

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

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Appeal from the South Carolina Administrative Law Court

Shirley C. Robinson, Administrative Law Court Judge

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Case No. 12-ALJ-07-0050-CC

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**RECEIVED**

DEC 09 2013

**SC Court of Appeals**

James R. Maull,

Appellant,

v.

South Carolina Department of Health and,  
Environmental Control and David Abdo,

Respondents,

v.

Russell and Laura Schaible,

Respondents.

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**INITIAL BRIEF OF APPELLANT**

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YOUNG CLEMENT RIVERS, LLP

Michael A. Molony

25 Calhoun Street, Suite 400

Charleston, SC 29401

P.O. Box 993 (29402)

(843) 724-6631

*Attorney for the Appellant, James R. Maull*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION.....	1
STATEMENT OF ISSUES ON APPEAL.....	2
STATEMENT OF THE CASE .....	3
STANDARD OF REVIEW.....	8
ARGUMENT.....	9
I. The ALC erred in affirming the Amendment where it incorrectly determined that this matter is a private dispute that does not impact the public interest by (a) wrongfully ignoring or misapprehending material and uncontroverted evidence (including the only expert testimony in the record) regarding the potential for public harm resulting from the Amendment and/or (b) wrongfully ignoring or misapprehending legal precedent regarding public navigational hazards in applying DHEC/OCRM’s regulations and determining that the Amendment complied with the requirements of 23A S.C. Code Ann. Reg. 30-12(A)(1)(a).....	9
II. The ALC erred in affirming the Amendment where it incorrectly determined that the Amendment complied with the requirements of 23A S.C. Code Ann. Reg. 30-11 and S.C. Code Ann. § 48-39-150 but DHEC/OCRM failed to consider the (unduly) adverse impact of the Amendment upon Maull’s value and enjoyment of adjacent property, as is required Reg. 30-11 and § 48-39-150.....	20
CONCLUSION.....	24

**TABLE OF AUTHORITIES**

**Page**

**Cases**

Brownlee v. S.C. Department of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (2009)..... 18

Dorman v. South Carolina Department of Health and Environmental Control, 350 S. C. 159, 565 S.E. 2d 119 (Ct. App. 2002)..... 20

Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997)..... 15

Hill v. SC Dep’t of Health & Env’tl. Control, 389 S.C. 1, 698 S.E. 2d 612 (2010)..... 8

Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004) ..... 14

White v. South Carolina Department of Health and Environmental Control, 392 S. C. 247, 708 S. E. 2d 812 (Ct. App. 2011)..... 15, 16, 24

**Statutes**

S.C. Code Ann. § 1-23-380..... 9

S.C. Code Ann. § 1-23-610..... 8, 13

S.C. Code Ann. § 48-39-150..... 22, 23

South Carolina Constitution Article 14..... 18

**Regulations**

23A S.C. Code Ann. Reg. 30-11 ..... 22

23A S.C. Code Ann. Reg. 30-12(A)(1)(a)..... 9, 21

## INTRODUCTION

This case arises out of Respondent South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management's ("DHEC" or "OCRM") issuance of an amendment (the "Amendment") to a critical area permit identified as P/N # OCRM-07-128-F (the "Permit") to Respondent David Abdo ("Abdo") for construction of a private recreational dock adjacent to the Atlantic Intracoastal Waterway ("AIWW") on Wappoo Creek. The Appellant, James R. Maul ("Maul"), an adjacent property owner, duly opposed the Amendment, and requested a contested case hearing before the South Carolina Administrative Law Court ("ALC") to challenge DHEC's decision to issue the Amendment. Maul now appeals the ALC's decision to this Honorable Court. Respectfully, both DHEC's decision to issue the Amendment and the ALC's affirmance thereof are erroneous and should be reversed.

## STATEMENT OF ISSUES ON APPEAL

- I. Did the ALC err in affirming the Amendment where it incorrectly determined that this matter is a private dispute that does not impact the public interest by (a) wrongfully ignoring or misapprehending material and uncontroverted evidence (including the only expert testimony in the record) regarding the potential for public harm resulting from the Amendment and/or (b) wrongfully ignoring or misapprehending legal precedent regarding public navigational hazards in applying DHEC/OCRM's regulations and determining that the Amendment complied with the requirements of 23A S.C. Code Ann. Reg. 30-12(A)(1)(a)?
  
