.” (R. p. 400). She said there are “white blooms, pink blooms, and you can see lots of life around it, like dragonflies” and that it is an aesthetic party of the community. (R. pp. 400; 413). She is concerned about the affects of dredging the pond because there is a lot of life in the sediment itself and the lilies will not be there after it is dredged. (R. p. 401).

The parties stipulated that the testimony of Linda Jackson would be representative

of the individual Petitioners who reside in the Kaminer Station area, and that Elaine Starr's testimony would be representative of those the individual Petitioners who are property owners on Cary Lake. This testimony evidences the harm alleged by the Appellants.

The United States Supreme Court has stated that the injury required for standing purposes need not be a substantial injury:

The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, . . . a \$5 fine and costs, . . . ; and a \$1.50 poll tax [W]e see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613. See also K. Davis, *Administrative Law Treatise* ss 22.09--5, 22.09--6 (Supp. 1970).

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973) (Internal citations omitted).

The "identifiable trifle" standard was recently re-affirmed by the Fourth Circuit. *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149 (4th Cir. 2000): "the claimed injury 'need not be large, an identifiable trifle will suffice.'" 204 F.3d 149, 156, *quoting* *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation marks omitted). See also, *Conservation Council of North Carolina v. Costanzo*, 505 F.2d

498, 501 (4th Cir. 1974). In this case, the Appellants have asserted far more than the “identifiable trifle” required to establish injury.

The Appellants have established a causal connection between the harm – loss of aesthetic enjoyment in viewing the pond and its wildlife – and the challenged action – DHEC’s failure to review impacts resulting from excavation of the lily pad pond as required by its regulations and its water quality certification of the Nationwide Permit.

B. The Town of Arcadia Lakes Has Standing

The ALJ also erred in concluding that the town of Arcadia Lakes did not have standing. The ALJ misconstrues the law of standing as applied to municipalities by applying a more restrictive analysis than is supported by case law.

Few cases in South Carolina have addressed the law of standing as applied to municipalities. As for the town asserting standing based on its own interests, the ALJ cites to two cases: *Glaze v. Grooms*, 324 S.C. 249 (Ct. App. 1996) and *City of Spartanburg v. County of Spartanburg*, 303 S.C. 393 (1991). Both of these cases occur in the narrow context of one municipal entity challenging the actions of a separate municipal entity. The ALJ cites these cases for two principles in regard to municipality standing: a municipality generally “must allege an infringement of its own proprietary interests and statutory rights” and must allege an injury/infringement distinct from that of its individual citizens. The ALJ errs in his application of these principles.

Neither *Glaze*, *City of Spartanburg*, nor any other South Carolina case Petitioners have been able to uncover expands on exactly what it means for a municipality to suffer infringement of a “proprietary interest” or “statutory right” distinct from its citizens.

Glaze simply recites the principles, and the one-page *City of Spartanburg* opinion provides little elaboration. However, reference to other jurisdictions that have applied these standing principles under circumstances similar to the ones at hand make clear that Arcadia Lakes' allegations are sufficient to establish standing.

The "proprietary interests" that would serve to provide a municipality standing are not as narrow as read by the ALJ. "The term 'proprietary' is somewhat misleading, for a municipality's cognizable interests are not confined to protection of its real and personal property. **The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets.**" *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-98 (9th Cir. 2004) (emphasis added). The court in *City of Sausalito* reached this conclusion while noting, the same as South Carolina courts, that a municipality could not simply assert the interests of its citizens and instead only had standing to protect its own "proprietary interests." *Id.* at 1197. In elaborating on the type of interests that are sufficient to confer standing on a municipality the court noted as follows:

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

Id. at 1198 (emphasis added).

The court found the City of Sausalito had demonstrated standing in part by alleging potential “injury to Sausalito's natural resources, citing an increase in ‘noise and trash,’ ‘impaired air quality,’ and harm to its ‘marina, parks, trails and shoreline’” from the challenged action. Further, the court found as sufficient to confer standing Sausalito’s allegations of injury to the town’s “aesthetic appeal in that the congestion accompanying the [challenged action] ‘will destroy the City's quiet, beauty, serenity and quaint and historic village character and attributes.’” Finally, the court relied on Sausalito’s allegations of a detrimental increase in traffic and crowds as a result of the challenged action. *Id.* at 1199.

In *Township of Belleville v. Federal Transit Admin.*, 30 F.Supp.2d 782, 789 (D.N.J. 1998), the court found a municipality had standing to bring a suit based on construction of a rail project that would generate “noise, air, and visible pollution” within the town’s borders. Providing further that “the township claims that the rail service will pose significant danger to its pedestrians, increase traffic, strike a blow to ‘civic pride’, and result in a loss of property taxes. If such injuries are established, the Court finds that it would be impossible not to conclude that at least some of these injuries also result in discrete and particularized harm to the township.” *Id.* In reaching this conclusion, the court applied the three prong test from *Lujan*, which, as noted above, was adopted by South Carolina in *Sea Pines Association v. SC Dept. of Natural Resources*.

In *City Of Albuquerque v. U.S. Dept. Of Interior*, 379 F.3d 901 (10th Cir. 2004), the city challenged the process by which the Department of the Interior chose the location to construct its new office building. The Department challenged the standing of

the city. The city did not allege the infringement of a real property interest. Far from it, the City alleged that by locating its offices outside the central business area, the Department was “weakening the City of Albuquerque and discouraging development and redevelopment of the central business area.” *Id.* at 912. Applying *Lujan*, the Court found the city had demonstrated standing. *See also, White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 824 (N.D. Ohio 2000) (applying *Lujan*, court found standing for a municipality suing gun companies under products liability based on allegations of increased municipal expenses based on defective firearms).

The analysis in the above cases is in stark contrast to the ALJ’s analysis. While the above courts cite to “proprietary” interests like diminishment of property value, impairment of municipal environment, increased traffic and congestion, and loss of civic pride, town character and aesthetic appeal as bases for standing, the ALJ exclusively inquires into whether the Town owns a portion of Cary Lake, the Lake within the Town’s borders where the water from Roper Pond, LLC flows. As with the individual Appellants, the ALJ’s focus on property ownership is a misconstruction of the law of standing.

Appellants are aware of no precedential case law to indicate that municipalities are subjected to more stringent standing requirements than individuals. On the contrary, the above cases demonstrate that the same analysis of standing is applied to municipalities as is applied to individuals. The analysis of individual petitioner standing above, as traced through *Lujan*, *Sea Pines*, *Sierra Club v. Morton*, *Pye* and the like is equally applicable to the town of Arcadia Lakes. Just as the individual petitioners need not own property to establish standing, Petitioners would respectfully submit that the

same applies to the Town.

The Town has demonstrated an “injury in fact” sufficient to confer standing. In his deposition in this case, Richard Thomas, mayor of Arcadia Lakes, testified on behalf of the Town as to the Town’s interests in this litigation. Water from Roper Pond goes straight under Trenholm Road into Cary Lake, which is in the town of Arcadia Lakes. (R. p. 825). The Town’s interest in protecting the environmental quality of Cary Lake, a natural resource within its borders, is at stake in this litigation. When asked what detriment the town will sustain if the project proceeds under the permit as issued, Mr. Thomas directly responded, “the detriment is potential harm to the water flowing through the project under North Trenholm Road, and into Cary Lake” which would work a “harm to the environmental interest of the town.” (R. p. 822, lines 16-21). As cited above, citizens of Arcadia Lakes, including the individual petitioners in this case, use Cary Lake for a variety of recreational purposes.

Second, as was cited as a basis for municipal standing in *Township of Belleville* and *City of Sausalito*, the challenged conduct stands to damage the Town’s interest in maintaining its character and desirable attributes. Mr. Thomas noted that “[o]ur town motto is seven lakes - one town.” (R. p. 823, lines 3-4). The “seven lakes [within our borders] are a vital part of our identity” and environmental harm to Cary Lake stands to damage this identity. (R. p. 823, line 3). A related threat from the challenged conduct is the harm to the Town’s aesthetic appeal. Mr. Thomas cited the risk of “[h]arm to the aesthetic interest of the Town of Arcadia Lakes being that the project is surrounded on three sides by the town” and that water flowing through the project flows directly into a

lake within the Town's borders. (R. p. 822, lines 20-22). These interests, of course, do not exist in a vacuum, and diminishing the aesthetics, character and environment of the Town would result in decreased demand for residing in the Town. As the court noted in *Township of Belleville*, this type of harm threatens property value and thus the municipalities property tax revenue. 30 F. Supp. 2d at 789. The above testimony of the individual appellants regarding the diminishment of their use, enjoyment and value of Cary Lake supports the likelihood of these harms.

Further, the permit and project threaten the Town's ability to comply with federal law. Mr. Thomas noted that "we are responsible for the water that flows into Cary Lake as well as out through our NPDES rules and regs." (R. p. 828). Mr. Thomas elaborated on the Town's responsibilities under the NPDES provision of the Clean Water Act as follows: The town is responsible for what comes into the town and what leaves the town as far as water quality. If the water quality coming into the town is not regulated by the town and we allow it to flow through the town [into downstream water bodies], then the way I understand the NPDES, we would then be responsible. Therefore, we could -- it could result in financial and/or litigation for the mitigation of that damage. Whatever that would be. (R. p. 844, lines 5-15). The Town's ability to comply with federal law is directly contingent on the outcome of this litigation.

Finally, the discussion of the Town's standing has to this point focused on harm directly resulting from the dredging of Roper Pond and the water flowing from the pond into the Town. However, for purposes of the standing inquiry, the harm to the Town extends to the proposed apartment complex as a whole, as the size and design of the

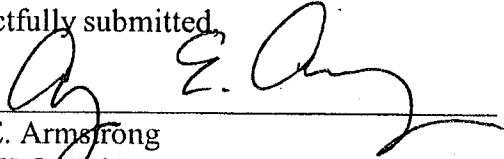
Roper Pond Apartments depends on the availability of Roper Pond for the development's stormwater. In regard to harm to the Town from the Apartments themselves, which is imminent if the proposed project moves forward, Mr. Thomas presented the Town's position that the value of properties in the vicinity of the Apartments, which would be within the Town's boundaries, would be diminished. (R. p. 883). The density and character of the proposed Apartments are inconsistent with surrounding development in the Town. (R. pp. 885; 893-894). The Town is also concerned about additional security issues and need for policing as a result of the Apartments. (R. p. 884). Thomas expressed that with the transient nature of those residing in the Apartments -- meaning people who rent for a relatively short time rather than property owners-- the Town anticipated increased security issues and crime in the vicinity. (R. pp. 884; 894). Thomas also cited increased traffic and congestion in the town from adding a dense development with 400 to 500 residents on the border of the Town of Arcadia Lakes, which only has 890 residents. (R. p. 894).

All of this testimony was uncontradicted. All of these harms are of the type accepted as a basis for standing in the above cases and any of these harms constitute discrete and particularized harm to the township. The ALJ erred in ignoring the only evidence before him and by basing his conclusion on the premise that the Town, as well as the individuals, must have a property interest in the project site or Cary Lake. The ALJ erroneously applied the standing standard to both the Town and the individual Appellants.

CONCLUSION

WHEREFORE, the Appellants respectfully request that this Court issue an Order reversing the Final Order and Decision of the Administrative Law Judge and concluding that Roper Pond, LLC does not have valid state approval for the dredging and excavation of the lily pad pond, and that the Appellants have standing to maintain this action.

Respectfully submitted,



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

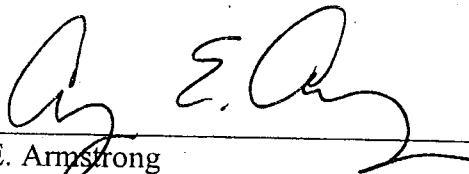
Attorney for the Appellants

Georgetown, South Carolina

February 28, 2011

Certificate of Counsel

The undersigned does hereby certify that this Final Brief complies with SCRAP Rule 211(b).



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

Attorney for the Appellant

Georgetown, South Carolina

February 25, 2011

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

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

Respondents.

BRIEF OF RESPONDENTS

W. Thomas Lavender Jr. (SC Bar No. 3143)
Joan W. Hartley (SC Bar No. 72735)
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, South Carolina 29202
Tel: 803-771-8900
Fax: 803-727-1471

Attorneys for Roper Pond, LLC

Stephen P. Hightower (SC Bar No. 72265)
Roger R. Hall (SC Bar No. 74203)
Office of General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
Tel: 803-898-3349
Fax: 803-898-3367

Attorneys for South Carolina Department of
Health and Environmental Control

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT (“ALC”) CORRECTLY FIND THAT THE USE OF THE POND AS A POST-CONSTRUCTION WATER CONTROL STRUCTURE DOES NOT REQUIRE A FEDERAL OR STATE PERMIT?
- II. DID THE ALC CORRECTLY CONCLUDE THAT THAT THE DREDGING AND EXCAVATION OF THE POND DOES NOT REQUIRE AN INDIVIDUAL WATER QUALITY CERTIFICATION?
- III. DID THE ALC CORRECTLY CONCLUDE THAT THE DEPARTMENT IS NOT REQUIRED TO REVIEW PROPOSED ACTIVITIES UNDER A CORPS NATIONWIDE PERMIT FOR WHICH THE DEPARTMENT PREVIOUSLY ISSUED A 401 WATER QUALITY CERTIFICATION?
- IV. WAS THE REVIEW OF ISSUES RELATED TO THE CORPS NATIONWIDE PERMIT PROPERLY BEFORE THE ALC IN ITS REVIEW OF THE DEPARTMENT DECISION TO GRANT COVERAGE TO ROPER POND UNDER THE STATE GENERAL PERMIT?
- V. DID THE ALC CORRECTLY CONCLUDE THAT THE APPELLANTS LACK STANDING TO CHALLENGE THE DEPARTMENT DECISION TO GRANT COVERAGE TO ROPER POND UNDER THE STATE GENERAL PERMIT?

STATEMENT OF THE FACTS¹

By letter dated December 15, 2008, the Department granted Roper Pond, LLC (“Roper Pond”) coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities (“State General Permit”), authorizing land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County (“Proposed Project”). Roper Pond is the owner of approximately 13 acres of real property on Trenholm Road in an unincorporated area of Richland County

¹ This Statement of the Facts provides the general factual framework for the Department’s permitting decision. Additional facts are cited in the Arguments section of this brief in support for the ALC decision to affirm the Department’s grant of coverage for the Proposed Project under the State General Permit.

("Property"). The Property includes 1.80 acres of jurisdictional wetlands and a pond ("Pond"). The Pond is man-made pond wholly within the boundaries of the Property. (Pet. Ex. 4, R. p. 540; Tr. p. 333, ll. 18-25, R. p. 464). The Pond is approximately five feet deep at its deepest point. (Tr. p. 230, ll. 3-6, R. p. 361). The Property is outside the corporate limits of the Town of Arcadia Lakes. (30(b)(6) Deposition of Town of Arcadia Lakes, hereinafter "Town Dep.," p. 83, R. p. 864). Roper Pond plans to develop the Property as a multi-family residential development.

A. Coverage under State General Permit

State regulations require a permit for stormwater discharges from land-disturbing activities associated with the Proposed Project. 24 S.C. CODE ANN. REGS. § 61-9.122.26(c). The Department administers this permitting program pursuant to 24 S.C. CODE ANN. REGS. § 61-9.122.26 *et seq* ("State NPDES Regulations") and 26 S.C. CODE ANN. REGS. § 72-300 *et seq*. ("State Stormwater Regulations"). Section 61-9.122.28(a)(2) of the State NPDES Regulations authorizes the Department to issue general permits for discharges for categories or subcategories of storm water point sources. 24 S.C. CODE ANN. REGS. § 61-9.122.28(a)(2)(i). On August 1, 2006, the Department re-issued the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities, Permit No. SCR100000 ("State General Permit"). (Pet. Ex. 3, R. p. 481. The State General Permit covers discharges from the commencement of construction activities until final stabilization of the construction site. (Pet. Ex. 3, Title Page, R. p. 481; Tr. p. 60, ll. 1-8, R. p. 191).

On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project pursuant to the provisions of the State General Permit. Roper Pond also submitted to the Department its

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storm water pollution prevention plan ("SWPPP") as required by the State General Permit and the State Stormwater Regulations. (DHEC Ex. 2, R. p. 663-759). Pursuant to the State 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, R. p. 182). 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, R. pp. 183-84).

Jill Stewart, a licensed professional engineer in South Carolina and Manager of the Department's Stormwater Permitting Section, conducted the review of Roper Pond's SWPPP. Under the State Stormwater Regulations, the SWPPP must address both the quality and the quantity of the stormwater runoff associated with a proposed project. 26 S.C. S.C. CODE ANN. REGS. § 72-307(C). In reviewing a SWPPP, the reviewing entity assesses the proposed best management practices ("BMPs") to determine if those measures are adequate to meeting the requirements of the State Stormwater Regulations and the State General Permit. The SWPPP for any proposed project can be revised as needed to incorporate the appropriate combination of BMPs and implementation procedures necessary to meet the requirements of the State General Permit. (Tr. p. 74, l. 24 – p. 75, l. 8, R. pp. 205-06). 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 of the Property. (Tr. p. 63, l. 7 – p.

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64, l. 7, R. pp. 194-95). In its review of the SWPPP, the Department requested certain revisions to the SWPPP submitted by Roper Pond. (Tr. p. 57, ll. 3-8, R. p. 188). Ms. Stewart testified that the Roper Pond SWPPP, with the requested revisions, complied with the requirements of the State General Permit and the State Stormwater Regulations. (*Id.*; Tr. p. 58, ll. 16-19, R. p. 189; p. 71, ll. 13-17, R. p. 202). Ms. Stewart further testified that any adverse 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 State General Permit, not the mere decision by the Department to authorize coverage under the General Permit. (Tr. p. 75, ll. 19-25, R. p. 206). Once Roper Pond begins construction activities, Section 3.10 of the State General Permit requires periodic inspections of the site by a qualified inspector to ensure compliance with the SWPPP. (Pet. Ex. 3, pp. 17-20, R. pp. 500-03; Tr. p. 76, l. 12 – p. 78, l. 16, R. pp. 207-09; p. 89, l. 16 – p. 90, l. 1. 19, R. pp. 220-21). Copies of the inspection reports are required to be maintained at the construction site. (Pet. Ex. 3, p. 19, R. p. 502; Tr. p. 79, l. 6 – p. 81, l. 5, R. pp. 210-12).

Although coverage under the State General Permit terminates once the site is stabilized following the conclusion of construction activities, Section 3.4(F) of the State General Permit requires the applicant to include “a description of all post-construction storm water management measures that will be installed during a construction process to control pollutants and storm water after the construction operations have been completed.” (Pet. Ex. 3, p. 15, R. p. 498). In its review of the SWPPP, the Department recommended the use of additionally water quality treatment devices to filter sediment and pollutants from stormwater post-construction. (Tr. p. 60, l. 13 – p. 61, l. 14, R. pp. 191-92). Pursuant to the State Stormwater Regulations, the SWPPP for a project

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disturbing more than ten acres requires a removal efficiency 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®, a water quality treatment device, and thus exceeds the requirements of the State Stormwater Regulations. (Tr. p. 67, l. 20 – p. 68, l. 22, R. pp. 198-99).

The State Stormwater Regulations also require an applicant to demonstrate that the development of the site does not result in a post-construction stormwater runoff rate that is greater than the pre-construction stormwater runoff rate. 26 S.C. CODE ANN. REGS. § 72-307(C)(4)(a). Roper Pond provided 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, R. pp. 195-96). The approved design included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate. (Tr. p. 65, ll. 16-19, R. p. 196). 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 State General Permit and the State Stormwater Regulations. (Tr. p. 67, ll. 15-19, R. p. 198). Both the State General Permit and the State Stormwater Regulations allow an existing pond to be used for control of the post-construction stormwater runoff rate on a developed site. (Tr. p. 49, ll. 15-25, R. p. 180).

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By letter dated December 15, 2008, the Department granted Roper Pond coverage under the State 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. (See Petitioners' Request for Contested Case Hearing dated February 16, 2009, R. p. 54).

B. Corps Permit for Filling of Wetlands

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, R. pp. 762). 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). The U.S. Army Corps of Engineers ("Corps") administers the permitting program for filling of wetlands under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 *et seq.*, ("Clean Water Act"). 33 U.S.C.A. § 1344. Pursuant to Section 404 of the Clean Water Act, a Corps permit is required "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C.A. § 1344(a). Section 404 of the Act authorizes Corps to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."

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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, R. p. 243). Both Nationwide Permit 29 and Nationwide Permit 39 authorize the fill of up to 0.10 acres of jurisdictional wetlands. (Tr. p. 140, ll. 4-12, R. p. 271).

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 25A S.C. CODE ANN. REGS. § 61-101 (“State Water Quality Certification Regulations”). (Tr. p. 118, l. 12 – p. 119, l. 5, R. pp. 249-50). The Department determined that the certification of these Nationwide Permits was appropriate in light of the requirements of the Water Quality Certification Regulations because the activities authorized under the Permits would have minimal individual or cumulative impacts. (Tr. p. 118, l. 12 – p. 119, l. 5, R. pp. 249-50). Accordingly, in 2007 the Department issued a 401 Water Quality Certification for a number of Nationwide Permits, including Nationwide Permit 29 and Nationwide 39 with certain general conditions. (Tr. p. 117, l. 20 – p. 118, l. 11, R. pp. 248-49; p. 142, ll. 5-17, R. p. 273). The 2007 401 Water Quality Certification of the Nationwide Permits included certain general conditions which applied to all of the Nationwide Permits certified at that

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time, including the following general condition:

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.

(Pet. Ex. 23, R. p. 573). 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, R. pp. 264-65; p. 135, ll. 15-18, R. p. 266; p. 143, ll. 1-10, R. p. 274).

George Whatley, the wetlands scientist for Roper Pond, consulted with the design engineers for the Proposed Project to minimize the impacts to wetlands and to prepare a Corps submittal for authorization to fill jurisdictional wetlands as required by Section 404 of the Clean Water Act. (Tr. p. 299, ll. 1-12, R. p. 430). 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, R. p. 429). On May 5, 2008, Mr. Whatley submitted a PCN to fill 0.075 acres of jurisdictional wetlands under a Nationwide Permit. (Roper Pond Ex. 6, R. p. 762). The PCN for the Proposed Project did not specify a particular Nationwide Permit under which the activities would be conducted. (Roper Pond Ex. 6, R. p. 762; Tr. p. 309, ll. 1-16, R. p. 440). 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, R. p. 555). In early 2009, Mr. Whatley contacted Colt Bowles of the Corps to request clarification on the verification of the PCN for activities under Nationwide Permit 39 for

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Commercial and Institutional Development instead of Nationwide Permit 29 for Residential Development. (Roper Pond Ex. 7, R. p. 780; Tr. p. 310, l. 20 – p. 312, l. 9, R. pp. 441-43). 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, R. p. 760).

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, R. p. 264; p. 136, ll. 12-21, R. p. 267). Mr. Hightower further testified that an individual 404 permit and accompanying 401 Water Quality Certification is not required unless a proposed activity does not meet the conditions of an applicable Nationwide Permit and the corresponding 401 Water Quality Certification issued by the Department for the Nationwide Permit. (Tr. p. 121, l. 23 – p. 122, l. 10, R. pp. 252-53; p. 156, l. 25 – p. 157, l. 22, R. pp. 287-88; p. 164, ll. 2-12, R. p. 295).

C. The Appellants

The Appellants are the Town of Arcadia Lakes, residents of Kaminer Station, a residential subdivision which borders the Roper Pond Property, and residents of the Cary Lake subdivision. The Property lies outside of the corporate limits of the Town of Arcadia Lakes (“Town”). (Tr. p. 249, ll. 20-23, R. p. 380). The Town contends that the Proposed Project will cause harm to the environmental interests of the town because Roper Pond drains into Cary Lake and the Town is responsible for the water flowing into Cary Lake. Cary Lake is privately owned and maintained by the Cary Lake Homeowners Association. (Town Dep., p. 43, l. 22 – p. 44, l. 9, R. pp. 824-25). The

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Town has no ownership interest in Cary Lake. (Town Dep, p. 44, ll. 1-4, R. p. 825). 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, R. pp. 825-26). 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, R. pp. 827-30). The Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake. (Town Dep., p. 46, l. 24 – p. 49, l. 15, R. pp. 827-30). The Town has never budgeted any funds for the maintenance or repair for any of the seven lakes within its corporate limits. (Town Dep., p. 49, l. 16 – p. 50, l. 3, R. pp. 830-31).

The Kaminer Station Subdivision is adjacent to the Roper Pond Property and hydraulically upgradient of the Roper Pond Property. (Tr. p. 241, l. 22 – p. 242, l. 10, R. pp. 372-73; p. 256, l. 11 – p. 257, l. 2, R. pp. 387-88). Ms. Linda Jackson, a resident of the Kaminer Station Subdivision, testified that she enjoys the view of the Pond on the Roper Pond Property and Cary Lake during walks in the area. (Tr. p. 243, l. 1 – p. 246, l. 15, R. pp. 374-77). Ms. Jackson further testified Cary Lake is privately owned, and there is no public access to Cary Lake. (Tr. p. 254, ll. 8-23, R. p. 385). Ms. Jackson testified that any negative impacts to Cary Lake would be the result of Roper Pond's failure to follow the General Permit and the SWPPP during the construction of the Proposed Project. (Tr. p. 250, l. 16 – p. 251, l. 7, R. pp. 381-82).

Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. (Tr. p. 263, ll. 18-23, R. p. 394). Elaine Starr, a resident of the Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. (Tr. p. 264, ll. 6-13, R. p. 395). Ms. Starr testified that the condition of Cary

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Lake has deteriorated over the years. (Tr. p. 264, ll. 6-23, R. p. 395). 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, R. pp. 408-11). Ms. Starr testified that she had not reviewed the stormwater plan for the Proposed Project. (Tr. p. 276, ll. 14-18, R. p. 407). Ms. Starr testified that any development in the area would exacerbate the condition of Cary Lake. (Tr. p. 277, ll. 7-23, R. p. 408). Ms. Starr further testified that the stormwater from the Proposed Project will negatively impact Cary Lake even if the SWPPP approved by 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, R. pp. 408-12).

STANDARD OF REVIEW

Appellate review of an ALC decision is governed by S.C. CODE ANN. § 1-23-610(B) (Supp. 2009). In a contested case hearing before the ALC, the party challenging the Department's decision has the burden of proof. *Young v. South Carolina Dep't of Health and Envtl. Control*, 383 S.C. 452, 459, 680 S.E.2d 784, 788 (Ct. App. 2009) (citation omitted). A reviewing court may not substitute its "judgment for that of the [ALC] as to the weight of the evidence on questions of fact unless the [ALC's] findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record." *Oakwood Landfill, Inc. v. South Carolina Dep't of Health and Envtl. Control*, 381 S.C. 120, 128, 671 S.E.2d 646, 651 (Ct. App. 2009) (citation omitted). "Decisions of the ALC judge should not be overturned by the reviewing court unless they are unsupported by substantial evidence or controlled by some error of law." *South*

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Carolina Coastal Conservation League v. South Carolina Dep't of Health and Envtl. Control, 380 S.C. 349, 361, 669 S.E.2d 899, 905 (Ct. App. 2008), *rev'd on other grounds in South Carolina Coastal Conservation League v. South Carolina Dep't. of Health and Envtl. Control*, 2010 WL 4608371 (S.C. Nov. 15, 2010) (citation omitted). The South Carolina Supreme Court has defined substantial evidence as follows:

Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's findings.

Porter v. South Carolina Public Service Com'n, 333 S.C. 12, 20 – 21, 507 S.E.2d 328, 332 (1999) (citations omitted).

ARGUMENTS

I. THE ALC CORRECTLY HELD THAT THE USE OF THE POND AS A POST-CONSTRUCTION WATER CONTROL STRUCTURE DOES NOT REQUIRE A FEDERAL OR STATE PERMIT.

Appellants contend that the ALC erred in finding that no permit is required for the Pond to be used to post-construction water control structure. (Appellants' Brief, p. 30). The approved design for the post-construction stormwater management system includes dredging the Pond to provide additional storage volume for control of the post-construction runoff rate. (Tr. p. 65, ll. 16-19, R. p. 196). As discussed more fully below, the dredging of the Pond does not require a 404 permit from the Corps. Moreover, there is undisputed evidence on the record to support the ALC's finding that the Pond is not a navigable water as that term is defined by the applicable federal and state law. Accordingly, as the ALC correctly held, no federal or state permit is required for the

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dredging and excavation of a non-navigable water body.

A. **Section 404 of the Clean Water Act does not require a permit for dredging and excavation of the Pond.**

The dredging of the Pond does not require a 404 permit from the Corps. 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 C.F.R. § 323.2, which provides in relevant part as follows:

(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.

* * *

(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 (j) and (l). It is clear that a 404 permit for "the discharge of dredged or fill

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material” is required only in those circumstances in which such material is being added to waters of the United States. Under the plans for excavation of the Pond, the dredged material will be placed in an area upland from the Pond. (Tr. p. 318, l. 19 – p. 319, l. 16, R. pp. 449-50; p. 327, l. 13 – p. 329, l. 5, R. p. 458-60). As such, there is no 404 permit required for the dredging and excavation of the Pond for use as a post-construction water control structure for the Proposed Project. Indeed, Appellants concede that the “dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act.” (Appellants’ Brief, p. 4). However, Appellants argue that the dredging and excavation of the Pond requires a permit and approval by the Department. As discussed *infra*, the substantial evidence on the record supports the ALC’s finding that the Pond is not a navigable water, and therefore, the dredging of the Pond does not require a federal or state permit.

B. There are no federal or state permits required for dredging and excavation of the Pond.

A permit for dredging and excavation of the Pond is required only if the Pond is a navigable water as that term is defined under Federal Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.*, or the State Construction in Navigable Waters Permitting Regulation, 23 S.C. CODE ANN. REGS. § 19-450 (“State Navigable Waters Regulation”). A Corps permit is required for dredging of “any navigable water of the United States” is regulated under Section 10 of the Federal 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. However, 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;
- (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). "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, the ALC correctly held that "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." (Final Order and Decision, p. 26).

Similarly, the State Navigable Waters Regulation also defines navigable water as navigable in fact. Section 19-450.2 of the Regulation provides as follows:

Navigable waters means those waters which are now navigable, or have been navigable at any time, or are capable of being rendered navigable by the removal of accidental obstructions, by rafts of lumber or timber or by small pleasure or sport fishing boats. Navigability shall be determined by the Department.

23 S.C. CODE ANN. REGS. § 19-450.2(C). Again, a permit for dredging of the Pond would only be required if the Pond is navigable in fact. Appellants make no claim that the Pond is or ever has been navigable in fact. Additionally, there is no evidence in the record to support such a claim.

The evidence on the record clearly demonstrates that the Pond is not a navigable water. 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

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Ex. 6, R. p. 544). 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, R. pp. 271-72; p. 332, ll. 5-9, R. p. 463). Accordingly there is substantial evidence on the record supporting the ALC's finding that the Pond is not a "navigable water of the United States" under the Rivers and Harbors Act or a navigable water under the State Navigable Water Regulations. Therefore, there is no basis in federal or state law that a permit is required for the dredging of the Pond.

C. Neither the State Stormwater Regulations nor the State General Permit create a permitting requirement for the dredging of the Pond.

As discussed *supra*, the Appellants concede that the dredging of the Pond is not regulated under Section 404 of the Clean Water Act. However, Appellants contend that Section 72-307 of the State Stormwater Regulations and Section 2.1(C) of the State General Permit impose an absolute requirement for a permit for use of the Pond as a water control structure. (Appellants' Brief, p. 30-31). There is simply no basis for this argument. Specifically, Section 72-307 of the Stormwater Regulations 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) (emphasis added). Accordingly, Section 72-307 does not impose a requirement to obtain a 404 permit in every instance in which an existing wetlands is used as a component of the stormwater management system. It merely requires that a 404 permit be obtained prior to implementation of the stormwater management plan in those instances in which the activities necessary to modify the existing wetlands for such use requires a federal or state permit. Similarly, Section

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2.1(C) of the State General Permit provides as follows:

If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective.

(Pet. Ex. 3, p. 4, R. p. 487) (emphasis added). Again, this provision of the State General Permit does not create an obligation to obtain a 404 permit where none is required under Section 404 of the Clean Water Act. As discussed *supra*, the proposed dredging and excavation of the Pond does not require a permit under either federal or state law. Therefore, the dredging and excavation of the Pond for use as a water control structure without a permit conforms to the requirements of the State Stormwater Regulations and Section 2.1(C) of the State General Permit.

II. THE ALC CORRECTLY HELD THAT THE DREDGING AND EXCAVATION OF THE POND DOES NOT REQUIRE AN INDIVIDUAL 401 WATER QUALITY CERTIFICATION.

Although the Appellants concede that the dredging and excavation of the Pond does not require a 404 permit, they contend that the Department should have reviewed the potential impacts of this activity under S.C. CODE ANN. REGS. § 61-101 ("State Water Quality Certification Regulations") and S.C. CODE ANN. REGS. § 61-68 ("State Water Quality Standards"). (Appellants' Brief, p. 23). Contrary to Appellants' contention, the review of the potential impacts under the State Water Quality Certification Regulations and the State Water Quality Standards are not triggered unless a federal permit is required for the proposed activity. As fully discussed *supra*, no federal permit is required for the dredging and excavation of the Pond. Both the State Water Quality Certification Regulations and the Water Quality Standards were promulgated by the Department to fulfill the requirements of the federal Clean Water Act. The application of these

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Regulations is set forth in the Clean Water Act and recognized in the express language of the State Regulations.

