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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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

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

vs.

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

**PETITIONERS' REPLY TO
RETURN TO PETITION FOR A
WRIT OF CERTIORARI**

The Respondents have filed Returns that add confusion, rather than clarity, to the Court of Appeals' already disjointed Opinion, highlighting the need for this Court to accept Certiorari. The Petitioners submit this Reply to the issues raised in those Returns.

I. OPINION ESTABLISHES INCONSISTENT STANDING PRECEDENT

The Respondents' Returns do not rebut the thrust of the Petitioners' argument on standing: that without this Court's intervention, the Court of Appeals' opinion in this case will establish a

distinctly inconsistent precedent that has the potential to throw this Court's carefully-crafted standing jurisprudence into turmoil. Only Respondent Roper Pond, LLC ("Roper Pond") actually addresses the Petitioners' arguments on standing, and its Return goes out of the way to avoid and misdirect from the core error in the Court of Appeals' opinion. In short, Roper Pond does its best to pretend that impacts to the lily pad pond (and the Petitioners' injuries related thereto) do not exist.

A. Dredging of the Lilly Pad Pond Provides a non-Speculative Basis for Standing

To be clear, this case primarily involves impacts to two separate bodies of water: Cary Lake and the lily pad pond (also known as roper pond). The lily pad pond is actually on the construction site, and proposed modifications to that pond are a main part of what prompted the need for the approvals at issue in this case. (R. pp. 534-41; 542-48; 555-62). Water drains out of Roper Pond, under Trenholm Road, into Cary Lake. While the individual Petitioners testified about their concerns for both water bodies, it is the project's impact on the lily pad pond that serves as the thrust of the individual Petitioners' basis for standing in this case. See Petition for Writ of Certiorari, pp. 7-8, 15-16.

i. Roper Pond Ignores Impacts to the Lily Pad Pond¹

As to the lily pad pond, the evidence of record establishes: that we have a scenic lily pad pond located in immediate proximity to where the individual Petitioners reside (R. pp. 534-41); that the pond was in clear view from the adjacent public sidewalk and road (R. p. 373); that individual Petitioners regularly walked/jogged/ drove by the pond to enjoy its beauty (R. pp. 373,

¹The Court of Appeals acknowledges impacts to the lily pad pond but dismisses them on property ownership grounds, as discussed below.

400); that individual Petitioners regularly enjoyed viewing flora and fauna in the pond (R. p. 401); and that the DHEC approvals at issue in this case authorize a dredging and deepening project that will change the character of the pond (R. pp. 534-41; 542-48; 555-62). Neither Respondents' Return seriously disputes any of these points, which together read as a basic recipe for environmental standing. Putting aside for the moment some of the ancillary standing issues that have arisen in this case, the Court of Appeals' rejection of the individual Petitioners' standing under this factual scenario represents a serious departure from both state and federal standing precedent and warrants this Court's intervention.

Not even Roper Pond disputes that the lily pad pond will be (and in fact has been) dredged and deepened under the DHEC approvals at issue here. Rather, Roper Pond's primary strategy is diversion. In particular, Roper Pond's Return either ignores impacts to the lily pad pond or treats them as interchangeable with impacts to Cary Lake. First, Roper Pond attempts to tie the Petitioners' standing testimony exclusively to Cary Lake, without mention of the lily pad pond. See Return, pp. 8-9. In relation to Linda Jackson's testimony, during which she discussed her enjoyment of the lily pad pond at length, Roper Pond only briefly notes her statements that *Cary Lake* is privately owned, has no public access, and will be negatively impacted only if Roper Pond's violates the permit terms.² Id. An issue which is consistently avoided in Roper Pond's Return is that the lily pad pond absolutely will be negatively impacted (in terms of the Petitioners' use and enjoyment) without a permit violation. In fact, the very purpose of the approvals at issue in this case is to facilitate that "negative impact" to the lily pad pond through dredging and excavating.

²This is Roper Pond's characterization of the testimony, not the Petitioners'.

Roper Pond then purportedly recounts the testimony of Elaine Starr, who lives on Cary Lake, only it neglects to mention any of Ms. Starr's testimony on the lily pad pond. She has enjoyed viewing the lily pad pond and said it is "absolutely gorgeous." (R. p. 400). She said there are "white blooms, pink blooms, and you can see lots of life around it, like dragonflies" and that it is an aesthetic party of the community. (R. p. 400, 413). She is concerned about the affects of dredging the pond because there is a lot of life in the sediment itself and the lilies will not be there after it is dredged. (R. p. 401). In short, the version of testimony portrayed in Roper Pond's Return evades the fact that the lily pad pond is/was an important local landmark and that destruction of the pond is the primary reason for most of the Petitioners' involvement in this case.

