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SC Court of Appeals

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

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2026-001583
Docket No. 23-ALJ-07-0442-CC

Bay Light, LLC,

Respondent,

v.

South Carolina Department of Environmental Services,

Respondent/Appellant,

and

South Carolina Coastal Conservation League,

Appellant.

INITIAL BRIEF OF APPELLANT

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
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October 14, 2026

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the ALC erred as a matter of law in concluding DES' use of the Waterfowl Focus Area map and corresponding GIS later map as the ACE Basin Task Force Boundary Area was an unconstitutionally vague application of Regulation 30-12.N(2)(b).**
- II. Whether the ALC erred as a matter of law by misapprehending the applicable burden of proof and improperly shifting it to the Appellants.**
- III. Whether there is any evidence in the record to support the ALC's Findings and Conclusions.**

STATEMENT OF THE CASE

This appeal arose from the Administrative Law Court's Amended Final Order dated June 16, 2026 in Docket No. 23-ALJ-07-0442-CC. This contested case began when Appellant South Carolina Department of Environmental Service ("DES" or "the Department") denied a critical area permit application on September 7, 2023. Respondent, Bay Light, LLC ("Bay Light"), had sought a permit for the construction of a private vehicular bridge to access a coastal island located on Toogoodoo Creek in Meggett, Charleston County, triggering the application of S.C. Code Reg. 30-12(N), Access to Coastal Islands. Pursuant to S.C. Code Sections 1-23-600(A) and 44-1-60 (2018), Bay Light requested a final review conference before the DHEC Board.¹ Following the Board's decision to decline to hold a final review conference, Bay Light filed a request for contested case hearing on November 6, 2023. Appellant Coastal Conservation League ("CCL" or "the League") submitted a consent motion to intervene on January 3, 2024, which was granted. Following a hearing on the merits on December 9 and 10, 2025, the ALC issued a Final Order on April 30, 2026. Appellants filed Motions for Reconsideration on May 12, 2026. The ALC issued an Amended Final Order on June 16, 2026². This appeal followed.

STANDARD OF REVIEW

Under the Administrative Procedures Act, this Court reviews the ALC's final order and may reverse or modify if Appellant's substantial rights have been prejudiced because the decision is in violation of constitutional or statutory provisions, made upon unlawful procedure,

¹ South Carolina Act No. 60 of 2023 resulted in the creation of the Department of Environmental Services and the elimination of the DHEC Board, effective July 1, 2024.

² The ALC's Amended Final Order requires that DES disregard an entire regulatory provision relating to areas of special resource value. On this critical issue, DES has no discretion on remand and therefore the Amended Final Order is final and not interlocutory under *Torrence v. South Carolina Department of Corrections*, 433 S.C. 224, 857 S.E.2d 549 (2021).

affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or arbitrary or capricious. S.C. Code Ann. § 1-23-610(B). S.C. Code Ann. § 1-23-610(C), governing judicial review of Administrative Law Court final decisions, has been recently amended to eliminate the agency deference standard on statutory interpretations. “In interpreting a statute or regulation, the court shall not defer to the agency's interpretation of the statute or regulation and instead shall interpret the statute or regulation de novo.” “Substantial evidence is not a mere scintilla of evidence, nor is the evidence reviewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.” *Rhame v. Charleston County School Dist.*, 415 S.C. 162, 166, 781 S.E.2d 151, 154 (Ct. App. 2015), quoting *Taylor v. S.C. Dept. of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006).

The appellate court “will correct the decision of the ALC if it is affected by an error of law, S.C. Code Ann. § 1–23–380(5)(d) (Supp.2010), and questions of law are reviewed de novo.” *S.C. Dept. of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012), reh'g denied (May 4, 2012) (citing *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). When the evidence gives rise to but one reasonable inference, the question becomes one of law for the courts to decide. *Kinsey v. Champion Am. Service Center*, 268 S.C. 177, 181, 232 S.E.2d 720, 722 (1977); *Sharpe v. Case Produce Co.*, 329 S.C. 534, 545, 495 S.E.2d 790, 795 (Ct. App.1997) (rev'd on other grounds). Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law. *Turner v. South Carolina Dept. of Health & Env'tl. Control*, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008).

“As in all instances, we review the [lower] court's legal and constitutional conclusions with no deference to the [lower] court.” See *Callawassie Island Members Club, Inv. v. Dennis*, 425 S.C.

193, 198, 821 S.E.2d 667, 669 (2018) (“We review questions of law de novo.”) *Owens v. Stirling* 443 S.C. 246, 264, 904 S.E.2d 580, 589 (2024)).

In reviewing constitutional challenges, the Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid. *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996). “A possible constitutional construction must prevail over an unconstitutional interpretation.” *Westvaco Corp. v. South Carolina Dep’t. of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995). Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt.” *Owens*, 443 S.C. at 261.

STATUTORY AND REGULATORY FRAMEWORK

The Coastal Tidelands and Wetlands Act, S.C. Code Ann. § 48-39-10 et seq., governs alterations of the critical areas of South Carolina. Appellant DES is the agency charged with the Act’s administration and the regulations promulgated thereunder. S.C. Code Reg. 30-1 et seq.

Particularly pertinent to this appeal, S.C. Code Ann. Reg. 30-12(N), governs the permitting of critical area alterations providing for access to coastal islands. Specifically, Regulation 30-12(N)(2)(b) provides:

Bridge permits, other than non-vehicular bridges for access by the general public, will not be issued in areas of special resource value unless they qualify under the special exceptions in R.30-12.N(10). These are the ACE Basin Taskforce Boundary Area, the North Inlet National Estuarine Research Reserve, and the Cape Romain National Wildlife Refuge.

S.C. Code Regs. 30-12(N)(10)(a) and (b) state that to receive a special exception, “the applicant shall present clear and convincing evidence that granting the bridge permit will serve an overriding public interest...” which means the applicant must demonstrate that the bridge “...will

create overriding public benefits resulting from mitigation and diminished impacts to public trust resources compared with development that would likely occur without the bridge.” S.C. Code Regs. 30-12(N)(2)(a) also provides that the “reasonable expectations” of the owner of a coastal island are to be weighed against the impacts to “public trust lands, critical area, coastal tidelands and coastal waters.”

STATEMENT OF FACTS

Bay Light is the owner of a coastal island of approximately nine acres in size located in Southern Charleston County, near the Town of Meggett. The property fronts Toogoodoo Creek, which flows into the North Edisto River through its confluence with the Wadmalaw River and is located approximately four miles from the Ernest F. Hollings ACE Basin National Wildlife Refuge. (Tr. p. 299 ll. 7-12).

Appellant CCL is a nonprofit organization whose mission is to advocate to protect the natural environment of South Carolina’s coast for the benefit of its citizens. CCL member Mary Adkins also owns property fronting on Toogoodoo Creek and located approximately 600 yards from the site of Bay Light’s proposed bridge project. (Tr. p. 262 ll.10-12). The dispute in this case centers around the location of the Bay Light coastal island property within the boundaries of the ACE Basin Task Force Boundary Area.

The ACE Basin

The general term “ACE Basin” is an acronym referring to the surrounding lands and waterways that flow into and form the Ashepoo, Combahee, and Edisto River basins, and eventually flow into the Atlantic Ocean. (Tr. pp. 285 ll.6-10, 16-20). The ACE Basin is globally recognized for its environmental significance, containing extensive tidal, brackish and freshwater marshes, mixed pine and hardwood forests, and critical habitat for migratory and threatened and endangered species. (Tr. p. 211 l. 13 – p. 213 l. 2; Ex. 1, 4, 5, 16, 22, 37, 39). Over the course of

decades, since the 1960s, when the acronym was coined and the area first identified by the Department of the Interior as a nationally important landscape for conservation, there have been many layers of protection identified that cover the ACE Basin, broadly. (Tr. pp. 285-286). However, for purposes of this appeal, the critical designated area is the specific term “ACE Basin Task Force Boundary Area,” as established by the Department of Interior’s U.S. Fish and Wildlife Service (“USFWS”) and the ACE Basin Task Force.

