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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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

Bay Light, LLC,Respondent

v.

South Carolina Department of Environmental Services,Respondent/Appellant

and

South Carolina Coastal Conservation League.....Appellant

INITIAL BRIEF OF RESPONDENT/APPELLANT
SOUTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL SERVICES

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STATEMENT OF ISSUES ON APPEAL

- I. Did the ALC commit reversible error by invalidating Regulation 30-12(N)(2)(b) as unconstitutionally vague as applied by the Department?
- II. Did the ALC commit reversible error by relieving Bay Light of its burden of proof by and conditioning that burden on the Department's production of evidence?
- III. Did the ALC commit reversible error by finding that the evidence did not establish a "nexus" between the ACE Basin Taskforce Boundary Area and the Department's Geographic Information System (GIS) data layer in view of the reliable, probative, and substantial evidence in the whole record?

STATEMENT OF THE CASE

This matter is an appeal of the ALC's Final Order, Amended Final Order and Order on Reconsideration reversing the Department's critical area permitting decision based on the determination that "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 Geographic Information System (GIS) data layer gives rise to an unconstitutionally vague application of the regulation." (Amended Final Order, p. 13).

On November 11, 2021, Bay Light, LLC ("Bay Light") submitted an application to the Bureau of Coastal Management ("BCM"), formerly the Office of Ocean and Coastal Resource Management ("OCRM"),¹ to construct a 385' x 15' pile-supported vehicular bridge to a coastal island in the Meggett area of Charleston County and a private recreational dock with a covered pierhead and floating dock. (Amended Final Order, p. 2).

On September 7, 2023, the Department denied the application. The Department determined that Bay Light's island lies within the ACE Basin Taskforce Boundary Area, an "area of special resource value" under S.C. Code Regs. 30-12(N)(2)(b), and that the project did not satisfy the heightened requirements of S.C. Code Regs. 30-12(N)(10). (Amended Final Order, pp. 2-3). The Department's Board declined a Final Review Conference, making the staff decision the final agency decision. (Amended Final Order, p. 3; S.C. Code Ann. § 44-1-60(F)).²

On November 6, 2023, pursuant to S.C. Code Sections 1-23-600(A) (Supp. 2025) and 44-1-60 (2018), Bay Light filed a request for contested case hearing with the Administrative Law

¹ BCM is a Bureau of Appellant South Carolina Department of Environmental Services ("SCDES" or "the Department").

² Prior to the Restructuring Act of 2024, final agency decisions were challenged pursuant to the procedures in S.C. Code Ann. § 44-1-60.

Court (“ALC”). (Request For Contested Case). The South Carolina Coastal Conservation League (“SCCCL”) filed a consent motion to intervene on January 3, 2024, which was granted.

On October 4, 2024, Bay Light moved for summary judgment, arguing that Regulation 30-12(N)(2)(b) is unconstitutionally vague and that the Department impermissibly delegated rule-making authority to the ACE Basin Taskforce. (Order Denying Motion for Summary Judgment, pp. 1-2). The Department and the South Carolina Coastal Conservation League (“SCCCL”) filed a Joint Return on October 31, 2024 arguing, among other things, that the claim was a facial challenge beyond the ALC’s jurisdiction. (Joint Return, p. 20).

On November 22, 2024, the ALC denied Bay Light’s motion, characterizing the claim as an as-applied challenge and finding genuine issues of material fact. (Order Denying Motion for Summary Judgment, pp. 5-7).

On December 9-10, 2025, the ALC conducted a hearing on the merits. (Amended Final Order, p. 1).

On April 30, 2026, the ALC issued a Final Order holding that the Department’s use of the Waterfowl Focus Areas map to prove the parameters of the ACE Basin Taskforce Boundary Area “gives rise to an unconstitutionally vague application of the regulation” and remanding to the Department “with the exception of the heightened standards set forth under regulation 30-12(N)(10).” (Final Order, pp. 13-14).

On May 12, 2026, the Department and SCCCL filed Motions for Reconsideration. (R. p. ____). Bay Light filed a Return on May 21, 2026 (R. p. ____), and the Department filed a Reply on May 29, 2026. (R. p. ____).

On June 16, 2026, the ALC issued an Amended Final Order, which reached the same result with revised findings and reasoning, and an Order on Reconsideration addressing the grounds it found “without merit.” (Amended Final Order; Order on Reconsideration).³

On July 15, 2026, the Department filed a Notice of Appeal with the Court of Appeals. (R. p. ____).

STANDARD OF REVIEW

Questions of law generally

"[Q]uestions of law are reviewed *de novo*" in appeals from ALC decisions." *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012). Pointedly, the Supreme Court recently affirmed that when the appellate issue is the constitutionality of a statute or regulation, *de novo* review is proper. *Butts v. Mace*, 448 S.C. 39, 48, 930 S.E.2d 698, 703 (2026), *reh'g denied* (June 29, 2026) (“[t]he constitutionality and interpretation of a statute are questions of law that appellate courts review *de novo*” (Emphasis added)). Accordingly, the Court of Appeals owes no deference to the ALC's legal conclusion that S.C. Code Ann. Regs. § 30-12(N) is unconstitutionally void-for-vagueness. The Court examines that question fresh and reviews the ALC’s constitutional determination independently.

Questions of law specifically about the constitutionality of statutes and regulations

³ Like the issue before the Court in *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011), the “ruling on the merits has finality with respect to the issue decided and will become the law of the case if it is not immediately appealed.” *Long*, 391 S.C. at 488, 706 S.E.2d at 37 (Geathers, J, dissenting). Specifically, when the ALC determined that S.C. Code Ann. Regs. 30-12(N)(2)(b) is unconstitutionally void for vagueness (Amended Final Order, pp. 2-3, 12-14), he “determined the rights of the parties with finality” and the remand is for “ministerial” purposes. *Torrence v. S.C. Dept. of Corrections*, 433 S.C. 224, 227, 857 S.E.2d 549, 550 (2021).

When, as here, the constitutionality of a regulation is the appellate issue, the standard of review requires deference to the *legislative findings*, not the ALC’s findings. *Owens v. Stirling*, 443 S.C. 246, 255, 904 S.E.2d 580, 589 (2024), *reh'g denied* (Aug. 16, 2024). “[D]eference requires the courts to uphold legislative findings unless they are ‘clearly erroneous.’” *Id.* (citing *Richards*, 227 S.C. at 561, 88 S.E.2d at 694; *see also Bauer v. South Carolina State Housing Authority*, 271 S.C. 219, 230, 246 S.E.2d 869, 875 (1978) (upholding legislative findings of fact because we were “unable to say from their face that they are *clearly wrong*”)).

When considering whether legislative findings are clearly erroneous—and thus whether the findings are entitled to deference—this Court will consider all the evidence before us, including any express or presumed legislative findings, the circuit court's findings, and the testimony and evidence upon which both legislative and judicial findings were made. This Court will then determine whether it is possible—in light of all the evidence and the applicable law—to find the legislation is constitutional.

Owens, 443 S.C. at 260-62, 904 S.E.2d at 588-89. “As to any facts the law requires the party challenging the statute to prove, this Court will determine whether the challenging party has met its burden of proof.” *Owens*, 443 S.C. at 264, 904 S.E.2d at 589 (citing *Powell v. Keel*, 433 S.C. 457, 461, 860 S.E.2d 344, 345 (2021)). The South Carolina Supreme Court has explicitly held “[i]t is well settled that *ordinances, as with other legislative enactments*, are presumed constitutional; their unconstitutionality must be proven beyond a reasonable doubt.” *Rothschild v. Richland Cnty. Bd. of Adjustment*, 309 S.C. 194, 198, 420 S.E.2d 853, 856 (1992) (Emphasis in original).

Mixed questions of law and fact

“Mixed questions are not all alike,” so the standard of review “depends on whether answering [the mixed question] entails primarily *legal or factual* work.” *U.S. Bank Nat. Ass’n ex rel. CWC Capital Asset Mgt. LLC v. Village at Lakeridge, LLC*, 583 U.S. 387, 388 and 396 (2018) (Emphasis added). “If [the issue] is a primarily *legal* question, then the appellate court should

‘typically’ review it as it would any other legal conclusion made by a lower court: *de novo*.” § 2589 Mixed Questions of Fact and Law—In General, 9C Fed. Prac. & Proc. (Wright & Miller) Civ. § 2589 (3d ed.) (citing *U.S. Bank Nat. Ass’n, supra*) (Emphasis added). Furthermore, “if an error of law has impaired the judgment of the trial judge on a mixed question of law or fact, then the court’s finding should be set aside on review.” *Id.* (citing *Shafer v. Army & A.F. Exch. Serv.*, 376 F.3d 386, 396 (5th Cir. 2004) (“when a district court bases its findings of fact upon an erroneous legal standard the appellate court reviews the record *de novo*”)).

The South Carolina Supreme Court opined that “the ultimate legal conclusion . . . is a question of law subject to *de novo* review.” *State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023). In that instance, the appellate court owes no deference to the ALC’s legal conclusions.

