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James W. Potter
Special Counsel
Admitted in SC, AL

September 18, 2013

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S.C. Supreme Court

HAND DELIVERY

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

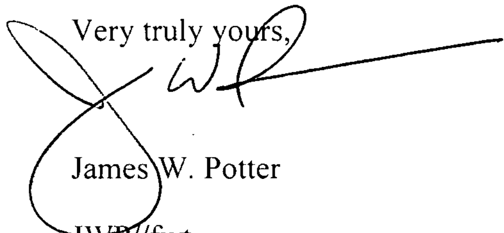
Re: *Duke Energy Carolinas, LLC v. South Carolina Department of Health and Environmental Control, et al.*
Case No. 09-ALC-07-0377-CC
Case Tracking Number 2013-001118

Dear Mr. Shearhouse:

Pursuant to my discussion with Ms. Allen yesterday, I am filing a copy of a Supplemental Citation as an attachment to this letter in lieu of being an attachment to the Reply.

Thank you for your assistance.

Very truly yours,



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JWP//fwt

Enclosures

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EXHIBIT A

2008 WL 1934476 (S.C.Admin.Law.Judge.Div.)

Administrative Law Court
State of South Carolina

*1 SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, PETITIONERS
v.
SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL AND FRIENDS OF CONGAREE SWAMP, WILDLIFE FEDERATION, AND AUDUBON SOUTH CAROLINA, RESPONDENTS

Docket No. 06-ALJ-07-0804-CC

April 12, 2008

APPEARANCES

DEBORAH BROOKS DURDEN, ESQUIRE,
FOR PETITIONER DOT

STEPHEN P. HIGHTOWER, ESQUIRE,
FOR RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
JAMES S. CHANDLER, JR., ESQUIRE, FOR FRIENDS OF CONGAREE SWAMP, SOUTH CAROLINA WILDLIFE FEDERATION, AND AUDUBON SOUTH CAROLINA

AMENDED FINAL ORDER AND DECISION

STATEMENT OF THE CASE

This matter is before the Administrative Law Court upon two requests for a contested case hearing pursuant to the Administrative Procedures Act to review the issuance of and conditions attached to the 401 Water Quality Certification and Construction in Navigable Waters Permit issued by Respondent South Carolina Department of Health and Environmental Control (DHEC) for a bridge replacement project proposed by Petitioner South Carolina Department of Transportation (DOT). The first petition was filed by DOT and challenged the findings and conditions contained in the Notice of Proposed Decision Water Quality Certification and Construction in Navigable Waters Permit issued by DHEC on June 23, 2006 (NOPD or Proposed Decision). Specifically,DOT contested DHEC 401 water quality certification because:

- DHEC failed to meet the applicable regulatory time periods to issue the Certification and/or Permit;
- The 401 Water Quality Certification should have been issued without a condition for additional bridging; and
- DHEC imposed conditions that do not accomplish an objective related to the project proposed by DOT.

The second petition was filed by Friends of Congaree Swamp, South Carolina Wildlife Federation, and Audubon South Carolina (Environmental Groups) and challenged the findings and conditions contained in the 401 Water Quality Certification and Construction in Navigable Waters Permit issued by DHEC on October 12, 2006 and the January 12, 2007 Decision of the DHEC Board. Simultaneously with this filing, the Environmental Groups

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also filed a motion to intervene in the contested case proceedinginitiated by DOT. In its contested case petition, the Environmental Groups alleged that the 401 Water Quality Certification and Construction in Navigable Waters Permit should not have been issued because the DOT project violated the 401 Water QualityCertification Regulations contained in subsection F of 25A S.C. Code Ann. Regs. 61-101 (Supp. 2006) and the Construction in Navigable Waters Permit Regulations contained in subsection 9 of 23 S.C. Code Ann. Regs. 19-450 (Supp. 2006). By an order dated March 26, 2007, contested case 07-ALJ-07-0804, which was filed by the Environmental Groups, was consolidated with this case. After notice to the parties, a contested case hearing on the merits was held on October 16-"18, 2007, at the Administrative Law Court in Columbia, South Carolina.

PROCEDURAL HISTORY

*2 On or about June 23, 2006, DHEC issued an NOPD authorizing a 401 Water Quality Certification to DOT for its proposed project to replace four bridges on U.S. Highway 601 in Richland County. A Final Review Conference before the DHEC Board was requested by both DOT and the Environmental Groups and was granted by the DHEC Board. DOT sought the removal of a condition in the permit that required 1:1 slopes throughout the project. The Environmental Groups sought the denial of the permit or the inclusion of a condition that would require DOT to bridge the entire floodplain. Arguments were heard by the DHEC Board from the parties and DHEC staff at the Board's August 10, 2006 hearing. The DHEC Board did not announce a decision at that time but continued the matter to its September 14, 2006 meeting. Following the September 14, 2006, the DHEC Board issued a decision finding that:

[T]he Board concludes that although the 1:1 slope requirement is intended to reduce adverse ecological impact of the proposed project, it is not an appropriate condition. Because the Board is removing the 1:1 slope requirement it is necessary for staff to consider whether alternative measures are appropriate. Therefore, the Board remands the certification and permit issuance to staff to remove the 1:1 slope condition and to consider inclusion of alternative measures that would more appropriately reduce the adverse ecological impact of the proposed project.

On October 12, 2006, DHEC staff issued an "Agency Decision Upon Remand Water Quality Certification and Construction in Navigable Waters Permit" (Remand Permit). This document was similar to the June 23 NOPD, with two exceptions: it did not include the condition requiring 1:1 slopes throughout the project, and it included new language in Condition 15 requiring four additional spans of bridge. Following that decision, DOT filed a request for a contested case hearing on October 20, 2006. Therequest contested the new conditions raised in the Remand Permit and asked for a determination of its rights because DHEC failed to act in a timely manner on the permit application.

On October 27, 2006, the Environmental Groups filed a request for a Final Review Conference before the DHEC Board concerning the Remand Permit. They sought either the denial of the permit or the inclusion of a condition that would require DOTto bridge the entire floodplain. The DHEC Board granted the request for a third Final Review Conference on the project and scheduled it for December 14, 2006. This Court issued an order on December 7, 2006 in response to DOT's motion to stay the proceedings at the DHEC Board, holding that the DHEC Board no longer had jurisdiction over the case.

LEGAL ISSUES RAISED

The following issues were raised in this proceeding:

1. Did DOT request a Final Review Conferences of DHEC's issuance of the 401 Water Quality Certification

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and the Construction in Navigable Waters Permit in a timely manner?

*3 2. What is the legal effect of the DHEC Board's attempt to remand this permit application back to DHEC staff following the Final Review Conference, and of the October 12, 2006 Decision Upon Remand issued by DHEC staff?

3. Did DHEC comply with the applicable time periods in issuing its 401 Water Quality Certification?

4. Does DHEC have the authority to require the conditions of one to one slopes on the causeway embankments and extra bridge spans as mitigation for wetlands impacts of the proposed project? **FINDINGS OF FACTS**

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

General Findings

The project proposed by DOT is the replacement of four bridges%[FN1] along US Highway 601 in lower Richland County south of the intersection of US 601 and S-48, Bluff Road. The existing highway between the bridges is built on a fill embankment that has been in place since at least 1942. This embankment elevates the road above the floodplain and is up to 30 feet high. Bridge One is a 150 foot bridge over a minor creek at the Northern end of the project. Bridge Two, which is at the beginning of the Congaree floodplain, is 1590 feet long and crosses part of an old oxbow known as Bates Old River. Bridge Three is 630 feet long and crosses another portion of Bates Old River. Bridge Four is a 1,760 foot bridge over the Congaree River at the Southern end of the project. Approximately 1.95 miles of this earthen embankment are in the Congaree floodplain.