ACE Basin Task Force

The ACE Basin Task Force (“Task Force”) is a public-private partnership with private landowners, governmental entities and non-governmental organizations that pursues voluntary land conservation within the designated boundary area in the ACE Basin. (Tr. pp. 287 l. 20- p. 288 l. 6, p. 293 l.1- p. 295 l. 2, 336 ll.8-16). The Task Force was established in 1989 as a public-private initiative by a group of private landowners, the South Carolina Department of Natural Resources (“SCDNR”), Ducks Unlimited and The Nature Conservancy for the specific purpose of protecting, restoring, and enhancing migratory waterfowl conservation habitat within its designated boundary. (Tr. pp. 286-287, 292, Ex. 1-5).

The Task Force operates under the authority of 12 USCA § 669 and the North American Waterfowl Management Plan (“Management Plan”), which was adopted by Congress during the Reagan administration in response to severe drought conditions that decimated migratory waterfowl populations across North America. (Tr. pp. 47-48, 287-294; Ex. 1, 2). The Management Plan authorizes the formation of public-private partnerships through joint ventures to protect, restore, and enhance conservation habitat critical to maintain and improve migratory waterfowl populations on a voluntary basis. (Tr. p. 47 ll. 11-16, p. 287 ll.2-9; Ex. 2). The implementation of the Management Plan in South Carolina is through the Atlantic Coast Joint Venture (“ACJV”),

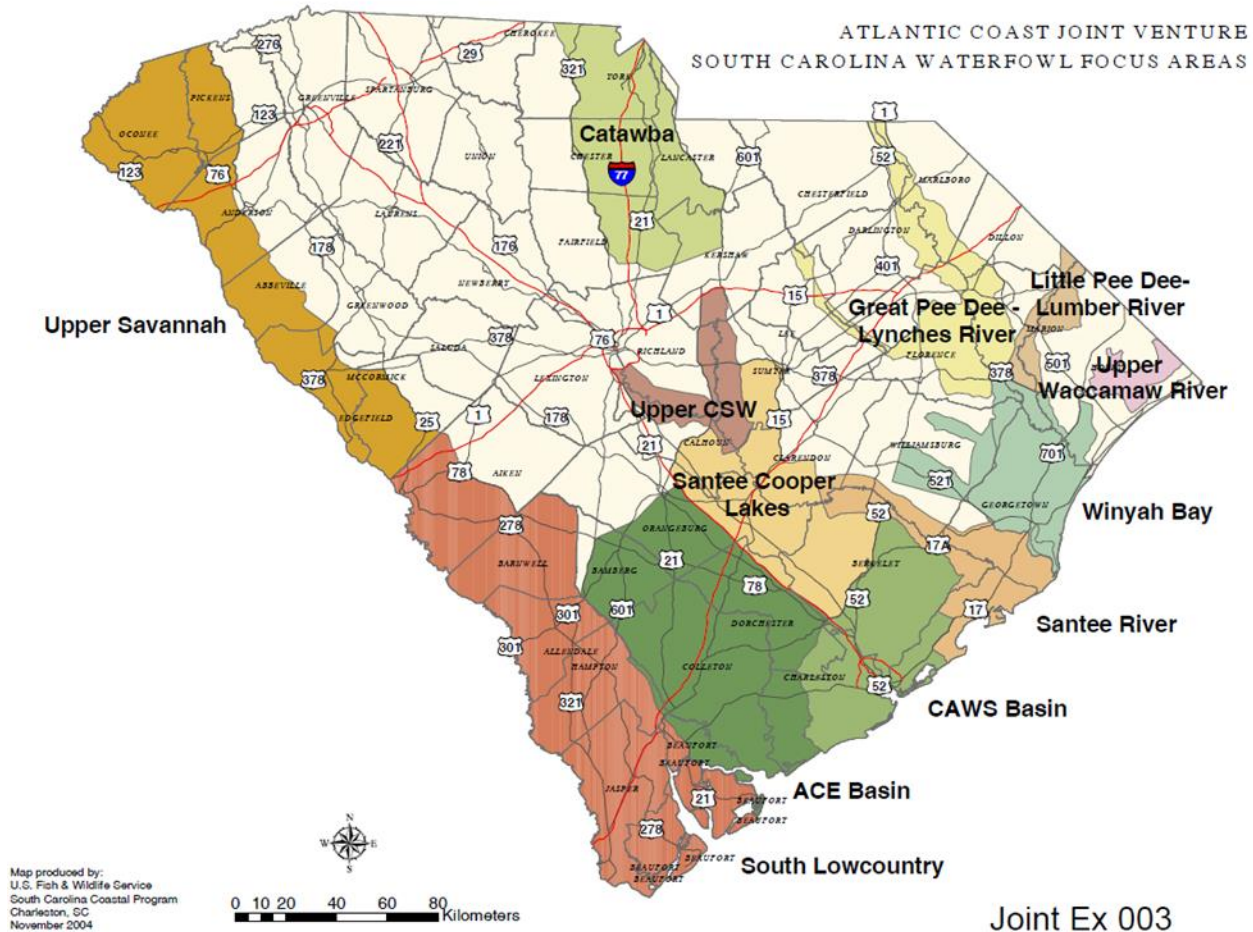
which is operated under the Department of the Interior through the U.S. Fish and Wildlife Service (“USFWS”). (Ex. 4, 5).

Consistent with the text of the Management Plan, the USFWS was obliged to create groups like the ACE Basin Task Force for voluntary conservation assistance in furtherance of its waterfowl habitat conservation goals. 16 USCA § 669a(11). (Ex. 1, 2). The Task Force is governed by a Memorandum of Understanding (“MOU”) signed by every member, including SCDNR and USFWS. (Tr. p. 333 l.23- p. 334 l.1); Ex. 1). The functions of the Task Force include assistance in coordinating conservation land acquisitions, conservation easement acquisitions, and obtaining grants through state and federal agencies under funding mechanisms such as the North American Wetlands Conservation Act (“NAWCA”), 16 U.S.C. § 4401, within the designated ACE Basin Taskforce Boundary Area. (Tr. p. 47 l. 16 – p. 48 l. 4, p. 294 ll.15-25, Ex. 1-5).

Congress also authorized the USFWS to “select,... restor[e], rehabilitat[e], and improve... areas of land or water...” which explicitly authorized the USFWS to select the boundary line for the ACE Basin Taskforce Boundary Area for conservation purposes. 16 USCA § 669a(11).

The ACE Basin Taskforce Boundary Area

The ACE Basin Taskforce Boundary Area (“ACE Taskforce Boundary” or “Boundary”) was adopted and approved in 2004 by the USFWS and depicted on the ACJV South Carolina Waterfowl Focus Areas map (“Waterfowl” or “WFA map”), and this boundary has not changed since. (Tr. pp. 297-298, pp. 302-305, p. 307 l.25- p. 308 l.2; Ex. 3, 5). The WFA map contains the boundary areas for each of the established focus areas for public-private partnerships formed in accordance with the Management Plan throughout the state to facilitate those groups’ waterfowl habitat conservation work thereunder. (Tr. p. 51 l. 22 – p. 52 l. 10; Ex. 3).



The ACE Taskforce Boundary is delineated in dark green on the adopted and approved WFA map. (Ex. 3; 5).³

Charles Lane, an inaugural member of the Task Force, testified extensively about the ACE Taskforce Boundary, including its creation and its boundaries. Charles Lane is a commercial land real estate agent in Charleston County, ACE Basin landowner, and has served as the Task Force chairman since its inception for all but four years. (Tr. pp.281 ll. 12-18, 284 ll. 7-9, 292 ll. 4-6). Mr. Lane was Vice Chairman of the Task Force at the time the Boundary Area map was generated and approved. (Tr. p. 298 ll. 15-20).

³ The ACE Taskforce Boundary is shaded purple in the ACJV Waterfowl Implementation Plan Revision dated June 2005.

Over time since the Task Force's formation and as technology advanced, particularly in order to qualify for grants or funding for the various conservation projects that the Task Force coordinates, the WFA map was created to clearly designate the identifiable boundary areas for the public-private partnerships working thereunder, including the ACE Taskforce Boundary. (Tr. p. 297 l.14- p. 298 l.14). In drawing a recommended ACE Taskforce Boundary for approval by the USFWS through the ACJV, the Task Force considered, "[w]hat are the areas that we need to focus on if we really are going to establish the waterfowl recovery goals that were called for in Reagan's bill." (Tr. p. 298 ll. 20-25).