As a prerequisite for a federal permit involving a discharge into waters, the Clean Water Act requires a certification from the state that the discharge will comply with state water quality standards. Section 401 of the Clean Water Act provides, in relevant part, that “[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . .” *See* 33 U.S.C. § 1341(a)(1). A federal permit cannot be issued unless the state grants certification or fails to act on a request for certification within a reasonable time, not to exceed one year, and thereby waives certification. *Id.* The Department promulgated the State Water Quality Certification Regulations to establish procedures for the State of South Carolina to make certification determinations under Section 401. The State Water Quality Certification Regulations expressly provide that the purpose of the Regulations is to establish procedures for certifications as required by Section 401 of the Clean Water Act, providing as follows:

1. This regulation establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.
2. Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department. Potential applicants are encouraged to contact the Department prior to submitting an application. Federal law provides that no Federal license or permit is to be granted until such certification is obtained. Federal permits or licenses for which certification is required as determined by the Federal agency include but are not necessarily limited to:

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(a) individual or general Federal permits issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Section 1344.

(b) Federal permits issued pursuant to Sections 9 and 10 of the Federal River and Harbor Act, 33 U.S.C. Sections 401 and 403.

(c) permits or licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. Section 1791, et seq.

25A S.C. CODE ANN. REGS. § 61-101(A)(1), (2). The definition of "certification" under the Regulation also expressly provides that such certification is limited to the certification required under Section 401 of the Clean Water Act: "'Certification' means certification as required under Section 401 of the Clean Water Act, 33 U.S.C. Section 1341." 25A S.C. CODE ANN. REGS. § 61-101(B)(2). Since there is no federal permit required for dredging and excavation of the Pond, a certification under the State Water Quality Certification Regulation is not and cannot be required.

Similarly, the State Water Quality Standards were promulgated by the Department to meet the requirements of Section 303 of the Clean Water Act. The Clean Water Act requires the states to adopt, and review every three years, standards for water quality, which are subject to the approval of the Environmental Protection Agency. 33 U.S.C. § 1313(c). Section 303 requires states to identify waters within their boundaries for which the effluent limitations required by the Clean Water Act are not stringent enough to achieve any water quality standard applicable to those waters and to establish a total maximum daily load for certain pollutants as identified by the EPA Administrator. 33 U.S.C. § 1313(d)(1). In issuing a certification under Section 401 of the Act, the Department is certifying that the proposed discharge under the federal permit will comply with these Standards and the limitations established therein. 33 U.S.C. § 1341(a). A review by the Department under the State Water Quality Certification Regulations or the State Water Quality Standards is triggered only by certain federal permitting decisions

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which may result in a discharge to navigable water. As the ALC correctly noted, the South Carolina Supreme Court has held that the State Water Quality Standards are not applicable to a permitting decision on a stormwater permit. In the Final Order and Decision, the ALC cited the holding in *Responsible Economic Development v. South Carolina Dept. of Health and Environmental Control* and found as follows:

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.

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:

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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'

(Final Order and Decision, p. 28-29, R. pp. 31-32). This decision is directly on point in this case.

The Appellants seek to distinguish the *Responsible Economic Development* holding by asserting that the State Water Quality Certification Regulations and the State Water Quality Standards were triggered by the requirement of a 404 permit in this case. (Appellants' Brief, p. 23). However, this assertion exemplifies the central flaw in Appellants' arguments in this appeal. The Department decision under appeal in this matter is the decision to grant Roper Pond coverage under the State General Permit and compliance with the State Stormwater Regulations, S.C. CODE ANN. REGS. § 72-300 *et seq.* This is not an appeal of the Corps authorization for activities under NWP 29 and the 401 Water Quality Certification of that Permit in 2007. Indeed, as discussed more fully

supra, once the Department issued the 401 Water Quality Certification for NWP 29 in 2007, the Corps is the only regulatory agency authorized to advise a party giving notice of its intent to proceed under NWP 29 that a proposed project qualifies for the Nationwide Permit. Accordingly, it is clear that there is no legal basis for Appellants' contention that the State Water Quality Certification Regulations and the State Water Quality Standards require the Department's review of the specific proposed activities under a Nationwide Permit for which the Department has already issued a 401 water quality certification.

III. THE ALC CORRECTLY HELD THAT THE DEPARTMENT IS NOT REQUIRED TO REVIEW PROPOSED ACTIVITIES UNDER A CORPS NATIONWIDE PERMIT FOR WHICH THE DEPARTMENT HAS ALREADY ISSUED A 401 WATER QUALITY CERTIFICATION.

At the heart of Appellants' arguments is the contention that the proposed filling of 0.075 acres of wetlands under NWP 29 requires a separate 401 water quality certification by the Department. (Appellants' Brief, p. 22). On the contrary, as Appellants acknowledge, the 401 Water Quality Certification for Nationwide Permit 29 was issued in 2007. That certification is unquestionably no longer appealable. Yet, Appellants argue that this 401 Water Quality Certification is ineffective unless and until the Department conducts a subsequent review of the specific proposed activities to confirm that such activities meet a general condition of the 401 Water Quality Certification, which the Appellants also contend requires certification of the entire project, including the dredging of the Pond. As discussed more fully below, Appellants' interpretation of the general condition of the 2007 401 Water Quality Certification is in direct conflict with the entire purpose of the Nationwide Permits and renders the 2007 401 Water Quality Certification meaningless. Moreover, Appellants' interpretation would

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effectively require a 401 Water Quality Certification for activities which do not require a federal permit. There is simply no basis in federal or state law for such interpretation. Finally, Appellants' interpretation of the General Condition of the 2007 Water Quality Certification is in conflict with the Corps regulations governing Nationwide Permits.

A. **The Section 401 Water Quality Certification for the NWP 29 was issued in 2007 and can no longer be appealed.**

The only activity requiring a 404 permit is the filling of 0.075 acres of wetlands for a road crossing and a building pad. (Pet. Ex. 10, R. pp. 559-60). Roper Pond obtained authorization to conduct these activities under NWP 29, which authorizes the fill of up to 0.10 acres of jurisdictional wetlands in connection with its planned residential development. (Tr. p. 140, ll. 4-12, R. p. 271). Appellants acknowledge that the 401 Water Quality Certification for NWP 29 was issued by the Department in 2007. (Appellants' Brief, p. 6). Pursuant to S.C. CODE ANN. § 44-1-60, any appeal of the 2007 401 Water Quality Certification was required to be filed with fifteen days after notice of the department decision is to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail. *South Carolina Coastal Conservation League v. South Carolina Dep't. of Health and Envtl. Control*, 2010 WL 4608371, *5 (S.C. Nov. 15, 2010) (interpreting S.C. CODE ANN. § 44-1-60(E)). Clearly, the 2007 401 Water Quality Certification for NWP 29 is no longer appealable. Moreover, Appellants do not dispute that the validity of the 2007 401 Water Quality Certification for NWP 29. Instead, Appellants argue that a general condition of the 2007 401 Water Quality Certification requires a full review under the State Water Quality Certification Regulation for all activities to be conducted under a Nationwide Permit certified in 2007. Such a position is untenable.

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Appellants contend that "DHEC must affirmatively certify that the project meets its Section 401 water quality certification general conditions in order for the project to have an approved and effective Section 404 Nationwide Permit." (Appellants' Brief, p. 6). Appellants base this argument on the following general condition for the 2007 401 Water Quality Certification:

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

(Pet. Ex. 23, R. p. 573). Appellants contend that the Department review necessitated by this general condition requires a comprehensive review of the entire development: "Consideration of all land within the project area that is directly impacted by the project includes impacts caused by filling wetland and other direct impacts such as dredging and excavating the lily pad pond." (Appellants' Brief, p. 20). Such interpretation is plainly contrary to the basic rationale for issuing Nationwide Permits. Indeed, as discussed more fully below, Roper Pond would contend that this provision is intended to prevent a developer from dividing a proposed development into phases or geographic areas in order to use the same Nationwide Permit multiple times and thus avoid individual permitting.

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

² 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.

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). Appellants’ interpretation of the general condition of the 2007 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 Quality Certification to require a full

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determination of no impact for all activities associated with an entire project. Moreover, Appellants offered no evidence at the hearing to support this interpretation. In this case, the regulated activity for the entirety of the Proposed Project involves the filling of only 0.075 acres of wetlands.

The proper interpretation of this general condition to the 401 Water Quality Certification, and the interpretation which is supported by the evidence on the record, is that an applicant may not segment a project into phases or geographic areas to avoid an individual 404 permit when the overall impacts exceed that authorized in a Nationwide Permit. As Chuck Hightower explained:

That is what it says, and the reason we put that condition on there, my understanding is, we were having applicants come in and they would apply for a coverage under a Nationwide Permit, and then they would get that one, and then as they developed a project in phases, they would come back for another Nationwide, and they would come back for another Nationwide, and they would come back for another Nationwide, and the intent was that we'd look at all the jurisdictional activities that required 404 permits at one time rather than piecemeal the projects.

(Tr. p. 154, ll. 2-13, R. p. 285). This interpretation is consistent with anti-segmentation principles for assessing environmental impacts under federal law. *See, e.g., State of S.C. ex rel., Campbell v. O'Leary*, 64 F.3d 892, 898-99 (4th Cir.1995) (holding that segmentation of one phase of a larger project prior to the completion of the environmental review of the entire project under NEPA constitutes impermissible segmentation if the component action has a "direct and substantial probability" of influencing the agency's decision on the larger project); *One Thousand Friends v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004) (noting that courts have found segmentation improper under NEPA when the segmented project "has no independent justification, no life of its own, or is simply illogical when viewed in isolation"). Indeed, when

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considering the language of the general condition in the 2007 401 Water Quality Certification in its entirety, it is clear that this condition is merely a further clarification of the prohibition against multiple use of the same Nationwide Permit in a "single and complete project" in the Corps Regulations.

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 NWPs 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 provides in relevant part: "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." (Pet. Ex. 23, R. p. 573). 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. As long as the activities fall within the scope of NWP 29, those impacts are deemed to be minimal and no assessment by either the Corps or the

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Department is required. Other unregulated activities would therefore fall outside the jurisdiction of the Corps and the State.

Significantly, the comprehensive review of the project which Appellants advocate would render the 2007 401 Water Quality Certification, and the Nationwide Permits themselves, completely meaningless. The general condition relied on by Appellants is applicable to every Nationwide Permit certified by the Department in 2007. Citing to the State Water Quality Certification Regulations, Appellants contend that the Department's review of any project which includes activities authorized under a Corps Nationwide Permit certified in 2007 would include the following:

The DHEC Water Quality Certification Regulations, S.C. Code Ann. Reg. 61-101, expressly require that DHEC, prior to issuance of a certification, must consider: "whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project including: (1) impact on existing and classified water uses; (2) physical, chemical, and biological impacts, including cumulative impacts; (3) the effect on circulation patterns and water movement; (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others. S.C. Code Ann. Reg. 61-101.F(3).

(Appellants' Brief, p. 24). In short, Appellants contend that this review by the Department is the same scope of review required for certification of an individual permit. As a preliminary matter, a review of this magnitude cannot be conducted within the time frame for pre-construction notification under the Corps Regulations. Specifically, Section 330.1 of the Corps Regulations provides in relevant part:

In most cases, permittees may proceed with activities authorized by NWP's without notifying the [District Engineer of the Corps]. 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**

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the DE within a 30-day period.

33 C.F.R. § 330.1(e)(1) (emphasis added). As such, for those Nationwide Permits which do not require pre-construction notification to the Corps, a party may proceed with activities authorized by the Nationwide Permit at any time without notice to the Corps. When pre-construction notification to the Corps is required, the permittee is entitled to proceed within 30 days of the Corps' receipt of such notification. Even where there is notification to the Corps, it would be impossible for the Department to conduct a review of the scope advocated by Appellants within this time period. Moreover, and significantly, the requirement to conduct a review of this scope would negate any benefit of proceeding under a Nationwide Permit and is directly in conflict with the fundamental rationale allowing Nationwide Permits for those activities which have been deemed to cause minimal impacts.

Additionally, pursuant to Corps Regulations and the State Water Quality Certification Regulations, the Corps—not the Department—is the regulatory agency authorized to review a notification to proceed under a Nationwide Permit and to determine whether the proposed activity is consistent with that Nationwide Permit. Any conditions of a 401 Water Quality Certification issued by the Department become a condition of the Corps permit. 33 C.F.R. § 330.4(c); *see also* S.C. CODE ANN. REGS. § 61-101(H)(1) ("Any certification condition is intended to become a condition of the Federal or State license or permit as specified in Federal or State law."). Pursuant to the Corps Regulations, the Corps district engineer has the discretionary authority to determine whether an activity complies with the conditions of the Nationwide Permit and whether the activities would have more than minimal impacts. 33 C.F.R. § 330.4(d). The Corps district engineer has the authority to modify the Nationwide Permit or to

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require an individual permit for the proposed activity. *Id.* Likewise, the State Water Quality Certification Regulations acknowledge that the agency issuing the permit is authorized to enforce the conditions of the permit: "Certification conditions which are included as conditions of such license or permit are subject to enforcement mechanisms available to the Federal or State agency issuing the license or permit." 25A S.C. CODE ANN. REGS. § 61-101.H.2 (emphasis added).³ Although the Department may impose conditions on its issuance of the 401 water quality certification for a Nationwide Permit, or any other federal permit affecting water quality, the authority to enforce those conditions is held by the Corps—the agency issuing the Nationwide Permit. Accordingly, there is no basis for Appellants' contention that the general condition of the 2007 401 Water Quality Certification for the Nationwide Permits requires a further action by the Department. Moreover, Section 401 of the Clean Water Act mandates the mechanism whereby a state which has certified a federal permit may revoke that certification. This mechanism allows a state to revoke a prior certification only with sixty days notice to the Corps and only pursuant to certain defined circumstances. 33 U.S.C. § 1341(c)(3). Section 330.4 of the Corps Regulations specifically addresses a State's withdrawal of a 401 water quality certification for a Nationwide Permit:

Where a state, after issuing a 401 water quality certification for an NWP, subsequently attempts to withdraw it for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation of the NWP authorization as outlined in § 330.5. Otherwise, such attempted state withdrawal is not effective and the Corps will consider the state certification to be valid for the NWP authorizations until such time as the NWP is modified or reissued.

33 C.F.R. § 330.4(c)(7). The Appellants' interpretation of the general condition of the

³ In this case the agency issuing the license or permit would be the Corps, not the Department, as the Department is merely certifying the Corps permit.

2007 401 Water Quality Certification would allow the Department to withdraw its certification of the Nationwide Permits without following the procedures outlined in the Clean Water Act and the Corps Regulations. Such a broad reservation of authority cannot be reconciled with federal law. If a state could revoke a prior certification at any time, Section 401(a)(3) of the Clean Water Act, which governs the revocation of a state water quality certification, would be rendered meaningless. Accordingly, such interpretation is unquestionably contrary to federal law and therefore without merit. There is simply no legal basis for the Appellants' contention that the Department must conduct a comprehensive review of an individual project proceeding under a Nationwide Permit issued by the Corps and previously certified by the Department.

Appellants further argue that standard language in the Corps letter to Roper Pond concurring in its notification to proceed under a Nationwide Permit requires certification by the Department prior to proceeding under that Permit. Specifically, the Corps letter advised Roper Pond that the Proposed Project must comply with a number of general conditions, including the following:

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, R. p. 555). Contrary to the Appellants' assertion, this standard language does not impose on Roper Pond a requirement to secure a 401 water quality certification prior to proceeding under NWP 29. This standard language merely reminds the party proceeding under a Nationwide Permit that other authorizations, including a 401 water

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quality certification, may be required for the proposed activity. Specifically, when the Corps issues Nationwide Permits, a state may certify, certify with conditions, or deny certification of a Nationwide Permit. However, a party may still proceed under a Nationwide Permit for which a state denied certification at the time the Nationwide Permit was issued if that party obtains an individual water quality certification to conduct activities under the Nationwide Permit. *See* 33 C.F.R. § 330.4(C)(6) (“In instances where a state has denied the 401 water quality certification for discharges under a particular NWP, permittees must furnish the DE with an individual 401 water quality certification or a copy of the application to the state for such certification.”). In this case, the 401 Water Quality Certification for NWP 29 was issued by the Department in 2007. Accordingly, no further certification or review by the Department was required prior to Roper Pond’s proceeding with the proposed activities under NWP 29.

IV. AS AN ADDITIONAL SUSTAINING GROUND, THERE IS NO STATUTORY OR REGULATORY AUTHORITY FOR THE REVIEW OF A NATIONWIDE PERMIT IN THE DEPARTMENT’S DECISION TO GRANT COVERAGE UNDER THE STATE GENERAL PERMIT.

The Department decision under review in this case is the decision to grant Roper Pond coverage for the Proposed Project under the State General Permit. 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. The permitting program under Section 402 is administered by the State as the delegated permitting authority of the EPA. The substantial evidence on the record supports the ALC’s finding that the SWPPP

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submitted for the Proposed Project conforms to the technical requirements of the State General Permit and the Stormwater Regulations. (Final Order and Decision, p. 22, R. p. 25). Indeed, the Appellants offered no evidence regarding the technical sufficiency of the SWPPP. Appellants' only expert did not even review the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and offered no opinion regarding the sufficiency of such measures. (Tr. p. 201, l. 12 – p. 202, l. 7, R. pp. 332-33; p. 211, ll. 2-11, R. p. 342). In fact, none of Appellants' witnesses reviewed the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (Tr. p. 201, l. 12 – p. 202, l. 7, R. pp. 332-33; Tr. p. 276, ll. 14-18, R. p. 407). Instead, Appellants argue that the Proposed Project fails to meet the permitting requirements under Section 404 of the Clean Water Act. Appellants thus endeavor to use the appeal of a Section 402 permit to challenge activities authorized under Section 404 of Clean Water Act and administered by Corps—not the Department. 33 U.S.C.A. § 1344(a),(d).

The Department decision under review in this case is the grant of coverage to Roper Pond under the State General Permit, a State permit issued in lieu of a Section 402 permit. The Department's decision is governed by the State Stormwater Regulations. Although the State General Permit and the State Stormwater Regulations reference the requirement for a 404 permit, the provisions referencing such requirement are applicable only when a permit is required for the use of an existing water body as a post-construction water control structure. As discussed at length in Section I.C *infra*, there is no permit required for the dredging and excavation of the Pond, and therefore, such provisions are not applicable in this case. Except in this limited circumstance, there is no statutory or regulatory basis for a Department's consideration of an activity regulated

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under Section 404 of the Clean Water Act in a decision on a 402 permit approved in accordance with criteria set forth in the State Stormwater Regulations. Any issues raised by Appellants regarding the validity and effect of NWP 29 were not properly before the ALC in its review of the Department's decision to grant coverage to Roper Pond under the State General Permit and therefore should not be considered by this Court on appeal.

V. THE ALC'S FINDING THAT THE APPELLANTS LACK STANDING IS SUPPORTED BY THE SUBSTANTIAL EVIDENCE ON THE RECORD AND THE RELEVANT CASE LAW.

By agreement of the parties, the Appellants were divided into three groups for purpose of determining standing in this matter. Those three groups are the Town, the residents of the Kaminer Station subdivision, and the residents of the Cary Lake subdivision. 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). As discussed below, the ALC correctly held that Appellants lacked standing to challenge the Department's decision to grant Roper Pond coverage under the State General Permit. Specifically, the substantial evidence on the record supports the ALC finding that Appellants failed to present evidence to demonstrate an injury in fact and a causal connection between Appellants' alleged injuries and the Department's decision. Additionally, Appellants lack standing in this action because the injuries alleged by Appellants would not be redressed by a decision in their favor.

A. **The substantial evidence on the record supports the ALC's finding that the Cary Lake residents lacked standing to challenge the Department's grant of coverage to Roper Pond under the State General Permit.**

The ALC correctly found that the Cary Lake residents failed to present evidence of an actual or imminent injury resulting from the Department's decision to grant Roper Pond coverage under the State General Permit. Elaine Starr, a resident of the Cary Lake subdivision, testified that the condition of Cary Lake has deteriorated over the years. (Tr. P. 264, ll. 6-23, R. p. 395). Significantly, 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, R. pp. 408-11). Linda Jackson, a resident of the Kaminer Lake subdivision, also testified that Cary Lake had been negatively impacted by previously development. (Tr. p. 250, l. 16 – p. 251, l. 7, R. pp. 381-82). Ms. Jackson further 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, R. p. 381-82). Evidence of prior general harm from similar activities does not satisfy requirement of a threat of "imminent and concrete harm" to a party challenging governmental action "because it relates to past injury rather than imminent

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future injury that is sought to be enjoined.” *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1150 (2009). Accordingly, the testimony by Ms. Starr and Ms. Jackson regarding prior violations by other developers does not support a claim that Roper Pond’s activities under SWPPP and the State General Permit will result in an actual and imminent injury to Cary Lake.

Additionally, Appellants simply failed to offer evidence that the SWPPP approved by the Department for the Proposed Project was not sufficient to control sedimentation and erosion control during the development of the Roper Pond property. The recent holding in *Bailey v. South Carolina Department of Health and Environmental Control*, supports the ALC’s ruling on standing in this matter. 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). In *Bailey*, this Court held that a neighboring property owner lacked standing to challenge the issuance of a permit for the modification of a dock. Specifically, Bailey claimed that the permit holder intended to modify the private dock for commercial use. This Court affirmed the ALC’s finding this alleged injury was conjecture and speculation as Bailey offered no evidence to support its claim that the dock would be used for commercial purposes:

Bailey testified that his objection was over the dock being used in a commercial manner as a marina, and he asserted the Townsends did not need a forty-foot floating dock for their personal use. **However, Bailey failed to present any evidence showing that Townsend’s dock was being used for commercial purposes.** Townsend asserted Bittner and Johnson were friends that she allowed to use the dock as a favor, not as a commercial arrangement. Townsend did not have a written agreement with Bittner or Johnson to pay her for using the dock, and she did not rent slips or allow the general public access to the dock. Further, due to Bailey’s claims, Townsend requested that Bittner and Johnson stop giving her money for dock-related costs.

Id. at 7-8, 693 S.E.2d at 430 (emphasis added). This Court thus upheld the ALC’s

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finding that Bailey lacked standing. Likewise, in the instant case, Appellants contend that the development of the Roper Pond property will negative impact Cary Lake, but failed to offer any evidence that the BMPs proposed by Roper Pond and approved by the Department in the SWPPP are inadequate to control sediment during the construction of the Proposed Project. Ms. Starr testified that she had not reviewed the SWPPP for the Proposed Project. (Tr. p. 276, ll. 14-18, R. p. 407). Likewise, Appellants' only expert did not review the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and offered no opinion regarding the sufficiency of such measures or the impact of the land-disturbing activities authorized under the State General Permit on Cary Lake. (Tr. p. 201, l. 12 – p. 202, l. 7, R. pp. 332-33; Tr. p. 203, ll. 18-23, R. p. 334; p. 211, ll. 2-11, R. p. 342). In contrast, Jill Stewart testified repeatedly that the BMPs approved under the SWPPP met the requirements of the State General Permit and the Stormwater Regulations. (Tr. p. 56, l. 12 – p. 57, l. 8, R. pp. 187-88; Tr. p. 71, ll. 6-17, R. p. 202). Ms. Stewart further testified that sedimentation and erosion during construction of the Proposed Project would be controlled through the combination of BMPs to be implemented under the SWPPP approved by the Department. (Tr. p. 62, l. 25 – p. 64, l. 7; R. pp. 193-95). Moreover, the SWPPP does not authorize the use of the Pond for sediment control during construction. (Tr. p. 67, ll. 15-19, R. p. 198). Ms. Stewart testified that stormwater runoff during construction would be controlled by sediment traps and silt fences and directed into stormwater basins—not Roper Pond. (Tr. p. 62, ll. 9-22, R. p. 193). Ms. Stewart further testified that any sediment reaching Roper Pond or Cary Lake during the construction of the Proposed Project would necessarily have to be the result a violation of the State General Permit and Roper

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Pond's failure to maintain the BMPs approved in the SWPPP. (Tr. p. 75, l. 9 – p. 76, l. 22, R. pp. 206-07). The substantial evidence—indeed, the only evidence—on the record demonstrates that any impact on Cary Lake would be the result of Roper Pond's failure to manage sediment and erosion control in accordance with the approved SWPPP and the State General Permit. Appellants cannot establish standing based on an alleged impact to Cary Lake without evidence that such evidence will result for the Department's decision in this matter.

Additionally, to the extent that Appellants allege that the impacts to Cary Lake will result from Roper Pond's failure to comply with the SWPPP and the State General Permit, there is no doubt that this alleged injury is neither actual nor imminent and is mere speculation and conjecture that Roper Pond will inevitably violate the State General Permit, the SWPPP, and the State Stormwater Regulations. Additionally, there is no causal connection between this alleged injury and the conduct complained of in this action—i.e., the Department's approval of the SWPPP and issuance of coverage to Roper Pond under the State General Permit. Any alleged harm resulting from Roper Pond's failure to manage sediment and erosion control in accordance with the approved SWPPP and the State General Permit cannot be raised to establish 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 SWPPP and the State General Permit. This is not an action challenging the Department's failure to enforce the conditions of the SWPPP and the State General Permit. The substantial evidence on the record shows that the injury which the Appellants allege could occur only if Roper Pond fails to conform to the conditions of

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the SWPPP and the State General Permit. As such, Appellants' allegations of potential impact on Cary Lake are not an injury in fact causally connected to the challenged action and do not support the Appellants' contention that the ALC erred in ruling that it lacked standing in this matter.

Similarly, Ms. Starr testified that she believed that any increase in density of the Property would have a detrimental impact on Cary Lake 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, R. pp. 408-12). Again, such contention is contrary to the substantial evidence on the record and presumes that Roper Pond will violate the SWPPP and the State Stormwater Regulations. The State 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). 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, R. pp. 195-96). Ms. Stewart testified that she reviewed the pre-construction and post-construction runoff calculations submitted by Roper Pond and determined that the design conformed to the requirements of the Stormwater Regulations. (Tr. p. 65, ll. 8-19, R. p. 196). Appellants offered no evidence to refute Ms. Stewart's testimony on this issue. Indeed, Ms. Starr testified that she had not reviewed the SWPPP for the Proposed Project. (Tr. p. 276, ll. 14-18; R. p. 407). Likewise, Appellants' expert did not review the SWPPP. (Tr. p. 201, l. 12 - p.

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202, l. 7, R. pp. 332-33). There is simply no evidence on the record to support Appellants' claim that the Proposed Project will increase the rate of stormwater runoff from the Property and thus negatively impact Cary Lake. There is no question that the substantial evidence on the record supports the ALC's finding that the Cary Lake residents lack standing to challenge the Department's decision in this case.

B. The substantial evidence on the record supports the ALC's finding that the Kaminer Station residents lacked standing to challenge the Department's grant of coverage to Roper Pond under the State General Permit.

Appellants contend that the testimony of Linda Jackson is sufficient to establish standing because Ms. Jackson, a resident of Kaminer Station, enjoys walking and running past the Pond, which she describes as "absolutely beautiful." (Appellants' Brief, p. 35). The injury that Ms. Jackson is alleging is the potential loss of viewing the lily pads in the Pond. Contrary to Appellants' assertions, claiming an aesthetic interest in the general 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). The ALC correctly held the Kaminer Station residents also failed to satisfy this test.

Specifically, the substantial evidence on the record supports the ALC's finding that there is no causal connection between the alleged injury and the Department's decision in this case. To the extent that the Kaminer Station residents have identified their alleged injury as the loss viewing the lily pads in the Pond, such action is not

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authorized by the Department's decision in this matter. With or without the approval of the Department, Roper Pond may remove the water lilies from the Pond. Indeed, Appellants' own expert acknowledged that water lilies are considered an invasive plant. (Tr. p. 209, l. 9, R. p. 340). As discussed fully *supra*, the dredging of the Pond is not regulated by the Department or any other state or federal agency. Simply put, the Department's decision to grant Roper Pond coverage under the State General Permit is not an authorization to dredge the Pond. No such authorization is required by any state or federal agency. Therefore, any alleged aesthetic injury related to the Pond is not causally connected to the Department's decision in this matter.

Additionally, to the extent that the Kaminer Station residents claim standing based on an alleged injury related to Cary Lake, the ALC correctly found the evidence does not support such claim. The Kaminer Station subdivision is adjacent to the Roper Pond Property and hydraulically upgradient of the Roper Pond Property. (Tr. p. 241, l. 22 – p. 242, l. 10, R. pp. 372-73; p. 256, l. 11 – p. 257, l. 2, R. pp. 387-88). Ms. Jackson testified that Cary Lake is privately owned, and there is no public access to Cary Lake. (Tr. p. 254, ll. 8-23, R. p. 385). Cary Lake is privately owned by the Cary Lake Homeowners Association. (Town Dep., p. 43, l. 22 – p. 44, l. 9, R. pp. 824-25). Accordingly, the ALC correctly held that there was no evidence of an impact to the Kaminer Station residents from the Proposed Project. Moreover, as discussed in above, the substantial evidence on the record clearly demonstrates that any impacts to Cary Lake would be the result of a violation of the SWPPP, State General Permit, and State Stormwater Regulations. Such alleged impacts are not a concrete and imminent harm, but mere speculation and conjecture that Roper Pond will inevitably violate the SWPPP,

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the State General Permit, and the State Stormwater Regulations. Moreover, such impacts are not a harm causally connected to the challenged action—the Department’s decision to grant Roper Pond coverage under the State General Permit. Accordingly, the substantial evidence on the record supports the ALC’s finding that the Kaminer Station residents lack standing in this matter.

C. **The substantial evidence on the record supports the ALC’s finding that the Town lacked standing to challenge the Department’s grant of coverage to Roper Pond under the State General Permit.**

Even more remote is the alleged standing of the Town. The ALC found that the Town lacks standing because the Town “alleged no injury separate from that of its individual citizens.” (Final Order and Decision, p. 17, R. p. 20). In their brief, Appellants contend that the Town has standing because the Department’s decision would cause “harm to the environmental interest of the town.” (Appellants’ Brief, p. 42). This is clearly an action on behalf of the Town’s citizens and does not establish standing for the Town. In *Capital View Fire District v. County of Richland*, 297 S.C. 359, 377 S.E.2d 122 (Ct. App. 1989), this Court held that a political subdivision cannot bring an action on behalf of its citizens under the doctrine of *parens patriae*. 297 S.C. 359, 377 S.E.2d 122 (Ct. App. 1989) (citing *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 102 S.Ct. 3260 (1982)). The ALC correctly found that the Town lacked standing to raise claims based on alleged injury to its individual citizens. (Final Order and Decision, pp. 17-18, R. pp. 20-21).

Appellants seek to avoid the application of the *Capital View* holding by making a vague, general claim that the Town itself will be harmed by the alleged environmental impacts of the Proposed Project. Specifically, citing the deposition testimony of Richard Thomas, Mayor of the Town, Appellants assert as follows in their brief:

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Further, the permit and project threaten the Town's ability to comply with federal law. Mr. Thomas noted that "we are responsible for the water that flows into Cary Lake as well as out through our NPDES rules and regs." (R. Thomas Depo. Tr. 47). Mr. Thomas elaborated on the Town's responsibilities under the NPDES provision of the Clean Water Act as follows: The town is responsible for what comes into the town and what leaves the town as far as water quality. If the water quality coming into the town is not regulated by the town and we allow it to flow through the town [into downstream water bodies], then the way I understand the NPDES, we would then be responsible. Therefore we could—it could result in financial and/or litigation for the mitigation of that damage. Whatever that would be (R. Thomas Depo. Tr. 6).

(Appellants' Brief, p. 43). Such claims are clearly broad speculation and based on an unfounded presumption that Roper Pond will violate the State General Permit and the SWPPP approved for the Proposed Project. An injury in fact cannot be based on these hypothetical statements of the Town's mayor. An "injury in fact" requires "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2130). In order for the injury to be particularized, it must affect the party in a personal and individual way and cannot be a prospective concern of future harm. *Id.*; see also *Commander Health Care Facilities, Inc. v. S.C. Dept. of Health and Envtl. Control*, 370 S.C. 296, 302, 634 S.E.2d 664, 666-67 (Ct. App. 2006) (holding that the plaintiff must demonstrate an injury resulting from the issuance of a certificate of need—not a hypothetical future impact of such action). The Town's claims that the Proposed Project will impose some environmental responsibility on the Town cannot, in any way, be characterized as concrete, actual, or imminent. The mayor's testimony fails to identify the manner in which the activities conducted by Roper Pond will impact the water quality of the Town and the basis for the Town's responsibility for stormwater runoff on the Roper Pond property. Indeed, such

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testimony is contrary to the substantial evidence on the record. The Roper Pond property is beyond the corporate limits of the Town. (Tr. p. 249, ll. 20-23, R. p. 380). The Pond drains through a pipe which runs beneath Trenholm Road and into Cary Lake, a privately-owned lake. (Town Dep., p. 44, ll. 11-15, R. p. 825). Cary Lake is privately owned and maintained by the Cary Lake Homeowners Association. (Town Dep., p. 43, l. 22 – p. 44, l. 9, R. p. 824-25). The Town has no ownership interest in Cary Lake. (Town Dep., p. 44, ll. 1-4, R. p. 825). Significantly, 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, R. pp. 825-26). The Town is in no way responsible for the maintenance or repair of Cary Lake. (Town Dep., p. 46, l. 24 – p. 49, l. 15, R. pp. 827-30). The Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake. (Town Dep., p. 46, l. 24 – p. 49, l. 15, R. pp. 827-30). The Town has never budgeted any funds for the maintenance or repair for any of the seven lakes within its corporate limits. (Town Dep., p. 49, l. 16 – p. 50, l. 3, R. pp. 830-31). Aside from the Mayor's general statement that the Town is responsible for water quality in the Town, there is simply no other evidence on the record to substantiate an allegation that the activities to be conducted by Roper Pond under the coverage of the State General Permit will affect the water quality downstream such that the Town will incur some responsibility for the alleged impacts.

