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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Samuel L. Johnson, Administrative Law Judge

ALC Docket No. 25-ALJ-07-0420-CC
Appellate Case No. 2026-001550

Robert Litzenberger, Appellant,

v.

South Carolina Department of Environmental Services and Branden Baker, Respondents.

APPELLANT'S REPLY IN SUPPORT OF AUGUST 14 MOTION; RETURN IN OPPOSITION TO RESPONDENT'S CROSS-MOTION TO DISMISS; AND MOTION FOR LEAVE TO CURE RULE 203 ATTACHMENT

Appellant Robert Litzenberger, appearing pro se, submits this Reply pursuant to Rule 240(f), SCACR, in support of his August 14, 2026 filing made in response to the Clerk's August 5 directive; submits this Return pursuant to Rule 240(e) opposing the Department's August 24, 2026 Cross-Motion to Dismiss; and, to the extent separate affirmative relief is necessary, moves under Rules 240 and 263(b) for leave to cure the omitted Rule 203(d)(2)(B)(ii) attachment by filing the complete July 10, 2026 Order Granting Motion for Summary Judgment as Exhibit A. The Department's clarification that no hearing occurred resolves the transcript issue; it does not establish abandonment of the appeal. The attached Order and the transition provisions of SCDES's 2026 Construction General Permit also demonstrate why the merits should not be foreclosed through a curable perfection defect.

I. THIS REPLY IS TIMELY.

The Department's Return was served on August 24, 2026. Rule 240(f), SCACR, gives the moving party five days from service of a return to file a reply. Rule 263(a), SCACR, excludes intermediate Saturdays, Sundays, and holidays when the prescribed period is less than seven days. The counted days are August 25, 26, 27, 28, and 31. This Reply is therefore timely on August 31, 2026.

II. APPELLANT COMPLIED WITH THE CLERK'S AUGUST 5 CURE DIRECTIVE.

On August 5, 2026, the Clerk notified Appellant that the Court had no record showing a transcript request and directed Appellant to provide proof of a timely request or move for permission to make the transcript request outside Rule 207. Appellant responded on August 14, 2026, within the period stated by the Clerk. The Department's August 24 filing now states that the ALC held no hearing on the summary-judgment motion and therefore no transcript exists. Appellant accepts that clarification and respectfully requests that the Court deem the transcript issue resolved. Appellant's compliance with the Clerk's written instruction demonstrates continued prosecution, not abandonment.

III. RULE 240(b) AUTOMATICALLY STAYS PERFECTION DEADLINES WHILE THE CROSS-MOTION IS PENDING.

Rule 240(b), SCACR, provides that a motion to dismiss an appeal automatically stays the time limits for perfecting the appeal until the motion is decided. The Department's Cross-Motion to Dismiss therefore triggers the rule's automatic stay. Appellant requests that the Court deny dismissal and, upon disposition of the pending motions, establish a definite period for any remaining perfection filings.

IV. RULE 263(b) AUTHORIZES ENLARGEMENT OF THE NON-NOTICE PERFECTION DEADLINES.

Rule 263(b), SCACR, permits the appellate court or an individual judge or justice to extend time prescribed by the Appellate Court Rules for any act except the time for serving the notice of appeal under Rules 203 and 243. Appellant does not seek to enlarge the time for serving his Notice of Appeal. The Notice was served and filed on July 13, 2026. The requested relief concerns subsequent perfection matters, including the Rule 208 Initial Brief, Rule 209 Designation, and supplementation of the appellate file with the challenged decision.

V. THE OMITTED JULY 10 ORDER IS A CURABLE ATTACHMENT DEFECT.

Rule 203(d)(2)(B)(ii), SCACR, requires an administrative notice of appeal to be accompanied by a copy of the decision challenged. Appellant's July 13 Notice identified the correct ALC docket and the July 10, 2026 summary-judgment decision. Respondent's Cross-Motion identifies the same decision. There is no uncertainty about the tribunal, docket, decision, or appellate intent. Appellant now tenders the complete fourteen-page July 10 Order as Exhibit A. Rule 203(d)(3) expressly mandates dismissal for an untimely notice or unpaid filing fee; it does not state that omission of the decision copy is jurisdictional. Rule 263(b), moreover, excludes only the time for serving the notice of appeal from enlargement. The Court should permit prompt cure rather than impose dismissal.

VI. THE INITIAL-BRIEF ISSUE SHOULD BE ADDRESSED THROUGH RULES 240(b) AND 263(b), NOT DISMISSAL.

Rule 208(a)(1), SCACR, provides that when no transcript is ordered, the appellant's initial brief is due within thirty days after service of the notice of appeal. The Department now clarifies that no hearing occurred and no transcript exists. Before the asserted brief deadline, however, the Clerk had directed Appellant to address an apparent transcript deficiency, and Appellant complied. Those circumstances support enlargement under Rule 263(b). The Department's pending Cross-Motion also automatically stays perfection deadlines under Rule 240(b). Appellant requests ten days after disposition of the pending motions to file and serve the Rule 208 Initial Brief, Rule 209 Designation, and any other perfection document directed by the Clerk.

