

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA SOUTH CAROLINA
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May 09, 2012

Christopher M. Holmes
222 W. Coleman Blvd., Suite 124
Mt. Pleasant SC 29464

Carlisle Roberts, Jr.
Haynsworth Sinkler Boyd
PO Box 11889
Columbia SC 29211-1889

Bradley David Churdar
SCDHEC
1362 McMillan Ave., Ste 400
Charleston SC 29405-2047

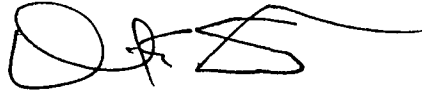
Davis Arjuna Whitfield-Cargile
SCDHEC
PO Box 1336
Beaufort SC 29907

Re SC DHEC v. Przyborowski, Phillip
Appellate Case No. 2010-168006

Dear Counsel

The above case appeared on an earlier preliminary list, but was not scheduled for argument. The matter will likely be scheduled for September, 2012. The Court will hold arguments on September 18, 19 and 20.

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a series of loops and a long horizontal stroke extending to the right.

CLERK



South Carolina Department of Health and Environmental Control

Promoting and protecting the health of the public and the environment

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MAY 7 2012

May 2, 2012

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re SCDHEC vs. Phillip Przyborowski
Case Tracking No. 2010-168006

Dear Mr. Shearouse:

I am in receipt of letter dated April 24, 2012 in the above referenced matter advising that the case is likely to be reached for hearing at the June 2012 court term. I apologize for not responding by the May 1, 2012 deadline as requested, but I was out of town at my Army Annual Training all of last week and did not see your letter until Monday.

Please be advised that I am available all stated dates during that term except June 19 and 20, 2012. I am scheduled to appear before the ALC in the matter of Maul v. SCDHEC and Abdo on June 19, 2012 and I will be having my summer visitation with my children during that period as well.

If you have any questions or need any additional information, please give me a call.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc Christopher McG. Holmes, Esquire

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Office of General Counsel

Charleston Office 1362 McMillan Avenue Suite 400 Charleston SC 29405 Phone (843) 953 0200 Fax (843) 953 0201 www.scdhec.gov



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Bradley C. Churdar Esquire
Davis A. Whitfield-Cargile Esquire
From Daniel E. Shearouse
Date April 24, 2012
RE June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 5, 6, 7, 19, and 20. Please notify this office in writing prior to May 1, 2012, as to any scheduling conflicts for the June term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

SCDHEC v. Przyborowski, Phillip



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Carlisle Roberts Jr Esquire
From Daniel E. Shearouse
Date April 24, 2012
RE June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 5, 6, 7, 19, and 20. Please notify this office in writing prior to May 1, 2012, as to any scheduling conflicts for the June term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

SCDHEC v. Przyborowski, Phillip



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Christopher M. Holmes, Esquire
From Daniel E. Shearouse
Date April 24, 2012
RE June Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the June 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of June 5, 6, 7, 19, and 20. Please notify this office in writing prior to May 1, 2012, as to any scheduling conflicts for the June term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

SCDHEC v. Przyborowski, Phillip

RECEIVED

MAR 15 2012

SC SUPREME COURT

pm 3-13-12

CHRISTOPHER McG HOLMES
Attorney at Law
222 W Coleman Blvd Ste 124
Mt Pleasant South Carolina 29464
Tel (843) 388 2966
Fax (843) 388 2967

March 13, 2012

Daniel E Shearouse, Clerk
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RE SC DHEC v Przyborowski

Dear Mr Shearouse

Enclosed please find the original and fifteen copies of the Brief of Respondent Przyborowski in the above referenced matter along with Proof of Service for same

Sincerely,



Christopher McG Holmes
Attorney for Respondent

cc Bradley D Churdar, Esq
Carlisle Roberts, Jr, General Counsel

The Supreme Court of South Carolina

South Carolina Department of
Health and Environmental
Control,

Petitioner,

v

Phillip Przyborowski,

Respondent

The Honorable Ralph K. Anderson, III
Richland County
Trial Court Case No. 2007-AL-07-00254

ORDER

For good cause having been shown, the time for serving and filing the Brief of Respondent in the above entitled matter is hereby extended until March 14, 2012.

IT IS SO ORDERED

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

February 15, 2012

cc Carlisle Roberts, Jr, Esquire
Bradley C. Churdar, Esquire
Davis A. Whitfield-Cargile, Esquire
Christopher M. Holmes, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
Heard October 7, 2009 - Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

Respondent

MOTION FOR EXTENSION OF TIME TO FILE
BRIEF OF RESPONDENT

TO THE SUPREME COURT AND COUNSEL OF RECORD

PLEASE TAKE NOTICE that the Respondent Philip Przyborowski hereby moves the Court for an order extending the time for filing the initial brief of Respondent for an additional thirty (30) days

The basis for this motion is that Respondent has been out of the country on business since mid-January and is not scheduled to return until late February. As a result, counsel has not had the ability to consult with his client on matters related to the brief and, for that reason and other obligations of counsel, has been unable to complete the writing of the brief as of this date. Counsel

RECEIVED
FEB 15 2012
S.C. SUPREME COURT

has consulted with counsel for the Appellant who has kindly expressed consent to this extension

WHEREFORE, Respondent request that the Court of Appeals enter an Order extending the time for filing the Initial Brief of Respondents for an additional 30 days

A handwritten signature in black ink, appearing to read 'Chris Holmes', is written over a horizontal line.

Christopher McG Holmes
222 W Coleman Blvd , Suite 124
Mt Pleasant, SC 29464

(843) 388-2966
(843) 388-2967 (fax)
cmh@cholmeslaw.com

Attorney for Respondent

February 13, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
Heard October 7, 2009 - Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

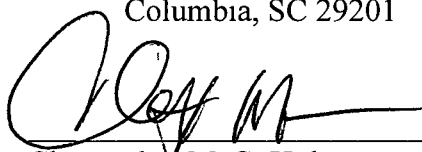
Respondent

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of Motion to Extend Time to File Brief of Respondent on counsel of record by depositing a copy of same in the United States mail, postage prepaid, addressed as follows

Bradley D Churdar, Esq
SCDHEC-OCRM
1362 McMillan Ave , Suite 400
Charleston, SC 29405

Carlisle Roberts, Jr , General Counsel
SC Department of Health
& Environmental Control
2600 Bull St
Columbia, SC 29201



Christopher McG Holmes
222 W Coleman Blvd , Suite 124
Mt Pleasant, SC 29464
(843) 388-2966

Attorney for Respondent Philip Przyborowski

February 13, 2012

CHRISTOPHER McG HOLMES
Attorney at Law
222 W Coleman Blvd , Ste 124
Mt Pleasant South Carolina 29464
Tel (843) 388 2966
Fax (843) 388 2967

February 13, 2012

Daniel E Shearouse, Clerk
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RE SC DHEC v Przyborowski

Dear Mr Shearouse

Enclosed please find the original and six copies of Respondent Przyborowski's Motion to Extend Time to File Initial Brief of Respondent in the above referenced matter along with Proof of Service for same and the required filing fee

Sincerely,



Christopher McG Holmes
Attorney for Respondent

cc Bradley D Churdar, Esq
Carlisle Roberts, Jr , General Counsel

check# 6022
\$2500

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FEB 15 2012

S.C. SUPREME COURT

pm 2-13-12

The Supreme Court of South Carolina

South Carolina Department of
Health and Environmental
Control,

Petitioner,

v

Phillip Przyborowski,

Respondent

The Honorable Ralph K. Anderson, III
Richland County
Trial Court Case No. 2007-AL-07-00254

ORDER

For good cause having been shown, the time for serving and filing the
Brief of Respondent in the above entitled matter is hereby extended until
February 13, 2012

IT IS SO ORDERED

JEAN H. TOAL, CHIEF JUSTICE

BY *Grenda J. Shaly*
Chief Deputy Clerk

Columbia, South Carolina

January 18, 2012

cc Carlisle Roberts, Jr, Esquire
Bradley C. Churdar, Esquire
Davis A. Whitfield-Cargile, Esquire
Christopher M. Holmes, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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S.C. SUPREME COURT

Opinion No 2010-UP-182
Heard October 7, 2009 - Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

Respondent

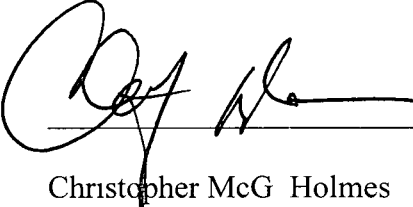
MOTION FOR EXTENSION OF TIME TO FILE
INITIAL BRIEF OF RESPONDENT

TO THE SUPREME COURT AND COUNSEL OF RECORD

PLEASE TAKE NOTICE that the Respondent Philip Przyborowski hereby moves the Court for an order extending the time for filing the initial brief of Respondent for an additional thirty (30) days

The basis for this motion is that the brief of Appellant was filed on December 14, 2011, and due to the intervening holiday period and other obligations of counsel for Respondent, counsel has not had adequate time to complete the writing of the brief as of this date. Counsel has consulted with counsel for the Appellant who has kindly expressed consent to this extension.

WHEREFORE, Respondent request that the Court of Appeals enter an Order extending the time for filing the Initial Brief of Respondents for an additional 30 days

A handwritten signature in black ink, appearing to read 'C. McG Holmes', is written over a horizontal line.

Christopher McG Holmes
222 W Coleman Blvd , Suite 124
Mt Pleasant, SC 29464

(843) 388-2966
(843) 388-2967 (fax)
cmh@cholmeslaw.com

Attorney for Appellant

January 13, 2012

2

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
Heard October 7, 2009 - Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

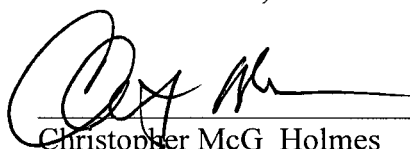
Respondent

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of Motion to Extend Time to File Initial Brief of Respondent on counsel of record by depositing a copy of same in the United States mail, postage prepaid, addressed as follows

Bradley D Churdar, Esq
SCDHEC-OCRM
1362 McMillan Ave , Suite 400
Charleston, SC 29405

Carlisle Roberts, Jr , General Counsel
SC Department of Health
& Environmental Control
2600 Bull St
Columbia, SC 29201



Christopher McG Holmes
222 W Coleman Blvd , Suite 124
Mt Pleasant, SC 29464
(843) 388-2966

Attorney for Respondent Philip Przyborowski

January 13, 2012

CHRISTOPHER McG HOLMES
Attorney at Law
222 W Coleman Blvd Ste 124
Mt Pleasant, South Carolina 29464
Tel (843) 388 2966
Fax (843) 388 2967

January 13, 2012

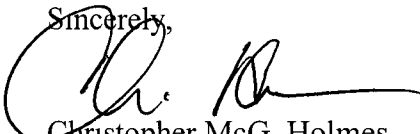
Daniel E Shearouse, Clerk
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RE SC DHEC v Przyborowski

Dear Mr Shearouse

Enclosed please find the original and six copies of Respondent Przyborowski's Motion to Extend Time to File Initial Brief of Respondent in the above referenced matter along with Proof of Service for same and the required filing fee

Sincerely,



Christopher McG Holmes
Attorney for Respondent

cc Bradley D Churdar, Esq
Carlisle Roberts, Jr , General Counsel

check #6011
\$2500

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JAN 18 2012

SC SUPREME COURT

PM 1-13-12



South Carolina Department of Health and Environmental Control

Promoting and protecting the health of the public and the environment

December 14, 2011

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211

RECEIVED

DEC 15 2011

RE SCDHEC vs Phillip Przyborowski
Docket No 07-ALJ-07-0254-CC
Ct App Case #200894427

SC Supreme Court

Dear Mr. Shearouse:

Please find enclosed for filing the original and sixteen (16) copies of the Brief of Appellant submitted on behalf of the South Carolina Department of Health and Environmental Control, in the above-referenced matter. As evidenced below and on the enclosed certificate of service, Respondent has been served with a copy of the Brief of Appellant. Also enclosed are thirteen additional copies of the Appendix as requested by the Court. I would appreciate your returning a clocked copy to me. I appreciate your attention in this matter.

Sincerely,

Davis A. Whitfield-Cargile
Staff Attorney

Enclosure as noted

Copy to Chris McG. Holines, Esq.

The Supreme Court of South Carolina

South Carolina Department of
Health and Environmental
Control,

Petitioner,

v

Phillip Przyborowski,

Respondent

The Honorable Ralph K. Anderson, III
Richland County
Trial Court Case No 2007-AL-07-0254

ORDER

For good cause having been shown, the time for serving and filing the Brief of Petitioner and additional copies of the Appendix in the above entitled matter is hereby extended until December 16, 2011

IT IS SO ORDERED

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

November 29, 2011

cc Carlisle Roberts, Jr, Esquire
Bradley C. Churdar, Esquire
Davis A. Whitfield-Cargile, Esquire
Christopher M. Holmes, Esquire

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NOV 20 2011

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
(S C Ct App , Withdrawn, Substituted and Refiled June 28, 2010)

South Carolina Department of Health and Environmental Control Petitioner,

v

Phillip Przyborowski Respondent

Petitioners Motion for Extension of Time

On October 20, 2011, the Supreme Court of South Carolina issued an order granting the Petition for Writ of Certiorari in this matter. The Order requires Petitioner to file an additional thirteen copies of the Appendix within 30 days (calculated by the undersigned to be November 21, 2011) and requires that the Brief of Petitioner be served and filed on or before November 21, 2011. DHEC respectfully requests that the deadlines set forth in the Order for the Petitioner to serve and file the Brief of Petitioner and to file additional copies of the appendix be extended to December 16, 2011.