From evasion to misstatement, Roper Pond consistently puts forward the argument that "[m]ost, if not all, of Petitioners' alleged injuries in support of standing would result from Roper Pond's failure to manage sediment and erosion control in accordance with the . . . Permit." Return, p. 19. Again, dredging and deepening of the lily pad pond is a function of the permit and has nothing to do with mismanagement of sediment and erosion control (a violation of permit terms). The only way Roper Pond's argument is even potentially accurate is if impacts to the lily pad pond are ignored in favor of testimony exclusively about Cary Lake, which is exactly what Roper Pond does in its presentation of the argument. See Return, pp. 17-19. In trying to make the Petitioners' objections to this project about anything other than the lily pad pond, Roper Pond ignores the Petitioners' most readily identifiable, easily demonstrable injury. A strategy no doubt intended to diminish the import of the Court of Appeals' unprecedented holding that the Petitioners' interests in the lily pad pond are insufficient because that pond is on private property.

ii. **Impacts to the Lily Pad Pond Result in More than “Abstract Distress”**

When Roper Pond does get around to acknowledging the lily pad pond, it briefly and weakly dismisses the Petitioners’ interests in that pond as nothing more than “abstract distress.” Return, p. 21-22. In doing so, Roper Pond block quotes a portion of the Fourth Circuit’s opinion in Friends of the Earth, Inc. V. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) that in fact strongly supports standing for the Petitioners’ based on their interest in the lily pad pond. That block quote contains the following relevant language: “The Supreme Court has made it clear that [aesthetic and recreational interests] may be vindicated in the federal courts”; **“purely aesthetic interest is cognizable for purposes of standing”**; “effect on ‘recreational, aesthetic, and economic interests’ is cognizable injury for purposes of standing”; and **“Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . deserving of legal protection through the judicial process.”** (emphasis added). Id. at 154-55.

Despite having just quoted this language, Roper Pond concludes with little explanation that, in this case, the Petitioners recreational and aesthetic interests in the lily pad pond fall in the category of “abstract distress.” Return, p. 22. Part of this conclusion rests on Roper Pond’s aforementioned effort to interchange the impacts to the lily pad pond with those to Cary Lake. The fate of the lily pad pond – dredging, deepening, and conversion into a stormwater retention pond – is in no way abstract. Further, the Petitioners in this case have testified that they live adjacent to the lily pad pond (R. pp. 394), that they have enjoyed viewing the pond nearly everyday for 37 years (R. p. 373), and that the pond serves as an important part of their community (R. pp. 400, 413). Relying on Pye, Smiley, and even the Gaston Copper case cited by Roper Pond, the Petitioners

submit that these interests far exceed those that this Court, the Fourth Circuit and other courts have lumped into the category of “abstract distress.”

The Petitioners have focused on the individual Petitioners’ interest in the lily pad pond to the exclusion of other bases for standing, only in the hopes that viewing this relationship in isolation will highlight what is practically a textbook case of environmental standing. The battle for consistent environmental standing results has been hard fought by this Court, and a precedent of this nature stands to throw turbulence onto that relatively stable body of law.

B. The Court of Appeals Improperly Rejected the Petitioners’ Aesthetic and Recreational Interests Based on Property Ownership

Roper Pond first states that the Petitioners mischaracterize the Court of Appeals’ holding on the requirement for a property interest; later though, Roper Pond makes arguments in support of the very same property interest requirement imposed by the Court of Appeals. Roper Pond’s Return is inconsistent and incorrect on both counts.

Roper Pond contends that the “Petitioners mischaracterize the Court of Appeals’ consideration of the fact that Roper Pond and Cary Lake are privately owned in the context of specific findings that the Petitioners failed to demonstrate standing in this case.” Return, p. 16. In support, Roper Pond attempts to present the Court of Appeals’ property interest inquiry as occurring entirely in the context of the Town’s interest in Cary Lake. Return, p. 16-17. A review of the Court of Appeals’ Opinion reveals this presentation to be patently inaccurate and merely a continuation of Roper Pond’s efforts to obscure the individual Petitioners’ legitimate interests in the lily pad pond. The Court of Appeals leaves no room to misinterpret or mischaracterize its imposition of a property interest requirement.