VII. EXHIBIT A SHOWS THAT THE ALC DECIDED THE CASE UNDER THE 2021 CGP.

The July 10 Order identifies Baker's November 2025 IL-NOI and DES's December 16, 2025 approval as the agency action under review. The Order states that Baker's package included a stamped plat depicting proposed disturbance more than thirty feet from the western boundary/tributary, a certification that he would follow the Talons OS-SWPPP, silt-fence protocol, and a stormwater and sediment-control narrative. It states that DES authorized 0.12

acre of disturbance. The Order then analyzes the 30-foot buffer in the CGP in effect when DES approved the IL-NOI and expressly notes that the CGP being applied became effective March 1, 2021. The Court concluded that Baker's submitted plans satisfied that 2021-CGP buffer requirement and that a Secondary Permittee could rely on the previously approved Talons OS-SWPPP.

VIII. THE 2026 CGP DOES NOT RETROACTIVELY DECIDE THE DECEMBER 2025 APPROVAL, BUT IT MATERIALLY LIMITS WHAT THE JULY 10 ORDER CAN BE READ TO AUTHORIZE AFTER MARCH 30, 2026.

SCDES issued the replacement NPDES Construction General Permit, SCR100000, on February 27, 2026, effective March 30, 2026 - more than three months before the ALC entered the July 10 Order. Appellant does not contend that the 2026 CGP retroactively changes the legal standard governing DES's December 16, 2025 approval. The point is narrower and stronger: the ALC's finding that the December 2025 plans satisfied the 2021 CGP does not establish compliance with the permit conditions governing continued coverage and construction after the 2026 CGP became effective.

IX. THE 2026 CGP EXPRESSLY REQUIRES PRIOR-CGP SWPPPs TO BE UPDATED.

Section 3.1.1.F of the 2026 CGP provides that SWPPPs associated with coverage approvals under the previous CGP, where coverage has not been terminated, must be updated in accordance with the 2026 CGP. Section 2.4.2.B likewise makes automatic continuation of coverage for permitted ongoing projects conditional on the SWPPP being updated under the 2026 CGP and on the original operator remaining in control. Those transition provisions directly matter here because the July 10 Order says Baker's Secondary Permittee coverage rests on his agreement to follow the previously approved Talons OS-SWPPP. The Order does not identify an updated 2026-compliant Talons C-SWPPP or OS-SWPPP, does not analyze the 2026 transition provisions, and does not decide whether the conditions for continued coverage under the replacement permit were satisfied.

X. THE 2026 CGP IMPOSES CURRENT LCP AND SECONDARY-PERMITTEE REQUIREMENTS THAT ARE NOT RESOLVED BY THE JULY 10 ORDER.

Section 3.1.1.G.III of the 2026 CGP provides that a C-SWPPP associated with a residential Larger Common Plan must be designed so the entire project site, during construction and through final buildout, complies with the permit; that compliant plan is what allows Secondary Permittees to obtain individual-lot coverage by referencing and implementing the approved OS-SWPPP. Section 2.2.2 further requires the Primary Permittee to make the OS-SWPPP and CGP available to the secondary lot owner, and requires the lot owner to agree to follow the approved OS-SWPPP and individual-lot controls or develop a plan meeting C-SWPPP requirements. Thus, the present question is not merely whether Baker once signed an IL-NOI agreeing to follow an old subdivision plan. It is whether the plan being relied upon for current construction is the plan required by the current permit.

XI. THE 100-FOOT PROVISION IS AN IDENTIFICATION/DELINEATION RULE, NOT A BLANKET 100-FOOT SETBACK.

The 2026 CGP must be stated accurately. Section 3.2.4.A requires the C-SWPPP to identify and delineate Waters of the State, including wetlands, within the disturbed area or total construction-site area. The permit dispenses with delineation only when a 100-foot undisturbed buffer can be maintained between the Waters of the State and all construction activities. Accordingly, the 100-foot language is not a universal setback. Its significance here is that a plan operating much closer than 100 feet cannot rely on that delineation exception; the applicable Waters of the State must instead be identified and addressed in the current C-SWPPP. That is materially different from treating a plat notation of 'more than 30 feet' as the complete water-feature analysis.

XII. THE 2026 CGP RETAINS A 30-FOOT WOTUS BUFFER BUT ADDS CURRENT BUFFER-MANAGEMENT REQUIREMENTS.

Section 3.2.4.C of the 2026 CGP requires Buffer Zone Management when Waters of the United States are on or immediately adjacent to the construction site. The ordinary natural buffer remains thirty feet; Sensitive Waters require a forty-five-foot extended natural buffer.

But the current permit also requires a Buffer Zone Implementation Plan and supporting narrative and maintenance provisions, and it imposes additional documentation and protective measures when the full buffer cannot be provided. The relevant conflict is therefore not '30 feet versus 100 feet.' The issue is whether the current, updated SWPPP identifies the water features, selects and documents the applicable buffer method, addresses any Sensitive-Waters classification, and implements the current permit's protective measures. The July 10 Order's finding that the December 2025 plat exceeded thirty feet under the 2021 CGP does not answer those questions.

XIII. THE ALC ORDER ITSELF MAKES THE TRANSITION ISSUE MATERIAL.

The Order holds that NPDES coverage is required because Lot 28 is part of a Larger Common Plan exceeding five acres. It also holds that Baker's authority as a Secondary Permittee depends on adherence to the approved subdivision OS-SWPPP. Those holdings make the 2026 transition provisions consequential rather than collateral. If current coverage depends on a subdivision SWPPP, and the replacement CGP requires prior-CGP SWPPPs with unterminated coverage to be updated, then the existence and contents of the updated plan bear directly on what authorization exists for present construction. The Court should not dismiss the appeal before Appellant is allowed to perfect it and present the merits on the proper record.