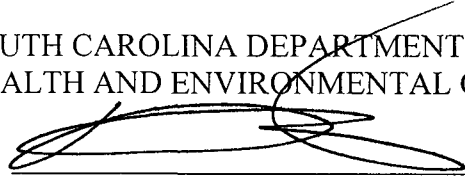
The primary basis for this request is that the undersigned attorney, who is the attorney primarily responsible for briefing this matter, and his wife welcomed their first son into the world on October 27, 2011. Prior to the Court granting certiorari, the undersigned attorney had arranged to be out of the office, and was out of the office, from October 26 through November 10, 2011. Due to the necessity of also devoting attention

to other matters, the undersigned was unable to complete preparation of the Brief of Petitioner after returning to the office on November 14. In addition, the Petitioner has not completed production of the additional copies of the appendix. The undersigned has consulted with Mr. Holmes, counsel for Respondent, and Mr. Holmes has graciously authorized the undersigned to represent to the Court that Respondent consents to Petitioner's request for extension of time.

WHEREFORE, based on the foregoing, Petitioner respectfully requests that the Court extend the deadline for filing additional copies of the record and for serving and filing Petitioner's Brief to December 16, 2011.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By 

Carlisle Roberts, Jr., General Counsel
S C Dept of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
803-898-3350

Bradley D. Churdar, Chief Counsel for OCRM
Davis A. Whitfield-Cargile, Staff Attorney
SC Dept of Health & Environmental Control
1362 McMillan Ave., Suite 400
Charleston, SC 29405
843-953-0229

Attorneys for Petitioner

November 21, 2011
Charleston, South Carolina



South Carolina Department of Health and Environmental Control
Promoting and protecting the health of the public and the environment

November 21, 2011

VIA U S MAIL

The Honorable Daniel E. Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re SCDHEC vs Phillip Przyborowski
Case Tracking No 2010-168006

Dear Mr. Shearouse:

Please find enclosed for filing the original and two copies of a Motion for Extension of Time in the above-referenced matter. If you would kindly return a clocked copy in the enclosed envelope, I would be most grateful. As reflected below and on the enclosed certificate of service, the undersigned is also serving Respondent's counsel with a copy of this motion. I appreciate your assistance in this matter.

Very truly yours,

Davis A. Whitfield-Cargile
Staff Attorney

Enclosure as noted

cc Christopher McG. Holmes, Esq. (with enclosures)

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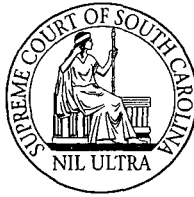
S.C. SUPREME COURT

pm 11-21-11

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Office of General Counsel

Charleston Office 1362 McMillan Avenue Suite 100 Charleston SC 29105 Phone (813) 953-0200 Fax (813) 953-0201 www.scdhec.gov



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

October 20, 2011

Carlisle Roberts, Jr, Esquire
DHEC Office of General Counsel
2600 Bull St
Columbia, SC 29201

Bradley C. Churdar, Esquire
Davis A. Whitfield-Cargile, Esquire
1362 McMillan Avenue
Suite 400
Charleston, SC 29405

Re SCDHEC v Przyborowski, Phillip

Dear Counsel

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before November 21, 2011. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

SCDHEC v Przyborowski, Phillip
Page Two
October 20, 2011

Very truly yours,



CLERK

DES/lda

Enclosure

cc Christopher M Holmes, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

Phillip Przyborowski,

Respondent,

v

South Carolina Department of
Health and Environmental
Control,

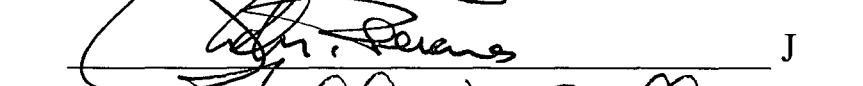
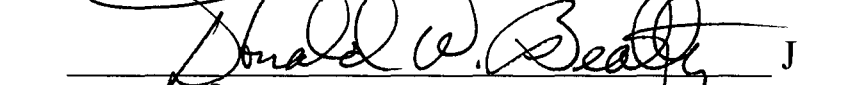
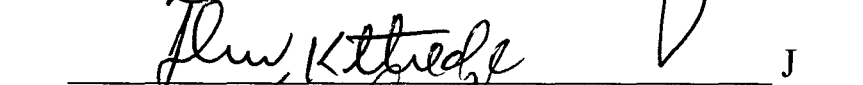
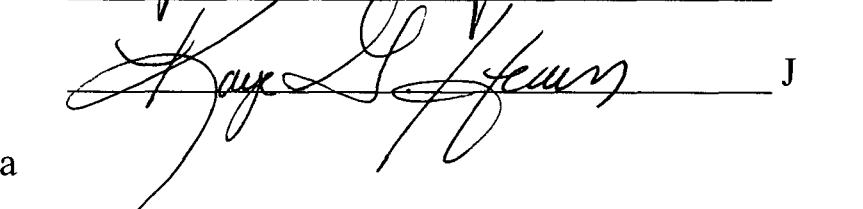
Petitioner

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in S C Dep't of Health and Env't'l Control v

Przyborowski, Op No 2010-UP-182 (S C Ct App filed June 28, 2010)

The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR

 C J
 J
 J
 J
 J

Columbia, South Carolina

October 20, 2011

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
pm 7-28-10
JUL 30 2010

APPEAL FROM THE ADMINISTRATIVE LAW COURT SC SUPREME COURT
The Honorable Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182 (S C Ct App , Withdrawn, Substituted and Refiled June 28, 2010)

South Carolina Department of Health and Environmental Control,

Petitioner,

v

Phillip Przyborowski,

Respondent

PETITION FOR A WRIT OF CERTIORARI

Carlisle Roberts, Jr ,General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull St
Columbia, South Carolina 29201
(803) 898-3349

Bradley D Churdar
Davis A Whitfield-Cargile
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405
(843) 953-0229

Attorneys for Petitioner SCDHEC

Other Counsel of Record

Christopher McG Holmes
Attorney at Law
222W Coleman Boulevard
Mt Pleasant, SC 29464
Attorney for Respondent

TABLE OF CONTENTS

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CERTIFICATION OF COUNSEL

Counsel for the Appellant certifies that the Petition for Rehearing was filed with the South Carolina Court of Appeals on March 15, 2010, and the Order Denying the Petition for Rehearing was issued on June 28, 2010

QUESTIONS PRESENTED

- 1 DID THE COURT OF APPEALS ERR IN AFFIRMING DISMISSAL OF THE ENFORCEMENT ORDER ON A GROUND NOT APPEARING IN THE RECORD?
- 2 DID THE COURT OF APPEALS EXCEED ITS AUTHORITY IN MAKING A FINDING OF FACT WHERE THE ADMINISTRATIVE LAW COURT DID NOT MAKE SUFFICIENT FINDINGS OF FACT TO SUPPORT A CONCLUSION THAT THE ENFORCEMENT ORDER IS ARBITRARY
- 3 WHERE THE ADMINISTRATIVE LAW COURT FOUND THE DOCK TO BE LONGER THAN THE REGULATORY MAXIMUM LENGTH OF 1000 FEET AND BOTH LOWER COURTS REJECTED RESPONDENT'S LEGAL DEFENSES, IS IT ERROR OF LAW TO FIND THAT THE ENFORCEMENT ORDER WAS ARBITRARY?

STATEMENT OF THE CASE

The subject of this controversy is a Respondent's dock, which exceeds 1000' over the critical area. The Petitioner, South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") issued Administrative Enforcement Order 06C-011J to Respondent for violating the prohibition on docks over 1000' in the critical area. The Enforcement Order also requires removal of an unauthorized floating jet dock. Respondent appealed the issuance of the Administrative Enforcement Order to the Administrative Law Court ("ALC"). After a hearing, The Honorable Ralph King Anderson, III, found that the Respondent's dock is in excess of 1000' over the critical area.¹ (R p 8) The ALC also found that the floating jet dock was unauthorized (R p 6). Despite the finding violations of the Critical Area Regulations, the ALC reversed the Enforcement Order based solely on his conclusion that a not to scale survey showing Respondent's dock and another dock to be $\pm 1020'$ "reflects arbitrary and purposeful discrimination in the administration of law" (R p 18).

The Court of Appeals did not uphold the ALC's finding of an equal protection violation. But rather than reversing the ALC's and requiring Respondent to comply with the Enforcement Order, the Court of Appeals affirmed based on "the ALC's finding that the enforcement order was arbitrary" (Appendix, p 2). The problem is, the ALC never made a finding that the Enforcement Order was arbitrary. Respondent never argued that the Enforcement Action was arbitrary. Moreover, when there is a clear violation of a regulation, as a matter of law, it cannot be arbitrary for the Department to bring an enforcement action. The Court of Appeal's affirming the ALC's dismissal of the

¹ The ALC concluded the dock is 1014' (R p 8). As Respondent through counsel admitted multiple times, the dock is in fact 1041' over the critical area (R p 256). Regardless, the ALC found the dock to be over 1000' but failed to enforce the Department's order requiring the dock be shortened to 1000'.

enforcement order based on a ground not appearing in the record frustrates the ability of the Department to consistently apply and enforce the critical area regulations

STATEMENT OF FACTS

Respondent, Przyborowski, owns property at 2640 Bohicket Road in Charleston County, S C and a dock extending from Respondent's property into Bohicket Creek. Activities and structures within the critical area of South Carolina are governed by the Coastal Tidelands and Wetlands Act, S C Code Ann §§ 48-39-10 *et seq* (1987 & Supp 2007), and the regulations promulgated pursuant to those provisions including 23A S C Code Ann Regs 30-1 *et seq* (Supp 2007).

The initial application represented that the dock would be 850 feet in length as measured from the critical area line (R pp 203-16). On July 18, 2000, critical area permit OCRM-00-262-M was issued by the Department to Respondent. The work authorized was based on the narrative description, drawings, and conditions imposed by the Department. The narrative description provides

The plan submitted by you, attached hereto, show the work consists of the following: Constructing a private dock. The proposed structure will have a 4' by 850' walkway that will lead to a 10' by 12' fixed pierhead. Channel ward of the pierhead a ramp will lead to a 10' by 20' floating dock. The purpose of the proposed activity is for the property owner's private, recreational use. (R p 218)

In May of 2002, Respondent requested a permit amendment to allow the addition of a second 10' by 20' floating dock (R p 224). The drawing associated with the Respondent's amendment request represented a dock length of 987 feet of walkway with 12 feet of pierhead beyond that, which totals 999 feet of structure (R pp 225-28). The Department authorized the modification. The respondent erroneously represented to the

Department that the dock is less than 1000 feet from the critical area line (R pp 224-228)

A Department enforcement and compliance inspector, Mr James Trumbull, visited the Respondent's dock on December 21, 2006 and January 10, 2007 (R p 114) Beginning at the critical line, Mr Trumbull, measured the walkway to be 1022 feet, the pierhead extends 14 feet beyond that and the floating docks extend approximately five feet beyond the pierhead, totaling approximately 1040' in length (R pp 94-95, p 98) After two site visits by Mr Trumbull, DHEC mailed a Notice of Violation on February 6, 2007 to Respondent and the Administrative Enforcement Order was mailed on April 20, 2007 to Respondent's counsel (R pp 229-35, 247-253, and 258)

On April 23, 2007, the Department mailed Administrative Enforcement Order 06C-011J by certified mail to Mr Przyborowski's attorney, Chris Holmes The Administrative Order was received on April 24, 2007 Mr Holmes wrote to the Department and stated "As I advised you at our on-site meeting yesterday, further measurements show that the Przyborowski dock extends approximately 1040' from the critical line to the floating dock " (R p 138, lines 19-21, p 150, lines 10-13, and p 256) Mr Albenesius, the dock builder, agreed that the dock is in excess of 1000' (R p 174, lines 21-25, p 176, line 16-p 177, line 2) Respondent filed a request for final review before the SCDHEC Board on May 9, 2007 On May 16, 2007, the SCDHEC Board decided not to conduct a final review conference in this matter and the clerk of the Board informed the Respondent of such by notice dated May 22, 2007

Respondent then filed a petition for a contested case on June 7, 2007 and a hearing was held on August 28, 2007 before the ALC The ALC issued a Final Order and

Decision on December 20, 2007 dismissing DHEC's enforcement action regarding the Respondent's dock in excess of one thousand feet. The Department filed a Motion for Extension to file Post-trial Motions on December 28, 2007 and the ALC granted the motion on January 2, 2008. The Department timely filed a Motion to Alter or Amend on January 7, 2008. In response to the motion, the ALC filed an Order on January 20, 2008 temporarily rescinding the Final Order and Decision until the Department's Motion to Alter or Amend was decided. On May 15, 2008 the ALC denied the Motion to Alter or Amend, and reinstated the prior Final Order and Decision.

On June 12, 2008, the Department filed a Notice of Appeal. The Court of Appeals issued Opinion Number 2010-UP-182 (the "Opinion") on March 1, 2010. The Department respectfully petitioned the Court of Appeals to rehear this matter *en banc* on March 15, 2010. The Court of Appeals denied the Petition for Rehearing on June 28, 2010, but withdrew and substituted the March 1, 2010 opinion with the opinion filed June 28, 2010.

ARGUMENT

The Court of Appeals properly did not uphold the ALC's finding of an equal protection violation. However, the Court of Appeals nonetheless upholds the ALC's dismissal of the Enforcement Order based on the "ALC's finding that the enforcement order was Arbitrary." However, the ALC made no such finding that the ALC's Order was arbitrary—the sole basis for the ALC's dismissal of the enforcement order was the ALC's finding of an equal protection violation, which the Court of Appeals did not uphold. Thus, the Court of Appeals inappropriately upheld the dismissal of the enforcement order on a ground not appearing in the record. In doing so, the Court of Appeals frustrates the ability of the Department to consistently apply and enforce the Act and implementing regulations.

I. Petition for Certiorari Should Be Granted Because The Court of Appeals Erred in Upholding the Appealed Order Based Upon A Ground Which Does Not Appear In The Record

The Court of Appeals erred in upholding the dismissal of the enforcement action based on a finding that the action was arbitrary, a ground which does not appear in the record. S C Dept of Health and Env'tl Control v Przyborowski, Unpublished Op No 2010-UP-182 (S C Ct App Withdrawn Substituted and Refiled June 28, 2010) ("we modify the appealed order to uphold dismissal of the enforcement action based on the ALJ's finding that the action was arbitrary, rather than on his finding that it amounted to a violation of Przyborowski's equal protection rights"). The ALC did not make a finding that the enforcement order was itself arbitrary. Rather, the ALC's Order dismissed the enforcement order based solely on his finding that a survey "reflects arbitrary and purposeful discrimination in the enforcement of the law" (R p 18). Moreover, Respondent did not make an argument that the enforcement order itself was arbitrary.

