

The Supreme Court of South Carolina

DTG Holdings, LLC, and Jasper Station Associates,
LLC, Respondents,

v.

South Carolina Department of Health & Environmental
Control, Appellant.

Appellate Case No. 2011-191826

ORDER

The parties move to dismiss this appeal. The motion is granted and this matter is dismissed. The remittitur will be sent as provided by Rule 221 of the South Carolina Appellate Court Rules.



C.J.
FOR THE COURT

Columbia, South Carolina
March 29, 2013

cc: Mary Duncan Shahid, Esquire
Bradley David Churdar, Esquire
Stephen Peterson Groves, Sr., Esquire
Carlisle Roberts, Jr., Esquire

RECEIVED

NEXSEN|PRUET

MAR 28 2013

S.C. SUPREME COURT

Stephen P. Groves, Sr.
Member
Admitted in South Carolina

27 March 2013

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29202

Re: **DTG Holdings, LLC and Jasper Stations Associates, LLC
v. South Carolina Department of Health and Environmental
Control**

Civil Action No.: 10-ALJ-07-0217-CC
Appeal from the South Carolina Administrative Law Court
COA Case Tracking No.: 2011191826
SupCt Case Tracking No.: _____
NP File No.: 048646-00001

Dear Mr. Shearouse:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Pursuant to Rules 240 and 261 of the South Carolina Appellate Court Rules, please find enclosed the **original and seven copies** of a joint **Consent Motion for Order of Dismissal** in the above-referenced appeal filed on behalf of both the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC, and the Appellant, South Carolina Department of Health and Environmental Control. In addition, please find enclosed the **original and two copies** of a **Proof of Service** for the joint **Consent Motion for Order of Dismissal** showing service upon counsel of record herein. Finally, I enclose our firm check in the amount of \$25.00 to cover the applicable filing fee. I would appreciate you kindly filing the joint **Consent Motion for Order of Dismissal** and the **Proof of Service** with the Supreme Court and returning a stamped copy of each to my attention in the enclosed, self-addressed envelope.

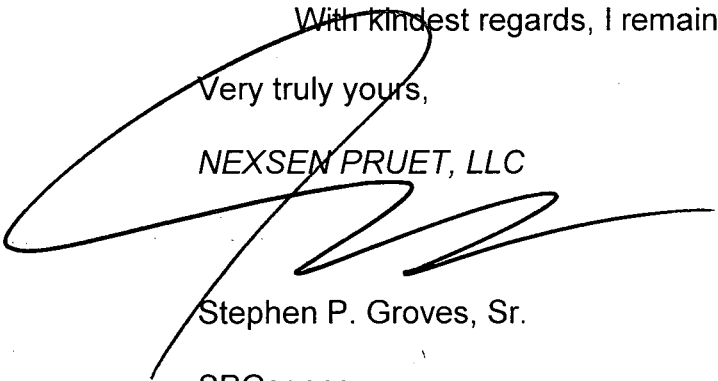
If you need anything else or if I may otherwise be of any assistance to you or to the Supreme Court, please feel free to contact me at your convenience. My direct telephone number is 843.720.1725, direct telecopier is 843.414.8206, and the e-mail is sgroves@nexsenpruet.com.

Hon. Daniel Shearouse
Clerk of Court
27 March 2013
Page 2

With kindest regards, I remain

Very truly yours,

NEXSEN PRUET, LLC



Stephen P. Groves, Sr.

SPGsr:spg

Enclosure

CCE The Honorable Jenny A. Kitchings (Clerk of Court – SCCOA)

Bradley D. Churdar, Esquire

NPCHAR1:1091815.1-LT-(SPG) 048646-00001

RECEIVED

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

MAR 28 2013

S.C. SUPREME COURT

Appeal from the Administrative Law Court
Hon. Carolyn C. Matthews, Administrative Law Judge
ALC Docket No.: 10-ALJ-07-0217-CC

DTG Holdings, LLC and
Jasper Station Associates, LLC,

Respondents,

v.

South Carolina Department of Health
and Environmental Control,

Appellant.

CONSENT MOTION FOR ORDER OF DISMISSAL

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206
E-Mail: sgroves@nexsenpruet.com
mshahid@nexsenpruet.com

Attorneys for the Respondents

Carlisle Roberts, Jr., Esquire
General Counsel
SCDHEC
2600 Bull Street
Columbia, South Carolina 29201
Telephone: 803.898.3350

Bradley R. Churdar, Esquire
Chief Counsel
SCDHEC
1362 McMillian Ave., Suite 400
N. Charleston, S. Carolina 29405
Telephone: 843.953.0229

Attorneys for the Appellant

TO: THE HONORABLE JUSTICES OF THE SOUTH CAROLINA
SUPREME COURT:

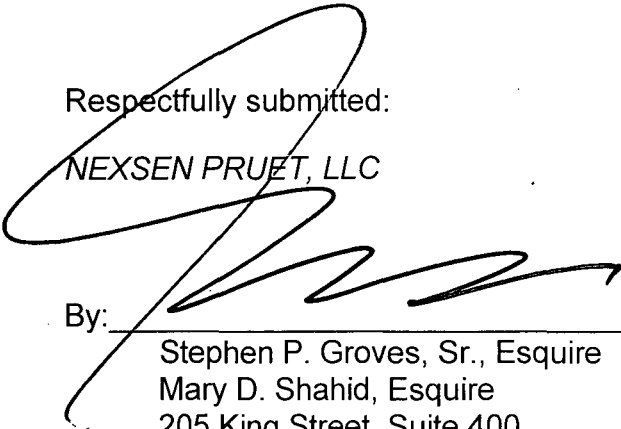
COMES NOW the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC, together with the Appellant, South Carolina Department of Health and Environmental Control ("SCDHEC"), pursuant to Rules 240 and 261 of the South Carolina Appellate Court Rules, and jointly respectfully requests this Supreme Court to issue an order dismissing this appeal on the grounds that the parties have been able to reach a mutually agreeable settlement of all issues involved herein and there are no longer any issues and/or disputes which presently need to be adjudicated by this Supreme Court and, therefore, the matter is, in essence, become moot.

The basis for this motion is the parties have resolved their dispute and submitted a proposed Consent Order of Settlement and Dismissal to the Circuit Court for approval and execution. (*A copy of the proposed settlement/dismissal order is attached hereto as Exhibit "A" and incorporated herein by reference.*). The parties' jointly agreed-upon and subsequently executed combination settlement agreement and dismissal request completely ends the parties' dispute, as well as, the ancillary concerns and issues expressed and raised by the intervenor below, the South Carolina Coastal Conservation League (the "SCCCL").

Finally, the parties respectfully request this Supreme Court to hold the briefing time in abeyance until such time as this motion may be considered and ruled upon.

Respectfully submitted:

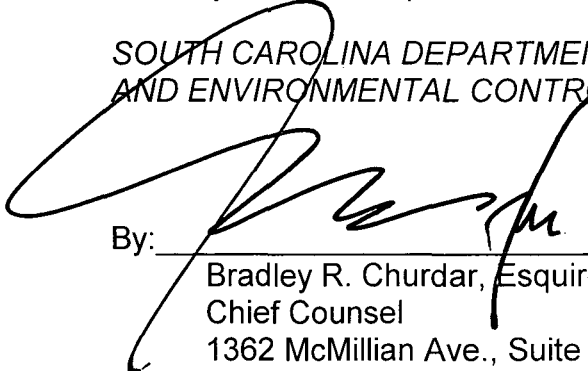
NEXSEN PRUET, LLC

By: 

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Mary D. Shahid, Esquire
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Charleston, South Carolina 29401
Telephone: 843.720.1725
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E-Mail: SGroves@nexsenpruet.com
MSahid@nexsenpruet.com

Attorneys for the Respondents

SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL

By:  (with permission)

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General Counsel
2600 Bull Street
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Telephone: 803.898.3350

Attorneys for the Appellant

Charleston, South Carolina

27 March 2013

NPCHAR1:1091636.1-NC-(SPG) 048646-00001

Exhibit "A"

NEXSEN | PRUET

Mary D. Shahid
Member
Admitted in SC

March 25, 2013

The Honorable Perry M. Buckner, III
101 Hampton Street
P.O. Box 470
Walterboro, SC 29488

Re: Jasper Station, LLC v. South Carolina Department of Health and
Environmental Control and The South Carolina Coastal Conservation
League
Case No.: 2010-CP-15-931

Dear Judge Buckner:

Enclosed herewith, please find a Consent Order of Settlement and Dismissal in the above captioned matter. If this Order meets with your approval, please sign and return to me in the envelope provided. I will make sure the Order is filed with the Colleton County Clerk of Court and will provide all counsel of record with copies of the executed and filed Order. If you have any questions, please do not hesitate to contact me.

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

With kindest regards,

Very truly yours,



Mary D. Shahid

MDS/rp

Enclosure(s)

cc: Bradley Churdar, Esquire
Amy Armstrong, Esquire

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Nexsen Pruet, LLC

Attorneys and Counselors at Law

NPCHAR1:1090431.1-LT-(MSHAHID) 048646-00001

3/25/13

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

JASPER STATION, LLC,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL
CONTROL,

Defendant

and

THE SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Inteviewer.

IN THE COURT OF COMMON PLEAS

FOR THE FOURTEENTH JUDICIAL
CIRCUIT

Case No. 2010-CP-15-931

**CONSENT ORDER OF
SETTLEMENT AND DISMISSAL**

This is an action for Declaratory Judgment filed in accordance with S. C. Code Ann. Sec. 15-77-50, seeking a declaration by this Court that Plaintiff, Jasper Station, LLC, ("Jasper Station") has obtained a permit by operation of law authorizing predevelopment site work within 88.93 acres of real property, located in Jasper County, S. C., and referred to herein as the "Jasper Station tract." On July 25, 2006, Plaintiff submitted a permit application to the South Carolina Department of Health and Environmental Control ("DHEC") seeking authorization to clear wooded areas within the Jasper Station tract and to muck and fill isolated non-jurisdictional wetlands on the tract. Plaintiff's Complaint is based on S. C. Code Reg. 72-305(M) which provides that "upon receipt of a completed permit application for sediment and stormwater management, the appropriate plan approval agency shall accomplish its review and have either the approval or review comments transmitted to the applicant within 20 working days. If notice is not given to the applicant or if action is not taken by the end of the 20 working day period, the applicant's plan will be considered

approved.” Plaintiff alleges that Defendant failed to timely respond to Plaintiff’s permit application and as a result Plaintiff obtained permit coverage under DHEC’s National Pollutant Discharge Elimination System (“NPDES”) General Permit authorizing “Stormwater Discharges From Large and Small Construction Activities,” Permit No. SCR100000, by operation of S. C. Code Reg. 72-305(M).

At the time of commencement of this action the Jasper Station tract included 31.17 acres of federally defined non-jurisdictional freshwater wetlands which Plaintiff proposed to muck and fill. At the time of execution of this Consent Order of Settlement and Dismissal, the Jasper Station tract included 15.75 acres of federally-defined non-jurisdictional freshwater wetlands or other waters. It is undisputed that the difference in wetland acreage between the time of commencement of this action and the execution and entry of this Consent Order of Settlement and Dismissal is because the Department of the Army, Charleston District Corps of Engineers (“the Corps”) issued: 1) a Jurisdictional Determination dated May 13, 2009, in which the Corps concluded that no wetlands or waters of the United States were found on 19.39 acres of the 88.93 acre tract; and 2) a Jurisdictional Determination dated March 27, 2012 which addressed 70.50 acres of the original 88.93 acres, and found 15.75 acres of non-jurisdictional wetlands within the 70.50 acres. These letters from the Corps are attached as Exhibits A and B respectively to this Consent Order.¹

DHEC answered and denied the material allegations that Plaintiff had obtained permit coverage by operation of law under the NPDES General Permit authorizing stormwater discharges from construction activities. In addition, DHEC asserted that it had denied Plaintiff’s pending permit application and such denial constituted final agency action in accordance with S.

¹The Corps’ initial conclusion that the Jasper Station tract contained 31.17 acres of non-jurisdictional wetlands was set forth in a Jurisdictional Determination (“JD”) issued February 9, 2006. This JD was valid for five years and expired during the pendency of this action on February 9, 2011.

C. Code Sec. 44-1-60 and the procedures set forth therein. Specifically, DHEC asserted that Plaintiff has failed to exhaust administrative remedies and that Plaintiff's claims were abandoned as a matter of law when Plaintiff failed to appeal the permit denial as required by S. C. Code Ann. Sec. 44-1-60. DHEC had issued a permit denial letter to Plaintiff on September 30, 2008, more than two years after Jasper Station submitted the permit application on July 25, 2006.

Intervenor the South Carolina Coastal Conservation League ("SCCCL") has supported the position of DHEC in this action, and has filed an additional claim against Jasper Station asserting that Jasper Station is required to obtain a permit in accordance with the S. C. Pollution Control Act, S. C. Code Sec. 48-1-10 et seq., as provided in Georgetown County League of Women Voters v. Smith Land Company, ___ S. C. ___, 713 S. E. 2d 287 (S. C. 2011).

The parties have put aside their respective positions and have agreed to a compromise and settlement of the matters asserted in the pleadings, including the Intervenor's counter-claim. This compromise and settlement is based upon project modifications to the development plans proposed by Jasper Station. The modifications relate to the wetland impacts. Jasper Station's engineering consultant, Woolpert, Inc., has provided a revised plan to DHEC staff, attached hereto as Exhibit C and entitled "Prop. Wetland Impacts," indicating that Plaintiff intends to clear, muck and fill 9.57 acres within a 14.9 acre contiguous wetland located on the tract. Plaintiff will preserve the remaining 5.3 acres of the 14.9 acre wetland and will buffer the remaining 5.3 acres by dedication of 1.8 acres of upland. In addition, Plaintiff intends to clear, muck and fill 1.74 acres of upland dug borrow pits identified by the Corps, and an additional 1.0 acres of two non-contiguous wetland areas measuring .6 acre and .4 acres. The total amount of impact is **10.57** acres of wetland fill and **1.74** acres of alteration of upland dug borrow pits. The

modifications to the project are reflected in the drawing entitled "Prop. Wetland Impacts," Exhibit C.²

Plaintiff, Defendant and Intervenor agree that as a part of this settlement, the Plaintiff will purchase 7 preservation mitigation credits.

In addition, Plaintiff has provided a "Conceptual Layout Plan," attached hereto as Exhibit D.

Based on the matters set forth above, and the modifications to the project as reflected in Exhibit C to this Consent Order, the parties enter into the following Settlement Agreement:

1. Plaintiff agrees to modification of its project for development of the Jasper Station tract in accordance with Exhibit C. Whereas Plaintiff had originally intended to clear, muck, and fill 31.17 acres of federally defined non-jurisdictional wetlands located on the Jasper Station tract, Plaintiff now intends to clear, muck, and fill 10.57 acres of federally defined non-jurisdictional wetlands located on the Jasper Station tract, and 1.74 acres of upland dug borrow pits. Plaintiff agrees to preserve, in perpetuity, the remaining 5.3 acres of federally defined non-jurisdictional wetlands located on the Jasper Station tract and to buffer these preserved wetlands through dedication of 1.8 acres of upland as depicted on Exhibit C. Plaintiff further agrees to mitigate for the wetland impacts depicted on Exhibit C with the purchase of 7 preservation mitigation credits prior to the commencement of any work within wetland areas identified on Exhibit C.

2. Defendant DHEC withdraws its letter of September 30, 2008, in which Defendant determined that the original development plans for the Jasper Station tract were inconsistent with the Coastal Zone Management Program Document and with the applicable regulations, and with

² The original submittal for permit coverage included authorization to impact 87.6 acres of the 88.93 acre site. Exhibit C includes 70.41 acres. It is undisputed that in the interim between 2006 and the date of execution and finalization of this settlement that the 88.93 acre parcel was subdivided into two parcels – the parcel reflected in Exhibit C and a separate but contiguous ± 18 acre parcel.

the NPDES General Permit Authorizing Stormwater Discharges from Large and Small Construction Activities. Defendant agrees that the project modifications as reflected in Exhibit C, along with the changes in the wetland boundaries arising from the Corps' Jurisdictional Determinations reflected in Exhibits A and B, as well as the additional information related to the Stormwater Pollution Prevention Plan identified in paragraph 3 below, address the inconsistencies identified in DHEC's letter of September 30, 2008. Defendant agrees that the application file is complete with receipt of the project modifications shown in Exhibit C, the Conceptual Layout Plan shown in Exhibit D, and Plaintiff's agreement to purchase seven mitigation credits. Defendant acknowledges that the Conceptual Layout Plan, Exhibit D, is indicative of potential future uses of the acreage reflected in Exhibit D.³

3. In addition to the information previously provided to Defendant, Plaintiff has agreed to provide a Stormwater Pollution Prevention Plan ("SWPPP") with information including sedimentology calculations for disturbance of " $\pm$ " 11 acres⁴, and a narrative description of pre-construction and post-construction run-off, and water quality controls, if needed, during construction and after construction is completed. Defendant agrees to issuance of permit coverage to Jasper Station, under Permit No. SCR100000, effective January 1, 2013, no later than thirty days from the date of receipt of the SWPPP and supporting information described herein.⁵

4. Plaintiff agrees to dismissal with prejudice of this civil action. Defendant and Intervenor agree to dismissal with prejudice of any claims raised by way of Answer and Counter-Claim.

³ All parties agree that Exhibit D, which was requested by Defendant, is a conceptual plan which illustrates the type and density of development that may be undertaken on the acreage but is not a final, engineered design.

⁴ This area is depicted on Exhibit C as "Wetland Fill" and "Borrow Pit Fill."

⁵ Plaintiff originally sought coverage under the General Permit that was effective August 1, 2006, but that permit has expired and coverage is now sought under the General Permit effective January 1, 2013.

5. Defendant agrees to withdraw its appeal, currently pending before the S. C. Supreme Court, of the Final Order and Decision in the contested case entitled DTG Holding, LLC, and Jasper Station Associates, LLC, v. SCDHEC, Docket No.10-ALJ-07-0217-CC. Defendant expressly acknowledges that withdrawal of its appeal of this related action gives effect to the Final Order and Decision of the S. C. Administrative Law Court reinstating permit coverage under SCR100000, identified as 27-02-03-02E, to DTG Holdings, LLC, and to Plaintiff.
6. Defendant and Intervenor agree to refrain from interfering with Plaintiff's implementation of authorization to commence land-disturbing activities based on the modification to Plaintiff's development plan. Defendant further agrees to provide information if requested by Jasper County or by the City of Hardeeville, S. C. or by any other local or state entity with jurisdiction over the Jasper Station tract consistent with the terms and conditions of this Consent Order, including but not limited to information demonstrating that the Plaintiff is in possession of permit coverage under SCR 1000000 authorizing clearing, mucking, and filling within the Jasper Station tract.
7. Nothing herein is intended to restrict or limit Defendant's authority to conduct inspections, determine compliance, and otherwise enforce the rules and regulations governing the activities that are approved herein.
8. The parties agree that each party hereto shall bear all attorneys fees and costs arising from its own counsel in connection with this claim, this Agreement and the matters and documents referred to herein, and any and all other related matters.
9. The parties agree that this Settlement Agreement set forth herein contains the entire agreement between and among the parties with regards to the matters set forth herein and shall

be binding upon and inure to the benefits of the executors, administrators, personal representatives, heirs, successor and assigns of each.

This Court adopts the parties' Agreement, set forth herein, as the Order of this Court. This agreement is enforceable by this Court and any party in violation of this Agreement is subject to the contempt powers of this Court.

Based upon the consent of the parties, as evidenced by their signatures below, and based on the terms of the settlement by and between the parties, set forth herein, this civil action is hereby dismissed with prejudice.

AND IT IS SO ORDERED.

Presiding Judge, Fourteenth Judicial Circuit

____ day of _____, 2013.

WE SO MOVE AND CONSENT:

Mary D. Shahid 3/25/13
Mary D. Shahid, Esq.,
Attorney for the Plaintiff Jasper Station Associates, LLC

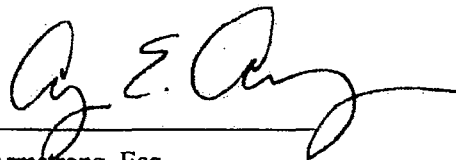
Bradley Churdar, Esq.,
Attorney for the Defendant the South Carolina Department
of Health and Environmental Control

Amy Armstrong, Esq.,
Attorney for Intervenor the South Carolina Coastal Conservation League

WE SO MOVE AND CONSENT:

Mary D. Shahid, Esq.,
Attorney for the Plaintiff Jasper Station Associates, LLC

Bradley Churdar, Esq.,
Attorney for the Defendant the South Carolina Department
of Health and Environmental Control

 3/25/13
Amy Armstrong, Esq.,
Attorney for Intervenor the South Carolina Coastal Conservation League

WE SO MOVE AND CONSENT:

Mary D. Shahid

3/25/13

Mary D. Shahid, Esq.,
Attorney for the Plaintiff Jasper Station Associates, LLC

Bradley Churdar

3/25/13

Bradley Churdar, Esq.,
Attorney for the Defendant the South Carolina Department
of Health and Environmental Control

Amy Armstrong, Esq.,
Attorney for Intervenor the South Carolina Coastal Conservation League



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CHARLESTON DISTRICT, CORPS OF ENGINEERS
69A Hagood Avenue
CHARLESTON, SOUTH CAROLINA 29403-5107

May 13, 2009

Regulatory Division

Mr. Asher Howell
Newkirk Environmental, Incorporated
Post Office Box 309
Bluffton, South Carolina 29910

Re: SAC 2008-2188-1JQ
Jasper County

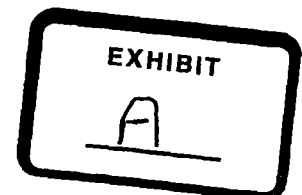
This is in response to your letter of April 15, 2009, requesting a modification of a wetland determination, on behalf of Mr. D Lynch, for 19.39-acre tract located southeast of the intersection of Jasper Station Road (S-27-162) and S-27-141, in the Okatee area of Jasper County, South Carolina. The project area is depicted on the survey plat you submitted which was prepared by TG Stanley, signed: 3-31-09 and entitled: *"This Plat Prepared At The Request Of / Jasper Station Associates, LLC / A Boundary Survey Of A 19.39 Acre Tract, / Being A Portion Of Tax Map #080-00-03-065, / Near Cherry Point, Jasper County, South Carolina"*. This site is a portion of a larger tract verified by this office in August, 2005, as reference # SAC 81-2005-1981, and again on January 16, 2009.

In your most recent letter, you stated that an access road to the site had been unintentionally left off the plat submission. You have corrected that error and supplied an updated plat, referenced above. This letter will supersede the January 2009 letter with an updated acreage correction.

Based on the August, 2005, on-site inspection and a review of aerial photography and soil survey information, it has been determined that the referenced property does not contain any wetland areas or other waters of the United States and, as such, Department of the Army authorization will not be required for mechanized land clearing, excavation, or the placement of dredged or fill material on this site.