XIV. THE COURT NEED NOT DECIDE CURRENT 2026-CGP COMPLIANCE ON THIS PROCEDURAL MOTION.

Appellant does not ask the Court, in resolving Respondent's Cross-Motion to Dismiss, to make a new factual determination about federal jurisdiction over a tributary, classify any water as Sensitive Waters, or adjudicate present permit compliance outside the appellate record. These authorities are cited for the limited purpose of demonstrating that the July 10 Order is not a meaningless or obsolete piece of paper, that the merits involve a live regulatory controversy, and that dismissal for curable perfection defects would foreclose review while physical construction proceeds under a regulatory regime that changed before the appealed judgment was entered.

XV. THE SEPARATE WASTEWATER APPEAL SHOULD NOT BE DISPOSED OF BY THIS CROSS-MOTION.

The Department's filing states that Appellant filed Notices of Appeal from two separate ALC decisions: the June 16, 2026 Order of Dismissal in ALC Docket No. 26-ALJ-07-0089-CC concerning onsite wastewater and the July 10, 2026 summary-judgment order in this stormwater matter. Appellant has not withdrawn or abandoned the wastewater appeal. Appellant respectfully requests clarification whether that separate appeal remains pending under Appellate Case No. 2026-001550, should receive a separate appellate case number, or has been formally consolidated. No ruling on the present stormwater Cross-Motion should be construed to dispose of the separate wastewater appeal absent an express order.

XVI. RELIEF REQUESTED.

Appellant respectfully requests that the Court: (1) deem the transcript issue resolved because no hearing occurred and no transcript exists; (2) deny Respondent's Cross-Motion to Dismiss; (3) grant leave under Rule 263(b) to cure the omitted Rule 203(d)(2)(B)(ii) attachment by accepting the complete July 10, 2026 Order attached as Exhibit A; (4) give effect to Rule 240(b)'s automatic stay of perfection deadlines while the Cross-Motion is pending; (5) allow Appellant ten days after disposition of the pending motions to file and serve the Rule 208 Initial Brief, Rule 209 Designation, and any other perfection documents directed by the Clerk, unless accepted earlier; (6) clarify the docket status of the separate appeal from ALC Docket No. 26-ALJ-07-0089-CC; and (7) grant such other relief as the Court deems just and proper.

Respectfully submitted,

s/ Robert Litzenberger
Robert Litzenberger, Appellant, pro se
219 Talons Ridge Road
Seneca, South Carolina 29672
Telephone: 850-424-5021
August 31, 2026
Seneca, South Carolina

MEMORANDUM OF AUTHORITIES

Rule 203(d)(2)(B)(ii) and (d)(3), SCACR.

Administrative notice-of-appeal attachment requirement; mandatory dismissal expressly identified for untimely notice or unpaid filing fee.

Rule 208(a)(1) and (4), SCACR.

Initial-brief deadline when no transcript is ordered and consequence for failure to timely file.

Rule 209(a), SCACR.

Designation of Matter to be Included in the Record on Appeal.

Rule 240(b)-(f), SCACR.

Automatic stay of perfection deadlines upon a motion to dismiss; motion, return, and reply procedure.

Rule 263(a)-(b), SCACR.

Computation of time and authority to enlarge appellate deadlines other than service of the notice of appeal under Rules 203 and 243.

SCDES NPDES General Permit for Stormwater Discharges from Construction Activities, Permit No. SCR100000 (2026 CGP), issued Feb. 27, 2026; effective Mar. 30, 2026.

Relevant provisions: Sections 2.2.2 (Secondary Permittees), 2.4 and 2.4.2 (new/ongoing projects and continuation), 3.1.1.F (update of prior-CGP SWPPPs), 3.1.1.G.III (residential LCP SWPPP through final buildout), and 3.2.4.A-C (Waters of the State identification/delineation and Buffer Zone Management). Official source: South Carolina Department of Environmental Services.

CERTIFICATE OF SERVICE

I certify that on August 31, 2026, I served a true and correct copy of the foregoing Appellant's Reply in Support of August 14 Motion; Return in Opposition to Respondent's Cross-Motion to Dismiss; and Motion for Leave to Cure Rule 203 Attachment, together with Exhibit A, upon the following parties of record by United States Mail, First Class, postage prepaid, and by electronic mail where an address is available:

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Assistant General Counsel
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Counsel for Respondent SCDES

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Respondent

s/ Robert Litzenberger
Robert Litzenberger, Appellant, pro se

EXHIBIT A

Order Granting Motion for Summary Judgment
Administrative Law Court Docket No. 25-ALJ-07-0420-CC
Filed July 10, 2026

Complete 14-page Order follows.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Robert Litzenberger,	)	Docket No. 25-ALJ-07-0420-CC
Petitioner,	)	
	)	
vs.	)	
	)	**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**
South Carolina Department of Environmental Services and Branden Baker,	)	
	)	
Respondents.	)	
	)	
	)	

This matter is before the Court pursuant to a Requested Case Hearing filed by Petitioner Robert Litzenberger (Petitioner) challenging the December 16, 2025 approval by the South Carolina Department of Environmental Services (Department[1]) of an Individual Lot Notice of Intent authorizing construction stormwater coverage for Lot 28, Talons Subdivision, Oconee County, South Carolina. Presently before the Court is the Department's June 22, 2026 Motion for Summary Judgment (Motion). For the reasons set forth herein, the Court grants the Motion.