Specifically, Roper Pond's obfuscation cannot overcome the plain analysis in the Court of Appeals' Opinion, which dismisses the individual Petitioners' aesthetic and recreational interests in the lily pad pond because the pond is on private property. After determining that the Town does not have standing, the Court of Appeals moved on to the individual Petitioners residing in the Kaminer Station subdivision, noting that "concerns reflecting aesthetic or recreational interests have been recognized as 'judicially cognizable injur[ies] in fact.'" (Shearhouse Adv. Sht. No. 26 at 122). However, citing Costanzo, the court identifies a distinction when that aesthetic or recreational interest is in another's private property. Id. The Court of Appeals sums up its consideration of the Kaminer Station Petitioners' injury-in-fact as follows: "Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants." Id. In short, the Court of Appeals determines that the Kaminer Station Petitioners do not have an injury-in-fact because the lily pad pond is on private property, and the court then moves on to consider the causation element of standing. See, Id. In its discussion of standing for the individual Petitioners' residing in the Cary Lake subdivision, the court's reliance on a property interest requirement is even more unmistakable. The court holds: "Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact." Id. at 123 It is nearly impossible to mischaracterize this plain statement.

The Court of Appeals' novel imposition of a property interest requirement is wrong for all the reasons noted in the Petition. See, Petition, pp. 7-9. There can be no debate, however, that the court did impose such a requirement on the *individual petitioners* in relation to *the lily pad pond*

and Cary Lake. Roper Pond's assertion to the contrary is merely an effort to disguise the court's misapplication of law.

Paradoxically, Roper Pond later attempts to hedge its bet by arguing in favor of the Court of Appeals' faulty property interest requirement. In distinguishing the Smiley case, Roper Pond puts particular emphasis on the fact that Smiley's aesthetic and recreational interests were in a "**public**" area, while the Petitioners' interest is in a lily pad pond on private property. Return, p. 19. Similarly, in distinguishing the Spectre case, Roper Pond emphasizes that it was a "property owner" whose standing was at issue. Id. Roper Pond is arguing for the same property interest requirement imposed by the Court of Appeals, under the same misinterpretation of Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4th Cir. 1974).

Notably, contrary to how it is put forward by the Court of Appeals and Roper Pond, the standing inquiry in Costanzo turned on property access, not property ownership. Particularly, that case considered the standing of groups to challenge construction on private property they had previously accessed as either a licensee or trespasser. Id. at 501-02. The Fourth Circuit's holding rested on the fact that the parties asserting standing no longer had a right to access the property; ownership of the property was only secondarily implicated as it related to access. Id. The situation here is inapposite. The individual Petitioners will still walk, run and drive by the lily pad pond and have visual access thereto; only their view will be diminished and their opportunity to see certain flora and faunal will be lost. These are the exact type of interests routinely found to serve as a basis for environmental standing. As outlined in the Petition, the scope of an environmental plaintiff's aesthetic and recreational interest has been significantly refined since 1974, and certainly

that interest no longer rests on physical access, much less ownership.³

The Court of Appeals' Opinion provides a springboard from which the argument can easily be made that an environmental plaintiff's aesthetic and environmental interests can only serve as a basis for standing when accompanied by a property interest. The potential implications for environmental plaintiffs in the State are immense. Regardless, without this Court's intervention, lower courts will likely face this argument in nearly every case where aesthetic and recreational interests are implicated.

C. Sufficiency of Evidence on Standing

Roper Pond's lead argument on standing is that the Petitioners fail "to recognize the distinction between the sufficiency of allegations to support standing at the pleading stage and the requirement to offer sufficient evidence to prove such allegations at trial." Return, p. 15. Roper Pond quickly moves on from this argument and never explains exactly what it sees as Petitioners' evidentiary failures. First of all, as it relates to the question of standing, the Petitioners know of no more "sufficient," definitive form of evidence than the testimony of the Petitioners themselves, which was offered at length during the trial of this case. Secondly, as argued in the Petition and this Reply, and as evident from the Opinion itself, the Court of Appeals' denial of standing, especially as it relates to the individual Petitioners and to the lily pad pond, turns on faulty application of law, not failure of evidence.

³Roper Pond faults the fact the individual Petitioners have never made use of the actual property on which the lily pond sits. Return, p. 19. South Carolina has never required that an environmental plaintiff actually physically occupy a property to have an aesthetic or recreational interest therein. See, e.g., S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); see also Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

II. MERITS OF THIS CASE PRESENT IMPORTANT QUESTION ON STATE ENVIRONMENTAL AUTHORITY

Just like with standing, Roper Pond does its best to distract from the central question on the merits of this case by interjecting extraneous legal issues and mischaracterizing the Petitioners' arguments. DHEC's Return, though, quickly brings that question back into focus when it notes at the outset of its arguments that: "*Since the Corps did not have regulatory authority to cover the excavation of the pond, the Department did not require an individual 401 certification for the [nationwide permit].*" DHEC Return, p. 9 (emphasis added). This justification offered by DHEC demonstrates its mistaken understanding that its 401 certification review, once triggered, is limited to the scope of the U.S. Army Corps of Engineers' ("Corps") Clean Water Act ("CWA") regulatory authority. In this case, DHEC's misunderstanding has resulted in significant impacts to a water of the State (the lily pad pond) that effectively occur beyond the reach of South Carolina's water quality regulations.