All other non-constitutional appellate issues

The standard of review for all other non-constitutional issues on appeal from the ALC’s three Orders is set forth in S.C. Code Ann. § 1-23-610(B). Specifically, the Court of Appeals has the authority to reverse the Administrative Law Court’s challenged Orders when the rights of the Department have been prejudiced because the Orders are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) *affected by other error of law*;
- (5) *clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record*; or

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

S.C. Code Ann. § 1-23-610(B)(1-6) (Emphasis added).

STATEMENT OF FACTS

Location and Proposed Activity

Bay Light is the owner of an approximately 9-acre island located on Toogoodoo Creek in Southern Charleston County. 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. (R. p. ____).

It is uncontested that the specific applicable critical area regulations are S.C. Code Ann. Regs. 30-12(N), governing access to coastal islands. In pertinent part, 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.

Regulation 30-12(N)(10)(a) states that to receive a special exception in areas of special resource value, "the applicant shall present clear and convincing evidence that granting the bridge permit will serve an overriding public interest" To do so, 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 Ann. Regs. 30-12(N)(10)(b). Regulation 30-12(N)(2)(a) also requires the "reasonable expectations" of the owner of a coastal island be weighed against impacts to "public trust lands, critical area, coastal tidelands and coastal waters."

Mr. Williams explained that the three areas of special resource value referenced in S.C. Code Ann. Regs. 30-12(N)(2)(b)⁴ 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).

Toogoodoo Creek flows into the North Edisto River and is located approximately four miles from the Ernest F. Hollings ACE Basin National Wildlife Refuge. (Tr. 299).

The ACE Basin

The ACE Basin is an acronym referring to the lands and waterways encompassing the Ashepoo, Combahee, and Edisto Rivers. (Tr. 285). The ACE Basin is globally recognized for its environmental significance. It contains extensive tidal, brackish and freshwater marshes, mixed pine and hardwood forests, and critical habitat for migratory and threatened and endangered species. (Tr. 283-285; Ex. 1, 37, 39). The ACE Basin's confluence of the Ashepoo, Combahee and Edisto Rivers flows into the Atlantic Ocean. (Tr. 299).

Since the 1960s, this area has been identified by the Department of the Interior as a nationally important landscape for conservation, with many layers of protection afforded it. (Tr. 285-286). The Department of Commerce established the ACE Basin National Estuarine Research Reserve ("NERR") to protect lands for the benefit of preserving the estuary. NERR has a designated boundary within the broader ACE Basin. (Tr. 285-286). The Ernest F. Hollings ACE Basin National Wildlife Refuge was established under the Department of the Interior to protect

⁴ S.C. Code Ann. Regs. 30-12(N)(2)(b) identifies the three areas as the ACE Basin Taskforce Boundary Area, the North Inlet National Estuarine Research Reserve, and the Cape Romain National Wildlife Refuge.

critical habitat and wetland ecosystems for migratory waterfowl and a vast array of wildlife species and has a designated boundary within the broader ACE Basin. (Tr. 286).

ACE Basin Taskforce

The ACE Basin Taskforce (“Taskforce”) is a public-private partnership with private landowners, governmental entities and non-governmental organizations that pursues land conservation within a designated boundary area in the ACE Basin. (Tr. 284-290, 293-298, 336, 356). This established Taskforce operates under the North American Waterfowl Management Plan’s authority, which was adopted by Congress during the Reagan administration in response to severe drought conditions that decimated migratory waterfowl populations across North America. (Tr. 47-48, 287-294; Ex. 1, 2).

i. Legal Authority for the Taskforce and its Boundary Area Designation

The North American Waterfowl 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.. (Tr. 286-290; Ex. 2). Further, the plan encourages regulation of land uses to prevent the destruction or degradation of waterfowl habitats. (Tr. 289-290; Ex. 2). In South Carolina, the North American Waterfowl Management Plan is implemented through the Atlantic Coast Joint Venture, which is operated under the Department of the Interior through the U.S. Fish and Wildlife Service (“USFWS”). (Tr. 290-292; Ex. 4, 5). Under this authority, the ACE Basin Taskforce was formed in 1989 as a public-private initiative by the South Carolina Department of Natural Resources (“SCDNR”), Ducks Unlimited, The Nature Conservancy, and a group of private landowners. Its specific purpose is to protect, restore, and enhance conservation habitat in the ACE Basin. (Tr. 291-294, 334, 336; Ex. 1-5).

Additionally, the ACE Basin Taskforce is authorized under 16 USCA § 669 and functions as an advisory committee to the USFWS and SCDNR under the Federal Advisory Committees Act. That Act states that “[t]he term ‘advisory committee’ means a . . . *taskforce*, or other similar group . . . that is established or utilized to obtain advice or recommendations for . . . one or more agencies.” 5 USCA § 1001(2)(a) (1972) (Emphasis added). These groups may be established or utilized by statute, by the president, or as is the case with the ACE Basin Taskforce, “by one or more agencies;” namely the USFWS and SCDNR. 5 USCA § 1001(2)(a)(i) - (iii) (1972).

The USFWS has explicit authority through 16 USCA § 669 to create the ACE Basin Taskforce group and the ACE Basin Taskforce Area’s boundaries (for regulatory purposes). It states, “the Secretary of the Interior⁵ is authorized to cooperate with the States, through their respective State fish and game departments, in wildlife-restoration *projects* as hereinafter in this chapter set forth.” 16 USCA § 669. Section 669a further provides definitions including “wildlife-restoration project” defined to:

Include[] the wildlife conservation and restoration program and means the selection, restoration, rehabilitation, and improvement of *areas of land or water* adaptable as feeding, resting, or breeding places for wildlife, *including* acquisition of such areas or estates or interests therein as are suitable or capable of being made suitable therefore . . . and also *including* such research into problems of wildlife management as may be necessary to efficient administration affecting wildlife resources, and such preliminary or incidental costs and expenses as may be incurred in and about such projects.

16 USCA § 669a(11) (Emphasis added).

Wildlife-Restoration Projects, by definition, include wildlife conservation and restoration programs. 16 USCA § 669a(11). This is a broad delegation of power from Congress. Congress

⁵ The USFWS is a bureau within the U.S. Department of the Interior. (See <https://www.fws.gov/about>).

also authorizes the USFWS to “select, . . . restor[e], rehabilitat[e], and improve . . . areas of land or water[.]” 16 USCA § 669a(11).

This statute explicitly authorizes the USFWS to select the boundary line for the ACE Basin Taskforce Boundary Area for regulatory purposes. Accordingly, the ACE Basin Taskforce acted pursuant to Congressional authority to adopt the Waterfowl Focus Area map (Ex. 3); the USFWS approved the Taskforce map in November 2004 and the General Assembly then adopted it as an enforceable regulatory boundary for the ACE Basin Taskforce area on June 23, 2006. (Tr. 303:10 to 305:9).

The ACE Basin Taskforce Boundary

The ACE Basin Taskforce Boundary Area was established in 2004. (Tr. 297). The USFWS approved the ACE Basin Taskforce Boundary Area map. (Tr. 297-298; Ex. 3). The USFWS has federal authority to establish the ACE Basin Taskforce Boundary Area pursuant to the Atlantic Coast Joint Venture and North American Waterfowl Management Plan and supported by the North American Wetland Conservation Act. 16 USCA § 669; 16 USCA § 4401. The ACE Basin Taskforce Boundary is delineated in dark green on the adopted and approved Atlantic Coast Joint Venture South Carolina Waterfowl Focus Areas map. (Ex. 3; Tr. 302-305).

Mr. Charles Lane was Vice Chairman of the Taskforce at the time the Boundary Area map was generated and approved. (Tr. 298). The boundaries were drawn based on geographic features and connections to the Ashepoo, Combahee and Edisto River systems. (Tr. 297-302). Relying in pertinent part on the resource agency staff with biological expertise, the Taskforce used identifiable features such as roads and waterways to set the boundaries of the Taskforce Boundary Area. (Tr. 297-302, 321-322, 326-327). The eastern side is bounded by the Atlantic Ocean and encompasses all of Edisto Island. Moving northeast, the boundary follows the North Edisto River

to where it merges with the Wadmalaw River around the Town of Meggett. It then follows S.C. Highway 165 north and across S.C. Highway 17 from Charleston County into Dorchester County where it meets I-26, which forms the boundary between the ACE Basin and Santee Cooper Lakes focus areas. (Tr. 175-176, 201-203, 301-305, 321-322). Once the Taskforce drew and agreed upon their boundary area, it was approved by the USFWS⁶ through the Atlantic Coast Joint Venture pursuant to 16 USCA § 669. (Tr. 256-257, 302-304; Ex. 3).

The ACE Basin Taskforce Boundary Area is depicted on the USFWS Atlantic Coast Joint Venture South Carolina Waterfowl Focus Areas map (Ex. 3) and has not changed since the approval and adoption of that map in 2004. The accurate ACE Basin Taskforce Boundary is likewise shown on the SCDNR website (Ex. 16) and the Department's GIS database regulatory base layer map (Ex. 8). (Tr. 305-308, 320, 325-327; Ex. 3, 8, 16, 18). The Boundary is publicly accessible by an internet or Google search using the specific term: "ACE Basin Taskforce Boundary." (Tr. 266-269, 271, 272-273, 276, 277-278, 305-306; Ex. 18, 24). Charles Lane, Mike McShane,⁷ Blair Williams, Mary Adkins, and representatives from SCDNR have all confirmed the accurate and approved ACE Basin Taskforce Boundary, which was in existence at the time Regulation 30-12(N)



⁶ The USFWS is a bureau within the U.S. Department of the Interior. (See <https://www.fws.gov/about>).

