STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC
Appellate Case No. 2009-135686

Deerfield Plantation Phase IIB Property Owners Association ..... Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC ..... Respondents,

vs.

Bill Clark Homes of Myrtle Beach, LLC ..... Respondents.

INITIAL REPLY BRIEF OF APPELLANT

Amy E. Armstrong
Michael Corley
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540
Attorneys for the Appellant

Georgetown, South Carolina
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I. This Court can Consider Arguments on the Subsequent Finding of Federal Waters on the Project Property

The Respondents contend that Deerfield Plantation Phase IIB Property Owners Association ("Phase IIB POA" or "Appellant") is barred from presenting the argument that the presence of federally jurisdictional waters on the project property invalidates the Stormwater Permit at issue in this appeal. In particular, the Respondents contend that this argument was not raised to, or ruled on by, the ALJ and is therefore not preserved for appellate review. Further, the Respondents contend that because the binding federal jurisdictional determination ("the 2010 JD") was issued after the ALJ's Final Order, the content of that determination is not proper for this Court's consideration. For a number of reasons, the Respondents' attempt to sidestep this fundamental issue, which has already once led this Court to remand the case to DHEC, is misguided.

First of all, the Respondents' narrow, speculative take on issue preservation is not consistent with this Court's prior rulings. The Respondents fault Phase IIB POA for not specifically arguing to the ALJ that "the Corps' *subsequent* assertion of jurisdiction" would invalidate Deertrack's Stormwater Permit. Brief of the Respondents, p. 16 (emphasis added). Of course, Phase IIB POA had no way to know that a subsequent assertion of jurisdiction would be issued, and it would have been impossible for Phase IIB to base its arguments on a nonexistent document. Phase IIB POA did, however, repeatedly attempt to argue to the ALJ that federal waters were present on the property and that impacts to those federal waters had to be considered before a valid Stormwater Permit could be issued. The Corps' subsequent assertion of

jurisdiction – the 2010 JD – is validation of the argument Phase IIB POA presented to the ALJ and now presents to this Court: that federal waters are present on the site and that failure to consider impacts to these federal waters invalidates the stormwater permit. Phase IIB POA's inability to predict the subsequent 2010 JD does not bar this Court's consideration of the underlying legal argument.

Again, Phase IIB POA attempted to present this federal waters argument to the ALJ, but the Court would not consider it. Early in the case, Phase IIB POA included the following in its Amended Prehearing Statement as an "issue[] to be presented for consideration": "Are the waters of the state and wetlands on the site connected to navigable waters of the United States by surface connections and **are the wetlands thus federal jurisdictional wetlands**?" p. 2 (emphasis added). Further, Phase IIB POA argued that "the necessary . . . federal wetlands permits and certifications have not been obtained." Amended Prehearing Statement, p. 5. Together, these statements effectively form the same argument the Respondents now contend is barred before this Court.

To the extent that the federal waters argument was not ruled upon by the ALJ, such is attributable to the Respondents' own efforts in having evidence on that issue excluded. While the Respondents now fault Phase IIB's failure to raise this argument to the ALJ, the Respondents previously filed a motion in limine asking the court to "exclude any and all evidence related to the question of whether any portion of the subject property contains 'Waters of the United States.'" Order of Feb. 26, 2009, p. 1. In granting that motion, the ALJ noted that the Corps had previously found no federally jurisdictional waters on the property and, therefore, that "a permit from the Corps is not required" in this instance. Id. p. 3. Consequently, the ALJ excluded from

trial any proof of past or current federal jurisdictional waters on the property. Id., p. 4. Nevertheless, the ALJ eventually made findings of fact and conclusions of law on the presence of federal waters on the project property.[1] See e.g., Final Order, finding ¶9, conclusion ¶7. Phase IIB POA challenged these findings and conclusions, along with the exclusion of related evidence, in a Rule 59 (a) Motion for New Trial. (Motion for a New Trial and to Alter or Amend p. 1).

In short, Phase IIB POA made every effort to have their argument on federal waters heard by the ALJ, yet the ALJ rejected those arguments and indeed reached an erroneous conclusion on the presence of federal waters. Phase IIB is asking this Court to recognize the ALJ's errors related to the federal waters argument and to correct the ALJ's erroneous conclusion.