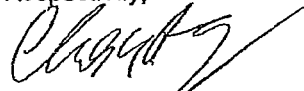
Please be advised that this determination is valid for five (5) years from the date of this letter unless new information warrants revision of the delineation before the expiration date. All actions concerning this determination must be complete within this time frame, or an additional delineation must be conducted. For the purposes of 33 CFR 331.2, this is considered to be an approved jurisdictional determination.

In future correspondence concerning this matter, please refer to SAC 2008-2188-1JQ. A copy of this letter is being forwarded to the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management for their information.



If you have any questions concerning this matter, please contact Paul Hinchcliff at 843-329-8044 or toll free at 1-866-329-8187.

Respectfully,



Charles R. Crosby
Chief, South Branch

Enclosure:
Basis for Jurisdiction

Copy Furnished:
South Carolina Department of Health
and Environmental Control
Office of OCRM
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CHARLESTON DISTRICT, CORPS OF ENGINEERS
69A Hagood Avenue
CHARLESTON, SOUTH CAROLINA 29403-5107

March 27, 2012

Regulatory Division

Mr. Lafayette Lyle
Soil and Wetland Consulting, Incorporated
153 Bachelor Hill Road
Walterboro, South Carolina 29488

Dear Mr. Lyle:

This is in response to your letter of March 15, 2011, requesting a wetland determination, on behalf of Mr. Dan Lynch, for a 70.50-acre tract located adjacent and southeast of the intersection of John Smith Road (SC462) and Jasper Station Road (S-27-162), in the Cherry Point area of Jasper County, South Carolina. The project area is depicted on the survey plat you submitted which was prepared by TG Stanley, last-revised dated: *January 11, 2012*, and entitled "*This Plat Prepared At The Request Of / Jasper Station Associates, LLC / A Boundary Survey Of A Portion Of Tax Map #080-00-03-065, / Near Cherry Point, Jasper County, South Carolina*", which was received on February 17, 2012.

This plat depicts surveyed boundaries of wetlands or other waters as established by your office. You have requested that this office verify the accuracy of this mapping as a true representation of wetlands or other waters of the United States within the regulatory authority of this office. The property in question contains 15.78-acres of federally-defined freshwater wetlands or other waters. However, none of these aquatic resources are considered to be subject to the jurisdiction of this office due to a decision by the U.S. Supreme Court. The location and configuration of these areas, as well as their status relative to jurisdiction, are reflected on the plat referenced above.

It should be clearly noted that the decision of the U.S. Supreme Court to exclude certain waters and wetlands from federal jurisdiction under the Clean Water Act has no effect on any state or local government restrictions or requirements concerning aquatic resources, including wetlands. You are strongly cautioned to ascertain whether such restrictions or requirements exist for the area in question before undertaking any activity which might destroy or otherwise impact these wetland resources.

Based on a June 12, 2011, on-site inspection and a review of aerial photography and soil survey information, it has been determined that the surveyed boundaries shown on the referenced plat are an accurate representation of federally defined freshwater wetlands or other waters that exist on the property in question.

Please be advised that this determination is valid for five (5) years from the date of this letter unless new information warrants revision of the delineation before the expiration date. All actions concerning this determination must be complete within this time frame, or an additional delineation must be conducted.

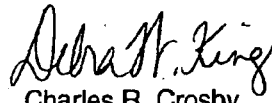
EXHIBIT

B

In future correspondence concerning this matter, please refer to SAC 2011-0296-1Q. You may still need state or local assent. Prior to performing any work, you should contact the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. A copy of this letter is being forwarded to them for their information.

If you have any questions concerning this matter, please contact me at 843-329-8044 or toll free at 1-866-329-8187.

Respectfully,


Charles R. Crosby
Chief, South Branch

Enclosure:
Basis for Jurisdiction

Copy Furnished:
South Carolina Department of Health
and Environmental Control
Office of OCRM
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

Jasper Station
 Section A

VICINITY MAP

SECTION A
 SECTIONED SECTION OF
 THE MAP FROM 00-01-000

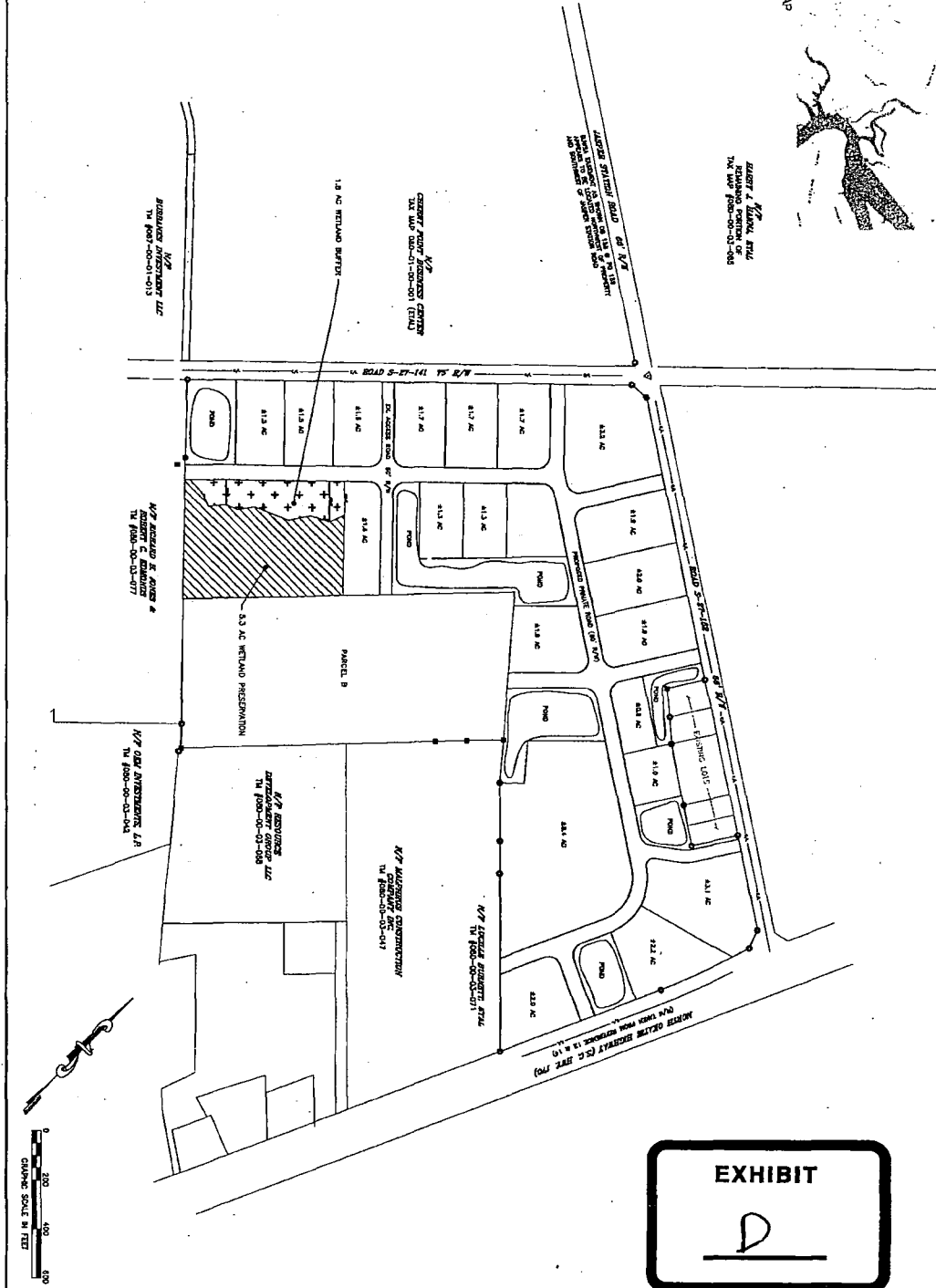


EXHIBIT
D

TOTAL SITE AREA	±70.41 AC
TOTAL UPLAND	±52.80 AC
TOTAL WETLAND	±15.87 AC
TOTAL BORROW PIT	±1.74 AC
PROP. WETLAND PRESERVATION	±5.30 AC
PROP. WETLAND BUFFER	±1.80 AC
PROP. WETLAND FILL AREA	±10.57 AC
PROP. BORROW PIT FILL	±1.74 AC

SHEET NO. 1	JASPER STATION HARDEEVILLE SOUTH CAROLINA CONCEPTUAL LAYOUT PLAN	 125 Fairchild Street Suite 120 Charleston, SC 29492 843.215.0401 FAX: 843.215.0405	PROJECT No: 072238 DATE: 07/26/12 DES: JTB DR: JTB CKD: JTB	REVISION	
				No.	DATE

**STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT**

Appeal from the Administrative Law Court
Hon. Carolyn C. Matthews, Administrative Law Judge
ALC Docket No.: 10-ALJ-07-0217-CC

DTG Holdings, LLC and
Jasper Station Associates, LLC,

Respondents,

v.

South Carolina Department of Health
and Environmental Control,

Appellant.

PROOF OF SERVICE

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Mary D. Shahid, Esquire
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mshahid@nexsenpruet.com

Attorneys for the Respondents

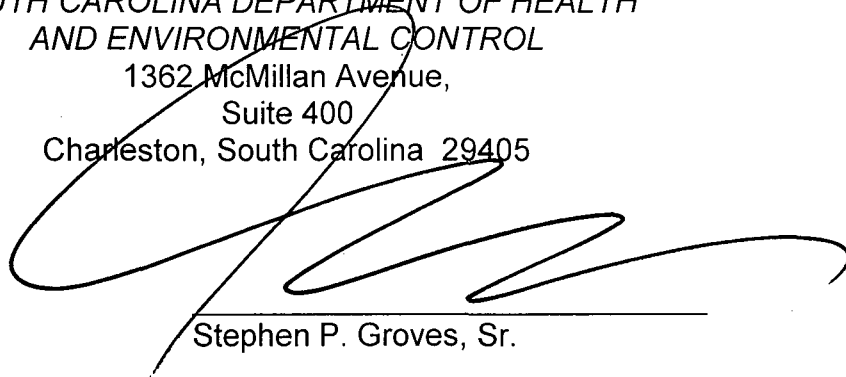
Carlisle Roberts, Jr., Esquire
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Bradley R. Churdar, Esquire
Chief Counsel
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N. Charleston, S. Carolina 29405
Telephone: 843.953.0229

Attorneys for the Appellant

I, Stephen P. Groves, Sr., Esquire, hereby certify that on 27 March 2013, I served a copy of the parties' joint **Consent Motion for Order of Dismissal** submitted by the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC, and the Appellant, South Carolina Department of Health and Environmental Control, on all counsel appearing in this appeal, via the United States Mail, postage pre-paid, and addressed as follows:

Bradley D. Churdar, Esquire
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL
1362 McMillan Avenue,
Suite 400
Charleston, South Carolina 29405

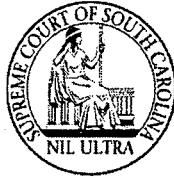


Stephen P. Groves, Sr.

Charleston, South Carolina

27 March 2013

NPCHAR1:1091636.1-NC-(SPG) 048646-00001



The Supreme Court of South Carolina

Nexsen Pruett

03/28/2013

RECEIPT #67847

Case No: 2011-191826
Case Short Title: DTG Holdings, LLC v. SCDHEC
Event:
Fee Type: Motion Fee
Amount: \$25.00
Payment Type: Check
Reference No: 402085
Check/Money Order Date: 03/27/2013
Comments:



The South Carolina Court of Appeals

JENNY ABBOTT
KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 17, 2012

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

Ms. Jacquelyn Sue Dickman
2600 Bull St.
Columbia SC 29201

Re: DTG Holdings, LLC v. SCDHEC
Appellate Case No. 2011-191826

Dear Counsel:

The following order has been endorsed on your motion for extension of time to file appellant's initial reply brief and designation of matter to be included in the record on appeal (3rd extension request) in the above matter.

"Granted.

By s/ V. Claire Allen, Deputy Clerk

May 17, 2012."

Please be advised the appellant's initial reply brief and designation of matter must be served and filed no later than June 6, 2012.

Very truly yours,

V. Claire Allen, Deputy
CLERK

cc: Carlisle Roberts, Jr.
Davis Arjuna Whitfield-Cargile
Mary Duncan Shahid
Stephen Peterson Groves, Sr.



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

June 6, 2012

The Honorable Tanya A. Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

Dear Ms. Gee:

Please find enclosed the Department's Motion for Extension (4th) of Time to File Appellant's Initial Reply Brief in the above referenced case.

By copy of this letter, I am notifying Mary D. Shahid, attorney for the Respondent, of this request.

I would appreciate your returning a clocked copy in the enclosed envelope.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc
Enclosure
cc: Mary D. Shahid, Esquire

RECEIVED
JUN 07 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

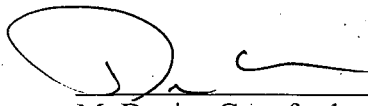
Appellant,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served the *Department's Motion for Extension (4th) of Time to File Appellant's Initial Reply Brief* by mailing a copy of the same by **U.S. First Class Mail**, postage pre-paid:

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Mary D. Shahid
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402


M. Denise Crawford

June 6, 2012
Charleston, South Carolina

RECEIVED
JUN 07 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

Appellant,

MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S
INITIAL REPLY BRIEF
(4th Extension Request)

TO: THE COURT AND COUNSEL FOR ALL PARTIES

PLEASE TAKE NOTICE that, pursuant to Rule 263, SCACR, Appellant South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") respectfully requests a forty-five (45) extension of time to file Appellant's Initial Reply Brief in this matter, making the Department's deadline for filing its Initial Reply Brief July 23, 2012. The basis for this motion is as follows:

This extension is requested due to Appellant's counsel's work load. Counsel serves in the US Army Reserves has recently returned from temporary active duty. Also, Counsel has just concluded a hearing before the South Carolina Court of Appeals, which required lengthy preparation in addition to multiple matters before the Administrative Law Court. Further, the parties are attempting to settle the Jasper Station circuit court case, and if settlement is reached, this would also resolve the matter before the Court.

SC Court of Appeals

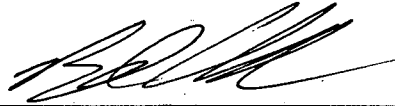
JUN 07 2012

RECEIVED

WHEREFORE, Appellant SCDHEC respectfully moves this Court for an Order extending the time for filing its Appellant's Initial Reply Brief until July 23, 2012. The Department respectfully requests that all other deadlines be held in abeyance pending the Court's approval of this extension.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By: 

Marshall Taylor, General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 898-3350

Bradley D. Churdar, Chief Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorneys for Appellant SCDHEC

June 6, 2012
Charleston, South Carolina

GRANTED

JOHN CANNON FEW, C.J.
FOR THE COURT

By: 

~~(Clerk)~~ (Deputy Clerk)

The South Carolina Court of Appeals

DTG Holdings, LLC, and Jasper Station Associates,
LLC, Respondents,

v.

South Carolina Department of Health & Environmental
Control, Appellant.

Appellate Case No. 2011-191826

ORDER

The time for serving and filing the appellant's initial reply brief is hereby extended until July 23, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Carlisle Roberts, Jr.

Davis Arjuna Whitfield-Cargile

Mary Duncan Shahid

Bradley David Churdar

Stephen Peterson Groves, Sr.

Jacquelyn Sue Dickman

William Marshall Taylor, Jr.

FILED

6-29-12 LAT



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

July 23, 2012

The Honorable Tanya A. Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

Dear Ms. Gee:

Please find enclosed the Department's Motion for Extension (5th) of Time to File Appellant's Initial Reply Brief in the above referenced case.

By copy of this letter, I am notifying Mary D. Shahid, attorney for the Respondent, of this request.

I would appreciate your returning a clocked copy in the enclosed envelope.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc
Enclosure
cc: Mary D. Shahid, Esquire

RECEIVED

JUL 26 2012

SC Court of Appeals

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.scdheec.gov

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

Appellant,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served the *Department's Motion for Extension (5th) of Time to File Appellant's Initial Reply Brief* by mailing a copy of the same by **U.S. First Class Mail**, postage pre-paid:

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Mary D. Shahid
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402

RECEIVED

JUL 26 2012

SC Court of Appeals

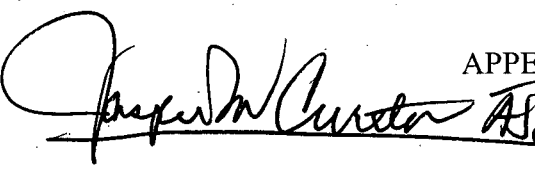

M. Denise Crawford

July 23, 2012
Charleston, South Carolina

Granted.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

 Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

Appellant,

MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S
INITIAL REPLY BRIEF
(5th Extension Request)

RECEIVED

JUL 26 2012

SC Court of Appeals

TO: THE COURT AND COUNSEL FOR ALL PARTIES

PLEASE TAKE NOTICE that, pursuant to Rule 263, SCACR, Appellant South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") respectfully requests a forty-five (45) extension of time to file Appellant's Initial Reply Brief in this matter, making the Department's deadline for filing its Initial Reply Brief September 6, 2012. The basis for this motion is as follows:

This extension is requested due to Appellant's counsel's work load and possible settlement of the Jasper Station circuit court case. Counsel has been involved in lengthy discovery in several ongoing cases as well as several matters related to Counsel's service in the US Army Reserves. Also, the parties are attempting to settle the Jasper Station circuit court case. The Respondents are currently working on a development plan for the property so that the parties can work the terms of the permit issuance and mitigation

7/23

9/6

5th

credits sufficient for this project, and if settlement is reached, this would also resolve the matter before the Court.

WHEREFORE, Appellant SCDHEC respectfully moves this Court for an Order extending the time for filing its Appellant's Initial Reply Brief until September 6, 2012. The Department respectfully requests that all other deadlines be held in abeyance pending the Court's approval of this extension.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By: 

Marshall Taylor, General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 898-3350

Bradley D. Churdar, Chief Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorneys for Appellant SCDHEC

July 23, 2012
Charleston, South Carolina



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 17, 2012

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

Mr. William Marshall Taylor, Jr.
2600 Bull Street
Columbia SC 29201

Re: DTG Holdings, LLC v. SCDHEC
Appellate Case No. 2011-191826

Dear Counsel:

The following order has been endorsed on your motion for extension of time to file appellant's initial reply brief (5th extension request) in the above matter.

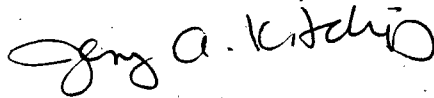
"Granted.

s/ Jasper M. Cureton A.J.
For the Court

August 17, 2012."

Please be advised the appellant's initial reply brief must be served and filed no later than September 6, 2012.

Very truly yours,

A handwritten signature in cursive script, appearing to read "J. A. Kitchin".

CLERK

cc: Carlisle Roberts, Jr.
Davis Arjuna Whitfield-Cargile
Mary Duncan Shahid
Stephen Peterson Groves, Sr.
Jacquelyn Sue Dickman



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

September 5, 2012

RECEIVED

SEP 10 2012

SC Court of Appeals

The Honorable Tanya A. Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

Dear Ms. Gee:

Please find enclosed the Department's Motion for Extension (6th) of Time to File Appellant's Initial Reply Brief in the above referenced case.

By copy of this letter, I am notifying Mary D. Shahid, attorney for the Respondent, of this request.

I would appreciate your returning a clocked copy in the enclosed envelope.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

Enclosure

cc: Mary D. Shahid, 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

RECEIVED
SEP 10 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

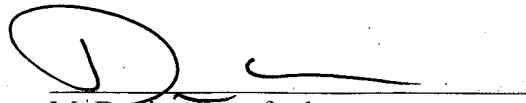
Appellant,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served the *Department's Motion for Extension (6th) of Time to File Appellant's Initial Reply Brief* by mailing a copy of the same by **U.S. First Class Mail**, postage pre-paid:

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Mary D. Shahid
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402


M. Denise Crawford

September 5, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

Appellant,

MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S
INITIAL REPLY BRIEF
(6th Extension Request)

TO: THE COURT AND COUNSEL FOR ALL PARTIES

PLEASE TAKE NOTICE that, pursuant to Rule 263, SCACR, Appellant South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") respectfully requests a forty-five (45) extension of time to file Appellant's Initial Reply Brief in this matter, making the Department's deadline for filing its Initial Reply Brief October 22, 2012. The basis for this motion is as follows:

This extension is requested due to Appellant's counsel's work load and possible settlement of the Jasper Station circuit court case. The parties in the Jasper Station circuit court case have made great progress towards the settlement of this matter with only one outstanding issue remaining, and if settlement is reached, this would also resolve the matter before the Court. In addition, Counsel is currently involved in lengthy preparation

6th

9/6/12

10/23/12

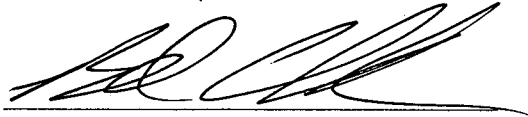
RECEIVED
SEP 10 2012
SC Court of Appeals

in the matter of SCDHEC v. Przyborowski, scheduled for oral arguments in the South Carolina Supreme Court later this month.

WHEREFORE, Appellant SCDHEC respectfully moves this Court for an Order extending the time for filing its Appellant's Initial Reply Brief until October 22, 2012. The Department respectfully requests that all other deadlines be held in abeyance pending the Court's approval of this extension.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By: 

Marshall Taylor, General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 898-3350

Bradley D. Churdar, Chief Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorneys for Appellant SCDHEC

September 5, 2012
Charleston, South Carolina

The South Carolina Court of Appeals

DTG Holdings, LLC, and Jasper Station Associates,
LLC, Respondents,

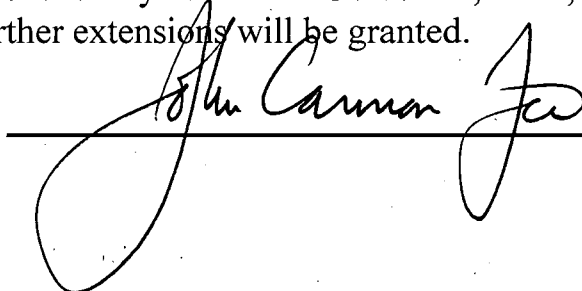
v.

South Carolina Department of Health & Environmental
Control, Appellant.

Appellate Case No. 2011-191826

ORDER

This is Appellant's sixth extension request as to its initial reply brief. The request of 45 days is granted in part. Appellant may have until October 2, 2012, to file and serve its initial reply brief. No further extensions will be granted.

_____, C.J.

Columbia, South Carolina

cc:

Carlisle Roberts, Jr.
Davis Arjuna Whitfield-Cargile
Mary Duncan Shahid
Bradley David Churdar
Stephen Peterson Groves, Sr.
Jacquelyn Sue Dickman
William Marshall Taylor, Jr.

FILED

September 25, 2012



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

October 2, 2012

RECEIVED
OCT 04 2012
SC Court of Appeals

The Honorable Tanya A. Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: DTG Holdings, LLC v. SCDHEC
Case Tracking #: 2011191826

Dear Ms. Gee:

I am in receipt of the Court's Order dated September 25, 2012 providing an extension of time to file a Reply Brief in the above referenced matter. In preparing to draft my reply and in reviewing the Department's previously filed brief, I do not feel it is necessary to file a reply brief in this matter. On this day, I called and spoke to Monica in your office and based on that conversation, please accept this letter as a request to set the due date for the Record on Appeal for thirty (30) days from the date of this letter, which would be November 1, 2012.