The ACE Task Force Boundary was drawn based on and directly in connection to the natural features of and connections to its namesake, the Ashepoo, Combahee and Edisto River basin systems, as well as roadways and other geographic identifiers. (Tr. p. 299 ll. 1-12, p. 326 l. 12 – p. 327 l. 5). Relying in pertinent part on the member resource agency staff with biological expertise, the Task Force used identifiable features such as roads and waterways to set the boundaries of the Task Force Boundary Area. (Tr. pp. 300 l.12- p. 301 l.1). The eastern side of the ACE Taskforce Boundary is bounded by the Atlantic Ocean, encompassing all of Edisto Island and running up along the North Edisto River to the confluence of the Wadmalaw River and Toogoodoo Creek and up a straight line from the site known as the Stevens Towing site following Highway 165 to around Meggett and through Ravenel north of Highway 17 and east to I-26. The northeast side follows I-26 north, bordering the Santee Cooper Lakes area to around Orangeburg then following Highway 301 southwest toward Barnwell and then running southeast roughly following the Salkehatchie and Combahee Rivers back to the Atlantic Ocean. (Tr. p. 301 ll. 14-20, p. 302).

Blair Williams is the Division Director of DES' Critical Area Permitting Division. (Tr. p. 172 ll.7-12). Mr. Williams' testimony generally describing the ACE Taskforce Boundary by connection to natural features and roadways was based on personal knowledge and consistent with Mr. Lane's testimony describing the same. (Tr. pp. 175-177, p. 201 ll.16-25, p. 202 ll.14-24, pp. 203-24).

The Task Force met and voted unanimously to approve the ACE Taskforce Boundary map and sent it through the ACJV for approval by the USFWS. (Tr. p. 304 ll. 1-18, Tr. p. 305 ll. 1-12). Mr. Lane confirmed that the dark green area on the WFA map is the ACE Taskforce Boundary and that it has never changed since its approval in 2004. (Tr. p. 305 ll.16-19, Tr. p. 307 l. 25- p. 308 l. 2; Ex. 3). The identical approved ACE Taskforce Boundary is likewise reflected on the SCDNR website (Ex. 16) and, more importantly, in the Department's Geographical Information System ("GIS") database regulatory base layer map (Ex. 8). (Tr. pp. 305-308, 320, 325-327; Ex. 3, 8, 16, 18). It is the same boundary reflected on Exhibits 3, 16, 18, and 24. (Tr. pp. 217-219, 305, 305, 328-329).

The ACE Taskforce Boundary was in existence at the time Reg. 30-12(N) was amended to its current version.⁴ (Tr. p. 217 ll. 4-13; Ex. 39). Mr. Williams explained that the three areas of special resource value referenced in S.C. Reg. 30-12(N)(2)(b) are essentially large land mass areas with salt and freshwater ecosystems, rivers, hardwood bottom forests that all provide critical habitat. The General Assembly has identified these areas as a special resource of value to help protect them from future development. (Tr. 211:8 to 212:12).

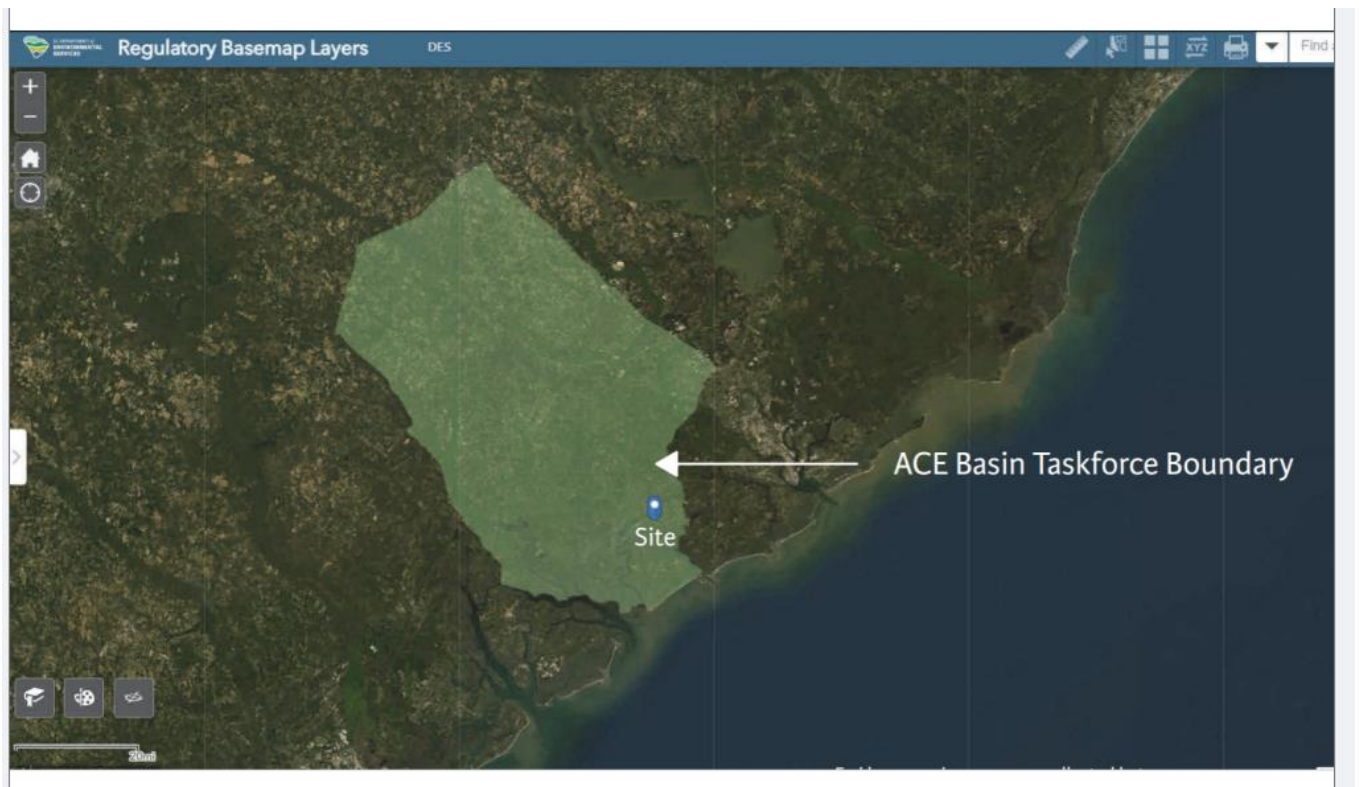
⁴ The court in S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control struck down that version of Regulation 30-12(N), Access to Small Islands, and said "[s]mall is a term of subjective relativity." (S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control, 610 S.E.2d 482, 486, 363 SC 67, 75 (2005)).

Finally, Mr. Williams testified to the timeframe when the ACE Taskforce Boundary was established in relation to the date that S.C. Reg. 30-12(N) became effective. The amendments to S.C. Reg. 30-12(N) were passed June 23, 2006 and the ACE Taskforce Boundary is also the WFA map, which was in place when USFWS adopted the ACE Taskforce map in November 2004. (Tr. p. 328 l. 17 – p. 329 l. 24; Ex. 39). Mr. Williams went on to testify that even if the USFWS were to change the WFA map that was approved in November 2004, the Department's regulatory authority regarding the ACE Taskforce Boundary would be limited to the boundary in place at the time the regulation amendments were adopted on June 23, 2006. (Tr. 224:4 to 225:14).

The Boundary is publicly accessible by an internet or Google search using the specific term: “ACE Basin Task Force Boundary,” which was confirmed by multiple witnesses. (Tr. pp. 266 l. 24- p. 267 l.8, p. 271 ll.4-9, 272 l. 4-24- 305 l. 20 -p. 306 l.7; Ex. 18, 24). During the pendency of the contested case proceedings, Mr. Lane confirmed that he was able to locate the Waterfowl Focus Area map on an internet search. (Tr. p. 305 l. 20 – p. 306 l.7). Additionally, after she became aware of Bay Light’s pending permit application, Mary Adkins conducted an internet search using the specific term referenced in the regulations (“ACE Basin Taskforce Boundary”), and was able to locate the map. (Tr. pp. 266-269).