FACTS/PROCEDURAL HISTORY

In April 1996, the Talons at Lake Keowee, Inc. (Talons) applied for stormwater discharge coverage pursuant to a National Pollutant Discharge Elimination System (NPDES) general permit issued by the Department, Permit No. SCR100000, for a planned residential subdivision on property owned by Talons in Oconee County, South Carolina (Talons Subdivision). Talons sought approval for disturbance of 9.0 acres of land in the 59.7-acre site, which included twenty-eight (28) buildable lots. In furtherance of Talons' application for coverage, Talons submitted to the Department a Comprehensive Storm Water Pollution Prevention Plan (C-SWPPP) including a site plan, project narrative, topographical map, soil information, stormwater discharge calculations, details of stormwater and sediment control features, and details regarding erosion control during construction activity on the individual lots in Talons Subdivision. Talons' project narrative indicated that the individual buildable lots in the Talons Subdivision would be developed by the property owners who bought the lots. The project plans that Talons submitted to the Department

[1] In this Order, the naming convention "Department" includes the Department's predecessor agency, the South Carolina Department of Health & Environmental Control.

included a third-party engineer's certification that the plans, specifications, and underlying calculations were consistent with the Stormwater Management and Sediment Reduction Act, S.C. Code Ann. § 48-14-10 et seq., and associated state regulations. On June 3, 1996, the Department approved the plan and granted Talons NPDES stormwater coverage under the general permit. While the Department's June 3, 1996 approval authorized stormwater discharge coverage under an existing general permit, this Order will refer to the coverage approval as the "Talons Permit."

Lot 28 is a 1.7-acre triangle shaped individual lot in the Talons Subdivision, located to the east of Lake Keowee at 218 Talons Ridge Road, Seneca, Oconee County, South Carolina 29672, and bounded along its western border by a tributary of Lake Keowee. In October 2025, the Department informed the current owner of Lot 28, Respondent Branden Baker (Baker), that he could develop the parcel by either seeking an individual NPDES permit or by filing an Individual Lot Notice of Intent (IL-NOI) seeking coverage as a "Secondary Permittee" to the Talons Permit. Baker was further informed by the Department that developing the lot as a Secondary Permittee would limit him to a maximum of approximately 0.25 or ¼ acre of disturbance,[2] whereas obtaining individual NPDES coverage would place no limitations on the amount of disturbance. On or about November 26, 2025, Baker filed an IL-NOI form for stormwater coverage as a Secondary Permittee for Lot 28. Baker's application package to the Department included: a stamped plat of the Lot 28 depicting the areas of land disturbance and reflecting a distance of more than 30 feet from the outermost boundary of proposed land disturbance to the western boundary/tributary of Lot 28; a certification that he is responsible for "installing and maintaining the appropriate sediment and erosion control measures" and has agreed to follow the approved On Site Storm Water Pollution Prevention Plan (OS-SWWP) for Talons Subdivision, including individual lot controls; a diagram of the protocol for the installation of silt fencing on Lot 28; and a stormwater and sediment control narrative.

On December 16, 2025, the Department approved the IL-NOI submitted by Respondent Baker for Lot 28 and granted construction stormwater coverage to Baker as Secondary Permittee to the Talons Permit, assigning NPDES Coverage Number SCRl0ZJYP. The Department's approval of Baker's IL-NOI authorized him to disturb up to 0.12 acres on Lot 28. The approval

[2] The roadway constructed for the Talons Subdivision pursuant to the Talons Permit resulted in disturbance of approximately 1.9 acres, leaving each of the 28 individual lots with approximately ¼ acre of permissible land disturbance.

also reminded Baker of his responsibility "**to adhere to the provisions of the Primary Permittee OS-SWPPP while conducting construction activity at the site and agree to follow the approved individual lot controls and drainage provisions developed in the Primary Permittee's On-Site SWPPP for the LCP.**" (Emphasis in original.)

On December 30, 2026, Petitioner filed a contested case hearing request to challenge the Department's approval of construction stormwater coverage to Baker. Petitioner requests that this Court determine whether the Department's approval: was based on inconsistent and incomplete land-disturbance calculations; failed to apply riparian buffer protections; failed to evaluate hydrological impacts; failed to account for land disturbance associated with certain construction activity; unlawfully relied on a Larger Common Plan; and arbitrarily relied on "incomplete or materially deficient submissions in the administrative record."

On January 15, 2026, this case was assigned to the undersigned Administrative Law Judge. On February 12, 2026, the Department served Petitioner with interrogatories and requests for production. On or about February 23, 2026, Petitioner served the Department with interrogatories, requests for production, and requests for admission. On March 18, 2026, Petitioner filed a motion seeking an extension of time to respond to the Department's discovery requests, contending he was awaiting a response to a Freedom of Information Act request to ensure his discovery responses were complete. On March 30, 2026, the Department filed a response to Petitioner's extension motion, arguing that Petitioner presented no valid basis existed to extend Petitioner's discovery response deadline. On April 1, 2026, the Court issued an Order denying Petitioner's discovery extension motion and ordering Petitioner to serve his responses within five days. On April 17, 2026, the Court issued a Notice of Hearing scheduling the contested case hearing for July 21, 2026.[3]

On June 22, 2026, the Department filed the instant Motion. In the Motion, the Department seeks dismissal of this contested case in its favor, arguing that Petitioner has failed to raise any genuine issues of material fact indicating its issuance of construction stormwater coverage to Baker was improper. The Motion was supported by the affidavit of John A. Poole (Poole Affidavit), who directs the Department's Stormwater Division and oversees all stormwater permitting reviews for South Carolina's non-coastal counties.