I apologize for the delay in making the decision not to file a reply, but given my busy schedule in recent months, I felt the delay was necessary in order to adequately review the matter and make the correct decision on behalf of the Department.

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: Mary D. Shahid, Esquire
Stephen P. Groves, Sr., 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

Dear Counsel:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy

CLERK



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 31, 2012

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

Mr. Davis Arjuna Whitfield-Cargile
PO Box 1336
Beaufort SC 29907

Ms. Mary Duncan Shahid
PO Box 486
Charleston SC 29402

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

Mr. Stephen Peterson Groves, Sr.
205 King Street
Suite 400
Charleston SC 29401

Ms. Jacquelyn Sue Dickman
Mr. William Marshall Taylor, Jr.
2600 Bull Street
Columbia SC 29201

Re: DTG Holdings, LLC v. SCDHEC
Appellate Case No. 2011-191826



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

October 31, 2012

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

RECEIVED

NOV 05 2012

SC Court of Appeals

Dear Ms. Kitchings:

In follow up with Laurie Field this morning, please find enclosed the Department's Motion for Extension of Time to File the Record on Appeal in the above referenced case. This extension is requested to allow time for the exhibits to be obtained from the Administrative Law Court.

By copy of this letter, I am notifying Mary D. Shahid, attorney for the Respondent, of this request.

I would appreciate your returning a clocked copy in the enclosed envelope.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc
Enclosure

cc: Mary D. Shahid, Esquire

20996

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 STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

Appellant

CERTIFICATE OF SERVICE

RECEIVED
NOV 05 2012
SC Court of Appeals

The undersigned hereby certifies that she has this day served the *Department's Motion*
for Extension of Time to File Record on Appeal by mailing a copy of the same by U.S. First
Class Mail, postage pre-paid:

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Mary D. Shahid
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402



M. Denise Crawford

October 31, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

Appellant,

MOTION FOR EXTENSION OF TIME
TO FILE RECORD ON APPEAL

NOV 05 2012

SC Court of Appeals

TO: THE COURT AND COUNSEL FOR ALL PARTIES

PLEASE TAKE NOTICE that, pursuant to Rule 263, SCACR, Appellant South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") respectfully requests a fifteen (15) day extension of time to file the Record of Appeal in this matter, making the Department's deadline for filing the Record on Appeal November 15, 2012. The basis for this motion is as follows:

This extension is requested due to the fact that the exhibits in this matter were retained by the Administrative Law Court. Follow up with Jana Shealy, Clerk of the Administrative Law Court, confirmed that the exhibits are in their possession and that there are several oversized exhibits. Therefore, the Appellant's counsel will need time to travel to Columbia to get the exhibits and have them copied for inclusion in the Record on Appeal.

1st
11/1

WHEREFORE, Appellant SCDHEC respectfully moves this Court for an Order extending the time for filing the Record on Appeal until November 15, 2012. The Department respectfully requests that all other deadlines be held in abeyance pending the Court's approval of this extension.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By: 

Marshall Taylor, General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street,
Columbia, SC 29201
(803) 898-3350

Bradley D. Churdar, Chief Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorneys for Appellant SCDHEC

October 31, 2012
Charleston, South Carolina

The South Carolina Court of Appeals

DTG Holdings, LLC, and Jasper Station Associates,
LLC, Respondents,

v.

South Carolina Department of Health & Environmental
Control, Appellant.

Appellate Case No. 2011-191826

The Honorable Carolyn C. Matthews
Trial Court Case No. 2010ALJ070217CC

ORDER

The time for serving the record on appeal on the opposing party and filing the proof of service with this Court is hereby extended until December 14, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Carlisle Roberts, Jr.

Davis Arjuna Whitfield-Cargile

Mary Duncan Shahid

Bradley David Churdar

Stephen Peterson Groves, Sr.

Jacquelyn Sue Dickman

William Marshall Taylor, Jr.

FILED

12-3-12 207



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

December 4, 2012

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED

DEC 06 2012

SC Court of Appeals

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

Dear Ms. Kitchings:

The Record on Appeal in the above referenced matter was due on November 15, 2012, which included fifteen (15) additional days as requested by the Department. I am writing to clarify the date of mailing noted on the Certificate of Service. As you are aware from our communication with your office, we encountered several problems in obtaining, verifying, and copying the exhibits included in the Record on Appeal. Due to technical problems at the Administrative Law Court, the Department did not receive the final exhibits until approximately 3:00 PM on November 15, 2012. Immediately upon receipt, Department staff began the copying and binding of the Record on Appeal. However, the complete Record with needed copies was not complete and ready for mailing until 3:30 AM. Immediately upon completion, the Record was delivered to the Post Office at approximately 4:00 AM. Therefore, I wanted to write and clarify that my Certificate was dated November 15, 2012, but the actual mailing was not technically delivered to the US Postal Service until the early hours of November 16, 2012.

I apologize for any confusion, but felt it was important to clarify this matter. If you have any questions or need any additional clarification, please contact me.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc: Mary D. Shahid, Esquire

20996

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



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

November 15, 2012

The Honorable Tanya A. Gee
Clerk
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

Re: DTG Holdings, LLC v. SCDHEC
Case Tracking #: 2011191826

Dear Ms. Gee:

Enclosed for filing, please find an original (unbound) and fifteen copies of the Record on Appeal and proof of service in the above referenced matter. By copy of this letter, I am serving all parties with the same. I would appreciate your returning a clocked copy in the enclosed envelope.

Please note that Petitioner's Exhibit #30 of the Record is an oversized exhibit and has been previously filed by the South Carolina Administrative Law Court, as indicated in the enclosed letter.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc: Mary D. Shahid, Esquire
Stephen P. Groves, Sr., Esquire

20996



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

December 4, 2012

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

Dear Ms. Kitchings:

Please find enclosed the Department's Motion for Extension of Time to File Appellant's Final Brief in the above referenced case.

By copy of this letter, I am notifying Mary D. Shahid, attorney for the Respondent, of this request.

I would appreciate your returning a clocked copy in the enclosed envelope.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc
Enclosure

cc: Mary D. Shahid, Esquire

20996

RECEIVED

DEC 06 2012

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 STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

Appellant,

CERTIFICATE OF SERVICE

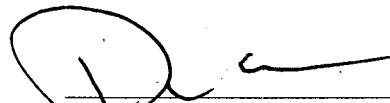
The undersigned hereby certifies that she has this day served the *Department's Motion for Extension of Time to File Appellant's Final Brief* by mailing a copy of the same by U.S.

First Class Mail, postage pre-paid:

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Mary D. Shahid
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402

RECEIVED
DEC 06 2012
SC Court of Appeals


M. Denise Crawford

December 4, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

Appellant,

MOTION FOR EXTENSION OF TIME TO FILE
APPELLANT'S FINAL BRIEF

TO: THE COURT AND COUNSEL FOR ALL PARTIES

PLEASE TAKE NOTICE that, pursuant to Rule 263, SCACR, Appellant South Carolina Department of Health and Environmental Control ("DHEC" or the "Department") respectfully requests a forty-five (45) extension of time to file Appellant's Final Brief in this matter, making the Department's deadline for filing its Final Brief January 18, 2013. The basis for this motion is as follows:

This extension is requested due to Appellant's counsel's work load and possible settlement of the Jasper Station circuit court case. Counsel has been involved in lengthy preparation for multiple oral arguments before the South Carolina Supreme Court and Court of Appeals in the last couple months as well as preparation for upcoming oral arguments in the Court of Appeals in the matter of Wise v. SCDHEC and South Fenwick next week and Berry v. SCDHEC in the Supreme Court

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SC Court of Appeals

12/5
1/18

in January. Also, the parties are continuing settlement negotiations in the Jasper Station circuit court case.

WHEREFORE, Appellant SCDHEC respectfully moves this Court for an Order extending the time for filing its Appellant's Final Brief until January 18, 2013. The Department respectfully requests that all other deadlines be held in abeyance pending the Court's approval of this extension.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

By:



Bradley D. Churdar, Chief Counsel
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
Attorney for Appellant SCDHEC

December 4, 2012
Charleston, South Carolina

The South Carolina Court of Appeals

DTG Holdings, LLC, and Jasper Station Associates,
LLC, Respondents,

v.

South Carolina Department of Health & Environmental
Control, Appellant.

Appellate Case No. 2011-191826

The Honorable Carolyn C. Matthews
Trial Court Case No. 2010ALJ070217CC

ORDER

The time for serving and filing the appellant's final brief is hereby extended until
January 18, 2013.

FOR THE COURT

BY *V. Claire Allen, Deputy*
CLERK

Columbia, South Carolina

cc:

Carlisle Roberts, Jr.

Davis Arjuna Whitfield-Cargile

Mary Duncan Shahid

Bradley David Churdar

Stephen Peterson Groves, Sr.

Jacquelyn Sue Dickman

William Marshall Taylor, Jr.

FILED

12-12-12 *ELT*



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

December 12, 2012

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

Mr. Davis Arjuna Whitfield-Cargile
PO Box 1336
Beaufort SC 29907

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

Ms. Jacquelyn Sue Dickman
Mr. William Marshall Taylor, Jr.
2600 Bull Street
Columbia SC 29201

Re: DTG Holdings, LLC v. SCDHEC
Appellate Case No. 2011-191826

Dear Counsel:

Upon reviewing your record on appeal, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- The caption/title does not comply with Rule 267(a), SCACR. Specifically, all counsel of record must be included on the cover of the record on appeal.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Mary Duncan Shahid
Stephen Peterson Groves, Sr.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC

Respondents,

vs.

South Carolina Department of Health and Environmental Control

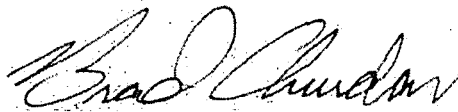
Appellant,

PROOF OF SERVICE

The undersigned hereby certifies that she has this day served the *Record on Appeal* by mailing a copy of the same by **U.S. First Class Mail**, postage pre-paid:

The Honorable Tanya A. Gee
Clerk
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

Mary D. Shahid
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402



Bradley D. Churdar, Chief Counsel, SC Bar #12829
South Carolina Department of Health
and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
churdabd@dhec.sc.gov
Attorney for Appellant SCDHEC

November 15, 2012
Charleston, South Carolina

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SC Court of Appeals



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

Fax Message

Date: 12/13/2012

Number of pages including cover sheet: _____

Please deliver this fax message

To:

Name: Laurie Field

Organization/Department: _____

Fax: 734-1496

Phone: _____

From:

Name: Denise Crawford

Region/Bureau/Division/Section: _____

Fax: _____

Phone: 953.0222

Subject/Comments:

Confidentiality Notice

This transmission is intended only for the use of the individual or entity to which it is addressed and may contain information which is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that any disclosure, distribution, or copying of this information is strictly prohibited. If you received this transmission in error, please notify the sender immediately by calling the above telephone number.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

DHEC 0504 (03/2012)

www.scdhec.gov



Catherine B. Templeton, Director

*Promoting and protecting the health of the public and the environment***VIA FACSIMILE**

December 13, 2012

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

Dear Ms. Kitchings:

In follow up to our conversation with Laurie Field today, please accept this letter as a request to remove Davis Whitfield-Cargile and Carlisle Roberts as attorneys of record in the above referenced matter. Mr. Whitfield-Cargile and Mr. Roberts are former employees and counsel for the Department, but have now left for private practice and are no longer involved with this matter. I will continue to represent the Department in this matter. The correct counsels of record are as follows:

Bradley D. Churdar, Counsel for the Department
Mary D. Shahid and Stephen Groves, Counsel for the Respondent

In addition, per your letter dated December 12, 2012, the Record on Appeal in this matter is correct and accurately reflects the counsel of record. Therefore, it is my understanding that no correction is needed. Please advise me as soon as possible if we need to take any further action on this matter.

I apologize for any confusion and appreciate your staff's ongoing assistance in this matter. If you have any questions or need any additional information, please contact me.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc: Mary D. Shahid, Esquire
Stephen Groves, 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

Stephen P. Groves, Sr.
Member
Admitted in SC

December 11, 2012

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: DTG Holdings, LLC v SCDHEC
Case Tracking#: 2011191826

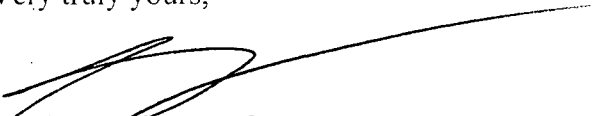
Dear Madam Clerk:

Please find enclosed the Respondent's Motion for Extension of Time to file
Respondent's Final Brief in the above captioned matter.

By copy of this letter, I am notifying Bradley Churdar, attorney for the Appellant, of
this request.

I would appreciate your returning a clocked copy in the enclosed envelope.

Very truly yours,


Stephen P. Groves, Sr.

SPG/rp

Cc: Bradley Churdar, Esquire

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

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DEC 13 2012
SC Court of Appeals

66550

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Colleton County
Case No.: 2011-CP-19-1826

DTG Holdings, LLC,

Respondents,

v.

South Carolina Department of Health
and Environmental Control

Appellants.

**MOTION FOR 30-DAY EXTENSION OF TIME
IN WHICH TO FILE
RESPONDENTS' ~~REPLY~~ BRIEF**

Stephen P. Groves, Sr., Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206
E-Mail: sgroves@nexsenpruet.com
Attorney for the Appellants

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DEC 13 2012

SC COURT of Appeals

TO: THE COURT AND COUSEL FOR ALL PARTIES:

COMES NOW the Respondent, DTG Holdings, LLC and Jasper Station
Associates, LLC, together with the Appellant, South Carolina Department of

Health and Environmental Control ("SCDHEC"), pursuant to Rule 263 of the South Carolina Appellate Court Rules, and jointly respectfully requests this Supreme Court to grant them a thirty-day (30) extension of time in which to file their Respondents' Final Brief in this appellate matter.

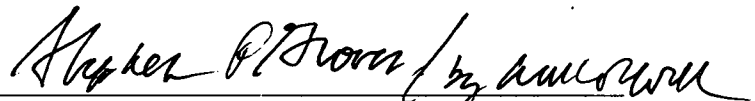
The basis for this motion is the record involves several tiers of determinations and requires additional time for consideration. Moreover, both appellate counsel for Respondents and SCDHEC are involved in other appellate and trial matters at this time.

Based upon the current briefing schedule, the Respondents' Brief is currently due on or before December 17, 2012. Consequently, anticipating a favorable reception and subsequent grant of this motion, the Respondents' Brief would then be due on January 16, 2013. Counsel for the Petitioner, SCDHEC, has consented to this request and will not file any objection.

Finally, both Respondents and SCDHEC respectfully request that this Supreme Court hold the briefing time in abeyance until such time as this motion may be considered and ruled upon.

Respectfully submitted:

NEXSEN PRUET, LLC

By: 

Stephen P. Groves, Sr., Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.577.9440
Telecopier: 843.720.1777

Attorneys for the Respondents

CONSULTATION WITH OPPOSING COUNSEL

I, Stephen P. Groves, Sr., Esquire hereby certify that on 5th December 2012, I consulted with Bradley D. Churdar, Esquire, attorney for the Respondents regarding this extension request. Bradley D. Churdar, Esquire has indicated he consent to this extension request and does not intend to file any type of formal objection.

Signed: Stephen P. Groves / s. groves

Stephen P. Groves, Sr., Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206
E-Mail: sgroves@nexsenpruet.com

Charleston, South Carolina

11 December 2012

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal from the Court of Common Pleas
For Colleton County
Case No.: 2011-CP-19-1826

DTG Holdings, LLC,

Respondents,

v.

South Carolina Department of Health
and Environmental Control

Appellants.

PROOF OF SERVICE for
MOTION FOR EXTENSION OF TIME
IN WHICH TO FILE RESPONDENTS' BRIEF

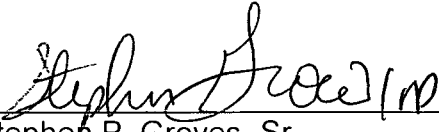
I, Stephen P. Groves, Sr., Esquire, hereby certify that on 11 December 2012, I served a copy of the **Respondents' Motion for Extension of Time In Which to File Respondents' Final Brief** submitted by the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC and Respondent, South Carolina Department of Health and Environmental Control, on all counsel appearing in this appeal, via the United States Mail, postage pre-paid, and addressed as follows:

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DEC 13 2012

SC Court of Appeals

Bradley D. Churdar, Esquire
SCDHEC
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405



Stephen P. Groves, Sr.

Charleston, South Carolina

11 December 2012



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

VIA FACSIMILE

December 13, 2012

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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DEC 17 2012

SC Court of Appeals

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

Dear Ms. Kitchings:

In follow up to our conversation with Laurie Field today, please accept this letter as a request to remove Davis Whitfield-Cargile and Carlisle Roberts as attorneys of record in the above referenced matter. Mr. Whitfield-Cargile and Mr. Roberts are former employees and counsel for the Department, but have now left for private practice and are no longer involved with this matter. I will continue to represent the Department in this matter. The correct counsels of record are as follows:

Bradley D. Churdar, Counsel for the Department
Mary D. Shahid and Stephen Groves, Counsel for the Respondent

In addition, per your letter dated December 12, 2012, the Record on Appeal in this matter is correct and accurately reflects the counsel of record. Therefore, it is my understanding that no correction is needed. Please advise me as soon as possible if we need to take any further action on this matter.

I apologize for any confusion and appreciate your staff's ongoing assistance in this matter. If you have any questions or need any additional information, please contact me.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc: Mary D. Shahid, Esquire
Stephen Groves, 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

Stephen P. Groves, Sr.
Member
Admitted in SC

16 January 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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JAN 17 2013

SC Court of Appeals

Re: **DTG Holdings, LLC and Jasper Stations Associates, LLC
v. South Carolina Department of Health and Environmental
Control**

Civil Action No.: 10-ALJ-07-0217-CC
Appeal from the South Carolina Administrative Law Court
COA Case Tracking No.: 2011191826
NP File No.: 048646-00001

Dear Ms. Kitchings:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Enclosed please find the following documents for filing with the Court of Appeals in the above-referenced appeal. There are being submitted on behalf of the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC:

1. The original and 15 copies of the **Final Brief of the Respondents DTG Holdings, LLC and Jasper Station Associates, LLC**; and
2. The original and one copy of the **Proof of Service** for the **Final Brief of the Respondents**.

I would appreciate you kindly filing these documents with the Court of Appeals and returning one date-stamped copy of each to my attention in the enclosed self-addressed and stamped envelope. Please note that the original version of the **Respondents' Final Brief** has been left unbound and is contained in a separate white envelope marked as such.

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1725
F 843.414.8206
E SGroves@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

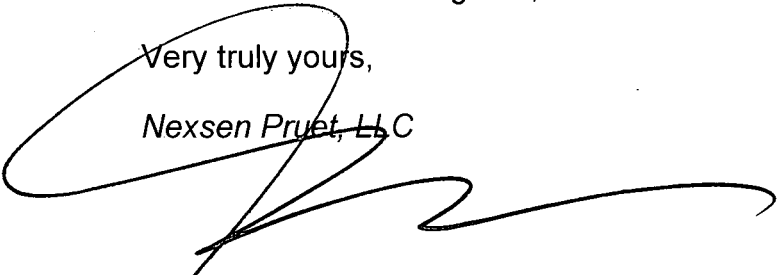
The Honorable Jenny Abbott Kitchings
Clerk of Court
16 January 2013
Page 2

If there is anything else you or your office may need from me, or if I may otherwise be of assistance, please feel free to contact me at your convenience. My direct telephone number is 843.720.1725, the direct telecopier number is 843.414.8206, and the e-mail address is sgroves@nexsenpruet.com.

With kindest regards, I remain

Very truly yours,

Nexsen Pruet, LLC



Stephen P. Groves, Sr.

SPGsr: spg

Enclosures

CCE: Bradley D. Churdar, Esquire



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

January 17, 2013

The Honorable Tanya A. Gee
Clerk
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

Re: DTG Holdings, LLC v. SCDHEC
Case Tracking #: 2011191826

Dear Ms. Gee:

Enclosed for filing, please find an original (unbound) and fifteen copies of the Department's Final Brief and proof of service in the above referenced matter. By copy of this letter, I am serving all parties with the same. I would appreciate your returning a clocked copy in the enclosed envelope.

If you have any questions or concerns, please give me a call.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc: Mary D. Shahid, Esquire
Stephen P. Groves, Sr., Esquire

20996

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JAN 18 2013

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 Court of Appeals

DTG Holdings, LLC, and Jasper Station Associates,
LLC, Respondents,

v.

South Carolina Department of Health & Environmental
Control, Appellant.

Appellate Case No. 2011-191826

The Honorable Carolyn C. Matthews
Trial Court Case No. 2010ALJ070217CC

ORDER

The motion for extension to file the respondent's final brief is granted, and the Court has received the brief.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Mary Duncan Shahid
Bradley David Churdar
Stephen Peterson Groves, Sr.
Jacquelyn Sue Dickman
William Marshall Taylor, Jr.

FILED

Sf 2/6/13



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 06, 2013

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

Ms. Jacquelyn Sue Dickman
2600 Bull St.
Columbia SC 29201

Mr. William Marshall Taylor, Jr.
2600 Bull Street
Columbia SC 29201

Re: DTG Holdings, LLC v. SCDHEC
Appellate Case No. 2011-191826

Dear Counsel:

Pursuant to your letter dated December 13, 2013, you are advised that Jacquelyn Sue Dickman and William Marshall Taylor, Jr. are counsel of record due to their appearances on motions for extensions dated April 20, 2012 and June 6, 2012. All parties are advised that all counsel of record are to be listed on the record on appeal and the final brief of appellant. If Ms. Dickman and Mr. Taylor wish to be removed from the record on appeal and final appellant's brief, they must each file a motion to be relieved as counsel within ten days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Carlisle Roberts, Jr.
Davis Arjuna Whitfield-Cargile
Mary Duncan Shahid
Stephen Peterson Groves, Sr.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 06, 2013

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

Ms. Jacquelyn Sue Dickman
Mr. William Marshall Taylor, Jr.
2600 Bull St.
Columbia SC 29201

Re: DTG Holdings, LLC v. SCDHEC
Appellate Case No. 2011-191826

Dear Counsel:

Upon reviewing your final appellant's brief, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- The color of the cover is not in compliance with Rule 267(e), SCACR.
- Rule 267 (SCACR), requires all counsel for appellant to be listed on the cover of the appellant's final brief.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Mary Duncan Shahid
Stephen Peterson Groves, Sr.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 06, 2013

Ms. Mary Duncan Shahid
PO Box 486
Charleston SC 29402

Mr. Stephen Peterson Groves, Sr.
205 King Street
Suite 400
Charleston SC 29401

Re: DTG Holdings, LLC v. SCDHEC
Appellate Case No. 2011-191826

Dear Counsel:

Upon reviewing your respondent's final brief, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- The document is not accompanied by the required certificate of counsel, as required by Rule 211, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Bradley David Churdar
Jacquelyn Sue Dickman
William Marshall Taylor, Jr.