Because neither party raised arbitrariness as a ground upon which the ALC could have dismissed the enforcement action, this is not a ground on which the Court of Appeals may uphold the dismissal “The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal” (Emphasis Added) Rule 220(c), SCACR² “An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record ” I’On, L L C v Town of Mt Pleasant, 338 S C 406, 420, 526 S E 2d 716, 723 (2000), see also Rule 208(b)(1)(B), SCACR (“[o]rdinarily, no point will be considered which is not set forth in the statement of issues on appeal ”)

The ALC’s Order addressed arbitrariness only as part of an equal protection analysis, not in the context of analyzing whether DHEC was arbitrary in its decision to bring an enforcement action Specifically, the ALC’s Order cited TNS Mills, Inc v S C Dep’t of Revenue, 331 S C 611, 503 S E 2d 471 (1998) in asserting that where there is disparate treatment, the action taken must be “arbitrary and purposeful discrimination” Based on this standard from TNS Mills, supra, the ALC held that the Department was aware of both docks that were “similarly situated,” and chose to institute an enforcement action against only one of the dock owners, thus violating the equal protection clause The Court of Appeals properly did not uphold the finding of an equal protection violation There was no discussion whatsoever in the Briefs or the Record on Appeal as to whether arbitrariness is grounds for dismissal Accordingly, Rule 220(c), SCACR plainly precludes the Court of Appeals from upholding the ALC’s dismissal of the

² Although the Opinion does not cite Rule 220(c) as the authority underlying the Opinion because arbitrariness does not appear in the record or in either party’s statement of issues on appeal as a ground on which the ALC could be reversed the Department assumes that the Opinion relies upon Rule 220(c) SCACR for authority

enforcement action based upon the ALC's finding of arbitrariness when the ALC made no such finding

II The Court Of Appeals Exceeds Its Authority By Effectively Making A New Finding Of Fact

Because the ALC made no finding that the enforcement order was arbitrary, the only way the Court of Appeals can reverse on that ground is by making such a finding itself. This is in excess of the Court of Appeals' authority. In permitting cases such as this, the ALC serves as the fact finder. S C Code Ann 12-23-610(B)(f) "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Able Communications, Inc v S C Pub Serv Comm'n, 290 S C 409, 411, 351 S E 2d 151, 152 (Sup Ct 1986). Where an inquiry by the fact finder was never conducted (such as determining whether DHEC's enforcement action was arbitrary in the present case), the Court of Appeals has no authority to make new findings. Id., Spartanburg Regional Medical Center v Oncology and Hematology Associates of South Carolina, LLC, 387 S C 79, 91-92, 690 S E 2d 783, 789 (2010), accord, Id. at 93, 690 S E 2d at 790 (Toal, C J , dissenting)

In Able Communications, supra, the Supreme Court went so far as to hold that appellate review is "impossible" when the reasons underlying the ALC's decision are not clearly established with "sufficiently detailed" factual findings that would "enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Id. at 411 (citing Hill v Jones, 255 S C 219, 178 S E 2d 142 (1970)). Otherwise, the Able Communications Court found that the reviewing court is left to mere speculation. Id. In the present case,

because the ALC made no factual findings or conclusions of law regarding the arbitrariness of DHEC's enforcement action, the Court of Appeals exceeded its scope of reviewing authority. Specifically, the Court of Appeals modified the ALC's Order upholding the dismissal of DHEC's enforcement action by substituting its own legal conclusion (arbitrariness) for the ALC's legal conclusion (equal protection violation).

III The Court Of Appeals Committed Error Of Law, Because The Administrative Law Court Found The Dock To Be In Excess Of 1000 Feet, In Clear Violation Of The Regulatory Maximum Length

The Court of Appeals error in exceeding the scope of its reviewing authority by finding DHEC's enforcement action to be arbitrary is highlighted by the fact that there is a clear prohibition of docks over 1000 feet in the critical area. 23A S C Code Ann Reg 30-12(A)(1)(I) ("Docks longer than 1000 feet over the critical area are prohibited. This is inclusive of pierheads, floats, boatlifts, ramps, mooring pilings and other associated features") (emphasis added). The ALC found the dock to be in excess of 1,000 feet in the critical area. As such, an enforcement action by the Department against a clear violation of the regulation cannot be said to be arbitrary.³ The three defenses raised by Respondent were equal protection and the equitable defenses of laches and estoppel. The ALC rejected the Respondent's arguments as to estoppel and laches, and the Court of Appeals Opinion properly does not uphold the ALC's finding of an equal protection violation.

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure,

³ The Department is given statutory authority "to revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit and to enforce the provisions of this chapter and all rules and regulations promulgated by the department and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter" and "to exercise all incidental powers necessary to carry out the provisions of this chapter." S C Code Ann § 48-39-50.

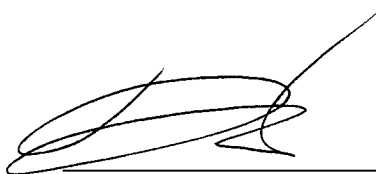
without adequate determining principles, or is governed by no fixed rules or standards” Converse Power Corp v South Carolina Dept of Health and Environment Control, 350 S C 39, 47, 564 S E 2d 341, 345 (Ct App 2002) (quoting Deese v State Bd of Dentistry, 286 S C 182, 184-85, 332 S E 2d 539, 541 (Ct App 1985)) Because the ALC found that dock is in excess of the fixed rule in the Regulations prohibiting docks over 1000’, as a matter of law, the enforcement order cannot be arbitrary As a result, there is not substantial evidence in the record to support a finding that the enforcement action was arbitrary since the ALC found that the dock is in clear violation of the regulation

The Court of Appeal’s Order exceeding its statutory authority and finding an enforcement order arbitrary despite a clear violation of the law frustrates the ability of the Department to consistently apply and enforce the Coastal Zone Management Act and its implementing regulations See Brownlee v South Carolina Dept of Health and Environmental Control, 382 S C 129, 143, 676 S E 2d 116, 123 (2009) (“We strongly believe that equal enforcement of the rules and regulations and compliance with the law by all parties is absolutely essential to avoiding precisely the problems generated here”) The Court of Appeals effectively discourages the Department from bringing enforcement actions, even where, as here, there are clear violations of the Act This is against public policy

CONCLUSION

WHEREFORE, based on the foregoing, the Department of Health and Environmental Control respectfully requests that the Court grant this Petition for Writ of Certiorari and issue an Opinion reversing the Court of Appeals and the Administrative Law Court in this matter

Respectfully submitted,



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July 28, 2010
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUL 30 2010

SC SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Unpublished Opinion No 2010-UP-182
Heard October 7, 2009 – Filed March 1, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Phillip Przyborowski,

Respondent

CERTIFICATE OF SERVICE

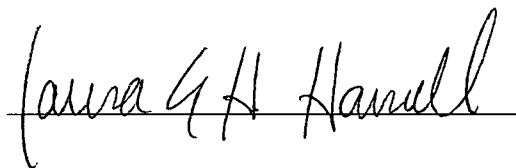
The undersigned hereby certifies that on this date s/he has served the Appellant's *Petition for a Writ of Certiorari and Appendix to Writ of Certiorari* in this matter upon the Respondents or their counsel, by placing copies of same in the United States Mail, first class postage prepaid, addressed to

The Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
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The Honorable Tanya Gee
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Christopher McG Holmes
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July 28, 2010



THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

RECEIVED

Ralph King Anderson, III, Administrative Law Judge

AUG 30 2010

S C SUPREME COURT

Opinion No 2010-UP-182
Heard October 7, 2009 - Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(

- 1 Did the Court of Appeals correctly affirm the Administrative Law Court's finding that Petitioner acted arbitrarily in bringing the enforcement action?

•

STATEMENT OF THE CASE

On April 24, 2007, respondent Philip Przyborowski received an Administrative Enforcement Order (AEO) from the petitioner South Carolina Department of Health and Environmental Control (“DHEC” or “Petitioner”) alleging respondent had violated a permit issued to him by petitioner on July 18, 2000, and amended by petitioner at respondent’s request on July 22, 2002

On May 9, 2007, respondent filed a request for final review (RFR) of the agency action by the DHEC Board. The Board denied the review and the AEO became DHEC’s final decision. Subsequently, respondent filed an appeal to the Administrative Law Court (ALC), and a contested case hearing was held on August 28, 2007, in Columbia, South Carolina.

On December 20, 2007, the ALC issued its Final Order and Decision directing respondent to remove a boat storage dock and dismissed the remainder of the enforcement issues.

Following the filing of a Motion to Alter or Amend by petitioner on January 2, 2008, the ALC temporarily rescinded its Order until the motion could be heard. On May 15, 2008, the ALC filed its order denying the motion and reinstating the order of December 20, 2007. DHEC then appealed to the Court of Appeals.

Following arguments on October 7, 2009, the Court of Appeals issued an unpublished decision on March 1, 2010, modifying and affirming the ALC. DHEC sought a rehearing, and on June 28, 2010, the Court of Appeals withdrew its earlier order and substituted and refiled an unpublished decision on June 28, 2010.

STATEMENT OF FACTS

On July 18, 2000, Philip Przyborowski received a permit from the South Carolina Department of Health and Environmental Control to construct a private dock from his property on Johns Island to the waters of Bohicket Creek. The dock was estimated to be 850' in length, which appeared to be a reasonable approximation by DHEC's project manager who visited the site. R p 191, lines 13-17. The permit required the dock alignment to be staked in the field and approved in writing by DHEC before construction could begin. R p 218. Respondent's dock builder testified the alignment was staked by a string line, and a construction placard was issued to him by DHEC. R p 155, lines 12-15, p 156, lines 3-7.

In March of 2002, after the dock had been built, Przyborowski requested an amendment to the permit seeking to add a floating dock. The drawings attached to the request showed a dock and pier with a total length of 999'. In July of 2002, the amendment was approved, and DHEC testified approval of the amendment also granted approval of all drawings attached thereto. R p 75, lines 1-25. The float was added and respondent also placed a "jet ski" float inside the floating dock.

Between 2000 and 2002, in addition to building the dock, respondent constructed his home on the property and removed several large pine trees near the edge of the marsh to create a view corridor. The resulting stump holes allowed tidal water to flow further into respondent's property.

In late 2006, DHEC came into possession of a survey indicating respondent's dock and an adjacent dock might be in excess of 1,000' in length. A DHEC employee went to respondent's property and, using a "wheel" device, measured respondent's dock and determined it did exceed 1,000'. DHEC conducted no independent survey of its own to confirm the exact length of the dock, nor did it contact the person who prepared the survey. The AEO was issued in April of 2007.

ARGUMENT

1 The substantial evidence on the whole record supports the conclusion that Petitioner acted arbitrarily

This Court's review (as was the Court of Appeals') of an administrative agency's findings of fact are limited. The Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2008). A court can reverse an agency's findings, inferences, conclusions or decisions only if they are "(a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency, (c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.*

" 'Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached.' Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence. *Id.* Furthermore, the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence. *See Hamm v. AT & T*, 302 S.C. 210, 394 S.E.2d 842 (1990)." Waters v. South Carolina Land Resources Conservation Com'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (S.C., 1996).

Rule 220 (c) SCACR provides an "appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." This Court has repeatedly

interpreted the word “grounds” as synonymous with “reasons ”

“An appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies. E.g., Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995) (appellate court may affirm for any reason appearing in the record), State v. Johnson, 278 S.C. 668, 301 S.E.2d 138 (1983) (same).” On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 723 - 724 (S.C., 2000)

The ALC undeniably found as a fact that DHEC acted arbitrarily in bringing the enforcement action against respondent and in failing to adequately explain its action (or inaction) with respect to the adjacent dock. In addition, the respondent presented evidence of the agency having approved another dock in excess of 1,000' after the regulation in issue had been adopted, thus demonstrating the regulation is not as absolute as DHEC has argued. (Respondent's exhibit 3, R pp 260-263) That the ALC cited the arbitrariness of DHEC in its conclusion that the Department's action constituted an equal protection violation does not vitiate the factual finding that the agency's action was arbitrary. The Court of Appeals correctly deferred to the ALC's findings of fact, whether express or implicit, in affirming the decision as modified.

That the Court of Appeals was resting its decision on affirmation of a factual finding is borne out by the difference between its two opinions. The only change it made occurred in the middle of the second paragraph. In its March opinion the Court cited “S.C. Code Ann. § 1-23-610(B)(e) (Supp. 2009) (providing an appellate court may reverse or modify an ALJ's order ‘if the substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record’),”

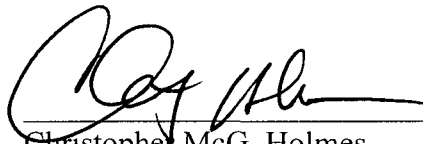
while in the June opinion it substitutes “S C Code Ann § 1-23-610(B) (Supp 2009) (‘The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact ’) ”

DHEC has not identified any novel question of law, conflicts with prior decisions of this Court, or substantial constitutional issues which would warrant a writ of certiorari. Not only have the opinions by the Court of Appeals been unanimous, they have been issued as unpublished opinions of no precedential value pursuant to Rule 268(d)(2) SCACR.

CONCLUSION

For all of these foregoing reasons, Respondent requests this Court decline to grant the Petition for Certiorari.

