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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. : 2025-000379
Docket Nos. 24-ALJ-07-0088-CC to 24-ALJ-07-0131-CC

South Carolina Coastal Conservation League..... Appellant,

v.

South Carolina Department of Health and Environmental Control and
Pulte Homes, LLC,.....Respondents.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Did the ALC err in ruling that the South Carolina Coastal Tidelands and Wetlands Act does not require the Department of Environmental Services to review individual septic permits in the coastal zone for consistency with the binding policies of its Coastal Management Program?

2. Did the ALC err in ruling that the Department is violating Appellant's constitutional right to due process in issuing the permits without any public notice?

STATEMENT OF THE CASE

On a parcel located in the Town of Awendaw, immediately adjacent to the Cape Romain National Wildlife Refuge, Respondent Pulte Homes, LLC ("Pulte") obtained forty-four (44) permits from Respondent South Carolina Department of Environmental Services.[1] (the "DES" or "Department") for the installation of small onsite wastewater permits, also known as individual septic tank permits. The Department issued the permits on December 21, 2023 and January 2, 2024. Despite being proposed for one development, DES reviewed the permits individually without considering the cumulative impacts of 44 septic tanks as part of the overall development. As a result, Appellant South Carolina Coastal Conservation League ("League") filed 44 requests for final review before the DES Board on January 17, 2024, and then filed 44 Requests for Contested Case Hearings with the Administrative Law Court ("ALC") on April 5, 2024. (R. pp. 36-499; 1561-2044). The cases were consolidated for hearing on May 7, 2024. (R. pp. 1-2).

Thereafter, the parties filed cross motions for summary judgment. On December 18, 2024, the ALC granted Respondents' Joint Motion for Summary Judgment and denied Petitioner's Motion for Summary Judgment. (Order, December 18, 2024). (R. pp. 2069-2100; pp. 6-11). Pursuant to SCALC Rule 29(D) and SCRCP Rule 59(e), Appellant filed a Motion for Reconsideration on December 30, 2024, which was denied on January 21, 2025. (Order Denying Motion for Reconsideration, January 21, 2025). (R. pp. 12-15). On February 20, 2025, Appellant filed a timely Notice of Appeal.

[1] Some of the events involved in this case occurred prior to the July 1, 2024 split and restructuring of the former South Carolina Department of Health and Environmental Control ("DHEC"), which resulted in the creation of the successor agency for environmental issues, the Department of Environmental Services ("DES"). For consistency, the Initial Brief of Appellant will refer to all actions of the agency as the Department or DES.

STANDARD OF REVIEW

In an appeal from the ALC, the Administrative Procedures Act, S.C. Code Ann. § 1-23-10 et seq. provides the appropriate standard of review. *Jack's Custom Cycles, Inc. v. S.C. Dep't of Rev.*, 439 S.C. 35, 41, 885 S.E.2d 433, 436-37 (Ct. App. 2023). Under S.C. Code Ann. § 1-23-380(5), this Court may reverse or modify the ALC's decision if the substantive rights of the Appellant 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 on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

On appeal, "our standard of review allows this court to reverse the ALC's decision if it is affected by an error of law." *Chapman v. S.C. Dep't of Soc. Serv.*, 420 S.C. 184, 188, 801 S.E.2d, 403 (Ct. App. 2017) (quoting *Ackerman v. S.C. Dep't of Corr.*, 415 S.C. 412, 417, 782 S.E.2d 757, 760 (Ct. App. 2016)) (internal quotation marks omitted). All questions of law are reviewed de novo. *S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012). Statutory interpretation is one such question of law. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010); see also *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

STATEMENT OF FACTS

The White Tract is located in proximity to the Cape Romain National Wildlife Refuge (Refuge), Portions of the property in question are located within the congressionally authorized

acquisition boundary[2] of the Cape Romain National Wildlife Refuge ("Refuge") in Charleston County, consisting of 233.45 acres known as the "White Tract." Pulte's proposed development on the White Tract has multiple phases and will include over 200 single-family homes on lots ranging from 0.325 to 0.934 acres, which would be serviced by individual septic systems. For Phase 1 of multiple planned phases of the development, Pulte applied for 44 individual permits for septic systems generating less than 1,500 gallons per day ("gpd"). S.C. Dep't of Env'tl Servs., Second Resp. to Pet'r's Requests for Admission (Aug. 15, 2024). (R. p. 2099). The Department did not publish any notice of the applications, as it does not issue public notice for individual septic tank permit applications. S.C. Dep't of Env'tl Servs., Resp. to Pet'r's Requests for Admission (July 23, 2024). (R. pp. 2095-2096). Appellant is a non-profit organization dedicated to protecting South Carolina's coastal resources. Appellant's membership exceeds 4,000 individuals, many of whom live near, recreate in, and rely on the waters and wetlands in and around Bulls Bay and Cape Romain National Wildlife Refuge. Its members are directly impacted by septic tanks which are known to degrade and pollute coastal waters.