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Administrative Law Court
Hon. Carolyn C. Matthews, Administrative Law Judge
ALC Docket No.: 10-ALJ-07-0217-CC

DTG Holdings, LLC and
Jasper Station Associates, LLC,

RECEIVED

FEB 11 2013

SG Court of Appeals

Respondents,

v.

South Carolina Department of Health
and Environmental Control,

Appellant.

**RULE 211, SCACR, CERTIFICATION
For The
FINAL BRIEF OF THE RESPONDENTS**

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
NEXSEN PRUET, LLC
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Attorneys for the Respondents

I, Stephen P. Groves, Sr., Esquire, hereby certify, this 16th day of January 2013, that the **Final Brief** of the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC, complies with all of the requirements set forth in Rule 211(b) of the South Carolina Appellate Court Rules.

NEXSEN PRUET, LLC

By: 

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*Attorneys for the Respondents,
DTG Holdings, LLC and
Jasper Station Associates, LLC,*

Charleston, South Carolina

8 February 2013

NPCHAR1:1065857.1-DOC-(SPG) 048646-00001

Stephen P. Groves, Sr.

Member
Admitted in SC

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FEB 11 2013

SC Court of Appeals

8 February 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: **DTG Holdings, LLC and Jasper Stations Associates, LLC
v. South Carolina Department of Health and Environmental
Control**

Civil Action No.: 10-ALJ-07-0217-CC

Appeal from the South Carolina Administrative Law Court

COA Case Tracking No.: 2011191826

NP File No.: 048646-00001

Dear Ms. Kitchings:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Enclosed please find the original and two copies of a **Rule 211(b), SCACR, Certification** in the above-referenced appeal. This certification is being submitted on behalf of the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC and in response to Claire Allen's letter dated 6 February 2013. I would appreciate you kindly filing this certification with the Court of Appeals and returning one date-stamped copy of each to my attention in the enclosed self-addressed and stamped envelope. By copy of this letter, I am also serving counsel for the Appellant, South Carolina Department of Health and Environmental Control, with a copy of the **Rule 211(b), SCACR, Certification**.

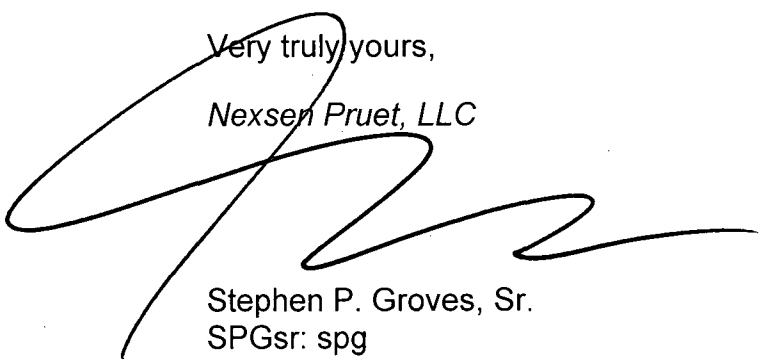
If there is anything else you or your office may need from me, or if I may otherwise be of assistance, please feel free to contact me at your convenience. My direct telephone number is 843.720.1725, the direct telecopier number is 843.414.8206, and the e-mail address is sgroves@nexsenpruet.com.

The Honorable Jenny Abbott Kitchings
Clerk of Court
8 February 2013
Page 2

With kindest regards, I remain

Very truly yours,

Nexsen Pruet, LLC

A large, stylized handwritten signature in black ink, appearing to read 'Stephen P. Groves, Sr.', is written over the typed name and firm name.

Stephen P. Groves, Sr.

SPGsr: spg

Enclosures

CCE: Bradley D. Churdar, Esquire

NPCHAR1:1065903.1-LT-(SPG) 048646-00001



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

February 18, 2013

The Honorable V. Claire Allen
Deputy Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *DTG Holdings, LLC v. SCDHEC*
Case Tracking #: 2011191826

Dear Ms. Allen:

Pursuant to your letter dated February 6, 2013, enclosed please find sixteen corrected covers for the Department's Final Brief in the above referenced matter. By copy of this letter, I am providing all parties with the same.

I apologize for any confusion and inconvenience in this matter. If you have any questions or need any additional information, please contact me.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc: Mary D. Shahid, Esquire
Stephen Groves, Esquire

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FEB 24 2013

SC COURT OF APPEALS

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 STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Administrative Law Court Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC.....Respondents,

vs.

South Carolina Department of Health and Environmental Control.....Appellant.

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SC COURT OF APPEALS

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STATEMENTS OF ISSUE OF APPEAL

- I. Do DTG's misrepresentation of property owner, permitting history, and enforcement history on its permit application for NPDES permit coverage provide grounds for termination of DTG's NPDES permit coverage?
- II. Did the ALC apply the wrong legal standard in determining whether termination of DTG's NPDES permit coverage was proper under Regulation 61-9 § 122.64(a)?
- III. Did the ALC err in concluding that the fact that there is now a wetland on the Site did not support termination of NPDES coverage?
- IV. Did the ALC commit reversible error in taking judicial notice of allegations pending in a civil action and treating those allegations as fact?
- V. Should the ALC have dismissed this contested case since DTG no longer has any interest in the Site and Jasper Station lacks standing to force DHEC to issue a permit to someone else?
- VI. Did Respondents waive the attorney-work product privilege on two emails that were disclosed to a non-client over which Respondents had no control?

STATEMENT OF THE CASE

This case involves Appellant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") termination of Respondent DTG Holdings, LLC's ("DTG") NPDES¹ permit coverage. DTG obtained NPDES permit coverage from DHEC on March 27, 2009. (Permit). On December 22, 2009, DHEC terminated DTG's NPDES permit coverage on the basis that DTG's permit coverage was obtained after DTG misrepresented information on its Notice of Intent for Stormwater Discharges from Large and Small Construction Activities (NOI), the application form submitted by DTG for NPDES permit coverage.

On December 22, 2009, the Department staff issued a Final Decision terminating permit coverage. (Letter from Barbara Neale / Ann Clarke, located in folder marked "Red Oaks Plaza, Phase #3). DTG and Jasper Station, LLC ("Jasper Station") (collectively, "Respondents") filed requests for review before the Board of Health and Environmental Control (the "Board") on January 6, 2010. (Request for Review). At its meeting on January 14, 2010, the Board declined to conduct the review conference requested by Respondents. Notice of this decision was mailed to Respondents on January 19, 2010. Pursuant to S.C. Code Ann. § 44-1-60(F), the staff decision to terminate DTG's permit coverage became the final agency decision when the Board notified Respondents of its decision not to conduct the review conference.

On January 21, 2010, Respondents requested a contested case at the Administrative Law Court (ALC) to challenge DHEC's final agency decision. The ALC held a hearing on September 1, 2010, and October 20, 2010. The parties submitted competing proposed orders in lieu of closing arguments. On February 11, 2011, the

¹ National Pollutant Discharge Elimination System.

Honorable Carolyn C. Matthews reversed the Department's termination of NPDES permit coverage and reinstated DTG's permit. On Motion from DHEC with consent of Respondents, the ALC granted DHEC until February 28, 2011 to file post trial motions. DHEC filed a Motion to Reconsider and Alter or Amend on February 28, 2011. No order was issued on DHEC's motion within 30 days of its filing. Therefore, the motion was deemed denied by Rule on March 30, 2011. DHEC filed a Notice of Appeal on April 29, 2011, divesting the ALC of jurisdiction over the matter.²

² On May 5, 2011, after the ALC was divested of jurisdiction, the ALC issued an order purporting to deny the motion for reconsideration.

SUMMARY OF THE FACTS

On December 22, 2009, DHEC terminated DTG's NPDES permit coverage. DHEC's termination was based on its determination that DTG misrepresented relevant facts in its NOI. The NOI is the application form provided by DHEC that must be submitted in order for an entity to obtain NPDES permit coverage under the 2006 Construction General Permit for Large and Small Construction Activities (CGP). The NOI is readily available on the Department's website. Clear, easily understandable instructions are contemporaneously downloaded in the same document as the NOI. (DHEC ex. 3). These instructions explain in detail how to answer each question on the NOI. Ryan Smith, DTG's consultant who prepared the NOI, downloaded these instructions and had them handy when he completed DTG's NOI.

DTG submitted its NOI to the Department on February 9, 2009. The NOI sought NPDES permit coverage for land disturbing activities for an 18.41 parcel of land at Red Oaks Lane Access from S.C. Highway 70 in Hardeeville, Jasper County, South Carolina (the "Site"). (Petitioner's Ex. 14, DTG NOI). The NOI was signed by Ryan Smith as the SWPPP³ preparer, and Gregg Malphrus, on behalf of the Project Owner/Operator.⁴ In signing the NOI, Gregg Malphrus made the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information is, to the best of my knowledge

³ The SWPPP is the Storm Water Pollution Prevention Plan.

⁴ Gregg Malphrus is one of three brothers who own DTG Holdings. These same three brothers own Malphrus Construction, the entity that cleared, mucked, and filled a wetland on the Site in November, 2008 after DHEC had issued a decision denying an application for NPDES permit coverage for the site.

and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Pets. Ex. 14.

Section II(B) of the NOI asks the applicant to list the “Property Owner” for the site. (Ex. 14) The instructions for Section II(B) of the NOI specify that the applicant is required to list the “complete, legal name of the current property owner.” (Pets. Ex. 6, p. 6 of instructions). DTG listed itself as the Property Owner. This was an inaccurate statement of fact. DTG never owned the property.⁵ The ALC found that Jasper Station was the owner of the site. Indeed, DTG’s 30(b)(6) designee testified that DTG knew Jasper Station was the owner of the site and that Jasper Station should have been listed. Ryan Smith also testified that he knew Jasper Station was the property owner and that Jasper Station should have been listed as the property owner.

Section III(I) of the NOI asks the applicant to “list all state and federal environmental permits or approvals applied for or obtained for [the Site].” The instructions for Section III(I) of the NOI instruct the applicant to “see § 122.21(f) of S.C. Regulation 61-9 for a list of permits, approvals, and programs that should be considered. If the provided information is inaccurate, NPDES coverage may be invalid.” The instructions for Section III(I) even provides a link to the relevant regulation. The regulation requires the applicant to list, among others, “any environmental permit or construction approval received or applied for under” the “NPDES program under CWA.” 24 S.C. Code Ann. Reg. 61-9 § 122.21(f)(6). DTG’s NOI left this line blank. This was a

⁵ (DHEC ex 1, 30(b)(6) depo of DTG pg 11, lines 19-24, p. 17, lines 7-20, pg 23, lines 2-22).

representation that no environmental permits had been applied for or obtained for the site. This was an inaccurate statement of fact. The ALC found that Jasper Station had applied for NPDES permit coverage for this site. Indeed, DTG's 30(b)(6) designee testified that DTG knew Jasper Station had previously applied for NPDES permit coverage for the site. Ryan Smith also testified that he knew Jasper Station had previously applied for NPDES permit coverage for the site. In fact, Mary Shahid, counsel for Respondents, instructed him to list the Jasper Station permit application on the NOI.⁶

Finally, Section III(G) of the NOI asks if DHEC "has issued a Notice to Comply or Notice of Violation for this site or LCP?" DTG answered "No." This was a misstatement of fact. On November 5, 2008, DHEC issued a letter to Jasper Station stating that land disturbance activities⁷ were being conducted on the site without a permit. Pets. Ex. 32 (Nov. 5 letter). The letter gave Jasper Station notice that "such actions are considered unlawful and place [Jasper Station] in violation of the Pollution Control Act." (Pets. Ex. 32 (Nov. 5 letter). The letter also instructed Jasper Station to comply with the law by discontinuing any activity on the site except stabilization measures. DTG acknowledged that it was aware of this letter prior to submitting the NOI. The existence of this letter was not disclosed to DHEC in DTG's NOI.

The facts certified to by DTG became a condition of permit coverage. The Department terminated DTG's permit coverage based on DTG's misrepresentations of these facts and DTG's failure to disclose all relevant facts throughout the permitting process. Ms. Nodolf, DHEC's employee who reviewed DTG's NOI, testified that if these

⁶ Albeit she instructed him to list the Jasper Station permit under Section III(B).

⁷ Incidentally, the work consisted of filling, mucking and clearing a 6 acre wetland. This work was performed by Malphrus Construction, which is owned by the same three brothers that own DTG.

facts had been accurately represented on the NOI, then DHEC's review of the application may have been different.

Rewinding to look at the background that preceded DTG's application brings to light the relevance of the misrepresented information. As mentioned above, the true owner of the site was Jasper Station. Jasper Station and DTG entered into a purchase agreement for the site on April 10, 2008. The Respondents knew at the time of signing the purchase agreement that the wetlands were an issue and that DHEC may not authorize the fill of the 6.07 acre wetland on the site.⁸ So Respondents included a clause that made the contract contingent upon obtaining Departmental approval to fill the wetland. DHEC Ex. 14 (Purchase Agreement).

When Respondents signed the purchase agreement, Jasper Station had a permit application pending with the Department. DTG and Jasper Station's 30(b)(6) designees both testified that there was no decision on the permit when the purchase agreement was signed in April 2008. The Department subsequently issued a letter denying permit coverage on September 30, 2008. Two months later, despite having received DHEC's letter denying Jasper Station's permit application, Jasper Station hired Malphrus Construction—owned by the same three brothers that own DTG—to clear, muck, and fill the wetland. The Department initiated an enforcement action after Malphrus Construction began land disturbance on the site. On November 5, 2008, the Department

⁸ This wetland portion is located in the center of the tract. It is a non-jurisdictional wetland (NJW), and was delineated by the U.S. Army Corps of Engineers (the Corps) on February 9, 2006 as a NJW. This means that the wetland tract was not subject to regulation by the Corps.

notified Jasper Station by letter that it was in violation of the Pollution Control Act.⁹ In the same letter, DHEC also requested Jasper Station to comply with the law by stopping all activities except as necessary to stabilize the site.

In the meantime, while the Department was investigating land disturbance activities on the site, Respondents were working to receive a new letter from the Corps stating that there were no longer wetlands on the site based on the work performed by Malphrus Construction. The purpose was to enable DTG to apply for new NPDES permit coverage for the Site. In fact, Ryan Smith had already begun preparation of a new NOI for DTG when Malphrus began work on the wetland. Ryan Smith knew that the wetland issue was a problem, so he left section IV(B) blank on his initial draft. DHEC Ex. 17 (Initial Draft of DTG NOI).¹⁰ Ryan Smith also sent Andy Smith a letter in October 2008 asking for guidance on how to deal with the situation. (DHEC Ex. 9, Oct. 16, 2008 Letter from Ryan Smith to Andy Smith)). He proposed as a solution that they “indicate wetlands exist on the site, submit the current plat and JD, and accompany the package with a letter stating what events have previously occurred.” (DHEC Ex. 9 (Oct. 16, 2008 letter from Ryan Smith to Andy Smith, p. 2). Ryan Smith also at some point prepared a plat that showed the location of the work in relation to the wetlands, Jasper Station’s prior permit application, and the 18 acre DTG site. (Pets. Ex. 9)

⁹ “Please note that such actions are considered unlawful and place you in violation of the Pollution Control Act, S.C. Code Ann § 48-1-90(a) (2008).” Pets. Ex. 32 (Nov. 5 letter)

¹⁰ In fact, before the purchase agreement had even been entered, Bob Glover (Jasper Station) emailed Andy Smith (DTG’s 30(b)(6) designee) that Malphrus was to clear, grub, grade, and seed an 800’ area and fill “only the low area of the wetlands, which is necessary in order to draw attention to the fact that all of this work is being done so that OCRM will not be able to say that we performed this work in the middle of a wooded area at night in an attempt to sneak in.” (DHEC Ex. 6, March 25, 2008 email from Bob Glover to Andy Smith).

Respondents subsequently received a letter from the U.S. Army Corps of Engineers (the "Corps") to this effect on January 16, 2009. DTG then submitted its NOI to apply for NPDES permit coverage for the site. Rather than do as Ryan Smith suggested in his October 16 letter and explain what happened, or include Pets. Ex. 9, or follow Ms. Shahid's advice and list the Jasper Station permit number on the NOI, DTG misrepresented the property owner, misrepresented that no previous environmental permits had been applied for or obtained, and misrepresented that no notice to comply or notice of violation had been sent. DTG was aware that the application it submitted, with misrepresentations and lacking full disclosure, would "go through without too much scrutiny" since the NOI represented that there would be no wetland impacts involved. (DHEC Ex. 11, October 21 email chain Andy Smith, Mary Shahid, et al).

DHEC was made aware of the misrepresentations in July 2009 when Jasper Station initiated a declaratory judgment action in circuit court. On August 21, 2009, DHEC issued a notice of intent to terminate permit coverage, and provided DTG and all other interested parties 30 days to comment. On December 22, 2009, DHEC staff issued a final decision terminating coverage. The staff decision became the final agency decision when the Board sent Respondents notice of its decision not to conduct a final review conference.

STANDARD OF REVIEW

The Administrative Procedures Act establishes this Court's standard of review for cases decided by the ALC and is set forth in Section 1-23-610(B) of the South Carolina Code (Supp.2009), which provides that the review of the ALC's order must be confined to the record. This Court may not substitute its own judgment for that of the

administrative law judge as to the weight of the facts. *Id.* This Court may affirm the ALC's decision or remand the case for further proceedings. *Id.* Further, the ALC's decision may be reversed or modified if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is: (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 of the whole record*; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.* (emphasis added).

DHEC's appeal primarily focuses on the ALC's legal error in applying the wrong legal standard from the regulation governing termination of NPDES permits. Questions of law are reviewed *de novo* on appeal. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law *de novo*."); Brownlee, et al. v. South Carolina Dept. of Health & Envtl. Control, 382 S.C. 129, 137, 676 S.E.2d 116, 120 (2009). Rules of statutory construction are employed to discern the meaning of regulations. See S.C. Ambulatory Surgery Center Assn. v. S.C. Workers' Compensation Comm., 389 S.C. 380, 699 S.E.2d 146 (2010). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Media Gen. Communications, Inc. v. S.C. Dept. of Revenue, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (quoting Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6,8 (1993)). The legislative language used in a statute or regulation is considered the best evidence of legislative intent, and courts are bound to

implement the legislature's express intent. Lexington County Health Services Dist. v. S.C. Dept. of Revenue, 384 S.C. 647, 651, 382 S.E.2d 508, 509 (Ct. App. 2009). Further, DHEC is given "the most respectful deference" in interpreting the terms of its regulations. Converse Power v. DHEC, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002); Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). See also, Brownlee, 382 S.C. at 136, 676 S.E.2d at 120 (quoting South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Env'tl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ.") and Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.")). Appellate courts look to the ordinary meaning of words when interpreting a regulation, taking care not to "resort to subtle or forced construction" that "limit[s]...the regulation's operation." Converse, 350 S.C. at 47, 546 S.E.2d at 346 (citing Beyerly v. Connor, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992)).

Argument

I. THE ALC's DECISION IS A RESULT OF THE APPLICATION OF THE WRONG LEGAL STANDARD FROM THE REGULATION

The regulation governing termination of NPDES permits presents five grounds for permit termination. S.C. Code Ann. Reg 61-9 § 122.64. The primary grounds in the regulation for purposes of this appeal are "[t]he permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time." S.C. Code of Regs. 61-

9.122.64(a)(2) (emphasis added). The ALC applied the wrong standard in three main respects: (A) the ALC mistakenly ruled that a misrepresentation of fact is not a ground for termination if the correct information is disclosed elsewhere in the application; (B) the ALC mistakenly ruled that a misrepresentation of fact is not a ground for termination unless it is accompanied by an intent to deceive DHEC; and (C) the ALC mistakenly imposed a higher standard for “relevant” than that found in the regulation. Given the ALC’s findings that certain facts on the NOI were inaccurate, the ALC’s utilization of the wrong legal standard was prejudicial. Had the proper standards from the regulation been utilized, DHEC’s termination of DTG’s permit coverage should have been affirmed.

A. The ALC mistakenly ruled that a misrepresentation of fact is not a ground for termination if the correct information is disclosed elsewhere in the application.

The use of the word “or” in § 122.64(a)(2) shows it provides two separate, alternative causes for termination of permit coverage. See Mr. T vs. Ms. T, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008) (“[The rule’s] use of the word ‘or’ indicates to this Court two potential independent action attacks on a judgment, order, or proceeding”). In other words, if the permittee misrepresented any relevant fact at any time, the regulation provides DHEC grounds to terminate permit coverage. Or, if the applicant failed to fully disclose all relevant facts throughout the permitting process, then the regulation also provides DHEC grounds to terminate permit coverage. DHEC primarily relies on the former—DTG’s misrepresentation of relevant facts in the NOI. Any misrepresentation of a relevant fact in the NOI provides an independent ground for termination of permit coverage.

This result is consistent with the plain language of this particular regulation and with a review of the regulation as a whole. Under the CGP, DHEC gives itself 20 days to act upon receipt of a complete NOI. In exchange for this limited timeframe for review once a complete application is received, the regulation imposes a burden on the applicant to review its application and provide accurate and complete responses.¹¹ To facilitate this process, the regulations require applicants to utilize a form provide by DHEC. In addition, the regulation gives DHEC the authority to rely on facts certified to by the applicant by making such facts a condition of permit coverage. Reg. 61-9, § 122.41(o).¹² When a fact is certified to, therefore, DHEC need not comb through the application materials to search for latent clues that the fact may be inaccurate. Rather, such facts become a condition of permit coverage, and DHEC has authority to terminate coverage based on the applicant's misrepresentation of any relevant fact at any time.

The ALC reversed termination in part based on the ALC's conclusion that the truth could be discerned from information provided elsewhere in the application materials,¹³ despite inaccurate statements of fact on the NOI. This conclusion is contrary

¹¹ See 24 S.C. Code Ann. Reg. 61-9 § 122.28(d)(4) ("Any NOI form submitted to the Department shall be signed in accordance with this Section."); § 122.28(d)(7) (certification requirement for signatures); § 122.41(o) ("Any person making application for a NPDES discharge permit or filing any record, report, or other document pursuant to a regulation of the Department "shall certify that all information contained in such document is true."). The applicant is not entitled just to certify facts upon information and belief; the applicant is required to certify that she has made inquiry of the person responsible for gathering information and filling out the NOI.

¹² 24 S.C. Code Reg. 61-9 § 122.41(o) ("Any person making application for a NPDES discharge permit or filing any record, report, or other document pursuant to a regulation of the Department "shall certify that all information contained in such document is true. All application facts certified to by the applicant shall be a considered a valid condition of the permit issued pursuant to that application.") (emphasis added).

¹³ The ALC reasoned that enough information was provided elsewhere in the application materials to give DHEC notice that this was the Jasper Station site. The ALC concluded

to the regulation. The regulation provides grounds for termination if any relevant fact is misrepresented by the applicant, regardless of whether the correct information may be discernable elsewhere in the application.

B. The ALC erred in holding that an inaccurate statement of fact must be made with intent to deceive in order for there to be grounds to terminate permit coverage.