Respectfully submitted,



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August 26, 2010
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
Heard October 7, 2009 - Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

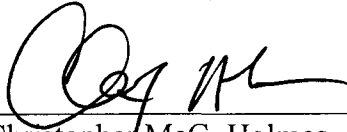
Respondent

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of Return to Petition for Writ of Certiorari on counsel of record by depositing a copy of same in the United States mail, postage prepaid, addressed as follows

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August 26, 2010

S.C. SUPREME COURT

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QUESTIONS PRESENTED

- 1 DID THE COURT OF APPEALS ERR IN AFFIRMING DISMISSAL OF THE ENFORCEMENT ORDER ON A GROUND NOT APPEARING IN THE RECORD?
- 2 DID THE COURT OF APPEALS EXCEED ITS AUTHORITY IN MAKING A FINDING OF FACT WHERE THE ADMINISTRATIVE LAW COURT DID NOT MAKE SUFFICIENT FINDINGS OF FACT TO SUPPORT A CONCLUSION THAT THE ENFORCEMENT ORDER IS ARBITRARY
- 3 WHERE THE ADMINISTRATIVE LAW COURT FOUND THE DOCK TO BE LONGER THAN THE REGULATORY MAXIMUM LENGTH OF 1000 FEET AND BOTH LOWER COURTS REJECTED RESPONDENT'S LEGAL DEFENSES, IS IT ERROR OF LAW TO FIND THAT THE ENFORCEMENT ORDER WAS ARBITRARY?

STATEMENT OF THE CASE

Petitioner, South Carolina Department of Health and Environmental Control (the “Department”) hereby adopts the Statement of the Case as presented in the Petition for Writ of Certiorari

STATEMENT OF FACTS

The Department hereby adopts the Statement of Facts as presented in the Petition for Writ of Certiorari

ARGUMENT

1 The Court of Appeals properly did not uphold the ALC’s finding of an equal protection violation but erred in upholding the ALC’s dismissal of the enforcement order based on a ground not appearing in the record

Like the Court of Appeals, Respondent fails in his one page Return to the Petition for Certiorari to identify where in the Administrative Law Court’s (ALC) Order the ALC found that the Department’s enforcement action was arbitrary. In fact, Respondent acknowledges on page six of its Return that the only way there is a finding of arbitrariness is if you imply it somehow in the ALC’s Order. This is inappropriate under Able Communications, Inc v S C Pub Serv Comm’n, 290 S C 409, 411, 351 S E 2d 151, 152 (Sup Ct 1986), Spartanburg Regional Medical Center v Oncology and Hematology Associates of South Carolina, LLC, 387 S C 79, 91-92, 690 S E 2d 783, 789 (2010), Id at 93-94, 690 S E 2d at 790-91 (Toal, C J , dissenting). Just two weeks ago, the Department issued the following directive

Although we find the order in this case is sufficient since the burden was on Hill in the first instance to specifically raise any alleged error, provide supporting proof, and seek a ruling on the issue thus raised, we take this opportunity to remind the bench of the need to make specific findings. Implicit findings, as well as general statements and conclusions, do not provide sufficient detail for appellate review. *See Able Commc’ns, Inc v*

S C Pub Serv Comm'n, 290 S C 409, 411, 351 S E 2d 151, 152 (1986) (“The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings ”)

Hill v Dept of Health and Environmental Control –S C --, --S E 2d--, 2010 WL 3304269, 9 FN 9 (Op No 26873, Filed August 23, 2010)

Perhaps the reason there was no finding in the ALC’s order that the Department’s Enforcement Action was because the Respondent never argued to the ALC that the Enforcement Order should be dismissed based on a finding of arbitrariness. Petitioner’s only defenses at the ALC were factual defenses and allegations that the Enforcement Order should be dismissed on equal protection grounds, or under equitable theories of laches or estoppels. The ALC properly found the dock to exceed 1000’ and properly rejected the laches and estoppels arguments. The Court of Appeals properly did not uphold the finding of an equal protection violation. Given that the arbitrariness of the enforcement order was not raised as a defense by Respondent at the ALC, there would have been no basis for the ALC to make a finding that the enforcement order was arbitrary.

Moreover, given the ALC’s finding—and the Respondent’s admissions—that the dock is in excess of 1000 and the Regulatory prohibition on docks in excess of 1000 feet¹, it cannot be arbitrary to bring an enforcement order to require Petitioner to bring his dock into compliance. Deese v South Carolina State Bd of Dentistry, 286 S C 182, 184-185, 332 S E 2d 539, 541 (Ct App 1985) (“A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and

¹ See 23A S C Code Ann Reg 30 12(A)(1)(I) (docks longer than 1 000 feet over the critical area are prohibited”)

exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards”) (internal citations omitted) Given that the ALC found that the dock as constructed violates the fixed standard in the regulations prohibiting docks over 1’000, had the ALC even found that the enforcement order was arbitrary, such a finding would be contrary to law

Respondent argues that since the Court of Appeals issued an unpublished opinion certiorari would not be appropriate This Court has granted certiorari to the Court of Appeals to review unpublished opinions on multiple occasions *See e g Buffington v T O E Enterprises*, 383 S C 388, 680 S E 2d 289 (2009), *State v Wiles*, 383 S C 151, 679 S E 2d 172 (2009), *Goldman v RBC, Inc.*, 369 S C 462, 632 S E 2d 850 (2006) (and others)

The Court of Appeals’ opinion, by affirming on a ground that does not exist in the record, effectively creates a much lower threshold than exists in law to avoid compliance with a properly issued administrative enforcement order to remedy a clear violation of law This Court has urged the Department to follow up on enforcement and compliance matters and to require compliance with the rules and regulations to avoid protracted litigation raising questions of potential equal enforcement violations *See Brownlee v South Carolina Dept of Health and Environmental Control*, 382 S C 129, 142-143, 676 S E 2d 116, 123 (2009) The Court of Appeals’ opinion, which affirms dismissal of an enforcement order on grounds not appearing in the record, greatly diminishes the ability of the Department to consistently require compliance with the Rules and Regulations Despite rejecting the ALC’s finding of an equal protection violation, the Court of Appeals declares to be arbitrary an order requiring a dock that violates a clear regulatory

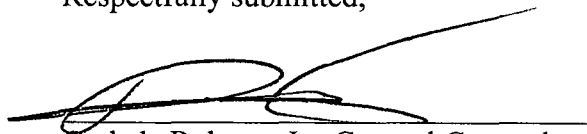
standard to be brought into compliance. If the Department cannot require a dock in violation of such a clear standard as the 1000' rule, what can the Department require compliance with?

This Court should grant certiorari clarify that the Court of Appeals cannot affirm based on a ground not appearing in the record or otherwise make new factual findings or imply factual findings into an order of the ALC. Moreover, the Court should grant certiorari to require Respondent's dock, which the ALC found to be in excess of the Regulatory limitation of 1000', to be brought into compliance with the Regulations, as the Department's Administrative Order required.

CONCLUSION

WHEREFORE, based on the foregoing, the Department of Health and Environmental Control respectfully requests that the Court issue an Opinion reversing the Court of Appeals and the Administrative Law Court in this matter.

Respectfully submitted,



Carlisle Roberts, Jr., General Counsel
S C Dept of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
803-898-3350

Bradley D Churdar, Chief Counsel
Davis A Whitfield-Cargile, Staff Attorney
SC Dept of Health & Environmental Control
1362 McMillan Ave, Suite 400
Charleston, SC 29405
843- 953-0229

Attorneys for Petitioner

September 7, 2010
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Unpublished Opinion No 2010-UP-182
Heard October 7, 2009 – Filed March 1, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Phillip Przyborowski,

Respondent

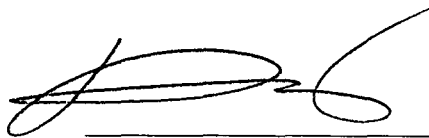
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date s/he has served the Appellant's *Reply to Respondent's Return to Petition for a Writ of Certiorari and Appendix to Writ of Certiorari* in this matter upon the Respondents or their counsel, by placing copies of same in the United States Mail, first class postage prepaid, addressed to

The Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211

Christopher McG Holmes
Attorney at Law
222 W Coleman Boulevard
Mt Pleasant, SC 29464

September 7, 2010



The Supreme Court of South Carolina

South Carolina Department of
Health and Environmental
Control,

Petitioner,

v

Phillip Przyborowski,

Respondent

ORDER

Petitioner has filed a Motion to Supplement Petition for Writ of Certiorari and Appendix. Therein, petitioner requests permission to supplement the petition for a writ of certiorari and the appendix with certain documents. In the alternative, petitioner asks this Court to remand the case for consideration of the information contained in the documents. As another alternative, petitioner asks this Court to "grant certiorari and issue an opinion reversing the lower courts based on the record as it stands." Respondent has filed a return in opposition to the motion.

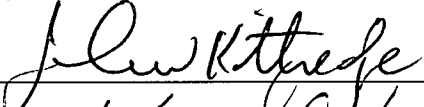
The request to supplement the petition for a writ of certiorari and the appendix and the request to remand are denied. With regard to petitioner's final request, this Court will rule on the petition for a writ of

certiorari after review of the petition, return and appendix as originally filed
by petitioner in this matter

IT IS SO ORDERED


C J

J

J

J

J

Columbia, South Carolina

March 3, 2011

cc Carlisle Roberts, Jr, Esquire
Bradley C Churdar, Esquire
Davis A Whitfield-Cargile, Esquire
Christopher M Holmes, Esquire

RECEIVED

FEB 03 2011

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
(S C Ct App , Withdrawn, Substituted and Refiled June 28, 2010)

South Carolina Department of Health and Environmental Control Petitioner,

v

Phillip Przyborowski Respondent

MOTION TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI AND
APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TO THE COURT AND ALL PARTIES

PLEASE TAKE NOTICE that Petitioner, South Carolina Department of Health and Environmental Control (the "Department"), respectfully moves to supplement the Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari. The purpose of this motion is to supplement the Record and the Petition with an admission from counsel for Respondent after the Court of Appeals' Opinion in this matter was issued.

BACKGROUND

The issue in this case is whether the Court of Appeals erred in affirming the Administrative Law Court ("ALC") reversal of the Department's Administrative Enforcement Order against Respondent.

The Department brought an enforcement action against Respondent because the Respondent's dock was in violation of the Department's critical area regulations, the Department determined that the dock exceeded the 1,000 foot limitation in the Department's critical area regulations. The Department's administrative enforcement process culminated in the issuance of an Administrative Enforcement Order requiring that the portion of the dock over 1,000 feet be removed¹ (R p 229-231). The Respondent appealed this order by requesting a final review conference with the DHEC Board on May 15, 2007 (R p 258). After the Board declined to conduct a review conference, the Respondent requested a contested case at the Administrative Law Court (ALC).

After a hearing, the ALC found that Respondent's dock was in fact over 1,000 feet in the critical area (R p 8). The Regulations prohibit docks exceeding 1,000 feet in the critical area. See S C Code Reg 30-12(A)(1)(I). Despite the finding that the dock is over 1,000 feet in the critical area, the ALC reversed the Department's Enforcement Order based on a finding that the Department's failure to bring an enforcement action against Albenesius, a neighboring property and dock owner, represented arbitrary and purposeful discrimination in the enforcement of the law (R p 18). The Court of Appeals affirmed the ALC's Order, but "modif[ied] the appealed order to uphold the dismissal of the enforcement action based on the ALC's finding that the Department's enforcement action was arbitrary, rather than on the finding that the action amounted to a violation of Przyborowski's equal protection rights" (App to Pet for Cert at 2). As the

¹ The Order also assessed a civil penalty and required the removal of an unauthorized floating jet dock. The issues raised in the petition for certiorari address the dock's violation of the 1,000 foot limitation in the regulations. For purposes of this motion, the AEO will only be referred to as requiring the dock to be brought into compliance with Regulation 30-12(A)(1)(I), which prohibits docks longer than 1,000 feet over the critical area.

Petition for Certiorari sets forth in detail, the ALC did not make a finding that the enforcement action was arbitrary. The only finding in the ALC's Order relating to arbitrariness is the ALC's finding that "the fact that DHEC received the information regarding both docks from the same survey yet instituted an enforcement action against only one of the dock owners with no apparent intention of bringing an action against the other reflects arbitrary and purposeful discrimination in the administration of the law" (R p 18)

Regarding the length of the Albanesius dock, which forms the factual basis for the only language in the ALC's Order that can be deemed a finding of arbitrariness (the finding which forms the impetus for the Court of Appeal's decision), the record from the ALC hearing in this matter reflected the following. Respondent submitted a not-to-scale survey approximating both the Respondent's dock and the Albanesius dock to be ± 1020 feet (R p 246).² The Department's witness, Mr. Trumbull, testified that he measured the Pryzborowski dock and the Albanesius dock with the same wheel device (R p 106-107). Trumbull testified that he measured the Przyborowski dock to be around 1,035 feet (R p 105) and the Albanesius dock to be "right at 1,000 feet" (R p 107). Also, there was no evidence of any enforcement action against Albanesius introduced into the Record.

In this appeal, the Department asks this Court to reverse because the Court of Appeals erred in affirming the lower court's decision, the ALC did not make a finding that the Department's enforcement action was arbitrary other than in the context of a finding of an equal protection violation based on the Albanesius dock and the Court of

² Respondent's counsel admitted in correspondence that the Respondent's dock was in fact 1,040' over the critical area (R p 256).

Appeals did not uphold the finding of an equal protection violation. The Department also asks the Court to find that the enforcement order is not arbitrary as a matter of law because the ALC found that Respondent's dock exceeds the 1,000 foot limitation, and the Court of Appeals rejected Respondent's legal equal protection based defense. Finally, the Department asks the Court to reverse because the Court of Appeals erred in affirming on a ground not appearing in the record.

MOTION

It has come to the Department's attention that counsel for Respondent, Mr. Holmes, represents the former owner of the Albenesius dock, Mr. Michael Albenesius in an ongoing enforcement action with the Department. In the context of his representation of Mr. Albenesius, Mr. Holmes makes an admission that the Albenesius dock and the Przyborowski dock are not similarly situated in terms of dock length.

