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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CIRCUIT COURT
FRANK R. ADDY, Presiding Judge

Appellate Case No. 2025-001315
Civil Action No. 2022-CP-10-05192

South Carolina Coastal Conservation League and Charleston Waterkeeper, ...……. Appellants,

v.

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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

Did the Circuit Court err in granting partial summary judgment to the Department of Environmental Services on the grounds that the South Carolina Coastal Tidelands and Wetlands Act does not require it to review individual septic permits in the coastal zone for consistency with the binding policies of its coastal management program?

STATEMENT OF THE CASE

This matter is on appeal from the Charleston County Court of Common Pleas in granting summary judgment to Respondent, South Carolina Department of Environmental Services ("DES" or "the Department"), on the grounds that the Coastal Tidelands and Wetlands Act does not require a Coastal Zone Consistency Certification ("CZC") for individual small septic tanks designed for peak flows less than 1,500 gallons per day.

This action was filed on November 10, 2022 against the Department pursuant to the Uniform Declaratory Judgments Act, S.C. Code Section 15-53-10, et seq. (R. pp. 22-84). Appellants filed a motion for preliminary injunction, which was denied on January 4, 2024. (R. pp. 100-543;1-3). On July 19, 2024 and July 31, 2024, the parties filed cross-motions for summary judgment. (R. pp. 560-798).

On May 30, 2025, the Circuit Court granted partial summary judgment in favor of the Department, concluding that the Department's application of a 1500-gallon-per-day minimum threshold before requiring a CZC Certification is a legitimate exercise of authority. **Cir. Court Order** at 4.[1] (R. p. 18). Appellants sought reconsideration on July 25, 2025, which was denied on October 27, 2025. This appeal followed.

[1] The Circuit Court granted partial summary judgment to Appellants on another issue in this case on July 14, 2025. (Order Granting Partial Summary Judgment, Honorable Frank Addy, Case No. 2022-CP-10-05192, July 14, 2025)

STANDARD OF REVIEW

The applicable standard of review on questions of law involving statutory interpretation is *de novo*. *See Catawba Indian Tribe v. State,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). The issue of interpretation of a statute is a question of law for the court. *Charleston County Parks & Recreation Comm'n v. Somers,* 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (stating "[t]he determination of legislative intent is a matter of law.") As such, this Court is free to decide a question of law with no particular deference to the circuit court. *Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

STATEMENT OF FACTS

Through this appeal, Appellants seek review of the Circuit Court's Order upholding the Department's failure to follow the plain language of the Coastal Tidelands and Wetlands Act, S.C. Code Ann. § 48-39-10 et seq. ("Act"), which requires it to review all state and federal permits for consistency with South Carolina's Coastal Management Program ("CMP"). S.C. Code Ann. § 48-39-80(B)(11). Specifically, the Act mandates that the Department "review all state and federal permits in the coastal zone, and to certify that these do not contravene the management plan." *Id*.

The Department has failed to undertake this mandatory CZC review for individual on-site wastewater systems, also known as, and referred to herein, as septic tanks or septic systems. The Department has been issuing, and will continue to issue, septic system permits for individual dwellings within large residential developments that are sited in close proximity to the State's coastal waterways, without regard for their density or cumulative impacts of such systems on the surrounding coastal environment. As a result of the Department's failure to give any consideration to these sensitive coastal areas or the cumulative and long-range impacts from such authorizations,

our coastal waters have become degraded by septic effluent contamination; such degradation harms the environment, as well as Appellants' members and other members of the public who utilize the vulnerable natural resources that abound within the coastal zone.

The Department's failures place public health at risk and expose our state's waterways, marshes, beaches, and fisheries to significant, documented harms that can be traced to untreated sewage from malfunctioning, ill-maintained, and/or ill-placed septic systems.

Appellant organizations, Coastal Conservation League ("the League"), Charleston Waterkeeper ("Waterkeeper"), and their members have significant, particularized, and concrete interests in the application of the South Carolina Coastal Tidelands and Wetlands Act, which is designed to protect sensitive coastal resources. The League routinely seeks to prevent or reduce endangerment to human health and the natural environment resulting from activities within the eight coastal counties. *See, e.g., S.C. Coastal Conserv. League v. S.C. Dep't Health & Envtl. Control*, 434 S.C. 1 (2021); *Kiawah Dev. Partners v. S.C. Dep't Health & Envtl. Control*, 411 S.C.16 (2014); *Spectre v. S.C. Dep't Health & Envtl. Control*, 386 S.C. 357 (2010). Waterkeeper similarly seeks to prevent and reduce such harms, specifically in Charleston County. *See, e.g., Charleston Waterkeeper v. Frontier Logistics*, 488 F.Supp.3d 240 (D.S.C. 2020).