The project would begin just south of the intersection between US 601 and SC 48, immediately south of the railroad tracks and continue south on US 601 to just across the Congaree River in Calhoun County. It consists of the following elements:a) replacement of the existing four bridges with structures that will have twelve (12) foot wide travel lanes and ten (10) foot wide shoulders; b) widening of the travel lanes on the entire causeway[FN2] to twelve (12) feet and widening of the shoulders to ten (10) feet; c) shifting the roadway forty (40) feet upstream; d) paving a four (4) foot wide strip of the expanded shoulder adjacent to the travel lanes; e) ensuring that all slopes on the causeway are graded to a slope of 2:1; f) upgrading guardrails along the project corridor; and g) installing a new access ramp to and expanding the parking ramp for the existing boat landing. The bridge openings would also be slightly larger, due to the use of longer spans (122.5-foot spans insteadof the existing 30-foot spans), which will reduce the number of columns used to support the bridge. The total length of the project is 4.3 miles.

The project is clearly needed and there are clearly no feasible alternatives to replacing the existing bridges.[FN3] Each of the four bridges to be replaced is rated as structurally deficient and functionally obsolete, meaning that they have significant safety and repair needs and are insufficient for the traffic volume they carry. The bridges have undergone extensive repairs, costing between $1.25 and $1.5 million, in the last ten years. The condition of the bridges has deteriorated to the point where it may not be financially feasible to continue to repair them. Moreover, the existing bridges and causeways have travel lanes that are only eleven (11) feet wide. The bridges have two (2) foot wide unpaved shoulders and the causeways have ten (10) foot unpaved shoulders. Therefore, in addition to replacing the existing bridges, the proposed project would slightly widen the existing fill embankment in some areas to allow for a widening of the travel lane from 11 to 12 feet and for ten-foot wide shoulders. This additional width would bring the bridges into currently accepted roadway safety standards.

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*4 Furthermore, closing a portion of Highway 601 for the construction of the replacement bridges is not a feasible alternative to avoid or minimize the impact to wetlands. US 601 is a major thoroughfare for trucks and passenger traffic. The detour route would be approximately 74 miles. Accordingly, it would result in significant financial, safety, and convenience impacts to the traveling public and businesses in the area. The project designers calculated the cost to the traveling public to be approximately $110,000 per day that the bridges would be closed. For instance, the International Paper Plant at Eastover would see a cost increase of $3.5 million per year for pulpwood supplies plus additional costs to employees and suppliers if thehighway were closed. In fact, a closure of six to ten hours for bridge repairs costs the firm roughly $8,000. Therefore, the project is designed to replace the bridges without having to close the road. To do this, the new bridges will be built as close as possible to the East of the existing bridges and the new bridges will be tied into the existing road.

Application for the 401 Certification

The application submitted to DHEC for the 401 Water Quality Certification showed Barrett W. Stone, an employee of Florence and Hutcheson[FN4], as the contact agent for the project. DOT's environmental office also had dealings with DHEC concerning the pending application. On June 26, 2006, DHEC mailed, via U.S. Postal Service, the NOPD/Staff Assessment to Wayne Hall at DOT. However, DOT did not receive that notice. DOT nevertheless received actual notice of DHEC's intention to issue the NOPD via an e-mail on June 26, 2006. [FN5] Once DOT received that notice, it requested a copy of the NOPD. Upon receiving the copy of the NOPD, DOT filed its request for a hearing before the DHEC Board within one day. Therefore, I find that DOT timely requested a Final Review Conference.

Environmental Impacts

The project is located in the Congaree Swamp adjacent to a newly acquired portion of the Congaree National Park and extends over the Congaree River. The Congaree River is a major river in the South Carolina Midlands formed by the confluence of the Saluda and Broad Rivers near the City of Columbia that merges with the Wateree River to become the Santee River. In the area south of the City of Columbia, the Congaree River winds through a large old growth bottom land forest. The uniqueness ofthis area led to the area being recognized by the federal government as the Congaree Swamp National Monument and in 2003 as the Congaree National Park. [FN6]

The Congaree River floodplain is part of a larger ecological concept known as the river continuum. Floodplain wetlands are linked to their associated river system, as water and materials that originate upstream will, during high flow periods,flow out into flood plain wetlands. They are considered waters of the State. Flow in the wetlands may be in channels, but will often be in the form of sheet flow -" non-directed horizontal flow.

*5 Floodplain wetlands also provide habitat for plants and animals through the sediment deposited when they are inundated with water. Typically, the water leaving a floodplain wetland is cleaner than when it entered the wetland because the wetland removes sediment, and excess nutrients and chemicals. Furthermore, the water leaving a floodplain wetland is higher in organic materials, which are exported downstream and are extremely important for other ecological functions that take place in downstream lakes, rivers, estuaries, and other floodplains.

The existing Highway 601 causeways constructed in 1942 have had a negative impact on the Congaree River floodplain. Those impacts include the interference with sheet flow across the floodplain and animal migration. The construction of the newcauseways, however, will not exacerbate those existing problems. Nevertheless, in

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light of the recognition of the impacts of this project in this important area, DOT offered to add one bridge length and two 60-inch culverts. DOT also proposed to purchase 43 acres of land for preservation and to "debit" 20 credits from DOT's Black River "mitigation bank." After the Board ordered that the additional 1:1 condition be removed, DHEC imposed the following condition in its Remand Permit:

[T]he applicant must remove existing roadway embankment for the purpose of restoring the hydrologic conditions. A total of 5.99 acres of embankment shall be removed and restored to wetland habitat. Further, bridge number 2 must be extended by 122.5 feet to the south, as agreed to, and 2 additional spans of 122.5 feet to the north, bridge number 3 must be extended 122.5 feet to the south and 122.5 feet to the north.

DHEC determined in its staff assessment that there are no feasible alternatives to the proposed project. While DHEC and the Environmental Groups have argued that the conditions they sought to include in the permit constitute "feasible alternatives" to the project, no argument has been raised that there is a feasible alternative to replacing the four bridges in a manner similar to that proposed by DOT. I find that the conditions sought by DHEC and the Environmental Groups are not feasible alternatives to building the project for purposes of determining whether the permit should be issued, but are simply related to what conditions can properly be required in the permit to minimize the adverse effects of the project.

Culverts

The language of Condition 2 of the proposed permit, requiring 60-inch floodplain pipes, states that the purpose of the pipes is to "help restore some of the sheetflow characteristics of the floodplain" in "the historical drainage areas along the causeway." The 60-inch culverts required in the proposed permit would, however, have no benefit for either wildlife passage or restoration of sheetflow. Terrestrial animals will not utilize a 60-inch culvert and fish will be unlikely to use it. Therefore, culverts that size would have little or no benefit to wildlife. Finally, the effect of flood waters being carried through two 60-inch pipes would be minuscule on a 2.7-mile wide floodplain. In fact, Hop Ridgell, DHEC's project manager who handled the permit, testified that he recommended removing the condition requiring the culverts because he did not believe the culverts were a cost-effective mitigation strategy.

*6 A biologist from the Department of Natural Resources nevertheless proposed the addition of larger 24-foot wide culverts for wildlife passage and the restoration of historic sloughs that existed prior to the placement of the existing fill causeways. However, there was no evidence presented as to the construction cost of such large culverts. In fact, the 60-inch culverts would cost between $360,000 and $400,000 each. Moreover, the purpose of culverts, in general, is not to minimize the adverse effect of a project, but as a compensatory restoration measure. However, even in this regard, the evidence did not establish that the culverts would effectively accomplish that goal.