To the extent the ALC reads a “mens rea” requirement into Section 122.64(a)(2) of Regulation 61-9 by requiring an intent to deceive, this is a higher standard or burden of proof for termination of permits than the regulation intends and is error of law.¹⁴ A review of the regulation’s plain language reveals that no such requirement exists. A misrepresentation is “an assertion that does not accord with the facts.” Black’s Law Dictionary (9th Ed. 2009) (“A misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words. [...] An assertion need not be fraudulent to be a misrepresentation.”). Though one of the definitions in Black’s states “[t]he act of making a false or misleading assertion about something, usually with the intent to deceive,”¹⁵ the regulation at issue here does not require intent to deceive in order

that DHEC could have figured this out based in part on a comparison of TMS numbers provided throughout the application, or comparison of the longitude and latitude, or by comparing different data layers on a GIS program utilized by the Department. It is worth noting though, in paragraph 22 on page 14, the ALC found that Respondents’ Exhibit 9 “clearly showed the relationship between the 18.4 acre parcel and the Jasper Station Tract.” DTG did not disclose this document during the application process. Ryan Smith testified it was not included with the application.

¹⁴ The ALC held that no misrepresentation occurred because the information an applicant is required to disclose on the NOI “was not hidden from the Department.” In other words, the Court reasoned that DTG’s failure to truthfully answer the questions asked on the NOI was irrelevant because the correct answers to those questions could be found elsewhere in DTG’s application.

¹⁵ At the hearing, the Judge Matthews commented that she remembered the intent to deceive requirement as one of the nine elements of fraud from law school. **However, unlike the common law elements of fraud, Regulation 61-9 does not require proof of**

for an inaccurate statement of fact in the application to constitute grounds for termination of permit coverage. Regulation 61-9 only requires an inaccurate statement of a relevant fact in order for there to be grounds for termination.

This lack of an intent to deceive requirement is consistent with the plain language of § 122.64(a)(2) of Regulation 61-9 as well as the scheme of Regulation 61-9 as a whole. Regulation 61-9 contains very strict signatory requirements.¹⁶ These requirements obligate the applicant to certify that the information submitted is true, complete, and accurate. The applicant is required to certify that it made inquiry of the persons responsible for gathering information and completing the NOI to ensure that the information is complete and accurate. Ignorance or inadvertence is not a defense to termination of permit coverage based on a misrepresentation.

As discussed above, facts certified to in the application become a condition of permit coverage. § 122.41(o). If an applicant fails to comply with a term of the permit, then the first ground for termination is also triggered. § 122.64(a)(1). Elsewhere in Regulation 61-9 and in the Pollution Control Act, stiffer repercussions, such as criminal convictions and civil fines, are provided when a misrepresentation is made by an applicant or permittee with intent to deceive.¹⁷ Where DHEC does not feel that criminal

intent to deceive in order to terminate permit coverage based on a misrepresentation.

¹⁶ 24 S.C. Code Reg. 61-9 § 122.28(d)(3) (“Material submitted shall be complete and accurate”); § 122.28(d)(4) (“Any NOI form submitted to the Department shall be signed in accordance with this Section”); § 122.28(d)(7) (certification requirement for signatures); § 122.41(o) (“Any person making application for a NPDES discharge permit or filing any record, report, or other document pursuant to a regulation off the Department “shall certify that all information contained in such document is true.”).

¹⁷ See § 122.41(k)(2): “The PCA provides that any person who **knowingly** makes any false statement, representation, or certification in any record or in any other document submitted or required to be maintained under this permit...shall, upon conviction, be

charges or civil penalties are warranted, DHEC still has grounds to terminate permit coverage under § 122.64(a)(2). After all, if the permit is utilized by the permittee, then grounds would exist under § 122.64(a)(1) because terms of the permit would not be complied with.

Thus, to the extent the ALC required evidence of proof of an intent to deceive, this was error of law. Claims of ignorance or inadvertence are not defenses to termination based on a misrepresentation. The regulation requires only a misrepresentation of a relevant fact.

C. The ALC applied the wrong legal standard for “relevant.”

The ALC did not consider the correct identification of the property owner, permitting history, or the Department’s issuance of notices “relevant” in the “context of determining whether cause exists for permit termination.” (Order 24) In doing so, the ALC incorrectly applied a higher standard of relevance than required by law. Information is “relevant” when it displays “*any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004) (emphasis added). This Court also has cited with approval the dictionary definition of relevant as “having a significant and demonstrable bearing on the matter at hand.” State v. Lawton, 382 S.C. 122, 127, 675 S.E.2d 454, 457 (Ct. App. 2009).¹⁸ Therefore, in the context of a permit application, information is relevant when it has *any* bearing or influence on the Department’s decision on the permit. In other words,

punished by a fine of not more than \$25,000 per violation, or by imprisonment for not more than two years, or both.” (emphasis added); See also § 122.41(o)(2).

¹⁸ See Merriam-Webster's Online Dictionary, “relevant” (last visited June 28, 2011) [http:// www.merriam- webster.com/ dictionary/ relevant](http://www.merriam-webster.com/dictionary/relevant).

to find that DTG's misrepresentations were irrelevant, this Court would have to find as a factual matter that the misrepresentations caused *no* tendency or likelihood that the Department could have made a different decision regarding DTG's permit application had DTG provided accurate information. These findings were not made. In finding that the misrepresented information was not relevant, the ALC imposed a higher standard than the regulation requires for termination of permit coverage.

The ALC concluded that in order to be relevant, the information must be required by regulation. First, this is not the standard for relevance. While DHEC agrees that information is *per se* relevant if the information is required by regulation to be provided to DHEC, the definition of relevant is not limited to information required by regulation to be provided. Moreover, even using the ALC's standard, all of the information misrepresented by the applicant is required by Regulation 61-9. Section 122.21(f)(4) requires the applicant to provide information on property ownership status and Section 122.21(f)(4) requires a listing of all permits or construction approvals received or applied for under, among other programs, the NPDES program under the CWA. Moreover, Regulation 61-9 requires applicants to use forms provided by DHEC.¹⁹ Applicants are

¹⁹ See 24 S.C. Code Ann.Reg. 61-9 § 122.64(f) ("All applicants for NPDES permits shall provide the following information to the Department, using the application form provided by the Department.") (emphasis added); § 122.21(a)(2) ("Applicants for State-issued must use State forms which must require at a minimum the information listed in the appropriate paragraphs of this section.") (emphasis added); § 122.1(d)(1) ("Permit application forms. Applicants for permits must submit their application on permit application forms designated by the Department."); § 122.28(b)(2)(i) ("Except as provided in paragraphs (b)(2)(v) and (b)(2)(vi) of this section, dischargers seeking coverage under a general permit shall submit to the Department a written notice of intent to be covered by the general permit. ... A complete and timely notice of intent (NOI) to be covered in accordance with the general permit requirements, fulfills the requirements for permit applications for purposes of [§§] 122.6, 122.21, and 122.26"); § 122.28(d)(1) ("An NOI shall be on forms as may be prescribed and furnished from time to time by the

required to completely, accurately, and truthfully complete the forms provided by DHEC.²⁰

Thus, even using the improper standard utilized by the ALC, the ALC committed error of law in failing to recognize that the regulation requires the applicant to provide the information requested on the NOI. Moreover, the ALC erred in raising the standard for termination beyond the standard of “relevant” as utilized by the regulation; relevancy means having any tendency to affect the outcome of the permitting decision.²¹ The ALC did not make a finding that DTG’s false statements of fact would have no tendency to affect the outcome of DHEC’s permitting decision.

II. THE LEGAL ERRORS IDENTIFIED ABOVE WERE PREJUDICIAL; IF THE ALC HAD APPLIED THE CORRECT STANDARD TO THE FACTS FOUND, THEN THE ALC WOULD HAVE AFFIRMED DHEC’S TERMINATION OF DTG’S PERMIT COVERAGE.

A. DTG’s Representation Of Property Owner Was A Misrepresentation Of A Relevant Fact

Section II(B) of the NOI, titled “Property Information,” asks the applicant to list the site’s Property Owner. The instructions for Section II(B) instruct the applicant to “list the complete, legal name of the current property Owner(s).” (emphasis added). DTG wrote “see above” to answer Section II(B) of the NOI. The above line listed DTG as the Project Owner/Operator. The ALC found this to be a representation that DTG owned the

Department. An NOI shall be accompanied by all pertinent information as the Department may require...”).

²⁰ 24 S.C. Code Reg. 61-9 §§ 122.28(d)(3) (“Material submitted shall be complete and accurate”); § 122.28(d)(4) (“Any NOI form submitted to the Department shall be signed in accordance with this Section”); § 122.28(d)(7) (certification requirement for signatures); § 122.41(o) (“Any person making application for a NPDES discharge permit or filing any record, report, or other document pursuant to a regulation of the Department “shall certify that all information contained in such document is true.”)

²¹ The ALC made no findings that the misrepresented information would have had no tendency to affect the outcome of the permit decision.

site. The ALC found that DTG did not own the site. (Order 10-11). Instead, the ALC found that Jasper Station was the property owner. The ALC did not make a finding that if Jasper Station had been accurately listed then there would be no tendency to affect the DHEC's permit decision.

Moreover, such a finding would not be supported by the evidence. The only evidence as to whether this information would have had a tendency to impact the Department's decision on the permit was Ms. Nodolf's testimony. Ms. Nodolf testified that if the correct property owner had been listed, she would have seen their prior permit application for the Site in EFIS and that the Department was in the process of investigating land disturbance, including wetland fill, without a permit on the site. She testified that this would have resulted in additional reviews and would have affected DHEC's outcome on the permit application.²² Her testimony was not rebutted. This makes the information relevant using the standard discussed above. The ALC erred in finding that this false statement of fact was not a misrepresentation of a relevant fact.

Moreover, since this information is required by regulation, it is relevant as a matter of law. The ALC's assertion that nothing in Reg. 61-9.122.21 or in the general permit requires the disclosure of the property owner's name is error. Section 122.21(f)(4) specifically requires the applicant to disclose the site's "ownership status." The ownership status of the site was that Jasper Station owned it and DTG had entered into a purchase agreement with Jasper Station for the site. This fact was misrepresented. Moreover, Regulation 61-9 requires applicants to use the form provided by DHEC. The General Permit also requires the applicant to submit a complete NOI. The NOI requires

²² See Footnotes 26 and 27.

the applicant to list the current property owner. Thus, the ALC's order is wrong when it states that this information is not required by regulation. Both the regulation and the general permit require the applicant to list the property owner. The property owner is relevant as a matter of law.²³

The ALC also attempted to justify DTG's misrepresentation as reasonable because DTG is the project owner/operator and would have eventually become the property owner if the sale had closed when the work was performed. The ALC was persuaded by some examples Respondents provided that they thought to be similar

²³ In Durant v. S.C. Dept. of Health and Environmental Control, the circuit court affirmed the decisions of the ALC and the Coastal Zone Management Panel to deny Durant's critical area permit application for a dock near Brookgreen Gardens and Huntington Beach State Park. Durant v. South Carolina Dept. of Health & Env'tl. Control et al., 2001-CP-22-248, Order Filed Nov. 12, 2002 (Cottingham, J.). In affirming the permit denial, the Circuit Court, the Honorable Edward Cottingham, ruled that DHEC "may properly deny any applicant that misrepresents a significant fact." *Id.* at 15. The applicant had represented that he was the sole owner of the lot to be attached to the proposed dock. *Id.* at 15-16. In fact, the applicant had a partner that also had an ownership interest in the lot. Judge Cottingham held that:

"these misrepresentations are very important to the proper operation of the permitting process. Without the Petitioner's property being a party to this proceeding, OCRM, PRT, Brookgreen, the Administrative Law Judge division and this court system are all subject to another application from the Petitioner's partner related to this same lot. The interests of consistency and of administrative and judicial economy require that the Petitioner's partner be a party to the Petitioner's application and be bound by all decisions made with respect to that application. By incorrectly representing the state of title to the lot to be attached to the proposed construction, the Petitioner frustrated those interests. Similarly by [sic] representing incorrectly that he had title to the land that extended to the high water mark, the Petitioner prevented OCRM from notices as required of it by [regulation]. Because the Petitioner's application incorrectly represented facts that are essential to the fair and efficient administration of the permit system, OCRM's procedures, along with basic principles of fairness, authorizes the denial of the Petitioner's application."

Id. at 16-17. Judge Cottingham's decision was subsequently affirmed by this Court on other grounds. Durant v. South Carolina Dept. of Health and Environmental Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004). DHEC submits that the misrepresentations by DTG are even more significant than the misrepresentations by Mr. Durant.

practices.²⁴ While the ALC's approach to ask for the eventual property owner may be a reasonable approach if the ALC was the agency creating the form, the ALC does not create the form. The regulations require the applicant to use the form created by DHEC. The NOI is the form created by DHEC that DTG was required to complete. The applicant is required by regulation and the general permit to fill out the NOI completely, accurately, and truthfully. DHEC's form is the one that the regulation required the applicant to fill out, with complete accurate and truthful answers. The NOI requires the applicant to provide the current owner. What the ALC would ask for if the ALC was creating the form is irrelevant.

In addition, the ALC reasoned that it makes sense to list the Project Owner/Operator as the Property Owner since the permit will be issued to the Project Owner/Operator. The form recognizes that the permit will be issued to the Project Owner/Operator, but it still requires the applicant to list the current property owner. Under this rationale, the answer to questions II(A) and II(B) would always be the same, rendering the second question redundant. If DHEC had intended that the project owner/operator would always be the property owner, DHEC would not have asked both

²⁴ Respondents' title examiner conceded that DHEC would have had no way of knowing whether the representations in the examples provided by Respondents were false representations as to ownership. Respondents only came to such conclusion after reviewing an extensive volume of permit files and forwarding a large number of the files reviewed to a title examiner. DHEC neither employs a title examiner nor is authorized to do so. Moreover, as Justice Holmes explained, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, **whether it usually is complied with or not.**" Texas & P. Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622, 623 (1903) (emphasis added). Here, what ought to be done is fixed by Regulation 61-9 and the General Permit, which require the applicant to fill out the form created by DHEC. This form requires the current property owner.

questions.²⁵ Regardless, the NOI requires the applicant to list the current property owner. DTG misrepresented this information.

DTG's misrepresentation of the property owner on the NOI provides an independent ground for termination of coverage warranting reversal of the ALC's decision.

B. DTG's Representation That No Environmental Permits Had Been Applied For Or Obtained Was A Misrepresentation Of A Relevant Fact.

Section III(I) of the NOI requires the applicant to "list all state and federal environmental permits or approvals applied for or obtained for this site." The instructions for Section III(I) are clear. They warn that "if the provided information is inaccurate, NPDES coverage may be invalid." (Pets. Ex. 11). Moreover, the instructions direct the applicant "to see § 122.21(f) of regulation 61-9" and offer a link to the regulation. § 122.21(f) reiterates the requirement that an applicant list "all permits or construction approvals received or applied for under," among other permitting programs, "the NPDES program under CWA." DTG's NOI left Section III(I) blank. This represented that there had been no environmental permits applied for or obtained under any of the programs listed in § 122.21(f) of Regulation 61-9. The ALC found that Jasper Station had previously submitted an application for NPDES permit coverage for the site. If the ALC had applied the correct legal standard, the ALC would have concluded that DTG's answer to Section III(I) was a misrepresentation of a relevant fact.

The ALC did not make a finding that this if the Jasper Station permit had been listed under Section III(I), it would have had no tendency to alter the decision DHEC

²⁵ See Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (stating it must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something.)

made on DTG's application for NPDES permit coverage. This finding of fact would be required to reach a conclusion that the misrepresentation that there had been no permits applied for is not grounds for termination. The ALC did not make this finding because such a finding would not be supported by the evidence.

Moreover, as discussed above, Ms. Nodolf testified that if the Jasper Station permit had been listed in the NOI, she would have been aware of the permit and that DHEC was investigating land disturbance (including the fill of wetlands) without a permit on the Site.²⁶ She testified that she would have done additional reviews and would

²⁶ In her testimony, Ms. Nodolf, the stormwater section project manager primarily responsible for the review of DTG's application, explained that the NOI information is inputted into the Department's "Environmental Facility Information System" (EFIS), a computer database the Department uses to process permit applications. DHEC exhibit 37a displays the main EFIS screen for the DTG permit that is the subject of this action. Ms. Nodolf explained that her routine is to click the main screen's "site info" button, which brings up the screen shown in DHEC exhibit 37b. Next to the listed landowner is a "D" button, which brings up details about the landowner. This button loads a Company Update screen when clicked, showing important information concerning the entity listed as landowner. This information includes all permitting history related to the entity, in addition to any violations or enforcement actions levied against it. Because the NOI listed DTG as the property owner, DTG was shown as such in screen 37b. Accordingly, the company update for DTG came up when Ms. Nodolf clicked the "D" button. (DHEC Ex. 37h). Ms. Nodolf explained that after looking at DTG's permit history (DHEC Ex. 37i) she was satisfied that none of DTG's existing permits implicated concerns for this site.

DTG's misrepresentation of this relevant fact prejudiced the Department. If Jasper Station was accurately listed as the property owner on the NOI, then Jasper Station would have appeared as the landowner in EFIS. Had this been the case, then the Company Update for Jasper Station (rather than for DTG) would have loaded when Ms. Nodolf clicked the "D" button. (DHEC Ex. 37c) The company update shows the entity's permitting history and enforcement history, including Jasper Station's prior permit application (which had been denied by DHEC) and an ongoing investigation for land disturbance without a permit. (DHEC 37c, 37d, 37e). Further, Jasper Station's Company Update would have included a violation, which in turn would have informed Ms. Nodolf that the Department was investigating an unpermitted land disturbance at that site. (DHEC 37c, 37f). The violation entry was created and entered into EFIS on February 12, 2009, prior to Nodolf's review of DTG's NOI in late March of 2009. Ms. Nodolf would have been aware of both Jasper Station's violation and suspect permitting history if it was

have reached a different decision on DTG's permit application.²⁷ This was the only evidence addressing what tendency this information would have had on the Department's decision had the information not been misrepresented on the NOI.²⁸ Using the test provided by the ALC, since this information is required by regulation, Jasper Station's prior NPDES permit application is relevant as a matter of law and it was a misrepresentation for DTG to represent that there had been no prior application.

The ALC justified DTG's misrepresentation of the site's permitting history by finding that DTG may have correctly answered Section III(B) of the NOI. Section III(B) of the NOI asks whether a project is properly considered part of a Larger Common Plan (LCP). According to Department instructions regarding Section III(B), the applicant is specifically asked to list the previous state permit numbers of other phases of the LCP.

correctly listed as the Property Owner on the NOI. As Ms. Nodolf explained, this would have prompted additional reviews and a different decision on the permit. Because the Department likely would have wanted to know this fact in determining whether to issue its permit, the fact is relevant. Thus, DTG's misrepresentation of this relevant fact provided proper grounds for permit termination.

²⁷ DHEC reviews the application for NPDES permit coverage for consistency with the state Coastal Management Program (CMP). S.C. Code Ann. § 48-39-80(B)(11); *Spectre, LLC v. S.C. Dep't of Health and Env'tl. Cntrl.*, 386 S.C. 357, 688 S.E.2d 844 (2010) (holding the CMP governs isolated wetlands and that coastal zone consistency certification is necessary in order to obtain NPDES permit coverage in the coastal zone). There are policies in the CMP governing commercial activities in wetlands. In order to obtain coastal zone consistency certification, the applicant must demonstrate that there are no feasible alternatives and that the activity is water dependent. *CMP, Ch. III(C)(3)(IV)(1)(b)* ("*commercial proposals which require fill or other permanent alteration of salt, brackish or freshwater wetlands will be denied unless no feasible alternatives exist and the facility is water dependent*). Since these wetlands are valuable habitat for wildlife and plant species and serve as hydrologic buffers providing for storm water runoff and aquifer recharge, commercial development is discouraged in these areas. The cumulative impacts of the commercial activity which exists or is likely to exist in the area will be considered.") (CMP, p. III-40) (emphasis added).

²⁸ The Order finds in paragraph 33 that there may have been some lack of conformity among DHEC staff in how they referenced the Jasper Station permit on internal documents. This is irrelevant, as DTG made no effort to list the Jasper Station permit applications in Section III(I) as instructed.

DHEC has not challenged the accuracy of DTG's answer to Section III(B) of the NOI. Whether DTG correctly answered Section III(B) of the NOI has no bearing on whether DTG misrepresented its answer to Section III(I). The ALC's rationale renders one of the two questions on the NOI redundant.²⁹ This was error of law.

Since the regulations and the form require DTG to list Jasper Station's prior application for NPDES coverage, DTG's false representation that there were no such applications is an independent ground for termination of permit coverage warranting reversal of the ALC's decision.

C. DTG's Representation That No Notice To Comply Or Notice Of Violation Had Been Issued Was A Misrepresentation Of A Relevant Fact

Section III(G) of the NOI requires DTG to inform DHEC if DHEC has issued any notice of violation or notice to comply for the site. The instructions state "select yes if DHEC has issued a notice to comply or notice of violation for the site or any site within the LCP. Provide additional information about the notice (e.g., order number) and a copy of correspondence with DHEC regarding the notice." DTG checked "No." The ALC found that the November 5, 2008 warning notice from DHEC was issued for the site. However, the ALC found that "nowhere in the letter is it designated as a "Notice of Violation or Notice to Comply." DHEC acknowledges that the caption of the November 5 letter is a "Warning Notice," and not a "Notice of Violation" or "Notice to Comply." But the ALC's reasoning puts form over substance. The law puts substance over form. See South Carolina Ins. Co. v. Barlow, 301 S.C. 502, 508, 392 S.E.2d 795, 798 (Ct. App. 1990) ("To hold otherwise, would amount to a sacrifice of substance to form.").

²⁹ See Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (stating it must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something.)

The substance of the letter clearly puts Jasper Station on notice that Jasper Station was in violation of the Pollution Control Act and must comply with the law:

Be advised that based on recent inspections conducted on October 15, 2008 and October 23, 2008, the Department has determined that land disturbing activities have been initiated on your site without NPDES coverage for storm water discharges. According to Water Pollution Control Permits, 24 S.C. Code Ann. Regs. 61-9.122.26(a) (Supp. 2007), you are required to apply for and obtain a [NPDES] permit prior to initiating land-disturbing activity. Please note that such actions are considered unlawful and place you in violation of the Pollution Control Act, S.C. Code Ann. Section 48-1-90(a)(2008).

Pets. Ex. 32 (Nov. 5 letter) (emphasis added). The above language clearly put Jasper Station on notice that it was in violation of the Pollution Control Act. The letter also noticed Jasper Station to comply with the Pollution Control Act:

You are hereby requested to discontinue any work activity at this site other than installation and maintenance of storm water, sediment and erosion control measures as directed by your design engineer for stabilization...[a]s indicated in my letter dated October 28, 2008, this matter is being referred to Enforcement Staff for further consideration. Please respond within three (3) working days to this office...with a time frame to bring this project into compliance.