Due to the lack of any public notice for the 44 septic tank permits, Appellant received no notification of pending applications and had to rely entirely on requests pursuant to the Freedom of Information Act, S.C. Code Ann. §30-4-10 et seq., to determine whether permit applications had been submitted or issued. The Department provides no rolling updates, and as a result, the League's members were forced to file repeated requests in hopes of uncovering a decision within the limited appeal window. By a stroke of luck, Appellant discovered that Pulte obtained approvals for the 44 lots to each have individual septic tanks within the fifteen-day timeframe to initiate

[2] U.S. Fish and Wildlife Service, Glossary (for Refuge Planning chapters), 602 FW 1 (Apr 1, 2024) (stating that "[a]cquisition Boundary (also known as an Approved Acquisition Boundary) [is a] defined area within which we are authorized to acquire all the acreage. The Director approves an acquisition boundary after we have completed the land protection planning and environmental compliance process.: https://www.fws.gov/policy-library/e1602fw1

appeals. The basis for the appeals was that the Department failed to conduct a review of the permits to determine whether they were consistent with the policies of the CMP. See RCCCH. (R. pp. 1561-2044).

Septic tanks, particularly those installed in high density developments and on smaller lots, have a high potential for significant negative environmental impacts. See *S.C. Coastal Cons. League & Charleston Waterkeeper v. SCDES*, Order Granting Partial Summary Judgment, Case No. 2022-CP-05192 p. 2, *S.C. Coastal Conservation League and Charleston Waterkeeper* stating "[t]he environmental dangers abound with installing multiple septic systems on small parcels of land. In the current development market outside of municipal sewer services, developers are relying on individual "small" onsite wastewater treatment systems, those generating less than 1,500 gallons per day (gpd) of wastewater, often for high density, small acreage (sometimes as small as 0.15 acres) parcels. This means that developed land is comprising significant portions of the septic drainfields for these projects. These developmental pressures are substantially increasing."). (R. p. 29). Installing individual septic systems in the vulnerable eight coastal counties can result in disastrous consequences when they are sited improperly, in dense proximity to one another, and when they are improperly maintained. [3]

Further, South Carolina has no substantive state laws or regulations requiring septic maintenance or inspection, meaning that once installed, a septic tank becomes the property owner's sole responsibility for the rest of its existence. *See* S.C. Code Ann. Regs. 61-56.101.1 ("Management and maintenance of each [small onsite wastewater system] is the responsibility of the individual property owner.").

[3] The Department admitted it is "fully aware that a percentage of improperly maintained septic systems could malfunction." Dep't of Env'tl Servs., Resp. to Pet'r's Requests for Admission (July 23, 2024) (R. pp. 2095-2096).

Despite this, Pulte obtained 44 septic permits for Phase I of its larger development plan located adjacent to the Cape Romain National Wildlife Refuge ("Refuge") and the Francis Marion National Forest, all while skirting review under specific state policies applicable to all other permits in the eight coastal counties.[4]

Notwithstanding the White Tract being located in Charleston County, in close proximity to Bulls Bay designated as an Outstanding Resource Water under S.C. Code Reg. 61-69, and immediately adjacent to the Refuge, the Department did not conduct a review of the septic tank applications for consistency with the policies set forth in the South Carolina Coastal Management Program ("CMP"). S.C. Dep't of Env'tl Servs., Resp. to Pet'r's Requests for Admission (Aug. 15, 2024). (R. p. 2099). Respondent DES' practice is to issue individual septic tank permits generating less than 1,500 gpd without review under the policies of the CMP.

The Refuge, located within a mile of the permitted septic tanks, extends 22 miles along the coast of South Carolina and is managed by the U.S. Fish and Wildlife Service ("FWS"). Over fifty (50) percent of the Refuge is designated as a Class I National Wilderness area.[5] It provides critical habitat and protection for a vast array of wildlife that include many bird species, including threatened and endangered species such as the Red knot, Piping plover, and American oystercatcher. And the Refuge contains Outstanding Resource Waters of Bulls Bay, which are the nearest surface waters to the proposed development. S.C. Code Reg. 61-69.

LEGAL FRAMEWORK

Recognizing that the coast of our state has particular environmental vulnerabilities, the South Carolina General Assembly enacted the Coastal Tidelands and Wetlands Act, S.C. Code

[4] The eight coastal counties include: Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Horry, and Jasper.
[5] https://www.fws.gov/refuge/cape-romain.

Ann. §§ 48-39-10 et seq., (the "Act") in 1977. The General Assembly found that "the coastal zone… may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." S.C. Code § 48-39-20(D). It further cautions that "[i]mportant ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values." § 48-39-20(E).

The General Assembly declared the basic state policy "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State" and "[t]o encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources *giving full consideration to ecological, cultural and historic values* as well as to the needs for economic and social development and resources conservation. S.C. Code Ann. 48-39-30(1) and (5) (emphasis added).

The Act further directs the Department to create two distinct regulatory programs: (1) a permitting program applicable to all uses and alterations of the coastal zone's "critical areas" where OCRM has direct permitting authority (S.C. Code Ann. 48-39-130); and (2) a review and certification program, applicable throughout the coastal zone, through which the Department reviews all permits applications for consistency with the CMP policies (S.C. Code Ann. 48-39-80(B).Section 48-39-80(B)(11) specifically provides that the Department "*shall* develop a system whereby the department *shall* have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan. For individual navigable waters permits for docks located in the eight coastal counties but outside of critical areas,

a coastal zone consistency certification is deemed approved if certification review is not completed within thirty days of an administratively complete application." (emphasis added). This mandate gave rise to the Coastal Zone Consistency ("CZC") review and certification process, which functions as a safeguard to ensure that proposed activities in the coastal zone align with the Act's policies and the objectives of the CMP.