Embankment

The existing embankments are constructed at a 2:1 slope and DHEC proposes to construct the new portions of the embankments also at a 2:1 slope. The Environmental Groups contend that the banks should be constructed at 1:1 slopes. Using 1:1 slopes would cut in half the amount of wetlands to be filled. However, if the embankments are constructed at 1:1 slopes instead of 2:1 slopes, it would add $20 million (in 2006 dollars) to the cost of the project, and it would also lead to higher future maintenance costs. The preliminary cost estimate for the entire project was $25 million (in 2005 dollars) including both the roadway and new bridges. The most recent estimate is $34 million (in 2007 dollars). Therefore, 1:1 slopes simply are not a cost-effective means to minimize the im-

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pacts of this project.

Bridge Spans

With DOT's approval, the June 23, 2006 NOPD required that one extra 122.5-foot bridge span be added, and the corresponding causeway be removed, at the Southern end of Bridge Two. The bridge span would be paid for using Federal Highway Administration (FHWA) bridge replacement funds.

DHEC now contends that additional bridge spans and removal of the existing roadway embankment are appropriate because the "additional bridge spans will eliminate approximately 4.4 acres (0.86 acres per span) of existing embankment to help restore the sheetflow characteristics of the floodplain in the area." The Remand Permit therefore added conditions requiring the construction of four 122.5-foot bridge spans. The proposal would require two spans at the North end of Bridge Two; one span at the South end of Bridge Three; and one span at the North end of Bridge Three.

DHEC contends that additional bridging should be required to compensate for the fill being placed in wetlands on account of the project. The additional bridge spans would cost $600,000 for each 122.5-foot span. However, the four additional bridge spans would have a de minimis impact upon the placement of any new fill. Rather, the clear purpose in requiring the additional bridge spans is to improve the sheetflow. The evidence clearly shows that the project, as proposed by DOT without the additional bridge spans, does not have a negative impact on the sheetflow in the project area, and may in fact make slight improvements to the sheetflow characteristics.

*7 Nevertheless, requiring additional bridge spans would not increase sheet flow unless removal of the corresponding existing causeway was also required. The Environmental Groups' expert witness, Dr. Tufford, testified that six additional spans of bridge totaling 735 feet would not make a significant difference in the sheetflow due to the size of the floodplain. To make a significant difference, he believed that much of the existing causeway would need to be removed. He said that modeling could be performed to determine the amount of additional bridging required for restoration.

The Environmental Groups thus contend that the four spans proposed by DHEC are insufficient and, therefore, DOT should be required to bridge the entire Congaree floodplain. However, bridging the entire floodplain would result in an enormous cost to the State of South Carolina, most of which would not be funded by the Federal Bridge Replacement Program. Moreover, the purpose of bridging the entire Congaree floodplain is not to reduce the impact of the project upon the wetlands or waters ofthe State but to restore the sheet flow to the condition existing prior to the construction of the causeway. Although, at some point, more bridging is likely to sufficiently increase sheet flow so that the system will again behave like a natural floodplain, Respondent's expert, Dr. Dan Tufford, testified that modeling would be necessary to determine how much bridging would be required to accomplish such an improvement.

Fill

The project will result in placement of fill material on currently undisturbed wetlands. That fill will be placed parallel to the existing causeway along the upstream edge of the existing elevated roadway, so that the bridge and roadway system can be re-constructed upstream of the existing system. The original amount of fill required will be eight (8) acres. Upon completion of the new bridges and the new causeway embankments that are needed to tie the new bridge spans back to the existingcauseway embankments, DOT proposes to remove six acres of the existing causeway embankments. As a result of the removal of this fill material, the project will add a net of

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two acres of fill in the Congaree floodplain wetlands.

The functions and values of the wetlands alongside the existing embankment are not as high as those of other wetlands in the general area of the Congaree floodplain. Therefore, the impact of the proposed new fill will likewise not be as high as those of other wetlands in the general area. Furthermore, Respondents have no data or studies showing that the placement of fill in this project would degrade water quality in any way. Instead, they rely on statements that, in general, any loss of wetlands has a negative impact by reducing wetland habitat and existing uses. Though Congaree Park is a "special and unique habitat," the proposed activity will not significantly impact the Park. I find that the water quality impacts of the project will be "very minimal."

*8 Nevertheless, wetlands created from the excavation six acres downstream of the old roadway would not be the same quality of the wetlands that would be newly-impacted. Any recovery of this area will take many years. However, Respondents' evidence did not show that the fill proposed for this project is likely to produce an adverse impact on navigable waters or other associated natural resources. In fact, DHEC's Staff Assessment for the permit does not identify any potential adverse impacts on navigable waters. Therefore, I find that there is no credible evidence that the fill proposed to be placed by this project will cause an adverse effect on water quality. Furthermore, the loss of wetlands as a result of the fill will be compensated for by DOT's purchase of 43 acres of land for preservation and the "debit" credits from DOT's Black River mitigation bank. The proposed activity will thus not permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired.

Cumulative/Animal Impacts

The Environmental Groups contend that the project will create a risk of wading birds being killed by predators. More specifically, John Grego, President of Friends of the Congaree Swamp, testified that, in his opinion, the cumulative impact of the project, considered with the existing adjacent power line easement, will create an increased risk of wading birds being killed by predators when they are attracted to the wider exposed area. However, the environmental studies prepared by a biologist for DOT found that the project would not cause a significant increase in cumulative and indirect impacts. Moreover, DOT's finding was adopted by the FHWA when it issued a Finding of No Significant Impact. Furthermore, the DHEC staff assessment states, "The cumulative impacts of the project are expected to be minimal in light of the fact that the existing structure had been there for 60 years." Therefore, I find that the cumulative impacts of the project on wading birds would be, at most, insignificant. Accordingly, I find that any requirement for additional bridge spans would not minimize any adverse cumulative impact effect of the proposed project.

Funding

The funding for this project comes from federal Highway Bridge Replacement and Rehabilitation Funds (BRR Funds). The use of BRR Funds is limited to the replacement of existing bridges. Thus, a project replacing existing fill with a longer bridge would only be eligible for those funds if the longer bridge were more cost effective. Here, replacement of existing fill with bridging on this project would not be cost effective. While the FHWA may allow some latitude with regard to the amount offill that can be replaced with bridging, the amount of additional bridging that DOT can include in the project and still keep its eligibility for the project's funding source is limited. The project as proposed by DOT includes one additional bridge span beyond what is necessary for replacement of the current bridges. DHEC's proposal for four additional spans would yield a total of five spans replacing existing causeway. While there is evidence that FHWA might allow as many as three additional spans if

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the culverts condition were removed, there is no evidence that their approval could be extended beyond that point. Therefore, the permit condition requiring a total of five additional bridge spans would be likely to cause the project to become ineligible for BRR Funds.

Issuance of the NOPD

*9 A Joint Public Notice for this project was issued by the US Army Corps of Engineers and DHEC on July 8, 2005. That notice is the date that begins the one-year clock to determine the date by which a Water Quality Certification must be issued. The one-year period expired on July 8, 2006.

DOT's application for the permit was filed on June 24, 2005 and DHEC received DOT's application fee on September 16, 2005. Sixty days from September 16, 2005 was November 15, 2005. DHEC did not issue an NOPD on the permit within the 60-day period. The 180-day-period running from September 16, 2005 expired on March 15, 2006. DHEC did not issue an NOPD on the permit within the 180-day period.