DES staff also confirmed the Task Force Boundary by testifying as to the information and data in their possession, including various GIS data layers identifying areas of special resource value which are obtained and utilized in coordination with sister state agencies. (Tr. p. 175 ll.13-21, p. 196 l.17- p. 197 l.6). The different layers within the GIS platform contain data or information that the Department can select and use in conducting its technical review of a permit application by entering the project’s location information and determining the presence of threatened or endangered species or culturally historic resources; or, as in the present matter, whether the site is

located within a regulated area such as the ACE Taskforce Boundary. (Tr. 196:17 to 197:20, Tr. 203:21 to 205:8). The Department's GIS data layer map contains the ACE Taskforce Boundary as approved on the WFA map. (Ex. 3, 8). It has been retained and used by DES since approximately 2009. (Tr. p. 177 ll.3-6).



Ex. 8.

There is no dispute that the Bay Light property is located within the ACE Taskforce Boundary as identified on the Waterfowl map. (Tr. pp. 175-176, 266-271, 326-327; Ex. 8). It is also undisputed that the Bay Light property is located approximately five miles inside the northeastern edge of the ACE Taskforce Boundary, as confirmed by Williams' testimony that he used the GIS measurement tool. (Tr. pp. 175 l. 23- p. 176 l. 21, p. 201 l.25- p. 202 l.13; Ex. 8). There was no evidence presented to show otherwise.

Bay Light's Purchase

Bay Light purchased the subject property in 2020 at a steep discount⁵ and specifically “to make money.” (Tr. p. 154 ll. 16-18, p. 155 ll. 15-25, p. 157 l. 17 – p. 158 l. 7). Prior to the purchase, Dr. Jim Southard, principle of Bay Light, hired resource consultant and permit agent Judd Goff to research the feasibility of obtaining a private vehicular bridge permit for the property, which required a determination of whether or not the property was located within an area of special resource value, namely, the ACE Taskforce Boundary. (Tr. p. 71 ll.5-17, p. 138 l.3 - p. 139 l.11, 158 ll.13-18, 160 ll.12-21, 168 l. 7 – 167 l. 9). Both were aware that if the island was located within the ACE Taskforce Boundary, the critical area application would be subject to heightened scrutiny and regulatory standards for protecting these significant public resources, thereby increasing the likelihood that a private bridge for development of the island would not be permitted. (Tr. pp. 77 ll. 5-25 166 ll. 2-13, 168 ll. 9-24).

Ultimately, Mr. Goff informed Dr. Southard he thought they “had a green light” to proceed as desired. (Tr. p. 160 ll. 12-21). Bay Light’s decision to purchase the property was based on Mr. Goff’s determination that he believed the property was not located within the ACE Taskforce Boundary and subject to heightened standards under S.C. Code Reg. 30-12(N). (Tr. pp. 78 ll. 1-14, 161 ll. 3-13, 163 ll. 1-6, 168 ll. 9-24).

Mr. Goff’s due diligence included reviewing the language of Reg. 30-12(N), which sets forth heightened criteria for projects located in areas of special resource value, such as the ACE Taskforce Boundary, and conducting less than ten (10) hours of research primarily through an internet investigation to determine if the property was located in the Boundary such that it would

⁵ For some time, Bay Light was aware of the subject property, which was listed for sale for \$689,500, and made an offer to purchase it for \$225,000, which was ultimately accepted. (Tr. pp. 169-170).

be required to obtain a special exception for a bridge permit. (Tr. pp. 71 l. 22- p. 72 l. 9, p. 78 l. 17 – p. 79 l. 6, p. 85 l. 8 – p. 86 l. 20, p. 122 l. 11- p. 123 l. 8).

Notwithstanding Mr. Goff has been in the field of work he described as a resource consultant which operates as a liaison between the applicant and regulatory agency since 1997, the record reflects that Mr. Goff has no direct experience with bridge permits in the ACE Taskforce Boundary or with questions about a project's location in relation thereto. (Tr. pp. 66 l. 17 – 69 l. 2, pp. 86 ll. 21-22). Moreover, the record reflects he searched for the term “ACE Basin Project Area Map” rather than the specific term “ACE Basin Taskforce Boundary Area.” (Tr. pp. 146 l. 6 – 147 l. 4, pp. 147 l. 11 – 148 l. 7; Ex. 20). While Mr. Goff did discover a couple of maps on the SCDNR website bearing an apparent connection to the ACE Basin generally, he did not discover a map with the ACE Taskforce Boundary Area as other witnesses testified that they were able to do. (Tr. pp. 78 l. 15 – 83 l. 24, p. 85 ll. 8-18; Ex. 14, 15, 23, 31-33).

Mr. Goff did not look on GIS despite having access to data layers and using it to assess permit feasibility in other contexts. (p. 131 l. 21 – 133 l. 22). Nor did Mr. Goff, in his capacity as liaison with the regulatory agency and charge to answer the specific question of Bay Light's location in the ACE Taskforce Boundary, contact anyone at DES (the agency responsible for reviewing critical area permit applications), SCDNR, or USFWS to confirm the accuracy of the maps he believed to be the regulatory Boundary or otherwise investigate any further. (Tr. pp. 133 l. 23 – 134 l. 20, 136 ll. 2-12, 139 l. 12 – 140 l. 17, 141 l. 2 – 142 l. 15 (Tr. 195 l.22 - p. 196 l.11). Nevertheless, without having used the proper terminology as part of his due diligence, Mr. Goff advised Dr. Southard that the property was not located within the ACE Taskforce Boundary. (Tr. pp. 138 l. 14 – 139 l. 11, p. 166 l. 2 – 168 l. 24, p. 169 ll. 4-7).

Despite Dr. Southard's understanding that the critical issue was whether his prospective property is within the ACE Taskforce Boundary, neither he nor his agent sought any information or feedback from DES before either the purchase of the property or the submittal of the application. (Tr. p. 195 l.22 -p. 196 l.11).

On November 12, 2021, after following through with the purchase, Bay Light submitted a critical area permit application to DES to build a private vehicular bridge to access the island and a private recreational dock. The permit application requested a 385' by 15' private vehicular bridge and also sought the construction of a 4' by 185' private recreational dock with a covered pierhead and a floating dock with ramp. (Ex. 6).

DES' Independent Investigation

During the public comment period, which occurs prior to the technical review, the Department received several written comments as well as testimony during the public hearing expressing concern about the property's location within the ACE Taskforce Boundary. (Tr. pp. 174, 179; Ex. 6, 22, 45). On April 26, 2022, in response to an inquiry from Mr. Goff, DES notified Mr. Goff that the Bay Light proposed bridge project is located within the ACE Taskforce Boundary and that DES has an ArcGIS mapping layer delineating the Task Force Boundary. (Tr. pp. 125-126; Ex. 6, 18).

From August 18, 2022 until September 7, 2023, when the permit application was denied, the Department staff conducted an independent investigation, including extensive review of aerial imagery from Google Earth, ArcGIS, and Charleston County GIS, as well as the maps depicting the ACE Basin Taskforce Boundary. (Tr. p. 196-199). Department staff also considered the public comments, state, local, and federal agency comments, and the information provided in the applicant's responses to the technical deficiency letter to fully evaluate the activities being

requested under the application and determine whether they were consistent with the Department's Regulations and Policies. (Ex. 6, 39). Moreover, in response to questions raised by Bay Light's representatives about the ACE Taskforce Boundary, the Department reached out to and met with SCDNR and Charles Lane to confirm the accurate Boundary was being utilized in the Department's GIS database layers. (Tr. p. 215 1.24-p. 216 1.25, 223:5 to 223:6; Ex. 30). The Department's efforts to reaffirm the ACE Taskforce Boundary was not due to uncertainty, but rather the Department exercising its own due diligence in response to the comments received to ensure they were making the right decision. (Tr. 222:18 to 223:4).

