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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

SC Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

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, Charleston Communities for Cruise Control, Appellants,
vs.

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

Community Groups' Response to South Carolina State Ports Authority's Motion to Dismiss Appeal

Appellants 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 (collectively, "Community Groups") submit this response to South Carolina State Ports Authority's ("SPA") motion to dismiss ("MTD") Community Groups' appeal of the Administrative Law Court's ("ALC") Order Denying Petitioners' Motion to Vacate, dated December 20, 2013 ("Motion to Vacate Order") and Order Denying Petitioners' Motion to Expand Discovery dated March 3, 2014 ("Discovery Order"). For the reasons discussed below, SPA's

motion to dismiss should be denied, and the Community Groups' appeal should be allowed to proceed.

At the outset, it should be understood that SPA has not moved to dismiss the Community Groups appeal of the ALC's Order dated April 11, 2014 ("Final Order"), in which the ALC granted SPA's motion for summary judgment alleging that the Community Groups lacked standing to challenge the legality of actions by the S.C. Department of Health and Environmental Control ("DHEC") authorizing a proposed new SPA cruise ship home basing in downtown Charleston. SPA appears to concede that the Final Order has been properly appealed; it seeks only partial dismissal of the appeal as relates to the ALC's rulings on discovery and the motion to vacate.

Background

1. SPA's Bid to Continue and Expand Cruise Ship Homebasing Operations in Charleston

SPA seeks to construct a new terminal in Charleston to serve as a home base for very large cruise ships that bring thousands of cars and trucks to a small, already-congested portion of downtown historic Charleston. With the advent of year-round home basing of cruise ships, starting with the Carnival Fantasy in 2010, cruise ship traffic in Charleston has grown tremendously, but SPA's existing 1973 terminal limits the prospects for growth because it is small (30,216 square feet), outdated, unattractive, and does not "comply with the Maritime Transportation Security Act of 2002 (post-9/11 requirements)." SCPA 009362 [Exhibit A].

SPA has proposed to convert an old warehouse, Building 322, into a new cruise terminal with approximately 108,000 square feet of space, SCPA 007496 [Exhibit B], or more than three times larger than Building 325. SPA views its Building 322 plan as

essential to maintaining its existing business and developing that business further. The 2,500-passenger Carnival Fantasy is the first cruise ship to conduct year-round home basing in Charleston, after Carnival determined that the region was “under-penetrated” by cruise marketing. While the vessel home-based at SPA’s existing terminal accommodates no more than 2,500 passengers, SPA’s proposed terminal has been designed to home base “one 3,500-passenger ship visiting twice a week.” SCPA 007256 [Exhibit C]. Asked whether its proposed investments would lead to increased cruise activity, SPA responded that that “you can be sure we wouldn’t pursue the business if it didn’t make economic sense.” SCPA 009754 [Exhibit D].

B. SPA’s Permit Application and Vacatur by the United States District Court

In applying for a Critical Area Permit from DHEC’s Office of Coastal and Resource Management (“OCRM”), SPA’s attorneys wrote that the project should be considered mere maintenance since “[a]ll work performed to renovate Building 322 is interior within the existing four walls and dimensions of the building.” SCPA 009650 (July 17, 2012 Letter from M. Shahid to S. Brooks) [Exhibit E]. Even a cursory review of SPA’s plans and studies shows this statement to state permitting officials to be false. Extensive renovation work is proposed for the exterior of Building 322, including a new mezzanine added to the East façade, SCPA 003640 [Exhibit F], a new mechanical support structure, SCPA 003632-3 [Exhibit G], and a new ship stores building, SCPA 003631 [Exhibit H].

SPA needs a federal Rivers and Harbors Appropriations Act (“RHA”) Section 10 authorization from the U.S. Army Corps of Engineers (“Corps”) to construct its new cruise ship terminal. SPA sought that authorization in 2012, and on April 20 of that year, the Corps office in Charleston approved SPA’s \$35 million cruise terminal project

pursuant to a general permit, the Nationwide Permit 3 for “maintenance” (“NWP 3”). Significant for present purposes, it is undisputed that SPA’s application for federal RHA authorization to conduct work in waters of South Carolina triggered the need for a Water Quality Certification (“WQC”) from DHEC pursuant to the federal Clean Water Act. See 33 U.S.C. §1341; 33 C.F.R. Pt. 330.4(c); 23A S.C. Code Ann. Regs. 61-101(A)(2). Because in April of 2012 the Corps was still in the process of obtaining a WQC for NWP 3 authorizations in South Carolina, its April 20 NWP 3 authorization for SPA was “provisional” pending that certification; once DHEC certified “activities authorized under NWP 3 as compliant with the State’s water quality standards,” SPA’s Project received certification “based on the Corps’ authorization of the Project under NWP 3.” SPA Resp. to Mot. to Vacate at 7 [Exhibit I].

Certain of the Appellants in this case went to federal court to challenge what they believed was an unlawful NWP 3 authorization for SPA’s project. After the various parties to that action, including SPA, cross moved for summary judgment on the merits, the U.S. District Court for the District of South Carolina the issued an order holding the Corps’ NWP 3 authorization for SPA’s project “unlawful and void,” and remanding the matter to the Corp to consider all activities within the scope of its analysis (i.e., the proposed terminal, not just the piling clusters). *Preservation Society of Charleston et al v. U.S. Army Corps of Engineers*, Order at 29, C/A No. 2:12-cv-02942-RMG [ECF No. 83] (emphasis added) (Motion to Vacate, Ex. 1) [Exhibit J] .

C. Motion to Vacate in the ALC, SPA's Response, and the ALC's Order

1. **The Motion to Vacate And SPA's Response**

The issue presented by the Motion to Vacate was the effect of the U.S. District Court's order setting aside the federal permit for SPA's project. SPA, as mentioned, was relying on the WQC that DHEC issued for NWP 3 for its cruise terminal. When the federal court vacated NWP 3 coverage for SPA's terminal, SPA's WQC went with it. This left SPA with having obtained a Critical Area Permit ("CAP") and Coastal Zone Consistency Certification ("CZCC") *without* a required Water Quality Certification ("WQC"). Under DHEC's regulations, however, all three authorizations are required for SPA's project, and under those regulations, the three separate approvals must be issued at the same time in a joint document. See S.C. Code Ann. Regs. 30-2.H; 61-101(A)(7)-(8).¹ The Motion to Vacate contended that the DHEC approval granted for SPA's project was thus facially incomplete and invalid, and asked the ALC to vacate the approval.

In opposition to the motion, SPA put forth a number of legal arguments said to remedy the lack of a WQC occasioned by the federal court's order. SPA contended first that the WQC that had come with the Corps' NWP 3 remained in place because its NWP 3 authorization had not, actually, been vacated. In fact, however, SPA's NWP 3 authorization was declared "unlawful and void" by a federal court granting a motion to have the NWP 3 authorization "set aside." See *Preservation Society of Charleston, supra*, Plaintiffs' Mot. For Summary Judgment at 3 (July 15, 2013) [ECF No. 58]. SPA also argued that the vacatur of its NWP 3 permit was not final because notices of appeal had been filed with the Fourth Circuit Court of Appeals. The Community Groups replied

¹ The only exception is general certifications for NWPs. S.C. Code Reg. 61-101(A)(3).

that there is no automatic stay for federal appeals and, in any event, SPA and the U.S. Department of Justice subsequently abandoned all of their appeals. SPA also argued that it still had a WQC because its project might qualify for NWP 3 one day in the future; Community Groups pointed out that this was gross speculation, and the motion was premised on SPA lacking a WQC at the present time²

SPA's second line of argument concerned state law. It argued that rather than joint issuance of three separate authorizations, DHEC's regulations instead *merge* the elements of the authorizations, so that where a project requires a Critical Area Permit, the project's federally permitted discharges need not be reviewed for consistency with the coastal zone management program or water quality standards. DHEC's regulations, however, permit a CAP document to jointly serve as a Water Quality Certification for an associated Federal permit only where the DHEC division that issues Critical Area Permits – the Office of Coastal and Resource Management (“OCRM”) – makes its decision “with coordination and input” from DHEC's Bureau of Water staff “regarding water quality impacts.” S.C. Code Ann. Regs. 30-2.H, 61-101(A)(8). Further, where a Water Quality Certification and a Coastal Zone Consistency Certification are both required, as here, the CZCC must be evaluated under coastal zone policies but issued “as a component of, and concurrently with” the WQC, which itself must be evaluated and issued pursuant to separate rules governing WQCs. S.C. Code Ann. Regs. 30-2.H, 61-101(A)(7). These regulations allow DHEC to issue *joint* permitting and certification documents that include

² Review of the federal court's order shows that the notion that SPA's project might one day qualify for a Nationwide “maintenance” permit is delusional: A \$35 million project intended to transform a defunct warehouse into a new cruise terminal that home bases vessels twice as large as those serviced now is not “maintenance.” *See, e.g.* 77 Fed. Reg. 10184 (Feb. 21, 2012) (NWP 3 maintenance does not include projects that change “uses” of permitted structures).

separate component decisions to authorize a project as being entitled to a Critical Area Permit, Water Quality Certification and Coastal Zone Consistency Certification. SPA itself understood this in attempting to rely on its NWP 3 Water Quality Certification rather than its CAP.