- II. Did the ALC err in affirming the Amendment where it incorrectly determined that the Amendment complied with the requirements of 23A S.C. Code Ann. Reg. 30-11 and S.C. Code Ann. § 48-39-150 but DHEC/OCRM failed to consider the (unduly) adverse impact of the Amendment upon Maull's value and enjoyment of adjacent property, as is required Reg. 30-11 and § 48-39-150?

## STATEMENT OF THE CASE

The Permit was originally issued to Abdo's predecessor in title, Charles R. Palmer ("Palmer"), on August 2, 2007. The Permit authorized construction of a private recreational dock adjacent to the AIWW at property identified as 29 Broughton Road, Charleston County, SC. The Permit authorized the location of the dock, at the water's edge, as 82.5 feet from Maull's existing dock. Maull resides at 27 Broughton Road. The Permit further authorized a distance of 132.1 linear feet at the water's edge between Abdo's dock and the dock constructed at 31 Broughton Road, owned by Respondents Russell and Laura Schaible (the "Schaibles").

Prior to issuance of the original Permit, OCRM staff contacted Maull, Palmer, and the Schaibles for purposes of meeting to discuss permitting of the Palmer (now Abdo) dock. The Schaibles had objected to the location of the Palmer dock. Maull suggested that Palmer move the boatlift from the side of the dock closest to the Schaibles, to the other side, pushing it closer to Maull, which resulted in 82.5 feet of separation between the Maull and Palmer/Abdo dock. The dock was approved as suggested by Maull, with the boatlift moved away from the Schaibles' property line. The Schaibles objected and unsuccessfully sought a review by the Board of Health and Environmental Control (the "Board"). After the Board denied review, no

further challenge was made to the Permit upon issuance in 2007.

Abdo's purchase contract for 29 Broughton was contingent upon Palmer obtaining a permit for a dock. The purchase occurred after the Permit was issued. Following the purchase of the property, just prior to the expiration of the Permit, Abdo decided that the configuration of the approved dock was not acceptable to him as the floating dock was located in front of the pierhead and the boatlift was located to the side of the pierhead.

The action giving rise to this contested case, the Amendment, which was issued to Abdo on October 6, 2011, authorized the movement of the dock structure much closer towards Maull's dock and property. The Amendment as approved reduces the distance between the Abdo dock and the Maull dock, at the water's edge, to approximately 39 feet.

Consequently, the Amendment reflects that the floating dock extends towards the Schaibles' dock. In order to maintain separation between Abdo and Schaible, the Abdo pierhead, floating dock, and boatlift are relocated closer to the shared property line with Maull. This results in substantially reducing the separation between the Maull dock and the Abdo dock, but increasing the separation between the Abdo dock and Schaible dock.

Importantly, following resolution of the configuration of the Palmer dock in August of 2007, Maull sought and obtained authorization on May

14, 2008, to change the configuration of the floating docks at 27 Broughton Road. In accordance with this authorization, Maull removed the existing floats which were in a "U" configuration and installed a 10' x 44' floating dock. The 10' x 44' floater replaced a 10' by 30' floater, reducing by a few feet the off-set between the Palmer boatlift as shown on the Permit and the Maull float. Maull modified his dock and added the longer floating dock in September of 2008.

Abdo's basis for moving the dock closer to Maull was to preserve as much space as possible between Abdo and Schaible in the event Abdo decides to purchase a larger boat and requires a longer floating dock. Maull's challenge to the Amendment raises his concerns regarding navigational safety, which is impaired by moving Abdo's dock closer to Maull's dock.

On December 8, 2011, the Board held a Final Review Conference to review Abdo's requested Amendment. During the Final Review Conference, Department staff explained to the Board that the previous belief that Mr. Maull's dock was located only 10 feet off the extended property line was erroneous and based upon an unintentional error while interpreting Maull's permit. The staff determined his dock was actually 18.5 feet away from the extended property line. This explanation is in conflict with the

Administrative Summary of Review, wherein DHEC staff sought to address Maull's navigational concerns, not just impose the minimum 20 foot off-set from extended property lines contemplated in 23A S.C. Code Reg. 30-12(A)(1)(p).