Pets. Ex. 32 (Nov. 5 letter). (emphasis added). It cannot reasonably be disputed that the existence of this letter is not relevant to a subsequent application to conduct land disturbance on the very same site while DHEC investigates land disturbance (including wetland fill). This representation is an independent ground for termination of permit coverage warranting reversal of the ALC's decision.

D. Alternatively, DTG's Failure To Disclose The November 5, 2008 Warning Notice Was A Failure To Disclose All Relevant Information.

Even if the Court puts form over substance and concludes that Section III(G) did not contain a misrepresentation because the title of the November 5 letter was not "Notice to Comply" or "Notice of Violation," it is a relevant fact that was not disclosed during the

permitting process. DTG did not include the November 5, 2008 letter with any of its application materials. It cannot be argued that the November 5 letter was not a relevant fact. In addition, in January 2009, Thomas & Hutton (DTG's and Jasper Station's mutual permitting consultant) prepared an exhibit that showed the location of the wetland in relation to the entirety of the Jasper Tract and the Site. (Pets. Ex. 9). The ALC found this to be particularly useful in showing the relationship between the DTG site, the Jasper Station permit application, and the investigation into land disturbance without a permit. Ryan Smith testified that he did not include Exhibit 9 in the permit application. Thus, the alternative ground under section 122.64(a)(2), "the permittee's failure in the application or during the permit issuance process to disclose full all relevant facts," exists as an independent basis to reverse the ALC's decision.

E. The Fact That There Are Now Wetlands On The Site Further Reveals The Relevance of The Misrepresentations In Sections II(B), III(I) and III(G), and Also Provides An Independent Ground For Termination.

The ALC concluded that "the issue of the sufficiency of the information provided by DTG in Section IV of the NOI related to wetlands is not before [the] Court." (Order pg. 21). The ALC did not consider the wetlands on the site in determining the relevance of the other misrepresented information. While DHEC agrees that it could bring another termination action against DTG based on the wetlands, DHEC submits that the ALC erred in not considering the wetlands. First, the wetland issues are probative in further showing the relevance of the information misrepresented in Sections II(B), III(G), and III(I) of the NOI. In addition, the fact that there are now wetlands on the site provides an independent basis for termination and the ALC was free to terminate on that basis. The ALC erred in holding otherwise.

DTG represented in Section IV of the NOI that there were no wetlands on the site. This representation was based on a January 16, 2009 letter from the Corps, a letter which was obtained only after Malphrus Construction reportedly cleared, mucked, and discharged some fill material into the wetland.³⁰ Malphrus Construction, owned by the same three brothers that own DTG, conducted the land disturbing activities pursuant to a contract Malphrus had with Jasper Station; the work was done some time after DHEC's September 30, 2008 denial of Jasper Station's NPDES permit application. DHEC was in the process of investigating Jasper Station's land disturbance activities on the site when the new letter was obtained from the Corps and when the DTG NOI was submitted. Though DHEC did not terminate based on the representations in Section IV, the wetland issues help show the relevance of the other information misrepresented. Regardless of the accuracy of DTG's NOI when it was submitted in February 2009, Respondents stipulated that DHEC's Jeff Thompson observed wetlands during site visits on July 28, 2009 and December 17, 2009.

Though DHEC requires applicants to provide a Corps' wetland delineation, DHEC is not restricted to wetlands delineated by the Corps of Engineers; DHEC's jurisdiction under the Pollution Control Act and Coastal Zone Management Act extends to waters of the state, which includes isolated wetlands not subject to the jurisdiction of the Corps under the Clean Water Act. See Georgetown County League of Women Voters v. Smith Land Co., Inc. -- S.C. --, -- S.E.2d --, 2011 WL 2682437, 1 (2011) (holding that the Pollution Control Act specifically defines the waters subject to regulation under the Act to include isolated wetlands, and that DHEC has jurisdiction over such wetlands

³⁰ Malphrus was instructed by Jasper Station to only fill the low areas of the wetland.

under the Pollution Control Act regardless of Corps' regulation over such wetlands under the Clean Water Act.); Spectre, LLC v. S.C. Dep't of Health and Enviro. Cntrl., 386 S.C. 357, 688 S.E.2d 844 (2010).

DTG was informed that the NOI would be unlikely to get much scrutiny if they could represent that there were no wetlands on the site. Ms. Shahid wrote the following in an email to Ryan Smith on October 21, 2008:

Here are my suggestions on how to compete [sic] the NOI:

Section II.B: Previous state permit/file number: 27-02-02-02/27-06-08-01

(Ryan included the previous Red Oaks number and I added the previous Jasper Station number.)

Section IV. Waterbody Information: "No" Jurisdictional Wetlands

"No" Non-Jurisdictional Wetlands

But-in order to indicate "No" on the wetlands section we need a new "No Wetlands" letter from the Corps.

[...]

This would constitute full disclosure to OCRM: including the Jasper Station permit # and getting the Corps to revise their earlier wetland letter. It might trigger some reaction from OCRM, but *it is also possible that the application would go through without too much scrutiny since there will be no wetland impacts involved.*

(DHEC Ex. 11) (emphasis added). DTG did not follow Ms. Shahid's advice and left the Jasper Station permit off the NOI. DTG also did not follow Ryan Smith's advice in his October 16 letter where he suggested that they "indicate wetlands exist on site, submit the current plat and JD, and accompany the package with a letter stating what events have previously occurred." Instead, DTG procured a new letter from the Corps, indicated no wetlands, and misrepresented the property owner, misrepresented that no environmental permits had been applied for, and misrepresented that no notice to comply or warning notice had been issued. In addition to the "no wetland" representation resulting in a

decreased level of scrutiny, DTG's other three misrepresentations (of owner, permitting history, and enforcement history) decreased the likelihood that DHEC would discover that the no wetland letter was obtained only after wetlands were illegally filled. If any of this information had been accurately represented in the NOI, Ms. Nodolf would have pulled the Jasper Station permit and known that the no wetland letter was a result of Jasper Station's unlawful fill of the wetland. This would have triggered additional review.³¹

Several cases hold that the ALC is not restricted to the agency's action in a contested case. See Brown v. S.C. Dept. of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002) ("Although this case reached the ALJ in the posture of an appeal, the ALJ was not sitting in an appellate capacity and was not restricted to a review of OCRM's permit decision.") (citing Reliance Ins. Co. v. Smith, 327 S.C. 528, 489 S.E.2d 674 (Ct. App. 1997)).

When it came to light that there are still wetlands on the Site, based on DTG's stipulation that Jeff Thompson observed wetlands on the Site, an independent ground for termination arose. Since DTG certified that there are no wetlands on the site, it is a condition of DTG's permit coverage that there be no wetland on the site. See 24 S.C. Code Ann. Reg. 61-9, § 122.41(o). Based on Respondent's stipulation that there are wetlands on the site, this condition of permit coverage cannot be complied with. DTG's NPDES permit coverage does not authorize the discharge of stormwater or fill material into wetlands or waters of the state. Ryan Smith agreed that DTG's application did not seek to discharge stormwater or fill into wetlands. Rather than sending the applicant and

³¹ See Footnotes 26 and 27.

DHEC back through the administrative process, the ALC was free to sustain DHEC's termination of DTG's permit coverage on that basis alone. Therefore § 122.64(a)(1) provides an independent ground for termination, warranting reversal of the ALC's decision.

III. THE ALC COMMITTED REVERSIBLE ERROR BY NOT GRANTING THE DEPARTMENT'S MOTION TO DISMISS SINCE THE PERMITTEE NO LONGER HAS AN INTEREST IN THE SITE.

Prior to the hearing, DHEC filed a motion to dismiss because this dispute was rendered moot by DTG's April 8, 2010 termination of the purchase agreement with Jasper Station. (DHEC Ex. 10). Jasper Station's 30(b)(6) designee testified that Jasper Station did not know whether DTG had an interest in negotiating a new purchase agreement if DHEC's termination was reinstated. He testified that it would be speculative to guess and that those conversations had not been fruitful. DTG was the only party to the permit—a contract between DHEC and DTG. Thus this dispute has been rendered moot as to DTG. Jasper Station does not have standing to revive it. Jasper Station cannot force DHEC to enter into a contract with another party who has no interest in the property.

In order for a litigant to have standing to bring an action, it must "be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action..." Powell ex. Rel. Kelley v. Bank of America, 379 S.C. 437, 445, 665 S.E.2d 237, 241 (Ct. App. 2008); Commander Health Care Facilities, Inc. v. SCDHEC, 370 S.C. 296, 301 634 S.E.2d 664, 666, (Ct. App. 2006). At the bare minimum, constitutional standing requires that the litigant sustain a direct injury or the immediate danger that a direct injury will be sustained. Id. The South Carolina Supreme

Court has articulated a stringent test for standing. To prove standing, DTG carries the burden of establishing that (1) it suffered an injury in fact; (2) the injury and the conduct complained of are causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. Id.

Neither DTG nor Jasper can meet the three elements of standing. Powell provides a helpful illustration of this Court's refusal to grant standing when a business has no ownership in an entity. In Powell, Bank of America (BOA) appealed an order apportioning interpleaded funds. The Court of Appeals held that BOA lacked standing to appeal the order, taking care to emphasize that BOA had no ownership interest in the interpleaded funds. Nonetheless, BOA argued that it had standing because a different apportionment to one of the parties would reduce its liability in the underlying tort action. The Court of Appeals disagreed, holding that such a tangential connection fell "far short of the 'injury in fact' standing requirement." Id.

Like BOA, Jasper Station's interest in hoping to have a better basis to negotiate a new purchase agreement with DTG or some other entity is too tangential a connection to provide standing. The lack of DTG's NPDES permit does not preclude Jasper Station from entering a purchase agreement with DTG or some other individual and subsequently submitting a new NPDES permit application that does not contain misrepresentations of fact. Thus, there was no justiciable controversy and the ALC erred by failing to dismiss the Department's Motion to Dismiss based on DTG's lack of standing.

IV. THE ALC DEPRIVED DHEC OF FULL DISCOVERY BY DENYING DHEC'S MOTION TO COMPEL PRODUCTION OF TWO DOCUMENTS WHICH WERE IMPROPERLY WITHHELD UNDER AN INAPPLICABLE CLAIM OF PRIVILEGE.

DHEC filed a motion to compel production of two documents that were improperly withheld by Respondents during discovery. The ALC's ruling from the bench that these documents were subject to privilege is contrary to law. In doing so, the ALC deprived DHEC of discovery provided by the rules.

"Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 186, 708 S.E.2d 787, 795 (Ct. App. 2011) (citing Samples v. Mitchell, 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct. App. 1997)). "Where these rights are not accorded, prejudice is presumed and unless the party that failed to comply establishes a lack of prejudice, reversal is required." Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 308, 609 S.E.2d 838, 842 (Ct. App. 2005).

A discovery violation occurred in this case because DHEC was entitled to production of the two documents under the discovery rules, but Respondents improperly withheld these two documents. After serving requests for production and a subpoena for documents, Respondents produced a privilege log on August 26, 2010. Counsel for Respondents and Appellant consulted and came to agreement on most of the documents, but Respondents counsel continued to withhold two documents under a claim of work product privilege. The ALC denied DHEC's motion to compel but admitted the documents under seal as Court's Exhibit 1. DHEC asserts that whatever work product protection may have applied was waived when the documents were shared with Ryan Smith. *See Privilege Log attached to Motion to Compel.*

The work product doctrine “protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party.” Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); See Rule 26(b)(3), SCRPC; Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385(1947). It is a general rule that “disclosure of privileged information waives the applicable privilege.” See Tobaccoville, 387 S.C. at 295, 692 S.E.2d at 531. Assuming that the two documents were created in anticipation of litigation, they were shared with Thomas & Hutton Engineering, an entity that Respondents and Respondents’ counsel lacked control over.³² This constituted waiver of the privilege.

Because the ALC denied DHEC discovery to which it was entitled, prejudice is presumed and the burden is on Respondents to show the lack of prejudice to avoid reversal.

V. THE ALC ERRED BY TAKING JUDICIAL NOTICE OF ALLEGATIONS BY JASPER STATION IN PLEADINGS IN A CIVIL ACTION PENDING IN COLLETON COUNTY AND TREATING THOSE ALLEGATIONS AS FACT.

The ALC’s Order took judicial notice of allegations contained in the litigation between Jasper Station and the Department pending before the Colleton County Court of Common Pleas (circuit court). The ALC treated Jasper Station’s allegations as facts. While the existence of the circuit court action is relevant to the case at hand in that it brings various DTG misrepresentations to light,³³ the ALC cannot make findings of fact

³² DHEC sought documents from Respondents that were in the possession of Thomas & Hutton. Respondents’ trial counsel instructed DHEC that a subpoena to Thomas & Hutton was necessary to obtain their production. Thomas & Hutton had separate counsel aid in the production of documents.

³³ The pending litigation filed by Jasper Station is relevant because it proves that: (1) Jasper Station had applied for NPDES permit coverage for the same site that is in issue in this case, and that DTG misrepresented a relevant fact when it certified (in Section III(I)

based upon allegations found in pleadings. Judicial notice “takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge.” Moss v. Aetna Life Ins. Co., 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976) (citing State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935)). A court may not take judicial notice unless the fact in question is either (1) of such common or general knowledge that it is accepted by the public *without qualification or contention*, or (2) its accuracy is capable of verification by reference to readily available sources of *indisputable reliability*. Moss, 267 S.C. at 370, 228 S.E.2d at 108 (emphasis added). Until an allegation in a pleading is actually litigated and sufficiently proven, it remains just that: an allegation and not a fact.

Using the circuit court action’s allegations, the ALC made findings that have no bearing on whether cause exists for permit termination. For example, the Order found that DHEC took no action on Jasper Station’s permit application despite Jasper Station repeatedly notifying DHEC that it claimed a permit by operation of law. (Order pg 8, paragraph 2). This finding is representative of the Order’s prejudicial recitations and findings of fact based on the pleadings in the pending Jasper Station action.³⁴ The ALC’s taking judicial notice of allegations as a basis for a finding of fact is error.

The allegations contained in the circuit court complaint cannot meet the standard for applying judicial notice articulated in Moss. First, the allegations may not be judicially noticed unless they are of such common or general knowledge that the public accepts them “without qualification or contention.” Moss, at 370. The public cannot

of the NOI) that no prior application for NPDES permit coverage existed; and (2) the Department had issued a notice of violation and to comply for the site.

³⁴ See pgs 3-4 of the Order.

accept the Jasper Station allegations as true. Jasper Station's circuit court complaint simply makes allegations, which are "formal statement[s] of factual matter[s] as being true or provable, *without [their] having yet been proved.*" Black's Law Dictionary (9th Ed. 2009) (emphasis added). Because the allegations are currently being contested in a judicial proceeding, they cannot be accepted without qualification or contention. Second, the allegations may not be judicially noticed unless their accuracy can be verified by sources of "indisputable reliability." Moss at 370. Allegations in a complaint do not have the requisite indisputable reliability. In fact, they possess no indicia of reliability—that is why their veracity is being disputed in the circuit court action. Moreover, the timeliness of DHEC's actions on Jasper Station's permit application has no bearing on DHEC's termination of DTG's permit. DHEC asks that these findings be vacated and the matter reversed.

Conclusion

The General Assembly charged the Department with administering, among others, the Pollution Control Act, the Stormwater Management and Sediment Reduction Act, and the Coastal Zone Management Act. Each Act DHEC administers includes a charge to DHEC to protect the public health and environment by regulating certain activities. Many of the statutes DHEC administers requires persons desiring to conduct activity in environmentally sensitive areas to obtain a permit or other approval from DHEC. DHEC's permitting process is public and transparent. It attempts to strike a balance between protecting the health and facilitating progress. It requires public notice of the permit application and allows members of the public and other resource agencies to

provide written comment and provides applicants and other interested parties rights of appeal.

An integral part of this process is the requirement that the applicant provide full, complete, and accurate information to the Department. § 122.64. This obligation presents both the Department and the interested public with the opportunity to review an application and make comments and decisions that comport with the substantive requirements of the law and the facts on the ground. As the South Carolina Supreme Court recently stated in S.C. Coastal Conservation League v. S.C. Dept. of Health and Env'tl. Control, this process of full disclosure is the linchpin that allows the Department to effectuate its mandated mission:

DHEC is responsible for managing the welfare of our public health systems and environment. *In discharging these duties, DHEC has implemented practices and procedures which foster transparency and full disclosure in all matters regarding its regulatory authority.* To this end, DHEC has enacted various notification regulations ...

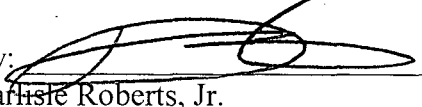
Regulation 61–101 serves to further DHEC's policy goals including providing notice to the public, fostering openness, and keeping the public informed about important environmental decisions. ...

390 S.C. 418, 429-30, 702 S.E.2d 246, 252-53 (2010) (emphasis added). Regulation 61-9 fosters the policies of the Pollution Control Act in part by requiring applicants seeking NPDES permit coverage to use the forms provided by DHEC and to answer the questions on the forms completely and accurately and with full disclosure. This facilitates DHEC's job of processing the permit as well the ability of the public to review public notices and comment on an application within the short time frame provided for reviews. Permit coverage may be terminated if the form contains a misrepresentation of a relevant fact or if information is not fully disclosed. DHEC's ability to effectively regulate is obfuscated

when applicants submit application forms that contain misrepresentations of fact. Knowing the property owner, permitting history, and enforcement history of a site are relevant facts that enable DHEC to meet its statutory obligations when acting on permit applications. The ALC's rationale that it is acceptable to misrepresent this information on the NOI so long as there are latent clues elsewhere in the application materials is contrary to the clear language of Reg. 61-9 § 122.64(a) and the purpose and policies of the Pollution Control Act. Each of DTG's misrepresentation on the NOI provides an independent basis to reverse the ALC's decision. For the reasons stated herein, DHEC respectfully requests that the Court reverse the ALC's decision and reinstate DHEC's decision to terminate DTG's permit coverage.

Respectfully submitted,

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Charleston, South Carolina
August 8, 2011

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
Hon. Carolyn C. Matthews, Administrative Law Judge
ALC Docket No.: 10-ALJ-07-0217-CC

DTG Holdings, LLC and
Jasper Station Associates, LLC,

RECEIVED

Respondents,

v.

JAN 10 2012

South Carolina Department of Health
and Environmental Control,

SC Court of Appeals

Appellant.

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I. STATEMENT OF ISSUES ON APPEAL

1. Whether there is substantial evidence in the record before the lower court to support the lower court's findings and conclusions that Respondents did disclose fully all relevant facts to Appellant in the permit application process to obtain General Permit coverage for the development known as Red Oaks Plaza Phase 3.
2. Whether there is substantial evidence in the record before the lower court to support the lower court's findings and conclusions that Respondents did not misrepresent relevant facts to Appellant in the permit application process to obtain General Permit coverage for the development known as Red Oaks Plaza Phase 3.
3. Whether the lower court's ultimate conclusions that Appellant failed to provide sufficient evidence to support termination of NPDES permit coverage under S. C. Code Reg. 61-9.122.64(A) are legal or factual, thus dictating this Court of Appeals' standard of review under S. C. Code Ann. § 1-23-610(B).
4. Whether the termination of a Purchase Agreement between Respondents for the property that is the subject of this appeal deprived the lower court of jurisdiction to hear and determine the contested case.
5. Whether the Appellant was deprived of full discovery.
6. Whether the lower court placed improper weight on matters judicially noted.

II. STATEMENT OF THE CASE

This appeal arises from a contested case which originated when the Appellant, the South Carolina Department of Health and Environmental Control ("SCDHEC"), terminated permit coverage obtained by Respondents.

The Respondent, Jasper Station, LLC, ("Jasper Station"), owns certain real property located in Hardeeville, Jasper County, South Carolina, described as 18.4 undeveloped acres and bearing TMS 080-00-03-065 (the "18.4 Acre Parcel"). On 8 April 2008, Jasper Station entered into a Purchase Agreement with the Respondent, DTG Holdings, LLC, ("DTG"), for the purchase of the 18.4 Acre Parcel.¹ (*DHEC Exh. 2*) Pursuant to the Purchase Agreement, DTG submitted an application to SCDHEC on 10 February 2009, seeking permit coverage for the anticipated stormwater discharges arising from construction, under SCDHEC's General Permit identified as SCR100000. DTG sought permit coverage for the project it described as Red Oaks Plaza Phase 3.

SCDHEC granted the permit on 27 March 2009, but on 21 August 2008, SCDHEC notified DTG it intended to terminate permit coverage and did so as of 22 December 2009. The underlying contested case challenging termination was filed on 21 January 2010. The South Carolina Administrative Law Court ("ALC") conducted hearings on 1 September 2010, and 20 October 2010. By order issued 11 February 2011, the ALC issued reversed SCDHEC's termination and reinstated permit coverage.

¹ The Purchase Agreement was terminated prior to the ALC hearing. However, under the terms and conditions of the Purchase Agreement, upon termination Jasper Station retains all entitlements obtained for the property, which includes the entitlements arising from the ALC's reinstatement of permit coverage.

SCDHEC filed its Motion to Reconsider and Alter or Amend on 28 February 2011.² The ALC issued an order denying SCDHEC's Motion to Reconsider and Alter or Amend on 5 May 2011. This appeal followed.

III. Statement of the Facts

This appeal addresses procedures related to SCDHEC's stormwater permitting program, administered by SCDHEC's Bureau of Water ("BOW") and the Office of Ocean and Coastal Resource Management ("OCRM"). In accordance the Clean Water Act,³ National Pollutant Discharge Elimination System ("NPDES") permits are required for stormwater discharges. SCDHEC administers the NPDES permit program in the South Carolina.⁴ SCDHEC has promulgated regulations governing stormwater discharges arising from construction activities.⁵ To implement its authority to regulate stormwater discharges arising from construction activities, SCDHEC adopted the "*NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities*" (*Jasper Station Exh. 31*), identified as Permit No.: SCR100000 (the "General Permit").⁶ A party must obtain permit coverage under the General Permit prior to commencing any construction and/or any land-disturbing activities.

² The parties consented to waive the deadlines provided for in the Rules of Procedure for the Administrative Law Court. Rule 29(D), RPALC, affords a party 10 days from the date of notice of an Order to seek reconsideration, and requires that the ALC act within 30 days on the motion.

³ See 33 U.S.C. § 1342 (Thomson Reuters West 2010).

⁴ See 33 U.S.C. § 1342(b) (Thomson Reuters West 2010).

⁵ See S. C. Code Reg. § 61-9.122.26 (Thomson Reuters West 2009).

⁶ The General Permit combines the requirements of S.C. Code Reg. § 61-9 governing NPDES permits and S.C. Code Reg. §72-300 governing stormwater discharges and the obligation to design a Storm Water Pollution Prevention Plans (the "SWPPP"). (*Jasper Station Exh. 31*.)

In accordance with S.C. Code Reg. § 72-305(M): “Upon receipt of a completed application for sediment and stormwater management, the appropriate plan approval agency shall accomplish its review and have either the approval or review comments transmitted to the applicant within 20 working days. If notice is not given to the applicant or if action is not taken by the end of the 20 working day period, the applicants plan will be considered approved.” This regulation is also included in the General Permit as a term and condition. (*Jasper Station Exh. 31, p.4*).