The Community Groups pointed out that the merger theory would render the significant distinguishing features among the separate review procedures for the respective types of review meaningless. Reflecting its federal origins, the regulations for WQC issuance require the Department to comply with specific provisions of the Clean Water Act, calling (1) for the use of “best practicable control technology,” (2) for special permits for activity that releases into a water body “toxic pollutants” specified by the statute, and (3) for conformance with the Charleston Harbor Total Maximum Daily Load (TMDL). S.C. Code Ann. Regs. § 61-101(A)(4). The WQC regulations further require the Department to “consider reasonable foreseeable similar activities of the applicant,” S.C. Code Ann. Regs. § 61-101(F)(3)(a)(4), and to go beyond mere consideration of the impacts to water quality, listed species, and aquatic ecosystems with expressed authority to deny a permit for a proposed activity based on any harm to these entities. S.C. Code Ann. Regs. § 61-101(F)(5)(a)-(b). Finally, the WQC regulations require the Department to follow different procedures prior to the issuance of a permit for public notice and informational hearings, S.C. Code Ann. Regs. § 61-101(D)(1), (E)(2) & (G)(1), and require the Department to “prepare a written assessment on the proposed activity requiring a Federal [] permit.” S.C. Code Ann. Regs. § 61-101(E)(2).

SPA’s next legal theory was that South Carolina had failed to act on SPA’s application for a WQC within one year and therefore waived its review authority over

SPA's project altogether. Although admitting that it received a WQC within one year of its January 2012 application by virtue of DHEC's April 23, 2012 certification of the SPA's NWP authorization, SPA contended that once the federal court's order rendered the WQC inapplicable, in fall of 2013, the time for DHEC to act was lost. The Community Groups pointed out that while the Clean Water Act does require action on an application for a WQC within one year, where DHEC does act – e.g., by denying or granting a WQC for a project – within the year period, and that decision is subsequently stayed or set aside in court, there is no waiver. *FPL Energy Me Hydro LLC v Dep't Env'tl. Prot.*, 926 A.2d 1197, 1203 (Me. 2007) (no waiver of certification where agency took action within one year; finding “no indication” that “Congress intended for all in-state appeals to be completed within the same one-year deadline”); *City of Klamath Falls v Env'tl Quality Comm'n*, 119 Or. App. 375, 377-378 (Or. Ct. App. 1993) (finding no waiver where agency acted within one-year period and applicant then instigated contested case challenge that extended beyond year) *aff'd on other grounds*, 870 P.2d 825 (Or. 1994).

SPA's final legal theory was that, even if DHEC had *not* issued the required WQC for SPA's project, the ALC could simply issue it by fiat. That proposition, however, bypasses legally required procedure for issuance of “*all*” DHEC permits and certifications giving rise to contested cases, including public notice, comment and hearings. S.C. Code Ann. § 44-1-60(A)(emphasis added); *see* § 44-1-60(B). Indeed, the Water Quality Certifications regulations themselves contain detailed requirements that the “Department” must follow in giving public notice of an application and its decision-making, including public notice, as well as “a reasonable period of time, normally thirty

(30) days from the date of notice within which interested persons may submit their views and information concerning the certification application to the Department.” S.C. Code Ann. Regs. § 61-101(D)(1).³ Among other things, DHEC must give notice to “the applicant”; “any agency with jurisdiction over or interest in the activity or disposal site”; “owners or residents of property adjoining the area of the proposed activity as identified in the application”; “newspapers of local and statewide interest in the area”; any “adjacent State agency of North Carolina or Georgia with jurisdiction over or interest in common waters affected by the proposed activity”; and “anyone who has specifically requested copies of public notices. *Id.* § 61-101(D)(4)(a). Moreover, the Department must give notice “by publication by the applicant of the Notice of Application in a newspaper of local or general circulation reasonably expected to cover the area affected by the activity,” with “sufficient information for the reader to understand the location, nature, and extent of the proposed activity and a contact for further information.” *Id.* § 61-101(D)(4)(b). DHEC must also “hold a public informational hearing whenever twenty (20) or more individual written requests are received during the public comment period and which raise water quality and classified use issues,” and “[s]uch hearing will be conducted by Department staff personnel.” *Id.* § 61-101(E)(2). Finally, in making its decision, “the Department” must prepare a written assessment on each proposed activity requiring a Federal license or permit. S.C. Code Ann. Regs. § 61-101(E)(2). This written assessment must address the water quality impacts of the project; make conclusions concerning compliance with water quality standards, protection of classified uses, and related water quality impacts; and must be available to the applicant and to the public

³ “Department” is explicitly defined as “the Department of Health and Environmental Control.” *Id.* § 61-101(B)(4).

upon request. *Id.* As with any DHEC decision on “any permit, license, certification or other approval, the department” is required to “take into consideration all materials comments received in response to the public notice in determining whether to issue, deny, or condition such permit, license, or other approval.” S.C. Code Ann. § 44-1-60(D).

DHEC must also follow specific requirements in issuing its WQC decision. “The Department” must “issue a notice of proposed decision on application for certification, including any proposed conditions” and notice “of availability of the staff assessment and related file information.” S.C. Code Ann. Reg. § 61-101(G)(1). The Department must mail notice to” the “applicant”; “agencies having jurisdiction or interest over the disposal site or activity site”; “owners or residents of property adjoining the area of the proposed activity”; and “those persons providing comment in response to the initial notice of application.” *Id.* Notice must also be sent by certified mail to those who have requested in writing to be notified, or electronic means if requested. S.C. Code Ann. § 44-1-60(E)(1). The Department’s “initial decision involving the issuance” of a WQC is “a staff decision,” issued as a “department decision on the administrative record” whose statutorily-specified components include the application and public comments as well as “material readily available at the department, or published materials which are generally available” if referenced in the decision.” S.C. Code Ann. § 44-1-60(D).

The procedures don’t end there. After a staff decision has issued, affected parties and others may request a Final Review Conference before the Board of Health and Environmental Control. *Id.* § 44-1-60(E-F). The Board is DHEC’s governing body, consisting of eight members appointed by the Governor upon the advice and consent of

the South Carolina Senate. *Id.* § 44-1-20. After the Board review process yields a “final agency decision,” such decision “must inform the parties of their right to request a contested case hearing before the Administrative Law Court.” *Id.* § 44-1-40 (E)(2). A “contested case hearing” may then be requested “before the Administrative Law Court, in accordance with the Administrative Procedures Act,” with due “consideration” given by the ALC “to the provisions . . . regarding the department’s specialized knowledge.” *Id.*

SPA’s argument that the ALC could consider, evaluate and decide a WQC by unilateral fiat would relegate these laws to waste bin of irrelevancy and bypass DHEC entirely, rendering the agency’s statutorily recognized “specialized knowledge,” if not its entire water quality budget, a complete nullity. It would also lead to absurd outcomes – a party appealing an ALC decision to the ALC as a contested case, etc. – that the General Assembly could not intended and due process could not sustain.

2. The ALC Order

The ALC’s Order, although brief, it plainly rejects the legal arguments put forth in the Motion to Vacate. Among other things, the ALC did not agree that vacatur by a federal court of SPA’s NWP authorization removes the NWP’s attendant Water Quality Certification coverage for SPA’s project. The ALC also disagreed with the Community Groups’ position that DHEC’s CZCC and CAP authorization for SPA’s project was fatally flawed for lacking a necessary component (the WQC) since SPA potentially get NWP 3 coverage sometime in the future. *But see* S.C. Code Ann. Regs. 61-101.A.(7) (where CZCC and WQC are both required for a project, the CZCC must be issued as a “component of, and concurrently with” the WQC). Finally, even though no party contested the Appellants’ contention that consultation had not occurred between OCRM

staff and the Bureau of Water, the ALC contended that “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 CAP. It also agreed with SPA’s legal position that the ALC itself could make the 401 Certification for SPA’s project directly – in essence, bypassing elaborate legal requirements governing consideration and issuance of WQCs – “in keeping with its *de novo review*” power. Order at 6-7.

C. Motion to Expand Discovery

The Community Groups filed their Motion to Expand Discovery in December 2013 after counsel for SPA indicated in an email that he deemed discovery to have closed some six months before, on May 20, 2013, *even though SPA had itself propounded discovery after that date*. Indeed, the parties traded draft scheduling orders after June 2013 envisioning discovery in this complex case going late into 2013, and production continued through that time. Not until SPA’s attorney coyly announced that he believed that discovery had closed did the need to seek clarification become apparent.

The Court rejected the request for clarification that discovery should continue and agreed with SPA that discovery closed on May 20, 2013 by operation of an ALC Rule 21, which is observed – as demonstrated by sworn testimony submitted by Community Groups – in the breach. In fact, on May 6, 2013, the ALC issued an Order making Prehearing Statements due on May 21, 2013, one day after discovery was later deemed to have closed. SPA’s Prehearing Statement, submitted in May, stated that it “anticipate[d] discovery may take between six to nine months to complete” and that “an expanded number of depositions are appropriate for this matter.”