On January 9, 2012, the Board in a split (5-2) decision, issued its Final Agency Decision granting the Amendment. The Board decided that no special conditions to the permit were necessary to address navigational concerns. The Board further authorized construction of the requested walkway with handrails leading to a covered pierhead with benches and a ramp leading to a floating dock as well as the addition of a four-pile boat lift for Abdo's personal use and the extended dock. The Board's decision eliminated the special condition that the structure be located 30.5 feet from the extended property line. Despite the claim that this permit condition was based on a mistake in interpreting the Abdo permit drawings, the DHEC staff had clearly included this condition of separation to address Maull's concerns regarding navigation. A distance of 30.5 feet from the extended property line created a separation of approximately 50 feet between the two docks.

In response to this decision, Maull filed a Notice of Request for Contested Case with the ALC on February 8, 2012. On July 24, 2012,

DHEC filed a Motion for Partial Summary Judgment and Motion to Dismiss against Maull. On August 2, 2012, Maull filed a response to DHEC's Motion to Dismiss and Motion for Partial Summary Judgment. On August 23, 2012, a Motion Hearing was held at the ALC. On October 4, 2012, the ALC issued an Order granting DHEC's Motion for Partial Summary Judgment as to issues raised by Maull regarding alleged procedural defects in the process of conducting a Final Review Conference. The ALC also denied DHEC's Motion to Dismiss.

On January 15, 2013 a hearing was held in the ALC, the Honorable Shirley G. Robinson presiding. Maull presented witness Crayton Walters ("Walters"), who was qualified, without objection, as an expert Witness in Maritime Matters including navigation, tidal and water current issues and vessel navigation. Walters was the only expert in the proceeding. On August 1, 2013, the ALC issued its Final Order and Decision ("ALC Order"), affirming DHEC's issuance of the Amendment.

This appeal timely follows.

## STANDARD OF REVIEW

“The review of the administrative law judge’s order must be confined to the record,” and “[t]he 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.” S.C. Code Ann. § 1-23-610(B); *see also* Hill v. SC Dep’t of Health & Env’tl. Control, 389 S.C. 1, 9 698 S.E. 2d 612, 616-17 (2010) (Under South Carolina’s Administrative Procedures Act, the ALC presides as the fact finder in contested cases and appellate review is limited to determining whether the findings were supported by the substantial evidence or were controlled by an error of law).

But this Court may remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner (here, Maull) have been prejudiced because the finding, conclusion, or decision of the ALC 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 on the

whole record; or

- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Section 1-23-610(B); S.C. Code Ann. § 1-23-380(5).

### ARGUMENT

- I. The ALC erred in affirming the Amendment where it incorrectly determined that this matter is a private dispute that does not impact the public interest by (a) wrongfully ignoring or misapprehending material and uncontroverted evidence (including the only expert testimony in the record) regarding the potential for public harm resulting from the Amendment and/or (b) wrongfully ignoring or misapprehending legal precedent regarding public navigational hazards in applying DHEC/OCRM's regulations and determining that the Amendment complied with the requirements of 23A S.C. Code Ann. Reg. 30-12(A)(1)(a).**

The ALC found and concluded that Maull's navigational concerns do not impact the public interest. According to the ALC, "[a]ny maneuvering of his vessel that [Maull] asserts he would have to undertake in order to navigate between the two docks [(i.e., Maull's dock and Abdo's dock as would be allowed by the Amendment)], if he can at all, would take place in close proximity to his and Mr. Abdo's docks and would have little or no impact on waterway traffic." (ALC Order pp. 9-10, Conclusion 14.) The ALC rejected Maull's expert's testimony based on the ALC's determination that the expert, Walters, opined that 100 feet was needed between Maull's

dock and his neighbors' docks and such a separation was impossible to attain. (ALC Order p. 10, Conclusion 15.) The ALC wrongfully ignores or misapprehends Maull's expert's testimony and opinions (along with other evidence, or lack thereof, in the record) and, in turn, erred in determining the nature of the navigational hazard arising from the Amendment and the Amendment's regulatory compliance.

The only expert in this matter is Walters. A licensed Harbor Pilot, he was, without objection, qualified as an expert in maritime matters, including matters he has previously testified to, currents in the creek area, navigability of boats, vessels, and allowed to opine about the appropriate distance between two docks. (Tr. p. 28-29, l. 24-25, l. 1-14.) Walters provided the following pivotal, and undisputed, testimony (that only he was qualified to do in this matter):

- The area where Abdo's and Maull's docks are located has the strongest currents in the Charleston area. (Tr. p. 29 l. 24-25.)
- The Wappoo Creek is a unique situation. (Tr. p. 30 l. 4-5.)
- The current at the dock location does not stay in the middle of the channel but hits one side of the Cut and then goes to the other. (Tr. p. 31 l. 2-7.)
- As a Harbor Pilot, Walters prefers two boat lengths of distance to maneuver to a dock. (Tr. p. 32, l. 18-25.)
- Because of the dynamics of water, wind, and current, adequate separation between docks is necessary for maneuverability.