⁷ Mr. Michael McShane was the Chairman of the ACE Basin Taskforce. Mr. McShane testified via his deposition transcript that the correct map for the Ace Basin Task Force Boundary was the 2004 Waterfowl Focus Area map. (Petitioner's Exhibit 43, Michael McShane's Deposition Pages 6:20 to 7:1).

was amended to current language, is the same boundary found on Exhibits 3, 16, 18, and 24. (Tr. 55:7-9, 217-219, 305, 305, 328-329).

Geographic Information System (GIS) Data Layer Provided by
DNR for the ACE Basin Task Force Boundary Area

The Department has a regulatory batch map database with different GIS data layers. (Tr. 175:9 to 175:22). These GIS data layers are tools that the Department uses to evaluate a project for consistency with specific regulatory requirements, as well as the general guidelines the Department is charged with looking at to ensure that all the resources within the coastal zone are protected. For example, the Department can select and then determine whether a threatened or endangered species or a cultural historic resource is present. One of the GIS data layers that the Department uses is the ACE Basin Taskforce boundary map.⁸ (Tr. 196:17 to 197:20). Using this GIS data layer, Department staff can then enter an address to determine whether that particular site falls within ACE Basin Taskforce boundary area. (Tr. 175, 198-204). All of these GIS data layers are used by the Department staff when making permitting decisions as part of the GIS review. (Tr. 203:21 to 205:8).

The GIS data layer for the ACE Basin Taskforce Boundary area came from SCDNR.⁹ (Tr. 207, 218). It has been used as a regulatory tool since about 2009. (Tr. 177:3-6). Mr. Williams

⁸ Mr. Williams addressed that the Department regulates other areas besides the ACE Basin Taskforce Boundary Area that do not have a fixed map in the regulation itself associated with them either. He testified that the Department does not have maps associated with threatened/endangered species and cultural historic sites, and the four critical areas either. (Tr. 214:24 to 215:15).

⁹ Mr. Williams testified that the Department commonly relies on information provided by either federal or state sister agencies in performing regulatory duties. He testified, for example, that the Department evaluates permit applications and relies on the expertise of sister agencies such as SCDNR for input on threatened and endangered species or the South Carolina Department or Archives and History on historic or cultural resources. He further testified that the Department relies on information provided by sister agencies in performing regulatory duties related to the other two areas of special resource value under S.C. Reg 30-12(N)(2)(b) that also have heightened

affirmed during his trial testimony that the ACE Basin Taskforce boundary map and the waterfowl focus area map that Emily Cope at SCDNR provided the Department “are the same map.” (Tr. 218:1 to 218:3).

Bay Light Lies Well Within the Boundary Area

Toogoodoo Creek, where the Bay Light property is located, flows into the North Edisto River and is located within the ACE Basin Taskforce Boundary Area. (Tr. 175-176, 266-271, 326-327; Ex. 8). Specifically, Mr. Williams testified (using the GIS data layer) that the Bay Light property on Toogoodoo Creek was approximately *five miles* inside the ACE Basin Taskforce Boundary Area. (Tr. 176:5 to 176:11). This portion of the boundary, and Bay Light’s location within it, was based on an easily-identifiable, well-known, unique, geographic feature (i.e., Wadmalaw River) clearly visible to Department staff through the transparent green GIS data layer overlaid on this coastal map. (Ex. 8, p. 4). The Department may accurately use this GIS data layer when making critical area permitting decisions.¹⁰ Mr. Williams testified that he started his measurement at the Wadmalaw River adjacent to Stevens Towing, another site that Mr. Williams was very familiar with and had evaluated permits for.¹¹

Bay Light’s Purchase of the Property/Due Diligence

Prior to the purchase, Dr. Jim Southard, principal of Bay Light, hired resource consultant and permit agent Judd Goff to utilize his 28 years of experience in the field to research the feasibility of obtaining a 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 Basin

protection (i.e., North Inlet National Estuarine Research Reserve and the Cape Romaine National Wildlife Refuge). (Tr. 225:15 to 226:13).

¹⁰ This GIS data layer is for agency use and is not publicly available.

¹¹ See Argument I.A.1.b. on page 28 for greater detail on Mr. Williams’ testimony and evidence regarding this 5-mile distance.

Taskforce Boundary Area. (Tr. 66, 71, 77-78, 118-119, 138, 142, 158, 160, 166, 168-169). Both Dr. Southard and Mr. Goff were aware that if the island was located within the Boundary Area, the critical area application would be subject to heightened scrutiny. (Tr. 77-78, 121, 166-167).

The two met on September 20, 2021 and it was at that meeting that Mr. Goff informed Dr. Southard he thought they “had a green light” to proceed as desired. (Tr. 160). Bay Light’s decision to purchase the property was based on Mr. Goff’s belief that the property was not located within the ACE Basin Taskforce Boundary Area, and therefore not subject to heightened standards under Regulation 30-12(N). Bay Light would not have purchased the property otherwise. (Tr. 77-78, 80, 97, 119, 121, 160-161, 163, 166-169). Dr. Southard testified that he relied entirely on Mr. Goff to determine the likelihood of obtaining a permit for a bridge. (Tr. 158, 160, 168-169). He acknowledged his awareness of questions about the location of the island and whether it was located within the ACE Basin Boundary, which would affect his ability to obtain a bridge permit. (Tr. 160-161, 166).

Mr. Goff’s due diligence included reviewing the language of Regulation 30-12(N), which sets forth heightened criteria for projects located in areas of special resource value, such as the ACE Basin Taskforce Boundary Area, and conducting less than ten hours of Internet research to determine if the property was located in the Taskforce Boundary Area such that the heightened standards would apply to Bay Light’s bridge permit application. (Tr. 69-72, 78-79, 122-123).

Mr. Goff testified that he does *not* have prior experience with critical area permitting in the ACE Basin Taskforce Boundary Area. (Tr. 146:5-147:4 (Emphasis added)). He further testified that he searched for the term “ACE Basin Project Area Map” rather than the specific term “Ace Basin Taskforce Boundary Area.” (Tr. 146-148). Other evidence in the record proved that he did not search for the correct term. (Ex. 20). In contrast to Mr. Goff, Ms. Adkin’s used the correct

identifier using the search term “ACE Basin Taskforce boundary” (the actual area referenced in S.C. Code Ann. Regs. 30-12(N)(2)(b)). Like Mr. Lane,¹² Ms. Adkins found the map marked as Petitioner’s Exhibit 24. (Tr. 266:24 to 267:8). She testified that she knows what the 2004 Waterfowl Focus Area map looks like and the boundary depicted in the Petitioner's Exhibit 24 is the same as the ACE Basin Taskforce Boundary Area map. (Tr. 267:22 to 268:8). Mr. Lane also found the correct map contained in Petitioner’s Exhibit 24 by entering the correct search term “ACE Basin Taskforce Project Boundary Map”. (Tr. 305:20 to 306:1).

Using a different term than that cited to in the regulation, Mr. Goff did discover a couple of maps on the SCDNR website bearing an apparent connection to the ACE Basin. However, he did not find a map of the ACE Basin Taskforce Boundary Area. (Tr. 78-80, 82-85; Ex. 14, 15, 23, 31-33). Nor did Mr. Goff contact anyone at DES, SCDNR, or USFWS to confirm the accuracy of the map he believed to be the Taskforce Boundary or otherwise investigate any further. (Tr. 140-141). Mr. Goff testified that he was satisfied that “we reviewed their online information that they provided.” (Tr. 133:23 to 134:12). Nevertheless, based on the maps he found in his internet search, Mr. Goff determined and advised Dr. Southard that the property was *not* located within the ACE Basin Taskforce Boundary. (Tr. 139-140). Yet when cross-examined about whether he had found the correct map prior to Dr. Southard purchasing the property, Mr. Goff responded that he “found only the ACE Basin Project boundary that was published at the time.” (Tr. 136:19-21; Tr. 137:1-5).

On cross-examination, Mr. Goff conceded that he did not find the ACE Basin Taskforce boundary area but an ACE Basin Core Area map (i.e. the camel map), and despite not finding it,

¹² Mr. Lane testified that using the Google search term “ACE Basin Taskforce Project Boundary Map,” (the map referenced in S.C. Code Ann. Regs. 30-12(N)(2)(b)), he found the map marked as Petitioner’s Exhibit 24 on the Internet. (Tr. 305:20 to 306:1).

he still advised Dr. Southard that the property that he wanted to buy was outside the ACE Basin Taskforce boundary area. (Tr. 139:3-7).¹³

Mr. Goff stated, and DES confirmed, that he did not contact anyone with DES for clarification and that he only contacts the agency where there is an active project pending before them. (Tr. 140-141; 195-196). Blair Williams, Division Director of Critical Area Permitting,¹⁴ and other DES staff have worked with Mr. Goff in a professional capacity for over a decade and that Mr. Goff is familiar with the DES permitting process and stays in regular communication with staff. (Tr. 194-195).