On June 10, 2013, weeks beyond the supposed May 20 discovery closure date, SPA's attorney emailed counsel for the Community Groups and DHEC proposing that the attorneys "*develop a scheduling order with deadlines for discovery, dispositive motions, exchange of evidence, etc.,*" and suggesting that SPA would "*inform the Court that we are going to try and come up with a consent scheduling order* and ask that the Court let us know what week it will set the hearing for inclusion in that order." Both Petitioners and DHEC agreed to proceed in this manner. Shortly thereafter, SPA's attorney wrote to the Court, informing it that "*the parties' are working on a proposed scheduling order with deadlines on discovery, dispositive motions, exhibit exchange, and other deadlines as well as a proposed confidentiality order for discovery matters*" and stating that that proposed orders would be submitted for the Court's consideration in the near term. In none of these communications did SPA (or DHEC, for that matter) suggest that a modification or expansion under ALC Rule 21 is being requested or even needed.

The ALC nonetheless denied the Community Groups motion to allow discovery to continue. Further, in the Final Order, the ALC denied a subsequent motion for reconsideration as being moot given that the ALC was dismissing the case for lack of standing. As already mentioned, the Final Order has been appealed and SPA has not sought to dismiss it.

Argument

I. Motion to Vacate

A. The ALC's Denial of the Motion to Vacate Is A Reviewable Order

Although the Community Groups' Motion to Vacate was premised on legal arguments about DHEC's governing law, SPA contends now that motion was

substantively one for summary judgment, and the denial of that motion was an interlocutory order that can never be appealed. SPA is wrong on both counts. First, the motion was in caption and substance a motion to vacate the permit, based on a facial legal flaw. SPA presented various views of the law in response. The ALC resolved those against the Community Groups; had it ruled for them, SPA's permit would have been either vacated and the matter presumably remanded to DHEC, thus avoiding the need for a full-blown contested hearing trial.

By denying what was in essence a motion for judgment on the pleadings, the ALC entered an appealable order, and this Court has jurisdiction to consider that appeal in connection with the Community Groups' appeal of the ALC's final judgment granting summary judgment against them for lack of standing. Appeals are generally allowed only if there has been a final judgment. *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). There is no dispute that the ALC's summary judgment order was a final judgment, since it disposed of all the issues in the case. *See Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct.App.2004). Even an order that is not directly appealable may be considered if there is an appealable issue before the court. *See Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979); *Cox v. Woodmen of World Ins Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct.App.2001). And where, as here, an appealable order is indeed before the Court, courts allow appeal of interlocutory orders where doing so could avoid another appeal in the future and potentially narrow the issues for trial. E.g., *Edge v. State Farm Mut Auto Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (entertaining a discretionary appeal of a motion to dismiss in the interest

of judicial economy because a related issue in a cross-appeal was properly before the court).

Here, judicial economy would undoubtedly be served by resolving the legality of the ALC's order denying the Motion to Vacate. Assuming this Court reverses the ALC's erroneous standing order, reversal of the order on vacatur would save the parties and the courts significant resources by removing the need for a contested case in the immediate future; should DHEC subsequently reissue the CAP and CZCC along the unlawful lines it did before and issue those decisions *with* the required WQC, all of those decisions could be addressed in a single proceeding. On the other hand, if on remand DHEC issues more lawful decisions, the need for a contested case could be avoided altogether. The most wasteful outcome would be to dismiss the vacatur issue, reverse the standing order, and then have subsequent appeals concerning failure to issue a WQC for the project, which could result in eventual vacatur and further appeals after that. *Cf. Morris v. Anderson County*, 349 S.C. 607, 610–11, 564 S.E.2d 649, 651 (2002) (holding that the appellate court may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation, but declining to address particular appeal based on concerns of issuing impermissible advisory ruling).

Courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable. *Brown v. Cnty. of Berkeley*, 366 S.C. 354 n.4, 362, 622 S.E.2d 533, 538 (2005) (*citing Pitts v Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 512 (Ct.App.2002) (*citing Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002))). That is the situation here. The ALC's Final Order hinges in part on the

view that the procedures for lawfully reviewing SPA's proposed cruise terminal would not redress the Community Groups' claimed injuries. While the Community Groups have presented evidence to contrary, Dodd Affid., [Exhibit K], resolution of that issue could well be influenced by the clarification of the proper scope of review and procedure available should DHEC's current authorization be set aside. As explained above, DHEC's regulations regarding public notice and comment and the scope of review for Water Certification evaluations are expansive – but were not but were not followed in this case. Clarifying whether they need or need not be followed would inform the summary judgment element of redressability, since the availability of expansive review and strict evaluation procedures – including the duty to minimize impacts on local inhabitants and the environment – would make it more likely that following those procedures would yield an outcome that reduces needless damage to the Community Groups and their members.

Even if the Motion to Vacate were recharacterized as a motion for summary judgment, SPA's claim that denial of those motions is never appealable is wrong. The denial of a motion for summary judgment is not generally appealable, *see Ballenger v Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994), but South Carolina appellate courts have recognized an exception for the reasons discussed above, where the order is companion to a properly appealed order. *See Pitts v Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 511–12 (Ct.App.2002) (entertaining an appeal from a denial of summary judgment because it was so closely connected with other issues properly before the court). For the reasons explained above, the ALC's order on the Motion to Vacate, even if somehow deemed denial of a motion for summary judgment, should be considered with

appeal of the ALC's summary judgment to inform resolution of the latter and to avoid unnecessary litigation on remand.

B. The Motion to Vacate is Not Moot

SPA's contends that appeal of the Motion to Vacate on the theory that, if no Section 401 Water Quality Certification exists for its project now, South Carolina has waived its certification authority because more than one year has passed since the permit application was filed. *See* SPA Mot. at 9 n.8. SPA's theory was rejected by the ALC and should be rejected here. Under 33 U.S.C. § 1341, where a state acts – *e.g.*, by issuing or denying a 401 Certification – within the one year period, subsequent activity on judicial review does not result in waiver. *See* Order on Enforcement of Automatic Stay at 10 n.11, *Savannah Riverkeeper et al v S.C. DHEC*, ALC No. 11-ALJ-07-0618-CC (May 31, 2012) [Exhibit L] (citing and quoting *FPL Energy Me Hydro LLC v Dep't Env'tl Prot.*, 926 A.2d 1197, 1203 (Me. 2007) (holding no waiver of certification requirements occurred where agency took action within one year, and finding “no indication” that “Congress intended for all in-state appeals to be completed within the same one-year deadline”)); *City of Klamath Falls v Env'tl Quality Comm'n*, 119 Or. App. 375, 377-378 (Or. Ct. App. 1993) (finding no waiver where agency acted within one-year period and applicant then instigated contested case challenge that extended beyond year), *aff'd on other grounds*, 870 P.2d 825 (Or. 1994). SPA admits that DHEC acted on SPA's application by issuing a 401 Certification for activities covered under Nationwide Permit

3 within one year of the application, *see* SPA Mot. 9 n.8. Thus, the waiver provision does not apply in this case.⁴

II. The ALC's Discovery Order is Appealable

SPA argues that the Discovery Order cannot be challenged because 1) it was vacated by the Final Order, and 2) it is moot. Again, SPA is wrong on both counts. The Final Order has been properly appealed and SPA has not sought to dismiss it. Thus, the order “vacating” the order refusing to allow discovery to continue is directly on appeal. Further, the ALC's order denying reconsideration of the motion to extend discovery as moot is a part of the Final Order, and that, too, is thus directly on appeal. Whether or not the Final Order was correct in finding the motion moot will be determined on the merits. If it is not moot (e.g., if the Final Order's standing ruling is reversed), then its merits should be resolved to guide the mode and manner of proceedings on remand and avoid needless litigation and appeals about the proper scope of discovery in that event. *See Hamm v S Carolina Pub Serv Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) (once court issues final order on the merits, the discovery order becomes appealable).⁵

SPA's contention that the Community Groups have disavowed their right to ongoing discovery for the purposes of summary judgment is overstatement. The

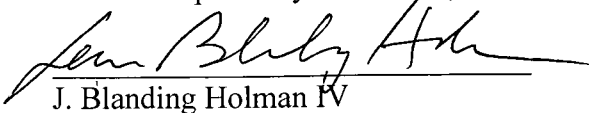
⁴ Were it otherwise, parties could unilaterally force waiver by appealing – and staying – a WQC denial while the statutory period runs. Even more absurdly, if a court were to declare a WQC invalid after the statutory period had run, its order to that effect would (under SPA's theory) render itself moot because it would directly effectuate waiver.

⁵ The decision cited by SPA are easily distinguished. In *Leviner v. Sonoco Products*, 339 S.C. 492, 530 S.E.2d 127 (2000), because the Circuit Court issued an order 30 days after it issued a Form Order remanding the case back to the workers compensation commissioner, the order was a nullity because the “trial judge no longer had jurisdiction over the matter.” *Id* at 494, 128. Similarly, in *Brennan's, Inc v Colbert*, 125 So.3d 537 (La. Ct. App. 2013), the court determined that the order on appeal was null because it was issued after a final decision and the court no longer had jurisdiction.

exchange quoted merely reflects that ongoing discovery was not required for proper resolution of a motion for summary judgment on standing, since the Community Groups had produced more than enough information to create material issues of fact on that question and thus summary judgment should have been denied. Appellants presented evidence from SPA's own documents on the issues of causal connection and redressability in addition to multiple sworn affidavits, and to the extent that there are any material facts in dispute that relate to standing then summary judgment is not appropriate. *Gadson v. Hembree*, 364 S.C. 316, 613 S.E.2d 533 (2005).