Additionally, the Town's claim to responsibility for these alleged impacts is based on a presumption that Roper Pond will fail to conduct activities authorized under the State General Permit in accordance with the terms of the Permit and the SWPPP approved by the Department. As discussed at length above, Appellants presented no

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evidence that the BMPs to be implemented under the SWPPP approved by the Department and the State General Permit are inadequate to prevent sediment from leaving the construction site. As such, there is no doubt that this alleged injury is neither actual nor imminent and is mere speculation and conjecture that Roper Pond will inevitably violate the State General Permit, the SWPPP, and the State Stormwater Regulations. For the reasons stated above, such alleged injury does not establish standing to challenge the Department's decision in this case.

Additionally, Appellants contend that the Town has standing based on the following alleged injuries resulting from the Department's decision: the diminution of property values within the Town, a development of the Property in a manner inconsistent with the density and character of the Town, increased security and crime in the vicinity of the Town, and increased traffic in the Town. (Appellants' Brief, p. 44). As a preliminary matter, such contention is effectively an acknowledgement by Appellants that this is a land use dispute thinly disguised as a stormwater permit appeal. Such allegations are clearly unrelated to the Department's decision at issue in this case, and therefore, not an injury in fact which is causally connected to the challenged agency action. However, even if such concerns could be raised to establish standing in this matter, these concerns are also mere speculation based on the perceived character and behavior of the residents of the multi-family residential development to be constructed. Appellants offered no credible evidence that this proposed development would result in the harm alleged. Again, these allegations of potential injury are not an injury in fact causally connected to the challenged action. Appellants have simply failed to identify evidence on the records demonstrating a concrete and imminent injury to the Town

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resulting from the Department's decision to grant Roper Pond coverage under the State General Permit. The substantial evidence on the record unquestionably supports the ALC's finding that the Town lacks standing in this matter.

D. As an additional sustaining ground, the ALC correctly held that Appellants lack standing because a ruling in favor of Appellants would not redress the injuries alleged by Appellants.

Even if Appellants had presented evidence of an injury in fact caused by the Department's decision to grant Roper Pond coverage under the State General Permit, which they clearly did not, such evidence would not be sufficient to establish standing because a ruling in favor of the Appellants would not redress their alleged injuries. As discussed above, Appellants presented no evidence that the BMPs and the SWPPP approved by the Department are not adequate to meet the requirements of the State Stormwater Regulations and the State General Permit. However, even if such evidence had been introduced, a ruling by the ALC that the SWPPP was inadequate would not prevent Roper Pond from ultimately proceeding under the State General Permit. Jill Stewart testified that any construction project can meet the requirements to proceed under the State General Permit. Ms. Stewart testified that she has reviewed and approved over 500 applications for coverage under the General Permit. (Tr. p. 50, ll. 1-2, R. p. 181). Neither the State 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, R. pp. 204-05). 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, R. p. 204). Ms. Stewart further testified that during her tenure with the Stormwater Permitting Section, the Department has never issued an individual permit for a construction project, but had

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approved all such projects under the State General Permit. (Tr. p. 73, ll. 3-11, R. p. 204).

It is clear from Ms. Stewart's testimony that any construction project can be approved under the State General Permit. Ms. Stewart testified that approval to conduct activities under the State General Permit is merely a matter of identifying the proper combination of BMPs to meet the requirement of the State General Permit and the State Stormwater Regulations. (Tr. p. 74, l. 24 – p. 75, l. 8, R. pp. 205-06). As such, a ruling that the SWPPP approved by the Department does not meet the requirements of the State Stormwater Regulations and the State General Permit—a ruling for which there is no evidence on the record—would merely require Roper Pond to submit a revised SWPPP. Such ruling would not preclude Roper Pond from ultimately proceeding under the State General Permit.

Additionally, and significantly, Appellants acknowledge that their primary objective is to prevent the development of the Roper Pond property as an apartment complex. In their brief, Appellants identify the harm to the Town as the diminution of property values within the Town, development of the Roper Pond property in a manner inconsistent with the density and character of the Town, increased security and crime in the vicinity of the Town, and increased traffic in the Town. (Appellants' Brief, p. 44). Ms. Jackson testified that their opposition to the Proposed Project was based on a change from the proposed development following the rezoning of the property for multi-family residential. (Tr. p. 245, l. 6 – p. 246, l. 15, R. pp. 376-77). Specifically, Ms. Jackson testified in relevant part: "... 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

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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. . . .” (Tr. p. 245, l. 24 – p. 246, l. 9, R. pp. 376-77). Appellants thus admit that their real objection to the Proposed Project is the development of the property for multi-family residential use. Such objections cannot be addressed through an appeal of authorization to conduct land-disturbing activities under the State General Permit. Appellants’ concerns can only be redressed through a challenge to zoning of the Roper Pond property and local land use ordinances. Indeed, Appellants attempted a challenge to the rezoning of the Property, but such challenge was not timely. (Tr. p. 245, l. 6 – p. 246, l. 15, R. pp. 376-77; Tr. p. 249, ll. 18-19, R. p. 380; p. 250, ll. 1-11, R. p. 381). Appellants’ appeal of the Department decision to grant coverage to Roper Pond under the State General Permit is merely another means of attempting to prevent the development of the Roper Pond property for multi-family residential use. A ruling in Appellants favor will simply not redress these concerns. The property is properly zoned for the proposed use, and as discussed above, the land-disturbing activities occurring during construction can be conducted under the State General Permit. Accordingly, the alleged injuries related to the development of the property for multifamily residential use would not be redressed by a ruling in Appellants’ favor in this matter.

Finally, to the extent that Appellants seek to enjoin the dredging and excavation of the Pond, a decision in favor of Appellants will not preclude Roper Pond from taking such action. As discussed at length *supra*, no federal or state permit or authorization is required for dredging of the Pond. As such, even if the ALC had concluded that the

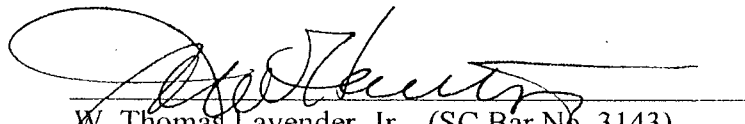
SWPPP was inadequate and therefore the Department erred in granting Roper Pond coverage under the State General Permit, such conclusion would in no manner impact Roper Pond's authority to dredge and excavate the Pond. Accordingly, the ALC's ruling that Appellants lack standing in this matter is further supported by substantial evidence on the record which demonstrates that a decision in Appellants' favor would not grant the relief sought with respect to the Pond itself.

CONCLUSION

For the forgoing reasons, the Department respectfully requests that the Court affirm the Final Order and Decision of Administrative Law Court.

Respectfully submitted,

February 28, 2011



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

Attorneys for Respondent Roper Pond, LLC



Stephen P. Hightower (SC Bar No. 72265)
Roger P. Hall (SC Bar No. 74203)
Office of General Counsel
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201
803.898.3570

Attorneys for Respondent South Carolina
Department of Health and Environmental Control

001055

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

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

FINAL REPLY BRIEF OF APPELLANTS

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

Attorney for the Appellants

Georgetown, South Carolina

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ARGUMENT

The Respondents do not contest that DHEC has authority to place conditions on its 401 Water Quality Certification of U.S. Army Corps of Engineers ("Corps") Nationwide Permits ("NWP"). The Respondents do not contest that in order to qualify for DHEC's 401 Water Quality Certification of a NWP, the project must meet the conditions of that certification. The Respondents do not contest that DHEC's 401 Water Quality Certification of NWPs applies only to those impacts specifically identified in the NWPs. The Respondents do not contest, and the ALJ found, that the project would impact wetlands in excess of what is authorized under the NWP, specifically excavation of the lily pad pond. And the Respondents do not contest that those impacts exceed what DHEC reviewed and authorized when it issued its conditional certification of the NWPs.

Indeed, the ALJ found that an individual 401 Water Quality Certification is required if 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. (R. p. 15, FF #27). This project's failure to qualify for approval under DHEC's 401 Water Quality Certification is the basis for the Appellant's challenge because that approval is a prerequisite to receiving coverage under the NPDES General Permit that is the subject of this appeal. Yet the Respondents fail to acknowledge the fundamental issue in Appellants' brief: Did DHEC and the ALJ err in approving the proposed project because it fails to meet the conditions of DHEC's 401 water quality certification of Nationwide Permits, which is a prerequisite to coverage under the NPDES General Permit for Stormwater Discharges? Instead, the Respondents' focus, as well as the ALJ's, is on

federal permit requirements under the Clean Water Act, rather than State requirements, along with assumptions about the intent of the NWP program and DHEC's authority.

I. Respondents and the ALJ Erroneously Equate Federal Regulatory Requirements with State Regulatory Requirements

DHEC's 401 Water Quality Certification review authority originates from the Clean Water Act, 33 U.S.C § 1341(a). It is true that a Corps 404 permit is what triggers the need for a 401 water quality certification, but once certification is triggered DHEC has authority to consider, and in fact does consider, impacts beyond those regulated by the Corps. (R. pp. 251-52). In fact, the General Assembly gave DHEC broad authority to review any "alterations to the aquatic ecosystem in the vicinity of the project," "adverse consequences on water quality," "all potential water quality impacts of the project, both direct and indirect, over the life of the project," and the "physical, chemical and biological impacts, including cumulative impacts," in promulgating the Water Quality Certification Regulations. S.C. Code Ann. Regs. 61-101.F.3. & 61-101.F.5. The plain language of the water quality certification regulations make it abundantly clear that the legislature intended DHEC's scope of review, once triggered, to include all water quality impacts stemming from a proposed project, regardless of the Corps' regulatory authority. Respondents' arguments that certification review is limited only to activities regulated by the Corps contravenes the plain language of the certification regulations and has no basis in law.

The Respondents spend significant time arguing that no federal permit is required for dredging and excavation of the lily pad pond. (Resp. Brief pp. 13-17). Appellants

have never argued that a federal Clean Water Act 404 permit or a Rivers and Harbors Act Section 10 permit is required for the dredging and excavation of the lily pad pond.¹

States are responsible for enforcing water quality standards on intrastate waters, of which the lily pad is one. 33 U.S.C. § 1319(a). It is through the 401 certification program that States ensure compliance with State water quality standards. *See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 114 S.Ct. 1900 (1994).

The Appellants' argument is that approval for coverage under the NPDES General Permit expressly requires the applicant to obtain any necessary 404 permit. In this case, a 404 permit was necessary for the filling of 0.075 acres of the 1.8 acres of jurisdictional

¹ Appellants contend that a 404 permit is required to bring a navigable water into a use which it was not previously subject, such as converting the lily pad pond into a water control structure. This argument is based on the Clean Water Act requirement that "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section." 33 U.S.C. § 1344(f)(2). The argument is also based on S.C. Code Ann. Regs. 72-307.C(7) and NPDES General Permit Section 2.1(C) which require that an applicant obtain a 404 permit prior to receiving coverage under the NPDES General Permit and/or using the pond as a water control structure. Together with DHEC's Jill Stewart's admission that Roper Pond, LLC's plans call for using the lily pad pond as a water control structure, the CWA, the DHEC regulations and NPDES Permit provide the basis for Appellants' argument that a 404 permit is required to use the lily pad pond as a water control structure.

Roper Pond, LLC did not identify in its original application to the Corps that it intended to excavate the lily pad pond and utilize the pond as a water control structure so the Corps would have no way of knowing that it intended to do so. There is no evidence that the Corps made a decision that a 404 permit is not needed to bring the pond into a new use in the form of Roper Pond, LLC's proposal to use the pond as a water control structure, and there is no legal support that a 404 permit is not necessary to utilize the lily pad pond as a water control structure.

wetlands on the property. In order to obtain a 404 permit, the applicant must have a 401 water quality certification. In this case, DHEC did not review the project and issue a certification letter stating that the project is consistent with the 401 Water Quality Certification issued for NWP #29, and in fact the project is not consistent with the certification because it involves impacts that go beyond what is authorized under NWP #29.

DHEC admits that a "specific determination" is required to insure that a project meets the 401 certification of an NWP before it issues a certification letter. (R. p. 609). DHEC made such a determination that the project "is consistent with the 401 Water Quality Certification issued for Nationwide Permit Number 39."² (R. p. 563). DHEC admits that no such determination was conducted for NWP #29. And DHEC admits that neither the storm water permit nor the certification of NWP # 39 covered the impacts to the pond. (R. pp. 167 & 244).

What the Respondents advocate, and the ALJ sanctioned, is for the citizens of South Carolina to trust that the Corps will ensure that State certification conditions are met in order to qualify for coverage under the State's NWP certification. (Resp. Brief pp.

² Of course, when George Whatley of B.P. Barber, Roper Pond's consultant, submitted the application on April 30, 2008, he represented that there was to be no dredging or excavation. (R. pp. 553-554). Mr. Whatley testified that at the time DHEC issued its certification letter dated October 2, 2008, he had not notified DHEC that Roper Pond was planning to dredge the pond and in fact he never provided DHEC such notification. (R. pp. 472-473). The evidence indicates that DHEC's stormwater section became aware of plans to excavate the pond in November, 2008, and that the section manager, Jill Stewart, inquired about whether the excavation was covered under the NWP. (R. pp. 551-552 & 921).

30-31). There is no factual or legal basis for this position. While the Corps may have enforcement authority, it is fully within DHEC's authority to review a project to ensure compliance with its certification conditions and in fact DHEC issued a certification letter for compliance with NWP #39 in this case.³ It failed to issue a certification letter for compliance with NWP #29, which provides the basis for Appellants' claim that the project fails to qualify for coverage under the NPDES General Permit.

II. DHEC Has Authority to Ensure Compliance With Its 401 Certification Conditions

A. DHEC Has Authority to Impose Conditions on Its Certification

Respondents' argument that DHEC 401 Certification conditions cannot possibly trigger an individual review of a NWP project, because it would be illogical, is unfounded. (Resp. Brief p. 26). DHEC has full authority to ensure compliance with the conditions of its 401 Water Quality Certification of the Corps' Nationwide Permits. "Any certification issued by the Department shall also set forth any limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards and compliance with other requirements of these regulations or other appropriate requirements of State law." S.C. Code Ann. Regs. 61-101.A.5. "The Department may issue, deny, or revoke general certifications for categories of activities or

³ Appellants note that there is a distinct difference in placing conditions on an individual certification versus conditions on a NWP. For individual certifications, DHEC knows exactly what activity will be taking place and often places project-specific conditions on those activities. For NWPs, the exact nature and extent of the activity could not be known when the certifications were issued, thus the certification conditions in part tell under what circumstances that certification applies.

for activities specified in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations. Such general certifications are subject to the same process as individual certifications.” S.C. Code Ann. Regs. 61-101.A.3. Taken together, DHEC can set forth any limitations on its certification of the NWP that are necessary to ensure compliance with State law. And DHEC did just that in issuing its certification of the NWPs in 2007.

In issuing its 2007 decision, DHEC authorized certification under the NWPs only if certain general conditions are met. (R. p. 563). Thus, in issuing its NWP 401 certification with conditions, DHEC clearly believed that there would be instances when a project may qualify under the Corps’ NWP terms, but still need individual review to ensure compliance with DHEC’s terms. Respondents, and the ALJ, attempt to limit DHEC’s review to only what is regulated by the Corps. (Resp. Brief pp. 27-28). Under the interpretation Respondents advocate, the general and special conditions DHEC imposed on the NWPs issued by the Corps would have no relevance or significance. As long as the project met the Corps’ NWP requirement, no review of DHEC’s 401 conditions would ever take place. If DHEC review was limited to the same review as the Corps, it would render the 401 Certification program redundant and superfluous.

B. DHEC Must and Does Review Projects for Compliance with its NWP 401 Certification Conditions

DHEC’s Chuck Hightower testified that DHEC does review projects and issue a certification letter, if it finds that the project qualifies for its certification of the NWP. (R. pp. 251-262). If it does not meet the specific and general conditions of the NWP

certification, Hightower said DHEC requires an individual certification. (R. p. 253). And DHEC did just that for NWP #39 in this case. But this project requires a NWP #29 and DHEC did not issue a certification letter for NWP #29.

If the NWP general and special conditions have been met thereby qualifying the project for coverage under DHEC's Water Quality Certification, the applicant may proceed. But if they have not been met, Hightower said DHEC requires an individual certification. (R. p. 253).

There is no evidence that the 30 day time frame within which the applicant may proceed after giving the Corps its Pre-construction Notification is insufficient for DHEC to determine whether the conditions of certification have been met or not. In fact, there was no complaint that DHEC issued its initial certification letter of NWP #39 in an untimely manner, and Respondents presented no evidence that "it would be impossible for the Department to conduct a review of the scope advocated by the Appellants within this [30 day] time period."⁴ (Resp. Brief p. 30). DHEC must and has issued certification letters determining that project requiring Preconstruction Notification meet its NWP certification conditions.

C. Appellants are Not Seeking Enforcement, Withdrawal or Revocation of the Certification

Contrary to Respondents' assertions, we are not talking about bringing an enforcement action to enforce conditions of the certification. And contrary to

⁴ Again, noting that Appellants only suggest that DHEC review NWP projects to ensure that the project meets the conditions of the 401 certification.

Respondents' assertions, Appellants do not advocate a DHEC revocation or withdrawal of its certifications of the NWP (Resp. Brief pp. 31-32). Rather we are seeking proper implementation of the NWP certification to ensure that a project meets the certification conditions prior to qualification for coverage under the NPDES General Permit. No enforcement, withdrawal or revocation is required. Rather, DHEC's certification of NWP does not apply to this project because the project involves impacts that exceed what was publicly noticed and authorized under the NWPs and their conditions of Certification.

D. Nationwide Permits Do Not Limit DHEC's Authority

Respondents make vague arguments about the rationale for issuing Nationwide Permits and the intent behind DHEC's condition that its review of a project "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." (R. p. 573). Respondents cite to Chuck Hightower's testimony on his "understanding" of the permit conditions and speculate that the condition is "further clarification of . . . a prohibition of multiple use of the same Nationwide Permit within a single project."⁵ But there is no need to speculate on the intent of this condition – its meaning is clear – DHEC considers all the land

⁵ Corps regulations referenced by the Respondents say that two different NWPs can be used for one single and complete project, but the same NWP cannot be used twice. 33 C.F.R. 330.69(c). Corps regulations also state that a "Single and complete project means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers." 33 C.F.R. 330.2(i). Nothing in this regulation is inconsistent with the plain meaning of the DHEC general condition that all lands impacted by the project must be considered in DHEC's review to ensure compliance. In fact, the Corps definition of "single and complete project" is consistent with the approach advocated by the Appellants. The only difference is that DHEC's regulatory authority pursuant to R. 61-101 exceeds the Corps authority under the Clean Water Act.

impacted by the project. In this case, those impacts include dredging of the lily pad pond. And in this case, those impacts were not considered.

III. Review for Compliance with R. 61-68 and R. 61-101 is Triggered if a Project Does Not Meet the Conditions of a NWP Certification and/or Exceeds the Impacts Authorized Under a NWP

Taken to its logical end, Respondents arguments would mean that DHEC does not and cannot ever individually review a NWP project for compliance with the certification conditions, much less the water quality standards. Contrary to Respondents' brief (Resp. Brief p. 24), Appellants do not contend that DHEC's review of **any** project authorized under a Corps NWP must always include an assessment for compliance with S.C. Code Ann. Reg. 61-101.F(3). Similarly, Appellants do not contend that DHEC's scope of review for compliance with its NWP certification conditions is the same as the scope of review for certification of an individual permit. (Resp. Brief p. 29). Rather, Appellants contend that DHEC must review a NWP project for compliance with its certification conditions. When a project does not meet DHEC's conditions of its NWP certification and/or if the project's impacts exceed those impacts authorized under an NWP, then DHEC must review the project individually for compliance with the water quality certification and water quality standards regulations, including R. 61-101.F.(3).

Respondents cite *Responsible Economic Development v. SCDHEC*, 371 S.C. 547, 641 S.E.2d 425 (2007), for the proposition that the State water quality standards are not applicable to a stormwater permitting decision. The statutory framework implicated in *RED* is wholly different from the one in play in this case. In *RED* there was no Corps 404

permit or 401 certification required as a prerequisite to obtaining the stormwater permit. In other words, there was nothing to trigger State water quality standards. In the case at bar, a Corps 404 permit and 401 certification are triggered by virtue of the fill of jurisdictional wetlands and are required in order to receive coverage under the NPDES General Permit, a stormwater permit, thus the water quality standards and certification regulations apply. The Appellants are challenging the granting of coverage under the NPDES General Permit, but the 404 permit and 401 certification are absolute requirements to obtaining such coverage, unlike the *RED* case.

IV. This Case is not an Appeal of DHEC's 2007 Certification Decision

Respondents' arguments that the appeal deadline to challenge DHEC's 2007 Water Quality Certification of the NWP has lapsed missed the point: there is no way Appellants could have known at the time the Certification was issued that Roper Pond would seek to dredge and excavate the lily pad, which is indisputably beyond the scope of Nationwide Permit #29. The general public, including the Appellants, had a right to rely on the Certification decision issued by DHEC, which includes a condition that DHEC would consider "all land within the project boundary," not "only the land area directly impacted" by the NWP request. (R. p. 573).

V. Challenge to Coverage Under NPDES General Permit Necessitates an Inquiry as to Whether the Terms of the NPDES Permit Have Been Met

Appellants' challenge is to the granting of coverage under the NPDES General Permit. As such, Appellants challenge whether the applicant has complied with the terms of the NPDES Permit, specifically that the applicant obtain a valid 404 Clean Water Act

permit and the accompanying, required 401 water quality certification. Because the 401 certification and 404 permit are prerequisites to NPDES coverage, review of whether the project meets the conditions of DHEC's water quality certification is properly before the Court. Appellants need not challenge the technical sufficiency of the SWPPP as stated by Respondents (Resp. Brief p. 34), but overall compliance with the NPDES General Permit. And Appellants have provided substantial evidence that the project does not qualify for coverage under the NPDES permit because there is no 401 certification of the 404 NWP.

VI. Appellants Meet the Test for Standing

A. Kaminer Station and Cary Lake Residents Have Standing

1. Injury-in-fact

Respondents never address one of the harms alleged by Linda Jackson and Elaine Starr – that the lily pad pond is a special amenity to the community and that if it the pond is excavated it would decrease their aesthetic enjoyment of the area. (R. pp. 376; 400-401; 413). And none of that testimony was contested. As discussed below, this is a classic example of the type of harm required to establish standing in environmental cases. (Aesthetic and environmental well-being are important ingredients of the quality of life in our society, and harm to aesthetic and environmental interests can provide the basis for standing to challenge permit decisions. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972); *Pye v. U.S.*, 269 F.3d 459 (4th Cir. 2001); see also *American Canoe Assn. v. Murphy Farms*, 326 F.2d 505 (4th Cir. 2003)).

In South Carolina Wildlife Federation v. South Carolina Coastal Council, 296

S.C. 187, 371 S.E.2d 521 (1988), a case cited with approval in *Sea Pines*, it was held that where parties "alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment of the fish and wildlife of the wetlands" that would be affected by a Coastal Council certification, "these allegations are sufficient to show standing." 296 S.C. 187, 190, 371 S.E.2d 521, 523.

In *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998), the plaintiff had standing where she alleged an injury to her use and enjoyment of a wetland adjacent to her home, even though the wetland was owned by a private developer.

In *American Canoe Assn. v. Murphy Farms*, 326 F.2d 505 (4th Cir. 2003), the plaintiffs had standing where they expressed concerns regarding the quality of waters and alleged that these concerns affected their aesthetic, recreational, and economic interests in the waters.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693 (2000), allegations that aesthetic and recreational values of the area would be lessened by the challenged activity was sufficient to confer standing.

In *Pye v. United States*, 269 F.3d 459 (4th Cir. 2001), adjacent landowners were held to have standing to challenge a wetlands permit based on alleged impacts on the cohesiveness and integrity of an area containing designated historic sites. The *Pye* Court ruled that:

"If the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that

anyone would have standing to oppose this ... grant.”

Pye v. United States, 269 F.3d 459, 468 (4th Cir. 2001), *quoting Society Hill Towers Owners’ Assn. v. Rendell*, 210 F.3d 168, 176 (3rd Cir.2000). As with *Pye*, if the individuals Appellants that live adjacent to and surrounding the proposed development site do not have standing to challenge the DHEC decision authorizing construction of the development, then it is indeed difficult to imagine who would have standing to challenge this decision.

Rather than address Appellants’ allegations of environmental and aesthetic harm resulting from lowered water quality and loss of viewing the lily pad pond, Respondents’ claim that Appellants must offer evidence that the SWPPP is not sufficient to control sedimentation and erosion control during development in order to prove standing. (Resp. Brief p. 37). This is an erroneous application of the law on standing.

The basis for standing in *Pye* was not harm resulting from a technical analysis of the permitted activity, rather it was the but-for relationship between the permitted activity and the alleged harm. And in this case the Appellants do not need to offer evidence on the technical sufficiency of the SWPPP, they merely need to make allegations of any injury that is “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Smiley v. South Carolina Dept. of Health and Environmental Control*, 374 S.C. 326, 649 S.E.2d 31 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992)). And Appellants did just that.

Both Linda Jackson and Elaine Starr testified collectively that they have seen sedimentation, impacts on water quality and flooding associated with stormwater problems in the project area. (R. pp. 375; 395; 407-408). Ms. Starr said that regardless of whether the SWPPP is followed, the project as designed will have adverse impacts on water quality of Cary Lake that she lives on because of the increased density – a scenario that she has repeatedly observed. (R. pp. 407-411). The increased density is directly traceable to the challenged activity, which is an NPDES stormwater permit authorizing construction of the proposed apartment complex development.

Both Ms. Jackson and Ms. Starr testified that in addition to water quality impacts, their aesthetic interests will also be harmed by not being able to view the lily pads and other wildlife using the pond, if it were dredged according to the approved stormwater permit. The dredging would also occur whether or no the SWPPP is complied with.

Harm in the form of concerns about adverse impacts to water quality, decreased recreational uses and decreased aesthetic enjoyment in viewing the lily pad pond are directly traceable to Roper Pond, LLC's proposed apartment complex for which it is seeking NPDES coverage. But for the proposed development for which Roper Pond, LLC seeks DHEC approval, non of these alleged injuries would occur.

The "prior general harm" that Respondents state is inadequate to establish injury is what provides Ms. Starr and Ms. Jackson's basis for concerns about sedimentation and lower water quality. That "prior harm" was the result of other developments that had to obtain stormwater permits from DHEC and have approved SWPPPs, just like Roper Pond. Those other developments also had to comply with all the permitting

requirements, yet water quality was still impacted. Past experience with water quality impacts resulting from increased density and development provide a rational basis for the Appellants' concerns about this project which are sufficient to establish a threat of future harm necessary for standing. The South Carolina Supreme Court, Court of Appeals and the Administrative Law Court have found standing in environmental permitting cases where appellants alleged potential future injury from challenged projects. *See, e.g., South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988); *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998); *Interstate Nuclear Services Corporation v. South Carolina Department of Health and Environmental Control*, Docket No. 96-ALJ-07-0558-CC, 1997 WL 757237 (November 21, 1997). These rulings echo decisions of the United States Supreme Court and the Fourth Circuit. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *Natural Resources Defense Council v. Watkins*, 954 F.2d 974 (4th Cir. 1992), quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); accord, *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 fn. 4 (4th Cir. 1988), citing *Valley Forge Christian College* for the proposition that "threatened rather than actual injury can meet minimum Article III standing requirements."

Appellants allege threatened future harm in the form of harm to aesthetic interests in viewing the lily pad pond, impacts on water quality and recreational activities. The prior harm provides a clear basis for the concerns about future harm to water quality and

common sense provides the basis for harm resulting from excavation of the pond and loss of lily pads and wildlife.

In addition, Appellants do not have to wait for those harms to occur through a violation, as suggested by the Respondents. If Appellants have standing to enforce a violation, as Respondents appear to acknowledge, then they have standing to challenge the activity that would give rise to that violation.

Respondents reliance on *Bailey v. SCDHEC*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010) (*petition for certiorari pending*), as a basis to deny standing is misplaced. In *Bailey*, this Court ruled that Bailey failed to present evidence of harm to establish standing. Respondents claim that Appellants similarly failed to present evidence of harm because they did not “offer any evidence that the BMPs proposed by Roper Pond and approved by the Department in the SWPPP are inadequate to control sediment.” (Resp. Brief p. 38). Appellants need not present evidence on the limited issue of the technical sufficiency of the BMPs or SWPPP to establish an injury.

Appellants need only present evidence of injury that is fairly traceable to the challenged activity. In this case Appellants did present voluminous evidence of harm in the form of injury to their aesthetic, environmental and recreational interests that would flow directly from the proposed apartment development authorized by the challenged DHEC decision, as discussed above.

This case is distinguished from *Sea Pines Ass’n v. DHEC*, 345 S.C. 594, 550 S.E.2d 287 (2001). In *Sea Pines* the court ruled that Appellants did not have standing

because they were not able to demonstrate that their aesthetic interests would be harmed by seeing less deer than they currently saw.

... Appellants presented no evidence their opportunity to view and enjoy the deer would be diminished by the permits. The Appellant's injury is conjectural because it is not certain that reducing the size of the herd would decrease the number of deer actually viewed by the residents each day. Because deer population growth has remained constant on Sea Pines, the deer population decrease proposed by the Department may have little or no effect on the residents' ability to enjoy the deer.

Even if we assume Appellants have alleged a particularized harm, Appellants failed to present evidence the injury would be redressed by a favorable decision in this case.

Sea Pines, 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001).

In this case, there is only one pond and when the lily pads are gone there will be no more to view at all.

2. Causal Connection

The Respondents' assertion that there is no causal relationship between the challenged activity and the injury complained of is erroneous. As discussed above, all that is required is that the alleged harm be "fairly traceable" to the activity being challenged. *Smiley*, 374 S.C. 326, 649 S.E.2d 31 (2007). Excavation of the lily pad pond is part of Roper Pond, LLC's plan, and that plan was submitted to DHEC for the approval which is being challenged through this appeal. Jill Stewart testified that she had received plans showing that the pond elevation would be lowered and specifically asked Roper Pond whether the impacts to the pond were included in the 401 water quality certification approval. She was told that impacts were included in that approval, despite the fact that

DHEC had not issued a certification letter. (R. pp. 164-167, lines 12-14; R. pp. 580-581).

It is the excavation of the lily pad pond, along with concerns that the approved development will adversely affect water quality, which Appellants have identified as harms in the form of aesthetic injury from viewing the pond and its wildlife; recreational injury from decreased water quality in Cary Lake; and financial injury from the decreased property values.

3. Redress by a Favorable Decision

Appellants seek to have the Department's decision to grant coverage under the NPDES General Permit rescinded for failure to comply with the NPDES permit and obtain a valid and effective 404 permit and 401 certification. Specifically, Appellants believe that DHEC must conduct an individual review of water quality impacts resulting from the excavation of the lily pad pond because the project does not meet DHEC's 401 Water Quality Certification of the NWP and exceeds the activities authorized under the NWP. Should DHEC conduct this required review and find that the aquatic ecosystem would be destroyed by the dredging and excavation or that the project would adversely affect water quality downstream, then it could deny certification. If certification were denied, the lily pad pond ecosystem could be protected and downstream water quality could be protected, which would remedy the Appellants' alleged injuries.

B. The Town of Arcadia Lakes Has Standing

Respondents' Brief does not address the Town's interest in its aesthetic appeal and in maintaining its character and desirable attributes as a basis for standing. These

interests are recognized as a basis for municipal standing in the cases cited in Petitioners' Brief and the Town stands to suffer imminent and concrete injury from the dredging and lowering of the lily pad pond, whether or not the related development follows.

Petitioners do not dispute that the Town cannot bring an action on behalf of its citizens under the doctrine of *parens patriae*. Respondents contend the environmental interest of the town is "clearly" one-in-the-same with the interests of its individual citizens. (Resp. Brief, p. 43). Respondents do not elaborate on why they believe this to be clear. Presumably, Respondents take this position because both the Town and its individual citizens have environmental interests that are implicated in this action. However, while a municipality may not simply assert the interests of its citizens, the interests of a municipality may very well be "congruent with those of its citizens." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). *See also, Capital View Fire Dist. v. County of Richland*, 297 S.C. 359, 361 377 S.E.2d 122, 124 (Ct. App. 1989) (citing Ninth Circuit case for proposition that "political subdivisions, such as cities and counties, may sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants."); *U.S. v. City of Pittsburg*, 661 F.2d 783, 787 (9th Cir. 1981) (ruling that "cities may sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants.").