In fact, it has come to the undersigned's attention that around the same time that the Department issued a Notice of Violation to Respondent, the Department had also issued a Notice of Violation to the owner of the Albenesius dock for being constructed out of compliance with the permit. (See Notice of Violation, Attached as Exhibit A). Mr. Trumbull's field notes have also been provided to counsel. It appears that at the time, Mr. Trumbull had measured the Albenesius dock to be 989 feet from the critical line to the end of the pierhead, and that Mr. Trumbull calculated the outermost point of the floating dock adjacent to the pierhead to be 1001 feet from the critical area line. (See Trumbull's Field Notes, attached as Exhibit B). As a result of the Notice of Violation and ongoing efforts by the Department, it has come to counsel's attention that the Department has entered a Consent Order with the current owner of the Albenesius dock,

BFF III, LLC, on December 22, 2010 As is set out on page 6 of the Consent Order, BFF Properties has agreed to shorten the Albenesius dock to 1,000 feet ³ (Consent Order, attached as Exhibit C)

In addition, the Department is also pursuing an action against Mr Albenesius, the party responsible for the construction of the Albenesius dock ⁴ Counsel for Respondent in this matter has made communications with the Department on behalf of Mr Albenesius in regards to the Department's ongoing enforcement action against Mr Albenesius In response to a proposed Consent Order between Albenesius and the Department, Mr Holmes submitted a letter to the Department on November 9, 2010, wherein Mr Holmes admits that the Albenesius dock is not similarly situated to the Respondent's dock in this matter (See November 9, 2010 letter from Chris Holmes, attached as Exhibit D) In fact, Mr Holmes argues that the Albenesius dock is not in excess of 1,000 feet (Exhibit D, page 2-3 ¶ 6) ⁵

The purpose of this motion is to request that the Court authorize that the Appendix to the Petition for Certiorari be supplemented to include these facts The only basis on which the Court of Appeals affirms the ALC's order is a purported finding by the ALC that the Department's action is arbitrary The length of the Albenesius dock and the absence of any enforcement action against Albenesius is the sole basis for the ALC's finding of arbitrary and purposeful discrimination in the enforcement of the law (the only language in the ALC's Order that can be read as a finding of arbitrariness) Respondent's

³ Depending on how the floating dock's length is calculated, the floating dock in front of the Albenesius pier head caused the overall dock length to be approximately 1,010 feet The Department's enforcement action against the owners of the Albenesius dock includes a requirement that the dock length be shortened

⁴ The facts in this paragraph show that the Department has diligently pursued an enforcement action against the Albenesius dock evidence which was not presented to the ALC

⁵ With regards to the proposed consent order's proposed finding that the overall structure length [of the Albenesius dock] exceeds 1,000 feet by 10 feet, Respondent's counsel states we will vigorously dispute this contention (Exhibit D p 2 ¶ 6)

argument that Respondent's dock and the Albenesius dock are similarly situated forms the sole impetus for the equal protection argument—the only context in which the ALC makes a finding of arbitrariness. Counsel for Respondent now admits that the two docks are not similarly situated in terms of dock length. Therefore, the Department respectfully requests that the Record be opened to include the attached exhibits, which constitute admissions by Respondent's counsel, and that the Petition for Writ of Certiorari be supplemented to include these exhibits in the Appendix. The admission by Respondent's counsel in Exhibit D completely nullifies Respondent's defense in this matter.

While the Department recognizes that matter that was not presented to the lower court may not be included in the Record on Appeal, Rule 210(c), SCACR, State v. Greene, 255 S.C. 548, 180 S.E.2d 179 (1971), Associates Discount Corp. v. Hiers, 248 S.C. 430, 150 S.E.2d 611 (1966), Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (record may not be supplemented with matters not presented to trial judge), the Department respectfully submits that where counsel for respondent has admitted in writing after the trial (and after the Court of Appeals' ruling) that the factual basis underlying its defense is false, the Petitioner should be allowed to bring such admission before the Court. This would serve judicial expediency by allowing this Court to make a ruling on the facts as admitted by Respondent's counsel rather than necessitate a new trial and further use of judicial resources.

In the alternative, the Court could remand to the Court of Appeals with instructions to remand to the ALC to conduct further proceedings based on this after-discovered evidence. In order to obtain leave from an appellate court to move for a new trial based on after-discovered evidence, a prima facie showing that the new trial is

warranted must be made State v Butler, 261 S C 355, 200 S E 2d 70 (1973), State v Jennings, 40 S C 553, 18 S E 932 (1894) The requirements for a new trial are that the evidence (1) is such as will probably change the result if a new trial is granted, (2) has been discovered since the trial, (3) could not have been discovered prior to trial by the exercise of due diligence, (4) is material to the issue, and (5) is not merely cumulative or impeaching Johnson v Catoe, 345 S C 389, 548 S E2d 587 (2001), State v Spann, 334 S C 618, 513 S E 2d 98 (1999), State v South, 310 S C 504, 427 S E 2d 666 (1993), State v Ford, 301 S C 485, 392 S E 2d 781 (1990) Here, the admission by counsel for Respondent that the two docks are not similarly situated is likely to change the ALC's finding that the Department's failure to bring an enforcement action against Albenesius reflects arbitrary and purposeful discrimination in the enforcement of the law, as is the fact that a consent order has been reached with the current owner of the Albenesius dock requiring the dock to be shortened by approximately ten feet so that it complies with the 1,000 foot regulation Moreover, the evidence of Respondent's counsel's admission was discovered after the trial and could not have been discovered sooner, as the written admission did not exist until November 9, 2010—after the Court of Appeals had issued its opinion in this matter This is relevant to the only language in the ALC's order that can be deemed a “finding that the enforcement order was arbitrary”—the only ground upon which the Court of Appeals affirmed, and is not merely cumulative or impeaching It belies Respondent's defenses in this matter

CONCLUSION

Based on the foregoing and in light of the admission by Respondent's counsel that Respondent's dock and the Albenesius dock are not similarly situated, Petitioner

respectfully requests that the Court grant this motion to supplement the Petition for Certiorari and the Appendix thereto. In the alternative, the Department respectfully proposes that the Court remand to the Court of Appeals with instructions to remand to the Administrative Law Court to conduct further proceedings in accordance with this after-discovered evidence, including specifically the admission by counsel for Respondent that the two structures are not similarly situated. In the alternative, the Department respectfully requests that the Court grant certiorari and issue an opinion reversing the lower courts based on the record as it stands.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL



Carlisle Roberts, Jr., General Counsel
S C Dept of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
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Bradley D. Churdar, Chief Counsel for OCRM
Davis A. Whitfield-Cargile, Staff Attorney
SC Dept of Health & Environmental Control
1362 McMillan Ave., Suite 400
Charleston, SC 29405
843-953-0229

Attorneys for Petitioner

February 1, 2011
Charleston, South Carolina



Charlie Hunter, Commissioner

Promoting and protecting the health of the public and the environment

NOTICE OF VIOLATION

February 12, 2007

Mr. Michael Albenesius
PO Box 13228
Charleston, SC 29422-3228

RE: Unauthorized Dock in the Tidelands Critical Area

Dear Mr. Albenesius:

This letter serves as notice of a potential violation of the South Carolina Coastal Zone Management Act. Specifically, the following activity was observed:

Description of Activity: The dock structure was not built as permitted and the installation of an unauthorized jet dock.

Site Location: On and adjacent to Bohicket Creek at 2634 Bohicket Rd., Johns Island, SC 29455.

Specific Program Violation: South Carolina Coastal Zone Management Act for an activity in the tidelands critical area.

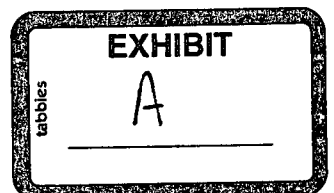
This notice is not necessarily indicative of a formal enforcement and OCRM may or may not pursue additional action. Should further action be required, you will be contacted shortly by OCRM. This additional contact may be for the purpose of scheduling an enforcement conference and/or pursuing an enforcement consent agreement. Possible administrative penalties may also be discussed at this time. This action may also be pursued as outlined in Section 48-39-170 (A) of Chapter 39 of Title 48 of the 1976 Code as Amended.

If you have any questions concerning this notice, you may contact me at (843) 747-4323, Ext. 158.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Ocean and Coastal Resource Management

Charleston Office 1362 McMillan Avenue, Suite 100, Charleston, SC 29405
Phone: (843) 741-5838 Fax: (843) 741-5817 www.scdhec.gov



Sincerely,

James Trumbull
Enforcement & Compliance Project Manager
Regulatory Programs Division

cc Bill Eiser, Acting Enforcement & Compliance Manager, DHEC-OCRM
Shelly Toms, Enforcement & Compliance Coordinator, DHEC-OCRM



Coastal Hunter Commissioner

Promoting and protecting the health of the public and the environment

ADMISSIONS LETTER

February 12 2007

Mr Michael Albenesius
PO Box 13228
Charleston, SC 29422-3228

RE Dock constructed out-of-compliance with the issued permit
P/N# OCRM-00-270-M

Dear Mr Albenesius

As you have previously been informed, the private recreational dock constructed on your property located on and adjacent to the Bohicket Creek at 2634 Bohicket Rd , Johns Island, SC 29455 has not been permitted or otherwise legally authorized by OCRM as constructed. The structure was not built as it was permitted. In addition there is a jet dock that has not been authorized.

The South Carolina Coastal Zone Management Act, S C Code Ann §§48-39-10 et seq (Supp 2004), requires that any construction or other activity in the coastal zone be permitted or otherwise legally authorized by OCRM.

The office of OCRM is mandated by law to enforce the provisions of this Act. Pursuant to Reg 30-8(F)(1) this Admissions letter is being issued, along with findings of fact, which have been drafted after an investigation by OCRM staff. Please find a copy of these findings of fact enclosed. Reg 3-8(F)(2) provides that the responsible party must either admit these facts or send OCRM their version of the facts, along with any other information you might wish us to consider by **February 28, 2007**. A failure to respond will result in a conclusion by the Department that you admit the truth of these facts.

Should your response indicate that more investigation is necessary, OCRM will contact you. If you have any questions concerning this notice, you may contact me at (843) 747-4323 Ext 158. Thank you for your prompt attention to this matter.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Ocean and Coastal Resource Management

Charleston Office • 1362 McMillan Avenue Suite 400 Charleston SC 29405

Phone (843) 741 5838 Fax (843) 744 5817 www.scdhec.gov

Sincerely,

James Trumbull
Enforcement & Compliance Project Manager
Regulatory Programs Division

cc Van Whitehead Staff Attorney, DHEC-OCRM
Barbara Neale, Acting Director of Regulatory Division, DHEC-OCRM
Curtis Joyner, Manager of Critical Area Permitting, DHEC-OCRM
Bill Eiser, acting Enforcement & Compliance Manager, DHEC-OCRM
Shelly Toms Enforcement & Compliance Coordinator, DHEC-OCRM

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
PROPOSED FINDINGS OF FACTS

- 1 Mr Michael Albenesius is the owner of certain property abutting the critical area regulated by the S C Department of Health and Environmental Control s Office of Ocean and Coastal Resource Management (OCRM), and located on and adjacent to the Bohicket Creek at 2634 Bohicket Rd , Johns Island, SC 29455 (TMS # 257-00-00-148)
- 2 Mr Michael Albenesius, as the property owner and entity who authorized the work, is responsible for the construction of a dock out- of- compliance with the issued permit at the above location
- 3 The construction of the following has not been permitted or otherwise legally authorized by the office of OCRM as required by law and is therefore considered unauthorized addition of a jet dock, the "L" shaped 10 x 60' floating dock and covered 20' x 20 pierhead
- 4 Please state any additional facts that you deem pertinent to this investigation and **return to OCRM by February 28, 2007**

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only. No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent to Mr. Michael Albenesius

Street 1st No. or PO Box No. PO Box 13228

City State ZIP Charleston SC 29422-3228

See Reverse for Instructions

UNITED STATES POSTAL SERVICE

First Class Mail
Postage & Fees Paid
USPS
Permit No G 10

• Sender Please print your name address and ZIP+4 in this box •

Jamie Trumbull
DHEC-OCRM
1362 McMillan Ave , Suite 400
Charleston, SC 29405

RECEIVED
Suite 400
FEB 16 2004

ite 400

FEB 18 2007

DIANE CHARLES

2:00 PM



Incident Referral Form

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management
1362 McMillan Avenue Suite 400
Charleston South Carolina 29405
(843) 744 5838 (843) 744 5847 (fax)

Date 12/18/06

Time 3 33 pm

OCRM Staff Taking Report Curtis, Joyner

Name, Address and Telephone Number of Person Making Report

Mike Murry, American Dock & Marine resulting from a Robert Frank Survey - see attached

Activity Description & Location (Tax Map #, Lot #, Permit #, Subdivision, or GPS Coordinates)

Dock is over 1000 feet at 1020 feet

Activity Location (Address, TMS#, Permit #, GPS Coordinates, etc)

TMS # 257-00-00-148

2634 Bohicket Rd

Johns Island, SC 29455

County Charleston

Nearest Waterbody Bohicket Creek

Name, Address & Telephone of Property Owner

Michael G Albenesius

2634 Bohicket Rd or P O Box 31576

Johns Island, SC 29455 Charleston, SC 29417

Hm 559-1510 Bus 571-9933 Fax 559-1510 *51

Name, Address & Telephone of Other Involved Party (i.e. builder, contractor, site manager)

-----FOR OFFICIAL USE ONLY-----

Report Assigned To Trumbull, James

Date Assigned 12/19/06

Investigation Date 1/10/07

File Name ALBENESIUS, MICHAEL G

Incident # 200605946

Investigator's Comments

While the initial complaint stated that the dock was over 1000 feet when I did the investigation I did not find that to be the case

However, upon further investigation I did find that the structure was not built in compliance with the issued permit

- 1 The permit was for a 10' x 20' covered boat lift instead I found that the 20' x 20' pierhead was covered
- 2 The floating dock was issued as a "U" shaped 10' x 30' structure instead there is a 'L' shaped 10' x 60' structure
- 3 The pilings for the permitted boatlift are there but the actual lift has not been installed, however there is a jet dock that is not authorized

EXHIBIT

3

tabbles

1580 East Ashley

- Placard not posted

- Appears to be getting ready to block access on creek

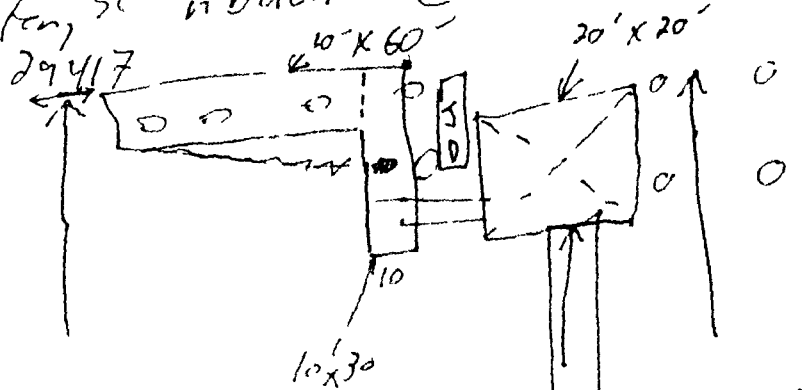
- Navigation is questionable?