However, the ALC in this case adopted an entirely improper and unprecedented standard of review for reviewing standing on summary judgment, in essence requiring the Community Groups to *prove*, by the greater weight of evidence, that they met novel standing requirements fabricated by the ALC whole cloth. That is not the *proper* standard, and it is not the law. If it were, then ongoing discovery would indeed be useful and necessary, since the ALC relied exclusively on self-serving affidavits from SPA officials whom the Community Groups were not allowed to depose. In summary, although discovery is not required for proper resolution of SPA's summary judgment motion, it would be necessary to the extent summary judgment is being resolved pursuant to a new standard whereby a non-moving party must *do more* than demonstrate the existence of a of a material issue of fact.

Respectfully Submitted,



J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
Telephone: (843) 720-5270
Fax: (843) 720-5240

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Michael G. Corley
Jessie A. White
South Carolina Environmental Law Project
Mailing Address: Post Office Box 1380
Pawleys Island, SC
29585
Physical Address: 430 Highmarket Street
Georgetown, SC 29440
Telephone: (843) 527-0078
Fax: (843) 527-0540

Attorneys for the Appellants

Charleston, SC

July 14, 2014

Exhibit A

Union Pier Plan Community Outreach **FREQUENTLY ASKED QUESTIONS**

What is the area of focus for the Union Pier Cruise Terminal Plan?

It includes the current Passenger Terminal as well as the areas where cruise ship passengers presently park their cars, board and debark cruise ships.

Who is responsible for creating the Union Pier Cruise Terminal Plan?

The SCSPA has the prime responsibility in this process. However, the SCSPA is working very closely with the City of Charleston throughout the process. The team of professional planners that was selected to develop the plan itself is led by Cooper, Robertson & Partners, one of the nation's leading planning and design firms with extensive experience in Charleston and with prominent waterfronts throughout the world. Public input is also encouraged throughout the process.

What's the timeline for the project?

By February we hope to present some options that are responsive to the input we've received. The completed plan would then be brought before the City of Charleston Planning Commission, with the goal to have the plan adopted by Charleston City Council. The SCSPA would then seek appropriate development partners. All of this could take a few years. There will be the opportunity for public involvement at every step throughout the process.

What is the financial plan for the cruise facility and the surrounding area?

We must create a financially viable plan. This means a plan that not only makes sense economically, but is also realistic and responsive to market conditions, preserves Charleston's character, and provides the Port with a reasonable return on its investment. This plan is currently being developed.

Didn't the SCSPA commission a Master Plan for this property several years ago?

A Master Plan for the property was developed and approved in 1996. Not only have many physical and market conditions changed since then, but also the facility must be updated to comply with the Maritime Transportation Security Act of 2002 (post-9/11 requirements). Accordingly, the SCSPA requested proposals from a number of leading planning firms during the summer of 2009 and selected Cooper, Robertson & Partners in early September.

Why doesn't the plan address more of the SCSPA's Union Pier property?

Exhibit B

CONCEPTUAL SITE PLAN

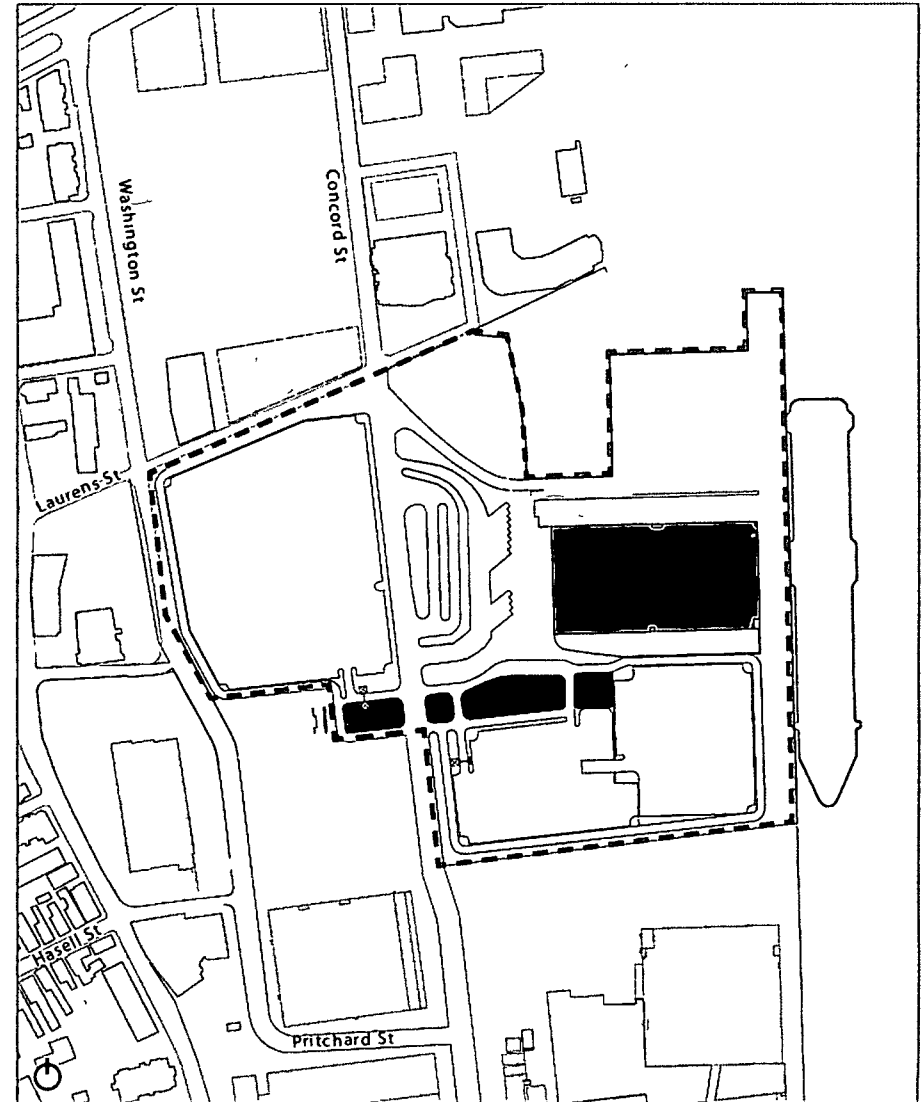
UNION PIER - CONCEPTUAL SITE PLAN

The Cruise Terminal District is an area zoned to address the operations of cruise embarkation and disembarkation and port of call operations

- Cruise passenger terminal,
- At-grade parking for the anticipated passenger size vessel,
- Separate areas for drop-off and pick-up by buses, taxis, and private owned vehicles,
- Roads and drives to allow service trucks to reach the dock apron,
- Parking for cruise line employees, government agencies, and security personnel,
- Elevated deck for servicing the cruise vessel and to operate as a dock apron

BUILDING 322 - CRUISE TERMINAL

Building 322 is presently a warehouse used to store household goods in transit located within the South Carolina State Ports Authority's Union Pier, at its north end. The footprint of Building 322 is a 240' x 450', or approximately 108,000 SF, in a single story building with a small suite of offices located on the second floor, southeast corner of the building. Construction of the warehouse is elevated cast-in-place concrete deck over piles above the Cooper River. The load bearing capacity design for the deck is 600 LB / SF, as evidenced by the painted markings in the interior of the structure. The building's exterior, from 8' above the finished floor up is steel framing with painted galvanized stamped steel cladding for both vertical and roof surfaces. Skylights are evenly spaced throughout the roof and bring limited natural light to the interior. From the finished floor to 8' of height, walls are cast-in-place concrete. There is a row of columns through the middle of the building in the east-west axis, all other structural supports are at the perimeter, on top of the 8' high concrete wall. On the north and south sides of the building railroad spurs allow railroad cars to serve under the building's roof. A loading dock extends into the railroad area at the same elevation as the interior of the building. Railroad lines are set up lower than the finished floor so cars can transfer goods to the building at the same height as the building's interior by matching the railroad car's floor to the building's finished floor.



Concept plan

CRUISE DISTRICT

Exhibit C

2. KICK-OFF MEETING SUMMARY

During the first week of September, selected team members went to Charleston to conduct a preliminary site investigation, attend a public meeting regarding the Union Pier Concept Plan, and to confirm the Scope of Work for the development of the cruise terminal at Building B322. At various meetings of varying participation and during numerous discussions, the following was recorded.

A Concept Plan was prepared by New York Architecture firm Cooper Robertson, with traffic and wharf-structural studies prepared by Kimley Horn and Moffatt & Nichol, respectively. SCSA has hired FMT to design and construct a passenger ship-to-shore gangway for the existing cruise terminal (B325.) The intent is to relocate the gangway to the new terminal (B322) once construction is complete.