The Town has a congruent but distinct environmental interest in the noise and visible pollution from this project, as well as the environmental quality of Cary Lake, the plants and wildlife therein, and groundwater and other connected water bodies within Town limits. While the Town and Individuals seek to vindicate these same

environmental interests, some of these interests have implications for the Town that are not shared with its individual citizens, in the form of diminished property tax base and aesthetic appeal, loss of overall Town character and the like. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-98 (9th Cir. 2004) and *Township of Belleville v. Federal Transit Admin.*, 30 F.Supp.2d 782, 789 (D.N.J. 1998), cases cited in Appellants' Brief, recognize a municipality's environmental interest as a basis for standing, under circumstances where the environmental interests of the municipality's individual citizens would also be at stake.

The Respondents argue that injuries to the Town from the Roper Pond apartment development itself (as opposed to those from the water quality issues accompanying the development) are "no more than speculation." (Resp. Brief, p. 46). If the apartment complex goes in, there will undoubtedly be more people with more car, which will increase the need for services, like the police security. Richard Thomas, mayor of Arcadia Lakes, testified on behalf of the Town as to the Town's interests in this litigation. Mr. Thomas testified at length as to the injuries the Town stood to sustain from the actual Roper Pond apartments -- namely diminished property value in the area, increased traffic, increased need for security -- and this testimony is uncontested in the record. (See citations to testimony in standing section of Petitioners' Brief). Respondents did not introduce any contradictory testimony or evidence in the record and now rely on an unsupported statement that the town's concerns are no more than speculation.

Respondents also argue that injuries from the apartment development are "clearly unrelated to the Department's decision at issue in this case." Again, Respondents do not

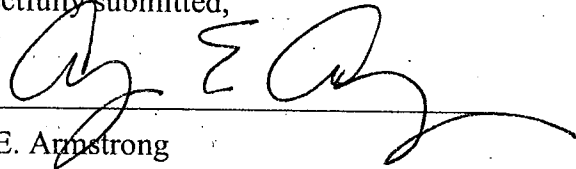
elaborate on why they believe this to be clear. This entire case arises from DHEC's granting of coverage to Roper Pond under "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities." This permit is not necessary, and this case does not exist, except for Roper Pond seeking to begin construction of its apartment complex. The permit is required for the construction of the apartments, and the apartment complex will be certain to occur once it has DHEC approval. Even if construction has not yet occurred, the Town "does not have to await the consummation of threatened injury to obtain preventive relief." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (internal quotations and citations omitted). No other approvals are needed and there is nothing to stop construction of the apartment complex, but for this permit and its requirements, namely a 404 permit with 401 water quality certification.

Finally, Respondents question the Town's legal responsibility for the quality of the water leaving Cary Lake. Again, the only evidence in the record on this point is the testimony of Richard Thomas, testifying on behalf of the Town of Arcadia Lakes, stating the Town's responsibility for the water quality under NPDES. (See citations to testimony in standing section of Petitioners' Brief). The Respondents have not presented any testimony, evidence or law to contradict the testimony regarding the Town's responsibility for the quality of water leaving Cary Lake. The Town's has responsibility for managing stormwater runoff to protect water quality pursuant to the Water Quality Act of 1987 (P.L. 100-4). In recognition of stormwater runoff as a significant source of water pollution and the 1972 Clean Water Act's failure to control it, Congress amended

the CWA with the Water Quality Act of 1987 to require municipalities to obtain NPDES permit coverage for their stormwater discharges. CWA § 402(p). It is under this authority from which the Town's responsibility derives.

On the evidence of record before the Administrative Judge, the Town had clearly demonstrated a basis for standing separate and distinct from that of its citizens.

Respectfully submitted,



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

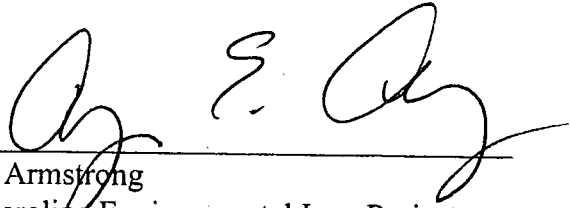
Attorney for the Appellants

Georgetown, South Carolina

February 28, 2011

Certificate of Counsel

The undersigned does hereby certify that this Final Reply Brief complies with SCRAP Rule 211(b).



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

Attorney for the Appellant

Georgetown, South Carolina

February 25, 2011

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

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

v.

South Carolina Department of Health and Environmental Control and

Roper Pond, LLC Respondents.

BRIEF OF AMICUS CURIAE

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA

IN SUPPORT OF RESPONDENTS

Kenneth E. Ormand, Jr. (SC Bar No. 4285)

Attorney for *Amicus Curiae*

Home Builders Association of South Carolina

625 Taylor Street, 2nd Floor

Columbia, SC 29201

TEL. (803-254-4220

FAX (802-254-0348

E-MAIL: Ken@Ormandlawfirm.com

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Introduction

The Homebuilders Association of South Carolina (hereinafter HBASC) respectfully submits this amicus curiae brief in support of Respondents, South Carolina Department of Health and Environmental Control (hereinafter SCDHEC) and Roper Pond, LLC. The HBASC is a not-for-profit corporation headquartered in South Carolina. HBASC's members include companies that construct houses and other structures in South Carolina. HBASC urges this Honorable Court to find that the issues that Appellants raise are not properly before this Court and affirm the decision of the Administrative Law Court.

Initially, by letter dated December 15, 2008, the South Carolina Department of Health and Environmental Control granted Roper Pond coverage under the NPDES General Permit for Storm Water Discharges associated with the construction of the Proposed Project. Roper Pond surpassed the requirements for General Permit coverage for storm water discharges associated with the construction of the Proposed Project. On December 30, 2009, Appellants requested review by the South Carolina Board of Health and Environmental Control of the issuance of the authorization to discharge under the General Permit. On January 14, 2009, the Clerk of the Board notified Appellants by letter that the Board decided not to conduct a review conference as requested. Thereafter, on February 16, 2009, Appellants filed a Request for a Contested Case Hearing. Both the request for Board Review and the Request for a Contested Case hearing filed with this Court raise a number of issues related to the 401 water quality certification and the

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authorization to impact wetlands under the United States Army Corps of Engineers Nationwide Permit 29.

Therefore, Respondents, SCDHEC and Roper Pond, LLC respectfully request that the Court find that the Department properly granted coverage for discharges associated with the construction of the Proposed Project under the General Permit pursuant to S.C. CODE REGS. ANN. § 61.9.122.26, and the terms and conditions of the General Permit.

The HBASC has a significant interest in the issues presented by this case as the issues go far beyond the dispute between the parties, and in fact have statewide and nationwide significance.

Statement of Interest

The HBASC has an interest in this case for numerous reasons. The HBASC is comprised of a unique group of trade-association members whose mission is to enhance the climate for housing and the building industry. The HBASC represents more than 4,000 members involved in home building, remodeling, multi-family construction, property management, subcontracting, design, house financing, building product manufacturing, and other aspects of residential and light commercial construction. The HBASC is affiliated with the National Association of Homebuilders (hereinafter NAHB). The NAHB is a federation of more than 800 state and local associations nationwide, and its membership includes over 205,000 member firms. Collectively, NAHB's members employ over 8,000,000 people. The NAHB's builder members will construct a large majority of the new housing units projected for 2011. The HBASC and the National Association of Homebuilders promote policies that provide and expand opportunities for

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all consumers to have safe and affordable housing, and keep housing a top priority in the state and nation.

The HBASC builder and developer members strive to provide affordable, quality housing and contribute to thriving communities while embracing and enhancing the natural environment. They regularly plan their projects and take steps to provide a high quality of life by minimizing natural disruptions, avoiding damage to sensitive resources, preserving trees and open space on building sites, and reducing overall environmental impacts. Due to the nature of their business, most builders and developers must follow certain regulations to minimize the chances of negatively impacting the environment. To avoid the potential harm of uncontrolled storm water from construction sites discharging into receiving streams, NAHB and HBASC members routinely design their projects with environmental protection in mind by using site designs and treatment technologies that go beyond what is required by Federal, State, or local regulations. Such builders and developers must obtain and function pursuant to the EPA's National Pollutant Discharge Elimination System (hereinafter NPDES) permits in an effort to control stormwater discharges that occur from their construction sites. As regulations become more demanding and stringent, builders and developers lose needed flexibility to devise and craft novel solutions to stormwater management during land development.

Statement of the Issues on Appeal

The HBASC respectfully adopts the statement of issues on appeal as stated in Final Brief of Respondents.

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Statement of the Case

The HBASC respectfully adopts the statement of the case as stated in the Final Brief of Respondents.

Facts

The HBASC respectfully adopts the statement of the case as stated in the Final Brief of Respondents.

Argument

- I. If Appellants were to succeed in their argument, by adding an additional unneeded step in stormwater regulation and nationwide permitting, there would be dire consequences for the construction industry, the housing market, and the public at large.**

Stormwater, which is present on construction sites, is regulated concurrently by local municipalities, states, and the EPA. Such stormwater management regulations have proven to be extremely effective in their goals, while also allowing builders and developers to be flexible in exacting and carrying forth the best business management practices to better facilitate their goals to provide safe and affordable housing to the American public. Therefore, existing regulations and programs sufficiently protect the public interest by balancing the need to protect the environment with the dire need of providing affordable housing. Such existing stormwater management programs sufficiently address the fears of the Appellants and the negative effects that the proposed project allegedly could have on Cary Lake and Roper Pond. Furthermore, these existing stormwater management regulations and programs have been followed, and requirements were even exceeded in some circumstances by Respondent, Roper Pond, LLC.

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In addition, the requirement of an additional water quality certification as asserted by Appellants would effectively negate the purpose and goals of a Nationwide Permit. If an additional water quality certification was to be mandated after the issuance of a Nationwide Permit, the effects would be nationwide. The additional requirement and fees would not only negatively impact the construction industry, but also the housing market and the public at large. Therefore, this brief will address (1) how existing stormwater programs which have been followed by Respondent sufficiently address the issue and therefore protect the public interest; (2) why the requirement of an additional water quality certification under a Nationwide permit which has already received a water quality certification would effectively negate and dismantle the purpose of the Nationwide Permitting system; (3) the effect that further regulations and permitting fees would have on the housing market, construction industry, and the public at large; (4) how Appellants are attempting to misuse the Clean Water Act and other environmental regulations for their own land control and zoning preferences.

A. The Existing Stormwater Management Programs Sufficiently Address the Issue and protect the public interest, and such procedures have been adequately followed by Respondent, Roper Pond, LLC.

The EPA has developed and implemented an effective, yet flexible program and set of regulations to address the wide variability of conditions under which stormwater is generated and how storm water discharges from point sources are managed. Although the Agency has established a number of standard conditions that must be met by those granted various NPDES permits, those permittees are generally provided the flexibility to select the Best Management Practices that are expected to be most effective rather than being coerced to comply with predetermined measures that may or may not work in the

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given scenario. The various regulations and efforts that have been undertaken have proven to be successful in balancing the need to protect the environment and serve the public interest while also ensuring a reasonable and cost-effective regulatory process and means of compliance. In areas where additional steps were deemed necessary to control runoff in order to protect the environment, states and localities have enacted specific requirements to do so. Today, many builders and developers have to comply with state and local requirements that address post-construction stormwater management including site plan review, design standards, inspections, and in some cases performance standards.

For example, South Carolina has its own stormwater management and pertinent construction regulations. Pursuant to 24 S.C. Code Ann. Regs. § 61-9.122.26 *et seq.* (NPDES Regulations), a permit is required for the land-disturbing activities associated with the Proposed Project. 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). The Department administers the General Permit pursuant to the NPDES Regulations and 26 S.C. Code Ann. Regs. § 720-300 *et seq.* (Stormwater Regulations). The General Permit covers discharges from the commencement of construction activities until final stabilization of the construction site.

Under a general permit, “the EPA issues a permit for specific types of activities and establishes specific rules for complying with such permit.” Texas Indep. Producers & Royalty Owners Assoc. v. EPA, 410 F.3d 964, 968 (7th Cir. 2005). Therefore, “rather

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than applying for an individual permit, operators must file a Notice of Intent ("NOI") stating that they plan to operate under the general permit, and absent a negative ruling by the EPA, discharges that comply with the terms of the general permit are automatically authorized." Id. The EPA created the general permit in 1991 when it became clear that the individual permitting process was unworkable to regulate storm water discharges which have the ability to occur generally anywhere. Id. at 967-68. Thus, "the EPA uses a general permit system to assure 'adequate environmental safeguards without the resource and administrative burdens' required under the individual permitting system." Id. at 968.

In the case at hand, on September 24, 2008, Roper Pond followed the appropriate steps by filing 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 (hereinafter SWPPP) as required by the General Permit and the Storm Water Regulations. 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 to determine if those measures are adequate to meeting the requirements of the Stormwater Regulations and the General Permit.

The SWPPP approved by the Department for the Proposed Project utilized a number of Best Management Practices to control erosion and sedimentation during construction. The plan includes 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. The Department, when reviewing the

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SWPPP, requested certain revisions to the SWPPP submitted by Roper Pond. If the requested revisions were made, it would comply with the requirements of the General Permit and the Stormwater Regulations. Thereafter, the revisions were made. A licensed professional engineer in South Carolina who also serves as Manager of the Department's Stormwater Permitting Section stated 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. Furthermore, once Roper Pond began its construction activities, the General Permit required periodic inspections of the site by a qualified inspector to ensure compliance with the SWPPP.

In addition, pursuant to 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 of a single outlet. 26 S.C. CODE ANN. REGS. § 72-207(C)(5)(b) (emphasis added). Although land-disturbing activities for the Proposed Project will only 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 its post-construction storm water management measures to control pollutants and storm water after construction operations have been completed. Therefore, Roper's post-construction stormwater design exceeds the regulatory requirements for authorization under the General Permit.

Appellants contend that the development of the Roper Pond property will negatively impact Cary Lake, but have failed to offer evidence that the Best Management Practices proposed by Roper Pond and approved by the Department in the SWPPP are

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inadequate to control sediment during the construction of the Proposed Project. The Department of Health and Environmental Control's policy is to protect the environment and reduce stormwater discharges from new development. If a General Permit was granted for the Proposed Project and the SWPPP approved, it is clear that what has been proposed and put into action by Roper Pond is sufficient to address the best interests of the public at large. As the evidence shows, Roper Pond has followed all and exceeded some policies and regulations with regard to the Proposed Project. Based upon Roper Pond's actions and the permitting policies already in place, the public interest is sufficiently protected, and no additional regulations or programs need be imposed.

B. The Requirement of an Additional Water Quality Certification under a Nationwide Permit that has already received a Water Quality Certification would effectively negate the purpose and policy of a Nationwide Permit.

Of particular significance and concern is Appellants' contention that the proposed filling of 0.075 acres of wetlands under the Nationwide Permit 29 requires a separate 401 water quality certification by the Department. (Appellants' Brief, p. 22). Nationwide Permit 29 was issued, with a 401 Water Quality Certification, in 2007. (Appellants' Brief, p. 6). Appellants acknowledge that this nationwide permit was approved and a water quality certification issued in 2007; however, Appellants argue that the 401 Water Quality Certification is ineffective unless and until the Department conducts a subsequent review of the specific proposed activities to confirm that such activities meet a general condition of the 401 Water Quality Certification. Appellants also contend that the 401 Water Quality Certification must require examination of the entire project, including the dredging of Roper Pond. This contention is without merit as "section 401" is

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inapplicable to this case. In addition, if Appellants were to succeed in their argument, it would completely dismantle the purpose and effect of such Nationwide Permits.

1. Section 401 is inapplicable to the dredging of Roper Pond.

Initially, the dredging of Roper Pond does not fall within the scope of Section 401. See 33 U.S.C.A. § 1341(a); 33 U.S.C.A. §§ 1362(16) and (12). For example, 33 U.S.C.A. § 1341(a), known as “section 401,” allows states to certify that “discharges” will comply with the applicable provisions of §§ 1311, 1312, 1316, and 1317. Pursuant to 33 U.S.C.A. §§ 1362(16) and (12), a “discharge” is defined as an “addition” of a pollutant to navigable waters, not the removal of a pollutant. 33 U.S.C.A. § 1362(12); See also Nat’l Mining Assoc. v. United States Army Corps of Eng’rs, 145 F.3d 1399 (D.C. Cir. 1998).

In the case at hand, the dredging of Roper Pond is a removal activity and not an addition of any material. The dredged material removed from Roper Pond is being deposited in an area up gradient from the Pond. Thus, “section 401” is not applicable to the case. Without the applicability of “section 401,” the state is not provided with any authority to certify the dredging of Roper Pond; therefore, Appellants’ contention is without merit.

2. The Requirement of Individual 401 Water Quality Certification after issuance of a Nationwide Permit would negate the purpose of the Permit and negatively impact the public.

If Appellants prevail in the argument that an individual 401 Water Quality Certification is required for every project authorized to proceed under a Nationwide Permit, it would effectively dismantle the purpose and effect of all Nationwide Permits.

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This would create a significant negative impact in terms of cost to builders and developers, home purchasers, and extensive delays in development across the state and nation.

The Nationwide Permit system provides an expedited review process for activities in waters of the United States that result in no more than minimal individual and cumulative adverse effects on the aquatic environment. 67 Fed. Reg. 2020, 2021 (Jan. 15, 2002). The Nationwide Permits allow district engineers flexibility when reviewing activities that involve discharges of dredged or fill material into ephemeral streams. Id. at 2023. General Condition 29, at issue in this case, requires project proponents to avoid and minimize impacts to waters of the United States to the maximum extent practicable on the project site. Id. at 2023-24. There is a 45 day Pre-Construction Notification review period which allows district engineers to adequately review those activities that require Pre-Construction Notifications. Id. at 2024. However, most Nationwide Permit verifications do not take the full 45 day period. Id. The 45 day period includes a 30 day completeness review. Id. The Completeness Review period makes the PCN process more efficient by requiring district engineers to request additional information early in the PCN process. Id. The average time to verify a Nationwide Permit is 19 days. Id. Furthermore, the Nationwide Permit does not require a public notice or the same level of review required for Standard Permit activity. Id. This short time period is significant to builders and developers, as it fosters efficient and environmentally friendly development, but minimizes costs to builders.

In effect, the Nationwide Permit is a streamlined authorization process. Therefore, Appellants' argument that SCDHEC must affirmatively certify that the project

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meets its Section 401 water quality certification general conditions in order for the project to have an approved and effective Section 404 Nationwide Permit would make the purpose of a Nationwide Permit meaningless. This requested action by Appellants would be an additional step in an already completed process. Such an additional step would render the streamlined authorization of Nationwide Permits meaningless and allow an appeal to be brought forth for every project authorized under a Nationwide Permit. This unnecessary step would unduly delay the construction and completion of developments. Such a delay in authorization of development would drive the cost of building up for developers as interest would accrue on the money borrowed for the development of the project; thus, this delay would add to the per unit cost of each residential unit, thereby increasing the cost of housing for the public.

C. The Current State of the Housing Market and the Effect of Additional Regulations and Permit Fees on the Community.

A number of factors have caused the housing market to significantly decline nationally. For example, the most recent devastating recession, skyrocketing unemployment rates, lack of credit available, and increasing number of foreclosures have and continue to upset the housing market. The past five years have exhibited a significant effect on the housing market: housing starts have declined drastically nationally and statewide; housing costs have increased, evidencing a decline in homeownership; and high unemployment rates in the construction industry have further crippled the housing market. Any additional regulations and permitting fees imposed on the market will not only affect builders and developers, but the public at large.

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1. Decline of Housing Starts Nationally and Statewide

From January of 2006 to April 2009, there was a documented 79% decline in total housing starts in the nation as the total housing starts fell from 2.27 million, the seasonally adjusted annual rate in January 2006, to 477,000 in April of 2009. In November 2010, national total housing starts were documented as being 555,000, a 76% decline from January 2006. National single-family housing starts declined from 1.82 million in January of 2006 to a low of 360,000 in January 2009, evidencing an 80% decline, and the lowest number ever to be recorded. In November 2010, national single-family housing starts had risen to 465,000 units, but still evidenced a drop of 74% from January 2006.

The South Carolina housing market reflects such depressing statistics as well. Housing starts in South Carolina have slipped from 38,000 in 2007 to just over 16,000 new starts in 2010. In the midlands, 2010 proved only 3,400 new housing starts with 2,900 single family and 500 multifamily homes. This dramatic decrease in housing starts from 2007 to 2010 equates to 11.4 new housing starts per 1,000 of the population in 2007 to that of 3.2 new housing starts per 1,000 of the population in 2010.

2. Decline in Homeownership and Rise of Housing Costs

Currently, the national home ownership rate stands at 68%; however, millions of American families struggle to find housing that meets their needs at a price they can afford. Within many communities, there is a growing gap between the cost of housing and what people in those communities can afford to pay for it. Reasons for such a shortfall include: housing prices outstripping incomes of many families holding jobs

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vital to the local community; lengthy and complex approval processes for builders and developers; outdated and exclusionary zoning ordinances limiting the range of allowed housing types and areas to be developed; and growth controls that limit land supply. In addition, the costs of compliance and the additional efforts that would be imposed by additional regulations under NPDES can have a significant effect on housing affordability. In fact, for every \$1,000 increase in the cost of building a median-priced home, approximately 425,000 households are priced out of the market. Therefore, such increases in compliance costs for builders have a direct correlation to the public interest in that it negatively impacts the already depressed housing market by raising home prices, thereby inhibiting market growth and making housing less affordable for the American public.

3. Unemployment in Construction

In addition, the housing market will not only be affected in a pricing sense due to such additional regulations and permit fees, but also in an employment sense. For example, economists have calculated that each new construction equates to more than two full-time jobs for the community. Thus, when housing affordability is compromised, new construction will not be commenced, thereby leading to higher unemployment. According to the Bureau of Labor Statistics, since the peak in industry employment in February 2006, home builders and associated trades have experienced a loss of 1.36 million jobs nationwide, a 39.4% decline. Notably, the November unemployment rate for construction, both residential and non-residential, stood at 21%. Thus, the decline in home building has and will continue to have devastating consequences for builders and workers whose livelihoods depend on construction activity.

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Because compliance costs are incurred prior to the home sales, builders and developers are required to pay additional carrying costs. In light of the fact that the vast majority of HBASC and NAHB membership consists of small businesses, the imposition of additional stormwater regulations will have a severe impact on their economic viability. With the drastic drop in new housing starts due to horrific economic conditions, the South Carolina and national housing market would further deteriorate with the threatened imposition of new regulations and permit fees on builders and developers. Because any new post-construction requirements will either become a part of the stormwater permits issued for homebuilding projects or require builders and developers to take additional steps to reduce impacts, the HBASC is concerned about the impacts that will accrue to our businesses and livelihoods, and to those of the public. Therefore, any additional proposed controls and regulations will only exacerbate the current financial crisis.

D. The Requested Action of Appellants is a matter of land use regulation, and all land use regulations have been met with compliance.

The Appellants, the Town of Arcadia Lakes, residents of Kaminer Station, and residents of the Cary Lake Subdivision, argue that the proposed project will cause harm to the environmental interests of 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, argue that because Roper Pond drains into Cary Lake and the Town is responsible for the water flowing into Cary Lake, the Town's environmental interests will be impacted by the proposed project. However, notably, Cary Lake is privately owned and is maintained by the Cary Lake Homeowners Association. Furthermore, the Town has no interest in Cary Lake. As noted in Respondent's brief, the

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Town is in no way responsible for the maintenance or remediation of Cary Lake; the Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake; and the Town has never budgeted any funds for the maintenance or repair for any of the seven lakes within its corporate limits. In addition, water from Cary Lake does not drain into any other water body within the corporate limits of the Town of Arcadia Lakes. Therefore, the Town of Arcadia Lakes is neither responsible for the water flowing into Cary Lake, nor does it have an interest in Cary Lake.

Interestingly enough, the relative position of Kaminer Station Subdivision and the Cary Lake subdivision draws light on the ultimate purpose of this appeal. Kaminer Station is adjacent to the Roper Pond Property and hydraulically up gradient of the Roper Pond Property. Ms. Linda Jackson, a resident of the subdivision, testified that she enjoys the view of the Pond on the Roper Pond Property and Cary Lake during walks in the area. She further testified that Cary Lake is privately owned, and there is no public access to Cary Lake. She testified that any negative impacts to Cary Lake would be the result of Roper Pond's failure to follow the General Permit and SWPPP during the construction of the Proposed Project.

In addition, Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. Elaine Starr, a resident of Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. She further testified that the condition of the Lake has deteriorated over the years due to sediment from previous development in the area that has impacted the Lake. However, notably, Ms. Starr testified that she had not reviewed the stormwater plan for the Proposed Project. Ms. Starr stated that any development in the area would exacerbate the condition of Cary

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Lake. Conversely, Jill Stewart, licensed professional engineer in South Carolina and the Manager of the Department's Stormwater Permitting Section found that the SWPPP addressed by the quality and quantity of the stormwater runoff associated with the project and that the measures were adequate to meet the requirements of State Stormwater Regulations and the State General Permit. Furthermore, with regard to the filling of wetlands under the Nationwide Permit, George Whatley, the wetlands scientist for Roper Pond, received notice and verification from the Corps that verified that the filling of 0.075 acres of jurisdictional wetlands met the terms and conditions of the Department of Army Nationwide Permit(s) # 39. Lastly, Charles Hightower, Section Manager of the Department 401 Wetlands Section, testified that he fill of 0.075 acres conforms to the conditions of the 401 Water Quality Certifications for the Nationwide Permits. Thus, the Best Management Practices submitted and actions taken by Roper Pond were all approved and determined to be environmentally conducive.

Ultimately, it is clear that the Appellants are using environmental statutes and regulations for their own preferential zoning and land control purposes. Such a misuse of the regulations violates the purpose and plain language of the applicable statutes. The Appellants oppose development in the area that would obstruct their views and further populate the area. Bringing such issues forward under the guise of environmental statutes and regulations is improper, and to entertain such preferences is not the role of this Honorable Court.

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Conclusion

In conclusion, Roper Pond, LLC has followed all applicable programs and environmental regulations with regard to the proposed project, and its actions have been deemed to be environmentally sound and in the public's best interest by the appropriate governmental agencies. Notably, it is clear that section 401 does not apply to Roper Pond as the dredging of the Pond involves the removal of a pollutant and not an addition of a pollutant; thus, the State has no authority to regulate the dredging of the Pond. In addition, from a policy standpoint, Appellants' argument that an additional water quality certification is required for the entire proposed project would have negative effects statewide and nationwide: It would dismantle the purpose and effect of the Nationwide Permitting System; it would open the door to allow every Nationwide Permit to be appealed by any interested party; it would impose unneeded and lengthy delays and fees on the construction industry; and drive the cost of housing up for the American public. This appeal was taken under the guise of environmental statutes and regulations with the ultimate purpose of controlling land-use and facilitating preferential zoning. With such a depressed housing market and construction industry nationwide, the American public cannot afford the interpretation of the regulations advocated by the Appellants.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

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

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

**APPELLANTS' RETURN TO
AMICUS CURIAE BRIEF**

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

Attorney for the Appellants

Georgetown, South Carolina
June 27, 2011

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ARGUMENT

The Homebuilders Association of South Carolina (Homebuilders) has submitted an *amicus curiae* brief in support of the Respondents in this case. The brief consists of two basic parts, neither of which provides a meaningful addition to the arguments already presented in the parties' briefs. The first part of the brief is directed toward the facts and law of this case but is a redundant "me too" addition to Respondents' brief. While avoiding a complete restatement of its previous arguments, Petitioners will demonstrate that these redundant arguments similarly fail. The second part of the brief consists of general policy arguments not directed toward the facts or law of this case. Petitioners will demonstrate that these arguments are unsupported and have no relevance to the legal standards applicable in this case.

I. HOMEBUILDERS' LEGAL ARGUMENTS ARE REDUNDANT AND INACCURATE

The function of an amicus brief is to call the court's attention to law or facts that may otherwise escape its consideration. Kemp v. Rubin, 64 N.Y.S.2d 510, 512 (N.Y. App. Div. 1946); Wyoming Coalition v. Wyoming Game & Fish Com'n, 875 P.2d 729, 734 (Wyo. 1994). Homebuilders' legal arguments duplicate those made by Respondents.

Homebuilders argues that Appellants' interpretation of the law negates the purpose of the Nationwide Permit system. Amicus brief, p. 5, 9-12. Homebuilders' arguments misinterpret Appellants' assertions, add nothing to those already made by Respondents, and are in fact considerably less thorough and detailed. See Respondents' brief, p. 23-33. Homebuilders argues that the Town of Arcadia Lakes is not responsible for and does not have an interest in Cary Lake. Amicus brief, p. 15-16. The Respondents have already thoroughly briefed this issue (See

Respondents' brief, p. 43-47), and the only evidence is that the Town is legally responsible for water quality. See 33 U.S.C. § 1342. Homebuilders argues that Roper Pond's SWPPP adequately provides for protection of water quality. Amicus brief, p. 5-9. Respondents have made the same argument (See Respondents' brief, p. 2-5, 47), and DHEC admits it did not look at water quality impacts associated with excavating the pond. (R. pp.167; 553-54). In short, with the exception of Respondents' general policy arguments which are discussed later, the amicus brief is nothing more than an abridged version of the Respondents' brief. The brief does not provide new argument, or even a new perspective, on the application of the law to the facts of this case. Appellants will therefore largely defer to its previous briefing in response to Homebuilders' arguments and only briefly respond to Homebuilders' main points here.

A. Appellants are asking for application of the NWP system, not modification thereof¹

Contrary to the arguments of Homebuilders, Appellants do not contend that an individual 401 Water Quality Certification is required for every project authorized to proceed under a Nationwide Permit. The Corps issued NWP 29 (the NWP applicable here) which approves residential construction resulting in the loss of less than half an acre of non-tidal waters. The State then conditionally certified the NWP under Section 401. Under the State's certification, most NWP 29 projects do not receive full individual state review. However, what Homebuilders and the Respondents ignore is that the certification is conditional, and thus sometimes will require individual review.

¹Appellants specifically incorporate pages 5-9 of their reply brief, which responds to this same argument as made by the Respondents.

DHEC's certification imposes both specific and general conditions applicable to NWP 29 projects beyond the limitations provided in NWP 29 itself. The specific conditions on NWP 29 provide, for example, that no more than 0.1 acres of waters of the U.S. can be filled for a single residence and that impounding of water is not authorized. These conditions create a situation where a residential construction project could satisfy the Corps' NWP 29 but not the State's certification of NWP 29. Of course, the only way for these State certification conditions to be given effect is for DHEC to review NWP 29 projects for compliance with its conditions. This review applies for both specific and general conditions applicable to NWP 29, which, as discussed at length in Appellants' brief, include the general condition that DHEC's 401 review considers "the overall project proposed or accomplished by a single owner/developer and it includes all land within the project boundary under single ownership." (R. p. 573, para 1).

Through the State's conditional certification of NWP 29, there is a broad class of NWP 29 projects DHEC no longer has to individually review for compliance with state water quality standards. When a NWP 29 project is within the limitations of DHEC's general and specific conditions, this is the end of DHEC's inquiry and it does not have to consider the individual water quality impacts of the project or apply state water quality standards found in R.61-101. In this way, the State's certification of NWP 29 is given effect and streamlines the NWP permitting process. However, if a residential construction project for example calls for more than 0.1 acres of waters of the U.S. to be filled (specific condition) or creates other significant water quality impacts on the project property (general condition), individual review of water quality impacts and standards must be undertaken. In this way, the conditions imposed on NWP 29 certification are given effect. This process does not negate the purpose of the NWP system, but rather

effectuates it.

For its part, DHEC has confirmed that the NWP system operates in this manner. As cited in Appellant's reply brief, DHEC's Chuck Hightower testified that DHEC reviews NWP projects, including NWP 29 projects, for compliance with DHEC's certification conditions and issues a certification letter if the conditions are met. (R. pp. 251-262). This is the streamlined review that does not have to consider water quality impacts and apply state water quality regulations. But, if the NWP project does not meet the conditions, individual review of water quality impacts is then required. (R. p. 253). What Homebuilders and the Respondents misunderstand is that only a cursory or "streamlined" review of an NWP project is required to determine if it complies with State conditions. Only if the project fails to comply with these conditions is individual certification review of water quality impacts required.

The Roper Pond project is not one of the standard residential projects that quickly moves through the streamlined NWP process. Rather, the "overall project," as that word is used in the State's NWP general conditions, includes water quality impacts well beyond the relatively minor fill required for the actual construction of residences -- namely, the dredging and excavation of the on-site lily pad pond. Indeed, Chuck Hightower testified that DHEC regularly reviews all water quality impacts beyond the § 404 wetland fill when reviewing an overall project. (R. pp. 251-52). Homebuilders' concept of the NWP system would make DHEC's certification conditions meaningless.

B. There is no evidence of the "dire consequences" portended by Homebuilders

Homebuilders' brief is full of unsupported alarmist statements, going so far as predicting "dire consequences for the construction industry, the housing market, and the public at large"

were Appellants to succeed. Brief, p. 4. This statement is completely without an evidentiary or legal basis, is irrelevant to the issues before the Court, and, Appellants would submit, demonstrates such unabashed self-interest as to diminish the credibility of Homebuilders' arguments all-together.