During the review of Bay Light's application, DES staff received the 2004 approved Waterfowl Focus Area map from SCDNR and additional confirmation that it and the ACE Taskforce Boundary are one and the same and consistent with DES' GIS data layer. (Tr. p. 217 1.4 – p. 217 1.24, Tr. 218: 1 to 218:3).

The Department denied Bay Light's permit application on September 7, 2023 because the property is located in the ACE Basin Taskforce Boundary Area and failed to meet the heightened standards listed in SC Code Regs. 30-12(N)(10) for a private bridge permit in an area of special resource value, among other code deficiencies. (Ex. 6, 39).

ARGUMENT

I. The ALC erred as a matter of law by disregarding the high standard of proof in concluding Respondent DES unconstitutionally applied Reg. 30-12.N (2) to Bay Light's Application.

A. The ALC incorrectly characterized Bay Light's challenge as an as-applied constitutional challenge, when as a matter of law, it is a facial constitutional challenge.

At the outset, CCL submits that Bay Light is cloaking a facial constitutional challenge in an as-applied constitutional challenge, a distinction which is important because of the procedural posture of a contested case proceeding. The ALC, as an administrative body, cannot rule on claims of facial constitutionality, only as-applied challenges to statutes and regulations. *See Travelscape, LLC v. S.C. Dept. of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) (citing *Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002)). “It is well settled in this State that ALCs, as part of the executive branch, are without power to pass on the constitutional validity of a statute or regulation.” *Travelscape*, 391 S.C. at 108, 705 S.E.2d at 38 (citing *Video Gaming Consultants, Inc. v. S.C. Dept. of Rev.*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000)). The logic behind this rule is that Administrative Law Judges are “... an agency of the executive branch of government and must follow the law as written until its constitutionality is judicially determined.” *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 516 S.E.2d 655 (1999); *S.C. Tax Comm'n v. S.C. Tax Bd. of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983).

The U.S. Supreme Court describes a facial constitutional challenge as one where “**no application** of the statute could be constitutional.” *Sabri v. U.S.*, 541 U.S. 600, 609 (2004) (emphasis added). This is the scenario that is present in this case and the ALC erred in concluding otherwise. A determination that the regulatory ACE Taskforce and subsequent heightened

standards under Regulation 30-12.N.(2)(b) is unconstitutionally vague effectively renders these regulatory standards nonexistent and unenforceable for any applicant. Whether intended or not, a facial invalidation is the only result of the ALC's determination that the ACE Taskforce Boundary is unconstitutionally vague as it relates to the Bay Light bridge permit application because this regulatory boundary cannot be vague and unenforceable for only one permit applicant (Bay Light) when the Department would apply these regulations in exactly the same manner for all applicants.

As Harvard Constitutional Law Professor Richard H. Fallon, Jr. insightfully stated, "the processes of reasoning necessary to resolve the dispute [of facial vs. as-applied] will sometimes unmistakably, even necessarily, yield the conclusion that a statute is invalid, not merely as applied to the facts, but more generally or even in whole. **In such cases, facial invalidation occurs as an outgrowth of as-applied adjudication.**" Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1337 (2000) (emphasis added). Accordingly, the ALC erred as a matter of law in ruling on the facial constitutionality of Regulation 30-12.N.(2)(b).

B. Even if deemed an as-applied constitutional challenge, the regulation is clear and constitutional.

The ALC ruled: "[c]onsequently, under this particular factual context, the Department's use of the Waterfowl Focus Areas map as an equivalent to the ACE Basin Taskforce Boundary Area and a proxy for the Department's GIS data layer gives rise to an unconstitutionally vague application of the regulation." Am. Order at 13. The errors in this ruling are apparent from the beginning: the stringent legal standard to be applied to questions of constitutionality was ignored altogether.

In fact, the ALC does not cite to the extremely high standard at all in the Amended Final Order, which is that a reviewing Court must presume a law's constitutionality and it must be upheld

unless the Court “find[s] beyond a reasonable doubt it does not conform to the constitution.” See *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (“A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.”); *Curtis v. State*, 345 S.C. 557, 570, 549 S.E.2d 591, 597 (2001); see also *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 435, 181 S.E. 481, 484 (1935) (“A statute will, if possible, be construed so as to render it valid;” and “a legislative Act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond reasonable doubt;” and “every presumption will be made in favor of the constitutionality of a legislative enactment”). *Owens v. Stirling* 443 S.C. 246, 264, 904 S.E.2d 580, 589 (2024)). See also *S.C. Human Affairs Comm'n v. Zeyi Chen*, 846 S.E.2d 861, 872 (S.C. 2020) (burden is proving “repugnance to the constitution is beyond a reasonable doubt”) (citing *Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013)).

The party challenging the constitutionality of a regulation bears the heavy burden of proof and a challenge to the regulation as-applied does not lessen this burden. *Rothschild v. Board of Adjustment*, 309 S.C. 194, 198, 420 S.E.2d 853, 856, citing *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956); *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955). The ALC failed to apply this standard of presumption of constitutionality and therefore this is a reversible error of law.

The ALC’s analysis as to whether the ACE Taskforce Boundary and R. 30-12.N.(2)(b) is unconstitutionally vague “such that a person of common intelligence must necessarily guess as to its meaning and differ as to its application” is fundamentally flawed. Am. Order p. 11 (citing *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001)). In one instance stating “the threshold issue is whether [Bay Light’s] Property is in an area of special resource value” and that “the ACE

Basin Taskforce Boundary Area is a term that can be objectively applied” while at the same time that “resolution of this case is not predicated upon the map which was assertedly adopted by the ACE Basin Task Force but rather how the Department applied the standard set forth under regulation 30-12.N(2)(b)[.]” Am. Order pp. 10, 12. In so doing, the ALC erroneously turned the presumption of constitutionality on its head and read into the regulation a requirement that the Department do more than apply the express terms according to their plain and literal meaning. *C.f. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 38-39, 766 S.E.2d 707, 720-21 (2014) (concluding ALC erred by reading substantiality requirement into regulation ignoring clear wording and effectively rewriting regulation). The ALC’s legal error is underscored in view of the underlying purpose and intent of the relevant statutory and regulatory framework implicated in this case.

The Legislative findings in the Coastal Zone Management Act (“CZMA”), S.C. Code Ann. §§ 48-39-10 et seq., and regulations and policies promulgated thereunder, including the Critical Area Regulations, S.C. Code Regs. §§ 30-1 et seq., are rooted in the basic premise of the public trust doctrine—that our tidelands and critical areas are valuable public resources presumptively owned by the State and held in trust for the benefit of all—and therefore establish criteria which must be satisfied before alterations to such resources may be permitted. As the Supreme Court explained:

While all citizens may use and enjoy these lands subject to the State's control, no citizen has an inherent right to take possession of or alter these lands. Accordingly, the public's interest must be the lodestar which guides our legal analysis in regards to the State's tidelands. Recognizing that permitting alteration of the tidelands may be in the public's interest in limited circumstances, the State enacted statutes and promulgated regulations which generally prohibit alterations to the tidelands except when the public interest requires otherwise. ... However, simply because the State permits alterations in limited circumstances does not change the fact that altering tidelands remains the exception to the rule. The State, through the General

Assembly, has adopted the policy that the public interest is usually best served by preserving tidelands in their natural state.

Kiawah Dev. Partners, II, 411 S.C. at 29, 766 S.E.2d at 715 (internal citations omitted).

The General Assembly declared: “Critical areas shall be used to provide the combination of uses which will insure [sic] the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits.” S.C. Code § 48-39-30(D). In accordance with this mandate, the Department’s regulatory scheme provides standards that must be met in order to obtain a permit to alter or impact critical area, including accessing coastal islands. S.C. Code Regs. 30-12.N.(1) (“Access to coastal islands by bridges or docks involves the placement of structures into critical area coastal tidelands and waters that are protected by the statute, the critical area regulations, and by the public trust doctrine” and such construction involves temporary and permanent impacts on critical area coastal tidelands and waters.). Moreover, the regulatory scheme recognizes that some critical area resources warrant heightened protection due to their special public value and significance thereby requiring applicants to meet a higher threshold to be eligible for a permit to impact those public resources for private gain—Regulation 30-12.N.(2)(b) is one of those provisions. (Tr. 211:8 to 212:12).