NY Enterprises, LLC

Yvonne Buchanan

PO Box 31576 843-442-5124

Charleston, SC Buchanan @ bell/south net



1001

2634

Buchanan Rd

**STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT**

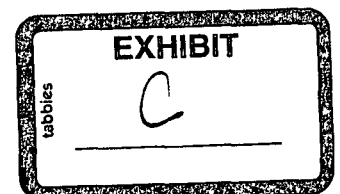
**IN RE BFF III, LLC
PERMIT # OCRM-00-270-M
CHARLESTON COUNTY**

**CONSENT AGREEMENT
10C-041Z**

BFF III, LLC is the owner of a dock structure in the tidelands critical area regulated by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (DHEC OCRM). The dock structure was constructed out of compliance with the permit by the previous owner. BFF III, LLC has agreed to work with DHEC OCRM to resolve this violation. Michael Albenesius, as the previous property owner, is additionally responsible for the violation described herein, and as such, will be named under separate action with DHEC OCRM. This Consent Agreement is entered into between DHEC OCRM and BFF III, LLC to resolve the issues presented herein.

FINDINGS OF FACT

1. BFF III, LLC is the owner of certain property abutting the tidelands critical area regulated by DHEC OCRM, located on and adjacent to Bohicket Creek at 2634 Bohicket Road, Charleston County, Johns Island, SC, 29455 (PID # 257-00-00-038) (Site), and as such, is responsible for corrective action to return the dock structure described herein to compliance with the Coastal Zone Management Act and associated regulations.
2. On July 18, 2000, permit # OCRM-00-224-M was issued to Elizabeth Scabrook (former owner) and permit # OCRM-00-270-M was issued to Michael Albenesius. Following the applicants' request to obtain one larger joint use dock in lieu of two smaller structures, the permits were combined under Permit # OCRM-00-270-M (Permit) and issued to Mr.



Albenesius The Permit authorized a 4' x 850' walkway with handrails leading to a 10' x 15' fixed pierhead and a 6' x 25' floating dock to be located on the downstream side of the pierhead

- 3 On June 18, 2001, the Permit was amended to authorize the construction of a 20' x 20' fixed pierhead and a 10' x 30' U-shaped floating dock at the Site
- 4 On August 29, 2006, the Permit was again amended to allow a 20' x 20' four pile covered boatlift to be installed at the Site
- 5 On December 18, 2006, DHEC OCRM received a complaint that the dock structure at the Site exceeded the 1,000' regulatory maximum length for docks. The complainant submitted a survey, stamped by a licensed surveyor, demonstrating the length of the dock to be "1,020' ±". This survey did not depict a critical line as established by DHEC OCRM.
- 6 On January 10, 2007, James Trumbull (formerly of DHEC OCRM) performed an inspection at the Site and observed that the floating dock had been built in an "L" shape as opposed to a "U" shape as was permitted. Additionally, Mr. Trumbull noted that there was an unauthorized floating jet dock at the Site and that a roof had been constructed over the fixed pierhead instead of over the boatlift, as was permitted. In his inspection findings, Mr. Trumbull stated that, "while the initial complaint stated that the dock was over 1,000' – when I did the investigation I did not find that to be the case." Mr. Trumbull's field notes attached to these findings show that Mr. Trumbull measured the walkway and pierhead at 989 and show a measurement of 1,001' from an unspecified line of demarcation to the outermost edge of the floating dock.
- 7 On February 6, 2007, Mr. Trumbull issued a Notice of Violation and Admission Letter including proposed Findings of Fact to the former owner of the Site, addressing the following violations: 1) the unauthorized "L" shaped floating dock, 2) the construction of a roof over the fixed pierhead, and 3) the installation of a floating jet dock. These documents were issued via certified mail but were returned to DHEC OCRM unclaimed by Mr. Albenesius. Consequently, an enforcement conference did not take place, and the

violation remained unresolved. Resolution was further complicated due to Mr. Trumbull's exit from DHEC OCRMs' enforcement section. Regrettably, the original case file was misplaced during this transition as DHEC OCRM worked through a backlog of violation resolutions.

8. At the time, BFF III, LLC learned of the violations at the Site and contacted DHEC OCRM in good faith to provide corrective action and discuss resolution. BFF III, LLC removed the unauthorized floating jet dock from the tidelands critical area and attempted to apply for an after-the-fact permit following the jet dock's removal. The after-the-fact permit application was not considered for processing.
9. On June 16, 2009, as a result of a separate complaint that the dock was over 1,000', Jason McMaster (DHEC OCRM Enforcement Section) performed a follow-up inspection of the Site and confirmed that the dock was not built according to the Permit. As in the 2007 inspection, Mr. McMaster observed the floating dock was constructed as an "L" shape as opposed to a "U" shape as was authorized, and a roof was constructed over the fixed pierhead as opposed to the boatlift. Additionally, Mr. McMaster observed that a sink and a storage area in the ceiling (attic) of the fixed pierhead were constructed without authorization, and that the jet dock noted in the 2007 inspection had since been removed. Although the dock walkway and pierhead (measured from the perceived critical line in the field) did exceed the permitted length of 850', the overall length did not exceed 1,000'.
10. On March 31, 2010, as a result of an additional complaint that the floating dock caused the dock to be over 1,000', Mr. McMaster re-measured all associated structures. In accord with Mr. Trumbull's previous measurements, and Mr. McMaster's initial inspection (June 16, 2009), the dock walkway plus the fixed pierhead total less than 1,000' (actual measurement = 998'). Using a right angle measurement from the channelward edge of the fixed pierhead to the adjacent floating dock, and then measuring the remaining length of the floating dock extending beyond the channelward edge of the fixed pierhead, it was determined that the unauthorized "L" shaped floating dock extends approximately 12' past the fixed pierhead. Therefore, the dock, inclusive of all associated

structures is 1,010' from the current critical line. This method of dock length determination is consistent with **Critical Area Permitting Regulations, S.C. Code Ann. Reg. 30-12(A)(1)(I)**, which states that "docks longer than 1,000' over critical area are prohibited. This is inclusive of pierheads, floats, boatlifts, ramps, mooring pilings, and other associated structures."

- 11 On August 2, 2010, Mr. McMaster spoke with Richard Fishman (owner of BFF III LLC). Mr. Fishman stated that he believed that this issue had been resolved several years ago after the jet dock was removed. Mr. McMaster clarified that although the jet dock had been removed, a number of violations remained at the Site. Mr. McMaster informed Mr. Fishman that a Notice of Violation/Admission Letter was soon to follow.
- 12 On August 11, 2010, a Notice of Violation/Admission Letter was issued to BFF III, LLC via certified mail. These documents outlined the violations in detail and provided BFF III, LLC fifteen (15) days to respond to the violations alleged by DHEC OCRM. The documents were signed for by Diana Fishman (wife of Richard Fishman of BFF III LLC) on August 16, 2010.
- 13 On August 25, 2010, an enforcement conference was held at the Charleston DHEC OCRM office and attended by Mr. McMaster, Heather Kellerman (DHEC OCRM Enforcement Section Manager), Blair Williams (DHEC OCRM Wetlands Section Manager), Michael Fishman (representative of BFF III, LLC), and Heyward Robinson (serving as technical consultant for BFF III, LLC). Also present were representatives of the previous owner of the referenced dock. During the conference, the violation concerning the 1,000' maximum extent was explained in detail as were the permit violations described herein. At the conclusion of the enforcement conference the possibility of a consent agreement requiring corrective action, was discussed.
- 14 Following the enforcement conference, Mr. Fishman, Mr. McMaster, Ms. Kellerman, and Mr. Williams discussed the implications of required corrective actions to return the existing dock to compliance with the Coastal Zone Management Act and associated regulations.

- 15 On August 26, 2010, at the request of the BFF III, LLC, Peabody & Associates Land Surveying reestablished the critical line at the Site from the year 2000, using plat data transferred at the time of sale thereby mimicking field conditions at the time the Permit was issued
- 16 On October 4, 2010, Mr McMaster measured the length of the dock structures from this reestablished critical line The walkway, as measured from the reestablished critical line to the pierhead, was 971' The pierhead measured another 20' channelward from the end of the walkway The floating dock extended 12' channelward of the pierhead These measurements combine for a total dock length over critical area to be 1,003' from the reestablished 2000 critical line
- 17 On November 4, 2010, Mr McMaster spoke with Sandy Peabody (licensed surveyor) of Peabody & Associates Land Surveying in regards to the channelward extension of the floating dock from the reestablished 2000 critical line Mr Peabody stated that by his official measurement, the total dock length over critical area is 1,010' from the reestablished 2000 critical line

CONCLUSIONS OF LAW

Violations of **The Coastal Zone Management Act, as amended Critical Area Permitting Regulations, S C Code Ann Reg 30-2(B), 30-12(2)(d)(i), 30-12(A)(1)(i), as amended** Permit **OCRM-00-270-M** are hereby acknowledged to include a walkway at the Site built 971' in length as opposed to 850' in length as was permitted, the installation of a floating dock in a configuration which was not in accordance with the submitted plans and drawings of Permit OCRM-00-270-M General Condition # 11 a roof constructed over the fixed pierhead as opposed to the 4 pile boathift as was authorized, the installation of an unauthorized sink on the pierhead, the installation of prohibited enclosed ceiling storage, and the prohibited construction of a dock greater than 1,000' in length

The Coastal Zone Management Act, as amended, S C Code Ann §48-39-170 provides that any person determined to be in violation shall be liable for and may be assessed a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation. It also provides that whenever DHEC OCRM finds that a person is in violation of any permit, regulation, standard, or requirement under this chapter, DHEC OCRM may issue an order requiring the person to comply with the permit, regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by DHEC OCRM. In addition, §48-39-170 provides that DHEC OCRM may bring a civil enforcement action under this section as well as seek appropriate injunctive relief under §48-39-160.

The Critical Area Permitting Regulations, S C Code Ann 30-8(D) provides that in lieu of any civil fine, DHEC OCRM may employ other means of enforcement resolution including supplemental restoration/enhancement activities.

NOW, IT IS THEREFORE AGREED, with the consent of BFF III, LLC that

1. Within 90 days of the date of this Consent Agreement, BFF III, LLC shall relocate all dock structures landward of the 1,000' maximum extent for dock structures. This requirement may be satisfied by one of two available options:
 - a) Relocate the floating dock structure landward of the 1,000' maximum extent and return it to its permitted "U" shape configuration or
 - b) Relocate the floating dock structure landward of the 1,000' maximum extent and submit an after-the-fact permit request for a configuration other than the permitted "U" shape.
2. Within 90 days of the date of this Consent Agreement, BFF III, LLC shall remedy the violation concerning the unauthorized roof over the fixed pierhead. This requirement can be satisfied by one of two available options:
 - a) Remove the roof from the fixed pierhead or
 - b) Submit an after-the-fact permit request for a roof over the fixed pierhead.

- 3 Within 90 days of the date of this Consent Agreement, BFF III, LLC shall remedy the violation concerning the unauthorized sink on the fixed pierhead. This requirement may be satisfied by one of two available options:
 - a) Remove the sink from the fixed pierhead or
 - b) Submit an after-the-fact permit request for a sink located on the fixed pierhead
- 4 Within fifteen (15) days of receipt of any written comment from DHEC OCRM concerning the after-the fact permit request for one or more of the above adequately revise and resubmit the after-the fact permit request
- 5 Within 90 days of the date of this Consent Agreement, BFF III, LLC shall remove the unauthorized ceiling storage compartment (attic) of the fixed pierhead
- 6 Submit all communication regarding this Consent Agreement and its requirements to

Jason McMaster, Enforcement Program
Office of Ocean and Coastal Resource Management
1362 McMillan Ave Suite 400
Charleston, SC 29405

This Consent Agreement shall be binding upon and inure to the benefit of BFF III, LLC and DHEC OCRM. BFF III, LLC may not assign any right or obligation under this Consent Agreement without the prior written consent of DHEC OCRM. Any written notice of extension shall be granted at the discretion of DHEC OCRM and shall become a fully enforceable portion of this Agreement.