The State enacted water quality standards in S.C. Code Ann. Reg. R.61-101 to apply to projects requiring a federal discharge/fill (Section 404) permit. These standards provide, for example, that DHEC will consider all water quality impacts over the life of a project and whether there are feasible alternatives to the project. R.61-101.F. There is no debate among the parties that a Corps Section 404 permit triggers application of these state water quality standards. The point of contention among the parties, and the apparent basis of Homebuilders' alarmist prediction, is that Appellants contend that once triggered, the state water quality standards apply to all water quality impacts of a particular project, rather than artificially sectioning off a portion of the project's water quality impacts. Appellants would submit that application of state water quality standards, duly enacted by our State authorities to apply to a wide variety of Section 404 projects, would not bring about the dire consequences predicted by Homebuilders.

At any rate, the Roper Pond project presents an unusual factual circumstance and question of law. Appellants submit that for a normal residential construction project, the discharge or fill of waters of the U.S. triggering the Section 404 permit is the extent of the water quality impacts to waters of the U.S. on the project property. This case presents the unusual circumstance where not only is a water of the U.S. being filled, but another water of the U.S. on the property (the pond) is being significantly modified and disrupted. While the significant modification and disruption does not require a Section 404 permit, it does require review under

state law, specifically R.61-101, which gives DHEC broad review authority, the NPDES General Permit and the conditions of NWP 29. It is only under an unusual circumstance such as this, where the project has water quality impacts on the property beyond Section 404, when the scope of application of the state water quality standards becomes a question. Though not relevant to the Court's legal inquiry, a ruling in favor of the Appellants would not have the dire consequences predicted by Homebuilders.

II. HOMEBUILDERS' GENERAL POLICY ARGUMENTS ARE IRRELEVANT TO THE INQUIRY BEFORE THE COURT

The only new arguments presented by Homebuilders relate to the overall state of the housing market and consist of nothing more than judicial lobbying with no evidentiary support in the record. Appellants submit that the extra-record evidence relied on by Homebuilders should be rejected by the Court. Nonetheless, Appellants will address the unsupported assertions.

Starting at page 12 of its brief, the Homebuilders focus on general policy in advancement of their objectives as an organization, without consideration of how the law of South Carolina applies to the facts of this case. An *amicus curiae* brief's principal or usual function is to aid the court on questions of law. Lakewood v. State Emp. Relations Bd., 584 N.E.2d 70 (Ohio Ct. App. 1990). Further, an *amicus curiae* must accept the case before the reviewing court as it stands on appeal, with the issues as framed by the parties; and *amicus curiae* generally cannot expand the scope of appeal to implicate issues that have not been presented by parties to the appeal. Garcia-Melendez v. Ashcroft, 351 F.3d 657, 662 n.2 (5th Cir. 2003), Baptist Health v. Murphy, 358 Ark. 341, 342-43 (2004). But beyond the fact that these arguments are not the proper subject of an *amicus curiae* brief, the arguments are simply not relevant to the issues before the court and

have no evidentiary support in the record.

Contrary to the above-cited cases, Homebuilders raises general questions of policy that do not aid the court on the law or the facts, and the policy questions raised have not been made an issue by either party in this action. Further diminishing the import of these arguments, Homebuilders relies extensively on detailed statistics, none for which any source of authority is cited, and none of which were subjected to cross examination by the Appellants, as they would have been had they been presented to the ALC and made part of the record.

Homebuilders begins by discussing the decline in new home construction and home ownership, and the resulting high unemployment rate in construction, concluding that increased cost of compliance with NPDES negatively impacts the already depressed housing market by driving up home prices. Brief, p. 14. In support of this argument, Homebuilders states without any citation to authority that "for every \$1,000 increase in the cost of building a median-priced home, approximately 425,000 households are priced out of the market," and that "economists have calculated that each new construction equates to more than two full-time jobs for the community." In addition to being pulled out of thin air, these statistics, and the arguments they support, are wholly irrelevant. Home prices could of course be cheaper if builders did not have to comply with the construction laws and regulations in place and did not have to obtain permits and certifications. That fact is self-evident and not in dispute. But the laws and permit requirements were put in place for a reason and the additional costs of such requirements contemplated in their enactment. The issue before this Court is whether DHEC properly applied the law -- how that application affects the depressed housing market is a question not before this Court.

Homebuilders concludes by expressing its unsubstantiated determination that it is clear Appellants are misusing environmental laws and abusing the role of this Court. Brief, p. 17. Homebuilders leads up to this conclusion by referencing testimony of Linda Jackson saying that she enjoyed the view of Roper Pond and Cary Lake and the testimony of Elaine Starr saying her family enjoyed using Cary Lake for a number of purposes. As best Appellants can determine, Homebuilders faults Appellants for having standing. Of course it is Appellants' own self-interests and not some objective desire to see environmental laws enforced which led them to file this action. If this were not the case, Appellants would not have standing to maintain the action.

As the Fourth Circuit stated in Pye v. United States, 269 F.3d 459, 468 (4th Cir. 2001):

If the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this [action]. If that is the case, the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action.

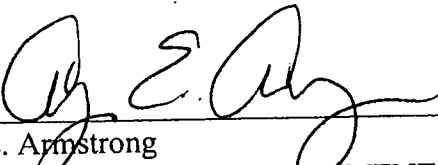
Pye, 269 F.3d at 468, quoting Society Hill Towers Owners' Assn. v. Rendell, 210 F.3d 168, 176 (3rd Cir.2000). Obviously Appellants are more upset that a scenic pond is to be destroyed, not that DHEC didn't properly exercise the scope of its Section 401 authority. Homebuilders reads from this some deceptive misuse of environmental laws. On the contrary, Appellants' motivations in filing this action are exactly what was contemplated in providing citizens a private right of action.

CONCLUSION

Appellants final brief and final reply brief address most all of the points raised in Homebuilders' *amicus brief*. Appellants have not addressed every point raised by Homebuilders to avoid redundancy with these previous filings. All-in-all, Appellants

submit that this *amicus brief* adds little to the inquiry before the Court and relies largely on statements and contentions unsupported by law or facts.

Respectfully submitted,



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

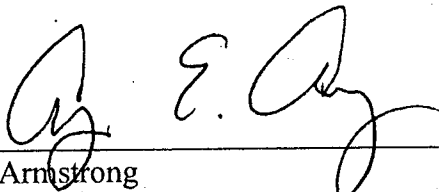
Attorney for the Appellants

Georgetown, South Carolina

June 27, 2011

Certificate of Counsel

The undersigned does hereby certify that this Final Reply Brief complies with SCRAP Rule 211(b).



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

Attorney for the Appellants

Georgetown, South Carolina

June 27, 2011

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2010-159446

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5095
Heard May 8, 2012 – Filed March 6, 2013

AFFIRMED

Amy E. Armstrong, of South Carolina Environmental
Law Project, of Georgetown, for Appellants.

W. Thomas Lavender, Jr. of Nexsen Pruet, LLC, of
Columbia, and J. Michael Harley, of Barrington, IL, for
Respondent Roper Pond, LLC; Roger Page Hall and
Stephen Philip Hightower, both of Columbia, for
Respondent SCDHEC.

THOMAS, J.: The Town of Arcadia Lakes (Town) and various individuals appeal a decision by the Administrative Law Court (ALC) upholding the authorization by the South Carolina Department of Health and Environmental Control (DHEC) of coverage for certain land-disturbing activities under a State General Permit. We affirm.

FACTS AND PROCEDURAL HISTORY

Respondent Roper Pond, LLC (Roper) is the owner and developer of 12.75 acres of real property on Trenholm Road in an unincorporated area of Richland County. The property includes 1.8 acres consisting of wetlands and waters that were identified by the United States Army Corps of Engineers (Corps) in 2005 as falling under the jurisdiction of the Federal Clean Water Act (CWA).¹ These jurisdictional wetlands include Roper Pond, a man-made pond that is visible from Trenholm Road but wholly within the boundaries of Roper's property. Before implementation of the project at issue in this appeal, water lilies covered the surface of Roper Pond.

Roper Pond drains through a pipe that runs beneath Trenholm Road and into Cary Lake. Cary Lake is privately owned by the Cary Lake Homeowners Association, which is not a party to this litigation. Although Cary Lake lies partly within the boundaries of the Town, the Town has no ownership interest in it and is not responsible for its maintenance or remediation.

In August 2007, Roper submitted to the Corps its initial plans for a multifamily apartment development to be built on its property. As part of this undertaking, Roper needed a permit for stormwater discharges from land-disturbing activities associated with the project. *See* S.C. Code Ann. § 48-14-30(A) (2008) (prohibiting land-disturbing activities without the submission of a stormwater management and sediment control plan to the appropriate agency and a permit to proceed with these activities); 9 S.C. Code Ann. Regs. 72-305 (Supp. 2012) (stating similar prohibitions to section 48-14-30(A) and setting out the permit application and approval process).

¹ 33 U.S.C. §§ 1251 *et seq.* (2006).

To expedite matters, Roper could "seek coverage under a promulgated storm water general permit" instead of obtaining an individual permit. *See* 3 S.C. Code Ann. Regs. 61-9.122.26(c)(1) (2012) ("Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit."). Under 3 S.C. Code Ann. Regs. 61-9.122.28 (2012), DHEC is authorized to issue general permits for stormwater discharges from projects that meet certain criteria. Pursuant to this authority, DHEC issued Permit Number SCR100000 (State General Permit) on August 1, 2006. The State General Permit, which DHEC described as an "NPDES General Permit for Storm Water Discharges from Large and Small Construction"² covered discharges from the commencement of an authorized project until final stabilization of the construction site.

In 2006, DHEC published a Guidance Document for the State General Permit advising prospective permittees about the need to obtain necessary permits from the Corps. In this particular case, Roper was required under section 404 of the CWA to obtain a wetlands permit from the Corps because it intended to fill some of the jurisdictional wetlands on the project site. *See* 33 U.S.C. § 1344(a) (2006) (authorizing the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites").

Under section 404(e) of the CWA, the Secretary of the Army is authorized to issue Nationwide Permits (NWP) for any category of similar activities involving discharges of dredged or fill material determined to "cause only minimal adverse environmental effects when performed separately" and to "have only minimal cumulative adverse effect [sic] on the environment." 33 U.S.C. § 1344(e)(1) (2006). If a proposed activity meets the applicable regional and general conditions for an NWP, application for its authorization can proceed more quickly than it would if the applicant sought an individual permit. On March 12, 2007, the Corps issued NWP 29 and NWP 39, the two NWPs at issue in the present litigation. NWP 29 applied to residential developments, and NWP 39 applied to commercial and institutional developments.

² As authorized by the Clean Water Act, the National Pollutant Discharge Elimination System (NPDES) Permit Program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. The program is administered by authorized states, including South Carolina.

The requirement for a 404 permit from the Corps in turn triggers a requirement under section 401 of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards (401 certification). 401 certification is required "from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1) (2006).³ On May 11, 2007, pursuant to its regulatory authority, DHEC issued 401 certifications for projects covered under NWP 29 and NWP 39.⁴ DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.

On April 30, 2008, George Whatley, a wetland scientist for BP Barber, submitted a joint federal and state application for the proposed construction project on Roper's property. On the application, Whatley noted the project would involve the filling of 0.075 acres of jurisdictional wetlands.⁵ On May 5, 2008, Whatley submitted a

³ DHEC regulations reference this requirement as well. *See* 8 S.C. Ann. Regs. 61-101.A.2 (2012) (stating federal law requires an applicant for a federal permit to conduct an activity that "during construction or operation may result in any discharge to navigable waters" "to first obtain a certification from [DHEC]" and stating that "Federal law provides that no Federal license or permit is to be granted until such certification is obtained").

⁴ *See* 8 S.C. Code Ann. Regs. 61-101.A.3 (2012) ("[DHEC] may issue, deny, or revoke general certifications for categories of activities or for activities specific in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations."); 33 C.F.R. § 330.4(c)(1) (2013) ("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 NWPs authorizing activities which may result in a discharge into waters of the United States.").

⁵ As noted earlier, the CWA requires a 404 permit for certain discharges of dredged or fill material into navigable waters. The term "navigable waters" is defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The United States Supreme Court has imposed limitations on the inclusion of wetlands, holding that "*only* those wetlands with a

pre-construction notification (PCN) to the Corps. In the PCN, Whatley noted that (1) although Roper initially advised the Corps in 2007 that the project would impact 0.099 acres of jurisdictional wetlands, the project was redesigned to reduce impacts to 0.075 acres and (2) "best management practices" (BMPs) would be implemented to ensure that construction activities would not impact jurisdictional areas lying outside the permitted impact areas. Whatley further requested that the Corps review the project for possible coverage under an NWP; however, he did not specify any particular NWP under which the activity would be conducted.

No other impacts to water quality were disclosed on the application; however, according to subsequent e-mails between BP Barber and the Corps, Whatley notified the Corps that the project included lowering the elevation of Roper Pond and the discharge of the soil and sediment from the bottom of the pond into an upland area. According to the e-mails, Whatley inquired whether either of these was an impact to be considered in obtaining approval for the construction, and the Corps advised that (1) lowering the pond was not an impact and (2) excavation of the pond would be exempt from permitting requirements provided the excavated material was "placed in a truck or deposited onto uplands" and there was "[n]o double handling or stockpiling in jurisdictional areas."

Pursuant to the requirements for coverage under the State General Permit, a Stormwater Pollution Prevention Plan (SWPPP) was prepared for the project on June 26, 2008. DHEC reviewed the SWPPP and requested certain revisions.

By letter dated September 9, 2008, the Corps advised Whatley that (1) it reviewed the PCN and determined the proposed activity would "result in minimal individual and cumulative adverse environmental effects and [was] not contrary to public interest," (2) the activity met the terms and conditions of NWP 39, and (3) for authorization to remain valid, the project had to comply with general conditions of the NWP, regional conditions, and certain special conditions, namely, that Roper obtain and provide the Corps with "all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management

continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]." *Rapanos v. U.S.*, 547 U.S. 715, 742 (2006) (emphasis in original). In the present case, there was no dispute that the 0.075 acres of wetlands to be filled in conjunction with Roper's proposed project were "jurisdictional wetlands" subject to the CWA.

Consistency Determination, State Navigable Waters Permit)." Consistent with its usual practice, the Corps sent a copy of the September 9, 2008 letter to DHEC as well as to Whatley.

On September 24, 2008, Roper submitted to DHEC a notice of intent (NOI) to discharge storm water associated with its proposed project, now designated as Roper Pond Apartments, seeking approval from DHEC to have the stormwater discharges covered under the State General Permit.⁶ According to the NOI, the project site was 12.8 acres, of which 9.9 acres would be disturbed by land-clearing activities.

DHEC responded to Whatley by letter dated October 2, 2008, advising it determined that the impacts of the project on water quality would be minimal and that the proposed work would be consistent with the 401 certification issued in 2007 for NWP 39, subject to various conditions not at issue in this appeal.

On November 17, 2008, DHEC staff engineer Jill Stewart e-mailed BP Barber to express various concerns. Among these concerns was information she received that the proposed plans for Roper Pond Apartments included lowering of the water surface elevation of Roper Pond to allow for detention of post-development runoff of stormwater. Stewart inquired whether the dropping of the water surface elevation should be taken into account in determining if a site is eligible for coverage under NWP 39. BP Barber responded the following day, informing Stewart that its wetlands consultant advised "the lowering of the water surface elevation is included and covered under [NWP 39]."

In December 2008, DHEC issued a letter acknowledging it was satisfied that the revised SWPPP met the requirements of the State General Permit and the applicable regulations. On December 15, 2008, DHEC staff granted Roper coverage under the State General Permit for its stormwater discharges associated with construction of Roper Pond Apartments.

⁶ The NOI was on a DHEC form entitled "Notice of Intent (NOI) for Stormwater Discharges from Large and Small Construction Activities, NPDES General Permit SCR100000."

By letter dated December 30, 2008, Appellants and other individuals requested that the DHEC Board review and overturn the decision.⁷ Among the technical issues raised in the letter were Roper's failure to disclose its intent to lower the elevation of Roper Pond and an allegation that it sought coverage under the wrong NWP. On January 14, 2009, DHEC responded to the letter, informing Appellants that the Board declined to conduct a final review conference and that anyone aggrieved by the decision could request a contested case hearing in the ALC. On February 16, 2009, Appellants filed a request for a contested case hearing in the ALC.

Meanwhile, on January 6, 2009, Whatley e-mailed the Corps requesting a corrected letter indicating the impacts of the project would be covered under NWP 29 instead of NWP 39. As noted earlier, Whatley also recounted Roper's plans to lower the elevation of Roper Pond and its intent to remove the excavated material to an upland area and his understanding that Roper did not need approval from the Corps for these activities. By letter to Whatley dated February 25, 2009, the Corps advised that it determined the proposed activity would result in minimal individual and cumulative adverse environmental effects, would not be contrary to the public interest, and met the terms and conditions of NWP 29. Except for the particular NWP referenced, the language in the February 25, 2009 letter was identical to the corresponding language in its September 9, 2008 letter.

As it did with the September 9, 2008 letter, the Corps sent a copy of its February 25, 2009 verification letter to DHEC. DHEC, however, did not issue another authorization letter advising Roper that the project would be consistent with the 401 certification issued in 2007 for NWP 29. According to Charles Hightower, DHEC's Section Manager of the 401 Wetlands Section, the purpose of such notification from DHEC is to provide an applicant assurance that the applicant's proposed project falls within the conditions of DHEC's 401 certification. Hightower further testified that Roper's proposed fill of the 0.075 acres of jurisdictional wetlands satisfied the necessary conditions to receive 401 water quality certifications for both NWP 29 and NWP 39 and that because the requisite conditions had been met, Roper did not need to notify DHEC before proceeding with the project under NWP 29.

On June 17, 2009, in response to a motion by Roper to dismiss Appellants' request for a contested case hearing, the ALC issued a consent order in which the parties

⁷ Additional facts about Appellants will be presented in the LAW/ANALYSIS section of this opinion.

agreed to the dismissal of all claims raised by Appellants challenging the 401 certification and authorization to conduct activities under NWP 39 for the proposed development. The partial dismissal did not affect Appellants' claims and Roper's defenses in connection with the 401 certification and authorization under NWP 29 .

The contested case hearing before the ALC took place on September 3 and 4, 2009. Stewart, Hightower, Whatley, and several individual Appellants testified. The record on appeal also includes depositions from various individuals, including Stewart and Hightower. In addition, Appellants called Seth Reice, Ph.D., a professor of ecology and biology at the University of North Carolina at Chapel Hill, as an expert on aquatic ecology. Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

On January 21, 2010, the ALC issued a final order upholding DHEC's approval of coverage under the State General Permit on the merits and further finding that Appellants lacked standing to challenge DHEC's decision. On March 23, 2010, following a hearing on a motion for stay by Appellants, the ALC temporarily stayed its final order pending a decision on Appellants' motion for reconsideration.

By order dated April 1, 2010, the ALC denied Appellants' motion to reconsider and lifted the temporary stay. Appellants then filed their notice of appeal to this court.

ISSUES⁸

- I. Did the ALC err in finding Appellants lacked standing to challenge DHEC's decision to authorize coverage for Roper Pond Apartments under the State General Permit?
- II. Did the ALC err in holding the 401 certification issued by DHEC was sufficient for a valid 404 permit and coverage under the State General Permit?
- III. Did the ALC err in holding that Roper's proposed stormwater control activities could be covered under the State General Permit?

STANDARD OF REVIEW

The standard of review that an appellate court is to apply to appeals from the ALC is set forth in the South Carolina Administrative Procedures Act (APA), specifically in section 1-23-610 of the South Carolina Code (Supp. 2012). *Murphy v. S.C. Dep't of Health & Env'tl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191 191, 194 (2012). Under section 1-23-610(B), a reviewing court may reverse or modify a decision by the ALC if the substantive rights of the appellant have been prejudiced because of a finding, conclusion, or decision that (1) violates constitutional or statutory provisions, (2) exceeds the agency's statutory authority, (3) is made upon unlawful procedure, (4) is affected by other error of law, (5) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (6) is arbitrary, capricious, or characterized by either abuse of

⁸ The Home Builders Association of South Carolina has filed an *amicus curiae* brief asserting that Appellants seek to add an unnecessary step in stormwater regulation and nationwide permitting that would have adverse consequences for the construction industry, the housing market, and the public at large and that existing programs and regulations sufficiently protect the public interest in the permitting process. Because our rulings on the issues Appellants have presented are dispositive of this appeal, we decline to address these policy concerns. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its disposition of a prior issue is dispositive of the appeal).

discretion or clearly unwarranted exercise of discretion. Section 1-23-610 has been applied not only to findings by the ALC on the merits of a controversy but also to findings by the ALC concerning a party's standing to maintain an action. *See Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 4-8, 693 S.E.2d 426, 428-30 (Ct. App. 2010) (referencing only the APA in stating the standard of review, but ultimately affirming the ALC on the ground that appellant lacked standing and declining to address appellant's remaining arguments), *cert. denied* (July 7, 2011).

LAW/ANALYSIS

I. Standing

Appellants in this case are (1) the Town, (2) various residents of Kaminer Station, a subdivision adjacent to and uphill from Roper Pond (Kaminer Station Appellants),⁹ and (3) various individuals whose properties border Cary Lake (Cary Lake Appellants).¹⁰ The ALC found none of these groups had standing to maintain this action. We agree.

In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001), the Supreme Court of South Carolina, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), set forth three requirements that must be met to satisfy "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

⁹ The Kaminer Station Appellants are Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Toney Sinclair, Aaron Small, and Bette Small.

¹⁰ The Cary Lake Appellants are Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown.

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."

(Citations omitted).

"The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to withstand a motion to dismiss. *Lujan*, 504 U.S. at 561. Elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation." *Id.* (quoted in *Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

A. The Town

The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. Quoting *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include (1) the Town's interest in protecting the environmental quality of Cary Lake, which lies partly within the Town borders, (2) the Town's ability to comply with federal law, such as NPDES regulations, (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal, and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether "proprietary" or not, are sufficient to confer standing on the Town in this case.

As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion.¹¹ Moreover, he acknowledged the Town is not responsible for the maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the "bottom lake," that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are "fairly traceable" to the challenged action in this case. Similarly, Appellants have not shown any causal connection between the authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC's determination that the Town lacks standing.

B. Kaminer Station Appellants

The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.

¹¹ In their reply brief, Appellants cite title 33, section 1342(p) of the United States Code (2006), which the United States Congress added to the CWA in 1987. This section covers municipal and industrial stormwater discharges. Under paragraph (4) of this section, the Administrator of the Environmental Protection Agency is required to establish regulations setting forth permit application requirements for discharges from municipal separate stormwater systems and either the Administrator or appropriate State agency would eventually acquire the authority to issue and deny such permits. We have found nothing in this section either requiring a municipality to obtain a permit for stormwater discharges from a stormwater system that is already covered by a permit or holding a municipality responsible for such discharges.

Linda Jackson, one of the Kaminer Station Appellants, conceded that "water flows down" and there was no serious concern that stormwater from Roper Pond would flow uphill to Kaminer Station. However, Jackson also described the visual appeal of Roper Pond and her appreciation of the nature sounds in the area. She also testified that she had fished on Cary Lake and had seen changes for the worse in that area as it developed. Such observations, even if shared by many others, arguably can still form the basis for a concrete and particularized injury that would confer standing. *See Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) ("[M]erely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Moreover, even those concerns reflecting aesthetic or recreational interests have been recognized as "judicially cognizable injur[ies] in fact." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. Nonetheless, when such interests involve property that is privately owned by a party other than the plaintiff, the presence of an injury in fact cannot be assumed. *Cf. Conservation Council of N.C. v. Costanzo*, 505 F.2d 498, 501-02 (4th Cir. 1974) (stating the plaintiffs' recreational use of privately owned property as either licensees or trespassers did not confer standing to challenge development on that property because there was no evidence that the owner of the property would allow such use to continue in the future). Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants.

Furthermore, we hold substantial evidence supports the ALC's determination that the Kaminer Station Appellants have not established a causal connection between their alleged injuries and the conduct giving rise to their complaint. When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves. Furthermore, Reice's inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

C. Cary Lake Appellants

Finally, we agree with the ALC that the Cary Lake Appellants failed to show that granting coverage for Roper Pond Apartments under the State General Permit would cause an actual or imminent injury and therefore lacked standing to challenge DHEC's decision to grant coverage under the State General Permit.

Testifying for the Cary Lake Appellants, Elaine Starr stated her home, where she has lived since 1971, borders Cary Lake, which is on the opposite side of Trenholm Road from Roper Pond. She further testified that she had a bachelor's degree in biology and had done graduate work in wetlands and coastal resources. She had participated in several organizations that were concerned with water quality, and she and her family have made extensive use of Cary Lake for recreational purposes. Starr testified about her empirical observations of the decline in the water quality of Cary Lake and how these observations were supported by her use of a Secchi disk, a technique to measure water clarity. She also expressed concerns about the possible demise of the water lilies due to the dredging of Roper Pond, noting "if their [rhizomes] or root systems get damaged or taken way, . . . they may not be there."

According to Starr, the increased sedimentation in Cary Lake that she described resulted from prior occurrences involving possible mismanagement. However, there was no evidence that the project at issue here would lead to similar results. Starr admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments. Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact. We therefore agree with the ALC that the Cary Lake Appellants presented at best only speculative evidence that they would suffer an injury in fact from DHEC's decision to allow Roper Pond Apartments to be covered under the State General Permit.

II. Validity of the 401 Certification

Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit, (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands, (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification, and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

First, although Roper did not initially inform the Corps that it intended to dredge and excavate the pond as part of the project, as of January 6, 2009, when Whatley requested a corrected letter from the Corps indicating that the impacts of the project would be covered under NWP 29 instead of NWP 39, the Corps had been informed that such an activity was to be part of the project. Having received this information, the Corps nevertheless determined that the project would result in "minimal individual and cumulative environmental effects" and met the conditions of NWP 29.

As to Appellants' second argument, we agree with their position that the general conditions for water quality certification require DHEC to review the "overall project proposed by a single owner/developer," "includes all land within the project bound under single ownership," and is not confined to "the land area directly impacted by each NWP request" and their assertion that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site or determined if feasible alternatives were available. Here, however, 401 certification was necessary only as a prerequisite to obtaining a 404 permit from the Corps for filling the jurisdictional wetlands. This requirement was pursuant to 33 U.S.C. section 1341(a)(1) (2006), which states in pertinent part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction

or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions

(emphasis added). Appellants have emphasized they never argued that a 404 permit was necessary to dredge and excavate the pond, and there was no contention here that this activity would result in a discharge into a navigable water. Furthermore, we have found no argument from Appellants to the effect that the alterations to the pond were an impact resulting from the filling of the jurisdictional wetlands, the activity for which a 404 permit was sought.

Based on our interpretation of the events in this case, we disagree with Appellants' third argument, their assertion that the project never received a proper water quality certification for coverage under NWP 29. We acknowledge Hightower admitted that after DHEC received notice from the Corps that the project would be covered under NWP 29, it did not issue a letter advising Roper that the project would be consistent with the 401 certification it issued for this NWP and agreed that sending such a letter would have been advisable; however, he also testified that an authorization letter was only a formality for the applicant's benefit and was not required by the State General Permit. The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

Finally, Appellants have challenged the water quality certification on the ground that DHEC failed to review the project to determine (1) whether it complied with 6 S.C. Code Ann. Regs. 61-68 (2012) and 8 S.C. Code Ann. Regs. 61-101 (2012), both of which were promulgated pursuant to the South Carolina Pollution Control Act, and (2) the impact of the draining and excavation of Roper Pond. They further argue the ALC erroneously relied on *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 552-53, 641 S.E.2d 425, 428 (2007), for the proposition that "a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act." We need not determine whether the ALC correctly

applied this holding. We have already determined that the Corps was aware that Roper intended to excavate the pond when it authorized coverage under NWP 29 and that the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit.

III. Coverage Under the State General Permit

Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.

First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.

Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRPC); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

CONCLUSION

We agree with the ALC that none of the Appellants had standing to maintain their challenge to the authorization of coverage for Roper Pond Apartments under the State General Permit. As to the merits of Appellants' arguments, we affirm the ALC's ruling that Roper is entitled to this coverage.

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Rose Barber, Respondent,

v.

Daryl Scott Barber, as Personal Representative of the
Estate of Robert Donald Barber, Appellant.

Appellate Case No. 2010-164206

Appeal From Richland County
W. Thomas Sprott, Jr., Family Court Judge

Opinion No. Op. 5096
Heard March 4, 2013 – Filed March 6, 2013

AFFIRMED

Timothy G. Quinn, of Quinn & Mason, LLC, of
Columbia, for Appellant.

James W. Corley, of Columbia, for Respondent.

CURETON, A.J.: Husband's estate appeals from the final order of the family court granting Wife a divorce, equitably dividing the parties' property, and

awarding alimony to Wife. Husband argues the family court erred in awarding Wife the benefit of his survivor's benefit plans.¹ We affirm.

FACTS

In 1996, after more than twenty years of marriage, the parties separated. In 1999, the family court in Lexington County entered a consent order establishing Husband's obligations to (1) pay Wife "\$1,300 monthly as unallocated support," (2) provide her with medical and dental insurance, and (3) maintain "all existing life insurance policies and survivor's benefits."

No further legal action occurred until 2009, when Wife brought an action in the family court in Richland County. Husband answered Wife's Amended Complaint in that action, moved to dismiss, and counterclaimed. In his counterclaim, Husband acknowledged Wife "should be entitled to an equitable distribution of both his military and civil service pensions."

In its Final Decree and Order on February 18, 2010, the family court ordered Husband to allocate to Wife fifty percent of the benefit earned from his retirement plans during the marriage. The family court stated Wife "may elect to waive the Survivor Benefits Coverage."

Husband died while this appeal was pending. His estate was substituted for him as a party to this appeal.

STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011).

¹ Husband identified five issues on appeal. We address only the question of the survivor's benefit plans because, at oral argument, he conceded the remaining four issues.

LAW/ANALYSIS

Husband asserts the family court erred in awarding the benefit of his survivor's benefit plans to Wife. We disagree.

With regard to military retirement benefits, a person who is required by a court order in a divorce proceeding to provide survivor's benefit coverage to a former spouse and who makes such an election may not change that election except through another court order that modifies the election provision of the first order. 10 U.S.C.A. § 1450 (2010). Similarly, survivor's benefits in a civil service retirement plan are subject to "the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree." 5 U.S.C.A. § 8341(h) (2007).

Husband argues that, while the family court had authority to make an equitable division of his retirement plans, it lacked jurisdiction over his election of a beneficiary for his survivor's benefit plans. *See Brown v. Brown*, 279 S.C. 116, 119, 302 S.E.2d 860, 861 (1983) (finding the federal law in effect at that time deprived the family court of jurisdiction over federal survivor's benefit plans and required reversal of family court's requirement that military retiree elect his former wife as the beneficiary of his survivor's benefits), *overruled on other grounds by Tiffault v. Tiffault*, 303 S.C. 391, 392, 401 S.E.2d 157, 158 (1991). Therefore, he reasons, the family court erred in ordering him to maintain Wife as the beneficiary of his survivor's benefit plans.²

We recognize the preemptive effect of federal law. *See Weston v. Kim's Dollar Store*, 385 S.C. 520, 525-26, 684 S.E.2d 769, 772 (Ct. App. 2009) (reciting the supremacy of federal law over state law and acknowledging state law that conflicts with federal law has no effect), *aff'd and remanded*, 399 S.C. 303, 731 S.E.2d 864 (2012). Clearly, our state courts are bound by federal laws applicable to military and civil service retirement plans. Moreover, those laws do not expressly prohibit a family court from ordering a divorcing party to maintain survivor's benefit coverage for a former spouse. On the contrary, the language of the governing

² According to counsel, Husband desired to make his young son, who was born to Husband and a third party, the beneficiary of his survivor's benefit plans.

statutes expressly permits court-ordered designation of beneficiaries. *See* 10 U.S.C.A. § 1450; 5 U.S.C.A. § 8341(h). Accordingly, we find federal law did not deprive the family court of jurisdiction to order the designation of Wife as the beneficiary of Husband's survivor's benefit plans.

We do not reach Husband's remaining issues on appeal. At oral argument, the parties agreed Husband's death had rendered those issues moot.

CONCLUSION

We find the federal law governing military and civil service retirement plans does not deprive a family court of jurisdiction to order a divorcing party to maintain survivor's benefit coverage for his former spouse. Consequently, the decision of the family court is

AFFIRMED.

FEW, C.J., and LOCKEMY, J., concur.

The South Carolina Court of Appeals

State of South Carolina, Plaintiff,

v.

Francisco Guerrero-Flores, Defendant.