The CMP has been recognized by the Supreme Court as having the force and effect of a regulation. *See Spectre, LLC v. S.C. Dep't. of Health & Envtl. Control*, 386 S.C. 357, 360, 688 S.E.2d 844, 845 (2010) (declaring that "the language of § 48–39–80 supports DHEC's view that the General Assembly meant the CMP policies themselves to be enforceable in the consistency review of state and federal permits.").

The CMP contains policies that directly and indirectly relate to septic tank permitting. Notably, the CMP dictates that "[i]n review and certification of permit applications in the coastal zone, OCRM will be guided by the following general considerations:

(1) [t]he extent to which the project will further the policies of the South Carolina General Assembly which are mandated for OCRM in implementation of its management program;

(3) [t]he extent to which the project will protect, maintain or improve water quality;

(7) [t]he possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area."

Id. at III-4 (selected clauses for relevance), CMP III-14.

The CMP directs OCRM (now known as the Bureau of Coastal Management) to authorize septic installations in the coastal zone only for "*low density residential developments* when they are designed properly and soils are adequate to insure against pollutants leaching into surface or groundwater resources." CMP III-6(1)(a) (emphasis added). Further, "[s]eptic tanks must be

situated a safe distance from the shoreline to ensure proper drainage and filtering of the tank effluents before they reach the water's edge with special attention given in identified erosion areas." *Id.* In coastal areas or regions with high water tables, like the South Carolina Lowcountry, dense developments relying on individual septic systems are particularly vulnerable to flooding and malfunctioning systems, increasing the risk of water pollution. However, DES effectively ignores all of these enumerated policies for a swath of septic tanks, so long as they are small enough.

ARGUMENT

The ALC wholly adopted DES's assertion that it has the discretion to decide which permits are subject to coastal zone consistency review. Such a ruling is contrary to (1) the clear and unambiguous language of the Act; (2) the legislative framework, including the S.C. Coastal Tidelands and Wetlands Act, the CMP polices and more broadly the federal Coastal Zone Management Act; and (3) the Department's own findings regarding the importance of carefully regulating the treatment of human waste in the coastal zone. The ALC further compounded this error in allowing DES to continue shutting the public out of the permitting process which impacts public health, livelihoods and recreation in failing to ever put any of these septic tank applications or permits on public notice.

The ALC found that "[t]he CMP was approved by the General Assembly and the Governor approximately forty-five years ago and it includes an exemption from Coastal Zone consistency review of individual wastewater permits for systems with capacities of less than 1,500 gallons per day." Order at 3. The ALC held that the Department need not review and certify permits for septic tanks with flow rates less than 1,500 gallons per day ("gpd") for consistency with the CMP because the CMP itself exempts such permits. CMP V-5, Table 1. (R. p. 2193). However, the statutory text

does not contain any exemption for septic tank permits below the 1,500 gpd threshold. In fact, when the Legislature chose to create specific limitations on coastal zone consistency review, it did so explicitly. Section 48-39-30(B)(11) provides that for "navigable waters permits for docks located in the eight coastal counties … a coastal zone consistency certification is deemed approved if certification review is not completed within thirty days of an administratively complete application." No other qualification exists in the Act.

Under the CMP policies, a CZC review includes evaluating "the long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area." CMP III-14. Had the septic permits for the White Tract been reviewed under the policies of the Coastal Management Program, the Department could have taken into account the well-established impacts of densely-sited septic systems in low-lying coastal areas adjacent to protected coastal estuaries associated with this proposed development. It could have undertaken the inquiry about the long-range and cumulative impacts of the project in the context of other development, and how these impacts might affect the nearby sensitive coastal ecosystems. But it did not.

The ALC's ruling excuses DES from reviewing applications for septic systems for dense residential developments in the coastal zone such as Pulte's planned development against any of the above considerations. Instead, the Department's only evaluation of septic tanks is whether the applicant has met minimum requirements for septic system installations that are used statewide, with the exception of one provision requiring a setback from the critical area. *See* S.C. Code Ann. Regs. 61-56. In other words, the special considerations for development projects within our fragile coastal ecosystems that the General Assembly aimed to achieve through the Act are being systematically ignored when small septic systems are sought.

Applying the binding norms and policies found within the CMP matters because there are significant practical consequences of failing to do so. The CMP dictates that the Department must consider its regulatory criteria for "all state and federal permits;" consideration of these criteria when evaluating septic system applications, including the factors discussed *infra*, pp. 17-18 (e.g., impacts on water quality, coastal waters, and wetlands; cumulative effects of the project when reviewed in the context of other possible development and general character of the area; impacts on wildlife refuges, fisheries, and oyster beds) would—and should—significantly impact how decisions are made for septic system permitting.

I. The plain language of the statute requires review of all permits, including individual septic tank permits, unless specifically exempted by statute.

The crux of Appellant's appeal lies in the ALC's and the Department's interpretation of Section 48-39-80(B)(11). Appellants assert that Section 48-39-80(B)(11) is clear and unambiguous and the Department's rogue decision to unilaterally exempt certain permits, specifically small onsite wastewater permits, from coastal zone consistency review exceeds its statutory authority.