Yet, with regard to the Bay Light property and permit application, Mr. Goff never called, emailed or contacted the Department in any way to inquire or confirm whether or not the property was in the ACE Basin Taskforce boundary area. (Tr. 139-142; 195:22 to 196:11).

Charles Lane, a licensed real estate agent and broker who has over 38 years of experience, testified that it is common practice of good due diligence to reach out to or meet with DES and other regulatory agencies prior to the purchase of property. (Tr. 313-315). Mr. Lane testified that in his experience, the standard and advisable practice in performing one's due diligence is to approach the regulatory agencies prior to closing to ascertain whether the required permits are likely to be issued. (Tr. 314:20 to 316:17). Charles Lane has been active in conservation his entire career and has been involved with the ACE Basin Taskforce since its inception in 1989. (Tr. 282,

¹³ Specifically, Mr. Goff testified his opinion that the Bay Light property was outside the ACE Basin Taskforce Boundary Area was based "[o]nly [on] published, publicly available boundaries that we had relating to the ACE Basin *Project Area* period was what we reviewed earlier." (Tr. 139:8-11) (Emphasis added).

¹⁴ Mr. Williams has been employed by the Department of Environmental Services (f/k/a Department of Health and Environmental Control) for over 20 years. (Tr. 172:10-12). For 17 years from 2008 to 2025, including the time the permitting decision was made in this case, Mr. Williams was the Department's Critical Area Permitting Section Manager (Tr. 172:20-22 173:3-7). He is currently the Division Director of the Critical Area Permitting Division. (Tr. 172:15-16).

292). He has served as either Chairman or a member since that time. He is Broker in Charge at Holcombe, Fair and Lane and has held a real estate license since 1987. (Tr. 281:22). Mr. Lane's firm handles commercial and residential real estate development transactions, and he has also personally been involved in the development of various properties along the coast. (Tr. 281:25 to 282:7). He personally has been involved in real estate transactions involving marsh islands, including one in particular that required a permit to construct a bridge for access at Selkirk Plantation. (Tr. 314:3-14).

Mr. Lane's testimony is consistent with that of Mr. Williams' testimony that DES routinely receives calls from agents and realtors inquiring about the possibilities for permitting projects prior to their clients purchasing a property, so many that DES has a project manager of the day dedicated exclusively to this role. (Tr. 192-194). To further increase accessibility, the Department's website has a project manager finder map for the public to use to locate the project manager for a particular area, call, email or leave them a voice mail. They will call back about any type of question the inquirer may have. (Tr. 192:12 to 193:5).

Department's review of the permit application

Following the purchase, on November 12, 2021, 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. On December 8, 2021 after determining that the application was administratively complete, the Department placed the permit request on a 30-day public notice. (Tr. 178, 180-181; Ex. 6, 39). Having received over twenty requests for a public hearing, the Department held a public hearing on March 2, 2022 and received additional written comments within the 15-day window thereafter. (Tr. 174, 178-179; Joint Ex. 39).

During the public comment period, the Department received several written comments as well as testimony during the public hearing expressing concern about the property's location within the ACE Basin Taskforce Boundary Area. (Tr. 174, 179, 186-190, 266, 269, 312-313, 331-332; Ex. 6, 22, 45). After the close of the public comment period, the Department undertook technical review of the application and, on April 13, 2022, sent the applicant a Technical Deficiency letter requesting additional information. (Tr. 181-183; Ex. 6, 39). On April 26, 2022, in response to an inquiry from Mr. Goff, the Department project manager for the Bay Light application, Sarah Reed, notified Mr. Goff that the Bay Light proposed bridge is located within the ACE Basin Taskforce Boundary and that DES has an ArcGIS mapping layer delineating the Taskforce Boundary. (Tr. 125-126; Ex. 6, 18). The Department received responses to the Technical Deficiency letter from the applicant in August and December 2022 but not all information requested was provided. (Tr. 183-184; Ex. 6, 39).

From August 18, 2022 until the permit application was denied on September 7, 2023, the Department staff conducted an extensive review of aerial imagery from Pictometry, Google Earth, ArcGIS, and Charleston County GIS, as well as the maps depicting the ACE Basin Taskforce Boundary. Department staff also fully evaluated and 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. 39).

Finally, Mr. Williams testified that when Bay Light's counsel (Stan Barnett) brought to the Department's attention that the "camel map" may have some significance in evaluating the ACE Basin Taskforce boundary area, the Department investigated this claim by contacting the SCDNR, and coordinating with Charles Lane, ACE Basin Taskforce Chairman to confirm the accurate

Taskforce Boundary was being utilized in the Department’s GIS database layers. (Ex. 8; Tr. 215:16 to 216:3). Mr. Williams explained that the reason the Department coordinated with both DNR and Charles Lane was because Mr. Williams and the Project Manager Reed wanted to make sure that they “got it right.” (Tr. 216:10). He said they wanted to “do our due diligence and make sure that we made the right decision.” (Tr. 216:8 to 216:16). This due diligence also included coordination with The Nature Conservancy. (Tr. 223:5-6).

The Department denied Bay Light’s permit application on September 7, 2023 because the Petitioner’s property is located in the ACE Basin Taskforce Boundary Area and, therefore, does not meet the heightened standards for a bridge permit. (Ex. 6, 39). In particular, the Department relied on S.C. Code Ann. Regs. 30-12(N)(2)(b).

ARGUMENT

Introduction

The ALC held that the Department’s application of S.C. Code Ann. Regs. 30-12(N)(2)(b) to Bay Light’s island is unconstitutionally vague because the evidence did not “sufficiently establish” the ACE Basin Taskforce Boundary Area, and it (the ALC) removed the Department’s authority to apply the heightened standards of Regulation 30-12(N)(10) to Bay Light’s permit. That ruling cannot stand for five reasons. First, the ALC had no jurisdiction to enter what is in substance a facial ruling. Second, the ALC’s own findings show that the Regulation is not vague. Third, the ALC failed to consider, and to defer to, the General Assembly’s legislative findings. Fourth, the ALC relieved Bay Light of its burden of proof. Fifth, the ALC’s findings on the “nexus” between the boundary and the GIS layer are clearly erroneous on the whole record. The constitutional question is reviewed *de novo*, and the legal errors identified below deprive the ALC’s related findings of any deference.

I. The ALC erred in four ways in invalidating Regulation 30-12(N)(2)(b) as “unconstitutionally vague” as applied by the Department. (Amended Order, p. 13)

Before looking at the substance of the ALC’s void-for-vagueness¹⁵ conclusion, it is important to bear in mind who gets deference from this Court. Is it the General Assembly or the ALC? “In a challenge to the constitutionality of a statute, it is *legislative findings*—to the extent they are expressed or may be fairly presumed—to which the law requires we *defer*, not circuit court findings.” *Owens v. Stirling*, 443 S.C. 246, 263, 904 S.E.2d 580, 589 (2024), *reh’g denied* (Aug. 16, 2024) (citing *Richards v. City of Columbia*, 227 S.C. 538, 560-61, 88 S.E.2d 683, 694 (1955)) (Emphasis added). “That deference requires the courts to uphold legislative findings unless they are ‘clearly erroneous.’” *Id.* at 264, 904 S.E.2d at 589 (quoting *Richards*, 227 S.C. at 561, 88 S.E.2d at 694); *see also Bauer v. South Carolina State Housing Authority*, 271 S.C. 219, 230, 246 S.E.2d 869, 875 (1978) (upholding legislative findings of fact where “unable to say from their face that they are clearly wrong”). “When considering whether legislative findings are clearly erroneous—and thus whether the findings are entitled to deference—this Court will consider all the evidence before us, including any express or presumed legislative findings, the circuit court’s findings, and the testimony and evidence upon which both legislative and judicial findings were made. This Court will then determine whether it is possible—in light of all the evidence and the applicable law—to find the legislation is constitutional.” *Owens*, 443 S.C. at 264, 904 S.E.2d at 589 (citing *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.”)). “As to any facts the law requires the party challenging the statute to prove, this Court will determine whether the challenging party has met its burden of proof.” *Id.* (citing *Powell v. Keel*, 433 S.C. 457, 461, 860 S.E.2d 344, 345 (2021)).

¹⁵ “The void-for-vagueness doctrine is primarily a criminal doctrine.” *S.C. Human Affairs Comm’n v. Zeyi Chen*, 430 S.C. 509, 529, 846 S.E.2d 861, 871 (2020).