DHEC did not request any additional information or materials from DOT necessary for reaching a certification decision, other than the permit fee. However, there is no evidence that DOT did not pay the permit fee within a reasonable time. Moreover, there is no evidence that any letter was ever sent from DHEC in this matter notifying DOT that DHEC was suspending its processing of the application. Therefore, I find that the processing of the application was never suspended by DHEC.

In the past several years, DOT has been forced to perform repair work to the existing bridges, which has caused significant cost to both DOT and surrounding businesses. For instance, Lee Floyd, DOT State Bridge Maintenance Engineer, testifiedthat DOT has spent up to $1.5 million repairing the existing bridges in the last ten years. Additionally, Susan McPherson, an employee of International Paper, testified that a closure of six to ten hours for bridge repairs costs her firm $8,000.

Moreover, the new bridges will be safer than the existing bridges, which are in major states of disrepair. Photographs of the existing bridges reflect large cracks in the concrete and extensive repairs used to hold the bridge decks in place. A sign under Bridge Four warns motorists not to park under the bridge because DOT fears that falling pieces of the bridge may injure someone.[FN7] Furthermore, current gaps at the bridges' expansion joints pose a risk to motorcyclists. The proposed project, in contrast, includes several features aimed at making the bridges safer for the traveling public, including wider shoulders on the bridge and road, and upgraded guardrails.

Finally, because the costs of concrete, steel and other materials necessary to build the proposed bridges have risen 35% to 40% in the past three or four years, the estimated construction costs for the project have increased significantly as a result of the delay.

Therefore, in light of the increased bridge repair and construction costs, as well as the delay in the safety improvements that will be afforded by the project, I find that DOT and the public have been prejudiced by DHEC's failure to timely issue its NOPD.

DHEC presented no evidence that it made any finding prior to November 15, 2005 that a feasible alternative to the proposed project existed, and I find that no such determination was made. On the contrary, the employee handling the permit application testified that he did not know enough about the project to make a request for information during that period of time.

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CONCLUSIONS OF LAW

*10 This Court has subject matter jurisdiction in this case pursuant to S.C. Code Ann. § 1-23-310 *et seq.* (2005 & Supp. 2006) and S.C. Code Ann. § 44-1-60 (Supp. 2006). The hearing before the ALC is a contested case hearing pursuant to the APA and is heard *de novo*. MarlboroParkHosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 595 S.E.2d 851 (2004). The proper standard of proof to be applied is a preponderance of the evidence. Anonymous (M-156-90) v. State Bd. of Med. Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998); National Health Corp. v. Dep't of Health and Envtl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). Furthermore, the burden of proof is upon the party asserting the affirmativeof an issue and, therefore, DOT bears the burden in this case of proving that the agency decision was in error under the statutory and regulatory standards. Leventis v. Dep't of Health and Envtl. Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Likewise, where the Environmental Groups seek to establish that DHEC's decision was in error, they too bear the burden of proof.[FN8]

Generally, to have standing in South Carolina "one must have a personal stake in the subject matter of the lawsuit" and be a real party in interest. Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Furthermore, in environmental cases, a petitioner has standing if he or she meets the following three-pronged test:

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 causalconnection 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. S.C. Dep't of Health and Envtl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007) (quoting in part Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992)). The evidence established that the Petitioner and Environmental Groups have standing to pursue this case.

The issues in this case revolve around DHEC's issuance of a 401 Water Quality Certification and Navigable Waters Permit. The criteria for the 401 Water Quality Certification are found primarily at S.C. Code Ann. Regs. § 61-101 (Supp. 2006). The relevant provisions for a Navigable Waters Permit are found at S.C. Code Ann. Regs. § 19-450 (Supp. 2006) and 33 USCA § 1341 (1994).

Section 401(a)(1) of the Clean Water Act allows states to exercise veto authority over Federal licenses and permits for discharges to navigable waters if the proposed activity would violate state water quality standards. 33 U.S.C. § 1341(a)(1) and 1341(d). In carrying out its responsibilities, the Act requires states to adopt water quality standards meeting certain minimum national standards. DHEC's authority to act for the State in issuing or denying certifications required by Section 401 of the Clean Water Act derives from the S. C. Pollution Control Act, which authorizes and requires DHEC to "maintain reasonable standards of purity of the air and water resources of the State." S.C. Code Ann. § 48-1-20. Furthermore, pursuant to S.C. Code Ann. Regs. § 61-101 (A)(1), DHEC established procedures and policies for implementing State water quality certification requirements under the Clean Water Act. Regulation 61-101 provides that, in reviewing an application for a permit under the Clean Water Act, DHEC must address and consider the following factors:

***11** (a) whether the activity is water dependent and the intended purpose of the activity;

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(b) whether there are feasible alternatives to the activity;

(c) 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. Regs. § 61-101 (F)(3). Additionally, "[w]hen issuing certification for such activities, the Department shall condition the certification upon compliance with all measures necessary to minimize adverse effects...." S.C.Code Ann. Regs. § 61-101 (F)(4).

Certification is to be denied, in part, if "there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses." S.C. Code Ann. Regs. § R.61-101 (F)(5)(b). Certification will also not be issued "unless the Department is assured appropriate and practical steps including stormwater management will be taken to minimize adverse impacts on water quality and the aquatic ecosystem." S.C. Code Ann. Regs. § 61-101 (F)(6).

DHEC's Compliance with Time Frames for Issuance of Its NOPD

DOT argues that DHEC waived its right to issue a Water Quality Certification by failing to timely issue its NOPD and final decision. The Respondents argue that the deadlines were complied with because:

- The DOT application was suspended under State permitting agency procedures for failure to submit the application fee with the application;
- The DOT application was further suspended by the public hearing requirement contained in R. 61-101; and
- The determination of feasible alternatives was not made until June 23, 2006.

The Federal Water Pollution Control Act provides the underlying authority for the regulation of water quality in the states. SeeAm. Jur. Pollution Control § 718. Certification requirements for Section 401 of the Clean Water Act are set forth in 25A S.C. Code Ann. Regs. 61-101. See 25A S.C. Code Ann. Regs. 61-101 (A)(1) (Supp. 2006). Pursuant to Federal and state laws, there are three separate time periods regulating DHEC's review of this DOT application - a 60-day period[FN9]; a180-day period[FN10]; and a general one-year period.[FN11] The 60 and 180 day time frames apply to the issuance of the NOPD whereas the one year time frame applies to the final decision of the agency. Regarding the one year time frame, the federal Clean Water Act, which is the controlling legislative act, provides that:

If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

*12 Additionally, Regulation 61-101 (A)(6) provides that the Department is "required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended." Here, there is a question as to what is the final de-

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cision. In other words, is the final decision the day the staff issued its decision or the date the Board issued its decision after a Final Review Conference? Resolution of that issue is decisive as to whether DHEC was timely in issuing its decision. Nevertheless, I make no finding regarding this issue because I find that DHEC's failure to issue its NOPD timely precludes further review of this case.

180 Day Time Frame

As set forth above, the federal Clean Water Act provides that a state must act on a request for certification "within a reasonable period of time." In implementing that law, the South Carolina regulations provide two pertinent time fames. Unless an application is suspended, the Department must issue an NOPD within 180 days of acceptance of an application. As set forth above, the Respondents contend that DHEC met that requirement because the application was suspended at various times.

They first argue that the DOT application was suspended under State permitting agency procedures for failure to submit the application fee with the application. Indeed, the evidence established that although DOT's application was filed on June 24, 2005, it did not remit the application fee until September 16, 2005, approximately 70 days after the application. Regulation 61-30 (C)(1)(b) does set forth that "[t]he Department will not process an application until the application fee is received." 24A S.C. Code Ann. Regs. 61-30 (C)(1)(b) (Supp. 2006). However, the evidence does not establish that the Department refused to process the application until it received the payment of the filing fee. In fact, the evidence established that the Department had begun reviewing the application even though it had not received a filing fee.