Appellate Case No. 2012-212046

ORDER

Francisco Guerrero-Flores has been indicted on drug charges and is awaiting trial. He filed a motion to suppress the contents of phone calls intercepted pursuant to section 17-30-110 of the South Carolina Code (Supp. 2012), a part of the South Carolina Homeland Security Act. *See* S.C. Code Ann. §§ 17-30-10 to -145 (Supp. 2012). Sections 17-30-110 and 17-30-15 require that this court hear the motion to suppress. *See* § 17-30-110(A) (requiring motions to suppress the contents of intercepted wire or oral communications be made to the "reviewing authority"); § 17-30-15(9) (defining "[r]eviewing authority" as "a panel of three judges of the South Carolina Court of Appeals"). Guerrero-Flores raises two arguments in support of suppression.¹ First, he contends the orders authorizing the interceptions violated subsection 17-30-80(D) because they authorized interception

¹ Guerrero-Flores raised additional arguments in his motion to suppress, which he conceded or withdrew at the suppression hearing. First, he argued the State failed to provide any evidence that it complied with the statutory requirements of the Homeland Security Act as to "Target Phone #3 and Target Phone #4." Guerrero-Flores conceded this issue at the suppression hearing. Additionally, Guerrero-Flores conceded his argument that a progress report for "Target Phone #5" was not in date compliance. Finally, Guerrero-Flores argued the order of authorization is insufficient on its face because it was issued based on information obtained through a "hand off" involving a criminal investigation in Tennessee. Guerrero-Flores withdrew this argument at the suppression hearing.

outside of the state of South Carolina. Second, he asserts the intercepted communications should be suppressed because neither the South Carolina Law Enforcement Division (SLED) nor an individual operating under a contract with SLED intercepted the communications as required under section 17-30-70. We deny the motion to suppress.

I. Facts

In September 2009, SLED, the Lexington County Sheriff's Department, and the United States Drug Enforcement Administration (DEA) began investigating a large heroin trafficking organization operating in Columbia and other parts of South Carolina. The organization used multiple cellular phones in the following manner: a purchaser would call one number to place an order, and the "dispatcher" would use a different phone to direct his "couriers" to the purchase location. Between March 5 and June 17, 2010, the Attorney General filed four applications in circuit court seeking authorization to intercept these communications. Each of the applications was based on an affidavit submitted by SLED agent Jack Rushing. The Honorable G. Thomas Cooper Jr. granted each application in a written order.

Based in part on communications intercepted pursuant to the orders, the State Grand Jury indicted Guerrero-Flores and several co-defendants for conspiracy, possession with intent to distribute, two counts of distribution, and several counts of trafficking, all related to heroin. This court held a hearing on Guerrero-Flores's motion in which we took testimony, received documentary evidence, and heard argument.

II. Interpretation of the Homeland Security Act

The Homeland Security Act is patterned after Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22 (2002) (Federal Act). *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012). Because no South Carolina cases have addressed the issues Guerrero-Flores raises in his motion to suppress, we find that federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting the provisions of the Homeland Security Act applicable to this case. *See Whitner*, 399 S.C. at 553, 732 S.E.2d at 864 (explaining "we look to the federal courts' interpretations" of the Federal Act when interpreting comparable provisions of the Homeland Security Act).

III. Compliance with Subsection 17-30-80(D)

Subsection 17-30-80(D) provides that "the judge may enter an ex parte order . . . authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting" Guerrero-Flores contends Judge Cooper's orders do not comply with subsection 17-30-80(D) because they authorize interception of communications outside of the state of South Carolina. We find that each of the orders complies with the subsection because each authorizes interception of phone calls within South Carolina.

The interception of a phone call can occur in two locations—the place where the tapped phone is located and the place where law enforcement officers first overhear the phone call. *See United States v. Luong*, 471 F.3d 1107, 1109 (9th Cir. 2006) (stating "interception occurs where the tapped phone is located *and* where law enforcement officers first overhear the call"); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992) (providing interception occurs at the place where "the to-be-tapped telephone is located" and "at the place where the redirected contents are first heard"). Thus, pursuant to subsection 17-30-80(D), a judge has the power to order interception within South Carolina on the basis of either the phone being located in South Carolina or law enforcement officers listening to the call in South Carolina. In this case, we find the orders comply with subsection 17-30-80(D) for both reasons: (1) they are directed at phones located in South Carolina, and (2) they direct law enforcement officers to listen to the intercepted communications in real time in South Carolina.

First, the orders are directed at phones located in South Carolina. Although these are cellular phones, the applications and supporting affidavits set forth extensive facts demonstrating that the phone users were located in South Carolina. Notably, all but two of the phones had South Carolina area codes.² Further, the applications

² Two of the phones had 773 area codes and subscriber addresses in Irvine, California. The following facts, however, indicate these two phones were being used in South Carolina for the purpose of heroin trafficking. The State presented evidence that, according to Sprint Nextel, the California address is the default address Sprint uses if the subscriber does not provide one when activating the service. Additionally, the State provided the circuit court information from the Department of Motor Vehicles for one of the phone users, which indicated the user

and supporting affidavits provide details to support the fact that the phones were being used in South Carolina as an integral part of heroin trafficking occurring here. Therefore, the orders complied with subsection 17-30-80(D) because they authorized interception of phone calls made to and from phones located in South Carolina.

Second, the orders directed SLED to listen to the intercepted calls in South Carolina.³ Each order contains the following language: "interception shall be conducted at the secure regional facility maintained by the DEA in Atlanta, Georgia, then routed to a secure listening post at the DEA office in Columbia, South Carolina (which is networked to the Atlanta, Georgia facility)." Thus, by requiring SLED agents to listen to the communications at "a secure listening post . . . in Columbia, South Carolina," the orders authorized the interception of the communications in South Carolina. *See Luong*, 471 F.3d at 1109 (providing "interception occurs . . . where law enforcement officers first overhear the call"). Accordingly, the orders comply with subsection 17-30-80(D).

Guerrero-Flores contends, however, the requirement that SLED use a DEA facility outside South Carolina violates subsection 17-30-80(D). We disagree. Guerrero-Flores focuses on the following language in each order: "interception shall be conducted at the secure regional facility maintained by the DEA in Atlanta, Georgia" While Guerrero-Flores is correct that this provision allows interception outside "the territorial jurisdiction of the court," he is not correct that this provision violates subsection 17-30-80(D). His argument ignores the remainder of the quoted sentence: ". . . then routed to a secure listening post at the DEA office in Columbia, South Carolina (which is networked to the Atlanta, Georgia facility)." As explained above, we hold this language complies with subsection 17-30-80(D) because it "authoriz[es] . . . interception . . . within the

had a current South Carolina address. As to the other phone, the State provided the circuit court information showing that both phones were being used by the same person. Finally, the application indicated law enforcement officers physically located one of the phones at a residence in Lexington County using a global positioning system.

³ We find it necessary to the resolution of this motion that we address this second reason the orders complied with subsection 17-30-80(D) because the evidence indicates that some of the phone calls were intercepted at a time when the cellular phones were not physically located in South Carolina.

territorial jurisdiction of the court." The mere fact that the order also authorizes interception in another state does not violate subsection 17-30-80(D). In fact, the State presented testimony of DEA telecommunication specialist Herman Jenkins indicating it is not practically possible for a law enforcement agency to intercept phone calls in South Carolina without using the DEA's regional intercept system facility in Atlanta. Jenkins explained that the DEA's Atlanta facility supports Georgia, South Carolina, North Carolina, and Tennessee. Therefore, all phone calls intercepted by law enforcement in those states are necessarily intercepted in Atlanta, in addition to the forum state.

Guerrero-Flores also argues that a two to three second delay in routing the calls to South Carolina requires a finding that the orders violated subsection 17-30-80(D). He argues that as a result of this brief delay, the calls were not intercepted in South Carolina because officers did not "first overhear" the calls here. *See Luong*, 471 F.3d at 1109 (providing "interception occurs . . . where law enforcement officers first overhear the call"). We disagree. Jenkins testified this delay in routing the calls from Atlanta to Columbia was a necessary consequence of the distance between the two cities, and that the technological limitations made the delay unavoidable. He also testified, although there was a slight delay, the calls were being broadcast to the Atlanta and Columbia offices in such a way that officers in both locations were listening to the communications in real time. In explaining how communications were received by both offices, Jenkins stated, "Whatever happen[ed] in Atlanta, w[ould] happen in Columbia . . . in real time."

Guerrero-Flores argues the use of the word "then" in the circuit court's orders, coupled with the necessary two to three second delay in routing the calls to South Carolina, indicates that the orders authorized calls to be intercepted only in Georgia because they were first heard there. His argument is based on a misreading of *Rodriguez* and *Luong*, and in particular the Second and Ninth Circuits' use of the phrases "first heard" and "first overhear."

In *Rodriguez*, the order authorizing the interception of phone calls was entered in the Southern District of New York, but four of the five phones to be tapped were located in New Jersey. 968 F.2d at 134. Because these phones were not located within the jurisdiction of the court that entered the order, the court did not have authority to enter the order based solely on the location of the phones. *Id.* at 134-35. Analyzing whether the order was nevertheless valid, the Second Circuit focused on the statutory definition of "interception." *Id.* at 135-36. The Federal

Act defines the term precisely as the Homeland Security Act defines "Intercept." Compare 18 U.S.C. § 2510(4) with S.C. Code Ann. § 17-30-15(3) (both defining "intercept" as "the aural or other acquisition of the contents of any wire . . . or oral communication"). The court reasoned that because "the definition of interception includes the 'aural' acquisition of the contents of the communication, the interception must also be considered to occur at the place where the redirected contents are first heard." 968 F.2d at 136.

Rodriguez is based on the location of "aural acquisition of the contents" of the calls, not on the specific timing of that event in one jurisdiction compared to its timing in another jurisdiction where interception might also have occurred. In *Rodriguez*, there was no need to address the significance of a delay between one listening location and another because the only place the calls were "first heard" was New York. See 968 F.2d at 135 (stating "[t]he order was entered on the government's representation . . . that *all* of the interception equipment for these five telephones would be . . . in the Southern District of New York" (emphasis added)).⁴ The *Rodriguez* court used the term "first heard" to distinguish the situation in that case from one in which the calls were not listened to in real time in the forum state, but were initially listened to *only* in another state beyond the court's jurisdiction.

In *Luong*, the Ninth Circuit described the narrow issue before it as "whether this statute authorized the district court in the Northern District of California to

⁴ Other courts have used phrases similar, if not identical, to "first heard." See, e.g., *Luong*, 471 F.3d at 1109 (using the phrase "first overhear the call"); *United States v. Denman*, 100 F.3d 399, 403 (5th Cir. 1996) (using the phrase "original listening post"); *United States v. Tavaréz*, 40 F.3d 1136, 1138 (10th Cir. 1994) (quoting *Rodriguez* for the phrase "first to be heard"). In each of those cases, however, there was only one listening place. See *Luong*, 471 F.3d at 1109 (stating "all of the intercepted conversations would 'first be heard in the Northern District of California[,]'" the forum); *Denman*, 100 F.3d at 401 (stating "the FBI intercepted, monitored, and recorded the calls . . . in Nacogdoches, Texas," within the forum); *Tavaréz*, 40 F.3d at 1138 (stating the calls were listened to in Cleveland County, Oklahoma, the forum). None of those cases involved the simultaneous routing of the call to a distant jurisdiction causing a delay in the call being heard in the forum.

authorize interception of communications to and from a mobile phone . . . located outside of the court's territorial jurisdiction but the government's listening post was located within it." 471 F.3d at 1108. The defendants argued that interception could not occur "where the government sets up a listening post where it is first able to hear the intercepted conversation." *Id.* at 1109. Focusing as the Second Circuit did in *Rodriguez* on the statutory definition of "interception," and not on the timing of what happened in the forum as opposed to some other location, the Ninth Circuit upheld the interception, stating "interception occurs . . . where law enforcement officers first overhear the call." *Id.* Importantly, there was only one listening post in *Luong*. *See id.* (stating the government's "affidavit indicated that . . . all of the intercepted conversations would 'first be heard in the Northern District of California'"). Therefore, the phrase "first overhear" as used in *Luong* cannot be read to apply to the situation we face here—where officers listened to the conversations in real time in South Carolina, but there was a several second delay in routing the calls from the DEA post in Atlanta.

Thus, a several second delay between Atlanta and Columbia is immaterial because the reasoning of *Rodriguez* and *Luong* requires us to focus on the location of the "aural acquisition" of the call. In this case, because law enforcement officers listened in real time in both cities, "aural acquisition" occurred simultaneously in both places.⁵ Therefore, under the reasoning of *Rodriguez* and *Luong*, the orders complied with subsection 17-30-80(D).

⁵ One federal district court has been presented with a similar situation to this case. *See United States v. North*, No. 3:09CR92TSL-FKB, 2011 WL 653864 (S.D. Miss. Feb. 14, 2011). In *North*, the order authorizing the interception of phone calls from North's cell phone was entered in the Southern District of Mississippi. *Id.* at *1. North's cell phone was located outside of Mississippi, "the monitoring post was located in Louisiana, [and] a simultaneous feed and aural acquisition station was located in the wire room of the DEA's Jackson, Mississippi office in the Southern District of Mississippi, so that aural acquisition was occurring in both jurisdictions simultaneously[.]" *Id.* at *3. The *North* court stated that the statute would have authorized interception in Mississippi based on the simultaneous feed; however, "while agents in the Jackson office apparently had the *capability* to hear conversations at the same time as the agents manning the Louisiana monitoring post, this did not occur." *Id.* at *4.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

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

vs.

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

PETITION FOR REHEARING OF
APPELLANTS

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

Attorney for the Appellants

Georgetown, South Carolina

March 21, 2013

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SC Court of Appeals

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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR the Appellants Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown respectfully petition this Court for a rehearing of its Opinion No. 5059, dated March 6, 2013.

SUMMARY OF GROUNDS FOR REHEARING

The Appellants respectfully submit that the Court overlooks or misapprehends the following particular points at issue in this appeal from the decision of Administrative Law Court (ALC):

1. The Court misapprehends the well-established law on standing in environmental cases by:
 - a. creating a new standard requiring property ownership in order to establish an injury in fact;
 - b. overlooking the S.C. Supreme Court's decision in Smiley v. DHEC, 374 S.C. 326649 S.E.2d 31 (2007) and others recognizing aesthetic and recreational interests as sufficient to confer standing; and
 - c. requiring proof of success on the merits, or proof of a future violation, to establish the causal connection necessary for standing.
2. The Court, while agreeing with Appellants that DHEC's review goes beyond the activity authorized by the Corps' NWP and that DHEC did not undertake that

review, overlooks the implications of these conclusions in the following respects:

- a. The Court's conclusions are in direct conflict with the ALC's conclusion that DHEC has no authority to consider impacts from the overall project;
- b. The Court's conclusions warrant remand to DHEC for consideration of the impacts of the "overall project" in light of information that waters of the State will be impacted beyond the impacts authorized by the NWP;
- c. The Court's preliminary conclusions should have led the Court to ultimately conclude that Roper Pond does not have a valid water quality certification because the project includes impacts beyond those authorized by the NWP certification and DHEC undertook no review of those impacts;
- d. DHEC erred in granting Roper Pond coverage under the State General Permit because Roper Pond did not have a valid 401 certification and thus did not have a valid 404 permit, as required for said coverage.

STANDARD FOR REHEARING

The purpose of a petition for rehearing is to "aid the court in deciding correctly a case heard by it." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933) (explaining that petitions for rehearing are often "dismissed with a simple order to that effect, for the reason that they contain nothing but a "rehash" of what the losing party has said before, matters which the court has already considered well and disposed of:"). Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement

System, 349 S.C. 531, 564 S.E.2d 322 (2001). "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Id. at 532, 564 S.E.2d at 322. When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." Covar v. Sallat, 22 S.C. 265, 272 (1885).

SUMMARY OF ARGUMENT

The Court's Opinion is in direct contradiction to the South Carolina Supreme Court and United States Supreme Court's decisions on standing, which will surely lead to confusion and likely have far-reaching implications for citizens and municipalities in their efforts to protect the aesthetic, recreational and environmental qualities of their neighborhoods. The Opinion injects a new requirement for injury in fact that a Plaintiff have a property interest in the area over which the challenged activity will occur. The Opinion further injects a requirement for causal connection that a Plaintiff prove success on the merits, or a future violation. Neither of these standards have been applied by any court, indeed, both federal and South Carolina courts hold the contrary.

The Court's Opinion agrees with Appellants' arguments that DHEC has broad authority to consider the "overall project," including impacts beyond those specifically authorized by an NWP, but then overlooks how those conclusions impact the certification and General Permit coverage at issue in this appeal.

ARGUMENT

I. The Court's Opinion Misapprehends the Law of Standing

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

The Court's Opinion cites the correct test for standing, but then injects a new requirement that an Appellant must have a property interest in order to establish standing. The Court holds that "similar to what we noted in our discussion about the Kaminer Station Appellants, **the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact.**"¹ (Shearhouse Adv.Sht. at 51). The Court applies the same requirement to the Town, rejecting as a basis for standing the Town's interest in Cary Lake, based on the fact that "the Town ha[s] no ownership interest in Cary Lake."² (Shearhouse Adv.Sht. at 49). The addition of this new, heightened standard for injury in fact overlooks and misapprehends the numerous South Carolina appellate court decisions, as well as Fourth Circuit and U.S. Supreme Court cases adopted in South Carolina, finding standing on nearly identical allegations of harm to aesthetic or recreational interests.

The Court's Opinion appears to acknowledge that the Kaminer Station Appellants will suffer some injury-in-fact ("The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC **to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.**" (Shearouse Adv.Sht. No. 11 at 49)). The Opinion cites to the "visual

¹Interestingly, when it comes to Elaine Starr's testimony, the Court overlooks the fact that Mrs. Starr, who lives on Cary Lake and is a member of the Cary Lake Homeowners Association, who owns Cary Lake, which is the receiving water body for Roper Pond's stormwater.

²Further, the Court adopts, and does not correct, the ALJ's exclusive reliance on whether the Town possesses an ownership interest in Cary Lake and Roper Pond. See Final Brief, p. 41.

appeal of Roper Pond” discussed by Mrs. Jackson. (Shearhouse Adv.Sht. at 50). The Opinion acknowledges that Mrs. Jackson’s aesthetic and recreational interests are exactly the type of injury that courts have found sufficient to establish standing. (Id.) (citing Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001)). Indeed, Mrs. Jackson testified that she has walked or run past the pond “thousands and thousands” of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. (R. p. 373). She described the pond as “absolutely beautiful.” (R. p. 374).

Elaine Starr, who lives on Cary Lake testified that she also enjoyed viewing the lily pad pond and said it is “absolutely gorgeous.” (R. p. 400). She said there are “white blooms, pink blooms, and you can see lots of life around it, like dragonflies” and that it is an aesthetic part of the community. (R. pp. 400; 413). She testified that if the pond is dredged there will be loss of a lot of life in the sediment itself and the lilies she enjoys seeing will not be there. (R. p. 401).

The Order further overlooks the testimony related to the Town’s aesthetic interests in the attractiveness of the Town upon entering and seeing the lily pad pond. Town Mayor Richard Thomas testified as to the Town’s aesthetic interest in this project, and that testimony was undisputed. (R. pp. 822-23). This aesthetic interest in and of itself is sufficient to confer standing, and the Court’s Opinion plainly overlooks this fact.

The Opinion appears to recognize that aesthetic and recreational interests are sufficient to establish an injury-in-fact in citing Sea Pines, but then inexplicably the Court inserts a new

standard requiring Plaintiffs to have property rights in the areas over which an environmental permit is sought, citing Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4th Cir. 1974). Costanzo stands for the proposition that an injury-in-fact cannot be *assumed* when the challenge involves private property. But in this case, Appellants did not expect the ALC or this Court to *assume* anything. Rather, the Appellants put forth evidence of injury in fact in the form of harm to recreational and aesthetic interests, similar to that alleged in Smiley v. SCDHEC, 374 S.C. 326, 649 S.E.2d 31 (2007); Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693 (2000); American Canoe Assn. v. Murphy Farms, 326 F.2d 505 (4th Cir. 2003). Even the court in Costanzo noted that the "claimed injury need not be great or substantial; an 'identifiable trifle', if actual and genuine, gives rise to standing." Id. at 501 (citing SCRAP, 412 U.S. 669, 687-689, n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)). Not only did the Appellants identify harm to their aesthetic and recreational interests, each of Appellant groups went on to describe even more injuries that would result directly from the development project at issue in this appeal: degraded water quality as a result of the project; sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired; impact on Cary Lake because of the increased density; impact to the character of the Town; diminished property values; the environmental quality of the Town; and increased crime, traffic and congestion as a result of the project. Certainly these allegations are

more than an "identifiable trifle" needed for standing.³

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

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

³The Court appears to equate these allegations of harm with a requirement for proof on the merits. See Section I.C. below.

for his rehabilitative jogging for at least six months a year for at least the next five years, are sufficient allegations of a 'stake in the outcome' to permit Smiley standing to challenge the permit." *Id.* (citing U.S. v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

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

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

In addition to imposing a property right requirement on the Town, the Court further misapprehends the relationship between the challenged project and the Town's obligations under the Clean Water Act. In arguing standing to this Court, the Town asserted its interest in complying with federal law – that is, in complying with the Town's Clean Water Act NPDES permit. This Court rejected that interest as a basis for standing, concluding: "We have found nothing in [33 U.S.C. § 1342, the authority cited by the Appellants,] either requiring a municipality to obtain a permit for stormwater discharges from a stormwater system that is already covered by a permit or holding a municipality responsible for such discharges." (Shearouse Adv. Sht. at 49, n.11).

Contrary to this Court's conclusion, the Town is required to have an NPDES stormwater

permit that imposes a continuing duty to comply with certain standards and limitations, and subjects the town to liability/responsibility if it fails to do so. 33 U.S.C. § 1342(p)(4) ("the Administrator shall establish regulations setting forth the permit application requirements for [MS4] stormwater discharges . . . Any such permit shall provide for compliance as expeditiously as practicable"). The project challenged in this action has the distinct potential to detrimentally impact the Town's ability to comply with those standards and limitations, which is a sufficient interest for municipal standing under the authority cited in the Appellants' Final Brief. See Final Brief, p. 39-41. The Court overlooks the Town's responsibility under the Clean Water Act's NPDES program.

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. In urban settings like Arcadia Lakes, stormwater runoff is collected through storm drains and pipes, and is channeled through a storm sewer system. These storm sewer systems are known under the CWA as Municipal Separate Storm Sewer Systems (MS4s). The Town of Arcadia Lakes operates an MS4 to collect and channel stormwater. See (R. p. 822, 828, 844). This MS4 collects stormwater from Roper Pond's property. See (R. pp. 828; Shearhouse Adv.Sht. at 39).

Under the Clean Water Act, MS4s fall under the definition of "point sources." See 33

U.S.C. § 1362(14). The CWA generally prohibits the discharge of any pollutant from a “point source” into the navigable waters of the United States unless the point source is covered by an NPDES permit. See, 33 U.S.C. §§ 1311(a), 1362(12)(A)); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999). MS4s are no exception – a municipality operating an MS4 that discharges into navigable waters must comply with the NPDES permit program.⁴ See, 33 U.S.C. § 1342. Arcadia Lakes operates such an MS4. See (R. p. 822, 828).

The NPDES component of the CWA requires municipalities to obtain permits that place limits on the type and quantity of pollutants that can be released from an MS4. See, 33 U.S.C. § 1342(a), (p). Particularly, an NPDES permit requires its holder, the municipality, to comply with certain effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and discharge requirements. See, 33 U.S.C. §§ 1342(a), 1311, 1312, 1314, 1316, 1317, 1318, 1343. Under this framework, **the Town of Arcadia Lakes operates an MS4 that necessitates an NPDES permit and requires compliance with NPDES standards and limitations.** See (R. pp. 828, 844). Arcadia Lakes thus has a significant interest in the quality of stormwater runoff entering its storm drains and pipes, and flowing through its MS4. This includes stormwater from Roper Pond’s development. See (R. pp. 828).

When an MS4 operating municipality does not comply with the NPDES requirements, that municipality is subject to suit and liability under the CWA, which can be initiated by either

⁴Some small MS4s do not have to comply with NPDES, but that exception is not relevant here.

the government or private citizens. See, e.g., Env'tl. Conservation Org. v. City of Dallas, 529 F.3d 519 (5th Cir. 2008); Natural Res. Def. Council, Inc. v. County of Los Angeles, 673 F.3d 880 (9th Cir. 2011). Particularly, under the CWA citizen-suit provision, federal courts are authorized to enter injunctions and assess civil penalties, payable to the United States Treasury, against any municipality found to be in violation of "an effluent standard or limitation" under the CWA. See, 33 U.S.C. § 1365(a); Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 175 (2000). Further, as to an MS4, the CWA "does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution." Natural Res. Def. Council, 673 F.3d at 900. In other words, if stormwater from Roper Pond causes the Town's MS4 to be noncompliant, the Town itself is liable.

With this more thorough outline of the NPDES framework, it is plain to see that the Town has an interest in this litigation sufficient for standing under the authority outlined in the Appellants' briefs. This interest is whole and apart from those of the Town's citizens and the individual Appellants, and has a direct causal connection to the activities that triggered the DHEC permitting requirement at issue in this case.

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

In this case, the causal component of standing requires that the Appellants' injury-in-fact be "fairly traceable to the challenged action," i.e., Roper Pond's permitted construction activities

– activities including excavation of the pond. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992). In contrast, this Court's Opinion requires that the Appellants' injury-in-fact be fairly traceable to a violation or noncompliance on the part of Roper Pond. In short, the Opinion requires that the Appellants prove the merits of the case in order to prove standing. The Appellants offered testimony, especially through Mrs. Jackson, Mrs. Starr and Mr. Thomas, that when the pond is excavated, as will happen under the permitted project, their enjoyment in viewing the pond and related activities would be eliminated – they would be injured for purposes of standing. (R. p. 374-376 & 401). This Court rejected those injuries on the basis of causation, because the Court concluded the Appellants could not prove that the permitted BMPs were inadequate (Shearhouse Adv.Sht. at 49) or that Roper Pond would violate the terms of its permit in the future (Shearhouse Adv.Sht. at 50). Proof of the merits of this case is a wholly separate issue from whether the activities that are part of the challenged project – in this case the excavation of the pond – bear a causal connection to the Appellants' injury-in-fact.

This Court's misapplication of the causation principle is perhaps best illustrated by analogy to a similar case. In Duke Power Co. v. Carolina Envtl. Study Group, Inc., the merits of the case involved the validity of the provisions of the Price-Anderson Act, which limited maximum liability in the event of any single nuclear incident to \$560,000,000. 438 U.S. 59 (1978). The plaintiffs, who lived near the proposed construction site for two nuclear power plants, challenged the constitutionality of that Act. Id. at 67. For purposes of standing, the

plaintiffs asserted injuries related to the possibility of a nuclear accident, as well as injuries related to the normal operation of the plants. Id. at 73-74. First of all, the Supreme Court concluded that it need not determine whether the injuries based on the possibility of a nuclear accident were "sufficiently concrete to satisfy constitutional requirements." Id. at 73. Rather, "several of the 'immediate' adverse effects" of the nuclear plants, including "environmental and aesthetic consequences" were of "the type of harmful effect which has been deemed adequate in prior cases." Id. at 73-74. In the same way, while the Appellants have asserted injuries related to future permit noncompliance or insufficiency, the Appellants have also asserted immediate adverse effects resulting from completion of the permitted activity.

As to causation, the Duke Power Court applied a but-for standard. Id. at 74-75. The plaintiffs position on causation was that but for the Act's limitation on liability, the nuclear plants would not be constructed, and the "immediate adverse effects" would then not occur. Id. at 74. The Court found a "substantial likelihood" of this "but for" relationship, and upheld causation and standing. Note that actual operation of the nuclear plants was not an issue on the merits, yet formed the basis for plaintiffs' standing. **The plaintiffs' injuries in fact had nothing to do with the plaintiff's constitutional claims, and the Court found that no such nexus was required.** Id. at 78. In the same way, the Appellants have identified aesthetic and recreational injuries that would not occur but for the permit at issue in this case. Those injuries form a sufficient basis for standing, apart from any reference to the merits of the case.

Instead of applying this but for analysis, the Court's Opinion instead sets a new standard of requiring Appellants to prove success on the merits (or that a violation of the permit is certain to occur) to meet the causal connection. Proof of the merits of the case is a wholly separate question from whether the activities facilitated by the challenged permit, including excavation of the pond, will lead to injury-in-fact. Indeed, courts regularly find that a project fully complies with the regulatory requirements, but that the plaintiff had standing to challenge the decision.

Mrs. Jackson and Mrs. Starr testified that if the pond were excavated, their enjoyment in viewing the pond would be gone. (R. pp. 374-376 & 401). The Town asserted its interests in the attractiveness of the Town based on the aesthetics of the lily pad pond upon entering the Town (R. pp. 822-23) – an allegation nearly identical to that described in Sausalito v. O'Neill, 386 F.3d 1186, 1197-98 (9th Cir. 2004). These aesthetic and recreational injuries have a but-for causal connection to the permit at issue in this case. And the Court need not engage in any degree of speculation to reach such a conclusion – if the permit stands, the pond will be excavated and these “immediate adverse effects” will occur.

The Opinion focuses its “causal connection” discussion on Jackson's concern about how the site would be managed, in light of her past experience with permit violations. The Opinion wholly overlooks her concern, along with Mrs. Starr's, about not being able to view and enjoy the pond and its attendant wildlife, which the Court earlier concedes are injuries in fact. The requisite causal connection is established through uncontroverted evidence that the lily pads and

wildlife will be eliminated by the excavation of the pond, coupled with the asserted use and enjoyment of viewing the pond and its wildlife. There is a direct link between the excavation of the pond and the injuries complained of by Mrs. Jackson, Mrs. Starr, and Mr. Thomas, i.e., loss or decrease of aesthetic and recreational interests.

Similarly, when assessing Mrs. Starr's testimony, the Court applies a heightened test for demonstrating a "causal connection," stating that "granting coverage for Roper Pond Apartments under the State General Permit" would not "cause an actual or imminent injury." (Shearhouse Adv. Sheet at 51). In so doing, the Court is requiring the exact type of nexus between merits and injury-in-fact that was flatly rejected in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. at 78. The question of adequacy of the Best Management Practices ("BMPs") goes to the merits of the case, not to standing, and the Appellants do not have the burden of proving that the BMPs are insufficient in order to establish standing. Just like with Mrs. Jackson, the Court imposes a requirement that Mrs. Starr prove either a future violation (that the project would be mismanaged) or success on the merits (that the SWPPP was insufficient). Both of these questions go far beyond the requirement that an injury in fact be "fairly traceable" to the challenged activity as described in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992).

A plaintiff need only show that he or she will suffer some "identifiable trifle" of injury. In applying this standard, the court in Pye v. U.S. noted that if "the Residents do not have

standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this ... grant.” 269 F.3d 459, 468 (4th Cir. 2001) (citing Society Hill Towers Owners’ Assn. v. Rendell, 210 F.3d 168, 176 (3rd Cir. 2000)). If those who are seeking to protect the environmental quality of the areas they use do not have standing, then “the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action.” Id.

Standing in Pye was not based on the regulatory or technical sufficiency of the permitted activity, but rather on a but for relationship between the permitted activity and the alleged harm. Id. at 468-69. Similarly, in this case the Appellants do not need to offer evidence on the technical sufficiency of the SWPPP in order to establish an injury-in-fact, they merely need to make allegations of any injury that is “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” Smiley v. South Carolina Dept. of Health and Environmental Control, 374 S.C. 326, 649 S.E.2d 31 (2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992)).

Appellants did just that by alleging that they enjoy and benefit from viewing the pond and observing wildlife, and that if the pond were excavated as will occur by way of this challenged decision, their benefit and enjoyment would be lessened.

II. Validity of the 401 Certification and General Permit Coverage

A. The Court Misapprehends Appellants Arguments on Applicability of DHEC's 401 Certification of the NWP to Excavation of the Pond

The Court characterizes the Appellants argument as contending that "the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was *not disclosed* when Roper Pond applied to the Corps for a 404 permit."⁵ (Shearhouse Adv. Sht. at 52) (emphasis added). The Court misapprehends Appellants argument. The basis of the Appellants legal challenge is not simply that Roper Pond failed to disclose the excavation, though this had this deficiency not occurred DHEC would have had the information regarding the overall impacts. Rather, Appellants assert that 1) the NWPs only cover certain clearly defined activities; 2) DHEC's NWP certifications further limit those activities by requiring projects to comply with general conditions; 3) in order to receive coverage under DHEC's NWP certification the activity must be limited to the impacts authorized by that certification and must meet the general conditions; 4) the general conditions require DHEC to review the "overall project," not review of "only the land area directly impacted by the NWP;" and 5) when the impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly

⁵Appellants suggest that the failure to disclose requested information on a permit application where the applicant certifies that the "information in this packet is complete and accurate" at a minimum casts doubt on the credibility of this witness as it relates to statements made regarding this application process. (R.pp. 553-54).

do in this case, they are not covered by DHEC's NWP certification.

This Court's Opinion recognizes DHEC's broad authority to review impacts that go beyond those authorized by the specific NWP in concluding that DHEC must review the "overall project proposed" by the developer. (Shearhouse Adv. Sht. at 52). Alterations or impacts to wetlands and waters beyond those defined in the NWPs are not covered by DHEC's 401 certifications of NWPs. (R. p. 603, lines 8-10).

In order to determine whether a project meets the conditions of DHEC's NWP certification, DHEC must conduct a review and affirmatively conclude that the conditions are either met or not. The point is that excavation of the pond is not contemplated by or authorized under DHEC's NWP certification. The General Conditions of the NWP certifications, and Regulations 61-68 and 61-101,⁶ require DHEC to review impacts beyond those authorized by the specific NWP, specifically excavation of the pond. Indeed, this Court effectively agrees with that argument.