Ports Executive Director Jim Newsome made a presentation of the Concept Plan at a public meeting, which was attended by approximately 250 people, providing facts and benefits of the project. The annual financial impact to Charleston is anticipated to be between \$37 and \$50 million, with one 3500-passenger ship visiting twice a week and current bookings through 2012. One direct result will be 250 jobs. Strict environmental standards are being followed, and the additional challenges of traffic and appropriate scale for the city are also being considered. A Cruise Neighbors Advisory Council has been formed. The benefits include the removal of cargo operations from Union Pier, overall reduction of traffic, better traffic management, end of Washington Street closures, and no trains. Furthermore, this will project will unlock the southern pier to development, increase public access, enable shoreline restoration, and allow for the reopening of Customs House wharf and the creation of Bennett Rice Mill Façade Park. The desired project schedule is 30 months, with 9 months for design, 3 for bidding, and 18 months for construction.

Logistics of existing Port operations at B325 were discussed. Typically, waste is put in three dumpsters, with the ship making arrangements. Historically, ships stores truck count varies from zero to 27. For each trip, 1500 metric tons of water are loaded – currently fire hydrants and a fire pump are utilized for this. Bunker fuel is barged up to the seaward side of the ship. Carnival has requested “bilge water tanks” be provided by the Port Authority. Current operations in building B322 include break-bulk cargo and BMW vehicle export. It is understood that the cargo activities will cease when the BMW operation is relocated. Maintenance activities are carried out by the Authority’s employee maintenance crews, although they will consider contracting maintenance in the future. The Authority wants to encourage Ports of Call. Depth is maintained at 35 feet, but is authorized to 42 feet.

Assumptions and directives were reviewed. Limit of this study is the terminal boundary, nothing outside of the boundary except for utility issues. All Concept Plan ideas for elements outside the terminal boundary are assumed to be viable (traffic). The cruise terminal will not interact with any other elements of the Concept Plan.

The architectural theme will be similar to the Charleston Visitor Center, with consideration of the local vernacular seen in such structures as the Rice Mill Façade. Principles of

Exhibit D

South Carolina has statutorily placed the state's maritime commerce responsibilities in the hands of the Ports Authority. There's not a serious port around that artificially limits the amount of business it will do. That's similar to saying, "we like 400 jobs, but not 401." At the same time, we understand the context of the city. That's exactly why we are designing our cruise terminal with that in mind – it's a one-berth one-ship terminal. And we have committed -- in writing -- to the size and scale of the operation.

What would lead to increased cruise activity?

We don't see any significant changes in the level of cruise activity. In 2011, we have 68 origination cruises and 21 port-of-calls. We think a nice compliment to the current operation would be a seasonal schedule of origination cruises to Bermuda or perhaps the western Caribbean. Our commitment is to 104 ships a year, or about two a week on average. If there were a change, we have committed to engage the public as we have for two years now.

Is the cruise ship component of the Port of Charleston a good bet given the ongoing uncertainty in our economy?

Cruising has fared pretty well in the down economy – in 2010, the number of passenger nights rose 9%, according to USDOT, after a slight decline in 2009. Given our region's population growth and Charleston's appeal, we believe it is a solid and attractive business proposition for our port, our state and the city. Plus, these are our neighbors taking the embarkation cruises – nearly a third are from right here in South Carolina. Also, it helps introduce people to our city – about 40% have never visited Charleston before, but 97% of them say they'll come back.

Given the level of investment the Ports Authority plans to make in a cruise ship terminal, is it reasonable to expect that increased cruise activity must be sought to cover the investment?

Even under a lower level of activity than we currently enjoy, the terminal will pay for itself. This is a 100% responsibility of the SCSPA, so it is – and must be – financially justifiable. Sensitive commercial details are obviously protected from disclosure under law, but you can be sure we wouldn't pursue the business if it didn't make economic sense.

What is the difference between cruise ship "port of calls" and "embarkation" ports?

Port-of-calls are ships that began their cruise somewhere else and the guests just visit for the day then get back on the ship. Embarkation ships, or origination ships, start and end their cruises here. We have a mix of both port-of-calls and embarkations. We have 68 origination cruises this year and 21 port-of-calls by 15 different ships owned by 11 different companies. In contrast, Key West is only port-of-calls. And because they're near the big cruise ports in south Florida, it's easy for ships to just pop in. They get up to three a day, host 350 ship calls a year and 850,000 passengers. That's not Charleston. Any suggestion that Charleston could ever become that is just false. There just aren't that many cruise ships sailing up and down the East Coast. We are naturally limited both by geography and demographics.

Why is the northern end of Union Pier the only workable scenario for the Ports Authority to accommodate cruise ships?

Columbus Street is not an option. That terminal is essential to cargo operations and we are completing a \$20-million expansion there for that very purpose. Cruise would eliminate rail access on the dock for heavy lift moves and would be impossible from an operational standpoint of mixing cargo and passenger activities. Even if the cruise terminal could be moved to Columbus Street, that means Union Pier would continue to be used for cargo operations -- it would be necessary for core port operations. Plus, any new terminal location – like Patriots Point – would require new construction and environmental impacts that would have to be considered. From a sustainability perspective, reusing the existing building and pier is a great solution.

The only options are (1) we shift the cruise terminal north on Union Pier and enjoy all the great benefits associated with that, or (2) we keep cruise where it is and re-build cargo operations on Union Pier. Do you want a mile of chain link fence, barbed wire and warehouses? Or do you want a cruise terminal that we can be proud of and an amazing opportunity to open 35 acres to the water? We think the latter is a much more attractive alternative for the city, the state and the port.

The cruise industry is expanding at the national and global scale (Cruise Lines International Association

Exhibit E

Traffic	There will be no increase in traffic from what currently exists. There will be a better traffic management plan than what currently exists. "There will be a simple, one-step cruise handling process obviating the need for shuttle buses and road closures." <i>Newsome letter para 3, 4, 5 p. 1-2.</i>
Modifications to Building 322	Detailed plans and an updated project description for modifications to Building 322 are in-preparation and will be provided to you upon completion. All work performed to renovate Building 322 is interior within the existing four walls and dimensions of the building. "The northern end of Union Pier offers an opportunity to retrofit an existing cargo warehouse and is the most economically efficient and environmentally sustainable solution for a new cruise terminal. . ." <i>Newsome letter para 5 p.2 (emphasis added)</i>
Covered Staging Area	SPA staff is preparing plans reflecting the sheltered staging area for loading/unloading ship supplies.
Shore Power	It is well known that the Carnival ship that will call at the new terminal with the most frequency is the <i>Fantasy</i> , which is not equipped to connect with shore power. OCRM should be cognizant that the "shore power" discussion is nothing more than a thinly veiled attempt by the project opponents to discourage Carnival cruise lines from home-porting the <i>Fantasy</i> in Charleston. But more importantly shore power is prohibitively expensive infrastructure. "Shore power is extremely costly, and where it has been employed it has been subsidized by utilities and government grants so that it is cost-neutral to cruise line customers." <i>See Newsome letter shore power discussion para 12, 13, 14, 15 p. 3-4.</i> What OCRM should acknowledge is that significant measures are being taken to reduce air emissions based on the mandated reductions in NOX, SOX, and PM 2.5. <i>Newsome letter para 13 p. 3</i>
Air Quality Standards	You have requested that SPA demonstrate that cruise ships are compliant with Air Quality standards. SPA has multiple statutory authorizations, obligations, and responsibilities, but monitoring and regulating air quality is not an SPA responsibility. However, DHEC's Bureau of Air Quality does have the responsibility of monitoring air quality and has collected ambient air quality data at or near other SPA facilities in Charleston County. SPA assumes that data is available to OCRM. As Mr

Exhibit F

3. Discharge of ballast water from vessels employing ballast water treatment systems using chlorine must meet a maximum total residual oxidants limit, measured as total residual chlorine, of 0.038 mg/L. (Minn. R. 7050.0220).
4. Each condition in the proposed permit cannot be made less stringent without potentially violating the requirements of Minnesota State law, including water quality standards.
5. If the MPCA determines that vessel discharges covered by this Certification can no longer comply with Section 401 of the Clean Water Act or Minnesota laws and regulations, then this Certification may be revoked or modified. (Minn. R. 7001.1450, Minn. R. ch. 7050, 7052, and 7053).

6.18 Missouri:

Missouri certified the VGP with the following additional permit conditions:

1. The National Pollutant Discharge Elimination System (NPDES) permit is written such that limitations do not cause the general or numeric criteria to be exceeded nor impair beneficial uses established in the Water Quality Standards, 10 CSR 20-7.031.
2. Representatives from the department shall be allowed to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the letters and conditions of the permit.
3. This Water Quality Certification shall not be construed or interpreted to imply the requirements for other permits are replaced or superceded. Any NPDES Permits, Land Disturbance General Permits, or other requirements shall be complied with.

6.19 Nebraska:

Nebraska certified the VGP with the following permit conditions:

Chapter 6, § 004 of Title 117 – Nebraska’s Surface Water Quality Standards, states that:

“No discharge of wastewater from domestic, municipal, or industrial sources shall be allowed directly into lakes or impounded waters except:

“004.01 Wastewater from sources authorized by NPDES permits to discharge to these waters prior to May 10, 1982 which have operated under active NPDES permits since then.