Moreover, the Respondents rely upon some nebulous evidence that the processing of the application was suspended. I do not find that evidence convincing. Furthermore, 25A S.C. Code Ann. Regs. 61-101 (C)(4) (Supp. 2006) sets forth the specific instance in the Regulation as to when an application is suspended for the 180 day time frame. It provides that:

When the Department requests additional information it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended upon notification to the applicant by the Department.

Here, DHEC did not establish that there was any meaningful length of time when information was not provided. More importantly, DHEC never notified DOT at anytime that the processing of its application was suspended. "The essential requirements of due process... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." Ross v. Medical University of South Carolina, 492 S.E.2d 62 (1997)quotingCleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, (1985). To allow the Department to surreptitiously suspend the processing of an application and thereby its deadline to make an NOPD would be a violation of due process. Finally, ignoring the above, DHEC did not issue its NOPD in this case until June 23, 2006. Even if its asserted time frame is accepted, the starting date for the 180-day time period would begin on September 16, 2005 and end on March 15, 2006.

*13 The Respondents also argue that the running of the 180-day time period was suspended because of the public hearing held in this matter. DHEC was required to hold a public hearing in this matter pursuant to 25A S.C. Code Ann. Regs. 61-101(E)(2) & (5) (Supp. 2006). Further, the regulations state that, if a public hearing is held, the public comment period must be extended fifteen days after the date of the hearing. 25A S.C. Code Ann.

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Regs. 61-101(E)(4) (Supp. 2006). Here, the public hearingwas held on November 15, 2005, so the public comment period did not end until December 1, 2005. Additionally, DOT did not respond to the written comments and the comments raised in the public hearing until February 2006. Again, however, DHEC never notified DOT at anytime that the processing of its application was suspended because of the public hearing requirement. Moreover, the Respondents have cited no provision in the Regulation that provides that the time frames are to be presumptively suspended while public hearings are held. Rather, those hearings would seemingly be an activity that is contemplated to occur within the 180-day time frame. Furthermore, as discussed above, to allow the Department to surreptitiously suspend the processing of an application and thereby its deadline to issue an NOPD under these circumstances would be a violation of due process. Thus, I conclude that the application process for this permit was never suspended by DHEC.

60-Day Time Limit

The Respondents argue that the 60-day time frame is not applicable in this case because the determination of feasible alternatives was not made until June 23, 2006, with the issuance of the Proposed Decision. Regulation 61-101 (F)(4) providesthat:

Certification of the activities listed below will be issued when there are no feasible alternatives. When issuing certification for such activities, the Department shall condition the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management. The Department shall issue proposed certification decisions on such applications within sixty (60) days of acceptance of the application unless otherwise suspended or in accordance with State permitting agency procedures. The Department will also attempt to issue general certifications for such activities.

* * *

(b) filling necessary for public highways or bridges.
25A S.C. Code Ann. Regs. 61-101(F)(4) (emphasis added). Therefore, when there are no feasible alternatives to a project, DHEC must issue its NOPD "within sixty (60) days of acceptance of the application unless otherwise suspended or in accordance with State permitting agency procedures" in cases involving "filling necessary for public highways or bridges." Here, the sole request by DOT was to add fill in-order to construct new bridging. The Respondents nevertheless argue that this regulation is not applicable because it considered "feasible alternatives" to this project. DHEC construes the term "feasible alternatives" to allow it to consider both its determination regarding avoidance of impacts and its determination of which conditions on the certification are necessary to mitigate for and minimize the unavoidable impacts of the project. The application of this regulation is thus contingent upon the meaning of the phrase "when there are no feasible alternatives."

*14 At the outset, I fail to see how DHEC's belated determination of whether there is a feasible alternative warrants a disregard for the 60-day requirement to make that very determination. Under their logic, the time frame for DHEC to make its decision should be ignored because DHEC failed to make its decision within that time frame. "Each word, clause, sentence, and section of a statute should be given meaning." Lee v. Thermal Engineering Corp., 352 S.C. 81, 94, 572 S.E.2d 298, 305 (Ct.App 2002). The Department's general interpretation of "feasible alternatives" however would make the 60-day time frame meaningless. In other words, if "feasible alternative" includes consideration of any conditions to impose upon the project, the Department can simply avoid the requisites of the time frame upon its contention that it is considering the conditions it wishes to impose.

Moreover, "[c]ourts should consider not merely the language of the particular clause being construed, but the

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word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." Hernandez-Zuniga v. Tickle, 374 S.C. 235, 247, 647 S.E.2d 691, 697 (Ct. App. 2007). DHEC's construction of the term "feasible alternatives" to include the conditions imposed on the certification is inconsistent with the plain language of the regulations. Regulation 61-101 (F)(4) provides that certification of projects involving the placement of fill for public highways or bridges will be issued "when there are no feasible alternatives." The regulations further provide that:

Certification will be denied if:

* * *

(b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses....

25A S.C. Code Ann. Regs. 61-101(F)(5) (Supp. 2006) (emphasis added). Thus, the regulations provide for certification of projects involving the placement of fill for public highways and bridges only if there are no feasible alternatives. If there is a feasible alternative to the activity, certification must be denied. Clearly, under the plain language of the regulations, "feasible alternatives" cannot encompass conditions which DHEC seeks to impose upon a certification, for if feasible alternatives to an activity exist, there can be no certification of that activity.

Nowhere in the regulation is there any indication that the 60-day time frame does not apply when DHEC is determining whether there are feasible alternatives to the project. To the contrary, in order to determine that a project has no feasiblealternatives, thus triggering the 60 day requirement, DHEC must necessarily determine whether there are indeed feasible alternatives to the activity. The regulations clearly contemplate that DHEC must act promptly upon all certification requests. 25AS.C. Code Ann. Regs. 61-101(C)(2) states that "if the Department does not request additional information within ten (10) days of receipt of the application or joint public notice, the application will be deemed complete for processing; however, additional information may still be requested of the applicant within sixty (60) days of receipt of the application." Furthermore, if DHEC determines that it needs additional information in order to make its determination, "it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended upon notification to the applicant by the Department. Any subsequent resubmittal will be considered a new application." Regs. 61-101 (C)(4). In this case, DHEC failed to follow its own procedures, since there is no indication that it ever requested additional information from DOT or that it suspended the processing of the permit pending the receipt of additional information.

*15 The Respondents' argument that the "conditions" DHEC seeks to impose upon the permit-"the construction of additional bridging-"constitute a feasible alternative to the project as proposed by DOT must likewise fail. The term "feasible alternative" is not defined in Regs. 61-101(F)(4) or (5). When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. State v. Landis, 362 S.C. 97, 606S.E.2d 503 (Ct. App. 2004). "Feasible" means "capable of being done or carried out;" "reasonable, likely." Merriam-Webster's Online Dictionary, www.m-w.com. Therefore, not only must a "feasible alternative" be possible, but it must also be reasonable. This construction of theterm "feasible alternative" is also supported by the fact that DHEC is required to consider permits for construction in navigable waters in the context of this water quality certification review. SeeRegs. 61-101(A)(9) (water quality certification review for activities requiring both water quality certification and a permit for construction in navigable waters will encompass issues pertaining to the navigable waters permit as well). Thus, the definitions governing navig-

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able waters permits areinstructive in this case.