A. DHEC has Authority to Apply its own Certification Conditions

Roper Pond argues that when DHEC conditionally certified the Corps' Nationwide Permits ("NWP") in 2007, DHEC lost the ability to assess or determine whether a proposed NWP project meets those conditions. See Roper Return, p. 2. Specific to this case, Roper Pond believes that when DHEC certified the NWPs with the general condition that "**SCDHEC considers . . . the overall project proposed . . . includ[ing] all land within the project boundary,**" DHEC then lost the ability to consider the overall project proposed, turning over that authority exclusively to the Corps. (emphasis added); See Roper Return, p. 14. The logical result of Respondent's argument would be that DHEC does not and cannot ever individually review a NWP project for compliance

with the certification conditions, much less the water quality standards. There is no factual or legal basis for this position.

On the contrary, DHEC's Chuck Hightower testified that DHEC does review NWP projects and issues a certification letter if it finds that the project satisfies the terms of DHEC's NWP certification. (R. pp. 251-262). If the NWP general and special conditions have been met, thereby qualifying the project for coverage under DHEC's Water Quality Certification, the applicant may proceed. But if they have not been met, Hightower said DHEC requires an individual certification. (R. p. 253).

What Roper Pond advocates, and the Court of Appeals sanctions, is for the citizens of South Carolina to trust that the Federal government, through the Corps, will ensure that State certification conditions are met in order to qualify for coverage under the State's NWP certification. Under Roper Pond's conception, if the State certification conditions are not met, the Corps presumably then transfers authority back to DHEC through some unknown mechanism so that DHEC can conduct an individual certification review. The Petitioners are not aware of any instance where the Corps has informed DHEC that DHEC's own certification conditions are not met, warranting individual certification review.

In making its argument on this point, Roper Pond relies on DHEC regulation R.61-101.H, which covers "*enforcement* of certification decisions and conditions." See 25A S.C. Code Ann. Regs. 61-101.H (emphasis added). Roper Pond fails to account for the important distinction between *making* a certification decision and *enforcing* a certification decision. Regulation R.61-101.H.2 does provide for the possibility that the Corps' "enforcement mechanisms" will be used to

enforce DHEC's certification conditions.⁴ Roper Pond though makes the stark extrapolation from this language that because the Corps has authority to *enforce* the terms of a certification decision, the Corps has sole authority to actually make a certification decision. On the contrary, while the Corps may have authority to bring enforcement measures, nothing in R.61-101.H limits DHEC's authority to make a certification decision by reviewing a proposed project's compliance with its certification conditions.

B. DHEC has Authority to Apply its own Certification Conditions Broadly

DHEC does not adopt Roper Pond's position that the Agency has turned over all authority to determine compliance with its own NWP certification conditions, but DHEC does argue for limiting the scope of its conditions. In particular, while DHEC acknowledges that this Court has previously found that state authority to regulate wetlands and waters extends beyond Federal regulation under the CWA, DHEC argues that in the legal context involved here, applicable state law does not warrant a similar extension. See, DHEC Return, p. 13. While the Petitioners have previously noted the broad scope of DHEC's Water Quality Certification Regulations, DHEC's contrary position warrants elaboration on the issue.

In promulgating the Water Quality Certification Regulations, the General Assembly gave DHEC broad authority to review any "alterations to the aquatic ecosystem in the vicinity of the project," "adverse consequences on water quality," "all potential water quality impacts of the project, both direct and indirect, over the life of the project," and the "physical, chemical and biological impacts, including cumulative impacts." S.C. Code Ann. Regs. 61-101.F.3. & 61-

⁴Note that the regulation also provides that: "The Department may conduct inspections for determining compliance with certification conditions." See R.61-101.H.3.