[3] In light of the resolution of this matter in this Order, the noticed hearing is no longer necessary.

Petitioner did not file a response to the Motion.[4]

DISCUSSION

Jurisdiction

The Court has jurisdiction to hear this matter pursuant to Section 1-23-600 of the South Carolina Code (Supp. 2025) and Section 48-6-30(D) of the South Carolina Code (Supp. 2025).

SCALC Rule 7(B)

As a preliminary matter, Petitioner's failure to file a response in opposition to the Department's Motion warrants granting of the Motion. Rule 7(B) of the Rules of Procedure for the ALC (SCALC Rules) provides:

> Any party may file a written response to the motion within ten (10) days of the service of the motion unless the time is extended or shortened by the administrative law judge; provided, however, if a party opposes the motion, the party must file a written response. …Failure of a party to timely file a response may be deemed a consent by that party to the relief sought in the motion or petition.

Because Petitioner filed no response to the Motion, the Court concludes that he has consented to the relief sought therein and that an Order granting summary judgment in favor of the Department is appropriate.[5] Although Petitioner's failure to respond is a sufficient basis in itself to grant the Motion, the Court will proceed to discuss the Motion under the standard applicable to motions for summary judgment.

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[4] On July 3, 2026, Petitioner emailed the Court a copy of a document styled as Petitioner's Motion to Compel Production of Responsive Electronically Stored Information, which made no reference or otherwise responded to the Department's Motion. However, as of the date of this Order, the foregoing motion to compel has not been filed with the Court in accordance with SCALC Rules 4, 19, 7(A), and 71(D).

Although Petitioner's motion is not before the Court, the Court notes that all discovery in this matter was required to be completed within 90 days of January 15, 2026 (the date this matter was assigned to the undersigned) pursuant to SCALC Rule 21(B). Moreover, the Department's Motion reflects that it provided detailed responses to Petitioner's requests for production on March 30, 2026, more than three months before Petitioner emailed the Court a copy his discovery motion. Thus, had Petitioner's emailed motion been properly filed, the filing would have been unreasonably late vis-à-vis the discovery deadline and Petitioner's receipt of the Department's purportedly deficient document production.

[5] The Court recognizes that Respondent is pro se. However, in South Carolina, pro se litigants are held to the same standards as attorneys, which includes compliance with the substantive and procedural requirement of the law. *See State v. Burton*, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003) ("A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law.").

Standard of Review

Rule 56(c) of the South Carolina Rules of Civil Procedure[6] states that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). To withstand a motion for summary judgment in cases applying the preponderance of evidence standard, the non-moving party must show the existence of a genuine issue of material fact from which a reasonable inference may be drawn in support of its position. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). "When a motion for summary judgment is made and supported as provided in [Rule 56, SCRCP], an adverse party may not rest upon the mere allegations or denials of his pleading …." Rule 56(e), SCRCP. Rather, "his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Id*. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *BPS, Inc. v. Worthy*, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct. App. 2005) (citing *Brockbank v. Best Capital Corp.,* 341 S.C. 372, 534 S.E.2d 688 (2000); *Hawkins v. City of Greenville,* 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

[6] SCALC Rule 68 provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules."

NPDES Stormwater Coverage Requirement for Construction Activity

The Department administers the state's approved NPDES Program, a federal permit program under the Clean Water Act that authorizes discharges of pollutants from point sources into waters of the United States pursuant to a permit. 33 U.S.C. § 1342(a). A state can administer its own NPDES program in lieu of the federal program after receiving approval from the Administrator of the United States Environmental Protection Agency ("EPA"). 33 U.S.C. § 1342(b). On June 10, 1975, the Administrator of the EPA delegated to the Department the responsibility for administering the NPDES program in South Carolina. *See* 57 Fed. Reg. 43,734 (Sept. 22, 1992). The Department's NPDES regulations are codified at S.C. Code Ann. Regs. 61-9.122 through 61-9.125.

In addition to regulating pollution sources commonly understood to be "discharges," e.g., industrial wastewater flowing from a pipe outlet into a river, the NPDES program also regulates discharges in the form of stormwater, whether collected through a municipal conveyance system or—as here—potentially finding its way into waters of the United States ways by virtue of runoff from land-disturbing construction activities. The state's NPDES regulations governing stormwater discharge are codified at S.C. Code Ann. Regs. 61-9.122.26 (Supp. 2025).