(Tr. p. 33, l. 1-7.)

- Without sufficient space to maneuver there is a risk to other vessels and for accidents. (Tr. p. 35, l. 1-17.)
- Risk is created by having a boat landing located in close proximity to the Abdo/Maull docks, having a great deal of boat traffic, and having insufficient space to maneuver the boat to the dock, with no room for error in a dynamic setting. (Tr. p. 36-37.)
- Boaters in Wappoo Creek do not have a lot of leeway when it comes to getting in and out of traffic. (Tr. p. 53.)
- Maneuverability is also restricted because of siltation of the Cut, and the fact that access is limited at certain times eliminating options for navigating back to the dock. (Tr. p. 38, l. 2-17.)
- Maull may not be able to moor his 48 foot boat at his dock as a result of the Abdo permit modification. (Tr. p. 42-43.)

Walters' opinions and observations were supported by Maull's testimony.

- Small boats traveling at high speeds are frequent users of the Cut at Maull's dock. (Tr. p. 59 l. 5-9.)
- Maull got involved in the Palmer permit application to insure he had room to move his boat to and from his dock. (Tr. p. 67 l. 24-25, p. 68 l. 1.)
- Maull's concerns regarding the proximity of the Abdo dock to his dock are based on general navigational safety in the Wappoo Creek and the safety issues created for the general public by the existence of a hazardous condition. (Tr. p. 74 l. 5-10, p. 80 l. 1-6.)
- The strong current and wind affects small boats too and the

approach to the dock needs to be made with the right conditions, and is unsafe to other boaters if forced in bad conditions. (Tr. p. 77 l. 5-22.)

- Maull uses his boat and dock hundreds of times every year and observes extensive boat and barge traffic traveling past his dock. Maull estimates that traffic has increase 40% in the past 30 years. (Tr. p. 79 l. 16-25.)
- Maull also notes that new types of watercraft are present such as jet skis etc.

Moreover, whereas Walters was an (the only) expert, and Maull himself has extensive experience navigating and docking in Wappoo Creek, Abdo admitted having limited experience docking in Wappoo Creek, although he had boated through the Creek. (Tr. p. 134 l. 1-5.) Schaible uses his boat approximately once a month. (Tr. p. 154 l. 10-16.) OCRM's witness, Jeff Thompson, has been in Wappoo Creek a "fair number of times" (Tr. p. 180 l. 17) but there is no testimony to support that he was responsible for maneuvering water craft through the Creek and he acknowledged that he had no experience on a larger boat in the Creek or maneuvering to Maull's dock. (Tr. p. 186 l. 19-23.) Yet, the ALC relied on Thompson's testimony to support a conclusion that the hazards and harm identified by Walters and Maull were private, and not public. (Final Order and Decision Findings of Fact 19-20.)

Respectfully, the ALC's decision in this regard cannot be sustained.

It is contradictory to the only reliable and probative evidence on point in the record and, indeed, derived from witnesses without the appropriate foundation and experience to identify the potential for public harm in this area.

The Administrative Procedures Act, which governs appeals from the ALC, authorizes this Court to reverse the findings and conclusions of the ALC if the ALC's decision is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." § 1-23-610(B). Substantial evidence is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). And the test is three-pronged. It is not merely sufficient to establish substantial evidence, but, of course, the evidence must also be reliable and probative.

The testimony of Thompson, Schaible, and Abdo was not reliable or probative as to the issue of whether the proximity of Abdo's and Maull's docks created a navigational hazard for users of Maull's dock that impacted the public. The mere fact that these witnesses had some experience being in boats in Wappoo Creek did not qualify them to provide reliable and probative evidence of the potential public harm arising from constraints on

Mauil's ability to safely berth his boat. Probative evidence is "the tendency of evidence to establish the proposition that it is offered to prove." McCormick on Evidence, Title 7, Chapter 16, Relevance; *cf.* Rule 401, SCRE (evidence is not relevant when it does not have "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."); Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) ("[V]erdicts may not be permitted to rest upon surmise, conjecture or speculation.").