“004.02 Noncontact cooling waters from sources authorized by NPDES permits to discharge to these waters.

“004.03 Stormwater from sources authorized by NPDES permits to discharge to these waters.”

This precludes allowing discharges into lakes and reservoirs of greywater, bilge water, or any sewage commingled with any other discharge as described in the permits and in Federal Register Vol. 73, No. 117, pp 34296 through 34304. Vessels on these waters will need to discharge to these wastewaters into sanitary dump stations that do not result in discharge to

Exhibit G

10. The issuance of this certification pursuant to Section 401 of the Clean Water Act does not release any dischargers from responsibilities or liabilities for past or future violations of federal, state, or local laws or regulations, nor does it release any potential dischargers from the responsibility of obtaining permits, including any from the IEPA, or other approvals from other units of government as may be required by law.

6.11 Indiana:

Indiana certified the VGP with the following additional permit conditions:

The following conditions shall apply to any activity that qualifies under this general permit.

1. Permittee shall allow the commissioner or an authorized representative of the commissioner (including an authorized contractor), upon the presentation of credentials:
 - a. to enter and inspect covered vessels;
 - b. to have access to and copy at reasonable times any records that must be kept under the conditions of this certifications;
 - c. to inspect, at reasonable times, any monitoring or operational equipment or method; collections, treatment, pollution management or discharge facility or device; practices required by this certification; and
 - d. to sample or monitor any discharge of pollutants from covered vessels.
2. This granting of WQC does not relieve permittee from the responsibility of obtaining any other permits or authorizations that may be required for the project or related activities from the IDEM or any other agency or person.
3. This certification does not:
 - a. Authorize impacts or activities outside the scope of this certification;
 - b. Authorize any injury to permittees or private property or invasion of other private rights, or any infringement of federal, state, or local laws or regulations;
 - c. Convey any property rights of any sort, or any exclusive privileges; or
 - d. Preempt any duty to obtain federal, state or local permits or authorizations required by law.
4. The IDEM, for any vessel that qualifies under the terms and conditions of this certifications, may choose to require an individual WQC if it determines that the vessel would have more than minimal impacts to water quality, either viewed individually or collectively with other activities that may affect the same waterbody
5. Activities authorized by the general permit shall not violate or exceed Indiana's Water Quality Standards at 327 IAC 2.
6. Discharges of ballast water to the Indiana portion of Lake Michigan must meet the International Maritime Organization certified treatment standard according to the following schedule:
 - a. For ocean-going vessels constructed prior to January 1, 2012, and meeting the applicability criteria in the federal NPDES permit, treatment shall be installed and operational to meet the performance standards for organisms included in Table 1 by January 1, 2016.
 - b. For ocean-going vessels constructed after January 1, 2012, and meeting the applicability criteria in the federal NPDES permit, treatment shall be installed and

operational to meet the performance standards for organisms included in Table 1 prior to commencement of vessel operation in Indiana State waters.

Analysis required by Table 1 shall be performed consistent with the protocols currently being validated by the EPA Environmental Technology Verification Program (EPA/U.S. Coast Guard/Naval Research Laboratory) and/or the following Great Ships Initiative protocols: The Procedure for Algae/Small Protozoan Sample Analysis, the Procedure for Zooplankton Sample Analysis, the Procedure for the Detection and Enumeration of E. coli by Membrane Filtration available online at <http://www.nemw.org/GSI/protocols.htm>

- c. If the federal government adopts treatment standards more stringent than IMO, then those standards shall replace those in Table 1 for new treatment systems installed after the date those federal standards go into effect.

Table 1. Biological performance standards for ballast water treatment technology

Parameter	Limit	Limit Type	Sample Type
Organisms > 50um in minimum dimension	<10 viable ² /m ³	Daily Average	Composite ³
Organisms 10-50 um in minimum dimension	<10 viable/ml	Daily Average	Composite
Escherichia coliform	<250 cfu/100ml	Daily Average	Composite
Intestinal enterococci	<100 cfu/100 ml	Daily Average	Composite

7. Any ocean-going vessel discharging ballast water employing ballast water treatment systems using chlorine, shall not exceed a maximum total residual chlorine limit of .02 mg/l. The usage of other biocides shall not be discharged in concentrations considered to be toxic or harmful to aquatic life or in concentrations that would violate applicable water quality standards.

6.12 Iowa:

Iowa certified the VGP with the following additional permit conditions:

Conditions:

1. Permittee is responsible for securing and for compliance with such other permits or approvals as may be required by the IDNR, federal, state, or local governmental agencies for the project activities described.

² "Viable organism" means organisms that are living and able to reproduce.

³ "Composite" sample type is a combination of individual grab samples taken at periodic intervals over the specified time period. Either samples taken at equal time intervals shall be combined using a volume of each sample that is proportional to the flow that sample represents, or equal volume samples shall be combined that are taken at intervals of equal flow volumes.

Exhibit H

health, or to animal, plant or aquatic life, pursuant to 35 Ill Adm. Code 302.210, 302.410, and 302.540.

6. No bilge or ballast water from vessels covered by the Vessel General Permit which fails to meet the effluent standards of Part 304 shall be discharged to waters of the State pursuant to 35 Ill. Adm. Code 308.103.
7. Except as provided in Condition No. 8, discharges of ballast water from vessels covered by the Vessel General Permit to the Illinois portion of Lake Michigan must meet the International Maritime Organization certified treatment standard according to the following schedule:
 - a. For vessels constructed prior to January 1, 2012, meeting the applicability criteria in the federal NPDES permit, treatment shall be installed and operational to meet the performance standards for organisms included in Table A by January 1, 2016.
 - b. For vessels constructed after January 1, 2012, meeting the applicability criteria in the federal NPDES permit, treatment shall be installed and operational to meet the performance standards for organisms included in Table A prior to commencement of vessel operation.

Table A. Biological Performance Standards for Ballast Water Treatment Technology

Parameter	Limit	Limit Type	Sample Type
Organisms > 50um in minimum dimension	<10 viable/m ³	Daily Average	Composite
Organisms 10-50 um in minimum dimension	<10 viable/ml	Daily Average	Composite
Escherichia coliform	<250 cfu/100ml	Daily Average	Composite
Intestinal enterococci	<100 cfu/100 ml	Daily Average	Composite

Analysis required by the above table shall be performed consistent with current protocols.

8. If ballast water treatment technologies, standards or limitations are adopted or approved by the USEPA, the U.S. Coast Guard, or other duly authorized Federal Agency and incorporated into the Vessel General Permit, the Agency will review the new or modified Vessel General Permit to ensure compliance with applicable Illinois laws and regulations. Based on that review, the Agency will waive, modify the existing certification or issue a new certification pursuant to Section 401 of the Clean Water Act.
9. If the IEPA determines that vessel discharges covered by the Vessel General Permit cannot comply with the conditions of this certification or the Illinois Water Quality Standards, then this certification may be amended to include different limitations, conditions, or requirements which are consistent with applicable laws, regulations, or judicial orders. The Agency will public notice any proposed amendments to the certification.

Exhibit I

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

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

**MEMORANDUM IN OPPOSITION TO
CRUISE OPPONENTS' MOTION TO VACATE**

In the latest frivolous effort to delay adjudication of this case, and avoid the airing of facts that expose the baseless nature of the campaign against cruise operations in Charleston, Cruise Opponents ask this Court for a second time to remand this matter. In their Motion to Vacate (Motion), the Cruise Opponents demonstrate a misunderstanding of the applicable regulatory scheme and mischaracterize the order from a Federal District Court in a related federal case—an order that has been appealed and is pending before the Fourth Circuit. The Motion should be summarily denied.

The relevant facts and background are well known to the Court, and the Ports Authority adopts and incorporates by reference the background and facts as previously set forth in its Motion to Dismiss for Lack of Standing and Motion for Sanctions, both filed on July 1, 2013.

and 20, 2012, respectively; 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. Accordingly, based on the Corps' authorization of the Project under NWP 3, the Project also received the requisite 401 Certification from DHEC. Thereafter, on December 18, 2012, DHEC issued the required critical area permit and CZCD for the Project. 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 supplementary 401 Certification. Therefore, all of the requisite licenses were issued by DHEC for the Project.

B. The analysis under the critical area, coastal zone consistency, and water quality certification regimes are nearly identical.

