

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Preservation Society of Charleston, Historic )  
Charleston Foundation, Historic )  
Ansonborough Neighborhood Association, )  
South Carolina Coastal Conservation )  
League, Charlestowne Neighborhood )  
Association, Charleston Chapter of the )  
Surfrider Foundation, and Charleston )  
Communities for Cruise Control, )  
Petitioners, )

Docket No. 13-ALJ-07-0056-CC

**ORDER DENYING PETITIONERS'  
MOTION TO VACATE**

v. )

South Carolina Department of Health and )  
Environmental Control and South Carolina )  
State Ports Authority, )  
Respondents. )

**APPEARANCES:** For the Petitioners:

Amy E. Armstrong, Esquire  
W. Jefferson Leath, Jr., Esquire  
J. Blanding Holman, IV Esquire

For the Respondents:

Randolph R. Lowell, Esquire  
Chad N. Johnston, Esquire  
Bradley D. Churdar, Esquire

**FILED**

December 20, 2013  
SC ADMIN. LAW COURT

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on the Motion to Vacate (Motion) filed on November 1, 2013. In this Motion, Petitioners moved for an Order vacating the Critical Area Permit and Coastal Zone Consistency Certification issued by the South Carolina Department of Health and Environmental Control (DHEC) to the South Carolina State Ports Authority (Ports Authority). On November 25, 2013, the Ports Authority filed a response to this motion. DHEC concurred with the analysis in the Ports Authority's response but did not agree with two of the conclusions contained therein.

**BACKGROUND**

On December 18, 2012, DHEC staff, through the Office of Ocean and Coastal Resource Management (OCRM), issued a Critical Area Permit and Coastal Zone Consistency Certification (Permit No. OCRM-12-054-B) authorizing the Ports Authority to make improvements to

Building #322, an existing waterfront building in the Union Pier Terminal (UPT), for the purpose of relocating a cruise passenger facility. The permit authorizes the installation of five pilings within the existing footprint of Building #322 to support the installation of three elevators and two escalators. The permit also authorizes other structural changes to Building #322 as well as the construction of two covered staging areas designed to handle passengers, luggage, and the loading and unloading of ship supplies.

Petitioners filed a request for contested case hearing at the ALC to challenge DHEC's decision to issue the permit. In this case, Petitioners allege that DHEC's decision violates the South Carolina Coastal Zone Management Act, S.C. Code Ann. 48-39-10, et seq., the South Carolina Code of Regulations 30-1, et seq., and the Coastal Management Program (CMP). Some of the Petitioners in this case also filed a separate action in federal court challenging the decision of the United States Army Corps of Engineers (Corps) to authorize the Ports Authority's project based on a nationwide permit. By Order dated September 18, 2013, the federal court granted Petitioners' motion for summary judgment and remanded the case to the Corps to conduct further analysis. Petitioners subsequently filed this motion, requesting this Court vacate the Critical Area Permit and Coastal Zone Consistency Certification or, in the alternative, remand this case to DHEC to review the project using a proper scope of analysis.

### **DISCUSSION**

This case involves permit applications for the Union Pier Terminal Project (Project) at both State and Federal regulatory bodies. While factually intertwined in the same project, the jurisdiction of the State and Federal permitting agencies are distinct.

#### **Federal Permitting Requirements**

Section 10 of the Rivers and Harbors Act (RHA) requires the authorization of the Corps prior to the obstruction or alteration of any navigable water of the United States. *See* 33 U.S.C.A. § 403. Specifically, Section 403 prohibits, *inter alia*, the (1) construction of any structure in or over any navigable water of the United States; (2) excavation or deposition of dredge or fill material; and (3) the accomplishment of any other work affecting the course, location, condition, or capacity of a navigable water. 33 U.S.C.A. § 403; *see also* 33 C.F.R. § 320.2(b). The instrument through which obstruction or alteration of navigable waters may be approved is a Section 10 permit from the Corps. *See* 33 C.F.R. § 320.2(b).

Congress has allowed the Corps to streamline some of its permitting responsibilities for similar categories of activities by authorizing the Corps to issue general permits that do not require applicants to undergo the individual permit review process. *See* 33 U.S.C.A. § 1344(e). These general permits are known as nationwide permits (NWP), and authorize certain activities that require Corps approval under, *inter alia*, Section 10 of the RHA. The purpose of NWPs is to “regulate with little, if any, delay or paperwork certain activities having minimal impacts.” 33 C.F.R. § 330.1(b) - 2(b).