The most reliable testimony as to the potential for public harm was provided by Walters (and, again, of course, no reliable testimony was presented to the contrary). This testimony was neither weighed nor applied by the ALC, however, since it reached the erroneous conclusion that the potential harm was private, not public.

The ALC's determination of private harm is inconsistent with the applicable precedent of White v. South Carolina Department of Health and Environmental Control, 392 S. C. 247, 708 S. E. 2d 812 (Ct. App. 2011). There, White challenged a permit authorizing construction of a community dock over the shared extended property line based on White's concerns that the proximity between his dock and the community dock will cause a

disruption to his commercial operations from his dock (selling fuel and ice to commercial shrimpers). The HOA claimed that the dispute regarding the location of the dock was a private dispute, but this Court disagreed. The Court found that “the present case involves disruption of a commercial enterprise and its customers. The objection lodged by White does not involve merely a private dispute with Coffin Point, but also concerns the needs of White’s customers, who themselves are members of the public, and the local shrimping industry in general. . . . [T]his case does not involve a mere private navigational dispute.”

Contrary to the Finding of Fact No.17 of the ALC Order, there was ample testimony that numerous docks are located in the area in close proximity to Maull’s dock and especially on the north side of the Wappoo Creek, all of which narrow the width of the waterway, which only increases the safety concern highlighted by Maull’s challenge to the Amendment. The following language from the White Court is pertinent in this regard:

The limited amount of space between White’s dock and coffin points’ dock combined with the size of their shrimp boats presented a danger of their boats colliding with the Coffin Point dock when they attempted to leave White’s dock to exit the creek. . . . Significantly, an OCRM official admitted that OCRM staff would consider any “significant impact” on a neighboring dock to constitute material armed to the policies of the Act.

Id. at 258, 708 S.E.2d at 817-18.

Here, we have undisputed testimony that the limited space between the Abdo and Maull docks would necessarily require additional, unnecessary, and potentially dangerous maneuvering in the busy Wappoo Creek area posing an impediment to the free flow of commercial and recreational traffic in the area.

Contrary to the ALC's decision (and, indeed, that of the DHEC Board before it<sup>1</sup>), even the initial Permit noted the potential impact on navigation of location of the docks. Again, the Wappoo Creek is part of the AIWW. It

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<sup>1</sup> The DHEC Board also concluded that the appeal of the Amendment was a purely private dispute. Interestingly, on p. 4 of their Final Decision, they reference a comment letter to the Department's staff from Maull. In the Order, they state that the comment letter provides, "In the event that both neighbors at 27 and 29 Brought Road [Mr. Abdo, Mr. Maull] come to their dock at the same time, there would not be enough space for safe docking for either party". Apparently, the Board selectively extracted this one comment from Mr. Maull's two page well-reasoned letter. The sentence quoted above is the last line in the following paragraph in that same comment letter:

I am concerned that placing this dock too close to my dock could be dangerous for boats and boaters due to the strong Wappoo Creek current, which moves very swiftly. On the outgoing tide, the water under the bridge going toward the Harbor makes a swift "S" turn and hits the bank between my dock and the proposed dock for 29 Broughton Road. This current is very difficult to navigate, and the closeness of the proposed dock will only increase the danger to all boaters. As I am sure you are aware, there is heavy boat traffic in the Wappoo Creek, and boat safety should not be endangered by constructing docks too close to the other . . .

Clearly, Maull expressed concern not only in the initial 2007 application with respect to navigation issues, but also in the very letter cited by the Board in its decision that navigation issues were not solely related to his dock, but to those of the general public.

has a significant amount of traffic, and according to Walters, is one of the most heavily trafficked waterways in the lowcountry. The AIWW is the functional equivalent of an interstate highway for commercial and recreational vessels.

In the case of Brownlee v. S.C. Department of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (2009), our Supreme Court addressed navigability and expressly noted that pleasure traffic, not just commercial floatage, is entitled to protection in using the waterway. South Carolina Constitution Article 14, §, in fact, 4 declares all navigable waters to be public highways for which all citizens are entitled to free access. In this case, there is undisputed testimony that public access will be adversely affected by location of the docks pursuant to the Amendment.

Notably, in Brownlee, the Court further admonished DHEC that its failure to require adherence to the conditions of the dock permit in that case spawned unnecessary litigation. In this situation, we have an analogous circumstance in that the DHEC staff and Board failed to adhere to, much less even consider, the same issues that were resolved in the 2007 permit. Failure to do so has spawned this litigation to protect the use and enjoyment of Maull's dock as well as the interest of the public in free and unimpeded navigation in the Wappoo Creek area.