In this case, the legislative declaration of findings to be examined under the *Richards v. City of Columbia* “clearly erroneous” standard are S.C. Code Ann. § 48-39-20 and S.C. Code Ann. § 48-39-30. *Richards*, 227 S.C. at 561, 88 S.E.2d at 694. Department Project Manager Reed clearly stated in her September 7, 2023, letter denying the Bay Light critical area permit application that the Department “relied upon” “Sections 48-39-30 (A), (B)(1) and (B)(2): Legislature’s policies for permitting structures in the critical area” in making this permitting decision. (Joint Ex. 39, p. 11).¹⁶ The Department’s application of Sections 48-39-20 and 48-39-30 to its permitting decision is in accordance with Section 48-39-150 which mandates that the Department “shall base its determination on . . . the policies specified in Sections 48-39-20 and 48-39-30[.]” S.C. Code Ann. § 48-39-150(A). The ALC acknowledged the Department’s reliance on these legislative findings on pages 2-3 of the Amended Final Order¹⁷ and did not conclude that the General Assembly’s legislative findings are “clearly erroneous.” *Richards v. City of Columbia*, 227 S.C. at 561, 88 S.E.2d at 694.

¹⁶ S.C. Code Ann. § 48-39-30:

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations[.]

¹⁷ The ALC notes at the bottom of page 2 of the Amended Final Order that “[o]n September 7, 2023, the Department’s Office of Coastal Resource Management (OCRM) staff denied Petitioner’s permit request pursuant to subsections 48-39-30(A), (B)(1), and (B)(2) of the South Carolina Code (2008) and regulations 30.12.N(2)(b), 30.12.N(3)(a), and 30.12.N(10), of the South Carolina Code of Regulations (Supp. 2025).”

The Supreme Court extensively addressed the legislative findings of S.C. Code Ann. § 48-39-20 and S.C. Code Ann. § 48-39-30 in *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) (*KDP II*). There the Court said that

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*.

411 S.C. 29, 766 S.E.2d at 715 (Emphasis added) (Internal citations to Department resources omitted) (citing S.C. Code Ann. §§ 48-39-20 to -30 (2008)).

Mr. Williams testified in detail about the three areas of special resource value referenced in Regulation 30-12 (*i.e.*, the ACE Basin Taskforce Boundary Area, the North Inlet National Estuarine Research Reserve, and the Cape Romain National Wildlife Refuge). He said that these three areas contain saltwater marshes, freshwater ecosystems, rivers, and hardwood bottom forests that provide critical habitat and that

the State, through the Atlantic Coast Venture and the Taskforce boundaries, remember, saw the importance of these areas and wanted to preserve these as these large, vast areas that provide significant resource value, that preserve critical habitat, pre- -- preserves the continuity of these higher end function and value systems that also, you know, have critical habitat for threatened endangered species; they have historic cultural resources. I mean, examples would be the rice impoundments. So, these areas are afforded that and identified as a special resource of value to help protect them from future development. And also one of the most - - one of the driving things that really started the Atlantic Coast Venture and the ACE Basin Taskforce boundary is the North American Waterfowl Management Plan to address the dwindling populations of waterfowl.

(Tr. 211:10 to 212:17).

Mr. Williams concluded by stating that the “ACE Basin Taskforce was formed as a part of that effort [by the USFWS and the Atlantic Coast Joint Venture] to identify these areas and create these boundaries, these areas of special resource value.” (Tr. 212:23 to 213:2).

The ALC never reached or decided the protecting-the-public-interest issue specified in the legislative policies and findings because it resolved the case solely on the threshold question of whether Bay Light’s property was within the ACE Basin Taskforce Boundary Area. Stated another way, protecting the public’s interest in the special resource value of the ACE Basin Taskforce Boundary Area was not the “lodestar which guide[d the ALC’s] legal analysis in regards to the State’s tidelands.” *KDP II*, 411 S.C. at 29, 766 S.E.2d at 715.

Considering the above-mentioned evidence and trial testimony, along with the express legislative findings in S.C. Code Ann. § 48-39-20 and S.C. Code Ann. § 48-39-30, as well as the Supreme Court’s clear application of those legislative findings in *KDP II*, “it is possible—in light of all the evidence and the applicable law—to find the legislation [S.C. Code Regs. 30-12(N)(2)] is constitutional.” *Owens*, 443 S.C. at 264, 904 S.E.2d at 58. Accordingly, without even addressing the ALC’s legal errors articulated below, this Court should reverse the ALC’s void-for-vagueness determination because the legislative findings as explained and applied by the Supreme Court in *KDP II* support the Department’s regulation and those legislative findings are entitled to deference, not the ALC’s findings.

A. The ALC’s first error was not applying the presumption of constitutionality to Regulation 30-12(N)(2)(b).

“All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.” *S.C. Human Affairs Comm’n v. Zeyi Chen*, 430 S.C. 509, 528, 846 S.E.2d 861, 872 (2020) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 SC. 634, 640, 528 S.E.2d 647, 650 (1999)). “The party challenging the statute bears the heavy burden of proving that its

repugnance to the constitution is clear and beyond a reasonable doubt.” *Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013) (internal quotation and citation omitted).

South Carolina courts extend the presumption of constitutionality beyond statutes to other forms of legislative and executive enactments. “[T]heir unconstitutionality must be proven beyond a reasonable doubt.” *Rothschild v. Richland Cnty. Bd. of Adjustment*, 309 S.C. 194, 198, 420 S.E.2d 853, 856 (1992). In *Rothschild*, the Court rejected the argument that an *as-applied* challenge to an ordinance required only a prima facie showing of unconstitutionality, holding instead that the beyond-a-reasonable-doubt standard applies regardless of whether the challenge is facial or as-applied. *Id.* (citing *Robinson v. Richland County Council*, 293 S.C. 27, 358 S.E.2d 392 (1987)) (also citing, *cf.*, *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)). *City of Beaufort v. Baker* reaffirmed this principle, stating “a duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt . . . even where the ordinance allegedly violates First Amendment rights.” 315 S.C. 146, 153, 432 S.E.2d 432, 474 (1993) (citing *Rothschild, supra*; *Thomson Newspapers, Inc. v. City of Florence*, 287 S.C. 305, 338 S.E.2d 324 (1985)). And in *City of Beaufort v. Holcombe*, this Court confirmed that the party challenging the constitutionality of the law must “negate every conceivable basis that might support it.” 369 S.C. 643, 649, 632 S.E.2d 894, 897 (Ct. App. 2006).

The ALC does not apply or even mention this presumption of constitutionality in any of the Orders challenged before this Court. Rather, the ALC applied the preponderance of evidence standard for contested cases to the vagueness question and treated purported gaps in the Department’s proof as sufficient to establish a constitutional defect. (Amended Final Order, p. 9). That is reversible legal error per S.C. Code Ann. § 1-23-610(B)(4).

Pursuant to *Rothschild* and its progeny, the fact that both Bay Light and the ALC characterized the void-for-vagueness issue as an *as-applied* constitutional challenge does not set the burden of proof lower than if Bay Light and the ALC characterized the challenge as *facial*. Bay Light had to prove beyond a reasonable doubt that Regulation 30-12(N)(2)(b) was unconstitutionally vague and “negate every conceivable basis that might support” the regulation’s constitutionality. *City of Beaufort v. Holcombe*, 369 S.C. at 649, 632 S.E.2d at 897. They failed to satisfy this very high standard as indicated below.

1. *There are two conceivable bases that support the constitutionality of S.C. Code Ann. Regs. 30-12(N)(2) per Holcombe*

In determining whether S.C. Code Ann. Regs. 30-12(N)(2) is unconstitutional beyond-a-reasonable-doubt, the Supreme Court held that a regulation is unconstitutionally vague if it “forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001). A regulation may be vague because it fails to give people of ordinary intelligence a reasonable opportunity to understand what it prohibits or because it authorizes or encourages arbitrary and discriminatory enforcement. *State v. Houey*, 375 S.C. 106, 119, 651 S.E.2d 314, 321 (2007). The doctrine applies “where the rule or standard is so vague and indefinite as to really be no rule or standard at all.” *S.C. Human Affairs Comm’n v. Zeyi Chen*, 430 S.C. at 529, 846 S.E.2d at 871.

a. *The ALC’s findings undercut its determination that the regulation is unconstitutionally void-for-vagueness.*

The ALC found that, unlike the regulation in *South Carolina Coastal Conservation League v. S.C. Dep’t of Health & Env’tl. Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 486 (2005), which turned on the “subjective relativity” of the word “small,” Regulation 30-12(N)(2)(b) “identifies