As the Motion points out, South Carolina's NPDES program requires a permit for "a storm water discharge associated with small construction activity" as defined by the NPDES Stormwater Regulation. S.C. Code Ann. Regs. 61-9.122.26(a)(9)(i)(B). Small construction activities are "construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres," or which result in "the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres." S.C. Code Ann. Regs. 61-9.122.26(b)(15)(i). Here, however, the total land disturbance under the larger common plan, i.e., the disturbance authorized under the Talons Permit, is *more than* five acres. Thus, although the Department cites the foregoing "small construction activity" provisions of the NPDES Stormwater Regulation as the reason Baker needs NPDES stormwater coverage for his planned construction activities, those provisions do not appear to require coverage here, insofar as the planned disturbance at Lot 28 is less than one acre and the associated larger common plan contemplates disturbing more than five acres. Regardless, the Court agrees with the Department's conclusion that NPDES stormwater coverage is required for land-disturbing construction activity at Lot 28 pursuant to the NPDES Stormwater Regulation. Because the larger common plan for the Talons Subdivision contemplates the disturbance of more than five acres, Baker's planned disturbance at Lot 28 requires coverage pursuant to the "industrial activity" provisions of the NPDES Stormwater Regulation. *See* S.C. Code Ann. Regs. 61-9.122.26(a)(1)(ii) (requiring NPDES permit for stormwater discharge "associated with industrial activity"); *id.* at (b)(14)(x) ("Storm water discharge associated with industrial activity" includes "[c]onstruction activity," a term that expressly includes "the disturbance of less than five acres of total land area that is a *part of a larger common plan of development or sale* if the larger common plan will ultimately disturb *five acres or more*[.]") (emphasis added); *id.* at (c)(1) ("Dischargers of storm water associated with industrial activity … are required to apply for an individual permit or seek coverage under a promulgated storm water general permit."). In short, because Lot 28 is part of Talons Subdivision—a larger common plan that disturbs more than five acres—NPDES stormwater coverage is required notwithstanding the fact that Baker seeks to disturb just 0.12 acres on his lot.[7] Having concluded that NPDES coverage is required, the Court turns next to the manner of effectuating stormwater coverage for the construction activity at issue.

<u>Construction General Permit</u>

As authorized by federal NPDES regulation, South Carolina's NPDES program includes a provision for the issuance and administration of general permits. S.C. Code Ann. Regs. 61-9.122.28. A general permit is a tool by which Department regulates a large number of similar dischargers by identifying the practices, prescriptive requirements, and limitations necessary to adequately protect water quality from a class of potential dischargers. A discharger within the generally permitted class may then seek permission to "discharge" under the NPDES Program by submitting their project plans to the Department and indicating their agreement to abide by the terms of the general permit. If coverage is approved for the project, the Department issues an NPDES "coverage number" to the discharger.

With respect to stormwater discharges from construction activity associated with residential subdivisions, NPDES coverage has been reviewed and approved by the Department through the NPDES General Permit for Stormwater Discharges from Construction Activities,

[7] Because the total planned land disturbance at Lot 28 is less than one acre, NPDES stormwater coverage is required only if the lot is part of a larger common plan that will disturb five acres or more. *See, e.g., Davis v. Cate*, 729 F. Supp. 3d 1339 (S.D. Ga. 2024) (no NPDES stormwater coverage required for less than one acre disturbance if site is not part of larger common plan).

SCR100000, also referred to as the Construction General Permit (CGP). The CGP provides that waters located on or immediately adjacent to a permitted site are to be protected during construction by the establishment of a 30-foot undisturbed buffer located between the waterway and the outermost sediment and erosion controls at the construction site. CGP § 3.2.4(C)(l)(a) ("Provide and maintain, at a minimum, a 30-foot undisturbed buffer zone during construction."). To obtain coverage under the CGP, a Primary Permittee (e.g., a developer) is required to prepare and submit to the Department for its review a Comprehensive Storm Water Pollution Prevention Plan (C-SWPPP) for the permitted area. The C-SWPPP must identify all potential sources of pollution expected to affect the quality of stormwater discharges and must describe practices to be used to minimize pollutants in stormwater discharges from construction sites. *Id.* § 1.1.1(D).

Here, Talons sought and obtained NPDES stormwater coverage under the CGP for the Talons Subdivision, including Lot 28. However, because Baker is not the permittee for the Talons Permit, the CGP does not, in and of itself, authorize *him* to conduct land-disturbing construction activity on his lot.

<u>Secondary Permittee</u>

Because Baker is not the permittee under the Talons Permit, that coverage approval alone does not constitute authorization for him to undertake construction activity on his lot. However, the CGP expressly contemplates that, as here, a Primary Permittee for construction of a residential subdivision, i.e. a developer, may opt to sell off individual lots in the permitted site to be developed over time, based on market conditions or other factors. To this end, the CGP includes "Secondary Permittee" provisions whereby the NPDES stormwater coverage provided thereunder extends not only to the original permittee but also to new lot owners who agree to abide by the limits and stormwater management provisions of the approved primary permit (and hence the conditions of the CGP).

The secondary coverage provisions applicable to land disturbance in residential subdivisions are contained in Section 2 of the CGP, which provides Secondary Permittee status to "[a]n individual lot owner or residential builder that conducts land-disturbing activity at a construction site, that is limited to home construction on an individual lot or group of lots that are part of a[] [Larger Common Plan for Development or Sale] previously approved by the Department." *See* CGP at § 2.2.2. Here, there is no dispute that Lot 28 is part of an approved Larger

Common Plan for Development or Sale (LCP).[8] Instead, Petitioner contends the Department did not verify the LCP's "continued applicability and compliance."[9]

With respect to new lot owners in an approved LCP, the CGP elaborates that it provides NPDES coverage despite the Primary Permittee's sale of the lot to the new owner, and regardless of the size of the lot:

> Individual lots or a collection of individual lots within a residential subdivision that are part of an LCP are regulated regardless of lot size or ownership. If the Primary Permittee obtains coverage under this permit for the development and then sells lots within the development, then coverage under this permit may either continue with the Primary Permittee or the Primary Permittee may require that the new lot owner (or new lot owner may choose to) obtain their own coverage under this permit as a Secondary Permittee.…
>
> Each individual lot(s) owner or residential builder obtaining their own coverage under this permit will be issued a new NPDES permit coverage number.