The ALC makes an additional finding that the question of navigation of the Maull boat can be resolved by mooring it on the outboard portion of the dock. This finding is itself clear error and further reflective of the ALC's error in affirming the Amendment by determining that this was a purely private dispute.

As stated over and over during the trial by both Maull and Walters, traffic in that area creates heavy wave action and potentially dangerous maneuvering by recreational boats that would not only damage Maull's boat, but could pose a safety hazard given the relatively narrow width of the Wappoo Creek at that location along with its especially strong currents at high and low tide.

The unique character of the Wappoo Creek area is indeed well illustrated by how readily this matter is distinguished from that of Dorman v. South Carolina Department of Health and Environmental Control, 350 S. C. 159, 565 S.E. 2d 119 (Ct. App. 2002), a case relied upon by the ALC. In Dorman, there was a small tidal creek that was effectively only utilized by small craft at high tide.

Walters testified that the location at issue here is at a curve in the Wappoo Creek (which creek is, just as a general matter, a busy thoroughfare of the AIWW) where the current is particularly treacherous. (Tr. Pgs. 2-8, 1-

17, 29-31 and 35). He has maneuvered many boats in and out of docks on that side of the waterway and testified that it was quite a daunting task, even for someone of his skill, to maneuver the vessel, of any size, into the dock. His testimony was clear (and without contradiction in the record): the maximum distance available between docks provides the safest protection for the interest of the public utilizing the waterway.

The ALC makes a finding that there are no vessels of similar size on the southern portion of the Wappoo Creek where the Maull's dock is located. That is contrary to the evidence, and there is no testimony to support that finding. Furthermore, evidence was presented that there are many large, and perhaps larger, vessels that are docked on the other side of the Wappoo Creek. These vessels also travel in and out of their docks further creating issues for the heavily-trafficked Wappoo Creek area.

Here, Maull has demonstrated a navigational concern that clearly affects the boating public on Wappoo Creek. The reliable, probative, and substantial evidence offered by Maull and his expert demonstrates that the proximity of the Abdo dock is not a mere inconvenience to Maull, but is problematic for the public.

Also, the navigational restriction that Reg. 30-12(A)(1)(a) seeks to prevent—restrictions and hazards to public navigation in the AIWW—has

been demonstrated in this contested case. Because, as explained herein, the overwhelming reliable, probative, and substantial evidence was that the dispute impacts the public, the ALC erred in determining that the navigational restriction was private, and failed to weigh the evidence that overwhelmingly supports a conclusion that the restriction impacts the general boating public. In addition to error on account of the lack of evidentiary support, this error is an error of law and warrants reversal.

**II. The ALC erred in affirming the Amendment where it determined that the Amendment complied with the requirements of 23A S.C. Code Ann. Reg. 30-11 and S.C. Code Ann. § 48-39-150 but DHEC/OCRM failed to consider the (unduly) adverse impact of the Amendment upon Maull's value and enjoyment of adjacent property, as is required Reg. 30-11 and § 48-39-150.**

The following facts were demonstrated before the ALC and are undisputed. In 2007, Abdo's predecessor in title, Palmer, submitted an application for a dock permit and requested authorization to construct a pierhead, floating dock, and boatlift, extending toward Appellants dock. A conditional permit was issued, reducing the impact on Maull, based on OCRM's determination that "The proposed dock would likely affect Maull's ability to navigate a large boat to and from a "u" shaped slip on his dock and the Department should address this through a conditional permit. Therefore, the dock configuration will be condensed without any movement towards the Schiables. This should present an agreeable solution to all

parties.” (Mauil Exhibit 1. May 25, 2007 letter Flake to Schiable/Mauil. Mauil Ex.1. Email Curtis Joyner to Tommy Loeber, 7/30/07 Ex. 1 pg 40 to Mauil Notice of Requested for Contested Case to ALC and . Tr. p. 67 – 73.)

After resolving the issue of distance between the Palmer/Abdo dock and Mauil’s dock, Mauil sought and obtained a permit to construct a slip for his boat located on the side of the dock closest to Palmer/Abdo. (Mauil Ex. 4.) This permit authorized approximately 82 feet of separation between the docks. Moreover, in 2007, at the same time as he was commenting on the Palmer/Abdo permit and seeking authorization for a boat slip on the side of his dock closest to Palmer/Abdo, he purchased a 48’ fishing boat. (Tr. p. 58, 62.)