Appellants' members live near, recreate on, fish from, and regularly use the coastal waters in South Carolina, and specifically the waters and wetlands in and around Bulls Bay in Awendaw, Cape Romain National Wildlife Refuge, James Island Creek, Shem Creek and numerous other waterbodies within the Coastal Zone that have been or will be impacted by the use of septic systems. One such development, incorporated into this claim by reference and later discussed in

more detail,[2] concerns the White Tract development. *S.C. Coastal Conserv. League v. S.C. Dep't Health & Envtl. Control & Pulte Homes, LLC*, No. 2025-000379 (Ct. App. Sept. 4, 2025).

I. RISKS OF SEPTIC SYSTEMS IN COASTAL AREAS

Conventional septic systems treat human waste from individual homes and businesses. They have two primary components: the septic tank and the drainfield. The tank filters out solid wastes which collect within the tank; the rest ("effluent") is released into the septic drainfield, which is simply the soil surrounding the tank. The soils within the drainfield naturally filter out bacteria, viruses, and nutrients from the septic effluent as it percolates through the soil before making its way to ground and surface waters. **Memorandum in Support of Appellants' Motion for Summary Judgment**, p. 2. (R. p. 564).

Proper functioning of septic systems is highly dependent upon unsaturated soil within the drainfield, adequate soil type and characteristics, sufficient distance between drainfield and water tables, and the size of the drainfield. Multiple soil surveys by the United States Department of Agriculture highlight this fact: "Clayey or wet soils are poorly suited to use as septic tank absorption fields" and "there must be unsaturated soil material beneath the absorption field to filter the effluent effectively[.]"[3] "Suitability of a soil for septic tanks and sewage-disposal fields depends mainly on its permeability, its depth to water table, and the hazard of flooding. . . . Soils that have a high water table or are likely to be flooded have severe limitations as sites for sewage-

[2] Appellant CCL has another related claim against the Department that is pending appeal by this Court. The arguments presented in *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control and Pulte Homes LLC* concerning the Department's failures to properly review individual on-site septic tanks for consistency with the Act and accompanying Coastal Management Program policies are substantively similar. As such, Plaintiffs intend to consolidate the two claims for this Court's consideration.

[3] Motion for Summary Judgment p. 2 (R. pp. 564-565), United States Dep't of Agriculture, et al., *Soil Survey of Dorchester County, South Carolina* (1990) at 51, available at https://www.govinfo.gov/content/pkg/CZIC-s599-s58-e64-1990/html/CZIC-s599-s58-e64-1990.htm (last visited on Nov. 21, 2025).

disposal fields. . . . [T]he site chosen for construction may be of such limited extent that it will not provide a disposal field of sufficient size to serve the structure that is to be built."[4]

Septic systems can malfunction for a variety of reasons. **Appellants' Motion for Summary Judgment**, **Ex. A**, Aff. of Dr. Jane Harrison (R. pp. 132-213); *see also id.* at **Ex. S**, Centers for Disease Control & Prevention, et al., *Healthy Housing Reference Manual* (2006) at 10-10. (R. p. 540). Although recent data is not available because the Department does not maintain a septic tank inventory of any kind, the Environmental Protection Agency ("EPA") has estimated that at least twenty percent of septic systems in the United States are malfunctioning to some degree. *See id*. at **Ex. E**, Envtl. Protec. Agency, *Stormwater Best Management Practice*, EPA-832-F-21-029E (2021). (R. pp. 653-659). The Department estimates that ten to thirty percent of septic systems fail to work properly in an average year. *Id*. at **Ex. D**, S.C. Dep't Health & Envtl. Control, *Nonpoint Source Management Plan 2020-2024* (2019) at 15. (R. pp. 629).

Malfunctioning septic systems can result in discharges of pathogen-laden human waste and other pollutants into the environment. Human exposure to untreated septic effluent presents public health risks, including disease, infection, and other illnesses. *See id*. at **Ex. A**, Aff. of Dr. Jane Harrison. (R. pp. 132-213). The Centers for Disease Control and Prevention ("CDC") state that "proper maintenance of septic tanks is a public health necessity. Enteric diseases such as cryptosporidiosis, giardiasis, salmonellosis, hepatitis A, and shigellosis may be transmitted through human excrement." *Id*. at **Ex. S**, CDC et al., *Healthy Housing Reference Manual* (2006) at 10-1 (R. p. 531).. Accordingly, the EPA has identified the performance of septic systems as a "national issue of great concern." *Id*. at **Ex. G**, *Voluntary National Guidelines for Management of*

[4] Motion for Summary Judgment p. 3 (R. p. 565), United States Dep't of Agriculture, et al., *Soil Survey: Charleston County, South Carolina* (1971) at 58, available at https://nrcs.app.box.com/s/mtk8vlsftgkni0wgt9cez4qonc0fbj0a/file/982760970135 (last visited on Nov. 21, 2025).