Id. at §2.2.2(A).

To obtain NPDES coverage under the CGP as a Secondary Permittee, the new lot owner must complete and submit an Individual Lot Notice of Intent (IL-NOI) at least seven (7) days prior to commencing construction activities. *Id.* The IL-NOI must indicate that the new owner will follow the approved On-Site Storm Water Pollution Prevention Plan (OS-SWPPP) for the LCP. *Id.*[10]

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[8] The CGP broadly defines LCP to include any documentation indicating that construction may occur on a specific plot. CGP at 73. The CGP further notes that:

> A common plan for development or sale identifies a site where multiple separate and distinct construction activities (areas of disturbance) are occurring on contiguous areas. Such sites may have one operator or owner or several operators and owners. Construction activities may take place at different times on different schedules, in separate stages, and/or in separate phases, and/or in combination with other construction activities. Each Developer, Operator or Owner for each Site or Project determined to be a part of an LCP are subject to permitting requirements as defined by this permit.

Id. "If master calculations have been prepared and/or submitted for an entire site, then all phases and parcels at that site would be considered part of an LCP." *Id.* By virtue of the Talons Permit, the Talons Subdivision constitutes an approved LCP.

[9] *See* Petitioner's Prehearing Statement, filed February 23, 2026 at III(5); *see also id.* at V ("The approval relies upon a subdivision-level stormwater plan originating from prior permitting.").

[10] The CGP allows the new lot owner to choose to develop their own SWPPP for the Department's review instead of following the Primary Permittee's OS-SWPPP. However, in such cases the Department may require the new lot owner to seek Primary Permittee status under the CGP. *See* CGP at § 2.2.2(A) ("When a Secondary Permittee elects not to follow the drainage provisions in the Primary Permittee's approved OS-SWPPP, the Department may require the Secondary Permittee to request coverage under this permit as Primary Permittee.").

The streamlined process for obtaining coverage as a Secondary Permittee is consistent with provisions of the NPDES stormwater regulation. Indeed, in circumstances like the instant case—where the contemplated disturbance at Lot 28 is less than one acre but NPDES coverage is nonetheless required because the size of the LCP exceeds five acres and therefore constitutes "construction activity" requiring stormwater NPDES coverage per section 122.26(b)(14)(x)—the NPDES stormwater regulation expressly exempts the new owner seeking Secondary Permittee coverage from the more onerous requirements the Primary Permittee undertook to obtain coverage for the LCP. *See* S.C. Code Ann. Regs. 61-9.122.26(c)(1)(ii) ("An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section … is exempt from the requirements of section 122.21(g) and paragraph (c)(1)(i) of this section."). Specifically, but without limitation, the NPDES stormwater regulation exempts the lot owner seeking Secondary Permittee coverage from submitting: a topographical map pursuant to 122.26 (1)(i)(A); an impervious surface estimate pursuant to 122.26 (1)(i)(B); an outfall testing certification pursuant to 122.26(1)(i)(C); pollutant spill information pursuant to 122.26(1)(i)(D); quantitative sample data pursuant to (1)(i)(E); and flow and sample data pursuant to 122.21(g). In short, the NPDES stormwater regulation and the CGP do not require a lot owner seeking Secondary Permittee status to submit—nor do they require the Department to review—data, studies, and reports comprising the Primary Permittee's C-SWPPP, which the Department previously reviewed and approved in conjunction with approving primary NPDES coverage.

Non-NPDES Stormwater Coverage

The Court notes that the NPDES regulations are not the only regulations applicable to stormwater discharges from construction activity. While the focus of the NPDES program is pollution control consistent with the federal Clean Water Act, stormwater runoff is also regulated pursuant to S.C. Code Ann. Regs. 72-300 et seq., *Standards for Stormwater Management and Sediment Reduction* (SSMSR), to "help prevent additional water quantity and quality problems…." S.C. Code Ann. Regs. 72-300. The SSMSR regulation generally provides that "a person may not undertake a land disturbing activity without an approved stormwater management and sediment control plan." S.C. Code Ann. Regs. 72–305(A). However, the SSMSR regulation does not require its own permitting where the land disturbing activities at issue will be conducted under another state or federal environmental permitting program containing the minimum standards under the SSMSR. S.C. Code Ann. Regs. 72-302.A(5). The CGP incorporates by reference the engineering design requirements of the SSMSR regulation. CGP § 3.1.1(C); *id.* at App. D. Thus, a separate SSMSR permit is not required for construction activity whose NPDES stormwater coverage derives from the CGP. *See Deerfield Plantation Phase II B Prop. Owners Ass'n v. S.C. Dep't of Health & Env't Control*, 414 S.C. 170, 175, 777 S.E.2d 817, 819 (2015) (describing NPDES stormwater regulation and SSMR regulation as "interrelated" and noting compliance "accomplished in one permitting action" under the CGP).

In this case the Department's properly supported Motion establishes that the Department approved Baker's IL-NOI for NPDES coverage of his planned construction activity at Lot 28 under the CGP as a Secondary Permittee of the previously approved Talons Permit, as contemplated by the foregoing regulatory framework. Baker submitted plans demonstrating that his proposed construction activity complies with the CGP's 30-foot buffer requirement, and he certified his agreement to comply with the previously-approved SWPPP for the Talons Subdivision. This satisfies the requirements under the CGP for obtaining Secondary Permittee coverage for an individual lot that is part of an approved LCP for a residential subdivision.