IT IS FURTHER ORDERED AND AGREED that this Consent Agreement governs only BFF III, LLC liability to DHEC OCRM for civil sanctions arising from the matters set forth herein and constitutes the entire agreement between DHEC OCRM, and BFF III, LLC with respect to the resolution and settlement of the matters set forth herein. The parties are not relying upon any representation promises, understandings or agreements except as expressly set forth within this

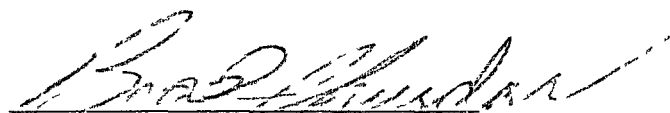
Consent Agreement Any violation of the provisions of this Consent Agreement shall be deemed a violation of the Coastal Zone Management Act *as amended* and therefore shall be deemed unlawful Upon ascertaining any such violation, DIIEC OCRM may initiate action to obtain compliance with both this Consent Agreement and the Coastal Zone Management Act

[Signatures on the following page]

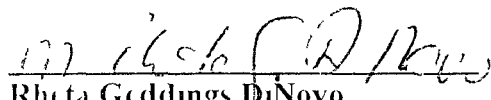
STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT


Carolyn Boltin-Kelly
Deputy Commissioner

Date 12-22-10

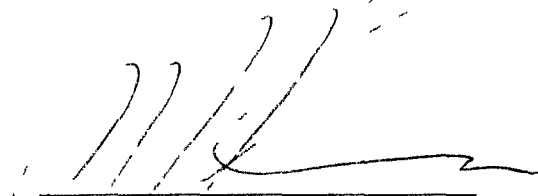

Reviewed by
DHEC OCRM Legal Counsel

Date 12-20-2010


Rheta Geddings DiNovo
Enforcement Program

Date December 16, 2010

With Consent BFF III, LLC


Rickard Fishman, Owner
BFF III, LLC

Date 12/7/10

CHRISTOPHER McG HOLMES
Attorney at Law
222 W Coleman Blvd
Mt Pleasant South Carolina 29464
Tel (843) 388 2966
Fax (843) 388 2967

November 9 2010

Jason McMaster
Project Manager/Enforcement Division
SCDHEC-OCRM
1362 McMillan Ave , Suite 400
Charleston SC 29405

RE Michael Albenesius, Proposed Consent Order 07C-012JZ

Dear Jason

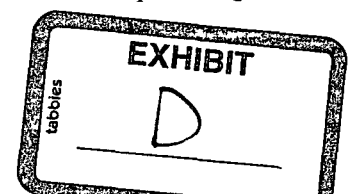
As a follow up to our telephone discussion of the Proposed Consent Order for Mr Albenesius I would like to set forth in writing the points we discussed and our position on them You indicated DHEC was proposing a total fine of four thousand one hundred (\$4,100.00) dollars for what it perceived to be six (6) separate violations of either the July 18, 2000 permit (OCRM-00-270 M), amendments thereto, and/or regulations and statutes I would like to address these separately

- 1 The total walkway length is 971' rather than the 850' stated in the permit Proposed fine \$650.00

Response The permit was applied for and issued in 2000, at a time when DHEC did not require surveyed drawings Mr Albenesius testified at a contested case before an Administrative Law Judge (ALJ) that he determined the length by taking a 1,000' roll of string, tying it off at the edge of the critical area and taking it out to the proposed pier location in Bohicket Creek He then cut the string and measured the remaining length which was 150' Fred Mallett the project manager, testified at the same hearing that he felt that attempt to measure the dock length was reasonable under the circumstances, that short of a survey an accurate measurement could not be obtained, and that he visited the site before the permit was issued and felt 850' was a good approximation Further, when building the dock, Mr Albenesius realized 850' would not be sufficient to reach the creek, so he called Mr Mallett who told him to go ahead and complete the dock Since 971' is only about a 15% variance from the estimate, is still within the 1,000' limit and undoubtedly would have been permitted if a survey had been provided a fine of any amount is unwarranted

- 2 L-shaped v U-shaped floating dock addition Proposed fine \$750.00

Response After obtaining this amendment in June of 2001 and beginning construction, Mr Albenesius noted that the inward portion of the U would be very close to the edge of the marsh, provide limited utility, and might even end up resting



RE Michael Albenesius, Proposed Consent Order 07C-0121Z

on the creek bank at low tide. Because of this, he connected the inward section of the U to the outer section without increasing the overall amount of space allowed under the amendment. Given the lack of an increase in the structure and the use of a less environmentally damaging alignment, the fine proposed seems excessive, if not unwarranted.

- 3 Roof placed over pier rather than over boat lift as permitted. Proposed fine \$650.00.
Response: The permit allows a roofed structure. If roofs had been built over both the pier and the boat lift, the proposed fine might be appropriate; however, if the applicant's choice had been a roof over the pier rather than boat lift in the first instance, that surely would have been permitted. Again, a fine for this discrepancy does not seem justified.
- 4 Attic, which is not allowed under the regulations, constructed in roof over pier. Proposed fine \$1,000.00.
Response: As an initial matter, we are not certain this prohibition existed in the regulations in 2000. You were going to review archived regulations to determine this. Even if this regulation was in place at the time, the fine seems particularly harsh for something that is so easily rectified by removal, which would have been done upon notice from DHEC.
- 5 Unpermitted sink installed on pier. Proposed fine \$100.00.
Response: As I informed you, I just participated in a contested case hearing of an after-the-fact in which one of the activities was placement of a sink on a pier without a permit. The sink was allowed without a penalty. We would request the same consideration.
- 6 The overall structure length exceeds 1,000' by 10'. Proposed fine \$1,000.00.
Response: We will vigorously dispute this contention. Apparently the basis for this conclusion is a survey conducted recently by a surveyor employed by the current owner of the property which purportedly "re-establishes" the 2000 critical area line. We had no participation or input of this re-creation and are satisfied that, at the time of construction, the dock did not exceed the regulatory limit. Further, your predecessor, Mr. Trumbull, testified in an ALC proceeding that he measured this dock in 2007 and found it to be in compliance. Given the passage of more than 10 years in which various natural and man-induced events could have influenced the location of the critical line and your agency's own determination of compliance in 2007, we will not agree to this allegation or to pay a fine of any amount on this particular

Jason McMaster
November 9, 2010
page 3

RE Michael Albenesius, Proposed Consent Order 07C-012 IZ

We would request that you take these facts into account when you re-consider this matter. In light of the absence of any efforts on the part of Mr. Albenesius to mislead the agency or do anything but proceed in a manner that was least environmentally damaging as well as his prompt response to every notification from your agency and complete cooperation in your investigation, we would suggest that a finding of nothing more than technical violations occurred and Mr. Albenesius is admonished to strictly comply with any future permits and/or amendments he may acquire. I look forward to hearing from you.

With kindest regards, I am

Yours truly,



Christopher McG Holmes

cc Michael Albenesius

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
(S C Ct App , Withdrawn, Substituted and Refiled June 28, 2010)

South Carolina Department of Health and Environmental Control, Petitioner,

v

Phillip Przyborowski, Respondent

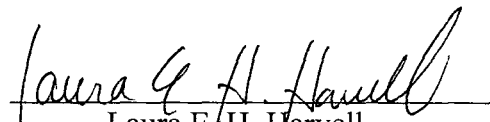
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date s/he has filed and served *Motion to Supplement Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari* in this matter upon the Respondents or their counsel, by placing copies of same in the United States Mail, first class postage prepaid, addressed to

The Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211

Christopher McG Holmes
Attorney at Law
222 W Coleman Boulevard
Mt Pleasant, SC 29464

February 1, 2011


Laura E H Harvell

RECEIVED

FEB 03 2011

S C SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

RECEIVED

FEB 10 2011

S.C. Supreme Court

Opinion No 2010-UP-182
Heard October 7, 2009 - Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

Respondent

Return
~~REPLY~~ TO MOTION TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI
AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI

In its most recent filing in this matter, petitioner argues that the position counsel for respondent has taken in a proceeding initiated by petitioner against a person not a party to the instant proceeding somehow conflicts with the position taken by respondent in this matter. Leaving aside the important facts that these are separate proceedings involving different parties and that being counsel for a party does not equate to being a "party" to the proceeding, a close examination of the documents with which petitioner seeks to supplement the record demonstrates it is petitioner that is now taking a position inconsistent with that argued to the Administrative Law Court. Furthermore, it is entirely inappropriate, inequitable and, potentially, unethical to attempt to inject

incompletely explained documents into this proceeding in this manner

As to petitioner's proposed Exhibits A and B, it is unquestionable that these documents, originated by petitioner and dated February 12, 2007, and December 18, 2006, respectively were available at the time of the ALC hearing held on August 28, 2007. Petitioner offers no reason why they could not have been introduced and explained at that time.

Exhibit C is reported to be a Consent Agreement entered into between petitioner and a stranger to these proceedings (and one not represented by counsel for respondent). This document constitutes rank hearsay, self-servingly generated by petitioner, and has no legitimate place in this case.

Finally, Exhibit D is correspondence from counsel for respondent in his capacity as counsel for a separate party in a separate proceeding. Rather than advancing any position at odds with that taken in this proceeding, counsel merely accedes, on behalf of his client, to the facts alleged by petitioner and argues the equity of proposed fines. The only portion of the correspondence relating to dock length is a challenge to a length arrived at by petitioner and another person subject to an enforcement action (and one not represented by counsel for respondent) involving an attempt to recreate in 2010 a situation that supposedly existed in 2000 based on an on-site investigation and survey to which counsel's client was not invited to or informed of.

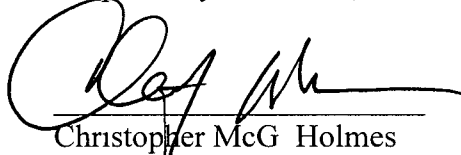
As the record shows, it is petitioner that is now taking a position inconsistent with that argued before the ALC. In August of 2007, petitioner contended the Albenesius dock did not exceed 1,000 feet in length and therefore was not targeted for enforcement. R. p. 106, l. 2- p. 108, l. 23. Now, having failed to prevail before the ALC and the Court of Appeals, petitioner has reversed its position and argued the structure does exceed that length and has commenced an enforcement action against

its owner in an attempt to cure the defect that existed in respondent's case By this action, petitioner has merely confirmed the continuing arbitrariness by which it conducts business, a course of conduct which the ALC found "raises the hackles of its citizens and brings into question the unreasonable exercise of its discretion " R p 15

CONCLUSION

For the foregoing reasons the Motion to Supplement should be denied, and for these reasons and the reasons previously set forth in respondent's Return to Petition for Writ of Certiorari, the petition should be denied

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Holmes", written over a horizontal line.

Christopher McG Holmes
222 W Coleman Blvd
Mt Pleasant, SC 29464
cmholmes@comcast.net
(843) 388-2966
(843) 388-2967 (fax)

Attorney for Respondent Philip Przyborowski

February 9, 2011
Mount Pleasant, SC

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
Heard October 7, 2009 - Filed March 1, 2010
Withdrawn, Substituted and Refiled June 28, 2010

South Carolina Department of Health and Environmental Control

Appellant,

v

Philip Przyborowski

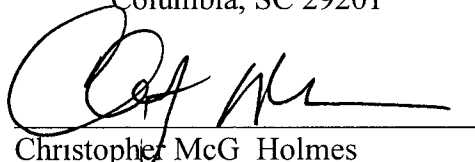
Respondent

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of Reply to Motion to Supplement Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari on counsel of record by depositing a copy of same in the United States mail, postage prepaid, addressed as follows

Bradley D Churdar, Esq
Davis A Whitfield-Cargile, Esq
SCDHEC-OCRM
1362 McMillan Ave , Suite 400
Charleston, SC 29405

Carlisle Roberts, Jr , General Counsel
SC Department of Health
& Environmental Control
2600 Bull St
Columbia, SC 29201



Christopher McG Holmes
222 W Coleman Blvd
Mt Pleasant, SC 29464
(843) 388-2966

Attorney for Respondent Philip Przyborowski

February 9, 2011

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FEB 17 2011

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

SC SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Administrative Law Judge

Opinion No 2010-UP-182
(S C Ct App , Withdrawn, Substituted and Refiled June 28, 2010)

South Carolina Department of Health and Environmental Control Petitioner,

v

Phillip Przyborowski Respondent

*PETITIONER S REPLY TO RESPONDENT PRZYBOROWSKI S 'REPLY ¹ TO
MOTION TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI AND
APPENDIX TO PETITION FOR WRIT OF CERTIORARI²*

In Respondent's Return, Respondent asks the Court to disregard that Mr Holmes is his attorney concerning some statements of fact regarding the basis for Respondent's position in this matter "Acts of an attorney are directly attributable to and binding upon the client " Motley v Williams, 374 S C 107, 112, 647 S E 2d 244, 47 (Ct App 2007) Respondent, through his counsel's arguments, has in this case argued that the Albenesius dock is similarly situated to Respondent's dock based on Respondent's allegation that the Albenesius dock, like the Przyborowski dock, is longer than 1,000 feet over the critical area Respondent further takes the position in this case, also through his counsel's arguments, that the Department's enforcement action against the Przyborowski dock

¹ Respondent s Return was captioned as a reply but in reality was a return as contemplated by Rule 240(e) SCACR Therefore this Reply will refer to the same as Respondent s Return

² For the sake of brevity this Reply will refer to the Motion to Supplement Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari as the Motion to Supplement

without an action against the Albenesius dock reflects arbitrary and purposeful discrimination in the administration of the law. As the Exhibit D to the Motion to Supplement demonstrates, Respondent's counsel has now taken an entirely different position in another case involving the very same Albenesius dock.

Respondent's counsel now takes the position while representing Mr. Albenesius that the very same Albenesius dock is not longer than 1,000 feet over the critical area (Exhibit D to the Motion to Supplement, ¶ 6). Regarding the language in the proposed consent order that "the overall structure length exceeds 1,000' by 10'," Respondent's counsel states as follows: "We will vigorously dispute this contention."

The written concession by Respondent's counsel in the communication Respondent's counsel wrote on behalf of Mr. Albenesius that the factual basis for Respondent's legal argument in this matter is the primary motivation for the Motion to Supplement. Clearly, this document was not available during the hearing before the Administrative Law Court. The written concession that there was no factual basis for Respondent's legal position in this case did not exist until it was created on November 9, 2010.

In addition, the Consent Agreement entered into with BFF III, LLC on December 22, 2010 (Exhibit C to the Motion to Supplement) was clearly not available during the hearing before the Administrative Law Court. It also was not in existence.