A. The Act mandates CMP review.

What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)).

The principles of statutory construction and interpretation are well-settled in this State. The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *See, e.g., Mid–State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). The first question to be asked when interpreting a statute is whether the statute's

meaning is clear on its face. *See, e.g., Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001). If a statute's language is plain, unambiguous, and conveys a clear and definite meaning, there is no need to employ the rules of statutory interpretation, and the court must apply the statute according to its literal meaning. *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). Under the plain meaning rule, the court has no right to search for or impose another meaning or resort to subtle or forced construction to change the scope of a clear and unambiguous statute. *Creswick v. Univ. of S.C.*, 434 S.C. 77, 81–82, 862 S.E.2d 706, 708 (2021) (internal citations omitted).

Here, the General Assembly repeatedly uses mandatory language in its directive to create the CMP and to provide for a review process: "The department shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter… (B) In devising the management program the department *shall* consider all lands and waters in the coastal zone for planning purposes. In addition, the department *shall*: (11) Develop a system whereby the department *shall* have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." S.C. Code Ann. § 48-39-80.

The ALC rejected the League's argument that the word "shall" creates a mandatory duty to review all state and federal permits not explicitly exempted by the Act because "shall" in section 48-39-80(B)(11) precedes "have the authority to" rather than directly preceding "review." Order, p. 4. (R. p. 9). The ALC concluded that "'Authority' means, 'Permission. Right to exercise powers; to implement and enforce laws; to exact obedience; to command' to judge. Control over; jurisdiction.' Authority, Black's Law Dictionary (6th Ed. 1990). The plain meaning of 'authority'

does not impose a requirement to exercise power, but the right to." Order, p. 4. (R. p. 9). For this reason, the Court found that the Department fulfilled its obligation under section 48-39-80(B) through the creation of the CMP, a system for reviewing permit applications in the coastal zone. Order, p. 3. (R. p. 8).

The ALC construed the Act as giving DES unlimited discretion to create exemptions from the coastal consistency review process altogether. The ruling primarily relies on the plain and ordinary meaning of the word, "authority," concluding that the Department must merely "create a system whereby it has the right to exercise power over permit applications in the coastal zone," but that it could simply decide not to exercise that power at will. Order Granting Respondents' Motion for Summary Judgment and Denial of Petitioner's Motion for Summary Judgment, pp. 3-5 (R. pp. 8-10), citing *Authority*, Black's Law Dictionary (6th Ed. 1990) ("Permission. Right to exercise powers; to implement and enforce laws; to exact obedience; to command; to judge. Control over; jurisdiction.").

The ALC's reading ignores that "shall," when used in a legal context, is mandatory language. "Shall" is defined as "[h]as a duty to; more broadly, is required to; the requester shall send notice; notice shall be sent. This is the mandatory sense that drafters typically intend and that courts typically uphold." *Black's Law Dictionary* (11th ed. 2019). *See, e.g., S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 123, 804 S.E.2d 854, 861 (2017) (construing "shall" as used in the South Carolina Constitution to mean "must.") The Act uses the word "shall" three times in Section 48-39-80(B) – emphasizing the General Assembly's directive that the agency must undertake coastal zone consistency review. This directive is further bolstered by the statute's use of the word "all" when referring to the types of permits the Department "shall" review; if the legislature had intended for the Department to review only permits of a certain size or category, it

could have, and would have, said so. *See City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (stating that "when determining the effect of statutory language, the cannon of construction *expressio unius est exclusion alterius or inclusion unius exclusion alterius* holds that to express or include one thing implied the exclusion of another, or the alternative."); *See also Seels v. Smalls*, 437 S.C. 167, 877 S.E.2d 351 (2022) (stating that "[t]he enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.").

A review of the Act as a whole is instructive. Section 48-39-20, legislative declaration of findings, and Section 48-39-30, legislative declaration of state policy, reflect a clear recognition of the value of the coastal zone to the State, and a related intent to provide heightened levels of protection for its natural resources. "The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations." S.C. Code Ann. § 48-39-20(D). "Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being *irretrievably damaged or lost* by ill-planned development that threatens to destroy these values." S.C. Code Ann. § 48-39-20(E) (emphasis added). Thus, our state policy balances economic and social improvement "with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development[.]" S.C. Code Ann. § 48-39-30(B)(1). In addition to the specific statutory language in 48-39-80(B), the entire statutory scheme envisions a process for ensuring that all activities impacting the coastal zone be reviewed to ensure protection of sensitive and fragile areas that have been damaged or lost from ill-planned development, including developments with a high density of septic tanks.

DES' interpretation of the Act and subsequent CMP policies ignores the Department's own guidelines and, taken to a logical conclusion, the Department could simply refuse to review any and all permits in the coastal zone without legal consequence. This shirking of the review mandate could extend to all manner of permits. The absurdity of such an interpretation is clear and undeniable: although the Department, and the CMP itself, repeatedly recognizes how improper sewage treatment is dangerous to the environment and that siting septic tanks in highly dense developments should be discouraged due to negative environmental impacts, DES has decided to ignore these realities entirely for a large swath of permits.