In instances in which a Federal permit or license is sought for construction or operation of facilities that may result in a discharge into navigable waters, the applicant is required to obtain a water quality certification (401 Certification) from the State in which the proposed discharge is to take place pursuant to Section 401 of the Clean Water Act (CWA). 33 U.S.C.A. § 1341. Therefore, in order for the Corps to finally issue a Section 10 permit to the Ports Authority authorizing the Project to move forward under the RHA, the Corps must first obtain a 401 Certification from the State of South Carolina. In South Carolina, the agency that assesses and issues 401 Certifications under the CWA is DHEC.<sup>1</sup> *See* S.C. Code Ann. Regs. 61-101.A.2 (“Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department.”). In response to and in conjunction with NWPs issued by the Corps, state agencies like DHEC are permitted to review the Corps’ NWPs and issue similarly streamlined 401 Certifications that offer authorization for projects determined by the Corps to fall under the general NWPs.

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<sup>1</sup> The CWA’s requirement that a State provide a certification that a project complies with the State’s water quality standards is also subject to additional parameters; namely, the State must issue a 401 Certification within one year of the submission of the permit application. Specifically, the CWA provides:

If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

33 U.S.C.A. § 1341(a)(1). Similarly, Regulation 61-101.A.6 provides that “[t]he Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended.” This requirement imposes a consequence on the failure to “act” within the one year, as DHEC is deemed to have waived its responsibilities under the CWA and the Corps is under no obligation to incorporate into its Section 10 permit any of the terms and conditions that may have been imposed in the 401 Certification.

### State Permitting Requirements

In addition to the Federal permitting requirements, projects that occur within a “critical area”<sup>2</sup> of the coastal zone<sup>3</sup> of South Carolina require additional review and State permitting requirements. Specifically, a person proposing to implement such a project must obtain a critical area permit from OCRM prior to the utilization of the critical area. *See* S.C. Code Ann. § 48-39-130(A).<sup>4</sup> These permits are subject to the requirements of the Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (CZMA), and associated regulations that govern the management, development, and protection of the critical areas and coastal zone of the State. S.C. Code Ann. Regs. 30-1 to -21. Further, the CZMA requires DHEC to certify State and Federal permits for consistency with the Coastal Management Program (CMP), commonly referred to as a Coastal Zone Consistency Certification (CZC Certification). *See* S.C. Code Ann. § 48-39-80(B)(11).<sup>5</sup>

Thus, projects requiring a Federal permit or license and implicating DHEC’s 401 Certification requirement which *also* take place within the coastal zone require a critical area permit under the CZMA and a CZC Certification certifying the project’s compliance with the CMP. When 401 Certification is required, Regulation 30-2(H) provides that the OCRM staff should coordinate with the appropriate DHEC staff regarding water quality impacts, and that ultimately the *critical area permit serves as the 401 Certification*. S.C. Code Ann. Regs. 30-2(H) (emphasis added); *See also* S.C. Code Ann. Regs. 61-101.A.8 (“The Department will not issue a separate 401 water quality certification for an activity which requires a direct permit for

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<sup>2</sup> “Critical area” is defined as coastal waters, tidelands, beaches, and the beach/dune system. *See* S.C. Code Ann. § 48-39-10(J). “Coastal waters” are defined as “the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark.” *See* S.C. Code Ann. § 48-39-10(F). “Tidelands” are defined to include “all areas at or below mean high tide....” *See* S.C. Code Ann. § 48-39-10(G).

<sup>3</sup> The “coastal zone” is defined as all coastal waters and submerged lands seaward to the State’s jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas (i.e., Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown counties). *See* S.C. Code Ann. § 48-39-10(B).

<sup>4</sup> OCRM is charged with carrying out South Carolina’s coastal zone policies and issuing permits in the critical areas of the coastal tidelands and waters. *See* S.C. Code Ann. Regs. 30-4(C); *S.C. Coastal Conservation League v. S.C. Dep’t of Health and Env’tl. Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005).

<sup>5</sup> Although the CMP has neither been codified nor made part of a DHEC regulation, it has been applied and enforced by the Supreme Court of South Carolina. *See, e.g., Spectre, LLC v. S.C. Dep’t of Health & Env’tl. Control*, 386 S.C. 357, 370, 688 S.E.2d 844, 851 (2010) (holding the General Assembly meant the CMP policies to be enforceable in the consistency review of state and federal permits).

alteration of the critical area of the coastal zone. . . . The direct permit will serve as the 401 water quality certification for an associated Federal permit.”). Additionally, for permit applications that require both a 401 Certification and a CZC Certification—i.e., projects that are both located within the coastal zone and require a Federal permit—“the [CZC Certification] shall be issued as a component of, and concurrently with, the [401] water quality certification” in accordance with the requirements of a CZC Certification under the CMP, and “the [401] water quality certification will serve also as the [CZC Certification].” S.C. Code Ann. Regs. 61-101.A.7. In other words, the analysis by OCRM of the criteria found in the CMP is to be conducted in conjunction with and as a part of the water quality certification analysis, essentially merging the two authorizations into one license document. Thus, in coordination with other DHEC staff, OCRM issues the critical area permit, which serves as the 401 Certification, and issues the CZC Certification as a component of and concurrently with a 401 Certification.