The Respondents also contend that the 2010 JD should not be considered by the Court because it was issued after the ALJ's Final Order. This argument ignores the fact that, while the 2010 JD was issued after the Final Order, its finding of federal jurisdiction has since been considered by both this Court and the ALJ. Specifically, on motion of the Appellant, the Court remanded this case to the ALJ for the explicit purpose of considering the implications of the 2010 JD. See (Court of Appeals Order of January 12, 2012; Appellant's Return to Respondent's Motion Seeking Establishment of an Appellate Briefing Schedule and Motion to Remand).[2]

The Appellant's Motion to Remand and this Court's order granting that remand on the basis of the 2010 JD are before this Court, whether part of the record or not, and are appropriately subject to judicial notice. See Sloan v. Greenville County, 380 S.C. 528, 670

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[1] Findings and conclusions that were proved erroneous by the 2010 JD.

[2]This case was remanded to the ALJ and then DHEC for action on the 2010 JD; when neither took any action, this Court brought the case back.

S.E.2d 663 (Ct. App. 2009) (court of appeals took judicial notice of other cases pending on its own docket). To argue that this Court cannot consider a document which it has already considered, and on which it previously granted a remand in this case, is entirely illogical. Notably, the Respondents' Brief cites and relies on other documents that have been filed with the Court during the pendency of this appeal. See Brief of the Respondents, pp. 22. Further, the Appellant's brief explains how the 2010 JD has been "presented to the lower court or tribunal" and is therefore proper for inclusion in the record on appeal under Appellate Court Rule 210(c). See Brief, p. 26, n.10.

II. The Subsequent Finding of Federal Waters Necessarily Dictates that the ALJ's Final Order Cannot be Affirmed

A. The Final Order Itself Leaves Essential Questions Unanswered

The Respondents' Brief attempts to circumvent the fact that the ALJ's Final Order reaches the following Conclusion of Law on federal waters that is now undisputedly, conclusively invalid: "It is uncontested that the U.S. Army Corps of Engineers determined that **there are no waters of the United States on the site**." Final Order, Conclusion of Law ¶ 7 (emphasis added). The course of the ALJ's analysis was then informed by this erroneous conclusion. As a result, the ALJ never considered a number of important questions that now must be answered: are there impacts to federal waters from this project?; what are the nature of these impacts?; is a federal permit required for the impacts?; is that federal permit a prerequisite to Stormwater Permit coverage?; and what weight should impacts to federal waters receive in the Stormwater Permit analysis? Where a main tenet underlying the ALJ's Final Order is invalid, the

ALJ's Final Order cannot be affirmed as-is, without any of these questions being answered.[3]

For their part, now that it is clear and "uncontested" that federal waters are present on the property, the Respondents want this Court to make the factual findings and legal conclusions necessary to remedy the ALJ's Final Order. For instance, the Respondents put forward without supporting evidence that the federal waters on the property "will continue to facilitate drainage" after redevelopment, the implication being that a federal permit may not be required. Brief, p. 19. Similarly, the Respondents seek to convince the Court that only a small portion of the project property will be affected by any federal permit and that any modifications to the project plan would be minor. Brief, p. 21. Again, the ALJ did not consider evidence on any of these points because he took it as legally established that no federal waters were on the property. The Court of Appeals therefore has no basis in the record for resolving disputed contentions like these put forward by the Respondents, and this realization has already once led the Court to remand this case to the ALJ and DHEC "for additional administrative action," which was never taken. See Order of January 12, 2012.

Clearly the Final Order is wrong, and it is wrong on a central matter in this case -- one of

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[3]The consequences of the ALJ's erroneous conclusion are exacerbated by the ALJ's evidentiary ruling, whereby the ALJ refused to hear any evidence contradicting the Corps' finding of no federal waters. The Respondents take the bizarre position in their brief that Phase IIB POA was "nonpersuasive" and somehow "failed to sustain their burden" in arguing to the ALJ that the project property contains federal waters. Brief of Respondents, p. 19. The Respondents apparently lose sight of the fact that they were successful in having the ALJ "exclude any and all evidence related to the question of whether any portion of the subject property contains 'Waters of the United States.'" Order on Motion in Limine, p. 1. To be clear, the ALJ accepted the Corps' jurisdictional assessment as conclusive on the issue of federal waters. See ALJ Order of February 26, 2009; Final Order, Finding of Fact ¶7. While complete deference to the Corps' jurisdictional assessment served the Respondents well at trial, the fact that the Corps has subsequently changed course is obviously problematic.

the enumerated "issues to be presented for consideration" that Phase IIB POA raised to the ALJ at the very start of this case. See Amended Prehearing Statement, p. 2. Federal waters are present on the project property, and the waters are impacted in some manner by the proposed project. See Respondent Deertrack Golf Inc.'s Reply to Appellant's Return to Petition for Rehearing, p. 2. If Deertrack Golf wants to argue that the impacts to federal waters do not necessitate changes to its Stormwater Permit, the proper venue for this argument is before the permitting agency on remand. For this Court's purposes, that argument does nothing to negate the fact that the ALJ's Final Order, which is before this Court for review, rests on an erroneous legal conclusion.