The Department concedes that Exhibits A and B to the Motion to Supplement were in existence at the time of the hearing in this matter. However, there was no basis to include these documents at the time of the hearing. Exhibit A to the Motion to Supplement was a Notice of Violation and Admissions Letter sent to Mr. Albenesius on

February 12, 2007³ Exhibit B to the Motion to Supplement is an Incident Referral Form dated December 18, 2006 that has attached to it field notes that show the measurement of the dock at the time⁴ During the ALC hearing in this matter, the Department witness testified that he measured the dock to be right around 1,000 feet Therefore, the Department did not pursue an enforcement action against the Albenesius dock for violating the prohibition of docks longer than 1,000 feet⁵ As the Consent Order between the Department and BFF III, LLL indicates, the dock was not measured to be longer than 1,000 feet until March 31, 2010 (Exhibit C to Motion to Supplement, p 3 of 9, ¶ 10) Upon measuring the dock to be longer than 1,000 feet in March 2010, the Department negotiated a consent order with the current owner of the Albenesius dock to bring the dock into compliance with the regulatory prohibition of docks longer than 1,000 feet over the critical area (Exhibit C to Motion to Supplement)

In other words, Exhibit A and B would have been cumulative to Mr Trumbull's testimony at the hearing that he measured the dock to be right at 1,000 feet and that there was no enforcement action against the Albenesius dock for violation prohibition of docks longer than 1,000 feet over the critical area However, Exhibits A and B are now relevant as background to Exhibit C, which did not exist until December 22, 2010, well after the ALC hearing in this matter

Respondent's only argument in the Return to the Motion to Supplement is that the Court should disregard Respondent's counsel's admission that the two docks are not

³ Incidentally the Notice of Violation and Admissions Letter that initiated the enforcement action against Respondent in this case was sent six days prior on February 6 2007 (R pp 247 249)

⁴ The Incident Referral Form appears to have been updated on or after the investigation date of January 10 2007

⁵ Although the Notice of Violation and Admissions Letter show that the Department did initiate an enforcement action against the Albenesius dock at the time for other violations of the Critical Area Regulations

similarly situated because Respondent's counsel was engaged on behalf of Mr Albenesius at the time of making that concession Respondent does not allege that Mr Holmes no longer represents Respondent in this matter, in fact, Mr Holmes filed the Return to the Motion to Supplement on behalf of Respondent in this matter Though the Department is not accusing Mr Holmes of a violation of the Rules of Professional Conduct, the admission by Respondent's counsel on behalf of Mr Albenesius that the Albenesius dock is not similarly situated to the Przyborowski dock completely belies the factual basis for Respondent's legal position in this matter Further, the recent consent order entered into between the Department and BFF III, LLC shows that after the Department measured the Albenesius dock to be longer than 1,000 feet in March 2010, the Department took appropriate action against the Albenesius dock to resolve the violation of Regulation 30-12(A)(1)(I)

Respondent does not make any legal argument against Petitioner's primary argument in the Motion to Supplement that notwithstanding the rule that evidence not presented to the lower court may not be included in the Record on Appeal,⁶ the Petitioner should be allowed to bring before the Court a written statement by counsel for respondent after the trial (and after the Court of Appeals' ruling) that the factual basis underlying its defense is false

Respondent also does not make any legal argument against Petitioner's alternative proposal that the Court could remand to the Court of Appeals with instructions to remand to the ALC to conduct further proceedings based on this after-discovered evidence

⁶ Rule 210(c) SCACR, State v. Greene 255 S C 548 180 S E 2d 179 (1971) Associates Discount Corp v Hiers 248 S C 430 150 S E 2d 611 (1966) Norris v Ferre 315 S C 179 432 S E 2d 491 (Ct App 1993) (record may not be supplemented with matters not presented to trial judge)

Exhibits A, B, C, and D satisfy the requirements to obtain leave from an appellate court to move for a new trial based on after-discovered evidence⁷ Here, Exhibit C to the Motion to Supplement (Consent Order) and Exhibit D to the Motion to Supplement (Letter from Respondent's Counsel on behalf of Mr Albenesius admitting that Albenesius dock and Przyborowski dock are not similarly situated) were not in existence until after the Court of Appeals issued its unpublished decision modifying the ALC's Order Both of these Exhibits are likely to change the ALC's finding that the Department's failure to bring an enforcement action against Albenesius reflects arbitrary and purposeful discrimination in the enforcement of the law, the only alleged finding in the ALC's Order on which the Court of Appeals affirms the ALC In addition, at the time of the hearing at the ALC, Exhibits A and B were only cumulative of Mr Trumbull's testimony that he measured the dock to be right at 1,000 feet and that no enforcement action was contemplated for violating the prohibition on docks longer than 1,000 feet

CONCLUSION

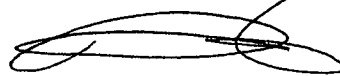
Based on the foregoing and in light of the admission by Respondent's counsel that Respondent's dock and the Albenesius dock are not similarly situated, Petitioner respectfully requests that the Court grant this motion to supplement the Petition for Certiorari and the Appendix thereto In the alternative, the Department respectfully proposes that the Court remand to the Court of Appeals with instructions to remand to the Administrative Law Court to conduct further proceedings in accordance with this after-

⁷ State v Butler 261 S C 355 200 S E 2d 70 (1973) State v Jennings 40 S C 553 18 S E 932 (1894) The requirements for a new trial are that the evidence (1) is such as will probably change the result if a new trial is granted (2) has been discovered since the trial (3) could not have been discovered prior to trial by the exercise of due diligence (4) is material to the issue and (5) is not merely cumulative or impeaching Johnson v Catoe 345 S C 389 548 S E2d 587 (2001) State v Spann 334 S C 618 513 S E 2d 98 (1999) State v South 310 S C 504 427 S E 2d 666 (1993) State v Ford, 301 S C 485 392 S E 2d 781 (1990)

discovered evidence, including specifically the admission by counsel for Respondent that the two structures are not similarly situated. In the alternative, the Department respectfully requests that the Court grant certiorari and issue an opinion reversing the lower courts based on the record as it stands.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL



Carlisle Roberts, Jr., General Counsel
S C Dept of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
803-898-3350

Bradley D. Churdar, Chief Counsel for OCRM
Davis A. Whitfield-Cargile, Staff Attorney
SC Dept of Health & Environmental Control
1362 McMillan Ave., Suite 400
Charleston, SC 29405
843-953-0229

Attorneys for Petitioner

February 15, 2011
Charleston, South Carolina

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Administrative Law Judge

South Carolina Department of Health and Environmental Control, Petitioner,

V

Phillip Przyborowski, Respondent

The undersigned hereby certifies that on this date s/he has filed and served ***Reply to Respondent's "Reply" to Motion to Supplement Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari*** in this matter upon the Respondents or their counsel, by placing copies of same in the United States Mail, first class postage prepaid, addressed to

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211

Christopher McG Holmes
Attorney at Law
222 W Coleman Boulevard
Mt Pleasant, SC 29464

February 15, 2011


~~Laura E. H. Harvell~~
Davis A. Whitfield Perle



South Carolina Department of Health and Environmental Control

Promoting and protecting the health of the public and the environment

February 17, 2011

VIA U S MAIL

Ms Linda Allen
Clerk's Office
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re SCDHEC vs Phillip Przyborowski
Case Tracking No 2010-168006

Dear Ms Allen

Thank you for your phone call on February 17, 2011. Per your conversation with the Department's legal assistant, Laura Harvell, find enclosed one (1) bound copy of the Record on Appeal in the above-referenced matter, as well as seven (7) corrective labels for the Record and the final briefs.

Thank you for your assistance in this matter. Please do not hesitate to contact me at 843-953-0229 if you have any questions.

Sincerely,



Davis A. Whitfield-Cargile

Enclosures

c Christopher McG Holmes, Esq (w/o enclosures)

RECEIVED

FEB 18 2011

SC SUPREME COURT

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Office of General Counsel

Charleston Office 1362 McMillan Avenue Suite 400 Charleston SC 29403 Phone (843) 953 0200 Fax (843) 953 0201 www.scdhec.gov



South Carolina Department of Health and Environmental Control

Promoting and protecting the health of the public and the environment

February 15, 2011

VIA U S MAIL

The Honorable Daniel E Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re SCDHEC vs Phillip Przyborowski
Case Tracking No 2010-168006

Dear Mr Shearouse

Please find enclosed for filing the original and seven (7) copies of Petitioner's Reply to Respondent's "Reply" to Motion to Supplement Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari. I would appreciate your returning a clocked copy in the enclosed envelope. By copy of this letter, I am serving all parties of record. I appreciate your assistance in this matter.

RECEIVED

FEB 17 2011

SC SUPREME COURT

Very truly yours,

Davis A. Whitfield-Cargile
Staff Attorney

Enclosure (as noted)

cc Christopher McG Holmes

CHRISTOPHER McG HOLMES
Attorney at Law
222 W Coleman Blvd
Mt Pleasant, South Carolina 29464
Tel (843) 388 2966
Fax (843) 388 2967

February 9, 2011

Daniel E Shearouse, Clerk
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RE SC DHEC v Przyborowski

Dear Mr Shearouse

Enclosed please find the original and six copies of Respondent Przyborowski's Reply to Motion to Supplement Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari in the above referenced matter along with Proof of Service for same

Sincerely,



Christopher McG Holmes
Attorney for Respondent

cc Bradley D Churdar, Esq
Davis A Whitfield-Cargile, Esq
Carlisle Roberts, Jr , General Counsel

RECEIVED

FEB 10 2011

S.C. Supreme Court
pm 2-9-11



South Carolina Department of Health and Environmental Control

Promoting and protecting the health of the public and the environment

February 1, 2011

VIA U S MAIL

The Honorable Daniel E. Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re SCDHEC vs Phillip Przyborowski
Case Tracking No 2010-168006

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of a Motion to Supplement Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari. I would appreciate your returning a clocked copy in the enclosed envelope. By copy of this letter, I am serving all parties of record. I appreciate your assistance in this matter.

Very truly yours,

Davis A. Whitfield-Cargile
Staff Attorney

DWC/lehh
enclosure

cc Christopher McG. Holmes

RECEIVED

FEB 03 2011

SC SUPREME COURT
pm 2-1-11

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Office of General Counsel

Charleston Office 1362 McMillan Avenue Suite 100 Charleston SC 29405 Phone (843) 953-0200 Fax (843) 953-0201 www.scdhec.gov



South Carolina Department of Health and Environmental Control

Promoting and protecting the health of the public and the environment

September 7, 2010

VIA U S MAIL

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211

RECEIVED

SEP 10 2010

RE SCDHEC vs Phillip Przyborowski
Docket No 07-ALJ-07-0254-CC
Ct App Case #200894427

S.C. SUPREME COURT

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the Reply to Respondent's Return to Petition for Writ of Certiorari filed on behalf of the Appellant, South Carolina Department of Health and Environmental Control, in the above-referenced matter. I would appreciate your returning a clocked copy of the same, in the enclosed self-addressed envelope. I appreciate your attention in this matter.

Sincerely,

Davis A. Whitfield-Cargile
Staff Attorney

Enclosures (as noted)

cc Christopher McG. Holmes, Esq. (enclosures)



**OFFICE OF OCEAN & COASTAL
RESOURCE MANAGEMENT**

1362 McMillan Avenue Suite 400
Charleston SC 29405

Return Service Requested

FIRST CLASS

The Honorable Daniel E Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211



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SEP 07 2011

CLASS

CHRISTOPHER McG HOLMES
Attorney at Law
222 W Coleman Blvd
Mt Pleasant South Carolina 29464
Tel (843) 388 2966
Fax (843) 388 2967

August 26, 2010

Daniel E Shearouse, Clerk
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RE SC DHEC v Przyborowski

Dear Mr Shearouse

Enclosed please find the original and six copies of Respondent Przyborowski's Return to Petition for Writ of Certiorari in the above referenced matter along with Proof of Service for same

Sincerely,



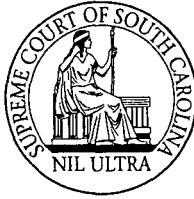
Christopher McG Holmes
Attorney for Respondent

cc Bradley D Churdar, Esq
Davis A Whitfield-Cargile, Esq
Carlisle Roberts, Jr , General Counsel

RECEIVED

pm 8 26-10
AUG 30 2010

SC SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

July 30, 2010

Bradley C. Churdar, Esquire
Davis A. Whitfield-Cargile, Esquire
1362 McMillan Avenue
Suite 400
Charleston, SC 29405

Re SCDHEC v. Przyborowski, Phillip
Case Tracking No. 2010-168006

Dear Counsel,

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

SCDHEC v Przyborowski, Phillip
Page Two
July 30, 2010

DES/lda

Enclosure

cc Carlisle Roberts, Jr, Esquire
Christopher M Holmes, Esquire



Charlie Hunter Commissioner

Promoting and protecting the health of the public and the environment

July 28, 2010

VIA U S MAIL

The Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211

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JUL 30 2010

SC SUPREME COURT

RE SCDHEC vs Phillip Przyborowski
Docket No 07-ALJ-07-0254-CC
Ct App Case #200894427

Dear Mr Shearouse

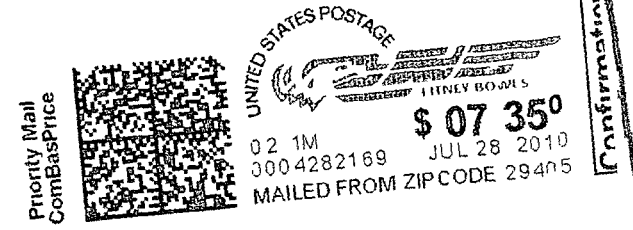
Please find enclosed for filing the original and seven (7) copies of the Petition for Writ of Certiorari filed on behalf of the Appellant, South Carolina Department of Health and Environmental Control, in the above-referenced matter. Also enclosed are two (2) copies of the Appendix in accordance with Rule 226(e), SCACR. I would appreciate your returning a clocked copy of the same, in the enclosed self addressed envelope. I appreciate your attention in this matter.

Sincerely,

Davis A Whitfield-Cargile
Staff Attorney

DWC/lehh
enclosure

cc Honorable Tanya Gee, SC Court of Appeals (w/ Petition but w/o Appendix)
Christopher McG Holmes, Esq (w/ Petition but w/o Appendix)



OFFICE OF OCEAN & COASTAL
RESOURCE MANAGEMENT
1362 McMillan Avenue Suite 400
Charleston SC 29405

Return Service Requested

FIRST CLASS

The Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11629
Columbia, SC 29211