While arguing that some analysis must occur at the same time, Cruise Opponents also argue that DHEC's evaluation of a project's compliance with state water quality standards under Section 401 of the CWA is wholly distinct and separate from its consideration of a critical area permit and CZCD under the CZMA. Motion at 7-8 ("Water Quality Certification review is distinct from the Critical Area Permit...."). Without providing the proper context, Cruise Opponents argue that DHEC's consideration of issues relevant to a 401 Certification is unique and should be conducted separate and apart from its evaluation of a critical area permit application. *See id.* ("The provisions contained in R.61-101 governing evaluation and issuance of

Exhibit J

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

RECEIVED
2012 SEP 18 P 3:19

Preservation Society of Charleston and)
South Carolina Coastal Conservation)
League,)
)
Plaintiffs,)
)
vs.)
)
United States Army Corps of Engineers,)
et al.,)
)
Defendants,)
)
and)
)
South Carolina State Ports Authority,)
)
Intervenor-Defendant.)
)
_____)

Civil Action No. 2:12-2942-RMG

ORDER

Plaintiffs Preservation Society of Charleston (“Preservation Society”) and South Carolina Coastal Conservation League (“Coastal Conservation”) have challenged the action of the Defendant Army Corps of Engineers (“Army Corps”) in authorizing an undertaking of the Intervenor-Defendant South Carolina Ports Authority (“Ports Authority”) to convert a previously permitted transit shed situated on the Union Pier over the navigable waters of the United States into a modern state-of-the-art \$35-million cruise ship passenger terminal. The Army Corps, in authorizing this undertaking, determined that it was unnecessary for the Ports Authority to first comply with the formal assessment and consultative requirements of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, and the National Historic Preservation Act (“NHPA”),

16 U.S.C. § 470f, because the Army Corps found that “the proposed activity will result in minimal individual and cumulative adverse environmental effects,” the undertaking qualified for treatment under Department of Army Nationwide Permit # 3 (“NWP # 3”) as “maintenance,” and the project was the type of activity that had “no potential to cause effects” on historic properties. Administrative Record [hereinafter AR] at 112-14, 119-30. The Army Corps determined the scope of its review would be limited to the footprints of five clusters of concrete pilings that under the proposal would come into direct physical contact with the navigable waters of the United States. AR 112, 120. Plaintiffs challenge these findings and determinations by the Army Corps, arguing that the proposed cruise ship passenger terminal was unlawfully authorized under the controlling statutory and regulatory provisions of NEPA and NHPA and the findings of minimal environmental and historic properties impact were arbitrary and capricious.

Legal Standards

Judicial review of agency action under NEPA and NHPA is conducted pursuant to the Administrative Procedures Act (“APA”) which requires a reviewing court to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004); *Friends of Back Bay v. U.S. Army Corps of Eng’rs*, 681 F.3d 581, 586-87 (4th Cir. 2012); *N.C. Wildlife Fed’n v. N.C. Dep’t of Transp.*, 677 F.3d 596, 601 (4th Cir. 2012). Further, “[i]nsofar as the agency’s decision may be deemed unreasonable as a matter of law, it is likely to have been arbitrary and capricious.” *Friends of Back Bay*, 681 F.3d at 587. An agency’s construction of a statute or regulation which it is charged with administering is generally entitled to deference by the courts and should be overturned only if “plainly erroneous or inconsistent

with the regulation.” *Fed. Mar. Comm’n v Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 193 (4th Cir. 2009) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). While the standard of judicial review is a “narrow one” and “highly deferential,” the inquiry must be “searching and careful,” *Marsh v. Or. Natural Res.*, 490 U.S. 360, 378 (1989), and the courts have no obligation “to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute,” *Seatrain Lines*, 411 U.S. at 746. Ultimately, “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1983).¹

Federal jurisdiction arises under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, which prohibits the erection of any structure in or over the navigable waters of the United States without the authorization of the Army Corps through the issuance of a permit. This includes a prohibition of the construction of any “wharf, pier, . . . or other structures” which are “in or over any navigable water of the United States” without authorization from the Army Corps. *Id.*; 33 C.F.R. § 320.2(b); 33 C.F.R. Pt. 325, App. B, para. 7b(2). The “navigable waters,” and thus the Army Corps’ jurisdiction, includes all waters riverward of the

¹ The Army Corps correctly notes that the Federal Rule of Civil Procedure Rule 56 standard for summary judgment (the movant must show that “there is no genuine dispute as to any material fact” and is entitled to judgment as a matter of law) is not applicable in a motion for summary judgment under the APA. (Dkt. No. 60 at 18-19). Since the court in an APA review does not resolve factual questions, the proper standard to dispose of a motion for summary judgment under the APA is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 879 (S.D. W.Va. 2009).

Ordinary High Water Line (“OHWL”). *Vieux Carre Prop. Owners, Residents & Assocs., Inc v. Brown (Vieux Carre I)*, 875 F.2d 453, 456 (5th Cir. 1989) (holding a park erected on a wharf over the navigable waters “completely riverward of the OHWL” is “indisputably within the Corps’ jurisdiction”); *United States v. S. Inv. Co.*, 876 F.2d 606, 609 (8th Cir. 1989) (“Under the RHA . . . , waters below the OHWL are declared waters of the United States and are subject to regulatory jurisdiction by the Corps.”); 33 C.F.R. § 329.11(a)(1).² Review may also be required where the activity is landward from the OHWL (and thus outside the Corps’ jurisdiction) when the level of federal control and responsibility are great, or where the project’s environmental consequences flow essentially from the portion of the project within federal jurisdiction. 33 C.F.R. Pt. 325, App. B, para. 7b(2).

Once it has been determined that an activity requires a permit from the Army Corps under the Rivers and Harbors Act, the Army Corps must also comply with a host of other federal statutes including NEPA and NHPA. NEPA, which has been referred to as our “basic national charter for protection of the environment,” 40 C.F.R. § 1500.1(a), requires that all “major federal actions significantly affecting the quality of the human environment” must undergo a review process that culminates in a “detailed statement” of the environmental impact of the proposed action, any adverse effects, and alternatives to the proposed action, 42 U.S.C. § 4332(C). These “major federal actions” may include “new and continuing activities, including projects . . . regulated by federal agencies” and “construction . . . activities located in defined geographic

² At oral argument, there was some discussion regarding the meaning of OHWL as compared to “Mean High Water Line.” See 33 C.F.R. § 329.12. In any case, Defendants acknowledged at oral argument that the entire structure at issue, Building 322, is situated in the navigable waters of the United States.

areas.” 40 C.F.R. § 1508.18(a),(b)(4). As the Chief Counsel of the Army Corps explained in a 2007 “legal guidance,” “Section 10 of the Rivers and Harbors Act . . . authorizes the Corps to issue permits for the construction or modification of structures in navigable waters.”

Memorandum from Earl Stockdale, Chief Counsel, Department of the Army, to the Director of Civil Works, “Legal Guidance on the NEPA Scope of Analysis in Corps Permitting Actions” (July 9, 2007) <http://www.spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/eis/NEPA%20S OA%20Opinion.pdf> [hereinafter “2007 Stockdale Memo”].

The NEPA process requires the permitting federal governmental agency to take a “hard look” at the environmental consequences of the proposed action, which includes the requirement that the agency “rigorously explore and objectively evaluate all reasonable alternatives.”

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); 40 C.F.R. § 1502.14(a).

Agencies are also required under the NEPA process to broadly disseminate relevant environmental information to the public. *Robertson*, 490 U.S. at 350; 40 C.F.R. § 1506.6. This process “does not mandate particular substantive results,” but “merely prohibits uninformed—rather than unwise—agency action.” *N.C. Wildlife Fed’n*, 677 F.3d at 601 (quotations omitted). The congressional purposes in mandating these formal assessment and consultative processes are to focus “the agency’s attention on the environmental consequences of a proposed project” and “ensure[] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die is otherwise cast.”

Robertson, 490 U.S. at 349.

When making an environmental assessment under NEPA, the Army Corps is mandated to consider both the direct and indirect effects, which may include such indirect effects as “growth

inducing effects” and “changes in the pattern of land use, population density or growth rate.” 40 C.F.R. § 1508.8. These indirect effects may be ecological as well as “aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” *Id.* Additionally, the permitting agency must consider the context and intensity of the impact of the undertaking. The regulation sets forth ten “intensity factors,” which include consideration of the “unique characteristics of the geographic area, such as proximity to historic or cultural resources,” “the degree to which the effects on the quality of the human environment are likely to be highly controversial,” and the “degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” 40 C.F.R. § 1508.27(a),(b)(3)-(5). The agency must also consider “the degree to which the action may adversely affect districts, sites, . . . structures, or objects listed in or eligible for listing in the National Register of Historic Places.” *Id.* § 1508.27(b)(8). “Conclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA.” *N.C. Wildlife Fed'n*, 677 F.3d at 602.

NEPA does not, however, require every undertaking to undergo a full environmental impact statement (“EIS”) and activities “which do not individually or cumulatively have a significant effect on the human environment” are entitled to a categorical exclusion from the NEPA process. 40 C.F.R. §§ 1501.4, 1508.4. Further, certain activities that have no more than minimal environmental impact may be eligible for a general permit under the Army Corps’ nationwide permit program so long as the activity meets all of the terms and conditions of a specific nationwide permit. 33 C.F.R. § 330.1(c). Where an activity qualifies for a nationwide permit, the Army Corps may verify eligibility and not require the applicant to otherwise submit

to a full NEPA environmental assessment. For instance, NWP # 3 authorizes certain “maintenance” activities that involve the “repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure . . . provided that the structure . . . is not to be put to uses differing from those specified or contemplated in the original permit.” AR 1104. NWP # 3 also authorizes “minor deviations” from the building’s configuration where the changes are required to comply with regulatory standards or current construction codes. *Id.* Even where an activity may require the issuance of an individual permit, an agency may initially make a more abbreviated review, known as an environmental assessment (“EA”), if it is uncertain if the activity under review will have a potential for significant environmental impact. 40 C.F.R. § 1508.9. In the final analysis, “when it is a close call whether there will be a significant environmental impact from a proposed action” the “policy goals underlying NEPA are best served if agencies ‘err in favor of preparation of an EIS when . . . there is a substantial possibility that the [proposed] activity may have a significant impact on the environment.’” *Friends of Back Bay*, 681 F.3d at 590 (quoting *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997)).