Moreover, even if the Court were to overlook Petitioner failure to file a response to the Motion, the Court agrees with the Department that the issues identified in Petitioner's February 23, 2026 prehearing statement—setting forth his grounds for challenging the Department's approval—do not implicate genuine issues of fact under the regulatory framework discussed above.

Petitioner's Prehearing Statement states that he seeks a determination of whether the Department accounted for all land disturbance and/or correctly calculated the amount of land disturbance.[11] However, Petitioner identifies no purported miscalculation, and the facts demonstrate that the Department's approval of the IL-NOI authorized a specific amount of land disturbance at Lot 28, 0.12 acres, which amounts to approximately half the available land disturbance under the Talons Permit for each individual lot (including Lot 28) in Talons Subdivision.[12] To the extent Petitioner contends the Department overlooked or miscalculated land disturbance when it approved the *Talons Permit*, the Court agrees with the Department that this

[11] *See* Petitioner's Prehearing Statement at III(1) and III(4).

[12] Of the nine (9) acres of land disturbance authorized by the Talons Permit, 1.9 acres was used by the Primary Permittee to develop the roadway in the Talons Subdivision. The remaining 7.1 acres of authorized land disturbance, divided by the 28 individual lots in Talons Subdivision, results in approximately 0.25 acres of authorized land disturbance per individual lot.

contested case cannot be used as a vehicle for an untimely challenge to the Department's approval of stormwater coverage to Talons in 1996. Petitioner has failed to create a genuine issue of material fact regarding the amount or calculation of land disturbance.

Petitioner's prehearing statement also indicates that he seeks a determination of whether the Department failed to apply a riparian buffer.[13] The Court, however, agrees with the Department that its approval of stormwater coverage to Baker incorporated the buffer provisions of the CGP, *i.e.* 30 feet, and that Baker's submitted plans comply with the foregoing buffer requirement. Petitioner has failed to demonstrate a genuine issue of material fact regarding the Department's purported failure to apply buffer protections.

Petitioner's prehearing statement also indicates that he seeks a determination of whether the Department failed to evaluate hydrologic impacts.[14] The Court concludes this issue does not implicate an issue of fact for trial under the regulatory framework discussed above. The Court agrees with the Department that this issue amounts to a challenge to the provisions of the CGP itself, which expressly allow a lot owner to seek Secondary Permittee coverage by agreeing to abide by the approved OS-SWPPP, including the site-wide hydrological calculations and evaluations submitted by the Primary Permittee. In this regard, the CGP's terms align with the provisions of the NPDES Stormwater Regulation, which expressly provide that a lot owner seeking Secondary Permittee status under an approved LCP is <u>not</u> required to submit hydrological and topographical information to the Department for review. Thus, by design, the CGP does not require an owner of a residential lot in an approved LCP to submit—and by extension does not require the Department to evaluate on a lot-by-lot basis—hydrological data in order for the lot owner to be approved for NPDES coverage as a Secondary Permittee. In any event, this contested case cannot be used to assert an untimely challenge to the Department's issuance of the CGP or its approval of the Talons Permit.[15]

Petitioner's prehearing statement also indicates that he seeks a determination of whether the Department lawfully relied on the approved LCP without verifying its continued applicability

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[13] *See* Petitioner's Prehearing Statement at III(2).

[14] *See* Petitioner's Prehearing Statement at III(3).

[15] The CGP (Permit No. SCR100000) in effect at the time the Department issued stormwater coverage to Baker became effective on March 1, 2021.

or compliance. The Court concludes this issue does not implicate an issue of fact for trial. The Court agrees with the Department that when a lot owner seeks NPDES stormwater coverage under the Primary Permittee's approved SWPPP, the CGP imposes no requirement for the Department to re-evaluate the provisions of the approved SWPPP for the LCP or the supporting documentation for the approved LCP. To the contrary, the Department's sole inquiry under the CGP is whether is whether primary stormwater NPDES coverage was terminated without completion of the stormwater infrastructure authorized for construction under the primary permit. CGP at 2.2.2. ("The primary permit coverage may be active or terminated, but if terminated the infrastructure must be completed").

Finally, Petitioner's prehearing statement indicates that he seeks a determination of whether the Department's approval was based on "incomplete or materially deficient submissions in the administrative record." The mere recitation of such a catch-all issue does not create a genuine issue of material fact for trial. Petitioner has not pointed the Court to any specific incomplete or materially deficient submission associated with the Department's approval of Baker's IL-NOI seeking construction stormwater coverage for Lot 28 as a Secondary Permittee.

In any event, in order to withstand the Department's properly supported Motion, Petitioner was required to come forward with affidavits or other supporting evidence demonstrating the existence of a genuine issue for trial. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 320, 548 S.E.2d 854, 856 (2001); Rule 56(e), SCRCP. "If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56, SCRCP. Here, Petitioner failed to respond to the Motion altogether and has failed to demonstrate any genuine issues of material fact for trial. Summary judgment in the Department's favor is therefore appropriate.

<u>ORDER</u>

IT IS THEREFORE ORDERED that the Department's Motion is **GRANTED,** and that this matter is **DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED.

July 10, 2026	Samuel L. Johnson
Columbia, South Carolina	Administrative Law Judge

CERTIFICATE OF SERVICE

I, Reynolds C. Rawls, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

Reynolds C. Rawls
Judicial Law Clerk

July 10, 2026
Columbia, South Carolina