This regulation is significant for understanding of the underlying dispute between the parties. The 18.4 Acre Parcel is part of a parent tract consisting of approximately 88 acres owned by Jasper Station (the Jasper Station Tract” or the “Parent Tract”). In a dispute presently pending in Colleton County Circuit Court between Jasper Station and SCDHEC,⁷ Jasper Station alleges SCDHEC failed and refuse to act on a stormwater permit application for the Parent Tract pending before SCDHEC for more than two years and, therefore, Jasper Station had permit coverage by default.⁸ Consequently, Jasper Station was authorized to conduct land disturbing activities on the 18.4 Acre Parcel,⁹ to prepare the site for sale to DTG. These land disturbing activities consisted of clearing, mucking, and filling portions of the 18.4 Acre Parcel, including six acres of isolated, non-federally jurisdictional freshwater wetlands located within the 18.4 Acre Parcel.¹⁰

⁷ See Jasper Station Associates, LLC v. SCDHEC (Colleton County Court of Common Pleas, Civil Action No. 2010-CP-15-0093).

⁸ See S.C. Code Reg. § 72-305(M) and the General Permit’s terms and conditions.

⁹ The 18.4 Acre Parcel was part of the larger Parent Tract and, in turn, covered by the default authorization permit authorization for stormwater discharge.

¹⁰ The United States Army Corps of Engineers reviewed the 88 acre parent tract and concluded, by letter dated 9 February 2006 (known as a “Jurisdictional Determination” or “JD”), the Parent Tract contained 31.17 acres of federally -defined freshwater wetlands which

As is alleged in the Colleton County pleadings, which the ALC noted, in mid-2006, Jasper Station submitted a request for permit coverage to undertake land disturbing activities on the Parent Tract under the General Permit¹¹ and repeatedly requested SCDHEC take action and/or update Jasper Station on the status of the request. Jasper Station sought to clear, muck, fill, and restore to original grade the 31 acre isolated, non-jurisdictional wetland located within the Parent Tract. SCDHEC refused to act on the permit coverage request for almost a year, at which point, by May 2007, Jasper Station claimed it had obtained permit coverage by default. In the third quarter of 2008, Jasper Station took measures to eliminate approximately six acres of wetlands located within the 18.4 Acre Parcel which is the subject of this appeal.

On 16 January 2009, the Corps of Engineers issued a JD, limited to the 18.4 Acre Parcel, and concluded that property did not contain any defined wetlands areas. DTG, after receiving this JD, submitted its NOI and supporting documentation to SCDHEC in order to obtain General Permit coverage for Red Oaks Plaza Phase 3. SCDHEC issued General Permit coverage to DTG.¹² When SCDHEC later discovered the 18.4 Acre Parcel was part of the Parent Tract, SCDHEC initiated the permit termination process. SCDHEC's failure to note the connection between the 18.4 Acre Parcel and the Jasper Station Parent Tract, however, did not result from any

were not subject to the Corps of Engineers' jurisdiction under the Clean Water Act. (Jasper Station Exh. 25) The 18.4 Acre Parcel included six acres of non-jurisdictional wetlands, part of the 31.17 acres referenced in the Corps of Engineers' 9 February 2006 JD.

¹¹ This is known as a "Notice of Intent" or "NOI".

¹² SCDHEC apparently did not realize the 18.4 Acre Parcel was part of Jasper Station's Parent Tract.

misrepresentations and/or lack of any disclosure by either Jasper Station or DTG and, therefore, SCDHEC's permit termination was improper.

Contents of NOI and Supporting Documentation

DTG hired a consulting firm to design its SWPPP and to submit its request for permit coverage under the General Permit to SCDHEC. Ryan Smith, a professional engineer employed by Thomas and Hutton Engineering Company's Savannah, Georgia office prepared DTG's submittal. On February 9, 2009, Darrel K. Callaway, who worked under Smith's supervision, submitted a NOI to SCDHEC, together with a set of site development plans, Plan Review Checklist, the applicable filing fee, a copy of the "Permanent Stormwater System Maintenance and Responsibility Agreement and Plan," a Stormwater Management model and report, the Corps of Engineers' 1/16/2009 JD, a digital project boundary for the 18.4 Acre Parcel, and applicable maps. (*Jasper Station Exh. 6; 9/1/2010 Trans.*, p.88, lines 1-15).

DTG made this submission for Red Oaks Plaza Phase 3. The 18.4 Acre Parcel was contiguous to a commercial development owned by entities related to DTG and known as Red Oaks Plaza. The 18.4 Acre Parcel was incorporated into the Red Oaks Plaza development master plan. (*9/1/2010 Trans.*, pp.100-101) Consequently, Mr. Smith concluded the 18.4 Acre Parcel was part of a "larger common plan," ("LCP") a term defined by SCDHEC in the Instructions it publishes with the NOI.¹³ (*Jasper Station Exh. 6; NOI, Part III.B, Instructions; 9/1/2010 Trans.*, pp.135-139).

¹³ SCDHEC states in its NOI Instructions that "If the site is part of a subdivision, industrial park, commercial park, *etc.*, then it is considered to be part of an LCP." (*Jasper Station Exh. 6*).

Upon determining that the property was part of an LCP currently owned by DTG or related entities, Mr. Smith filled out the NOI to reflect that DTG owned the property even though, at the time the NOI and supporting documentation was submitted, Jasper Station owned the 18.4 Acre Parcel, but it was under contract for sale to DTG. Mr. Smith testified his decision to show DTG as the property owner, instead of Jasper Station, was his belief that if property proposed for development is *subject to a purchase contract and a particular project is only going to be undertaken upon sale of the property*, then it is appropriate to list the entity intending to pursue the project who would own the property at the time the land disturbing activities and storm water discharges occur. (9/1/2010 Trans., pp.108-109).¹⁴

However, it is undisputed that other information submitted in support of the NOI clearly showed the 18.4 Acre Parcel was part of Jasper Station's Parent Tract. The NOI identified the 18.4 Acre Parcel with the TMS Number assigned the Parent Tract. The NOI provided coordinates and property location which are part of the Parent Tract. The NOI included the Corps of Engineers' 16 January 2009 JD which expressly referenced the 18.4 Acre Parcel as being part of the Parent Tract. The NOI included a digital boundary which showed the 18.4 Acre Parcel was part of the Parent Tract. The NOI included detailed engineering drawings and plans which showed the relationship of the 18.4 Acre Parcel with Jasper Station's Parent Tract. (Jasper Station Exh. 6; 9/1/2010 Trans., pp.____).

¹⁴ In addition to Mr. Smith's testimony, a review of OCRM permitting files demonstrated multiple other instances where NOIs were submitted showing project owner and property owner as the same entity, when at the time of the NOI submission, the property owner was actually another entity, not reflected on the NOI.

Furthermore, DTG, Jasper Station, and Thomas and Hutton had directly communicated with SCDHEC regarding the 18.4 Acre Parcel and its relationship to DTG.¹⁵ On 6 January 2010, just prior to the NOI's submission, Shannon Hicks, a SCDHEC employee, contacted Gabe Smith, a professional engineer and Thomas and Hutton employee working for DTG and Jasper Station. Ms. Hicks was inspecting the work done to fill the six acres of wetlands within the 18.4 Acre Parcel, and Gabe Smith sent Ms. Hicks a map showing the 18.4 Acre Parcel was part of Jasper Station's Parent Tract, and advising Ms. Hicks "the parcel in red is the 18-acre piece Malphrus cleared." (*Jasper Station Exh. 9*).

In addition to ownership information, the NOI seeks information regarding any past permitting history on the site. Consistent with his determination the 18.4 Acre Parcel was part of the Red Oaks Plaza LCP, Mr. Smith listed a state permit associated with development of Red Oaks Plaza when asked to disclose "*Previous state permit/file number.*" Mr. Smith left blank the request to "*list all state and federal environmental permits or approvals applied for or obtained for this site.*" Mr. Smith testified the omission of this information was an oversight, but that OCRM staff had advised him, upon review of the completed NOI, that the NOI application was administratively complete and did not express concern over the empty line on the form. (*Jasper Station Exh. ____*; 9/1/2010 Trans., pp.140-142):

It isn't clear, however, what information would be appropriately included in the line Mr. Smith inadvertently left blank on the NOI which, as noted, sought a list of "*all state and federal environmental permits or approvals applied for or obtained for this*

¹⁵ DTG is an entity formed by the Malphrus Family.

site.” (*Jasper Station Exh. 6*) While Jasper Station has claimed default permit coverage,¹⁶ SCDHEC has yet to acknowledge or recognize the permit coverage and continues to dispute that fact in Circuit Court. As is evident from the e-mail exchange between Ms. Hicks and Gabe Smith (*Jasper Station Exh. 9*), SCDHEC had conducted a series of investigations of the Jasper Station tract to determine if any land disturbing activities had been undertaken. These investigations are embodied in multiple SCDHEC “*Stormwater Management and Sediment Reduction Site Inspection Reports*.” (*Jasper Station Exhs. 7a,-7e*).¹⁷

Importantly, the SCDHEC inspector is required to indicate on the “*Stormwater Management and Sediment Reduction Site Inspection Reports*” whether the matters observed on the site warranted enforcement. The Inspector concluded on 26 July 2007, and on 14 February 2008, that no violations were observed and no corrective action was necessary. Upon observing land disturbance on 15 October 2008, 23 October 2008, and 6 January 2009, the Inspector noted in response to the inquiry as to whether “Any Enforcement Action to be taken” that enforcement was “to be determined.” It is clear from these reports, copies of which were provided to Jasper Station by the Inspector upon completion of the report, that SCDHEC had not initiated any

¹⁶ See S.C. Code Reg. § 72-305(M).

¹⁷ These Reports were created to reflect SCDHEC inspections which occurred on 26 July 2007, 14 February 2008, 15 October 2008, 23 October 2008, and 6 January 2009. These reports all include a line upon which the SCDHEC inspector is to list the “Permit #.” That line is blank on the 26 July 2007, form following Jasper Station’s declaration that it obtained permit coverage by operation of S.C. Code Reg. § 72-305(M). The form dated 14 February 2008 lists a permit number – 27-06-08-01- as do the forms dated 51 October 2008, and 23 October 2008. Nevertheless, the most recent form dated 6 January 2009, indicated “none” in the response to provide “NPDES Permit No.” and refers to 27-06-08-01 as the “State Tracking No.” The forms are, at best, confusing.

enforcement action against Jasper Station for the land clearing activity on the 18.4 Acre Parcel on 9 February 2009, when the DTG NOI and supporting application information was submitted. Consequently, in completing the NOI's section which asks whether "DHEC has issued a Notice to Comply or Notice of Violation" Mr. Smith indicated "No" in response. Although Ms. Hicks sent Dan Lynch, a representative of Jasper Station, a "Warning Notice" dated 5 November 2008, (*Jasper Station Exh. 32*) that "Warning Notice" indicates the matter was being "referred to enforcement." That status didn't change, as the later reports still indicated enforcement was "to be determined." (*Jasper Station Exhs. 7a-7e*). SCDHEC did not notify DTG or Jasper Station it was commencing an enforcement action based on the matters observed and reported in the various Inspection Reports until 9 June 2009, several months after DTG submitted the NOI and SCDHEC approved General Permit coverage. (*1/21/2010 Notice of Intent to Request Contested Case*).

Basis for Termination

South Carolina law provides, in pertinent part, as follows:

- (a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:
 - (1) Noncompliance by the permittee with any conditions of the permit;
 - (2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time.¹⁸

SCDHEC terminated DTG's NPDES permit coverage based on DTG's alleged misrepresentations in "Section II.B, Section III.G and Section III.I." (*Jasper Station Exh. 24.*) SCDHEC identified the following alleged misrepresentations:

¹⁸ See S.C. Code Reg. § 61-9.122.64.

1. DTG was not the property's owner-of-record;
2. TMS # 080-00-03-065 was currently part of an enforcement investigation with SCDHEC; and
3. The NOI for Red Oaks Plaza Phase 3 indicated no environmental permits or approvals had been applied for or obtained for this site, yet SCDHEC had denied a previous application for permit coverage under the 2006 CGP prior to filing the NOI.

SCDHEC concluded that "[t]hese facts [were] not accurately represented on the NOI for Red Oaks Plaza Phase 3." (Jasper Station Exh. 24).

Assuming arguendo the NOI was inaccurate,¹⁹ SCDHEC unjustifiably narrows the permit application to just the two page NOI form, and not the hundreds of additional pages which accompanied the NOI. (*Jasper Station Exh. 6*). In fact SCDHEC's NPDES Regulations place little emphasis on the alleged deficiencies which SCDHEC has noted above. There are specific permit application requirements for NPDES permits.²⁰ Of SCDHEC's identified three "deficiencies" – property owner, enforcement, and prior permit applications – only one is contained in S.C. Code Reg. § 61-9.122.21(f) as "information requirements."²¹

¹⁹ Both Jasper Station and DTG reiterates that the responses contained in the NOI were correct and justified under the circumstances.

²⁰ See S.C. Code Reg. § 61-9.122.21.

²¹ S.C. Code Reg. § 61-9.122.21(f) requires (a) a description of the activity necessitating NPDES permit coverage, (b) the name, location, and mailing address of the facility seeking coverage; (c) identification of services and products provided through the use of Standard Industrial Codes ("SIC"); (d) the operator's name; (e) whether the site is in Indian Country; and (f) a list of all permits or construction approvals previously sought or obtained. Neither enforcement history nor property ownership are noted as required information.

The General Permit, admittedly drafted by SCDHEC, also addresses application requirements in Section 2.2 – “*Notice of Intent Contents and Other Required Information.*” (*Jasper Station Exh. 31*) Section 2.2 (B) require the applicant to provide the following information on the NOI form:

1. Operator Name. . . 2. Project/Site name. . . 3. Whether your Site is located in Indian Country. . . 4. Whether the SWPPP has been prepared in accordance with the CGP. . . 5. Name(s) of the Water(s) of the State into which your site discharges. . . 6. Information regarding discharge. . . 7. Project start and completion date. . . 8. Total acreage. . . [and]
9. Designation of Authorized Representative.

In addition, Section 2.2 states that the NOI is not considered complete without additional information, such as the information submitted by DTG, which includes a SWPPP, design documents, and supporting calculations. SCDHEC, therefore, has absolutely no justification for confining its decision to terminate DTG’s permit coverage based solely on the information in the two-page NOI form.

The NPDES permit coverage, which allowed DTG to proceed with development of the 18.4 Acre Parcel, was a contractual contingency which, if satisfied, allowed for a closing of a Purchase Agreement for \$2,209,200.00. (DHEC Exh. 2). When SCDHEC revoked DTG’s NPDES permit coverage, the Purchase Agreement terminated. (*DHEC Exh. 2*). The ALC accurately characterized SCDHEC’s termination as a “drastic administrative action with the potential for significant negative impact on the permittee.” (*Order*, p. ____). Moreover, the NPDES permit coverage survived termination of the Purchase Agreement and can be transferred/assigned by DTG to Jasper Station.^{**22**}

^{**22**} S.C. Code Reg. § 61-9.122.61 allows for transfer of permits with SCDHEC’s consent.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Substantial Evidence Supported The ALC's Conclusion That SCDHEC Failed To Show Cause Under S. C. Code Reg. § 61-9.122.64 Justifying Termination Of The General Permit Coverage.

SCDHEC attempts to avoid the substantial evidence standard and persuade this Court of Appeals the ALC committed an error of law. In fact, this case is resolved upon review of the facts in the record to determine whether certain facts are relevant and, if relevant, whether these facts were fully disclosed and/or misrepresented. Issues of what information was provided to SCDHEC and whether the information was fully disclosed and relevant are factual issues, not questions of law. In an appeal from the decision of an administrative agency the Administrative Procedures Act provides the appropriate standard of review.²³ As this Court of Appeals is aware, “[s]ubstantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence. The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.”²⁴ Furthermore, “where conflicting evidence exists as to an issue, the Court’s substantial evidence

²³ See S. C. Code Ann. §. 1-23-610(B) (“The review of the administrative law judge’s order must be confined to the record. 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. The Court of Appeals may . . . reverse or modify the decision if the substantive rights of the petitioner has been prejudiced because of the finding, conclusion, or decision is: . . . (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . .”).

²⁴ Original Blue Ribbon Tax v. South Carolina Dept. of Motor Vehicles, 380 S.C. 600, ___, 670 S.E.2d 674, ___ (Ct.App. 2008) (internal citations omitted).

standard of review defers to the findings of the fact-finder.”²⁵ Moreover, pursuant to Rule 29B, RPALC, addressing the burden of proof, “[i]n matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof.”

In this case, SCDHEC is enforcing its Order providing Notice of Termination and has the burden of proving the validity of its findings set forth in the Termination of Permit Coverage. (*Jasper Station Exh. 24.*) SCDHEC must prove that relevant information was either not fully disclosed or was misrepresented. It is not enough for SCDHEC to prove, as it did below, that its two page NOI application form was not “filled-out completely”. Instead, the inquiry is whether relevant information was either misrepresented²⁶ or simply not provided during the permit issuance process.

NOI Section II.B – Property Owner

Ryan Smith, acting for DTG, listed DTG as the “Project Owner” in response to information sought in Section I of the NOI. (*Jasper Station Exh. 6.*) When asked to provide the identity of the Property Owner in Section II.B, Mr. Smith inserted “Same as above.” (*Jasper Station Exh. 6.*)²⁷ Nevertheless, it is further undisputed that the submittal package which accompanied the NOI contained multiple materials which clearly indicated the 18.4 Acre Parcel was part of the 88 acre Parent Tract owned by

²⁵ Risher v. South Carolina Dept. of Health and Env'tl. Control, 393 S.C. 198, ___, 712 S. E. 2nd 428, ___ (2011).

²⁶ Importantly, “misrepresentation” is defined in Black’s Law Dictionary as “the act of making a false or misleading assertion about something, usually with the intent to deceive.” Black’s Law Dictionary (9th Ed. 2001).

²⁷ It is undisputed that on 10 February 2009, when the NOI and the accompanying documentation was submitted to OCRM, Jasper Station was the record owner of the 18.4 Acre Parcel.

Jasper Station and the subject of SCDHEC's inquiry extending from October 2008, into January 2009, relating to land disturbing activities resulting in the filling, grubbing, and grading of six acres of wetlands within the 18.4 Acre Tract. In Findings of Fact 20, 21, and 22 the ALC listed documents contained in the NOI submission which clearly revealed the relationship between Jasper Station's Parent Tract and the 18.4 Acre Parcel. (*Order*, pp.13-14.)²⁸ The ALC noted the importance of the digital boundary provided by Mr. Smith which clearly showed the 18.4 Acre Parcel was contained within the Parent Tract's 88 acres. (*Order*, pp.13-14.) Moreover, as noted in Finding of Fact 22, SCDHEC had notice one month prior to receipt of the permit submittal when Gabe Smith e-mailed Shannon Hicks, attached a plat of the 18.4 acre parcel within the Jasper Station tract, and explained that the clearing was done by "Malphrus." (*Order*, pp.13-14.) Importantly, Greg Malphrus signed the NOI on 5 February 2009, as "Project Owner/Operator." (*Jasper Station Exh. 6*).

The identity of the Property Owner was clearly disclosed in the volumes of required materials which accompanied the NOI (*Jasper Station Exh. 6*) and which were, presumably, reviewed by SCDHEC staff. Moreover, there was no basis to upon which to conclude the two-page NOI form was filled out reflecting DTG as the property owner with the intent to deceive. In fact, Ryan Smith testified he filled the form out in that manner in an effort to assist SCDHEC, since the land disturbing activities would only be undertaken if the Purchase Agreement were to close, and if DTG owned the property. (*9/1/2010 Trans.*, pp.____). The President, CEO, and Chairman of the Board of

²⁸ The ALC noted there was "a) a site map ...; b) TMS number ...; c) January 16, 2009 letter from the U. S. Army Corps of Engineers ...; d) site development plans that ... depict the 18.4 acre parcel within the Jasper Station tract and identify Jasper Station Associates, LLC, as the property owner of the surrounding tract." (*Order*, pp.13-14.)

Thomas and Hutton explained his firm's actions as follows: "Our intent was not to mislead or misrepresent, but instead to reflect the situation at the time permit coverage is triggered – when construction commences. That is what we understood to be the correct representation as in most NOI applications we prepare; the actual land owner is under contract with a third party." (*Jasper Station Exh. 33*).²⁹

Finally, South Carolina law³⁰ does not allow for permit coverage termination if any fact is omitted or misrepresented, but only if "relevant facts" are determined to be missing. The ALC properly assigned meaning to the word "relevant" and found that the terms and conditions of the General Permit addressing submittal requirements did not require disclosure of the identity of the property owner. (*Order*, pp.6-7; *Jasper Station Exh. 31*.) Moreover, the regulation³¹ governing NPDES permit applications does not require the identity of the property owner to be disclosed.

Consequently there is substantial evidence in the record to affirm the ALC's findings the identity of the property owner for the 18.4 Acre Parcel was disclosed and, moreover, was not misrepresented.

²⁹ Jasper Station and DTG presented additional information, considered by the ALC, which supported Thomas and Hutton's practices with regard to completing the NOI. (*Jasper Station Exhs. 34, 35*). Jasper Station and DTG presented the testimony of two witness – one a title abstractor and the other a real property attorney – who examined NOI's and property records from Charleston, Berkeley, and Beaufort Counties and found several recent instances where the property owner was shown on the NOI as the party contracting to purchase the property, and not as the record owner on the date the NOI was submitted. (*9/1/2010 Trans.*, pp.____).

³⁰ See S. C. Code Reg. §. 61-9.122.64.

³¹ See S. C. Code Reg. §. 61-9.122(f).

NOI Section III.G – Notice to Comply/Notice of Violation

The information sought in Section III. G is “*whether SCDHEC issued a Notice to Comply or Notice of Violation for the site.*” Ryan Smith checked the box labeled “No.” SCDHEC presented no evidence to show it had issued a Notice to Comply or Notice of Violation. Notably, the NOI **does not seek** information regarding whether SCDHEC has **ever** investigated the site. The NOI seeks specific information related to specific enforcement procedures. A Notice of Violation is a specific notification referenced in SCDHEC’s Uniform Enforcement Process and OCRM’s published Enforcement Policy. (*Jasper Station Exhs. 10a-10c*). There is no reference in these policy documents to a Notice to Comply. Furthermore, there is no evidence any document entitled “Notice to Comply” was ever delivered to Jasper Station and/or DTG relative to the 18.4 Acre Parcel.

While Jasper Station/DTG received a “Warning Notice” on 5 November 2008, and asked to stop land disturbing activities (*Jasper Station Exh. 32*), SCDHEC clearly hadn’t yet then determined whether the matter rose to the level of enforcement, since Jasper Station/DTG was advised that “this matter is being referred to Enforcement staff for further consideration.” (*Jasper Station Exh. 32*). In a follow-up inspection, conducted on 6 January 2009, SCDHEC staff did not indicate any further enforcement action would be taken, as they could have by checking the “Yes” box on the Compliance Inspection Report. (*Jasper Station Exh. 7e*). Instead, SCDHEC commented that “Enforcement action to be determined.” (*Jasper Station Exh. 7e*).