⁶Regulation 61-10 requires DHEC to consider: "whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts, including: (1) impact on existing and classified water uses; (2) physical, chemical, and biological impacts, including cumulative impacts; (3) the effect on circulation patterns and water movement; (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others." S.C. Code Ann. Reg. 61-101.F.(3). Regulation 61-68 water quality standards require the maintenance and propagation of a balanced, indigenous aquatic community of fauna and flora. S.C. Code Ann. Reg. 61-68.A.(4). The water quality standards also require DHEC to "maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . ." S.C. Code Ann. Reg. 61-68.A.(4).

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

The Court's Opinion correctly notes that DHEC's 401 certifications for those general permits, or Nationwide Permits, "include general conditions that a given project must meet, including the requirements that DHEC . . . would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity."⁷ (Shearouse Adv.Sht. No. 11 at 41). The Opinion also cites the Corps of Engineers' requirement that in order for the project to be valid under NWP 39, it "had to comply with the general conditions of the NWP, regional conditions, and **certain special conditions**, . . . including 'all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification' . . ." (Id. at 42). The Court holds that DHEC is required to "review the 'overall project proposed by a single owner/developer,' 'includ[ing] all land within the project bound by single ownership,' and is not confined to 'the land area directly impacted by each NWP request.'"⁸ (Shearhouse Adv. Sht. at 52). The Court further agrees with the Appellants "that no

one at DHEC undertook a complete examination of the impact of the project on all waters and
~~_____~~⁷The Court takes a limited view of the "activity," apparently interpreting "activity" to mean only the fill, yet the General Permit Coverage is a Stomrwater Permit for construction activities, and is not limited to review of wetland fill. In addition, the Water Qaulity Certification Regulations, and the conditions of the 401 Certifications, require a broad review to include considerations beyond simply the wetland fill.

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

wetlands at the project site or determined if feasible alternatives were available,” as required by the certification conditions. (Id.) Then the Court’s Opinion fails to take the next logical step, which is that Roper Pond does not qualify for NWP certification because its project includes impacts on the overall project site that exceed the NWP certification and that it thus fails to comply with the NWP certification.⁹

Instead of taking the next logical step, the Opinion begins a discussion of federal law, and appears to make the assumption that because no Clean Water Act approval is needed for excavation of the lily pad pond, there is no requirements for State review and approval. This Court is correct that the Appellants have never alleged that a 404 CWA permit is needed for excavation. Clean Water Act authority is not at issue in this case. The South Carolina Supreme Court has directly addressed the question of whether State authority to regulate wetlands and waters exceeds Federal regulation under the Clean Water Act, and has expressly ruled that “federal [CWA] jurisdiction is not essential to [State] consistency review.” Spectre, LLC v. S. Carolina Dept. of Health & Env’tl. Control, 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010).

While Spectre involved DHEC’s regulatory authority under the S.C. Coastal Zone Management Act and this case presents the question of DHEC’s regulatory authority under the S.C. Pollution Control Act, the parallel is that our Supreme Court has expressly ruled that South Carolina law can and does give DHEC broader regulatory authority than the Clean Water Act. The dredging

⁹Even DHEC admits that a “specific determination” is required to insure that a project meets the conditions of its NWP certification. (R. p. 609). If a project does not meet the specific and general conditions of the NWP certification, Hightower said DHEC requires an individual certification. (R. p. 253).

and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC has broader review authority over waters of the State that derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.¹⁰ And in this case, the conditions of DHEC's NWP certification expressly retain the agency's authority to review those impacts.

The Court's Opinion overlooks this argument that the DHEC NWP certification is broader than the Corps NWP approval. The Opinion points out that Appellants have not argued that alterations to the pond resulted from filling of the wetlands, and the Court is correct. This statement shows a fundamental misunderstanding of how the 404 and 401 programs relate to each other. There are two separate regulatory programs with two separate regulatory criteria and, in this case, two separate sets of conditions imposed on NWPs by each agency. Indeed, the Clean Water Act Section 1341(a)(1) cited in the Opinion specifically states that the State must certify that a discharge complies with "applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." 33 U.S.C. § 1341(a)(1). Section 1313 requires states to adopt water

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

quality standards, and DHEC has promulgated those regulations in S.C. Code Ann. Reg. 61-68. 33 U.S.C. § 1313. DHEC also promulgated water quality certification regulations at S.C. Code Ann. Reg. 61-101. The Clean Water Act states that “[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements.” 33 U.S.C. § 1341(b). Yet that is exactly what the ALC and this Court have done – allow the Corps’ NWP to act as a limitation on DHEC’s authority to require compliance with State water quality requirements, despite the CWA’s clear language that it not be construed to limit State’s authority to include additional water quality requirements.

The Court acknowledges that DHEC did not conduct the overall review required by the NWP certification conditions, but does not hold DHEC accountable for its failure. If DHEC does not conduct some review to ensure that the project meets the conditions of the NWP 401 Water Quality Certification, and DHEC does not consider “all land within the project boundary under single ownership,” then the conditions applicable to the NWPs will be rendered superfluous.¹¹

The fact that this Court agrees that DHEC does have authority to review the “overall project” should warrant reversal of ALJ’s conclusion to the contrary (holding that DHEC has no

¹¹As a practical matter, DHEC could, in theory look at the Joint Federal and State Application and determine, if an applicant was forthright, whether the project exceeded DHEC’s certification authorization. Through that process DHEC could determine when it need to conduct an individual certification review because the project exceed what was authorized by the NWP certifications, as it should have done in this case.

authority to review the excavation portion of the project¹²) (ALC Order, R. p. 30). In addition to the internal conflict within the ALC's Order, there is a direct conflict between the ALC's Order and this Court's Opinion on the question of DHEC's authority.

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

Given the Court's conclusion that DHEC must review the "overall project," and that DHEC did not undertake a "complete examination of the impact of the project on all waters and wetlands at the project site" (Shearhouse Adv. Sht. at 52), the Court necessarily should conclude that 1) the project fails to comply with the 401 Certification of NWP 39 and 2) DHEC should have either issued a certification denial letter or required an individual 401 certification review through which it could consider "all land within the project" given DHEC's knowledge that the pond – a water of the State¹³ – would be excavated.

¹²The ALJ's conclusion is in conflict with his finding that an individual 404 permit and accompanying 401 Water Quality Certification is required if a proposed activity does not meet the conditions of the 401 Water Quality Certification for the NWP. (R. p. 15, FF #27).

¹³The Pollution Control Act defines waters as "Lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction." S.C. Code Ann. § 48-1-10(2).

C. The Court Overlooks the Requirement for a Certification Decision

It is precisely because DHEC was required to undertake some review of the “overall project proposed by” the developer, including review of “all land within the project boundary under single ownership,” which is not confined to “the land area directly impacted by each NWP request, DHEC necessarily had to arrive at some decision regarding compliance with those NWP certification conditions. DHEC’s failure to conduct the review and make a determination of whether the project meets the NWP conditions and qualifies for coverage is fatal, and Roper Pond thus lacks 401 certification.

D. The Court’s Conclusions Overlook the Implications on the Stormwater

General Permit Coverage

Section 2.1(C) of the NPDES General Permit provides as follows: “If a US Army Corps of Engineers’ 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective.”¹⁴ (R. p. 487) **If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.”** (R. pp. 555-562). The NPDES General Permit conditions expressly require that any Corps of

¹⁴ On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 (“Guidance Document”). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 487). Because the project did not qualify for coverage under DHEC's NWP certification, it was not entitled to coverage under the General Permit. Thus, the Court erred in failing to conclude that DHEC improperly granted coverage under the General Permit for its failure to comply with the conditions of the NWP certification and consider the "overall project," specifically the excavation of the pond.

CONCLUSION

WHEREFORE, the Appellants respectfully request that this Court issue an Order granting Rehearing and reversing the Final Order and Decision of the Administrative Law Judge and concluding that Roper Pond, LLC does not have valid state approval for the dredging and excavation of the lily pad pond, and that the Appellants have standing to maintain this action.

Respectfully submitted,



Amy E. Armstrong

Michael Corley

Amy E. Armstrong
Michael Corley
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 Appellants

Georgetown, South Carolina

March 21, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

**RESPONDENT ROPER POND, LLC'S RETURN TO
APPELLANTS' PETITION FOR REHEARING**

W. Thomas Lavender, Jr. (SC Bar No. 3143)
Joan W. Hartley (SC Bar No. 72735)
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, South Carolina 29202
Tel: 803.771.8900
Fax: 803.727.1471

Attorneys for Roper Pond, LLC

Columbia, South Carolina
April 1, 2013

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Appellants contend that the Court's ruling creates a new standard for establishing standing. These contentions disregard the distinction between the sufficiency of allegations at the pleading stage and the requirement to offer evidence sufficient to prove such allegations at trial. The Court's ruling recognizes the requirement that there be a causal connection between the alleged injury and the action challenged. In this case, the action challenged is DHEC's grant of coverage to Roper Pond under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("State General Permit"), ("State General Permit"), based upon approval of Roper Pond's storm water pollution prevention plan ("SWPPP"). The Court correctly found that the Appellants failed to present evidence to demonstrate an injury in fact causally connected to DHEC's grant of coverage to Roper Pond under the State General Permit.

Appellants further contend that the Court should have remanded this matter to DHEC for consideration of the impacts beyond those authorized by the United States Army Corps of Engineers ("Corps") Nationwide Permit. Similarly, Appellants contend that Roper Pond did not have a valid 401 water quality certification for the Nationwide Permit and thus did not have a valid 404 permit authorizing the filling of the 0.075 acres of wetlands. The Court correctly held that the excavation of the pond was not an impact to be reviewed by DHEC pursuant to the 401 water quality certification for Nationwide Permit 29. While Appellants acknowledge the excavation of Roper Pond does not require a 404 permit, Appellants continue to argue that the excavation of the Pond in connection with project, nonetheless, creates a requirement for a 404 permit despite the absence of such requirement in the Clean Water Act and the Corps' concurrence of that no permit under the Clean Water Act is required for such excavation. Contrary to Appellants' contentions, the Court correctly

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held that no additional 404 permit or 401 water quality certifications were required prior to DHEC's grant of coverage to Roper Pond under the State General Permit.

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

Appellants contend that they have asserted alleged injuries in fact sufficient to establish standing to challenge DHEC's decision to grant coverage to Roper Pond under the State General Permit. Appellants' contention that the Court misapprehends well-established law is based on Appellants' failure to recognize the distinction between the sufficiency of allegations to support standing at the pleading stage and the requirement to offer sufficient evidence to prove such allegations at trial. Contrary to Appellants' assertions, the Court's ruling does not require the Appellants to prove success on the merits. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court stated the three-prong standing test and explained the burden of proof with respect to allegations to establish standing as follows:

The party invoking federal jurisdiction bears the burden of establishing these elements. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990); *Warth, supra*, 422 U.S., at 508, 95 S.Ct., at 2210. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889, 110 S.Ct. 3177, 3185-3189, 111 L.Ed.2d 695 (1990); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114-115, and n. 31, 99 S.Ct. 1601, 1614-1615, and n. 31, 60 L.Ed.2d 66 (1979); *Simon, supra*, 426 U.S., at 45, n. 25, 96 S.Ct., at 1927, and n. 25; *Warth, supra*, 422 U.S., at 527, and n. 6, 95 S.Ct., at 2219, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra*, 497 U.S., at 889, 110 S.Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can

no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone, supra*, 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31.

504 U.S. 555, 561 (1992). This Court applied the proper standard in reviewing the ALC's ruling on standing to confirm that the evidence presented at trial by Appellants, including the absence of sufficient evidence, supported that ruling.

With respect to the Kaminer Station Appellants, the Court upheld the ALC's ruling on standing "to the extent that it found that Appellants have failed to establish an injury that would be traceable to the permitting decision." (Shearhouse Adv. Sht. at 49). Contrary to Appellants' assertions, the Court did not hold that the aesthetic interest of the Kaminer Station could not be an injury in fact. Instead, the Court affirmed the ALC's determination that the Kaminer Station Appellants failed to offer evidence of a causal connection between the injuries alleged and the permitting decision at issue in this case:

When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves. Furthermore, Reice's inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

(Shearhouse Adv. Sht. at 50). Fundamental to this ruling is the recognition of the conduct complained of in this action—i.e., DHEC's approval of the SWPPP and authorization of coverage to Roper Pond under the State General Permit. Most, if not all, of Appellants' alleged injuries in support of standing would result from Roper Pond's failure to manage sediment and erosion control in accordance with the approved SWPPP and the State General

Permit. With respect to these allegations, the potential injuries alleged would not be caused by the issuance of coverage under the State General Permit, but by a failure to comply with the SWPPP and the State General Permit. Moreover, as the Court correctly held, Appellants failed to offer any evidence that "BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site." (Shearhouse Adv. Sht. at 49).

Appellants further contend that the Court disregards the other injuries alleged: "degraded water quality as a result of the project; sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired; impact on Cary Lake because of the increased density; impact to the character of the Town; diminished property values; the environmental quality of the Town; and increased crime, traffic and congestion as a result of the project." (Petition, p. 6). With respect to allegations regarding the character of the Town, property values, and increased crime and traffic, Appellants offered no credible evidence that the proposed development would result in the harm alleged. These concerns are nothing more than mere speculation based on the perceived character and behavior of the residents of the multi-family residential development to be constructed. More significantly, such allegations are clearly unrelated to DHEC's decision at issue in this case, and therefore, not an injury in fact which is causally connected to the challenged agency action. With respect to the alleged injuries related to water quality and impact to Cary Lake, as discussed above, such injuries would be the result of Roper Pond's failure to conform to the conditions of the SWPPP and the State General Permit—not the issuance of coverage under the State General Permit—which is the challenged action in this matter.

To the extent that Appellants have alleged injuries which are at least generally

related to DHEC's grant of coverage to Roper Pond under the State General Permit, the Court noted that the Appellants' expert failed to opine that the land-disturbing activities authorized under the State General Permit would adversely impact Roper Pond:

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

(Shearhouse Adv. Sht. at 45). As both the ALC and this Court recognized, Appellants failed to present any evidence that the activities authorized by the DHEC decision at issue in this case would result in the injuries alleged by Appellants. Under South Carolina and federal case law, Appellants bear the burden of proof at trial to present such evidence. The Court correctly held that Appellants failed to meet this burden.

II. THE COURT PROPERLY APPLIED THE TEST FOR STANDING WITH RESPECT TO ALLEGED INJURIES TO PRIVATELY-OWNED BODIES OF WATER.

Appellants assert that the Court "injects a new requirements that an Appellant must have a property interest in order the establish standing." (Petition, p. 4). Appellants rely on the holding in *Smiley* for the holding that aesthetic and recreational interests are sufficient to confer standing. Appellants recite the holding in *Smiley* as follows:

In *Smiley* the Supreme Court held that a plaintiff must make claims as to "use and enjoyment" of an affected area. *Smiley v. S. Carolina Dept. of Health and Env'tl. Control*, 374 S.C. 326, 333, 649 S.E.2d 31 (2007). In that case, the Court found that "interference with Smiley's enjoyment of the beach, and his inability to use it for his rehabilitative jogging for at least six months a year for at least the next five years, are sufficient allegations of a 'stake in the outcome' to permit Smiley standing to challenge the permit." *Id.* (citing *U.S. v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

(Petition, pp. 7-8). The petitioner challenging the beach renourishment project in the *Smiley* case alleged an injury based on the interruption of his use to a “public beach on the Isle of Palms.” *Smiley v. South Carolina Dep’t of Health and Envtl. Control*, 374 S.C. 326, 330, 649 S.E.2d 31, 33 (2007) (emphasis added). Such is not the case here. The Court correctly recognizes that the pond on the Roper Pond property is a man-made pond wholly within the boundaries of the Property. Citing to the holding in *Conservation Council of N.C. v. Costanzo*, 505 F.2d 498 (4th Cir. 1974), the Court notes that an injury in fact will not be assumed when property at issue is privately owned. In *Costanzo*, the Fourth Circuit held as follows:

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

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

intervene, the standard for which would have been determined pursuant to Rule 24, SCRCF.

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

In most kinds of litigation, there is scant need for courts to pause over the standing inquiry. One can readily recognize that the victim of an automobile accident or a party to a breached contract bears the kind of claim that he may press in court. In other sorts of cases, however, the nexus between the legal claim and the individual asserting the claim may not be so self-evident. Standing inquiry in environmental cases, for example, must reflect the context in which the suit is brought. In some instances, environmental injury can be demarcated as a traditional trespass on property or tortious injury to a person. In other cases, however, the damage is to an individual's aesthetic or recreational interests. The Supreme Court has made it clear that such interests may be vindicated in the federal courts. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 705, 145 L.Ed.2d 610 (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. at 562-63, 112 S.Ct. 2130 (purely aesthetic interest is cognizable for purposes of standing); *Sierra Club v. Morton*, 405 U.S. at 734, 92 S.Ct. 1361 ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society ... deserving of legal protection through the judicial process."); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (interest supporting standing "may reflect aesthetic, conservational, and recreational as well as economic values" (internal quotation marks omitted)). But because these and other noneconomic interests may be widely shared, the Supreme Court has cautioned that environmental plaintiffs must themselves be "among the injured." *Sierra Club v. Morton*, 405 U.S. at 735, 92 S.Ct. 1361. If it were otherwise, the Article III case or controversy requirement would be reduced to a meaningless formality.

Courts must therefore examine the allegations in such cases "to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752, 104 S.Ct. 3315. **Such scrutiny is necessary to filter the truly afflicted from the abstractly distressed.** Courts discharge this duty by asking such questions as: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated?"

Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Id.* If the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and an adjudication of his rights.

Id. at 154-55 (emphasis added). Appellants interpret aesthetic interest so broadly as to confer standing on any party who has "enjoyed viewing" the property which is the general subject of the challenged action. Moreover, Appellants have failed to present evidence as to how the DHEC decision at issue in this case negatively impacts its enjoyment of viewing the Roper Pond property in an actionable manner. Accepting Appellants' standing argument would suggest that they could assert standing if Roper Pond constructed a fence obstructing the view of the pond from the public roadway; however, such action would clearly not be actionable. Indeed, the Appellants' claims to potential harm resulting from any deprivation of the enjoyment of the view of Roper Pond can be no more than a claim of being "abstractly distressed." Appellants' interpretation of the test for standing based on aesthetic interests would unquestionably reduce the standing requirement "to a meaningless formality."

Similarly, Appellants advocate a broad interpretation of the requirement for demonstrating a causal connection between the alleged injuries and the proposed development. Citing to the United States Supreme Court holding in *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), Appellants contend that "but-for standard" should be applied to causation under the test for the standing. (Petition, p. 13). In *Duke Power Company*, individuals who lived and worked in proximity to the sites of two planned nuclear power plants filed suit against Nuclear Regulatory Commission, challenging the constitutionality of the Price-Anderson Act. *Id.* at 62. The Act set a

monetary cap on damages recoverable in consequence of nuclear accidents. The plaintiffs asserted a number of injuries resulting from the construction of the power plants, including exposure to radiation, thermal impacts to two lakes used for recreational purposes, reduction in property values, and fear of exposure to radiation and nuclear accident. *Id.* at 73. While the Court did not determine whether all the alleged injuries were “sufficiently concrete to satisfy constitution requirements,” the Court held that “it is enough that several of the ‘immediate’ adverse effects were found to harm appellees.” *Id.* At trial, the plaintiffs have put forth testimony from Duke Power officials at the trial level to demonstrate that they would have had to consider withdrawing their plans for the new nuclear plants in the absence of the act. *Id.* at 76-77. Based on that testimony, the district court “discerned a ‘but for’ causal connection between the Price-Anderson Act, which appellees challenged as unconstitutional, and the construction of the nuclear plants which the [appellees] view as a threat to them.” *Id.* at 74. In upholding the district court’s finding of standing, the Court held that the “but for” determination supporting the finding of standing was not clearly erroneous. *Id.* at 73-74, fn. 19. This could hardly be characterized as the adoption of a “but for” standard on the second prong of the standing test. Moreover, while concurring in the judgment, Justices Stewart and Stevens wrote separately on the standing issue—in particular, the “but for” causation. Justice Stewart stated:

On the issue of standing, the Court relies on the “present” injuries of increased water temperatures and low-level radiation emissions. Even assuming that but for the Act the plant would not exist and therefore neither would its effects on the environment, I cannot believe that it follows that the appellees have standing to attack the constitutionality of the Act. **Apart from a “but for” connection in the loosest sense of that concept, there is no relationship at all between the injury alleged for standing purposes and the injury alleged for federal subject-matter jurisdiction.**

Surely a plaintiff does not have standing simply because his challenge, if

successful, will remove the injury relied on for standing purposes only because it will put the defendant out of existence. **Surely there must be some direct relationship between the plaintiff's federal claim and the injury relied on for standing.** Cf. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450; *United States v. SCRAP*, 412 U.S. 669, 687-690, 93 S.Ct. 2405, 2415-2417, 37 L.Ed.2d 254; *Linda R. S. v. Richard D.*, 410 U.S. 614, 617-618, 93 S.Ct. 1146, 1148-1149, 35 L.Ed.2d 536. An interest in the local water temperature does not, in short, give these appellees standing to bring a suit under 28 U.S.C. § 1331 (1976 ed.) to challenge the constitutionality of a law limiting liability in an unrelated and as-yet-to-occur major nuclear accident.

Id. at 95 (emphasis added). Similarly, Justice Stevens stated:

The string of contingencies that supposedly holds this litigation together is too delicate for me. We are told that but for the Price-Anderson Act there would be no financing of nuclear power plants, no development of those plants by private parties, and hence no present injury to persons such as appellees; we are then asked to remedy an alleged due process violation that may possibly occur at some uncertain time in the future, and may possibly injure the appellees in a way that has no significant connection with any present injury. **It is remarkable that such a series of speculations is considered sufficient either to make this litigation ripe for decision or to establish appellees' standing;** FN* it is even more remarkable that this occurs in a case in which, as Mr. JUSTICE REHNQUIST demonstrates, there is no federal jurisdiction in the first place.

FN* With respect to whether appellees' claim of present injury is sufficient to establish standing, it should be noted that some sort of financing is essential to almost all projects, public or private. Statutes that facilitate and may be essential to the financing abound—from tax statutes to statutes prohibiting fraudulent securities transactions. One would not assume, however, that mere neighbors have standing to litigate the legality of a utility's financing. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539.

The Court's opinion will serve the national interest in removing doubts concerning the constitutionality of the Price-Anderson Act. I cannot, therefore, criticize the statesmanship of the Court's decision to provide the country with an advisory opinion on an important subject. Nevertheless, my view of the proper function of this Court, or of any other federal court, in the structure of our Government is more limited. We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual case or controversy, it is our duty to do so. But whenever we are persuaded by reasons of expediency to engage in the

business of giving legal advice, we chip away a part of the foundation of our independence and our strength.

Id. at 102-03 (emphasis). Contrary to the Appellants' assertion, it cannot be stated that the Duke Power Court "applied a but for standard." The Court merely held that the district court's "but for" finding was not clearly erroneous. Based on the strong arguments in the concurring opinions, it certainly cannot be argued that a "but for" standard as to the second prong of the standing test was adopted by the Court. As such, there is no basis for the application of a "but for" standard in this case.

Contrary to Appellants' assertion, the Court's ruling does not impose a "new requirement" to demonstrate a property interest to establish standing regarding a claim to actual damage to a body of water on private property. The Court corrected held that such claim is to be asserted by the property owner or a party with responsibility for maintenance of the water body. Appellants cite the following holding: "similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact." (Petition, p. 4 (citing to Shearhouse Adv. Sht. at 51)). Appellants thus contend that such holding is contrary to case law finding "standing on nearly identical allegation of harm to aesthetic or recreational interests." (Petition, p. 4). Such case law would not be applicable to this holding because the holding cited by the Appellants was made in the context of the Court's ruling on Appellants' standing based on claims of "increased sedimentation in Cary Lake." (Shearhouse Adv. Sht. at 51).

As a preliminary matter, the Court corrected held that Appellants failed to present evidence that the Roper Pond project would result in increased sedimentation in Cary Lake.

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According to the evidence on the record, the increased sedimentation was the result of "prior occurrences involving possible mismanagement" and Appellants offered "no evidence that the project at issue here would lead to similar results." *Id.* Indeed, as the Court noted, Elaine Starr, who testified on behalf of the Cary Lake Appellants, "admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments." (Shearhouse Adv. Sht. at 51). However, even if Appellants had present evidence to demonstrate increased sedimentation into Cary Lake as a result of the land-disturbing activities on the Roper Pond property, which they did not, the Cary Lake Appellants would have no standing because the only evidence on the record is that the Cary Lake Homeowner Association is the owner of Cary Lake. (R. pp. 824-25). Under the relevant state and federal case law, the property owner has standing to assert a claim to such damages to waters on private property. For example, in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000), the Fourth Circuit reviewed the district court's dismissal of Clean Water Act citizen suit brought by Friends of the Earth ("FOE") and Citizens Local Environmental Action Network ("CLEAN"), alleging that defendant had been illegally discharging a pollutants in violation of the limitations in its NPDES permit. The Court held that CLEAN had standing to bring the action because a member owned property which included a lake in the path of defendant's discharge. The lake owner testified that "his family swim less in and eat less fish from the lake because of his fears of pollution from Gaston Copper's permit exceedances." *Id.* at 156. In contrast, FOE asserted standing based on alleged injuries to two members. One who owned and

operated a canoe company that runs trips on the Edisto River and another who scuba dives in the Edisto River. the Court found that standing for FOE was a "closer call" and remanded FOE's assertions of standing to the district court for evaluation in light of a recent Supreme Court ruling on standing. *Id.* at 161, fn. 1. Although the FOE members made assertions similar to those of the CLEAN member regarding the impact the pollution of a public waterway, the Edisto River, only the CLEAN member could assert a claim regarding the impacts to his lake. Clearly, standing to allege an actual injury to a privately-owned water body is unique to the property owner.

Additionally, Appellants contend that Ms. Starr has standing to assert an injury to Cary Lake as an owner because she is a member of the Cary Lake Homeowner Association. (Petition, p. 4, fn. 1). However, there is no evidence on the record regarding the nature of the governance or ownership of common elements under the control of the incorporated association. Accordingly, this argument cannot be considered by the Court.

III. ROPER POND'S ACTIVITIES CANNOT SUBJECT THE TOWN TO POTENTIAL VIOLATION OF ITS MUNICIPAL SEPARATE STORM SEWER SYSTEM ("MS4") PERMIT.

As a threshold matter, any violation related to the stormwater discharge from the Roper Pond property would be subject to enforcement pursuant to the terms of the State General Permit and the applicable state regulations. The stormwater discharge associated with the construction activities at Roper Pond is expressly authorized by the State General Permit which was issued pursuant to the Clean Water Act and S.C. Regulation 61-9.122.26. DHEC's grant of coverage under the State General Permit and approval of the SWPPP directly regulates storm water discharges at the Roper Pond project. Under the State Stormwater Regulations, the SWPPP must address both the quality and the quantity of the

storm water runoff exiting the property. 26 S.C. S.C. CODE ANN. REGS. § 72-307(C). 26 S.C. S.C. CODE ANN. REGS. § 72-307(C). Roper Pond's failure to comply with the terms and conditions of the State General Permit or to conduct construction and storm water management activities in accordance with the SWPPP would in no manner implicate the Town. There is simply no basis for DHEC or any other regulatory agency to look to Town to remedy any such violation.

Appellants contend that the Town has standing because "if stormwater from Roper Pond causes the Town's MS4 to be noncompliant, the Town itself is liable." (Petition, p. 11). However, the Town has failed to present evidence to demonstrate how stormwater runoff from the Roper Pond property would result in noncompliance with the applicable MS4 permit. Indeed, Richard Thomas, Mayor of the Town, testified that the Town has delegated its responsibility for compliance with its MS4 requirements to Richland County through an intergovernmental agreement:

Q: Now, you already have problems with the water flowing into Cary Lake today, don't you?

A: That's correct.

Q: Some of the other projects you've talked about.

A: We are managing those individually.

Q: Have you incurred any fines or problems under the NPDES as a result of those problems?

A: No, the County has incurred some fines from EPA based on their handling of some of the problems in Gill Creek.

Q: But as I understand, the Town of Arcadia Lakes has not incurred any fines or financial consequences?

A: Not that I'm aware of. We have an intergovernmental agreement with the County. And the County, therefore, is responsible for maintaining our

NPDES, MS4 requirements to the EPA entity.

(R. p. 845, ll. 3-22). The regulations governing MS4 permit requirements expressly provide for the Town's delegation of its compliance requirement to another MS4 through an intergovernmental agreement.

Specifically, Sections 61-9.122.30 through 122.37 govern the permitting obligations of small MS4s, such as the Town. Section 61-9.122.34 requires a small MS4 to "develop, implement, and enforce a stormwater management program designed to reduce the discharge of pollutants from your MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." S.C. CODE ANN. REGS. § 61-9.122.34(a). The regulation further provides that this program "must include the minimum control measures described in paragraph (b) of this section." *Id.* As the Town has done, the regulations expressly provide that a small MS4 may rely on another governmental entity to satisfy its NPDES permit obligations to implement minimum control measures required by S.C. Regulation 61-9.12.34 if the other entity agrees to implement the control measures on its behalf and encourages the small MS4 to enter into an agreement with the entity accepting responsibility for such compliance with the permit requirements. S.C. CODE ANN. REGS. § 61-9.122.35(a).

Moreover, Section 61-9.122.34(b) provides that a number of the minimum control measures require the MS4 to enact ordinances to enforce the minimum control measure programs. S.C. CODE ANN. REGS. § 61-9.122.34(b)(3)(ii)(B), (4)(ii)(A), and (5)(ii)(B). Roper Pond is located in an unincorporated area of Richland County, outside of the municipal boundaries of the Town. As such, the Town lacks the authority to enact ordinances to enforce such measures with respect to activities on the Roper Pond property.

Only Richland County has authority to take enforcement action against Roper Pond with respect to compliance with the control measure programs pursuant to its MS4 permit.

Additionally, the Town has failed to allege and has offered no proof of any specific action on the part of Roper Pond which would result in the Town's noncompliance with its MS4 permit. Unlike most permits authorizing non-stormwater discharges governed under 33 U.S.C. § 1342, the regulations governing permitting for MS4s do not require numerical effluent limitations on such discharges. Specifically, Section 61-9.122.34(a) (which adopts federal regulation 40 C.F.R. § 122.34) provides in relevant part as follows: "For purposes of this section, narrative effluent limitations requiring implementation of best management practices (BMP) are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements (including reductions of pollutants to the maximum extent practicable) and to protect water quality. Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to section 122.33 constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable.'" In promulgating 40 CFR §§122.30 through 122.37, EPA explained this provision of the regulations as follows:

Regardless of the basis for the development of the effluent limitations (whether designed to implement the six minimum measures or more stringent or prescriptive limitations to protect water quality), EPA considers narrative effluent limitations requiring implementation of BMPs to be the most appropriate form of effluent limitations for MS4s. CWA section 402(p)(3)(b)(iii) expresses a preference for narrative rather than numeric effluent limits, for example, by reference to "management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. 1342(p)(3)(B)(iii). EPA determines that pollutants from wet weather discharges are most appropriately controlled

through management measures rather than end-of-pipe numeric effluent limitations. As explained in the Interim Permitting Policy for Water Quality-Based Effluent Limitations in Storm Water Permits, issued on August 1, 1996 [61 FR 43761 (November 26, 1996)], EPA believes that the currently available methodology for derivation of numeric water quality-based effluent limitations is significantly complicated when applied to wet weather discharges from MS4s (compared to continuous or periodic batch discharges from most other types of discharge). Wet weather discharges from MS4s introduce a high degree of variability in the inputs to the models currently available for derivation of water quality based effluent limitations, including assumptions about instream and discharge flow rates, as well as effluent characterization.

64 Fed. Reg. 68722, 68753. As discussed above, the minimum control measures required under the MS4 permit requires the development, implementation and enforcement of various programs to control the discharge of pollutants in stormwater collected in the MS4 system. Any violation of the permit for the Town's MS4 system would arise from Richland County's failure to implement and enforce such programs. The Town has not alleged that numerical effluent limitations are applicable to discharges from its MS4 system, and indeed, such requirements would be highly unusual. Moreover, the Town failed to offer any evidence identifying the specific MS4 permit requirement which could be violated as a result of Roper Pond's discharge into its MS4 system. Finally, the only evidence on the record related to compliance with the Town's MS4 is the Mayor's testimony that the Town has never had any compliance issues related to problems with stormwater flowing into Cary Lake. The Appellants' claim that the potential for a violation of its MSW4 permit and the related regulations is not sufficient to confer standing on the Town.

IV. THE COURT CORRECTLY HELD THAT THE DREDGING AND EXCAVATION OF THE POND WAS NOT AN IMPACT TO BE REVIEWED BY DHEC PURSUANT TO THE 401 WATER QUALITY CERTIFICATION FOR THE NATIONWIDE PERMIT.

Appellants contend that the Court misapprehends its argument regarding the consideration of impacts to Roper Pond in connection with filling of wetlands authorized by Nationwide Permit ("NWP").²⁹ Appellants assert that, *inter alia*, "excavation of the pond is not contemplated by or authorized under DHEC's NWP certification." (Petition, p. 18). No such authorization under the NWP certification is required. The only activity authorized by NWP 29 was the proposed filling of 0.075 acres of wetlands under NWP 29.

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

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

(Shearhouse Adv. Sht. at 53). This holding acknowledges that DHEC had already issued a 401 certification for projects covered under NWP 29. NWP 29 did not require further action or approvals by either the Corps or DHEC for activities within the scope of those authorized by the Nationwide Permit.