The special exception criteria in areas of special resource value such as the ACE Taskforce Boundary require an applicant to meet the overriding public interest test by presenting clear and convincing evidence that the project “will create overriding public benefits resulting from mitigation and diminished impacts to public trust resources compared with development that would likely occur without the bridge” and secure such public benefits by a permanent conservation easement. S.C. Code Regs. 30-12.N.(10)(a)-(d).

The specific inclusion of the ACE Taskforce Boundary as an area of special resource value in the regulation evidences the General Assembly’s express intent to afford heightened regulatory

standards for critical area permits within those defined boundaries. *See Charles Blanchard Constr. Corp. v. 480 King St., LLC*, 447 S.C. 295, 300, 926 S.E.2d 235, 238 (2026) (“What a legislature says in the text of a statute is considered the best evidence of the legislative intent [and] courts are bound to give effect to the expressed intent of the legislature.”). The ACE Basin has long been recognized as priority wetland and conservation habitat of public significance. (Ex. 4, 5). Indeed, the ACE Basin Task Force was recognized early on as a “Flagship Project” for the ACJV in implementing the goals and recommendations of the Waterfowl Management Plan. (Tr. pp. 282-296, p. 356, Ex. 2, 4, 5).

Accordingly, when the critical area regulations governing access to coastal islands were amended in 2005, *inter alia*, identifying the “ACE Basin Taskforce Boundary Area” as an area of special resource value requiring heightened protection, the plain and literal understanding of that specific term necessarily means the ACE Taskforce Boundary as depicted on the WFA map. *See, e.g., Murphy v. S.C. Dep't of Health & Env't Control*, 396 S.C. 633, 639–40, 723 S.E.2d 191, 195 (2012) (words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation); *Kiawah Dev. Partners, II*, 411 S.C. at 39, 766 S.E.2d at 720-21 (“Whe[n] the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper.”).

In the context of this framework, the ALC erroneously construed Regulation 30-12.N.(2)(b) in a manner that frustrates the very purpose and intent of this provision: to require heightened protections and thereby strict permitting requirements for critical areas of special resource value with significant public interests at stake. DES effectuated this intent by denying Bay Light’s permit application based on the project’s location within the ACE Taskforce Boundary

and the applicant's failure to meet the heightened regulatory standards; yet, the ALC concluded without any legal basis that DES' use of the ACE Taskforce Boundary as it exists on both the Waterfowl map and GIS data layer map was an unconstitutionally vague application of Regulation 30-12.N.(2)(b). A person of common intelligence is not left guessing as to the meaning of the ACE Taskforce Boundary – it is evident on the face of Waterfowl Focus Area map and clearly identical to the Department's GIS data layer map.

The standard for constitutionality was not correctly applied and the burden was misplaced. Bay Light's burden was to affirmatively show the property was outside the ACE Taskforce Boundary and that this boundary was unconstitutionally vague but it presented no evidence proving Regulation 30-12.N.(2)(b) is vague, let alone meeting the heavy burden of proving "its repugnance to the constitution is clear and beyond a reasonable doubt." *S.C. Human Affairs Comm'n v. Zeyi Chen*, 846 S.E.2d 861, 872 (S.C. 2020) (citing *Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013)). DES properly applied the ACE Taskforce Boundary in determining the Bay Light property was located within that specific and clearly defined area of special resource value. Nevertheless, the ALC ignored the correct legal standard and discounted the proper application of the ACE Taskforce Boundary and the plain intent of the presumptively valid regulatory scheme affording heightened protections for projects within the clear boundaries of this express term.

The ACE Taskforce Boundary and Regulation 30-12.N.(2)(b) is not vague and it was legal error for the ALC to conclude otherwise. Given the standard for constitutionality is beyond a reasonable doubt, such a ruling is reversible error.

II. The ALC misapprehended and misplaced the burden of proof, inappropriately ruling in Bay Light's favor.

A. Establishing the location of Bay Light's property relative to the ACE Basin Taskforce Boundary Area was not Appellants DES and CCL's burden to bear

As the aggrieved party asserting the Department wrongfully denied its permit application, Bay Light bore the burden of affirmatively proving that it met the regulatory criteria and that the requested permit should have been granted. S.C. Code Ann. § 1-23-600; *Leventis v. S.C. Dep't of Heath & Env't Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000).

The Department denied Bay Light's private bridge permit application because the project is located in the defined ACE Taskforce Boundary area of special resource value and the application failed to meet the specific regulatory standards under SC Code Regs. 30-12(N)(2)(b) and 30-12(N)(10). (Ex. 6, 39). Accordingly, to prevail Bay Light's burden was to show that the project is **not** located within the ACE Taskforce Boundary and required to meet those heightened standards. That burden was not carried. Moreover, the ALC misapprehended that burden and inappropriately concluded the Department and League presented insufficient evidence to affirm Bay Light's property was located in the ACE Taskforce Boundary and subject to the heightened regulatory criteria.

Indeed, the Court recognizes that, "in this case, the threshold issue is whether [Bay Light's property] is in an area of special resource value." Am. Order at 12. The Order cites to existing law on the burden of proof in a contested case: "[i]n general, the party asserting the affirmative of an issue in an adjudicatory administrative proceeding has the burden of proof." *DIRECTV, Inc. & Subsidiaries v. S.C. Dept. of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017). Am. Order p. 9. "Accordingly, [Bay Light] bears the burden of proving that the Department's decision was in error under the statutory and regulatory standards." *Id.* Yet, the Order shifts the burden from

Bay Light to the Appellants and instead required the latter to show the affirmative of this issue based on an arbitrary standard of proof threshold with no legal basis.

The ALC characterized its ruling in favor of Bay Light as based on a lack of proof and improperly placed the burden of that proof on Appellants Department and CCL:

In conclusion, the evidence failed to adequately establish the boundaries of the ACE Basin Taskforce Boundary Area as they relate to [Bay Light's] property and in turn, the Department's authority to subject [Bay Light's] permit to the higher scrutiny of an area of special resource value. Indeed, the evidence in the Record failed to sufficiently define the boundaries of the ACE Basin Taskforce Boundary Area. Consequently, under this particular factual context, the Department's use of the Waterfowl Focus Areas map as an equivalent to the ACE Basin Taskforce Boundary Area and as a proxy for the Department's GIS data layer gives rise to an unconstitutionally vague application of the regulation.

Am. Order p. 13. Specifically, to arrive at this conclusion, the ALC determined the evidence presented by **Appellants** was insufficiently clear to discern whether Bay Light's property falls within the regulated ACE Taskforce Boundary. *Id.* This was error.

First the ALC correctly noted "the ACE Basin Taskforce Boundary Area is a term that can be objectively applied. Indeed, the ACE Basin Taskforce Boundary Area was established in 2004 as a collective effort between the ACE Basin Task Force and the Department of Interior." Am. Order p. 12 (internal citations omitted). Then the ALC improperly shifted the burden of proof stating that "[Bay Light] produced several maps describing the general region of the ACE Basin in which the Project was not located. While these maps did not expressly demarcate the ACE Basin Task Force Boundary Area, they bring into question the Department's determination particularly since there is no map bearing the label ACE Basin Taskforce Boundary Area as set forth in Regulation 30-12(N)(2)(b)." Am. Order p. 12. In fact, there is neither a basis in law nor evidence in the record supporting the ALC's conclusion. None of the maps introduced by Bay Light identify, and do not purport to identify, the ACE Taskforce Boundary, which is the area that is actually

regulated. (Pet. Ex. 23-24). Rather, the evidence showed the WFA map establishes the ACE Taskforce Boundary and that boundary is clearly and unambiguously reflected in the Department's GIS data layer map and includes the Bay Light property. Ex. 8. This was directly testified to by several witnesses, including an individual employed by the agency who regulates the area in question and a founding member of the Task Force. .