The NOI seeks specific information regarding whether the applicant is aware of a Notice of Violation or Notice to Comply. (*Jasper Station Exh. 6*). On the other hand, the NOI does not ask whether any inspection reports have been generated, or "Warning Notices" issued. (*Jasper Station Exh. 6*). Ryan Smith correctly filled-out this section of the NOI and provided an accurate response to the information that was sought. Moreover, following SCDHEC's 6 January 2009 site visit, Thomas and Hutton provided SCDHEC with a plat of the 18.4 Acre Parcel (located within Jasper Station's Parent Tract, and had notified Ms. Hicks that "Malphrus" had performed the work that she had inspected that day. (*Jasper Station Exh. 9*) Consequently, there is no basis to conclude DTG withheld information regarding the status of the site. In fact, the facts presented to the ALC could support a finding SCDHEC knew, or should have known, based on the totality of information presented, the 18.4 Acre Parcel was the subject of numerous inspections and a "Warning Notice".

NOI Section III.I – All State And Federal Environmental Permits Or Approvals

As already noted, this section was left blank. As Ryan Smith explained, his failure to fill in the blank under Section III.I was simply an "oversight." (9/1/2010 *Trans.*, p.82, lines 10-19; pp.34-35). In any case, identification of other permits is, arguably, relevant as it is the only criterion of three bases for termination that is found in the regulation addressing NPDES permit application.³²

Here, however, the only reason this information was important to OCRM staff reviewing the submittal was, according to the Amanda Nodolf, because she could have entered the permit number into the SCDHEC data base known as EFIS and presumably

³² See S. C. Code Reg. §. 61-9.122(f).

would have brought-up a screen on her desktop that showed that the 18.4 acre site was part of the Jasper Station tract. (*DHEC Exh. 37f*). Ms. Nodolf acknowledged, however, the same information would have been revealed had she followed her normal practice in her "Arcview" review.³³ Ms. Nodolf had multiple Arcview layers at her disposal, but admittedly didn't utilize them. (*9/1/2010 Trans.*, pp.309-313; *Jasper Station Exh. 8*).

While DTG's consultant did not provide the information requested in Section III.I of the NOI, SCDHEC readily admits the information was only relevant because it would have alerted SCDHEC staff to the connection between Jasper Station's Parent Tract and the 18.4 Acre Parcel. Contrary to SCDHEC's implications, neither DTG nor Jasper Station ever concealed the connection between the two properties. In fact, the connection was disclosed in the multiple documents attached to the NOI as part of the permit application submission.

In addition, the ALC gave weight to Ryan Smith's conclusions Red Oaks Plaza Phase 3 was part of a larger common plan (LCP), and the relevant past permitting history was associated with development of the LCP Red Oaks Plaza, rather than Jasper Station's Parent Tract. The ALC also noted SCDHEC staff wasn't consistent in its identification of the Jasper Station NOI seeking permit coverage under the General Permit, which it submitted in July 2006. As is apparent from the Inspection Reports, (*Jasper Station Exhs. 7a-7e*) there is little uniformity among SCDHEC staff in identifying the Jasper Station permit/permit application and, consequently, no basis to conclude that in February 2009, when DTG submitted the NOI, that the Jasper Station

³³ OCRM staff testified they can conduct two desktop reviews. The EFIS review and the Arcview review. The Arcview review is not dependent on the information supplied by the applicant but, instead, utilizes the digital boundaries and allows OCRM to keep track of stormwater permit applications in a geographic area.

permit/permit application number would have been material to SCDHEC's review.³⁴ In fact, SCDHEC staff determined, after the termination process was commenced, that its data base was insufficient to provide enough warning to SCDHEC staff and Ms. Hicks directed OCRM staff in a 21 July 2009, e-mail to add information to the data base expressly warning staff "do not permit within this tract – see EFIS." (*Jasper Station Exh. 29*)

While the Jasper Station permit/permit application number from its 2006 NOI can be considered "relevant," it is only relevant because it may have led OCRM staff to see the relationship between DTG and Jasper Station when it reviewed the NOI permit application. The information wasn't misrepresented, as the only evidence as to why the information wasn't included was Ryan Smith's testimony that it was merely an oversight. Furthermore, the relationship between DTG and Jasper Station was fully disclosed, albeit not through information provided in Section III.I of the NOI, but through the many many attached documents supporting the NOI. Furthermore, S.C. Code Reg. § 61-9.122.64 refers to the "permit issuance process" and **not just** to the two page NOI form which initiates the process.

The ALC decision should be affirmed in all respects.

³⁴ Ms. Nodolf's EFIS review was conducted after-the-fact, in preparation for a trial conducted 18 months after SCDHEC issued General Permit coverage to DTG.

B. The ALC's Ultimate Conclusion That SCDHEC Failed To Show Cause Under S. C. Code Reg. § 61-9.122.64 Justifying Termination Of The General Permit Coverage Constitute Factual Conclusion Implicating Appellate Review Pursuant To S. C. Code Ann. § 1-23-610(B).

SCDHEC characterizes the ALC's findings as misapplication of the agency's regulations and errors of law. Obviously, SCDHEC is aware of the weaknesses in the appellate record which SCDHEC created and, in turn, the overwhelming weight of the evidence demonstrating DGT's disclosure of all relevant facts. In addition, SCDHEC failed to prove, under any standard of review, that DTG and/or Jasper Station misrepresented the relevant facts during the NOI permit process. Therefore, SCDHEC's only opportunity to persuade this Court of Appeals to reverse the ALC depends on SCDHEC's ability to shift this Court of Appeals' focus in this appeal from the "substantial evidence" standard to an inquiry dithering whether the ALC's decision was "affected by other error of law".³⁵

South Carolina law³⁶ is clear and unambiguous. A NPDES permit may be terminated for cause, and the permittee's failure to disclose all relevant facts during the permit issuance process or misrepresentation of relevant facts at any time is cause for termination. SCDHEC demonstrated the NOI's first page was not completed to SCDHEC's "satisfaction". Nevertheless, SCDHEC failed to prove any relevant facts were withheld, since those facts were apparent in the accompanying materials which supported the NOI. As to whether DTG or Jasper Station misrepresented relevant facts, the only "evidence" SCDHEC provided was the fact the property owner's identity

³⁵ See S. C. Code Ann. § 1-23-610(B).

³⁶ S. C. Code Reg. § 61-9.122.64.

was not correctly identified on the NOI. As previously noted, the designation of DTG as the “property owner” was completely justified under the circumstances. SCDHEC failed to demonstrate either DGT or Jasper Station provided information on the NOI with an intent to deceive and/or was consciously misrepresented. In fact, the substantial evidence showed the practice of naming the purchaser as the property owner was certainly not limited to this permit application. Moreover, the identity of the property owner wasn’t hidden as it was clearly was disclosed in the NOI’s supporting materials.

SCDHEC had the burden to prove “cause for termination” and failed to sustain its burden. Cause is a factual analysis under the applicable regulation, not a legal analysis. SCDHEC frames its appeal based on a claim that the ALC interpreted S. C. Code Reg. § 61-9.122.64.³⁷ Notwithstanding SCDHEC’s arguments to the contrary, the ALC did not interpret the regulation. What the ALC did, however, was to conclude our Legislature intended the words “relevant” and “misrepresent” to have meaning.³⁸ The ALC then applied those words to the evidence presented within in the context of the regulation.

³⁷ “Statutory interpretation is a question of law.’ Hopper v. Terry Hunt Constr., 373 S. C. 475, 479, 646 S. E. 2d 162, 165 (Ct. App. 2007). This Court of Appeals is free to decide matters of law with no particular deference to the fact finder. Pressley v. REA Constr. Co., 374 S. C. 283, 287-88, 648 S. E. 2d 301, 303 (Ct. App. 2007). “But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard.’ Hopper v. Terry Hunt Constr., 373 S. C. 475, 479-480, 646 S. E. 2d 162, 165. See also Murphy v. Owens Corning, 393 S. C. 77, 710 S.E. 2d 454 (Ct. App. 2011).

³⁸ See CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 75, 716 S.E.2d 877, 881 (2011) (*quoting* State v. Sweat, 379 S.E. 367, 665 S.E.2d 645 (Ct.App. 2008), *affirmed*, 386 S.C. 339, 688 S.E.2d 569 (2010)) (Second and third alterations in original) (“We must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, [since] [t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.’”).

The application of a regulation to a specific set of facts, and the assignment of ordinary meaning to words and phrases within that statute, is subject to review under the substantial evidence, and is improperly characterized by SCDHEC as legal action.

C. Both Jasper Station And DGT Have Standing To Challenge SCDHEC's Termination Action Even Though The Purchase Agreement Between Jasper Station And DGT Has Been Ended.

SCDHEC argues the ALC's should have dismissed the contested case on the grounds of mootness since the DGT/Jasper Station Purchase Agreement had been terminated. SCDHEC argues that the termination deprived DGT/Jasper Station of standing to challenge the NPDES permit termination notice. SCDHEC misinterprets the law.

The 18.4 Acre Parcel was subject to the Purchase Agreement with a sales price of \$2,209,200.00. The sale was, however, contingent upon the acceptance, approvals and permits by all governmental agencies as required for DGT's full development of the entire 18.4 Acre Parcel. Consequently, the fair market value of the property as reflected in the Purchase Agreement reflected the value of developed land - not undeveloped land. The ability to develop the land and attain the value stated in the Purchase Agreement was clearly dependent upon obtaining the applicable permits and entitlements.

The permit SCDHEC issued to DTG was for disturbance of all 18.4 acres in order to construct a "commercial business park." (*Jasper Station Exh. 6*). This permit has significant value both to DGT (purchaser) and to Jasper Station (seller). This permit aids Jasper Station (seller) in realizing the contract value of the property and facilitates sale of the 18.4 Acre Parcel to DGT (purchaser). In accordance with the terms of the

Purchase Agreement, Jasper Station retained the permit, and other entitlements, upon termination. SCDHEC's regulations allow for transfer of permits between original permittee and new permittee.³⁹ So, the fact that a contract didn't close, because of delay occasioned by SCDHEC procedures, doesn't render the issue moot.⁴⁰ The ALC reinstated the permit. After DTG and Jasper Station prevail in this appeal, the procedures in S. C. Code Reg. § 61-9.122.61 can be implemented and Jasper Station will be able to accept transfer and assignment of the permit as DTG's contractual successor-in-interest.⁴¹

Regardless of the status of their contractual relationship, DTG and Jasper Station have an interest in the ALC's reinstated permit, as it establishes the right to develop the 18.4 Acre Parcel into a commercial business park – a logical use given the adjoining land uses. This interest is not conjectural, the property can be sold with entitlements which allow for development of a commercial business park. Both DTG and Jasper Station were injured by the permit termination, regardless of whether the Purchase Agreement contract survived the protracted proceedings which have followed. Most

³⁹ See S. C. Code Reg. § 61-9.122.61.

⁴⁰ The Purchase Agreement was entered into on 8 April 2008, with closing scheduled 60 days from the receipt of the SCDHEC permit. General Permit coverage was obtained in March 2009, but termination proceedings commenced five months later. The Purchase Agreement allowed for two years to obtain finality on all entitlements. At the expiration of two years, or in April 2010, DTG and Jasper Station were embroiled in the termination proceedings before the ALC and DTG exercised its contractual right to terminate the agreement.

⁴¹ "Generally, a successor is '[a] person who succeeds to the office, rights, responsibilities, or place of another.' Black's Law Dictionary (9th ed. 2009). The word successor can mean one who has in fact succeeded. Battery Homeowners Ass'n v. Lincoln Fin. Res., Inc., 309 S. C. 247, 250, 422 S. E. 2d 93, 95 (1992). Holly Woods Ass'n of Owners v. Hiller, ___ S.C. ___, 708 S. E. 2d 787, 796 (Ct.App. 2011) (In this matter 'Holly Woods Association of Residence Owners was the successor to Holly Woods Association of Residence Owners, Inc., and therefore, had standing.' ").

importantly, DTG's and Jasper Station's injuries are clearly redressed when this Court of Appeals affirms the ALC's decision in all respects.⁴² Reinstatement of General Permit coverage affords the parties the opportunity to renegotiate the Purchase Agreement, or allows Jasper Station to offer the property for sale again, without contingencies.

D. SCDHEC Was Not Prejudiced By The ALC's Denial Of SCDHEC'S Motion To Compel.

The ALC denied SCDHEC's Motion to Compel production of two emails exchanged between an attorney for DGT/Jasper Station and Ryan Smith and Mitchell Bohannon of Thomas and Hutton. The e-mails were presumably sealed and traveled with the ALC's record, but the e-mails were made available to SCDHEC's counsel when the court reporter produced the trial transcript and exhibits⁴³ and are, in essence, no longer sealed. The ALC reviewed the e-mails before excluding them and concluded they were subject to the work product doctrine. (9/1/2010 Trans., pp.7-9). The ALC concluded the communications at issue were between Jasper Station's legal counsel and Jasper Station's consultant and permitting agent.

The e-mails reveal a dispute between the professionals at Thomas and Hutton and one of the principals of Jasper Station, Bob Glover. This dispute was no secret to DGT's and Jasper Station's counsel. Thomas and Hutton had put their errors and omissions carrier on notice of the dispute and potential claim, and M. Elizabeth Jowers,

⁴² See Bailey v. South Carolina Dept. of Health and Envrtl. Control, 388 S.C. 1, ___, 693 S. E. 2d 426, ___ (Ct.App. 2010) (Discussion of three-part test establishing standing from Lujan v. Defenders of Wildlife, 504 U. S. 555 (1992)).

⁴³ This production was done in advance of the time the parties submitted their respective proposed order to the ALC for consideration.

Esquire,⁴⁴ had participated in Ryan Smith's deposition as Mr. Smith's counsel. Attorney Jowers also attended the contested case hearing and SCDHEC's counsel was required to coordinate with Attorney Jowers for access to Mr. Smith and to compel his appearance at the ALC hearing. SCDHEC was well aware Thomas and Hutton was concerned about Jasper Station bringing claims against their firm and Thomas and Hutton had sought unsuccessfully to obtain a waiver from Jasper Station before its representatives testified in this matter. (9/1/2010 Trans., pp.84-85, pp.157-58).

As this Court of Appeals knows, the "attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party.⁴⁵ Generally, in determining whether a document has been prepared 'in anticipation of litigation', most courts look to whether or not the document was prepared because of the prospect of litigation.⁴⁶

In this case, DTG's and Jasper Station's counsel was, on 20 July 2010, reacting to a breakdown in relationship between her client and its consultant, and her client's threat to bring legal action against the consultant. This occurred approximately a month before the consultant's deposition was scheduled and six weeks before the scheduled

⁴⁴ Attorney Jowers is a member of Carlock, Copeland and Stair, a civil litigation firm specializing in defense of claims.

⁴⁵ See Rule 26(b)(3), SCRCP; Hickman v. Taylor, 329 U.S. 495 (1947).

⁴⁶ See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir.1992) (document 'must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim,' as contrasted to "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes."); In re Grand Jury Subpoena, 357 F.3d 900, 907 (9th Cir.2004) (document "should be deemed 'in anticipation of litigation' ... if ... [it] can be fairly said to have been prepared or obtained because of the prospect of litigation." (citation omitted)); In re Kaiser Aluminum & Chemical Co., 214 F.3d 586, 593 (5th Cir. 2000) (primary motivation behind creating the document must be to aid in possible future litigation)." See also Tobaccoville USA, Inc. v. McMaster, 387 S. C. 287, 692 S. E. 2d 526 (2010).

contested case hearing. Since the e-mail was sent in anticipation of litigation, DGT and Jasper Station believed it was properly protected under the work-product doctrine. Regardless of whether the ALC's ruling was correct or in error, SCDHEC suffered no prejudice due to the non-production, since SCDHEC was already aware of the controversy which had arisen between Jasper Station and its consultant.

Should this Court of Appeals disagree with the ALC's assessment of the privilege attached to these two e-mail communications, the lateness of SCDHEC's motion hearing (*i.e.*; on the day of trial) prevents the parties from simply starting over. "Where, as here, a party abuses discovery^[47], the proper remedy is to vacate the requests and require the party to start over. As a result, we vacate the five discovery orders before us."⁴⁸

Consequently, this Court of Appeals must weigh whether remand is appropriate to allow the ALC to consider the e-mails and to allow counsel to cross examine witnesses regarding these e-mails. SCDHEC was aware of the conflict between Jasper Station and its consultant and the threat of litigation and, indeed, pursued those issues at trial. Should this Court of Appeals disagree with the ALC regarding the work product doctrine designation, there is little benefit to be gained in remanding the case in light of the e-mails since SCDHEC was fully aware of the dispute at the commencement of the trial and questioned the witnesses regarding that very dispute.

⁴⁷ Given the circumstances of the situation, SCDHEC cannot reasonably claim that in withholding these two e-mails DGT and Jasper Station "abused" the discovery process.

⁴⁸ See Oncology and Hematology Associates of S.C., LLC v. South Carolina Dept. of Health and Envrntl. Control, 387 S. C. 380, ___, 692 S. E. 2d 920, ___ (2010).

5. The ALC Placed The Appropriate Weight On Matters Which Were Judicially Noted.

The ALC took “judicial notice of the allegations in the pleadings that have been filed by Jasper Station and DHEC in the civil action pending in Colleton County” including an Order filed in the case denying SCDHEC’s Motion for Summary Judgment” (*Order*, p.3). Nevertheless, the ALC noted, “any recitation of the allegations of the matters raised in Colleton County herein is only for purposes of providing relevant background of this contested case.” (*Order*, p.3). SCDHEC argues, albeit incorrectly, the ALC accepted as “fact” the allegations of Jasper Station.

The ALC took judicial notice of the underlying dispute in the Colleton County Circuit Court, but did not accept as fact the allegations of the pleadings, rather, the ALC simply noted the existence of the underlying dispute and stated it was relevant for purposes of understanding SCDHEC’s permit termination action. (*Order*, p.2). The ALC qualified its recitation of matters alleged in the underlying suit simply as “background.” Quite simply, the ALC took notice of an undisputed fact, that Jasper Station and SCDHEC were parties to an action in the Court of Common Pleas related to whether Jasper Station had a permit by operation of law.

To the extent the ALC made any findings of fact regarding matters between Jasper Station and SCDHEC and to the extent SCDHEC is concerned those findings might be based on the ALC “accepting as fact” Jasper Station’s allegations, there was substantial evidence in the record before the ALC to support the ALC’s findings beyond the Circuit Court proceedings. SCDHEC relied on Bob Glover’s deposition (with attached exhibits) as part of its case before the ALC. Mr. Glover’s testimony, and the attached exhibits (reflecting communication between Jasper Station’s attorney and

SCDHEC) supported any finding made by the ALC regarding the underlying dispute. The ALC did not rely, and did not have to rely, on the allegations in the Circuit Court pleadings. Any of the ALC's findings regarding the underlying dispute were supported by SCDHEC's own evidence. (DHEC Exh. 2).

SCDHEC's arguments are meritless and must be dismissed.

6. **The Parties' Stipulation OCRM Employee Jeff Thompson Inspected The 18.4 Acre Parcel on 28 July 2009, And Found Evidence Of Hdrophytic Vegetation, Hydric Soils, and Hydrology, The Three Parameters For Delineating Wetlands, Did Not Constitute An Independent Ground Justifying Permit Termination.**

SCDHEC asks this Court of Appeals to affirm the permit coverage termination on an independent ground – the parties' stipulations regarding OCRM's inspection of the 18.4 acre parcel and findings. (Court Exh. 2). Although this inspection and findings occurred before the 21 August 2009, Notice of Intent to Terminate (*Jasper Station Exh. 21*) and the 22 December 2009, final Notice of Termination, (*Jasper Station Exh. 24*), SCDHEC never made any mention of these findings as part of the cause for termination.

These 28 July 2009, findings can't serve as cause for termination because it is undisputed SCDHEC relies on the Corps of Engineers to identify and delineate wetlands for purposes of obtaining permit coverage under the NPDES General Permit. (Court Exh. 2) As previously mentions, Corps of Engineers had inspected the 18.4 Acre Parcel and issued a JD advising there **were no wetlands or waters of the United States** on the property. (*Jasper Station Exhs. 6, 12*).

The NOI requests, in section IV, that the applicant disclose whether there are jurisdictional or non-jurisdictional delineated wetlands on the site. (*Jasper Station Exh. 6*) The applicant is instructed that "delineation" means "identification by the U. S. Army Corps of Engineers or a wetland consultant. (*Jasper Station Exh. 6*, Instructions, p.7) The applicant is further instructed that in the coastal zone⁴⁹ "WOS [waters of the State] must be verified by the USACOE [U. S. Army Corps of Engineers]." (*Jasper Station Exh. 6*, Instructions, p. 7). In this case, the Corps of Engineers issued a JD letter on 16 January 2009, valid for five years or until 16 January 2014, finding there were no wetlands located on the 18.4 acre tract. (*Corps Letter*, pp.1-2).

In addition to its Instructions, SCDHEC provides a "*Checklist for Design Professionals*" which is completed by the applicant's consultant and submitted along with the NOI. The 24th item on the Checklist is entitled "OCRM Requirement" and includes the requirement to produce "a Corps wetland verification letter." (*Jasper Station Exh. 15*, Checklist) The only reference to a delineation performed by OCRM is in relation to proposals to impact tidal wetlands areas⁵⁰, not freshwater wetland areas. (*Jasper Station Exh. 15*, Checklist)

DTG complied with the requirements when it provided a valid JD reflecting the Corps' of Engineers' conclusions there were no wetlands on the 18.4 Acre Parcel. OCRM may disagree with those conclusions, but that disagreement was not cause for termination. That fact is plainly evident from a review of SCDHEC's Notice of

⁴⁹ Jasper County is in the coastal zone as established by S. C. Code Ann. §§ 48-39-10 et seq., as it is one of the eight coastal counties.

⁵⁰ SCDHEC-OCRM has permitting jurisdiction over the State's critical areas which are tidal wetland areas.

Termination in which **no mention is made** of OCRM's findings. There was no basis in the record before the ALC to support termination on this "alleged" independent ground. DTG and Jasper Station complied fully with the instructions provided by SCDHEC regarding identification of wetlands.

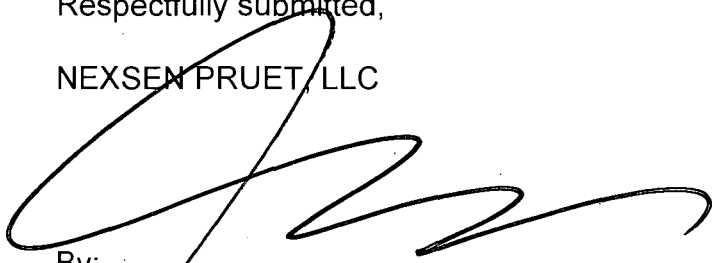
SCDHEC's arguments are meritless and must be dismissed.

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC, respectfully request this Court of Appeals to affirm the findings and conclusion of the ALC in all respects.

Respectfully submitted,

NEXSEN PRUET, LLC



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