B. The Stormwater Permit Cannot be Affirmed Without Resolving the Need for a Clean Water Act Permit

At the most basic level, the presence of federal waters simply creates too many unanswered questions for this Court to affirm the Final Order or the Stormwater Permit. The question of a federal permitting prerequisite is illustrative of this point.

The Appellant's Brief explains how the Clean Water Act ("CWA") requires a Section 404 permit from the Corps and a Section 401 water quality certification from the State before federal waters can be filled. Brief, pp. 27, 30. If such permit and certification are required here, they must be obtained before the Stormwater Permit. See e.g., R.61-9.122.4(b) ("No [stormwater] permit may be issued [w]hen the applicant is required to obtain a State or other appropriate certification under section 401 of CWA and . . . that certification has not been obtained or waived."); see also, Brief of Appellant, pp. 27-31. The requirement for first obtaining CWA approvals is stated a number of times in DHEC's stormwater authority, and it is more than a meaningless procedural hurdle. Rather, the Clean Water Act approvals inform the stormwater

permit consideration, and DHEC cannot approve a stormwater plan that would result in violation of the Clean Water Act. See R.61.9-122.4(a).

The Respondents' Brief does not contest that a CWA water quality certification, if required, must be obtained before their Stormwater Permit. The Respondents do however argue that a Section 404 permit from the Corps is not a mandatory prerequisite to the Stormwater Permit "in all circumstances." Brief of the Respondents, p. 21. Particularly, the Respondents cite language from the Stormwater Permit indicating that, in certain circumstances, DHEC can separate-out the area of a project property for which a Section 404 permit is required and preemptively issue a stormwater permit for the unaffected project area. Id., p. 21. Note, though, that the Respondents stop short of saying that this is what DHEC has done here. Indeed, Deertrack Golf's Stormwater Permit covers the entire project area, including the areas containing federal waters. As for whether a CWA permit and certification will now be required for this project, the Respondents' Brief is entirely noncommittal.

The reason why the Respondents can only introduce questions, and not answers, is apparent from Deertrack Golf's Petition for Rehearing filed with this Court. Therein, Deertrack notes as follows:

> **Deertrack's plans showed construction impacts in [the federal waters]** and, under the storm water authorization provided by DHEC, **Deertrack must now obtain a permit from the Army Corps of Engineers authorizing these impacts or**, alternatively, just **eliminate any construction in these areas**. Deertrack is prepared to do one or the other of these options."

Respondent Deertrack Golf, Inc.'s Reply to Appellant's Return to Petition for Rehearing, p. 2 (emphasis added). In other words, under the proposed project approved by DHEC, Deertrack Golf would need a CWA permit and certification, but Deertrack may or may not modify the

proposed project, which may or may not then require DHEC to modify the Stormwater Permit at issue in this case. While this picture is murky, what is clear is that this Court has no way to determine whether or not a CWA permit and certification will eventually be required for this project,[4] and, accordingly, this Court has no way to determine whether or not a mandatory prerequisite to the Stormwater Permit has been satisfied. Not to belabor the point, but, again, this is the reason why the Court previously remanded this case to the ALJ and DHEC for administrative action.[5]

The version of the proposed project approved by DHEC requires a CWA permit and certification as a mandatory prerequisite to obtaining a Stormwater Permit. This case was remanded for the very purpose of the Respondents figuring out how to resolve this deficiency. Having not done so, the Respondents ask this Court to simply ignore the deficiency or to assume it will go away.

III. The Respondents do not Contest the ALJ's Failure to Account for Waters of the State

The Respondents' Brief failed to contest a number of issues raised by the Appellant in this appeal. Perhaps most significantly, the Respondents provided no answer to one of Phase IIB POA's primary arguments: that the ALJ corrected DHEC's finding of no "waters of the State" on the project property, but then did not consider any of the standards applicable to those waters.

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[4]Under Deertrack Golf's own representation, such permit and certification would be required in the proposed project's current form. Id.