Appellants argue that DHEC's certification of NWP 29 in 2007 is ineffective unless and until the DHEC conducts a subsequent review of the specific proposed activities to

confirm that such activities meet a general condition of the water quality certification, which the Appellants contend requires certification of the entire project, including the dredging of the Pond. To the extent that the Court agrees with this argument, such holding belies the very nature of the issuance of Nationwide Permits and completely negates the validity of the water quality certification issued for the Nationwide Permits in 2007. 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). It would be illogical to place a condition on the 401 Water Quality Certification to also require a full assessment of the impact for all activities associated with each individual project for which coverage under a nationwide permit is sought. In issuing the Nationwide Permit, the Corps has already made that a determination that activities authorized under the Nationwide Permit “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” DHEC’s certification of that Nationwide Permit is based on its concurrence regarding this determination by the Corps.

Appellants contend that a general condition of the 2007 water quality certification for Nationwide Permits requires a full review of the impacts of the entire project if regulated activities within the scope of that project are being conducted under the authority of a NWP. This interpretation is simply incongruous with the entire purpose of the Nationwide Permits and renders the 2007 401 Water Quality Certification and NWP 29 a nullity. “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." *Crutchfield v. County of Hanover, Virginia*, 325 F.3d 211, 214-15 (4th Cir. 2003) (citing 33 C.F.R. § 330.1(b) (2003)). Appellants contend that the following general condition for the 2007 401 Water Quality Certification requires a separate review of all impact related to a project seeking to fill less than 0.10 acres of wetlands under NWP 29:

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.¹

(R. p. 573). This general condition does not require a separate review of the impacts of an entire project. To hold otherwise would defeat the purpose of the Corps issuance of Nationwide Permits and DHEC's certification of those Nationwide Permits. As discussed more fully in Respondents' Brief, the proper interpretation of this general condition to the 401 water quality certification for the 2007 Nationwide Permits, and the interpretation which is supported by the evidence on the record, is that an applicant may not segment a project into phases or geographic areas to avoid an individual 404 permit when the overall impacts exceed that authorized in a Nationwide Permit. 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:

¹ 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.

(c) Multiple use of nationwide permits. Two or more different NWPs 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. (emphasis added). The only use of “single and complete project” in the relevant federal and state law is in Section 330.6 of the Corps Regulations. The reference to this term in the general condition of the 401 certification for the 2007 Nationwide Permits is unquestionably a reference to a defined term. As such, DHEC’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. Moreover, since this general condition is applicable to every Nationwide Permit certified by DHEC in 2007, the interpretation advocated by Appellants would render the 2007 water quality certification, and the Nationwide Permits themselves, completely meaningless.

Additionally, pursuant to Corps Regulations and the State Water Quality Certification Regulations, the Corps—not DHEC—is the regulatory agency authorized to review a notification to proceed under a Nationwide Permit and to determine whether the proposed activity is consistent with that Nationwide Permit. Any conditions of a 401 Water Quality Certification issued by DHEC become a condition of the Corps permit. 33 C.F.R. § 330.4(c); *see also* S.C. CODE ANN. REGS. § 61-101(H)(1) (“Any certification condition is intended to become a condition of the Federal or State license or permit as specified in Federal or State law.”). Pursuant to the Corps Regulations, the Corps district engineer has the discretionary authority to determine whether an activity complies with the conditions of the Nationwide Permit and whether the activities would have more than minimal impacts. 33 C.F.R. § 330.4(d). The Corps district engineer has the authority to modify the

Nationwide Permit or to require an individual permit for the proposed activity. *Id.* Likewise, the State Water Quality Certification Regulations acknowledge that the agency issuing the permit is authorized to enforce the conditions of the permit: "Certification conditions which are included as conditions of such license or permit are subject to enforcement mechanisms available to the Federal or State agency issuing the license or permit." 25A S.C. CODE ANN. REGS. § 61-101.H.2 (emphasis added).² Although DHEC may impose conditions on its issuance of the 401 water quality certification for a Nationwide Permit, or any other federal permit affecting water quality, the authority to enforce those conditions is held by the Corps—the agency issuing the Nationwide Permit. Accordingly, there is no basis for Appellants' contention that the general condition of the 2007 401 Water Quality Certification for the Nationwide Permits requires a further action by DHEC. Moreover, Section 401 of the Clean Water Act mandates the mechanism whereby a state which has certified a federal permit may revoke that certification. This mechanism allows a state to revoke a prior certification only with sixty days notice to the Corps and only pursuant to certain defined circumstances. 33 U.S.C. § 1341(c)(3). Section 330.4 of the Corps Regulations specifically addresses a State's withdrawal of a 401 water quality certification for a Nationwide Permit:

Where a state, after issuing a 401 water quality certification for an NWP, subsequently attempts to withdraw it for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation of the NWP authorization as outlined in § 330.5. Otherwise, such attempted state withdrawal is not effective and the Corps will consider the state certification to be valid for the NWP authorizations until such time as the NWP is modified or reissued.

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

33 C.F.R. § 330.4(c)(7). The Appellants' interpretation of the general condition of the 2007 401 Water Quality Certification would allow DHEC to withdraw its certification of the Nationwide Permits without following the procedures outlined in the Clean Water Act and the Corps Regulations. Such a broad reservation of authority cannot be reconciled with federal law. If a state could revoke a prior certification at any time, Section 401(a)(3) of the Clean Water Act, which governs the revocation of a state water quality certification, would be rendered meaningless. Accordingly, such interpretation is unquestionably contrary to federal law and therefore without merit. There is simply no legal basis for the Appellants' contention that DHEC must conduct a comprehensive review of each individual project proceeding under a Nationwide Permit issued by the Corps and previously certified by DHEC.

Additionally, the Court "found no argument from Appellants to the effect that the alterations to the pond were an impact resulting from the filling of the jurisdictional wetlands, the activity for which a 404 permit was sought." (Shearhouse Adv. Sht. at 53). Indeed, Appellants' expert acknowledged that he was not offering any opinion as to whether the land-disturbing activities in other areas of the project would have any adverse impact on the pond. (R. p. 342). Appellants' continue to assert, without any regulatory basis, that DHEC failed to perform a required review of the impacts of the "overall project"; however, Appellants offered no evidence regarding those impacts or the effect of DHEC's alleged failure to conduct such review on DHEC's authorization for coverage of the project under the State General Permit.

Finally, Appellants contend that "DHEC has broader review authority over the waters of the State that derives from the Pollution Control Act, the 401 water quality

certification regulations at R. 61-101 and the water quality standards at R. 61-68.” (Petition, p. 21). Again, this argument disregards DHEC’s regulation of the Roper Pond project. The State General Permit authorizing stormwater discharges in connection with the construction project is issued pursuant to the Pollution Control Act and authorized the discharge of pollutants from stormwater associated with construction activities related to the Roper Pond project. (R. p. 689). Additionally, the proposed filling of the 0.075 acres of wetlands pursuant to NWP 29 is authorized by DHEC pursuant to the 2007 water quality certification. Except for the filling of the 0.075 acres of wetlands, Appellants concede that no other 404 permit is required for the project. As such, no other water quality certification is required. Moreover, no other permit or approval from DHEC is required. In short, DHEC and the Corps have issued all required permits for Roper Pond project. DHEC has fully asserted its regulatory authority over the construction of project pursuant to the applicable state and federal statutes and regulations.

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

Appellants assert that DHEC’s grant of coverage under the State General Permit was not proper because any required 404 permit must be issued and effective prior to such authorization by DHEC. (Petition, p. 54). Appellants contend that Roper Pond failed to comply with Section 2.1(C) of the State General Permit, which provides as follows:

If a US Army Corps of Engineers’ 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may no grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective.

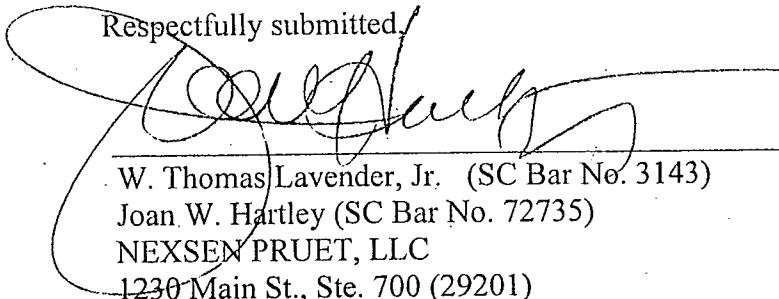
(R. p. 487) (emphasis added). This provision of the State General Permit does not create an

obligation to obtain a 404 permit where none is required under Section 404 of the Clean Water Act. Appellants have repeatedly conceded that no 404 permit is required for the excavation of the pond. Yet, Appellants continue to argue that additional 404 permitting is required for the project. It is undisputed that the only activity in connection with the property which is regulated under Section 404 is the proposed filling of the 0.075 acres of wetlands. This activity was authorized by NWP 29, for which DHEC had issued a water quality certification in 2007. The Court correctly held that DHEC's certification of NWP 29 was sufficient for Roper Pond to undertake the proposed filling of the 0.075 acres of wetlands without further approvals from either the Corps or DHEC. (Shearhouse Adv. Sht. at 54). Accordingly, there is no merit to Appellants' assertion that Roper Pond's authorization to conduct such activities was not authorized by NWP 29 because the 401 certification was defective.

CONCLUSION

For the forgoing reasons, Respondent Roper Pond, LLC respectfully requests that the Court deny the Appellants' Petition for Rehearing.

Respectfully submitted,

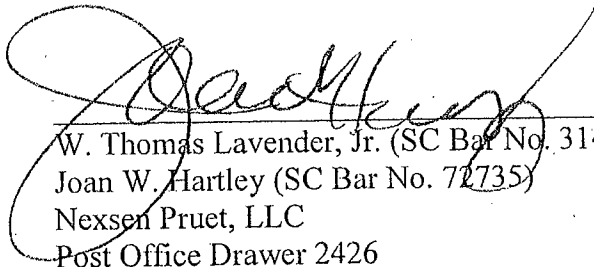


W. Thomas Lavender, Jr. (SC Bar No. 3143)
Joan W. Hartley (SC Bar No. 72735)
NEXSEN PRUET, LLC
1230 Main St., Ste. 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Respondent Roper Pond, LLC

April 1, 2013

April 1, 2013



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

Joan W. Hartley (SC Bar No. 72735)

Nexsen Pruet, LLC

Post Office Drawer 2426

Columbia, South Carolina 29202

Tel: 803.771.8900

Fax: 803.727.1471

Attorneys for Roper Pond, LLC

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2010-159446

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5095
Heard May 8, 2012 – Filed March 6, 2013
Withdrawn, Substituted, and Refiled June 12, 2013

AFFIRMED

Amy E. Armstrong, of South Carolina Environmental
Law Project, of Georgetown, for Appellants.

W. Thomas Lavender, Jr. of Nexsen Pruet, LLC, of
Columbia, and J. Michael Harley, of Barrington, IL, for
Respondent Roper Pond, LLC; Roger Page Hall and

Stephen Philip Hightower, both of Columbia, for
Respondent SCDHEC.

THOMAS, J.: The Town of Arcadia Lakes (Town) and various individuals appeal a decision by the Administrative Law Court (ALC) upholding the authorization by the South Carolina Department of Health and Environmental Control (DHEC) of coverage for certain land-disturbing activities under a State General Permit. We affirm.

FACTS AND PROCEDURAL HISTORY

Respondent Roper Pond, LLC (Roper) is the owner and developer of 12.75 acres of real property on Trenholm Road in an unincorporated area of Richland County. The property includes 1.8 acres consisting of wetlands and waters that were identified by the United States Army Corps of Engineers (Corps) in 2005 as falling under the jurisdiction of the Federal Clean Water Act (CWA).¹ These jurisdictional wetlands include Roper Pond, a man-made pond that is visible from Trenholm Road but wholly within the boundaries of Roper's property. Before implementation of the project at issue in this appeal, water lilies covered the surface of Roper Pond.

Roper Pond drains through a pipe that runs beneath Trenholm Road and into Cary Lake. Cary Lake is privately owned by the Cary Lake Homeowners Association, which is not a party to this litigation. Although Cary Lake lies partly within the boundaries of the Town, the Town has no ownership interest in it and is not responsible for its maintenance or remediation.

In August 2007, Roper submitted to the Corps its initial plans for a multifamily apartment development to be built on its property. As part of this undertaking, Roper needed a permit for stormwater discharges from land-disturbing activities associated with the project. *See* S.C. Code Ann. § 48-14-30(A) (2008) (prohibiting land-disturbing activities without the submission of a stormwater management and sediment control plan to the appropriate agency and a permit to proceed with these activities); 9 S.C. Code Ann. Regs. 72-305 (Supp. 2012) (stating similar

¹ 33 U.S.C. §§ 1251 *et seq.* (2006).

prohibitions to section 48-14-30(A) and setting out the permit application and approval process).

To expedite matters, Roper could "seek coverage under a promulgated storm water general permit" instead of obtaining an individual permit. *See* 3 S.C. Code Ann. Regs. 61-9.122.26(c)(1) (2012) ("Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit."). Under 3 S.C. Code Ann. Regs. 61-9.122.28 (2012), DHEC is authorized to issue general permits for stormwater discharges from projects that meet certain criteria. Pursuant to this authority, DHEC issued Permit Number SCR100000 (State General Permit) on August 1, 2006. The State General Permit, which DHEC described as an "NPDES General Permit for Storm Water Discharges from Large and Small Construction"² covered discharges from the commencement of an authorized project until final stabilization of the construction site.

In 2006, DHEC published a Guidance Document for the State General Permit advising prospective permittees about the need to obtain necessary permits from the Corps. In this particular case, Roper was required under section 404 of the CWA to obtain a wetlands permit from the Corps because it intended to fill some of the jurisdictional wetlands on the project site. *See* 33 U.S.C. § 1344(a) (2006) (authorizing the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites").

Under section 404(e) of the CWA, the Secretary of the Army is authorized to issue Nationwide Permits (NWP) for any category of similar activities involving discharges of dredged or fill material determined to "cause only minimal adverse environmental effects when performed separately" and to "have only minimal cumulative adverse effect [sic] on the environment." 33 U.S.C. § 1344(e)(1) (2006). If a proposed activity meets the applicable regional and general conditions for an NWP, application for its authorization can proceed more quickly than it would if the applicant sought an individual permit. On March 12, 2007, the Corps issued NWP 29 and NWP 39, the two NWPs at issue in the present litigation.

² As authorized by the Clean Water Act, the National Pollutant Discharge Elimination System (NPDES) Permit Program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. The program is administered by authorized states, including South Carolina.

NWP 29 applied to residential developments, and NWP 39 applied to commercial and institutional developments.

The requirement for a 404 permit from the Corps in turn triggers a requirement under section 401 of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards (401 certification). 401 certification is required "from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1) (2006).³ On May 11, 2007, pursuant to its regulatory authority, DHEC issued 401 certifications for projects covered under NWP 29 and NWP 39.⁴ DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.

On April 30, 2008, George Whatley, a wetland scientist for BP Barber, submitted a joint federal and state application for the proposed construction project on Roper's property. On the application, Whatley noted the project would involve the filling of 0.075 acres of jurisdictional wetlands.⁵ On May 5, 2008, Whatley submitted a

³ DHEC regulations reference this requirement as well. *See* 8 S.C. Ann. Regs. 61-101.A.2 (2012) (stating federal law requires an applicant for a federal permit to conduct an activity that "during construction or operation may result in any discharge to navigable waters" "to first obtain a certification from [DHEC]" and stating that "Federal law provides that no Federal license or permit is to be granted until such certification is obtained").

⁴ *See* 8 S.C. Code Ann. Regs. 61-101.A.3 (2012) ("[DHEC] may issue, deny, or revoke general certifications for categories of activities or for activities specific in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations."); 33 C.F.R. § 330.4(c)(1) (2013) ("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 NWPs authorizing activities which may result in a discharge into waters of the United States.").

⁵ As noted earlier, the CWA requires a 404 permit for certain discharges of dredged or fill material into navigable waters. The term "navigable waters" is

pre-construction notification (PCN) to the Corps. In the PCN, Whatley noted: (1) although Roper initially advised the Corps in 2007 that the project would impact 0.099 acres of jurisdictional wetlands, the project was redesigned to reduce impacts to 0.075 acres and (2) "best management practices" (BMPs) would be implemented to ensure that construction activities would not impact jurisdictional areas lying outside the permitted impact areas. Whatley further requested that the Corps review the project for possible coverage under an NWP; however, he did not specify any particular NWP under which the activity would be conducted.

No other impacts to water quality were disclosed on the application; however, according to subsequent e-mails between BP Barber and the Corps, Whatley notified the Corps that the project included lowering the elevation of Roper Pond and the discharge of the soil and sediment from the bottom of the pond into an upland area. According to the e-mails, Whatley inquired whether either of these was an impact to be considered in obtaining approval for the construction, and the Corps advised: (1) lowering the pond was not an impact and (2) excavation of the pond would be exempt from permitting requirements provided the excavated material was "placed in a truck or deposited onto uplands" and there was "[n]o double handling or stockpiling in jurisdictional areas."

Pursuant to the requirements for coverage under the State General Permit, a Stormwater Pollution Prevention Plan (SWPPP) was prepared for the project on June 26, 2008. DHEC reviewed the SWPPP and requested certain revisions.

By letter dated September 9, 2008, the Corps advised Whatley: (1) it reviewed the PCN and determined the proposed activity would "result in minimal individual and cumulative adverse environmental effects and [was] not contrary to public interest"; (2) the activity met the terms and conditions of NWP 39; and (3) for authorization to remain valid, the project had to comply with general conditions of

defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The United States Supreme Court has imposed limitations on the inclusion of wetlands, holding that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]." *Rapanos v. U.S.*, 547 U.S. 715, 742 (2006) (emphasis in original). In the present case, the parties do not dispute that the 0.075 acres of wetlands to be filled in conjunction with Roper's proposed project were "jurisdictional wetlands" subject to the CWA.

the NWP, regional conditions, and certain special conditions, namely, that Roper obtain and provide the Corps with "all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit)." Consistent with its usual practice, the Corps sent a copy of the September 9, 2008 letter to DHEC as well as to Whatley.

On September 24, 2008, Roper submitted to DHEC a notice of intent (NOI) to discharge storm water associated with its proposed project, now designated as Roper Pond Apartments, seeking approval from DHEC to have the stormwater discharges covered under the State General Permit.⁶ According to the NOI, the project site was 12.8 acres, of which 9.9 acres would be disturbed by land-clearing activities.

DHEC responded to Whatley by letter dated October 2, 2008, advising it determined that the impacts of the project on water quality would be minimal and that the proposed work would be consistent with the 401 certification issued in 2007 for NWP 39, subject to various conditions not at issue in this appeal.

On November 17, 2008, DHEC staff engineer Jill Stewart e-mailed BP Barber to express various concerns. Among these concerns was information she received that the proposed plans for Roper Pond Apartments included lowering of the water surface elevation of Roper Pond to allow for detention of post-development runoff of stormwater. Stewart inquired whether the dropping of the water surface elevation should be taken into account in determining if a site is eligible for coverage under NWP 39. BP Barber responded the following day, informing Stewart that its wetlands consultant advised "the lowering of the water surface elevation is included and covered under [NWP 39]."

In December 2008, DHEC issued a letter acknowledging it was satisfied that the revised SWPPP met the requirements of the State General Permit and the applicable regulations. On December 15, 2008, DHEC staff granted Roper coverage under the State General Permit for its stormwater discharges associated with construction of Roper Pond Apartments.

⁶ The NOI was on a DHEC form entitled "Notice of Intent (NOI) for Stormwater Discharges from Large and Small Construction Activities, NPDES General Permit SCR100000."

By letter dated December 30, 2008, Appellants and other individuals requested that the DHEC Board review and overturn the decision.⁷ Among the technical issues raised in the letter were Roper's failure to disclose its intent to lower the elevation of Roper Pond and an allegation that it sought coverage under the wrong NWP. On January 14, 2009, DHEC responded to the letter, informing Appellants that the Board declined to conduct a final review conference and that anyone aggrieved by the decision could request a contested case hearing in the ALC. On February 16, 2009, Appellants filed a request for a contested case hearing in the ALC.

Meanwhile, on January 6, 2009, Whatley e-mailed the Corps requesting a corrected letter indicating the impacts of the project would be covered under NWP 29 instead of NWP 39. As noted earlier, Whatley also recounted Roper's plans to lower the elevation of Roper Pond and its intent to remove the excavated material to an upland area and his understanding that Roper did not need approval from the Corps for these activities. By letter to Whatley dated February 25, 2009, the Corps advised that it determined the proposed activity would result in minimal individual and cumulative adverse environmental effects, would not be contrary to the public interest, and met the terms and conditions of NWP 29. Except for the particular NWP referenced, the language in the February 25, 2009 letter was identical to the corresponding language in its September 9, 2008 letter.

As it did with the September 9, 2008 letter, the Corps sent a copy of its February 25, 2009 verification letter to DHEC. DHEC, however, did not issue another authorization letter advising Roper that the project would be consistent with the 401 certification issued in 2007 for NWP 29. According to Charles Hightower, DHEC's Section Manager of the 401 Wetlands Section, the purpose of such notification from DHEC is to provide an applicant assurance that the applicant's proposed project falls within the conditions of DHEC's 401 certification. Hightower further testified that Roper's proposed fill of the 0.075 acres of jurisdictional wetlands satisfied the necessary conditions to receive 401 water quality certifications for both NWP 29 and NWP 39 and that because the requisite conditions had been met, Roper did not need to notify DHEC before proceeding with the project under NWP 29.

On June 17, 2009, in response to a motion by Roper to dismiss Appellants' request for a contested case hearing, the ALC issued a consent order in which the parties

⁷ Additional facts about Appellants will be presented in the LAW/ANALYSIS section of this opinion.

agreed to the dismissal of all claims raised by Appellants challenging the 401 certification and authorization to conduct activities under NWP 39 for the proposed development. The partial dismissal did not affect Appellants' claims and Roper's defenses in connection with the 401 certification and authorization under NWP 29 .

The contested case hearing before the ALC took place on September 3 and 4, 2009. Stewart, Hightower, Whatley, and several individual Appellants testified. The record on appeal also includes depositions from various individuals, including Stewart and Hightower. In addition, Appellants called Seth Reice, Ph.D., a professor of ecology and biology at the University of North Carolina at Chapel Hill, as an expert on aquatic ecology. Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

On January 21, 2010, the ALC issued a final order upholding DHEC's approval of coverage under the State General Permit on the merits and further finding that Appellants lacked standing to challenge DHEC's decision. On March 23, 2010, following a hearing on a motion for stay by Appellants, the ALC temporarily stayed its final order pending a decision on Appellants' motion for reconsideration.

By order dated April 1, 2010, the ALC denied Appellants' motion to reconsider and lifted the temporary stay. Appellants then filed their notice of appeal to this court.

ISSUES⁸

⁸ The Home Builders Association of South Carolina has filed an *amicus curiae* brief asserting that Appellants seek to add an unnecessary step in stormwater regulation and nationwide permitting that would have adverse consequences for

I. Did the ALC err in finding Appellants lacked standing to challenge DHEC's decision to authorize coverage for Roper Pond Apartments under the State General Permit?

II. Did the ALC err in holding the 401 certification issued by DHEC was sufficient for a valid 404 permit and coverage under the State General Permit?

III. Did the ALC err in holding that Roper's proposed stormwater control activities could be covered under the State General Permit?

STANDARD OF REVIEW

The standard of review that an appellate court is to apply to appeals from the ALC is set forth in the South Carolina Administrative Procedures Act (APA), specifically in section 1-23-610 of the South Carolina Code (Supp. 2012). *Murphy v. S.C. Dep't of Health & Env'tl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191 191, 194 (2012). Under section 1-23-610(B), a reviewing court may reverse or modify a decision by the ALC if the substantive rights of the appellant have been prejudiced because of a finding, conclusion, or decision that: (1) violates constitutional or statutory provisions; (2) exceeds the agency's statutory authority; (3) is made upon unlawful procedure; (4) is affected by other error of law; (5) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) is arbitrary, capricious, or characterized by either abuse of discretion or clearly unwarranted exercise of discretion. Section 1-23-610 has been applied not only to findings by the ALC on the merits of a controversy but also to findings by the ALC concerning a party's standing to maintain an action. *See Bailey v. S.C. Dep't of Health & Env'tl. Control*, 388 S.C. 1, 4-8, 693 S.E.2d 426, 428-30 (Ct. App. 2010) (referencing only the APA in stating the standard of review, but ultimately affirming the ALC on the ground that appellant lacked

the construction industry, the housing market, and the public at large and that existing programs and regulations sufficiently protect the public interest in the permitting process. Because our rulings on the issues Appellants have presented are dispositive of this appeal, we decline to address these policy concerns. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its disposition of a prior issue is dispositive of the appeal).

standing and declining to address appellant's remaining arguments), *cert. denied* (July 7, 2011).

LAW/ANALYSIS

I. Standing

Appellants in this case are: (1) the Town; (2) various residents of Kaminer Station, a subdivision adjacent to and uphill from Roper Pond (Kaminer Station Appellants);⁹ and (3) various individuals whose properties border Cary Lake (Cary Lake Appellants).¹⁰ The ALC found none of these groups had standing to maintain this action. We agree.

"Standing to sue is a fundamental requirement in instituting an action." *Bodman v. State of S.C.*, Op. No. 27248 (S.C. Sup. Ct. filed May 8, 2013) (Shearouse Adv. Sh. No. 21 at 27, 31) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)). "When no statute confers standing, the elements of constitutional standing must be met." *Youngblood v. S.C. Dep't of Soc. Servs.*, ___ S.C. ___, ___, 741 S.E.2d 515, 518 (2013).¹¹

In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 601; 550 S.E.2d 287, 291 (2001), the Supreme Court of South Carolina, quoting *Lujan v. Defenders of Wildlife*, 504

⁹ The Kaminer Station Appellants are Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Toney Sinclair, Aaron Small, and Bette Small.

¹⁰ The Cary Lake Appellants are Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown.

¹¹ The ALC did not consider whether the "public importance" exception could confer standing on any of the Appellants, and Appellants have not raised this exception in their brief. See *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) ("[S]tanding may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.").

U.S. 555, 560-61 (1992), set forth three requirements that must be met to satisfy "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."

(Citations omitted).

"The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to withstand a motion to dismiss. *Lujan*, 504 U.S. at 561. Elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation." *Id.* (quoted in *Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

A. The Town

The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. Quoting *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include: (1) the Town's interest in protecting the environmental quality of Cary

Lake, which lies partly within the Town borders; (2) the Town's ability to comply with federal law, such as NPDES regulations; (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal; and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether "proprietary" or not, are sufficient to confer standing on the Town in this case.

As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion.¹² Moreover, he acknowledged the Town is not responsible for the maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the "bottom lake," that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are "fairly traceable" to the challenged action in this case. Similarly, Appellants have not shown any causal connection between the authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC's determination that the Town lacks standing.

¹² In their reply brief, Appellants cite title 33, section 1342(p) of the United States Code (2006), which the United States Congress added to the CWA in 1987. This section covers municipal and industrial stormwater discharges. Under paragraph (4) of this section, the Administrator of the Environmental Protection Agency is required to establish regulations setting forth permit application requirements for discharges from municipal separate stormwater systems and either the Administrator or appropriate State agency would eventually acquire the authority to issue and deny such permits. We have found nothing in this section either requiring a municipality to obtain a permit for stormwater discharges from a stormwater system that is already covered by a permit or holding a municipality responsible for such discharges.

B. Kaminer Station Appellants

The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.

Linda Jackson, one of the Kaminer Station Appellants, conceded that "water flows down" and there was no serious concern that stormwater from Roper Pond would flow uphill to Kaminer Station. However, Jackson also described the visual appeal of Roper Pond and her appreciation of the nature sounds in the area. She also testified that she had fished on Cary Lake and had seen changes for the worse in that area as it developed. Such observations, even if shared by many others, arguably can still form the basis for a concrete and particularized injury that would confer standing. *See Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) ("[M]erely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Moreover, even those concerns reflecting aesthetic or recreational interests have been recognized as "judicially cognizable injur[ies] in fact." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. Nonetheless, when such interests involve property that is privately owned by a party other than the plaintiff, the presence of an injury in fact cannot be assumed. *Cf. Conservation Council of N.C. v. Costanzo*, 505 F.2d 498, 501-02 (4th Cir. 1974) (stating the plaintiffs' recreational use of privately owned property as either licensees or trespassers did not confer standing to challenge development on that property because there was no evidence that the owner of the property would allow such use to continue in the future). Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants.

Furthermore, we hold substantial evidence supports the ALC's determination that the Kaminer Station Appellants have not established a causal connection between their alleged injuries and the conduct giving rise to their complaint. When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits

rather than the permits themselves. Furthermore, Reice's inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

C. Cary Lake Appellants

Finally, we agree with the ALC that the Cary Lake Appellants failed to show that granting coverage for Roper Pond Apartments under the State General Permit would cause an actual or imminent injury and therefore lacked standing to challenge DHEC's decision to grant coverage under the State General Permit.

Testifying for the Cary Lake Appellants, Elaine Starr stated her home, where she has lived since 1971, borders Cary Lake, which is on the opposite side of Trenholm Road from Roper Pond. She further testified that she had a bachelor's degree in biology and had done graduate work in wetlands and coastal resources. She had participated in several organizations that were concerned with water quality, and she and her family have made extensive use of Cary Lake for recreational purposes. Starr testified about her empirical observations of the decline in the water quality of Cary Lake and how these observations were supported by her use of a Secchi disk, a technique to measure water clarity. She also expressed concerns about the possible demise of the water lilies due to the dredging of Roper Pond, noting "if their [rhizomes] or root systems get damaged or taken away, . . . they may not be there."

According to Starr, the increased sedimentation in Cary Lake that she described resulted from prior occurrences involving possible mismanagement. However, there was no evidence that the project at issue here would lead to similar results. Starr admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments. Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact. We therefore agree with the ALC that the Cary Lake Appellants presented at best only speculative evidence that they would suffer an injury in fact from DHEC's decision to allow Roper Pond Apartments to be covered under the State General Permit.

II. Validity of the 401 Certification

Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

First, although Roper did not initially inform the Corps that it intended to dredge and excavate the pond as part of the project, as of January 6, 2009, when Whatley requested a corrected letter from the Corps indicating that the impacts of the project would be covered under NWP 29 instead of NWP 39, the Corps had been informed that such an activity was to be part of the project. Having received this information, the Corps nevertheless determined that the project would result in "minimal individual and cumulative environmental effects" and met the conditions of NWP 29.

As to Appellants' second argument, we agree with their position that the general conditions for water quality certification require DHEC to review the "overall project proposed by a single owner/developer," "includes all land within the project bound under single ownership," and is not confined to "the land area directly impacted by each NWP request" and their assertion that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site or determined if feasible alternatives were available. Here, however, 401 certification was necessary only as a prerequisite to obtaining a 404 permit from the Corps for filling the jurisdictional wetlands. This requirement was pursuant to 33 U.S.C. section 1341(a)(1) (2006), which states in pertinent part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction

or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions

(emphasis added). Appellants have emphasized they never argued that a 404 permit was necessary to dredge and excavate the pond, and there was no contention here that this activity would result in a discharge into a navigable water.

Furthermore, according to their brief, the specific "impacts" that Appellants maintain were overlooked by DHEC pertained only to the pond. As Appellants point out, under DHEC's general conditions, Roper was required to: (1) demonstrate that impacts to wetlands have been avoided and that unavoidable impacts to wetland areas have been minimized; and (2) provide suitable compensation for any unavoidable impacts. Roper, as the owner of the property on which the pond is located, would be the proper party to object to impacts that have not been avoided or minimized and to enforce compensation for any unavoidable impacts. In other words, Roper would be placed in the illogical position of having to complain about its own project or to demand compensation from itself.

Based on our interpretation of the events in this case, we disagree with Appellants' third argument, their assertion that the project never received a proper water quality certification for coverage under NWP 29. We acknowledge Hightower admitted that after DHEC received notice from the Corps that the project would be covered under NWP 29, it did not issue a letter advising Roper that the project would be consistent with the 401 certification it issued for this NWP and agreed that sending such a letter would have been advisable; however, he also testified that an authorization letter was only a formality for the applicant's benefit and was not required by the State General Permit. The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

Finally, Appellants have challenged the water quality certification on the ground that DHEC failed to review the project to determine: (1) whether it complied with

6 S.C. Code Ann. Regs. 61-68 (2012) and 8 S.C. Code Ann. Regs. 61-101 (2012), both of which were promulgated pursuant to the South Carolina Pollution Control Act; and (2) the impact of the draining and excavation of Roper Pond. They further argue the ALC erroneously relied on *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 552-53, 641 S.E.2d 425, 428 (2007), for the proposition that "a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act." We need not determine whether the ALC correctly applied this holding. We have already determined that the Corps was aware that Roper intended to excavate the pond when it authorized coverage under NWP 29 and that the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit.

III. Coverage Under the State General Permit

Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.

First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.

Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

CONCLUSION

We agree with the ALC that none of the Appellants had standing to maintain their challenge to the authorization of coverage for Roper Pond Apartments under the State General Permit. As to the merits of Appellants' arguments, we affirm the ALC's ruling that Roper is entitled to this coverage.

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.