Now, inexplicably, the Palmer/Abdo dock has been moved to within 40 feet of Mauil’s dock, the situation he sought to avoid in 2007, when OCRM agreed that the original Palmer permit application would negatively impact Appellant’s use of his dock.<sup>2</sup> This Court has held that “section 48-39-150(A)(10) requires OCRM to consider the effect of the proposed use on the value and enjoyment of adjacent owns. This consideration is

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<sup>2</sup> Even in staff’s review of the Abdo permit application the staff determined that a 30’ offset from the shared extended property line, resulting in a 50’ distance between docks, was appropriate to address Mauil’s use and enjoyment of his dock, but inexplicably the

independent of OCRM's policies on navigation." White, 392 S.C. at 258, 708 S.E.2d at 818.

It is clear from the supplemental information that OCRM staff provided to the Board, which was adopted by the Board as its decision (DHEC Ex. 7), that no consideration or weight was afforded to the impact of the Abdo dock on Maull's value and enjoyment of his property. The staff and Board were only focused on considerations of "navigation" in establishing the distance between docks. Their analysis simply (and improperly) ended when they determined that twenty feet was within the "legal requirements" of the Act. Of course, as this Court stated in White, this consideration is independent of OCRM's policies on navigation and must be considered by OCRM and the ALC.

Moreover, no consideration or weight was afforded to Maull's reliance on the finality of the Palmer permit application—a negotiated resolution based on the staff's conclusion that reduction of the separation between Palmer's dock and Maull's dock would limit and restrict Maull's use of his dock. Such resolution prompted Maull to purchase a larger boat and construct a boat slip located on the side closest to Abdo. The record is devoid of any evidence that the Board or the staff gave any weight to these

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Board modified that condition to only 20'. This reflects a complete lack of consideration

important facts, which had been weighed and considered in 2007, and the ALC erred in affirming the Board.

It is important to note that Abdo has never taken steps to construct the dock and, in fact, waited until the initial permit almost expired before making these substantial revisions. Furthermore, ALC fails to note that Abdo and the Schiables were not only aware of but, in the Schiables' case, had retained counsel to negotiate the location of the dock for them. At a minimum, the Schiables' position in this matter should be discounted because they had adequate opportunity to address the location of the dock in the initial permit application, were represented by counsel, and, most importantly, can only cite "loss of view" as damage that would result as a consequence of the construction of the dock in its present location.

It is important to note that the Maull does not contest, and in fact supported, the application for construction of the dock on Abdo's property. Maull's concern stems from the creation of a mooring hazard not only for Maull's dock but also for the public as both Abdo and Maull attempt to maneuver their boats to the inboard portion of their docks. Furthermore, it would require a simple reconfiguration of the bulkhead of Abdo's dock to

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of the use and enjoyment of Maull as an adjoining property owner.

afford a wider berth which would benefit both Abdo and Maull in this matter.

The ALC further made a finding that DHEC staff approved the location of the dock twenty feet from the extended property line. Maull does not object to that criteria as it impacts the walkway of the dock. But, as this case highlights, the particular twenty-foot extended property line requirement cannot be a one-size fits all for every dock in the State; particularly, one located in one of its busiest waterways.

The ALC does not address nor consider the specific provisions of the DHEC staff as it relates to navigation concerns of the dock. DHEC staff cannot simply ignore its prior permit provisions; rather, this “Amendment” radically alters the configuration of the dock and the staff, and DHEC, should be estopped from completely disregarding their original position; particularly, where this abrupt about-face so unduly harms the use, value, and enjoyment of Maull’s property. The ALC erred in allowing DHEC to do so, and in affirming the Amendment.

### **CONCLUSION**

For the foregoing reasons, and any other reason that may be apparent from the record, Maull asks this Honorable Court to reverse the Administrative Law Court’s Final Decision and Order approving DHEC’s

issuance of the October 6, 2011 Amendment to critical area permit OCRM-07-128-F to Abdo so that the Amendment is overturned and invalid.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Michael A. Molony

25 Calhoun Street, Suite 400

Charleston, SC 29401

P.O. Box 993 (29402)

(843) 724-6631

*Attorney for the Appellant, James R. Maul*

Charleston, South Carolina

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