Onsite and Clustered (Decentralized) Wastewater Treatment Systems, EPA 832-B-03-001 (2003). (R. pp. 380-386). The Department itself made the same findings when it promulgated its septic regulations:

> A major factor influencing the health of individuals where public wastewater treatment facilities are not available is the proper onsite treatment and disposal of domestic wastewater. Diseases such as dysentery, cholera, infectious hepatitis, typhoid, and paratyphoid are transmitted through the fecal contamination of food, water, and the land surface largely due to the improper treatment and disposal of domestic wastewater. For this reason, every effort should be made to prevent such hazards and to treat and dispose of all domestic wastewater through the practical application of the most effective technology available.

S.C. Code Ann. Regs. 61-56.100(1).

The CDC cites failing septic systems as one of the most common sources of well water contamination,[5] and untreated effluent from malfunctioning septic systems is widely understood to be a major source of surface water contamination in degraded water bodies. *See id*. at **Ex. A**, Aff. of Dr. Jane Harrison. (R. pp. 132-213). The Department routinely acknowledges the same. For example, the Coastal Management Program ("CMP") provides that "the major negative impact associated with sewage treatment systems is potential water quality degradation from effluent discharge[.]" CMP III-60; *see also id*. at **Ex. D**, S.C. Dep't of Health & Envtl. Control, *Nonpoint Source Management Plan 2020-2024* (2019) at 15 (stating "[i]mproperly functioning septic systems can be a significant source of NPS [nonpoint source] pollution, particularly in rural areas."). (R. p. 629). Further, the Department has acknowledged the contribution of untreated septic effluent as part of its analysis of factors that contribute to the well-documented degraded water quality in James Island Creek. *See id*. at **Ex. F**, S.C. Dep't of Health & Envtl. Control, *Total*

[5] **Appellants' Motion for Summary Judgment, Ex. G**, Centers for Disease Control & Prevention, *Well Siting and Potential Contaminants* (2009). (R. pp. 765-766).

Maximum Daily Load - James Island Creek, Technical Doc. No. 002-2020 (2019) at 17-18, 26 (discussing failing septic systems as a nonpoint source of pollution in James Island Creek, and estimating the number of existing septic systems within the James Island Creek watershed to be significantly higher than surrounding areas). (R. pp. 684-685;693).

Risks of septic malfunction abound in the coastal zone. Septic systems rely on deep, dry soils to properly filter effluent; low-lying coastal areas with shallow groundwater tables, however, are often not suited for this purpose. Soils in the coastal zone are more prone to saturation due to flooding, coastal storms, storm surge, heavy rainfall, seasonal variances, and sea level rise; further, all of these conditions raise groundwater levels, which can quickly overwhelm septic systems. *See id*. at **Ex. A**, Aff. of Dr. Jane Harrison (R. pp. 132-213); *see also id*. at **Ex. C**, Aff. of Sharon Richardson. (R. pp. 313-325).

Despite the fact that federal and state policy and law have repeatedly recognized and emphasized the unique, sensitive nature of coastal areas, and despite an enormous body of scientific literature identifying the risks and harms of septic pollution on coastal waterbodies, the Department affords no special consideration of septic systems in the coastal zone, which is particularly problematic in large planned residential developments. Instead, DHEC treats applications throughout the state—from the mountains to the coast—exactly the same. This means, for example, that a septic-dependent development system installed in a neighborhood in rural Richland County must meet the same minimal depth and soil requirements as a septic system placed in low-lying areas along the coast. This approach ignores stated federal and state policy regarding the unique nature of coastal areas[6] as well as recognized best management practices for

[6] *See* S.C. Coastal Tidelands and Wetlands Act of 1977, S.C. Code Ann. § 48-39-20 & 30.

septic tanks. *See id*. at **Ex. A**, Aff. of Dr. Jane Harrison (R. pp. 132-213); *see also id*. at **Ex. C**, Aff. of Sharon Richardson. (R. pp. 313-325).