[5]It is worth noting that the Appellant is the only party that had no ability to affect administrative action on the Court's earlier remand. The remand was for Respondent Deertrack Golf to provide the necessary information to DHEC and for DHEC to process and review that information.

See Brief of Appellants, Section II.

Section II of the Appellant's Brief explains how DHEC treated the project site as if it contained no waters of the State, in plain contradiction to the regulatory definition of that term. Because DHEC found no waters of the State, it did not consider any of the regulations applicable thereto. See Brief of Appellants, pp. 23-24 (discussing a number of regulatory provisions specific to waters of the State). The ALJ then corrected DHEC's application of the regulatory definition, finding waters of the State on the project property, and the ALJ was then obligated to undertake the analysis of State waters that DHEC failed to consider. As it stands now, though, neither DHEC nor the ALJ have undertaken the required analysis, and the Respondents have not argued otherwise. "Waters of the State" is a legally significant designation that has been effectively meaningless in this case.

IV. The Pretreatment Requirement Cannot be Ignored as "Illogical"

The Respondents' Brief provides further validation of Phase IIB POA's position on application of the "pretreatment requirement." That is, the ALJ's failure to apply this regulatory requirement is not attributable to a purported regulatory conflict, but merely to the ALJ's disagreement with the terms of R.61-68(E)(4) . See Brief of Appellant, p. 21. As stated in the Respondents' Brief, application of the terms of R.61-68(E)(4) would be "illogical." Brief of the Respondents, p. 12. The treatment of R.61-68(E)(4) as "inapplicable by illogicality," is problematic for a number of reasons.

First of all, the requirement is simply not illogical. As a reminder, the requirement is stated as follows: "Any discharge *into waters of the State* must be permitted by the Department and *receive a degree of treatment and/or control* which shall produce an effluent which is

consistent with [state and federal water quality standards]." R.61-68(E)(4) (emphasis added). As stated by DHEC's Shannon Hicks: "Under our rules, there would have to be pretreatment provided for any flow, any stormwater flow, that enters waters of the State." POA Exh. 85, p. 17, lines 18-21. In arguing that this requirement dictates an illogical result, the ALJ and Respondents imagine a "degree of treatment and/or control" as an extreme measure. The Respondents in fact go so far as to say the requirement would mean that "existing stormwater ponds can't be incorporated into the stormwater management plan for a new development." Brief of Respondents, p. 13. In reality, as the Respondents themselves acknowledge, "a degree of treatment and/or control" could be as little as "the stormwater travers[ing] a series of grass swales before entering the ponds."[6] Id. at 12.

To the extent that the ALJ and the Respondents find the pretreatment requirement illogical, that conclusion seems largely based on their failure to recognize the distinction between an existing pond (with existing flora, fauna and ecosystem) and a pond to be newly excavated for purposes of stormwater retention. The existing ponds on the golf course have been in place for around 35 years and over that time have become habitat for a variety of plants and animals, whether or not that was the original purpose of the ponds. See (Tr. 1, pp. 70-72; Tr. 2, pp. 228-231). On the other hand, Deertrack Golf also plans to excavate new ponds from high ground on the old golf course. See, Brief of the Respondents, p. 10. It is entirely logical that our water quality regulations treat these ponds differently for purposes of utilization in a stormwater plan,

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[6]In other words, the stormwater flowing through a ditch. The Appellant has already accented the fact that the ALJ did not even receive testimony on what would constitute "a degree of treatment and/or control" in this context. Brief of Appellant, p. 21. The ALJ's Order does not agree with the pretreatment requirement, but he did not even receive enough testimony to determine what that requirement would be.

particularly where, as here, there is a massive redesign of the entire stormwater system. Stated in another way, it is not illogical for our water quality regulations to provide an additional layer of protection (even if relatively minor) for an existing "water of the State" that will be incorporated into a new stormwater plan. This is exactly the function of R.61-68(E)(4) in this context. Contrary to the Respondents' arguments, the fact that our stormwater regulations generally provide for the use of ponds as a means of stormwater retention does not mean that all ponds used for that purpose should be treated the same. In the stormwater context, the pretreatment requirement is not illogical, but rather acknowledges the real differences between constructing a new pond for stormwater storage and using an existing pond for stormwater storage.

The Respondents make much of the fact that the existing ponds – the waters of the State – are already being used to facilitate drainage on the golf course property. This is of course true, as Phase IIB POA relies on these ponds to carry its stormwater off the property. It is also true, though, that almost every body of water inherently serves some drainage/stormwater function. Every stream, river, pond and lake contains and conveys rain and storm water, whether that body of water is natural or manmade. Under the Respondents' argument, any of these bodies of water could then be used in a stormwater plan without application of the pretreatment requirement. On the contrary, to borrow the Respondents' language, it would be illogical to conclude that a pond is not a water of the State and not subject to the pretreatment requirement just because the pond is utilized for drainage.