101.F.5. The plain language of these regulations make it abundantly clear that the legislature intended DHEC's certification scope of review, once triggered, to include all water quality impacts stemming from a proposed project, regardless of the Corps' regulatory authority. The NWP certification conditions that are undisputedly applicable to this proposed project were issued under the authority of these broad provisions. Respondents' arguments that certification review is limited only to activities regulated by the Corps contravenes the plain language of the certification regulations and has no basis in law. It is true that a Corps 404 permit is what triggers the need for a 401 water quality certification, but once certification is triggered DHEC has authority to consider, and in fact does consider, impacts beyond those regulated by the Corps. (R. pp. 251-52).

C. DHEC Misapprehends the Deference Owed its Interpretation of its own Certification Decision

DHEC maintains that: "The Court of Appeals decision should also be upheld because it comports with the Department's interpretation of the water quality certification it issued for NWP 29," adding that "[o]nly the staff has the institutional knowledge necessary to place the language [of the general conditions] into context." DHEC Return, p. 15, 17. DHEC is arguing that it is owed deference on interpretation of its own permitting decision. The type of deference advocated for by DHEC has no precedent.

DHEC cites cases wherein agencies are accorded deference on interpretation of their own enabling statute and regulations, and it argues that the same deference is owed to "the Departments's interpretation of the certification that it placed on all NWPs." *Id.*, p. 16. The mistake in this logic is that DHEC's conditional NWP certification is a basic permitting decision, just like any other individual 401 certification review, and it has no regulatory or statutory significance. See, R.61-101.A.3. While the ALC's interpretation of that permitting decision is

entitled to some deference by virtue of South Carolina Administrative Procedures Act, certainly DHEC's post hoc rationalization giving staff's opinion of how a permit condition should be interpreted in a particular permitting decision receives no additional deference. See, S.C. Code Ann. § 1-23-610. If DHEC's argument on deference were accepted, DHEC would receive deference in every legal challenge where it took a position in defense of its own permitting decision. Obviously such is not the state of the law.

D. Petitioners do not Argue that the Stormwater Permit Creates Requirement for a Corps Permit

The Petitioners have never argued that the stormwater permit – the NPDES General Permit – “create[s] a requirement for a Corps permit where none is required by the federal statutes.” Roper Return, p. 11. While Roper Pond attributes that argument to the Petitioners, and then offers opposition to the purported argument, the Petitioners' position has always been that the stormwater permit merely *reflects* the requirement for the Corps 404 permit.

Specifically, approval for coverage under the NPDES General Permit expressly requires the applicant to obtain any necessary 404 permit first. In this case, a 404 permit is necessary for the filling of 0.075 acres of the 1.8 acres of jurisdictional wetlands on the property. In order to obtain a 404 permit, the applicant must have a 401 water quality certification. The stormwater permit does not *create* the requirement for a 404 permit and 401 certification, but given that a 404 permit is required for the project, that 404 permit and the attendant 401 certification must be obtained before stormwater coverage.

As a further point of clarification, the Petitioners have never argued that a federal Clean Water Act 404 permit is required for the dredging and excavation of the lily pad pond. Rather, states are responsible for enforcing water quality standards on intrastate waters, of which the lily

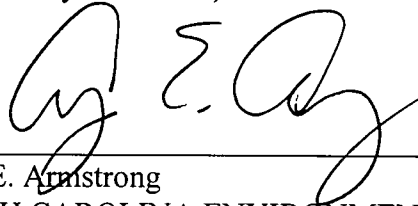
pad is one. 33 U.S.C. § 1319(a). It is through the 401 certification program that States ensure compliance with State water quality standards. See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 114 S.Ct. 1900 (1994).

The Petitioners submit that these efforts to cloud the merits being presented for this Court's consideration can be remedied by reference to the Petition for Writ of Certiorari, which presents a distinct question of State environmental authority: whether DHEC is required to consider (through individual 401 Certification) significant aquatic impacts of the proposed project beyond the Corps' 404 authority, in particular the dredging and excavation of the lily pad pond.

CONCLUSION

WHEREFORE, the Petitioners respectfully request that this Court issue a Writ of Certiorari to the Court of Appeals, hear this appeal and reverse the opinion of the lower court.

Respectfully submitted,



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October 8, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

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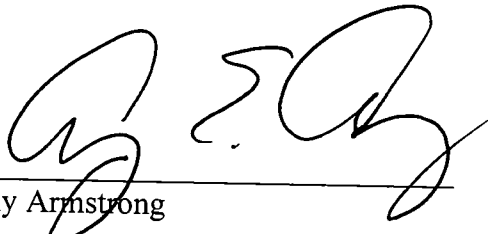
South Carolina Department of Health and Environmental Control
and Roper Pond, LLC, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Petitioner's Reply to Respondents' Return to Petition for Certiorari upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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October 8, 2013