In construing a statute, "[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to an absurd result so plainly absurd that it could not have been intended by the General Assembly." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). If this construction stands, the Department could create exemptions whenever it wanted, including for every single state permit and certification. Neither DES nor the ALC identify any line which cannot be crossed; because the agency's "authority" permits it to decide whether or not to review any single or every permit, it could theoretically exempt all permits from review. Not only does the ALC's ruling lead to an absurd result, it also leads to arbitrary and capricious decision-making for the agency's decision about whether and what permits to exempt are entirely untethered from the statute.

The ALC fails to address the League's assertion that the Department's interpretation of its obligation under section 48-39-80(B) exceeds its statutory authority by materially altering the statute, which creates an absurd result. Order, p. 3. (R. p. 8).

The Department and the ALC believe that agency has discretion to willy-nilly decline to apply the CMP, and thus to ignore all legislative findings, legislative declarations of state policy,

and applicable CMP policies. The Act simply does not give the agency such unbridled discretion to decline to carry out its mandates. While the Legislature may not enact a law vesting an administrative body with broad and uncontrolled discretion in its execution, in enacting a law which is comprehensive in and of itself may authorize an agency to "fill up the details" by prescribing rules and regulation for complete operation and enforcement of the law within its expressed general purpose. *State v. Brown*, 274 S.C. 592, 595, 266 S.E.2d 415, 417 (1980), citing *McNickel's, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998) (quoting *Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 126 S.E.2d 15 (1962)). The ALC concluded that the Department can, in effect, create exemptions by regulation.

B. The Act has a specific exemption from full review, but not for individual septic tanks.

Notwithstanding the numerous provisions that address septic systems and/or residential development, along with the general guidelines that require the consideration of the cumulative impacts of a given project, the ALC held that anything treating 1,500 gpd or less individual septic tanks are exempt from review. This holding is based on a provision in a Table (Table 1) referenced only in Chapter V of the CMP which reads: "State Agency Permits Subject to Council Review and Certification: (3) [s]tate permits to construct wastewater treatment systems or septic tanks handling *either more than 1500 gallons per day or other than domestic waste*." This table is not referenced anywhere else within the text of the CMP, and more specifically, is not at all referenced in Chapter III, Management of Coastal Resources, which describes the process and requirements by which DES should review permits for residential septic tanks. And, of course, the Act provides no such exemption.

The Legislature is knowledgeable in creating exemptions or exceptions to a rule and it did so within the Act on numerous occasions. For instance, in Section 48-39-130(D), it excluded several activities in the critical area from requiring a permit. See Section 48-39-130(D)(1-10) (stating that "it shall not be necessary to apply for a permit for the following activities: … ." Conversely, there are no exclusions or exceptions within Section 48-39-80(B). However, it does explicitly include the word "all."

One of the basic canons of statutory construction is "*expression unius est exclusion alterius*" or "*inclusion unius est exclusion alterius*," which provides that "to express or include one thing implies the exclusion of another, or of the alternative." Black's Law Dictionary 602 (7th Ed. 1999). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Norman J. Singer, Sutherland Statutory Construction § 47.23 at 227 (5th Ed. 1992) (citations omitted).

In *Hodges v. Rainey*, 314 S.C. 79, 533 S.E.2d 578, former governor Jim Hodges invoked S.C. Code Ann. § 1-3-240(B), known as the Restructuring Act in removing the Chairman of the Santee Cooper Board of Directors. The Chairman brought suit and argued that the provision did not apply to him but our Supreme Court disagreed. Subsection C of Section 1-3-240 contained specific positions that are exempt from the broad authority to remove an individual from office, and applying this canon of construction, the Court ruled the statute allowed for the application of the provision to remove the Chairman. "The text of the Restructuring Act is certain—the Act grants the Governor the right to remove appointed state officers at his or her discretion, while specifically exempting ten boards and commissions. If the legislature's intent is clearly apparent from the

statutory language, a court may not embark upon a search for it outside the statute." *Id.* at 87, 582 citing *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956).

In this case, the Legislature actually did modify its directive to review all state and federal permits, but included an express limitation for review of certain dock permits by adding in that for "individual navigable waters permits for docks located in the eight coastal counties but outside of critical areas, a coastal zone consistency certification is deemed approved if certification review is not completed within thirty days of an administratively complete application." S.C. Code Ann. 48-39-80(B)(11). No similar qualification exists for 1,500 gpd or less septic tank permits.

II. The ALC's Ruling that Septic Tank Permits Do Not Need CMP Review Exceeds Statutory Authority.

"Although a regulation has the force of law, it must fall when it alters or adds to a statute." *S.C. Coastal Conserv. League v. S.C. Dep't Health & Envtl. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010). A rule may only implement the law. *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496, 499 (1943).

Any administrative action or regulation that materially alters or adds to the unambiguous language of a statute must be rejected, as courts have consistently struck down such administrative overreach. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003); *State v. Sweat*, 379 S.C. 367, 374, 665 S.E.2d 645, 649 (Ct. App. 2008); *see S.C. Coastal Cons. League v. S.C. Dept. of Health & Env't. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010) (reasoning that "[a]lthough a regulation has the force of law, it must fall when it alters or adds to a statute."), *see also Lee v. Michigan Millers Mut. Ins. Co*., 250 S.C. 462, 468, 158 S.E.2d 774, 776 (1968) (explaining that "[a]n order cannot be made by an administrative body which would materially alter or add to the law."); *Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 355-56, 120 S.E.2d 15, 20

(1962) (holding that even though an agency was delegated the power to publish rules and regulations to enforce the law, they were not delegated the authority to adopt an alterations that satisfied their own legal theories). In this instance, the CMP is the equivalent of a regulation under *Spectre*, and thus the ALC's interpretation materially alters and adds to the statute.