At any rate, it is not for the ALJ or the Respondents to ignore a regulatory requirement because they find it illogical. The ALJ purported to resolve a regulatory conflict when he decided not to apply R.61-68(E)(4). The Appellant's Brief provides a thorough explanation of how the

ALJ misapplied the legal standards applicable in the case of conflicting regulations. Brief of Appellant, pp. 14-18. The Respondents have provided no response to this section of the Appellant's Brief, again accentuating the fact that the ALJ's failure to apply R.61-68(E)(4) had nothing to do with conflicting regulations. It is the role of the ALJ to apply the regulatory definition of "waters of the State" and the regulatory requirements of R.61-68(E)(4) as those provisions were written and enacted, not to pick and choose the regulations that should apply based on his perception of the wisdom embodied therein.

V. The Respondents' Brief Mischaracterizes the Course of This Dispute

The Respondents attempt to marginalize both Phase IIB POA's opposition to the proposed project and the outcome of that opposition. First of all, the homeowners in Phase IIB POA have repeatedly and consistently testified that their opposition is not to redevelopment of the golf course, but to a redevelopment plan that was designed without any consideration for the drainage and flooding problems in the existing neighborhood. See e.g., Tr. 1, pp. 137-140. Phase IIB POA has no allusions about preventing development of this private property, but the homeowners have been completely within their rights in demanding a development plan that doesn't sacrifice the existing homes for the new ones.

Secondly, as should be evident from the briefing in this case, Phase IIB's opposition has achieved results. In 2006, the Corps conclusively determined that the golf course property contained no federal waters. Deerfield Plantation Phase IIB POA, Inc., v. U.S. Army Corps of Engineers, et al., 801 F.Supp.2d 446, 449 (2011). Phase IIB POA thereafter challenged this determination in federal court. Id. While the Corps' determination would have been valid for five years, the Corps chose to voluntarily "reconsider" its determination four months after Phase IIB

filed this action, finding federal waters on the property. Id. The Respondents have attempted to diminish the import of this result. See Brief of the Respondents, p. 6. And, indeed, Deertrack Golf's unwillingness to acknowledge this result as a significant factual and legal development is the reason why this case now sits in such an untenable posture. Though Deertrack Golf enjoys the narrative of Phase IIB POA as obstructionist neighbors presenting meritless claims, this simply does not fit with reality.

Finally, the Respondents fault Phase IIB POA for being obstructionist, while at the same time diminishing Phase IIB for "inexplicably abandoning" its drainage and flooding concerns in this appeal. Brief of the Respondents, p. 13. The Appellant does not find it inexplicable to forego challenging the ALJ's resolution of disputed factual questions, given the substantial evidence standard. Phase IIB POA has in fact taken pains to limit this appeal to narrow legal issues and the factual framework relevant thereto. On this point, none of these distractions raised by the Respondents have any relevance to this appeal, and Phase IIB POA asks only that they be ignored.

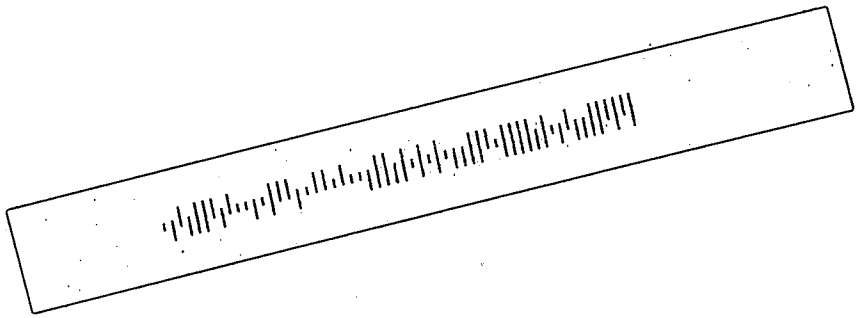
Amy E. Armstrong
Michael Corley
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

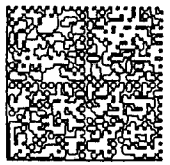
Attorneys for the Appellant, Deerfield Plantation Phase IIB Property Owners Association

Georgetown, South Carolina

February 3, 2014

S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585





Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211