The regulations governing permits for construction in navigable waters contain the following definition of "feasible":

> Feasible (feasibility) is determined by the Department and is based upon the best available information, including but not limited to technical input from the agencies, and consideration of economic, environmental, social and legal factors bearing on the suitability of the proposed activity and its alternatives. It includes the concepts of reasonableness and likelihood of success of achieving the purpose. "Feasible alternatives" applies to both locations or sites and to methods ofdesign or construction and includes a "no action" alternative.

24 S.C. Code Ann. Regs. 61-19-450.2(G) (emphasis added). Here, while DHEC and the Environmental Groups argue that the conditions they sought to include in the permit constitute "feasible alternatives" to the project, there was no evidence that there is a viable feasible alternative to replacing the four bridges in a manner similar to that proposed by DOT. Clearly, the bridges must be replaced at this location following the existing roadway. Furthermore, neither spanning the entire floodplain nor employing 1:1 slopes is an economically feasible alternative to replacing the four bridges in a manner similar to that proposed by DOT. The remaining conditions sought by DHEC and the Environmental Groups simply address what conditions shouldbe required in the permit to minimize the adverse effects of the project.

Appropriate Sanction

The Environmental Groups argue that Regulation 61-101 does not set forth any consequence for DHEC's failure to comply with the 180-day time frame and that the Court should therefore not assume that the legislature intended for DHEC to waive its power to dictate 401 permit terms once the 180-day time period elapses. In support of that contention, the Environmental Groups point to Johnston v. S.C. Dep't of Labor, Licensing, and Regulation, 365 S.C. 293, 617 S.E.2d 363 (2005). I disagree.

***16** In Johnston, a licensed real estate appraiser was charged by the Real Estate Appraisers Board (Board) with violating certain regulations applicable to those in his profession. After an administrative hearing on the matter, the Board foundthat the appraiser had committed the alleged violations and therefore issued a written order imposing a fine and suspending his license. Pursuant to S.C. Code Ann. § 40-60-150(C)(3) (Supp. 2004),[FN12] the Board was required to serve written notice of its decision on the appraiser within thirty days of issuing its final order. However, notice of the Board's decision was not properly served on the appraiser within the requisite thirty-day time period. Thereafter, the appraiser appealed the Board's decision to the ALC. The ALC reversed the Board's order, finding that the Board's failure to serve notice of its decision within the statutorily-mandated time period divested the Board of jurisdiction to decide the matter. However, on further appeal, the Supreme Court held that the failure by the Board to comply with Section 40-60-150(C)(3) did not affect the Board's jurisdiction. Instead, the Supreme Court held that the Board's decision was valid, but ineffective, until it was served upon the appraiser. The Supreme Court explained:

There is no indication the Legislature intended for the time limit to prevent the Board from having the ability to discipline an errant appraiser if the Board fails to serve notice of the written decision within the prescribed time period. Instead, the Legislature intended to speed the resolution of appraiser disciplinary cases for the benefit of all parties involved... We note that, although the thirty-day time limit is mandatory, the Legislature has not provided how that mandate is to be enforced. There is no language regarding the consequences if the Board misses the deadline for serving written notice of its decision on the appraiser. Accordingly, we will not assume

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the Legislature intended the Board to lose its power to act for failing to comply with the statutory time limit.

Johnston, 365 S.C. at 297-98, 617 S.E.2d at 365 (internal citations omitted). The Supreme Court then determined that the appraiser was not prejudiced by the Board's failure to complete service within thirty days of the Board's issuance of its decision, and it therefore remanded the case to the ALC for a ruling on the merits of the appraiser's other claims. Id. at 298, 617 S.E.2d at 365.

The present case is distinguishable from Johnston in several ways. First, while it is true that Regulation 61-101 does not expressly set forth consequences for DHEC's failure to timely issue its NOPD, Regulation 61-101 does refer to the waiver provision of 33 USCA § 1341. See 25A S.C. Code Ann. Regs. § 61-101(A)(6) (Supp. 2006). Therefore, it would be misleading to claim that "there is no language" in Regulation 61-101 regarding the consequences of DHEC's failure to timely act. In fact, a reasonable interpretation of Regulation 61-101 is that the legislature intended to incorporate the waiver provision of 33 USCA § 1341 into Regulation 61-101.

*17 Second, regarding Johnston, because the Board's decisions do not become effective until they are served on the appraiser, the Board has an independent reason, other than the threat of losing its power to act, to promptly serve the appraiser. Here, however, other than the threat of losing its power to dictate 401 permit terms, DHEC generally has no independent reason to timely issue its NOPD. Proposed projects cannot go forward until a 401 permit is issued. Therefore, except in rare cases where a proposed project is expected to have a positive net impact on the environment, DHEC's environmental interests are not harmed by delaying the issuance of its NOPD (unless, of course, DHEC faces the possibility of losing its power to act).

Third, in Johnston, had the Supreme Court agreed with the appraiser's argument, it would have meant that the appraiser would have gone undisciplined for his actions. Clearly, allowing licensed real estate appraisers to go unpunished for their professional misdeeds is not in the public's best interest. Here, however, a state's waiver of its right to dictate 401 permit terms does not affect the federal government's authority to place conditions on the permit in accordance with federal law. See Christopher J. Eggert, The Scope of State Authority Under Section 401 of the Clean Water Act after PUD No. 1 v. Washington Department of Ecology, 31 Williamette L. Rev. 851, 857 (1995). Therefore, unlike the situation in Johnston, finding that DHEC has waived its right to act does not mean that the public's interests will go wholly unprotected.

Finally, in this case, unlike the appraiser in Johnston, DOT has suffered prejudice as a result of DHEC's delay in the issuance of its NOPD. For instance, the delay has significantly increased the risk that DOT will be forced to perform maintenance on the currently-existing bridges, which are in increasing states of disrepair. Moreover, over the past several years, the costs of concrete, steel and other materials necessary to build the proposed bridges have increased at a rate much higher than inflation. Therefore, the delay has significantly increased the cost of the proposed project. Furthermore, because the currently-existing bridges are not as safe as the new bridges will be, the delay has prejudiced the safety of the traveling public.

For these reasons, I conclude that DHEC has waived its right to dictate the terms of DOT's 401 permit by failing to issue its NOPD within the time limits set forth in Regulation 61-101.[FN13]

Timeliness of DOT's request for a Final Review Conferences

During the trial of this matter, DHEC made a motion to dismiss this case because DOT failed to timely request review of this case. In pertinent part, S.C. Code Ann. 44-1-60 (E) (Supp. 2006) provides that:

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Notice of the department decision must be sent to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail. return receipt requested. The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person.

*18 Furthermore, "[a]ll department decisions involving the issuance... of permits... which may give rise to a contested case shall be made using the procedures set forth in this section." S.C. Code Ann. § 44-1-60(A) (Supp. 2006). Therefore, filing a request for a final review conference is a procedural requirement for an entity or person to challenge a DHEC decision at the ALC. SeeMRI at Belfair, LLC v. S.C. Dep't of Health and Envtl. Control and Coastal Carolina Med. Center, 06-ALJ-07-0714-CC, 2006 WL 3232043 (Admin. Law Ct. October 18, 2006).

The timing of the issuance of the NOPD in this case creates a quandary. The NOPD was issued before 2006 Act 387 went into effect but the review of the case occurred after the effective date of Act 387. After noting several exceptions. Section57 of Act 387 provides that: "For all other actions pending on the effective date of this act, the action proceeds as provided in this act for review." Therefore, it appears that the notice provisions of the prior law applied to this case but the review of the case is pursuant to the procedures of Act 387.[FN14] The law setting forth the requisites for notice prior to Act 387 was found in 25 S.C. Code Ann. Regs. 61-72§ 201(A) (Supp. 2005), which provided that:

Any person may request an adjudicatory hearing by filing a Petition for Administrative Review with the Clerk of the Board. Any such Petition must be filed within 15 days, or other period provided by law, following actual or constructive notice of a final staff decision on a licensing matter as defined above, or following receipt of an administrative order.