Despite the purported exemption, the Department admits that it is, in fact, the state agency charged with processing permit applications to construct and operate onsite wastewater systems generating less than 1,500 gpd, and it admits that a permit to construct and operate any new, upgraded, or expanded onsite wastewater system must be obtained prior to construction and operation of the system. Declaration of S.C. Dep't of Env'tl Servs., Resp. to Pet'r's Requests for Admission (July 23, 2024), Exhibit A, p. 2. (R. p. 2096). It simply exempts them from CZC review. As such, the Department, in issuing these 44 septic tank permits[6] without review for consistency with the policies of the CMP violates legislative intent and exceeds the plain mandate of the statute.

Notably, septic tanks generating less than 1,500 gpd make up an increasing number of septic systems utilized by residential developers. When review of these septic systems is not undertaken on account of a whole-scale "exemption" within the CMP, vast numbers of developments in the eight coastal counties—some of which, such as the development reviewed in this action, cram hundreds of individual septic tanks onto acres divided into very small lots—are without any regulatory oversight. Such a vast oversight could not have been what the General Assembly intended in giving the Department such broad authority to review all state and federal permits.

[6] These 44 permits make up only a small fraction of what the developers intend to establish on this property, but avoid review of the cumulative impacts from the project's inception by dividing the permit applications up into "phases" for DES to review.

Moreover, smaller septic tanks in such large quantities are burdened by the same environmental impacts sought to be avoided by reviewing larger tanks for CMP consistency. Regardless of gpd capacity, high concentrations of septic systems in an area can overload the soil's treatment capacity, increasing the risk of contamination with pathogens and nitrates.[7] Not only does no legal basis exist for DES' purported exemption, no factual basis exists either. Consequently, the degradation and harm that the CMP is designed to prevent, is instead sanctioned by the ALC. These harms were deliberately contemplated and addressed in the CMP, and the General Assembly charged the Department with adequately protecting against them.

In carving out CZC review for a huge number of permits, forgoing the protection and full consideration of the unique circumstances of our coast, the Department and the ALC reject the legislative directive, and in so doing materially alter and amend the Act. While this may lighten their regulatory burden, it is at the expense of compliance with statutory mandates and the health and enjoyment of the residents of South Carolina's coastal regions, and the members of the SCCCL that are party to this action. In allowing DES to shirk its statutory obligations, the ALC's ruling leads to an absurd result.

The failure to certify the 44 septic tank permits for consistency with the policies under the CMP undermines its very purpose. The Act was designed to balance economic development with environmental protection, with a strong emphasis on safeguarding fragile coastal resources. S.C. Code § 48-39-30(8). It mandates the Department to protect, restore, and enhance the State's coastal resources. Reviewing and considering the impacts posed by septic systems, particularly when in

[7] Septic System Impacts on Water Sources, EPA (as of July 17, 2025) (further stating that "Other problems include excessive nitrogen discharges to sensitive coastal waters and phosphorus pollution of inland surface waters, which increases algal growth and lowers dissolved oxygen levels. Contamination of important shellfish beds and swimming beaches by pathogens is a concern in some coastal regions."). https://www.epa.gov/septic/septic-system-impacts-water-sources.

high density developments sited in low-lying areas adjacent to sensitive waters, is essential to protecting coastal resources. As such, DES has failed to incorporate specialized knowledge of coastal processes, functions, and values, which it possesses, into its permitting of these coastal septic systems.

Further, the Legislature knew how to provide for permitting exemptions where they thought it was necessary in permitting for critical areas. For example, in addition to the explicit dock review limitation found in Section 48-39- 80(B)(11), S.C. Code Ann. § 49-39-130 provides exemptions for dredge and fill by the U.S. Army Corps of Engineers for maintenance, walkways over sand dunes major utilities, and conservation and research activities.

Not only does the Act require consideration of these sensitive coastal areas, the federal Coastal Zone Management Act, which granted the authority of the State to develop the CMP, clearly obliges the preservation and protection of coastal waters. *See* 16 USCA §1452 ("[t]he program should at least: provide for the protection of natural resources including wetlands and floodplains and to manage coastal development to improve and safeguard water quality.") There is an obvious tension among the CMP policies, the Act, and federal obligations to protect coastal water quality and, yet, DES excludes a very large category of permits that can and have had such negative consequences as degrading water quality, creating contamination that results in significant health hazards, closure of shellfish grounds and swim advisories.

CZC review by the Department is mandated by statute and is intended to give weight to the unique value of natural resources on the coast, as well as the unique natural forces at play on the coast. The Department's failure to undertake coastal zone consistency review and its related failure to consider the appropriateness and impacts of coastal forces on the 44 septic systems is not only inconsistent with the plain language of S.C. Code § 48-39-80(B)(l1), but also contrary to

established case law and legislative intent. Accordingly, the ALC erred in granting summary judgment to allow the Department to continue evading the Legislature's directives, and wholly altered the Act in doing so.