The State's coastal waterways are not meeting applicable water quality standards for safe recreational use. *See id*. at **Ex. B**, Aff. of Andrew Wunderley. (R. pp. 214-312). Further, many of the State's shellfish harvesting areas are not meeting the applicable water quality standards for human consumption of fish and shellfish, resulting in restricted or prohibited shellfish harvesting classifications.[7] This degradation in water quality is correlated with malfunctioning septic systems from nearby residential developments. *See id*. at **Ex. B**, Aff. of Andrew Wunderley. (R. pp. 214-312). The case studies of James Island Creek and Shem Creek provide cautionary tales of how septic systems installed decades ago, and presumably properly functioning at the beginning of their functional life, eventually fail and wreak havoc on Charleston's coastal waterways, prompting swimming advisories and closures to shellfish harvesting. *See id*. at **Ex. B**, Aff. of Andrew Wunderley. (R. pp. 214-312).

II. INCREASED PREVALENCE OF LARGE-SCALE SEPTIC-DEPENDENT PROJECTS IN THE COASTAL ZONE

The historic use of clustered residential septic systems near coastal waterways has a well-documented history of long-term impacts to water quality. The CMP document itself identifies that "[i]ndividual systems such as wells and septic tanks are adequate where development is limited, *but can have major environmental impacts in densely populated areas*." CMP III-60 (emphasis added). Further, the CMP document directs the Department's Bureau of Coastal Management to authorize septic installations in the coastal zone only for "*low density* residential

[7] Plaintiffs' Memorandum in Support of Motion for Summary Judgment (R. pp. 567-568), SCDHEC Conditional Shellfish Harvest Closure Application, available at https://sc-dhec.maps.arcgis.com/apps/webappviewer/index.html?id=f305d270358e426da4e4d9f4c1653df0 (last visited Feb. 27, 2023); *see also* SCDHEC Shellfish Maps, available at https://scdhec.gov/food-safety/retail-food/shellfish-monitoring-program-overview/shellfish-maps (last visited Feb. 27, 2023).

developments *when they are designed properly* and *soils are adequate*[.]" CMP III-16 (emphases added). Despite this, the Department continues to permit the installation of thousands of densely-placed septic systems, all while skirting coastal zone consistency review.

Increasing development in the coastal zone has long been identified as a problem, even as far back as the inception of the Act—forty-five years ago—when the General Assembly found that "increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, [and] permanent and adverse changes to ecological systems[.]" S.C. Code Ann. § 48-39-20. Indeed, the CMP (1979) cautioned that "[u]rbanization of coastal areas results in greater discharge rates [of domestic sewage] and the estuary and nearshore waters may continue to be the ultimate jump [sic] of sewage and slump discharges in the foreseeable future." CMP IV-96.

Today, this problem has never been more true. Although specific data sets are unavailable due to the lack of historic and current septic system placement records, we know that South Carolina relies more heavily on septic systems for household waste treatment than other states; up to 50% of residents in North and South Carolina rely on onsite wastewater treatment systems, many of which are already concentrated near the coast. *See* **Appellants' Motion for Summary Judgment**, **Ex. A**, Aff. of Dr. Jane Harrison. (R. pp. 132-213). Further, coastal counties in South Carolina are experiencing unprecedented population growth. As a result, many tracts identified for large-scale residential development are located outside of municipal sewer service, meaning that developers—often tract builders—are turning to septic for wastewater treatment. These septic-dependent developments—often tract houses—tend to share the common characteristics of high density and small parcel size (less than a one acre, even as small as 0.15 acres), meaning that

a large percentage of the developed land is actually comprised of septic drainfields. *See id*. at **Ex. R**. (R. pp. 524-527).

As aforementioned, the White Tract development exemplifies a proposed septic-reliant development in an area of great resource value. It is also, as stated, pending before this court in a separate but related claim. The White Tract is located on 233.45 acres of wetlands and forested land in Awendaw, contemplates 204 single-family homes, all serviced by individual septic systems, with lots ranging in size from 0.325 acres to 0.934 acres. The property extends to the Intracoastal Waterway and is directly adjacent to both the Cape Romain National Wildlife Refuge, which is composed almost entirely of barrier islands, salt marsh, and coastal waters, and the Francis Marion National Forest. As of the date of this appeal, White Tract has received various permits from the Department, including 44 individual septic tank permits and a stormwater permit for Phase I of its development. *Coastal Conservation League v. SCDES & Pulte Homes*, Appellate Case No. 2025-000379; *Friends of Coastal South Carolina v. SCDES & Pulte Homes*, ALC Docket No. 25-ALJ-07-0013-CC.