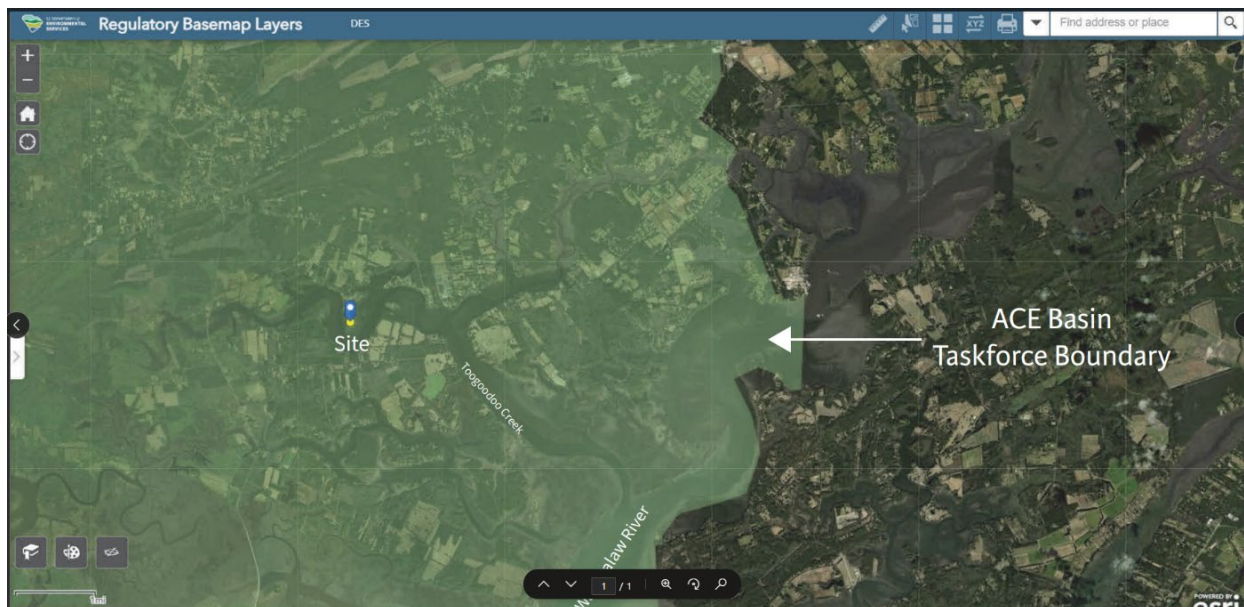
the area at issue as the ACE Basin Taskforce Boundary Area,” which “*is a term that can be objectively applied.*” (Amended Final Order, p. 12 (Emphasis added)). The ALC found that the area “was established in 2004 as a collective effort between the ACE Basin Taskforce and the Department of Interior.” (Amended Final Order, p. 12). The ALC found that the Waterfowl Focus Areas map “outlines a boundary for the ACE Basin.” (Order on Reconsideration, p. 4). And the ALC found that if the boundary was established in 2004 “the application of that boundary would not be vague as the Court should only need to look to the terminal points of the boundary lines.” (Amended Final Order, p. 10).

Those findings resolve the vagueness question. A term that can be objectively applied to a boundary fixed in 2004 and approved by a federal agency, does not leave a person of ordinary intelligence to guess at its meaning. What the ALC found lacking was proof, not meaning. The Order on Reconsideration says so directly: “the vagueness of the Department’s application of the standard . . . emanates from the elusiveness of its evidence,” and “if another permit applicant challenges the Department’s authority . . . the Department could submit evidence to establish the limits of the boundaries.” (Order on Reconsideration, p. 11). A conclusion that evidence in one case was insufficient to locate a boundary is not a holding that the regulation fails to supply a standard. At most it is a finding that the Department did not carry its factual burden, and that finding, if it is supportable at all, did not require, support or permit a ruling that the regulation was unconstitutional. Courts avoid constitutional questions when a case can be decided on other grounds. *See Butts v. Mace*, 448 S.C. 39, 48, 930 S.E.2d 698, 707 (2026), *reh’g denied* (June 29, 2026) (“the constitutional avoidance canon . . . directs that when a statute is susceptible to both constitutional and unconstitutional interpretations, courts must adopt the construction that

preserves the statute's validity”); *see also* 19 S.C. Jur. *Constitutional Law* § 6 (“[a] court should not pass upon a constitutional issue unless doing so is necessary to a decision”).

b. Mr. Williams’ testimony that the Bay Light property is five miles inside the ACE Basin Taskforce Boundary line.

Mr. Williams testified (using the GIS data layer) that the Bay Light property on Toogoodoo Creek was approximately *five miles* inside the ACE Basin Taskforce Boundary Area. Page 4 of Exhibit 8 below is a screen shot of that GIS data layer showing the boundary following the serpentine curves of the Wadmalaw River.¹⁸ This portion of the boundary was based on an easily-identifiable, well-known, unique, geographic feature (*i.e.*, Wadmalaw River) that was clearly visible through the transparent green GIS data layer that overlaid a map of the lower half of the South Carolina coast.



Ex. 8, p. 4.

The geographic features that Mr. Williams testified to allow the Department to accurately use the GIS data layer when making critical area permitting decisions. Mr. Williams testified that he

¹⁸ Mr. Williams testified that the ACE Basin Taskforce Boundary Area is an “area based upon geographic features *such as the Wadmalaw River* and the different types of watershed basis, such as Ashepoo, Cumbee and Edisto, highways and roads.” (Tr. 236:12-15 (Emphasis added)).

started his measurement at the Wadmalaw River adjacent to Stevens Towing (another site that Mr. Williams was very familiar with and had evaluated permits for). Specifically, regarding this particular portion of the Taskforce Boundary line, Mr. Williams testified that “[t]here's a straight line from that peninsula [where Stevens Towing Company is located] down to the shorelines of the Wadmalaw Island. That's a pretty straight line that you can measure from. So, we measured from that line as a crow flies to the site. And it's roughly five miles – a little over five miles.” (Tr. 176:5 to 176:11). In establishing that the Bay Light property was five miles inside the boundary line, Mr. Williams testified to his familiarity with this GIS data layer¹⁹ (Ex. 8) and also his personal and professional familiarity with the Wadmalaw River in this area. (Tr. 202:25 to 203:3). In his tenure with the Department, Mr. Williams has handled numerous permitting issues “along the same shoreline there in the Meggett area, as well as docks across the [Wadmalaw] river on the Wadmalaw Island and a mooring field that's associated with Stevens Towing.” (Tr. 203:7 to 203:11). He also “grew up in Hollywood, South Carolina, and [he’s] navigated these waters quite a bit growing up.” (Tr. 203:11 to 203:13).

Based on the above findings from the ALC’s Orders as well as Mr. Williams’ testimony that the Bay Light property is about five miles inside the ACE Basin Boundary Area, Bay Light failed to “negate every conceivable basis that might support” the regulation’s constitutionality. *City of Beaufort v. Holcombe, supra* at 649, 632 S.E.2d at 897. Bay Light failed to meet the “heavy burden” of proving beyond a reasonable doubt that S.C. Code Regs. 30-12(N)(2) is “repugnan[t]

¹⁹ Mr. Williams testified that he compared the ACE Basin Taskforce boundary map with the 2004 Waterfowl Focus Area map provided by Emily Cope at SCDNR and testified “they are the same map.” (Tr. 218:1 to 218:3). Mr. Williams further testified that the email correspondence marked as Joint Exhibit 6C between Emily Cope and Mr. Craig Watson, who was with the Atlantic Coast Joint Venture, helped him “confirm that the GIS data layer that BCM had been using is consistent with the 2004 Waterfowl Focus Area map.” (Tr. 219:3 to 219:8).

to the constitution.” *Zeyi Chen, supra* at 528, 846 S.E.2d at 87. Despite these failures, the ALC erroneously found the regulation void for vagueness.

B. The ALC’s second error was retaining jurisdiction over Bay Light’s void-for-vagueness claim, because the claim, the ALC’s holding, and its remedy reach beyond the Bay Light case and operate as a facial invalidation of Regulation 30-12(N)(2)(b).

The ALC is an executive-branch body that “must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation.” *Great Games, Inc. v. S.C. Dept. of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000). It may decide whether a law is unconstitutional as applied to a particular litigant, but it has no power to pass on the facial validity of a statute or regulation. *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 38-39 (2011); *Dorman v. S.C. Dep’t of Health & Env’tl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002); *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000). The Department raised this objection at summary judgment, in its proposed order, and in its Motion for Reconsideration, and the ALC rejected it each time. (Order Denying Motion for Summary Judgment, pp. 5-6; Amended Final Order, pp. 9-10; Order on Reconsideration, pp. 10-11). Whether the ALC had jurisdiction, and whether a claim is facial or as-applied, are questions of law reviewed *de novo*. *Blue Moon*, 397 S.C. at 260, 725 S.E.2d at 483; *Butts*, 448 S.C. at 48, 930 S.E.2d at 703.

The label a party chooses is not controlling. “The [as-applied or facial] label is not what matters. The important point is that plaintiffs’ claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 194, 130 S.Ct. 2811, 2817 (2010); *see also Bucklew v. Precythe*, 587 U.S. 119, 138-39, 139 S.Ct. 1112, 1127-28 (2019) (warning against “pleading games” over labels). South Carolina likewise recognizes that “[t]he line between facial and as-applied relief is a fluid one.” *Doe v. State*, 421

S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (quoting 16 C.J.S. *Constitutional Law* § 153, at 147 (2015)). The salient question is what the claim attacks and what relief follows from it.

At summary judgment the ALC concluded that Bay Light's claim was as-applied because Bay Light "does not argue that the ACE Basin Taskforce Boundary Area is incapable of determination" and instead challenged "OCRM's application of the Waterfowl Focus Areas Map." (Order Denying Motion for Summary Judgment, p. 6). The ALC repeated that reasoning in the Amended Final Order, stating that "resolution of this case is not predicated upon the map which was assertedly adopted by the ACE Basin Taskforce but rather how the Department applied the standard," and that if the boundary was established in 2004, "the application of that boundary would not be vague." (Amended Final Order, p. 10).