III. The lack of public notice constituted a due process violation and the ALC's ruling was erroneous.

Administrative agencies are required to meet minimum standards of due process. *Stono River Env't Prot. Ass'n v. S.C. Dep't Health & Env't Control*, 305 S.C. 90, 93–94 (1991) (citing S.C. Const. art. I, § 3; *Smith & Smith, Inc. v. S.C. Pub. Serv. Comm'n*, 271 S.C. 405 (1978)). The South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on **due notice** and an opportunity to be heard… and he shall have in all such instances the right to judicial review." S.C. Const., Art. I, § 22 (emphasis added); *see Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171-172 (2008)("Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. Rather, due process is flexible and calls for such procedural protections as the particular situation demands."); *see also Stono River*, 305 S.C. at 93–94 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). To maintain a due process challenge, a party must explain the dimensions of the property and liberty interests at issue, which "stem from an independent source such as state law." *Hamilton v. Bd. of Trustees of Oconee County School Dist.*, 282 S.C. at 525, 319 S.E.2d at 721; *see also* 16C C.J.S. Constitutional Law §§ 1888, 1896 (Dec. 2024).

In concluding DES did not violate the League's due process rights to notice, the ALC found, "SCCCL was able to learn of the permits through significant effort on its part, including the use of FOIA requests. While the Court is concerned that the Department's lack of public notice

creates a risk of due process violations in other cases, the fact remains there is no requirement for the Department to provide public notice of wastewater system permits. Since the Department was not required to provide public notice of wastewater system permits and SCCCL's due process rights are met in this proceeding, SCCCL was not prejudiced by the Department's lack of public notice." Order, p. 5. (R. p. 10).

Currently, the Department does not place applications for individual septic tanks of less than 1,500 gpd on public notice, nor does it publicly notice issued permits for the same. This failure creates a system whereby affected persons and the public at large are unable to engage in decision making processes that affect their rights. In short, affected persons are kept completely in the dark about the State's permitting of septic systems even in ecologically sensitive coastal areas that have the potential to harm the quality of their communities and surrounding environment. Because the Department does not provide any public notice of septic tank permit applications or its decisions to grant such permits, the public and any affected persons immediately are due notice.

In this case, the rights impacted by the failure to provide due notice include recreational uses in and on public trust resources, such as boating, swimming, fishing, and harvesting shellfish, in addition to impacts on their health and well-being and their property values. The League's over 4,000 members, who reside, recreate, and rely on the waters and wetlands around Bulls Bay and Refuge, are directly impacted by the potential for pollution and environmental degradation posed by the improperly noticed, reviewed, and issued permits. Indeed, the League's members have protected rights to recreate in and on public trust resources, including specifically the waters of Bulls Bay which are adjacent to the proposed White Tract septic systems. *See Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995) ("[e]veryone has the alienable right to breath clean air; drink safe water; to fish and sail, and recreate upon the high

seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks."); *see also McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 120 (2003) (As part of its public trust duties, the State "cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access."). When such public trust waters are harmed or threatened by pollution, such harm and threat impairs and interferes with Appellant's protected rights. The failure to provide any public notice has unjustly restricted the League's ability to oppose these systems that could impact their rights to recreation and public trust resources, as well as their health and wellbeing.

Indeed, the Circuit Court recently ruled that the public is in fact entitled to public notice of septic tank permits under the Due Process Clause. See Order Granting Partial Summary Judgment, *Coastal Conservation League and Charleston Waterkeeper v. South Carolina Department of Environmental Services*, Case No. 2022-CP-10-05192 July 14, 2025. ("To summarize, due process protections require DES to place all septic tank applications on public notice so that affected persons are afforded notice and an opportunity to comment.") (R. pp. 28-35).

A. The Lack of Notice Resulted in Substantial Prejudice.

To prevail on a procedural due process claim, a party must demonstrate substantial prejudice. *See Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 435 (1984). The court may reverse or modify an agency's decision if the substantial rights of the appellant have been prejudiced because the administrative decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the agency's authority; (c) made upon unlawful procedure; (d) affected by error of law; (e) clearly erroneous in light of the record; or (f) arbitrary or capricious. *See Myers v. S.C. Dep't of Health & Hum. Servs.*, 418 S.C. 608, 615 (Ct. App. 2016).

In *Myers*, the court rejected a due process challenge based on defective notice because the petitioner had received advance notice, was represented by counsel, and had timely access to the agency's reasoning. *Id.* at 617. The court concluded there was no substantial prejudice. This case is fundamentally different. Here, DES' failure to provide any public notice of the 44 septic tank permits forced the League to rely on speculative, resource-intensive Freedom of Information Act ("FOIA") requests. The League had no notice prior to the permitting decisions, no access to the agency's reasoning before the permits were issued, and no opportunity to participate in the process. The League faced a real risk of missing the 15-day appeal window entirely. This is precisely the type of structural disadvantage that constitutes substantial prejudice.