Bay Light presented no evidence affirmatively showing that its property is not located within the ACE Taskforce Boundary and subject to the heightened regulatory standards. Instead, it presented several maps relating to the ACE Basin **generally**, but none containing the operative ACE Taskforce Boundary at all. "Here, however, Petitioner produced several maps describing the **general region of the ACE Basin** in which the Project was not located." Am. Order at 12 (emphasis added). Additionally, Bay Light and its agent testified that they were aware of the ACE Taskforce Boundary and the heightened regulatory standards that applied thereto, specifically admitting that the decision to purchase the property at issue and pursue a bridge permit was entirely dependent on a determination that the property was **not** located within the regulated ACE Taskforce Boundary. (Tr. pp. 77-78, 160, 166-169). "Mr. Goff has nearly twenty-nine years of experience in preparing critical area permits and currently serves as a resource consultant for Red Bay Environmental, LLC. Nonetheless, he was unable to locate an ACE Basin Taskforce Boundary Area map detailing its boundary lines." Am. Order at 4. "Significantly, Mr. Goff averred that the Property was outside of the boundaries shown on each of those maps." Am. Order at 5. This is the only evidence that was introduced by Bay Light and it falls far short of the requisite burden.

Based on the record on the whole, Bay Light and its agent's due diligence to determine the ACE Taskforce Boundary and the property's relation thereto was objectively constrained and unreasonable and they failed to carry their burden of proving DES wrongfully denied the critical

area permit. The ALC misapprehended Bay Light's burden and erred by treating Bay Light's complete absence of affirmative proof as to the location of its property outside the ACE Taskforce Boundary to mean this boundary and subsequent heightened standards were improperly applied.

B. GIS Data was not recognized as proof of the ACE Basin Task Force Boundary.

The ALC recognized DES' retention and use of GIS data: "To discern whether a property is within a special resource area, the Department uses a regulatory batch map and ArcGIS database which enables Department staff to overlay project locations on various data layers of significance. The Department obtained the Geographical Information System (GIS) data layer for the ACE Basin Taskforce Boundary from DNR in 2009 and has used it to evaluate permitting projects since that time." Am. Order at 5-6. "Mr. Williams' determination that Petitioner's Property was roughly five miles within the most northeastern edge of the boundary was based upon a GIS layer created by DNR's 'GIS gurus.'" Am. Order at 6.

However, the Court noted that there was no testimony from the individuals who "were intricately involved in [the GIS data's] creation." Am. Order at 8. While the individuals who at the time were SCDNR employees were not called to testify, Charles Lane was intimately involved with the Task Force and testified extensively to his personal knowledge of the creation of the boundary generally while reiterating the Task Force relied on the technical and biological expertise of its members like SCDNR to do the actual delineating. The ACE Taskforce Boundary was drawn and agreed to by unanimous consent of the Task Force then approved by the USFWS in 2004 and it has not changed. Injecting a standard of requiring individual staff members who may leave agencies or otherwise become unavailable to provide live testimony at trial in order to accept a clear and unambiguous Boundary and DES' application thereof is unreasonable and legally unsubstantiated.

The CZMA encourages, and in fact requires, consultation with other resources agencies to administer the Act. S.C. Code Ann. § 48-39-50 (N) imposes a duty on DES “[t]o encourage and promote the cooperation and assistance of state agencies, coastal regional councils of government, local governments, federal agencies and other interested parties.” Complex permitting decisions can often implicate specialized knowledge of regulatory agencies and it is appropriate for agencies to rely on other agencies for technical expertise, provided they conduct their own independent investigation. Utilizing external data is not inappropriate so long as the permitting agency conducts its own review. See *Greeneagle, Inc. v. S.C. Dept. of Health & Env. Control*, 399 S.C. 91730 S.E.2d 869 (Ct. App. 2012) (affirming DHEC’s determination based on review of a County solid waste management plan).

C. The Court erred in imposing a requirement of proof by DES of the metes and bounds of the Task Force Boundary Area.

The Amended Order states, “the Court must factually apply the metes and bounds of the ACE Basin Taskforce Boundary Area to discern whether Petitioner’s project is subject to the heightened requirements under regulation 30-12.N(2)(b) of the South Carolina Code of Regulations for an area of ‘special resource value.’” Am. Order p. 14. In requiring that metes and bounds must be proved in the contested case, the ALC is imposing a standard that is not contained within the regulations.

Metes and bounds are defined as “the boundary lines of land, with their terminating points and angles.” Blacks Law Dictionary 6th Ed. The ALC inappropriately imposed a requirement to establish the entirety of the ACE Basin Task Force Boundary area with precision in metes and bounds. Moreover, metes and bounds can include such things as natural features such as rivers.

Garrett v. Locke, 309 S.C. 94, 98 419 S.E.2d 842, 845 (Ct. App. 1992) “In locating land, resort is had first to natural boundaries, next to artificial monuments, then to adjacent boundaries, and last to courses and distances.” Citing *Fulwood v. Graham*, 30 S.C.L. (1 Rich.) (1845).

Where there are disputes as to boundaries the intent of the grantor governs. *Klapman v. Hook*, 206 S.C. 51 (1945). “The vital question is the intent of the grantor at the time the deed is executed.” Clearly this is not a real property dispute; however, since the ALC has demanded “metes and bounds” descriptions, the “grantor” in this scenario would almost certainly be the ACE Basin Task Force Boundary and USFWS who approved the map. The boundaries were corroborated by Charles Lane, one of the only individuals who could and did testify as to both the intent of and general description of features used by the Task Force in establishing its boundaries.

There are numerous examples where the Legislature has established protected areas without requiring establishment of metes and bounds. S.C. Code Ann. § 50-11-880 identifies numerous wildlife sanctuaries and describes areas such as the Prestwood Lake Area by natural features, Forest Lake and references roads and waterbodies and not metes and bounds and some merely by names without any more specific description. 50-11-870

There are also certain statutory schemes that specifically require the establishment of areas, such as soil and water conservation districts, by metes and bounds: “if the department shall determine, upon the facts presented at such hearing and upon such other relevant facts and information as may be available, that there is need, in the interest of the public health, safety and welfare, for a soil and water conservation district to function in the territory considered at the hearing, it shall make and record such determination and shall define, by metes and bounds or by legal subdivisions, the boundaries of such district.” S.C. Code Ann. § 48-9-560.

However, when there are no specific statutory or regulatory requirements, metes and bounds are not required. Under the canon of construction “*expressio unius est exclusio alterius*,” an exclusion of a metes and bounds requirement cannot be inferred. *Hodges v. Rainey*, 341 S.C. 795, 33 S.E.2d 578 (2000). “There is a basic presumption the General Assembly has knowledge of previous legislation when later statutes are passed on a related subject.” *Arnold v. Ass'n of Citadel Men*, 337 S.C. 265, 273, 523 S.E.2d 757, 761 (1999).

The ALC imposes a legal requirement that does not exist in concluding the Bay Light property’s location in relation to the ACE Taskforce Boundary cannot be discerned absent metes and bounds. Am. Order p. 14. An ordinary person of reasonable intelligence can visually compare boundary shapes and confirm their consistency. There is no basis for requiring an establishment of the metes and bounds of the ACE Taskforce Boundary, particularly when the proposed bridge is located so clearly within its boundaries.

The ALC misapprehended and improperly discounted the testimony of both Mr. Lane and Mr. Williams regarding these geographical boundaries that include rivers and roads. In fact, both witnesses described the boundaries and did so consistently. Mr. Lane was clear that the map was created prior to the existence of GIS data so the Task Force’s reliance on geographic features and existing roads was entirely reasonable. The more specific technical confirmation should have, and indeed did, come from the resource agencies who are tasked with retaining this type of data. S.C. Code Ann. § 48-22-40 imposes a duty on SCDNR to conduct geologic mapping and studies for sharing with other state and local governmental agencies- the Legislature has tasked SCDNR with having such mapping expertise and DES appropriately relied on them to supply the GIS mapping data.