The ALC's ultimate holding, however, contradicts that premise and reaches every applicant seeking a critical area permit in the ACE Basin Taskforce Boundary Area. Specifically, the ALC held that the evidence "failed to adequately establish the boundaries of the ACE Basin Taskforce Boundary Area," that the Waterfowl Focus Areas map "does not include a sufficiently clear indication of the parameters of that area," and that the Taskforce's roads and natural features were not "sufficiently defined" by the testimony. (Amended Final Order, pp. 12-13). Those findings concern the boundary itself, not the way the Department applied the regulation to Bay Light's permit application. The ALC relied on the absence of "metes and bounds" for the boundary, reasoning that "without the metes and bounds of the ACE Basin Taskforce Boundary Area, what one person may believe to be the physical limits of the ACE Basin Taskforce Boundary Area may differ from another." (Order on Reconsideration, p. 5). Putting aside the fact that there is no metes and bounds requirement in the statute or regulation associated with the ACE Basin Taskforce

Boundary Area, a defect of that kind (absence of metes and bounds) is in the definition of the regulated area, and it exists for every property owner in the same way.

The relief confirms the point. The ALC did not simply find that Bay Light's island lies outside the boundary. It remanded the application to be processed "with the exception of the heightened standards set forth under regulation 30-12(N)(10)." (Amended Final Order, p. 14). That remedy eliminates the Department's ability to apply Regulation 30-12(N)(2)(b) to this application on the stated ground that the term (ACE Basin Taskforce Boundary Area) is too indefinite to apply.

This is the situation addressed in *Reed*: the claim and the relief "reach beyond the particular circumstances" of the litigant. *John Doe No. 1 v. Reed*, 561 U.S. at 194, 130 S.Ct. at 2817 (citing *United States v. Stevens*, 559 U.S. at 472-73, 130 S.Ct. at 1587) (Emphasis added). The reasoning needed to resolve a challenge "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). The ALC lacked jurisdiction to rule on that question, and its constitutional holding should be vacated. *See Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38-39. Bay Light's own theory confirms the point: its Return described its position as that "precision in the Taskforce Boundary is not just desirable, it is legally required for the regulation to be properly applied." (Petitioner's Opposition to Motion for Reconsideration, p. 2). Since the ALC does not have the authority to render such a finding, this Court must reverse.

C. The ALC's third error was holding that the Department's application of Regulation 30-12(N)(2)(b) is unconstitutionally vague.

The ALC's vagueness ruling is reviewed *de novo*. "The constitutionality and interpretation of a statute are questions of law that appellate courts review *de novo*." *Butts*, 448 S.C. at 48, 930

S.E.2d at 703; *see Blue Moon*, 397 S.C. at 260, 725 S.E.2d at 483. To the extent the ruling is described as a mixed question of law and fact, the standard of review “depends on whether answering it entails primarily legal or factual work,” *Village at Lakeridge*, 583 U.S. at 396, and the work here is primarily legal. Whether a regulation that names a boundary area fixed in 2004 gives fair notice and guards against arbitrary enforcement is a question about the meaning and sufficiency of regulatory text, measured against the standards the South Carolina Supreme Court has set. *See State v. Miller*, 441S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (“the ultimate legal conclusion . . . is a question of law subject to *de novo* review”). And if an error of law impaired the ALC’s judgment on a mixed question, its finding “should be set aside on review.” 9C Fed. Prac. & Proc. (Wright & Miller) Civ. § 2589 (3d ed.); *see Shafer v. Army & A.F. Exch. Serv.*, 376 F.3d at 396 (when findings rest on an erroneous legal standard, the appellate court reviews the record *de novo*).

The ALC’s vagueness holding rests on three legal errors: (1) it treated a failure of proof as a constitutional defect; (2) it did not apply the presumption of constitutionality, and (3) it did not consider or defer to the legislative findings that supply the Regulation’s narrowing context. Those errors infect whatever factual findings underlie the ruling,²⁰ and the Court owes the ALC’s conclusion no deference.

²⁰ For example, Mr. Williams testified Bay Light’s property is five miles inside the ACE Basin Taskforce Boundary Area measuring from an easily-identifiable, well-known, unique, geographic feature (i.e., the Wadmalaw River). Yet, the ALC concluded “the evidence failed to adequately establish the boundaries of the ACE Basin Taskforce Boundary Area as they relate to Petitioner property.” (Amended Final Order, p. 13 (Emphasis added)). “[W]hen raising a claim of unconstitutional vagueness, the litigant must demonstrate that the challenged statute is vague *as applied to his own conduct* [or location of the Bay Light property in this case], regardless of its potentially vague application to others.” *State v. Lewis*, 863 S.E.2d 1, 6 (2021) (citing *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 507, 757 S.E.2d 388, 393 (2014)) (Emphasis in original).

D. The ALC's fourth error was failing to acknowledge that S.C. Code Ann. Regs. 30-12(N)(2) satisfies the notice and "anti-arbitrariness" purposes of the vagueness doctrine.

“[W]hen analyzing a statute for vagueness, the inquiry focuses on two independent grounds: whether the provision ‘fails to give ordinary people *fair notice* of the conduct it punishes, or is so standardless that it invites *arbitrary enforcement*.’” *State v. Lewis*, 434 S.C. 158, 167, 863 S.E.2d 1, 6 (2021) (quoting *Johnson v. United States*, 576 U.S. 591, 595, 135 S.Ct. 2551, 2556 (2015) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 1859 (1999)) (Emphasis added).

In this case, Regulation 30-12(N)(2) gave Bay Light fair notice. The ALC found the area was established in 2004, nearly two decades before Bay Light’s critical area permit application. (Amended Final Order, p. 12). The Regulation names the area; the Taskforce and the Department of the Interior designated it; Mr. Williams, Mr. Lane, and Ms. Adkins each located it by reference to the Waterfowl Focus Areas map; and the Department told Bay Light’s consultant in April and May 2022 which map and GIS layer it was using. (Tr. 124:5-127:3; 217:4-218:3; 267:6-268:12; 306:2-7). Bay Light’s own consultant conceded that (1) the property lies inside the GIS boundary Ms. Reed identified, (2) that he never asked the Department, DNR, or the U.S. Fish and Wildlife Service about the boundary, and (3) that he found only the “ACE Basin Project” boundary, which he agreed is a different thing. (Tr. 127:13-23; 134:1-12; 136:24 to 138:2; 139:12 to 140:17). A purchaser who did not look for the regulated boundary, and who relied on a differently named map, did not lack notice because the regulation is indefinite.

Nor is there arbitrary enforcement. The Department applied one GIS data layer, obtained from DNR and unchanged since about 2009, to every permit in the area. (Tr. 177:3-6; 223:7-15). The ALC did not find that the Department treated similarly situated applicants differently. The

fact that the other two areas of special resource value have federally adopted boundary documents, (Order Denying Motion for Summary Judgment, p. 4 n.2), does not make the ACE Basin designation indefinite; it shows only that the designation is documented differently. Despite the ALC's finding, the lack of a metes and bounds description of the Taskforce Boundary Area does not create arbitrary enforcement, nor does it create a "subjective boundary." (Order on Reconsideration, p. 4). But equally important, as stated earlier, a metes and bounds description of the Taskforce Boundary Area is not legally required. The ALC erred in imposing such a requirement on the Department²¹ after finding the Department's contrary argument meritless.²²

II. The ALC erred in relieving Bay Light of its burden of proof and conditioning that burden on the Department's production of evidence.

The ALC recognized the governing rule: "the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof," so "Petitioner bears the burden of proving that the Department's decision was in error under the statutory and regulatory standards." (Amended Final Order, p. 9). The burden of persuasion does not shift. *Ford v. Atl. Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143 (1932). This principle was reinforced in *Herndon v. Morgan Mills, Inc.*, where the Supreme Court held that "[t]he difficulty in proving a fact in a [] case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party." 143 S.E.2d 376, 380-81, 143 S.E.2d 376, 381 (1965).

²¹ "[T]he 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.'" (Amended Final Order, p. 14 (Emphasis added)).

²² "Respondents further argue that the Court incorrectly imposes a requirement on the Department to establish the metes and bounds for the ACE Basin Taskforce Boundary Area, particularly when an ordinary person of reasonable intelligence can visually compare boundary shapes and confirm that Petitioner's property is within the regulated boundary. *This argument is without merit.*" (Order on Reconsideration, p. 4 (Emphasis added)).

Bay Light asserted that “Respondent incorrectly characterizes the Petitioner’s burden as being to prove that the project site was not in the Taskforce Boundary Area.” (Petitioner’s Return to the Department’s Motion for Reconsideration, pp. 2-3). However, Petitioner’s Prehearing Statement cuts against this assertion. Bay Light’s counsel identified the issue before the ALC in paragraph 3(a) of Petitioner’s Prehearing Statement as:

Whether OCRM properly applied the provisions of S.C. Reg 30-12(N)(2) to find that the island to which Petitioner seeks to construct a bridge is *inside the ACE Basin Taskforce Boundary Area*, thereby requiring application of heightened review standards set forth in S.C. Reg 30-12(N)(10)?

(Pet. Prehearing Statement, p. (Emphasis added)).