The ALC erred in concluding that the eventual contested case hearing cured the due process violation. As the South Carolina Supreme Court has held, due process requires not just access to a forum, but access at a meaningful time and in a meaningful manner. *S.C. Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). Here, the League's access came only after extraordinary effort, materially impairing its procedural rights. Likewise, this case stands in contrast to *Olson v. SCDHEC*, 379 S.C. 57, 663 S.E.2d 497 (2008), where the court found no due process violation because petitioners received newspaper notice of a minor dock permit amendment and timely appealed. The petitioners had full access to an evidentiary hearing and exercised procedural rights without impediment. *Id.* at 68-69. The League, in contrast, was excluded from the permitting process at the outset and had no opportunity to act until well after the permits had issued.

B. Obtaining Notice Through FOIA is Inadequate

As to the due process claim, the ALC held that because the League was able to obtain the permits through FOIA requests and file a challenge, it was not prejudiced by the Department's

failure to provide public notice; therefore, the League's due process rights had not been violated. Order, p. 5. (R. p. 10). This reasoning overlooked the fundamental purpose of public notice, which is to ensure timely and equitable participation in the permitting process, not merely to allow retroactive access after decisions are made. FOIA mandates that the records of any department of the State, including the Department, be open to the public for inspection. S.C. Code § 30-4-15. To make a FOIA request, the requester must submit a written request and pay associated fees, which are subject to inflation and based on personnel time and reproduction costs. S.C. Code § 30-4-30(b).

Having to rely on FOIA requests rather than having public notice available for permitting applications and decisions places an impossible burden on affected persons. To use FOIA effectively, individuals must already know that a septic permit application has been filed or issued. Without any notice from the agency, they cannot know when to request records. In the event an affected person is put on notice of a permit application by some means other than notice from the Department, the affected person must time a FOIA request concurrently with a septic permit application and/or permit issuance. A request made too early will return nothing; a request made too late risks expiration of the 15-day window to challenge the permit. Even a perfectly timed request is no safeguard, because the Department has up to 40 days to respond, likely foreclosing judicial review. Thus, FOIA is not a viable substitute for timely public notice.

Here, the League's ability to challenge the 44 permits at issue was entirely dependent on a successful public records request. The League was not informed of these permits by any mechanism established by the Department. Instead, it had to expend internal staff resources to monitor developments and file multiple FOIA requests. Had the League not undertaken this

burdensome effort, it would have had no way to discover the existence of the permits before the appeal window closed. This burden is materially different from the burden evaluated in *Stogsdill v. S.C. Dep't of Health & Human Servs.*, 410 S.C. 273, 763 S.E.2d 638 (2014), where the court found no due process violation because the petitioner had general notice of a reduction in Medicaid services and availed himself of the opportunity for a hearing. In contrast, the League had no notice at all. The Department's reliance on FOIA creates a system in which only those with speculative foresight, time, and resources might obtain information.

C. The Lack of Public Notice Violates S.C. Code § 44-1-60(E).

At the time of the challenged agency action, S.C. Code § 44-1-60(B) required that "[t]o the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings." This provision has since been recodified as S.C. Code § 48-6-30(B) following the 2024 agency reorganization. The statute further required DES to send notice of its decisions by certified mail to applicants, permittees, licensees, and affected persons who had requested notification. Notice was to be provided simultaneously to ensure equal opportunity to appeal. Failure to do so jeopardizes procedural fairness. *See S.C. Coastal Conserv. League v. S.C. Dep't of Health & Env't Control*, 390 S.C. 418, 429 (2010); *Pickens County v. S.C. Dep't of Health & Env't Control*, 435 S.C. 99 (2021).

Under this section, DES must send notice to affected persons who have requested it in writing. In practice, however, the Department has asserted that affected person status is only granted if a permit application is already pending. This circular logic renders the statute functionally useless. Without public notice of septic tank permit applications, the League's members could not request affected person status for a given tract of land, thereby frustrating the very purpose of the statute and rendering the provision as superfluous. Procedural deficiencies,

such as failure to provide public notice or consider public comments, call into question the integrity of permitting decisions and constitute as-applied due process violations when they deprive affected persons of the right to participate in decisions that impact their interests. Here, the Department's failure to issue any public notice foreclosed the League's opportunity to meaningfully engage and impaired its statutory and constitutional rights.

Therefore, the Department's failure to provide public notice of the 44 septic permits, as applied in this case, violated the League's due process rights by depriving it of timely and meaningful participation in decisions affecting public trust resources. The procedural burden imposed on the League materially impaired its ability to exercise statutory and constitutional rights and constitutes substantial prejudice. The ALC's decision should be reversed.

CONCLUSION

DES is charged with protecting our dwindling and vulnerable environmental resources, particularly along the coast. Refusing to evaluate the potential for thousands of small septic tanks being installed in the eight coastal counties frustrates the entire purpose of the Act. Appellant respectfully requests this Court reverse the Order of the ALC.

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. : 2025-000379
Docket Nos. 24-ALJ-07-0088-CC to 24-ALJ-07-0131-CC

South Carolina Coastal Conservation League…….Appellant,

v.

South Carolina Department of Health and Environmental Control and
Pulte Homes, LLC,……..Respondents.

CERTIFICATE OF COUNSEL FOR APPELLANT'S FINAL BRIEF AND FINAL REPLY BRIEF

I, Leslie S. Lenhardt, do hereby certify that Appellant's Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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