III. THE LEGAL FRAMEWORK OF S.C. CODE ANN. § 48-39-80 AND THE CMP

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. 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 Ann. § 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." S.C. Code Ann. § 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).

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 the Department 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 DES' 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 individually are small enough.

ARGUMENT

The Circuit Court 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 Circuit Court found that that "the Department did in fact 'consider all lands and waters in the coastal zone for planning purposes' and further finds that the Department determined that requiring a CZC Certification for *all* septic tank permits and 'small' onsite wastewater systems was unnecessary to establish adequate environmental protections." **Cir. Court Order** at 4. (R. p. 18). The Circuit Court 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. 947). 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 exemption from certification review 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. The Circuit Court's ruling excuses DES from reviewing applications for septic systems for dense residential developments in the coastal zone 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. This problem is compounded particularly with high-density developments where no consideration is given despite the collective significant volumes of sewage associated with the dozens or hundreds of such systems.

Applying the binding norms and policies found within the CMP matters because of the 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 – such as the 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 – when evaluating septic system applications would, and should, significantly impact how decisions are made for septic system permitting.

I. The plain language of the statute requires review of individual septic tank permits.

The crux of this appeal lies in the Court 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, despite the Department's rogue decision to unilaterally exempt certain permits, specifically small onsite

wastewater permits, from coastal zone consistency review without any statutory authority, and the Court's failure to enforce it.

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 (5thed. 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, 476S.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, 549S.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 Circuit Court rejected Appellants' argument that the word "shall" creates a mandatory duty to review all state and federal permits not explicitly exempted by the Act because "[p]lainly there is no conflict between S.C. Code Ann. § 48-39-80(B)(11) and CMP V-5 (Table 1). The Program Document is simply "filling up the details" of the statutory mandate." **Cir. Court Order** at 5. (R. p. 19). The Circuit Court cited *McNickel's Inc. v. S.C. Dep't of Revenue*, "[w]hile the Legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *Id*. citing *McNickel's Inc. v. S.C. Dep't of Revenue*, 331 S.C. 629, 503 S.E.2d 723 (1998).

In other words, the Circuit Court, applying no principles of statutory construction, held that the Act gives DES unfettered discretion to create exemptions from the coastal consistency review process altogether. Such a conclusion 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."). And indeed, the General Assembly *did* provide an exemption, except the exemption from CMP review was specific to dock permits outside of the critical, and not for septic systems.

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). 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. Under the Court and the Department's theory, the agency has the discretion to determine whether or not to review all manner of permits despite the lack of statutory authority to do so. The absurdity of such an interpretation is clear an 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 Circuit Court 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 Circuit Court's ruling lead to an absurd result, it also permits arbitrary and capricious decision-making for the

Department's decision about whether and what permits to exempt are entirely untethered from the statute.

In essence, the Circuit Court's Order permits the Department to have unfettered 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)) (emphasis added). Despite this, the Circuit Court 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 Circuit Court 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 1,500 gallons per day or other than domestic waste." (R. p. 947).

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* S.C. Code Ann. § 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 for septic systems 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*, former governor Jim Hodges invoked S.C. Code Section 1-3-240(B), known as the Restructuring Act in removing the Chairman of the Santee Cooper Board of Directors. *Hodges*, 341 S.C. 79, 533 S.E.2d 578 (2000). 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 Circuit Court'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*. The Circuit Court 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.

Despite the purported exemption, the Department has acknowledged 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. DHEC' Response to Plaintiffs' Request for Admission dated June 3, 2024. (R. pp. 940-944). It simply exempts them from CZC review. As such, every time the Department issues septic tank permits without review for consistency with the policies of the CMP, it 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 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.

Moreover, smaller septic tanks in such large quantities are burdened by the same environmental impacts sought to be avoided by reviewing larger septic 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. 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 Circuit Court. 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 Circuit Court 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. In allowing DES to shirk its statutory obligations, the Circuit Court's ruling leads to an absurd result.

The failure to certify 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 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. S.C. Code Ann. § 48-6-30(D)(2).

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), Section 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. S.C. Code Ann. § 49-39-130.

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 is not only inconsistent with the plain language of Section 48-39-80(B)(l1), but also contrary to established case law and legislative intent. Accordingly, the circuit court erred in granting summary judgment to allow the Department to continue evading the Legislature's directives, and wholly altered the Act in doing so.

CONCLUSION

The Circuit Court erred as a matter of law when it concluded the Coastal Tidelands and Wetlands Act does not mandate that the Department certify individual septic tanks for consistency with the CMP. Therefore, Appellants respectfully request this Court reverse the Order of the lower court in this matter.

Respectfully submitted,

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