Nevertheless, ALC Rule 11(C) provided that "[u]nless otherwise provided by statute, a request must be filed and served within thirty (30) days after actual or constructive notice of the agency's determination."[FN15] Therefore, the time for serving a request for contested case review under Rule 11(C) and Regulation 61-72 differed. Clearly, however, ALC Rule 11(C) was the last legislative expression of a timeframe.[FN16] Therefore, since Regulation 61-72 is not a "statute," the provisions of Rule 11(C) must prevail. Ramsey v. County of McCormick , 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991) ("Under the last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails.").[FN17]

DOT thus had 30 days to file a request for review from the date of notice. The notice was mailed on June 23, 2006 and DOT filed a cross-appeal and opposition to the Environmental Groups' challenge to the permit on July 19, 2006 That filing thus complied with the thirty day time frame.

Furthermore, I find that DOT established that it did not receive notice of the NOPD until June 26, 2006 via an e-mail. That day Berry Still, an employee of DOT, requested a formal copy of the permit by mail. DOT filed its request for a hearing to DHEC within one day of receiving a copy of the NOPD by mail. Therefore, I find that, under the circumstances, DOT timely requested a Final Review Conference.

*19 Finally, DOT is the party seeking the permit. It is simply unreasonable to conclude that DOT would not be a necessary party at such an early stage of the permitting process after the Environmental Groups timely filed their request for DHEC's Final Review Conference. SeeSpanish Wells Prop. Owners Ass'n v. Bd. of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 376 S.E. 160 (1988). The DHEC Board never made a ruling on

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DHEC's objection to the timeliness of DOT's filing. If the DHEC Board was aware of the objection but didn't find it meritorious, the DHEC staff is bound by the Board's decision. SeeDirector. Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122 (1995). Therefore, even if DOT did not timely request a Final Review Conference, they were nevertheless a party to the proceeding.

DHEC Board's Authority to Remand

DOT and the Environmental Groups challenge DHEC's right to remand the permit back to staff for the imposition of additional conditions following the conclusion of the Final Review Conference. S.C. Code Ann. § 44-1-60(E) provides that the decision of DHEC's staff becomes the final agency decision unless a written Request for Final Review is filed with DHEC. After that final review, "the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented." S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2006). The language of the statute referring to the Board's hearing as a "final review" does not suggest that DHEC will engage in further review of the matter by staff. Thus, DHEC's authority to remand a permit to staff following the Final Review Conference is questionable. Nevertheless, in light of the fact that this case is properly before the ALC for a *de novo* review and the ALC's determination that DHEC waived its right to review the Certification, this issue need not be resolved in this case.

Mitigation for Wetlands Impacts

401 Water Quality Certification

DOT challenges DHEC's mitigation for wetlands impacts as a condition of the 401 Water Quality Certification. DHEC argues that it has the inherent right to require mitigation based on its right to include conditions to minimize adverse impactson water quality and the aquatic eco-system. Regulation 61-101 (F)(3) provides that:

In assessing the water quality impacts of the project, the Department will address and consider the following factors:

(a) whether the activity is water dependent and the intended purpose of the activity;

(b) whether there are feasible alternatives to the activity;

(c) 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;

*20 (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

25A S.C. Code Ann. Regs. 61-101 (F)(3) (Supp. 2006). As noted above, a Certification will be denied if "there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses." 25A S.C. Code Ann. Regs. 61-101 (F)(5)(b) (Supp. 2006). Here, there were no feasible alternatives to the project.

A Certification will also not be issued "unless the Department is assured appropriate and practical steps... will be taken to minimize adverse impacts on water quality and the aquatic ecosystem." 25A S.C. Code Ann. Regs. 61-101 (F)(6) (Supp. 2006). Therefore, the issue for consideration for this project is whether the potential water

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quality impacts of the project warrant conditions upon the permit and whether the appropriate and practical steps were taken to minimize adverse impacts on water quality and the aquatic ecosystem. Here, the potential water quality impacts of the project are negligible. DOT has further taken the appropriate and practical steps to insure that impacts to water quality and the aquatic ecosystem are minimal.

Navigable Waters Permit

The Environmental Groups argue that the more comprehensive standards, and in particular the mitigation requirements, of navigable waters permits must be considered in evaluating the issuance of this Water Quality Certification. Regulation 61-101 (A)(9) provides that:

> If an activity also requires a permit for construction in State navigable waters pursuant to applicable laws and regulations, the review for the water quality certification will consider issues of that permit and the Department will not issuea separate permit for construction in State navigable waters. The certification will serve as the permit.

25A S.C. Code Ann. Regs. 61-101 (A)(9) (Supp. 2006). Since this project involves construction in State navigable waters, both the Water Quality Certification and Construction in Navigable Waters Permit should be jointly considered in this case. However, the requirement that the Navigable Waters Permit be considered does not necessarily warrant the application of the more comprehensive standards in deciding the issues of this case. Rather, the Navigable Waters Permit must be considered inthe context of the issues in this case.

A state Navigable Waters Permit is required "for any dredging, filling or construction or alteration activity:

- in, on, or over a navigable water, or
- in, or on the bed under navigable waters, or
- in, or on lands or waters subject to a public navigational servitude under Article 14 Section 4 of the South Carolina Constitution and 49-1-10 of the 1976 S.C. Code of Laws including submerged lands under the navigable waters of the state, or
- for any activity significantly affecting the flow of any navigable water."

23 S.C. Code Ann. Regs. § 19-450.1.A (Supp. 2006) (bullets added). A navigable water is defined in the Regulation as "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." 23 S.C. Code Ann. Regs. § 19-450.2.C (Supp. 2006). Lands or waters subject to a public navigational servitude is defined as "those lands below the mean high water line in tidally influenced areas, or below the ordinary high water mark of any nontidal navigable waterway of the state." 23 S.C. Code Ann. Regs. § 19-450.2.D (Supp. 2006). Inversely, "no permit is required by the Departmentfor any activity or construction on private highlands above the mean high water line or ordinary high water mark which does not affect directly and significantly any navigable water or water or land subject to a public navigational servitude." 23 S.C. Code Ann. Regs. § 19-450.3 (Supp. 2006).

***21** The issues of this case involve *solely* the impact of fill in the floodplain and the benefits associated with the removal of existing fill. There is no evidence that the fill at issue to be placed by DOT in the construction of the bridges is: 1) in a navigable water; 2) in, or on the bed under navigable waters; 3) in, or on lands or waters subject to a public navigational servitude; or 4) for any activity significantly affecting the flow of any navigable water. Seealso 23 S.C.Code Ann. Regs. § 19-450.2 (E), (F) (Supp. 2006) (defining "mean high water line" and "ordinary high water mark"). In other words, the proposed activities that Respondents are *specifically* objecting to will take place on "highlands above the mean high water line or ordinary high water mark," and they will not "affect directly and significantly any navigable water or water or land subject to a public navigational ser-

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vitude." Therefore, the requirements of the Navigable Waters Permit have no application to the issues presented in this case.[FN18]

Conclusions

There are two distinct environmental issues presented by Respondents in this case -" the impact that the proposed project will have to the area and the desire to have the impact of the existing causeway either lessened or eliminated. I find that restoration of the sheet flow to be a laudable goal. However, I do not find the facts of this case or the existing law supports that aspiration. In fact, the Department of Natural Resources proposed to have the entire floodplain bridged, which would constitute an enormous cost to the State of South Carolina, most of which would not be funded by the Federal Bridge Replacement Program. Rather, the more feasible and reasonable consideration is the minimization of the impact of this project.