The WFA map, which establishes the boundaries within which the Task Force operates under the Management Plan and regulatory framework related thereto, is the regulated ACE Taskforce Boundary and the Department's GIS data layer map utilizes that same boundary; accordingly, the Bay Light property was determined to be located within the ACE Taskforce Boundary and subject to the heightened regulatory standards for areas of special resource value. The ALC's conclusion that the Department's application of the Boundary to the Bay Light property was in error is entirely unsupported and legally flawed because Bay Light presented no such affirmative evidence. Rather, Bay Light "produced several maps describing the general region of the ACE Basin in which the Project was not located" which the ALC treated as "bring[ing] into question the Department's determination[,]" erroneously finding Appellants "failed to sufficiently establish that the GIS data layer is the boundary that was assertedly adopted by the ACE Basin Task Force." Am. Order pp. 10, 12.

The vast majority of evidence in the record put forward by Bay Light relates to events that occurred prior to the application being submitted evidencing an apparent confusion on the part of Bay Light and/or its agent, which could easily have been resolved by contacting the administrative agency, which did not happen. (Tr. pp. 140-141). The Court made its findings based on a flawed burden of proof: "the evidence in the record simply failed to reasonably show that the Petitioner's property was within the ACE Basin Taskforce Boundary Area." Am. Order. p. 13.

The record clearly reflects that Bay Light knew about the governing regulatory scheme in S.C. Code Reg. 30-12(N)(2)(b) and submitted a critical area application intended to obtain a permit to construct a private vehicular bridge and dock on a coastal island. Despite contracting an experienced permitting agent to verify the property was not located in the ACE Taskforce Boundary area of special resource value, Bay Light's agent advised that the property was outside

the regulated boundary using maps which did not in fact contain the regulated boundary. Subsequently, DES informed Bay Light during its permit review that the project is indeed located within the regulated ACE Taskforce Boundary and made a permitting decision based on that and Bay Light's failure to meet the governing regulatory criteria. Therefore, Petitioner's burden was to show that this permitting decision was in error by proving the project is **not** located within the ACE Taskforce Boundary and subject to the standards for areas of special resource value. That burden was not carried and the ALC erred as a matter of law in ruling in Bay Light's favor.

III. There is no substantial evidence in the record to support the ALC's findings and conclusions.

The ALC's conclusion that "the evidence in the Record failed to sufficiently define the boundaries of the ACE Basin Taskforce Boundary Area" is not supported by any actual evidence in the record. Am. Order at 13. Rather, the evidence in the record shows a clear and logical connection from the inception of the ACE Basin Task Force and its conservation and habitat protection initiatives within the defined and approved ACE Basin Taskforce Boundary Area to the Department's application of Regulation 30-12.N(2)(b) determining that Bay Light's private bridge project cannot be permitted due to the property's location within that Boundary Area and its failure to meet the regulation's overriding public interest test and other relevant critical area standards pertaining thereto.

The uncontroverted evidence established that the ACE Taskforce Boundary was designated according to the natural and geographic features of the ACE river basin, that the Boundary is depicted on the ACJV South Carolina Waterfowl Focus Areas Map (Ex. 3) and that the Boundary has not changed since the delineation and approval of the Waterfowl map by the Task Force and Department of Interior's USFWS in 2004. (Tr. p. 55 ll. 7-13, p. 304 l. 9 – p. 306 l. 17, p. 313 ll. 1-

8, p. 328 l. 17 – p. 329 l. 24; Ex. 3, 5, 39). The Boundary is readily and publicly accessible by an internet or Google search using the specific regulatory term: “ACE Basin Task Force Boundary.” (Tr. pp. 266 l. 3 – 268 l. 11, p. 271 ll. 1-11, p. 272 ll. 16-17, p. 278 ll. 2-11, p. 305 l. 20 – p. 306 l. 7 276, 277-278, 305-306; Ex. 18, 24). And the Boundary is likewise reflected on the SCDNR website (Ex. 16) and the Department’s GIS database regulatory base layer map (Ex. 8). (Tr. pp. 307 l. 18 – 308 l. 10, p. 320 ll. 2-23, p. 325 ll. 22-25, p. 200 ll. 16-22, p. 217 l. 8 – p. 219 l. 8, p. 223 ll. 7-13, p. 226 l. 18 – p. 227 l. 19; Ex. 3, 6, 8, 16, 18). The vast majority of witness testimony and evidence by Charles Lane, Mike McShane, Blair Williams, Mary Adkins, as well as representatives from SCDNR on background have all confirmed the accurate and approved ACE Taskforce Boundary, which was in existence at the time Reg. 30-12(N) was amended to current language, is the exact same boundary reflected on Exhibits 3, 5, 8, 16, 18, and 24. (Tr. pp. 55 ll. 7-13, p. 217 l. 8 – p. 219 l. 8, p. 223 ll. 7-13, p. 224 l. 19 – p. 227 l. 19, p. 252 ll. 5-18, p. 266 l. 3 – 268 l. 11, p. 271 ll. 1-11, p. 297 l. 12 – p. 302 l. 20, p. 304 l. 9 – p. 308 l. 10, p. 311 l. 13 – p. 312 l. 7, p. 312 ll. 1-8, p. 320 ll. 2-23, p. 328 l. 15 – p. 329 l. 24; Ex. 3, 5, 6, 8, 16, 18, 24, 39).

DES staff conducted an independent and thorough investigation prior to issuing its decision, including confirming the ACE Taskforce Boundary with the longest standing Task Force member, who was personally and directly involved with its delineation back in 2004, and consultation with the resource agency with the scientific expertise and information to compile the necessary data to provide that GIS data to DES staff. (Tr. pp. p. 196 – 227).

The evidence in the record does not support the ALC’s finding that “... the evidence in this case failed to sufficiently establish that the GIS data layer is the boundary that was assertedly adopted by the ACE Basin Task Force.” Am. Order at 10. In fact, no reasonable person can draw a different conclusion than the Waterfowl Focus Area map identifies the ACE Basin Taskforce

Boundary Area, which is clearly and unambiguously the same boundary as the GIS data layer map introduced into evidence and maintained by the Department since approximately 2009. (Tr. p. 175 ll.13-21, p. 177 ll.3-6, p. 196 l.17- p. 197 l.6). The undisputed testimony was that the Bay Light property is approximately five miles inside the Boundary. (Tr. p. 176) The location of the property within the ACE Taskforce Boundary is not a close call.

Contrary to the Court's assertion that "if Mr. Lane is unable to describe the boundaries, how can an ordinary person be expected to identify the physical limits of the ACE Basin Taskforce Boundary Area?" (Am. Order at 8), Mr. Lane personally described with particularity how the Boundary was set, including how the Task Force's efforts within the designated ACE Basin waterfowl focus area predated the availability of GIS technology and data. Therefore, the Task Force's reliance on geographic features, waterbodies and existing roads was entirely reasonable. The more specific technical confirmation should have, and indeed did, come from the resource agency member who is tasked with the compilation of this type of data: SCDNR. For example, S.C. Code Ann. § 44-22-40 enables SCDNR to develop and retain geological and other data and is responsible for its proper retention. Consistent with this statutory mandate, Mr. Williams testified that the Department commonly relies on information provided by either federal or state sister agencies in performing regulatory duties, including data on threatened and endangered species, historic or cultural resources and areas of special resource value. (Tr. pp. 203-205, 207, 215, 225-227).

There is no evidence in the record that Bay Light's property is outside the ACE Basin Taskforce Boundary Area. As such, there is no possibility of drawing two inconsistent conclusions from the evidence in this case. On the whole, the facts in the record allow for only one reasonable

conclusion: that the Bay Light property is within the ACE Taskforce Boundary and subject to the Department's critical area regulatory standards accordingly.

CONCLUSION

A conclusion that a regulation runs contrary to the Constitution is a tremendously high bar, one that the ALC lowered in several respects. It did not evaluate the contested case to determine whether Reg. 30-12.N(2)(b) is unconstitutional beyond a reasonable doubt, and placed the burden of proving constitutionality and the boundaries of the regulatory ACE Basin Taskforce Boundary Area on the parties who were respondents in the contested case. Moreover, there is no evidence in the record that Bay Light carried its burden to show the property is located outside of the ACE Taskforce Boundary and not subject to the heightened critical area standards for areas of special resource value. All of these errors require that this Court reverse the decision of the ALC.

Respectfully submitted,

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