Based on this challenge to the Department’s permitting decision, Bay Light assumed the burden of proving that the Department improperly applied the provisions of S.C. Reg 30-12(N)(2) and the result of that purportedly improper regulatory application is that Bay Light’s island was actually outside the ACE Basin Taskforce Boundary Area (not inside) and thus was not subject to the heightened review standards set forth in Regulation 30-12(N)(10).

The ALC acknowledged the burden but did not apply it. It found that Bay Light’s maps, which depict only “the general region of the ACE Basin,” “did not expressly identify the ACE Basin Taskforce Boundary Area” but “bring into question the Department’s determination.” (Amended Final Order, p. 12; Order on Reconsideration, pp. 2-3). That is not proof that the island is outside the boundary, and the only evidence of where the boundary lies came from the Department’s and SCCCL’s witnesses. The ALC then conditioned Bay Light’s burden on the Department’s evidence: the requirement that Bay Light prove the island is inside or outside the boundary “may be reasonable if there was discernible data of the ACE Basin Taskforce Boundary Area in the Record,” but was “unreasonable” where Respondents did not sufficiently establish it. (Order on Reconsideration, p. 3). It characterized the Department’s position as “an appeal to

ignorance” and held that “it would be improper to require Petitioner to prove . . . that its property is not located within an area that was never sufficiently established by Respondents.” (Order on Reconsideration, p. 5). And it repeatedly faulted the Department for not calling additional witnesses (Ms. Cope, Mr. Harrigal, Mr. Bishop, DNR, TNC, USFWS). (Amended Final Order, pp. 6-8 & n.14; Order on Reconsideration, p. 10).

That reasoning allocates the risk of non-persuasion to the Department on a question on which Bay Light bore the burden, and it treats the Department’s purported failure to disprove Bay Light’s theory as proof of it. It also overlooks that Bay Light’s evidence about the boundary came from its own consultant, who conceded that he found only the “ACE Basin Project” boundary, never looked at the Department’s GIS layer, and never asked anyone. (Tr. 133:2-22; 136:24 to 138:2).

Because the ALC applied an incorrect legal standard in allocating the burden, its conclusion that the Department could not apply the heightened standards must be reversed. S.C. Code Ann. § 1-23-610(B)(4). Findings made under an erroneous legal standard are not entitled to deference, and the Court reviews the record *de novo* to determine whether the proper standard was applied. *See Shafer*, 376 F.3d at 396; 9C Fed. Prac. & Proc. (Wright & Miller) Civ. § 2589 (3d ed.).

III. The ALC’s finding that the evidence did not establish a “nexus” between the ACE Basin Taskforce Boundary Area and the Department’s GIS data layer is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

The Court of Appeals may reverse an ALC finding that is “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” S.C. Code Ann. § 1-23-610(B)(5). The ALC found “the evidence in the Record did not establish a sufficient nexus between the ACE Basin Taskforce Boundary Area and the GIS data layer which the Department applied to

determine that Petitioner’s project fell within an area of ‘special resource value’ and thus, subject to the heightened requirements under Regulation 30-12(N)(2)(b) of the South Carolina Code of Regulations.” (Order for Reconsideration, p. 11.) Findings entered under an erroneous legal standard are not insulated by S.C. Code Ann. § 1-23-610(B)(6). *See Shafer*, 376 F.3d at 396. Here, the ALC’s nexus finding is also tainted by the previously-articulated legal errors; the unsupported constitutional premise; the failure to consider the legislative findings; and the misallocated burden. Independently of those errors, however, the nexus finding rests on four improper conclusions, each of which the record does not support.

A. The record supports the nexus between the boundary and the GIS layer.

The only evidence of how the Department’s GIS layer relates to the Taskforce’s boundary was the Department’s evidence, and it was uncontradicted. Mr. Williams testified that the layer came from SCDNR, was used continuously since about 2009, and “is based upon the . . . November 2004 waterfowl focus area map,” which was “an effort that was conducted by the ACE Basin Taskforce, along with a lot of other federal and state agencies.” (Tr. 177:3-6; 226:14-25). SCDNR’s Emily Cope confirmed to him that the Taskforce boundary and the 2004 map are the same, and the Department confirmed that its layer is consistent with that map. (Tr. 217:4 to 219:8). Mr. Lane, the Taskforce’s chairman, testified that the dark-green area on that map is the boundary, that the Department of the Interior approved it in 2004, and that it has never changed. (Tr. 301:11-13; 306:2-7). Ms. Adkins, SCCCL’s witness, agreed that the boundary she found online was the same as the Waterfowl Focus Areas map. (Tr. 267:22-268:12). The Department’s staff summary in Joint Ex. 39 affirms the nexus between the boundary and the GIS layer and Mr. Lane adopted the staff summary as accurate. (Tr. 327:16 to 329:24). Bay Light did not offer any testimony or

other evidence that the GIS layer departs from the 2004 map that was adopted by the USFWS, and its own consultant conceded that the island lies within it. (Tr. 127:13-23).

B. The ALC mischaracterized the testimony about the “five miles” and the DNR employees.

The ALC found that Mr. Williams’ five-mile measurement rested on “a data layer that could only be verified by SCDNR employees, none of whom testified” (Final Order, pp. 5-6); in the Amended Final Order it faulted the Department for not calling the “GIS gurus.” (Amended Final Order, pp. 6, 8). The measurement, however, was taken from a boundary segment that follows an identifiable geographic feature the Wadmalaw River at Stevens Towing, which Mr. Williams has known “both personally and professionally” and which is visible on the layer itself. (Tr. 176:1-11; 202:5-24; 203:7-13; Ex. 8, pp. 3-4). Verifying that the island sits about five miles from and within that segment of the Taskforce Boundary line requires no GIS authorship.

C. The ALC mischaracterized Mr. Williams’ and Mr. Lane’s descriptions of the boundary.

The ALC found that Mr. Williams’ description of the boundary “materially differs” from Mr. Lane’s. (Amended Final Order, p. 7). Mr. Williams was describing the “most eastern, northeastern extent of the boundary for right there on the Wadmalaw River,” the segment he used to measure. (Tr. 202:14-24). Mr. Lane was describing the northeastern side of the whole ACE Basin, from the Atlantic Ocean around Edisto Island, the North Edisto River, Highway 17 and I-26. (Tr. 301:14-23). Those are different parts of the same boundary and there is no inconsistency between them. The Order on Reconsideration reasons that Mr. Lane’s “broader” description should have included Highway 165 (Order on Reconsideration, p. 9), but a witness’s failure to mention one road in a general description of a 21-year-old-boundary does not contradict a different witness’s specific description of one segment of the Taskforce Boundary.

D. The ALC faulted the Department for not producing metes and bounds, which the Regulation does not require.

The ALC treated the absence of metes and bounds as dispositive. (Order on Reconsideration, pp. 4-5). Nothing in the Regulation, the Act, or the cases the ALC cited requires metes and bounds for a protected area designated by reference to natural features and roads. Moreover, this reasonably implies that the authorized creators of the Boundary Area purposefully chose to forego traditional metes and bounds in favor of the chosen boundary designation. Mr. Lane explained that the Taskforce had no GIS in 2004 and “used roads, and . . . creeks, so that people would know where it is.” (Tr. 300:14-23). Mr. Williams testified that the area is based on features “such as the Wadmalaw River and the different . . . watershed basins, such as Ashepoo, Combahee and Edisto, highways and roads.” (Tr. 236:12-15). The ALC cited a dictionary and a treatise to define metes and bounds (Order on Reconsideration, p. 4), not any authority that a regulation must use them. Absence of a surveyor’s description is not absence of a boundary. In fact, in this circumstance, with these natural boundaries, metes and bounds are unnecessary.

E. The ALC’s credibility rulings do not support the ALC’s absence of a nexus finding.

The ALC discounted Mr. Lane’s testimony because he “really can’t remember” the roads and because DNR and TNC employees were not called, and it found Ms. Adkins not credible. (Amended Final Order, pp. 4-6, 7 n.7). Credibility determinations receive deference, but deference does not extend to a finding that has no support in the record or that rests on a mistaken legal premise. Mr. Lane’s inability to recite every road from memory 21 years later does not contradict his testimony that the Taskforce adopted the boundary shown on the Waterfowl Focus Areas map and that it has not changed. And the ALC’s finding that the Department failed to call witnesses it could have called goes to the burden of proof, which Part II shows the ALC misallocated in error.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court reverse the Administrative Law Court's Amended Final Order and Order on Reconsideration and hold: (1) the ALC lacked jurisdiction to enter its constitutional ruling; (2) Regulation 30-12(N)(2)(b) is not unconstitutionally vague as applied to Bay Light's application; (3) the ALC erred in failing to consider and defer to the General Assembly's legislative findings in S.C. Code Ann. §§ 48-39-20 and 48-39-30; (4) the ALC improperly relieved Bay Light of its burden of proof; and (5) the ALC's findings on the boundary and its relationship to the Department's GIS data layer are clearly erroneous, and that the Department properly applied the heightened standards of Regulation 30-12(N)(10). In the alternative, the Department requests that this Court vacate the Amended Final Order and remand for application of the correct burden of proof and the correct legal standard.

Respectfully submitted,

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