If the issue was the filling of the wetlands to create four new bridges, the impact to the wetlands would be a grave concern. In fact, it is quite clear that the existing causeways have interrupted the sheet flow in this area and thus had an environmental impact.[FN19] Nevertheless, it is equally clear that the footprint of the causeways at issue in this case has existed since 1942. Moreover, though the foot print of those causeways will change as a result of this project, there are threeimportant details concerning that change. The most important detail is that the fill will only be placed along the side of the causeways. Therefore, the impact to sheet flow which was the most pervasive concern presented by the Respondents would be de minimis. Secondly, as a result of the change of the bridge design, the bridge spans will be increased. In the areas where the spans are lengthened the resulting unneeded causeway will be removed. Consequently, the project will actually increase sheet flow. Finally, the only significant impact this project will have upon the floodplains is the impact to the wetlands where the fill is placed. [FN20] However, the evidence clearly showed that DOT will offset that impact by purchasing 43 acres of land for preservation and debiting 20 credits from its Black River "mitigation bank."

*22 The project, without a condition requiring additional bridge spans, has no negative impact on sheetflow. Rather, the reasoning behind requiring the four additional bridge spans or bridging the entire Congaree floodplain is not to reduce the placement of new fill by the project, but to remove fill from the pre-existing causeway. In other words, the condition requiring additional bridging was a mitigation compensation measure. However, there is no such requirement in the above statutes or regulations.

Nevertheless, DOT agreed to place two 60-inch pipes through the causeway of this area to help increase sheet flow. However, the evidence overwhelmingly established that the flood waters carried through two 60-inch pipes would be minuscule. Instead of the pipes, adding bridging south of Bridge # 2 would be more beneficial for movement of water, and additional bridging north of Bridge # 2 would be more beneficial for movement of wildlife. I therefore find that the permit, if properly reviewed, should be amended to eliminate the 60-inch pipes and add additional bridging to the north and south ends of Bridge Two.

ORDER

IT IS HEREBY ORDERED that Condition 2 of the Water Quality Certification and Construction in Navigable Waters Permit contained in the June 23, 2006 Notice of Proposed Decision shall be removed; and

IT IS FURTHER ORDERED that Condition 1 of the Water Quality Certification and Construction in Navigable Waters Permit contained in the June 23, 2006 Notice of Proposed Decision is amended to read, "All disturbed land surfaces and sloped areas must be stabilized and sloped with a minimum 2:1 embankment slope

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upon project completion;" and

IT IS FURTHER ORDERED that the disputed portions of Condition 14 of the Water Quality Certification and Construction in Navigable Waters Permit contained in the June 23, 2006 Notice of Proposed Decisionis amended to read:

As proposed, the applicant must provide compensatory mitigation, not inconsistent with this order, for wetlands impacts associated with the proposed work as proposed in the compensation plan dated September 16, 2005. This will be through the purchase and preservation of 43 acres of high quality wetlands on-site, or by providing monetary assistance to the National Park Service for the acquisition of additional lands suitable for 60.2 mitigation credits for addition into the Congaree National Park. The applicant must also provide documentation of withdrawal of 20.2 restoration/enhancement credits from the SCDOT Black River Mitigation Bank. In addition, the applicant must extend Bridge #2 by 122.5 feet on each side and remove any unnecessary causeway that may currently exist in the areas where Bridge #2 will be extended.[FN21]

and

IT IS FURTHER ORDERED that though the above portions of the NOPD dealing with 401 Water Quality Certification are amended, this case is nonetheless dismissed in keeping with the Findings of Fact and Conclusions of Law contained in this Final Order and Decision.

***23 AND IT IS SO ORDERED.**

Ralph King Anderson III
Administrative Law Judge

FN1. For ease of reference, these bridges will be referred to by numbers One through Four.

FN2. A causeway is "a raised way across wet ground or water." Merriam-Webster Online Dictionary (2006).

FN3. DHEC and the Environmental Groups argue that the conditions they sought to include in the permit constitute "feasible alternatives" to the project. However, there was no evidence that there is a feasible alternative to replacing the four bridges in a manner similar to that proposed by DOT.

FN4. Florence and Hutcheson is a consultant that was hired by DOT to manage the environmental permitting for the 601 Bridge Replacement Project.

FN5. No certified letter containing the June 23, 2006 NOPD was ever sent from DHEC. However, as explained below, I do not find that a certified letter was required at the time of the sending of the NOPD

FN6. Congaree National Park is located west of the US 601 causeway and bridges. Congress has also authorized the national park to expand its boundaries eastward to the confluence of the Congaree and Wateree Rivers. If or when the NPS purchases all of the land authorized for Congaree National Park, the US 601 causeway and bridges would bisect the park.

FN7. In 2003, an employee of a contractor attempting to repair Bridge Four was killed on the job when he fell from scaffolding.

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FN8. In making this conclusion, it is notable that this case is a consolidation of separate cases filed by DOT and the Environmental Groups.

FN9. 25A S.C. Code Ann. Regs. 61-101 (A)(4) (Supp. 2006).

FN10. 25A S.C. Code Ann. Regs. 61-101 (A)(6) (Supp. 2006).

FN11. 33 U.S.C.A. § 1341 (a) (1) (1994).

FN12. S.C. Code Ann. § 40-60-150(C)(3) (Supp. 2004) stated in pertinent part: "The board shall render a decision and shall serve notice, in writing within thirty days, of the board's decision to the applicant or appraiser charged."

FN13. Though I find that DHEC failed to comply with the 60-day time limit, I do not find that failure alone warrants a determination that DHEC waived its right to dictate the terms of the NOPD. Nevertheless, DHEC's failure to comply with the 180-day time frame, especially in light of its failure to comply with the 60-day time limit, does warrant this determination

FN14. In fact, DHEC concedes that the notice provisions of the prior law apply in making its argument that it was not required to send the notice by certified mailing.

FN15. Prior to the enactment of Act 387, requests for contested case hearings following a DHEC staff decision were filed with the ALC.

FN16. The last time that Regulation 61-72 was amended was April 23, 1993, which was prior to the formation of the ALC.1993 Act No. 181, § 19 (creating ALC).

FN17. Act 387 also amended S.C. Code Ann. § 1-23-600 (Supp. 2005) to provide that: "All requests for a hearing before the Administrative Law Court must be filed in accordance with the court's rules of procedure. S.C. Code Ann. § 1-23-600 (C) (Supp. 2006). A subsequent statutory amendment may be interpreted as clarifying original legislative intent. Buist v. Huggins, 367 S.C. 268, 625 S.E.2d 636 (2006).

FN18. While mitigation requirements are not applicable in this case, DOT nonetheless has previously agreed to provide compensatory mitigation. Therefore, in keeping with their prior agreement, I presume that DOT will provide compensatory mitigation for this project.

FN19. Though there was much testimony about that impact, the Congaree National Park which is adjacent to the four bridges is still considered a pristine area.

FN20. In fact, the project is consistent with plans for the national park and will not have an adverse impacts on federally protected species or critical habitat.

FN21. I am amending the NOPD in this Decision to set forth what I deem to be a proper resolution of the factual issues in this case in the event the appellate court finds that DHEC did have the authority to proceed with the review of this permit.

2008 WL 1934476 (S.C.Admin.Law.Judge.Div.)

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