#### Analysis of this Permit under State Law

Petitioners argue that because the Federal Order vacated the Corps’ NWP 3 authorization for the Project, DHEC’s statewide 401 Certification for NWP 3 does not exist. Petitioners next argue that the Federal Order vacating the authorization under NWP 3 removed the predicate for exempting the Ports Authority from obtaining a separate, individual 401 Certification. Finally, Petitioners argue that the Ports Authority did not seek a separate 401 Certification and the Critical Area Permit and CZC Certification issued by DHEC did not include the required 401 Certification.

There is no dispute that in January 2012, the Ports Authority submitted joint applications for federal and state permits to the Corps and DHEC, respectively, regarding the Project. Because the Project involves driving pilings in a navigable water, it implicates the Corps’ jurisdiction under Section 10 of the RHA. In April 2012, the Corps notified the Ports Authority that the Project was authorized under NWP 3, although the authorization was provisional pending receipt from DHEC of verification of the Project’s compliance with Section 401 of the CWA and the CMP. Pursuant to its certification requirements under Section 401 of the CWA, DHEC evaluated, *inter alia*, NWP 3 for its compliance with State water quality standards, and on April 23, 2012, certified activities authorized under NWP 3 as compliant with the State’s water quality standards.

Separate from the necessary Federal permits, because the Project takes place in the coastal zone and involves the alteration of a critical area, the Project also required a critical area permit and a CZC Certification certifying the Project's compliance with the CMP. As discussed, OCRM issues the critical area permit in coordination with other DHEC staff and issues the CZC Certification as a component of and concurrently with the 401 Certification. Under state law, the critical area permit serves as the 401 Certification and the 401 Certification serves as the CZC Certification.

On December 18, 2012, DHEC issued the critical area permit and CZC Certification for the Project. This was separate from the 401 Certification regarding NWP 3 as issued by DHEC in April 2012. Consequently, and notwithstanding the applicability of DHEC's 401 Certification for NWP 3, water quality issues were a part of DHEC's analysis in its critical area permit evaluation, *see* S.C. Code Ann. Regs. 30-2(H), and the critical area permit issued by DHEC for the Project also serves as the 401 Certification. Moreover, since the critical area permit is "project specific" and by law it "serves as the 401 water quality certification," it appears that the existing critical area permit document may serve as the 401 Certification as it was issued later in time and subsequent to DHEC's general certification for NWP 3.

#### Effect of the Federal District Court Order

Petitioners contend that the Federal Court vacated the Corps' determination that NWP 3 would be applicable to the Project. However, the Federal Court found that the Corps did not use the proper scope of analysis in evaluating the Project, and thus remanded the Project to the Corps for reconsideration under a broadened scope of analysis. In fact, the Federal Order distinctly held that:

*In reversing and remanding the Army Corps' authorization in this matter, the Court does not reach or in any way address the type of permit or level of review which the Corps must undertake once it evaluates the proposed project under the proper 'scope of analysis.'*

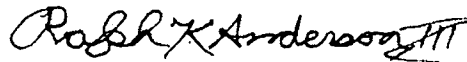
(emphasis added). Therefore, the Federal Order does not negate the critical area permit and CZC Certification at issue in this case.

Since the Project may still be eligible for general, NWP approval, it appears premature to dismiss this case upon the presumption that an analysis under NWP 3 is improper. Furthermore, the application form for the Project submitted by the Ports Authority includes a reference to "33 USC 403" and "33 USC 1341," which is the Section 10 permit required under the RHA and the

attendant 401 Certification. At this stage of the litigation, there is not sufficient evidence for this Court to determine the extent of DHEC's review or the procedures that were followed in issuing the permit. Moreover, in presenting their challenge to DHEC's determination, Petitioners can certainly dispute whether review of this matter should be based, in part, on the 401 Certification associated with NWP3 or the critical area permit and CZC Certification. The ALC can then determine based upon the facts of this case in keeping with its *de novo* review what is the appropriate scope of review for this project and whether the project complies with the standards of that review. Thus, the motion to vacate must be denied at this stage of the litigation.

**ORDER**

**IT IS HEREBY ORDERED** that the Petitioners' Motion to Vacate is **DENIED**.  
**AND IT IS SO ORDERED.**



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Ralph K. Anderson, III  
Chief Administrative Law Judge

December 20, 2013  
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

*E. Harvin Belser Fair*

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E. Harvin Belser Fair  
Judicial Law Clerk

December 20, 2013  
Columbia, South Carolina