An essential first step in determining the proper level of review of any proposed activity under NEPA is establishing the proper “scope of analysis.” The “scope of analysis” should include all activities that fall within federal jurisdiction, and thus require a federal permit, as well as those portions of a larger project outside federal jurisdiction where there is sufficient federal control and responsibility. 33 C.F.R. Pt. 325, App. B, para. 7b; 53 Fed. Reg. 3120, 3121-22 (Feb. 3, 1988). For an activity subject to Section 10 of the Rivers and Harbors Act, the “scope of analysis” should include “the specific activity requiring a [Department of Army] permit” lying within or over the navigable waters of the United States and upland activities subject to federal

control and responsibility. *Aracoma Coal Co.*, 556 F.3d at 194 (4th Cir. 2009); 33 C.F.R. § 320.2(b); 33 C.F.R. Pt. 325, App. B, para. 7b. Once the proper “scope of analysis” is determined, the Army Corps then evaluates the eligibility of the proposed activity for general or individual permit treatment. The Army Corps’ determination of the proper “scope of analysis” is entitled to deference. *Wetlands Action Network v. U.S. Army Corps of Engr’s*, 222 F.3d 1105, 1115 (9th Cir. 2000), abrogated on other grounds by *Wilderness v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

In addition to the mandates set forth under NEPA, an agency reviewing a permit application under the Rivers and Harbors Act must also comply with NHPA, which requires an assessment of the “effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” 16 U.S.C. § 470f. Indeed, even if a project is eligible for approval under a national permit program in regard to NEPA processes, review is still required under NHPA. AR 1187. The processes under NHPA, known commonly as “Section 106 review,” include a requirement that the permitting agency “afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment” regarding the proposed project. 16 U.S.C. § 470f.

Like NEPA, NHPA contains a provision limiting the necessity of the permitting agency to follow the formal assessment and consultation processes of the Act when the agency determines that the proposed project “is a type of activity that does not have the potential to cause effects on historic properties.” 36 C.F.R. § 800.3(a)(1). In examining potential effects on historic properties, the agency, utilizing the previously determined “scope of analysis,” must consider both the direct and indirect effects on historic properties by the type of activity proposed, both

within and outside the permit area. *Id.* § 800.16(d); 33 C.F.R. Pt. 325, App. C, paras. 2a-b, 5f. An “adverse effect” can be found where the proposed project “may alter, directly or indirectly, any of the characteristics of a historic property,” including action that “would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” 36 C.F.R. § 800.5(a)(1). This may include “reasonably foreseeable effects” and the “introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features. *Id.* § 800.5(a)(2)(v). As the Fourth Circuit observed in *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001), “[e]ven if no shovels or backhoes will touch [an] historic area, damage to historic areas can occur in less direct ways.”

Factual Background

This litigation arises out of a challenge to the authorization granted by the Army Corps to the Ports Authority under Section 10 of the Rivers and Harbors Act to proceed with the Ports Authority’s “Building No. 322 renovation” as a maintenance project under NWP # 3. AR 103, 112-14. Plaintiffs and the Army Corps characterize the proposed project in fundamentally different ways. The Army Corps acknowledges that the Ports Authority’s application seeks authorization for renovating Building 322 and the installation of concrete pilings represents only a “part of [the] overall project.” However, the Army Corps treats the application as merely one to install five clusters of concrete pilings into the navigable waters of the United States and evaluates the potential environmental and historic impact of the project as if the undertaking is limited to the installation of the new concrete pilings. AR 112. The Army Corps asserts that the installation of the pilings would have “minimal individual and cumulative adverse environmental effects” and constitutes maintenance activity eligible for processing under NWP # 3. *Id.* On the

other hand, Plaintiffs assert that the proposed activity involves a structure that is located over the navigable waters of the United States and the full scope of activities (i.e. the new passenger terminal rather than only the supporting concrete pilings) is subject to assessment and review pursuant to NEPA and NHPA. Plaintiffs argue that when the undertaking is properly evaluated in its entirety its potential adverse environmental and historic impact requires the preparation of an EIS and full consultation under NHPA. The Plaintiffs further argue that the proposed undertaking does not remotely satisfy the requirements for a maintenance project and is not eligible for authorization under NWP # 3.³

The proposed project would convert a previously permitted “transit shed” into a \$35-million passenger terminal on the northern end of Union Pier, which is situated over the navigable waters of the United States along the Cooper River in downtown Charleston, South Carolina. AR 17, 42-43. The proposed project would require the placement of five clusters of concrete pilings directly into the navigable waters of the United States to provide support for escalators and elevators needed for the new terminal. The proposed pilings appear to have no independent utility other than to provide foundational support for the infrastructure associated with the proposed passenger terminal. The proposed new passenger terminal would have 108,480 square feet and the capacity “for homeporting a 3,450 passenger ship.” AR 758, 765.

³ Plaintiffs moved before the Court to supplement the record, which the Court granted. (Dkt. No. 50). All of the supplemented materials are post-decisional. The Court indicated in granting the motion that it was not then determining whether such documents were relevant or what weight the Court would give to the supplemented materials. (Dkt. No. 50 at 3). Having now reviewed the full administrative record and the supplemented materials, the Court has determined that these post-decisional documents are unnecessary for the Court to address the issues in this APA review. Consequently, the Court has given no weight or consideration to the supplemented materials.

The proposed new passenger terminal would more than triple the size of the existing 30,216-square-foot passenger terminal which sits at the southern end of Union Pier approximately a quarter of a mile from the proposed site. AR 758.

The proposed new passenger terminal would be situated “in the center of Charleston’s historic waterfront” and “adjacent to some of the most cherished, historically important, and valued neighborhoods.” AR 754. The proposed terminal would sit adjacent to the “tree canopied neighborhood of Ansonborough.” AR 754. The Ansonborough neighborhood lies within the Charleston Historic District, which is listed on the National Register of Historic Places and is one of the largest and best preserved Revolutionary- and Colonial-era districts in the United States. AR 754, 755, 879. Thirty-three other National Historic Landmarks are located nearby. AR 51.

Plaintiffs and various neighborhood associations have vigorously voiced their concern that the placement of this proposed new and enlarged passenger terminal near these historic neighborhoods and National Landmark structures would adversely impact the quality of life and historic feel and integrity of these communities and structures. AR 52. The adverse impacts they note include traffic congestion, air and noise pollution, and impairment of Charleston’s scenic beauty. *Id.* They argue that the adverse effects of the cruise ship industry significantly worsened with Charleston becoming the home port for the Carnival *Fantasy* in 2010, which they assert brought greatly increased numbers of passengers, automobiles, buses, and tractor trailers to the highly confined and dense historic waterfront area on embarkation and disembarkation days. AR 52, 878. They argue that the new passenger terminal would exacerbate this situation by bringing even greater numbers of passengers and cruise ships, now closer to historic residential

neighborhoods with the proposed move northward on Union Pier, and produce significant adverse impacts on the environment, Landmark neighborhoods and structures, and the overall quality of life in the peninsula city of Charleston.

The Ports Authority has acknowledged that a cruise ship terminal can “present special challenges” in “managing automobile and pedestrian traffic,” “protecting the environment,” and “preserving Charleston’s unique character” and “there are still lingering questions about how well the cruise ship business will fit into the context of this diverse, world class city.” AR 1003-04. Record evidence provided by the Ports Authority supports the claim of Plaintiffs that the number of cruise ships and passengers has increased in recent years, and the proposed new and larger passenger terminal would likely significantly increase the number and size of cruise ships visiting Charleston and the volume of cruise passengers in the historic Charleston waterfront. In the five-year period preceding the home porting of the *Fantasy* in 2010, Charleston hosted on average nearly forty-five cruise ships per year.⁴ In 2010, the number of cruise ships visiting Charleston increased to sixty-nine. AR 731. This increase set off loud protests from neighborhood, preservation, and environmental groups and led the National Trust for Historic Preservation and the World Monuments Fund to place the Charleston Historic District on endangered watch lists. AR 50-54. By 2012, the number of cruise ships visiting Charleston had risen to eighty-four, an 86% increase over the 2005-2009 five year average. AR 46.

The Ports Authority has clearly indicated that it seeks to build a new passenger terminal capable of handling a single 3,450-passenger ship on average twice a week or 104 cruise ship

⁴ Cruise ships visiting Charleston during this five-year period were as follows: 2005: 47, 2006: 50, 2007: 44, 2008: 49, 2009: 33. AR 731.

visits over a calendar year. AR 765, 1005, 1008. The Ports Authority asserts that the existing cruise ship market could accommodate this level of activity with an adequate passenger terminal. AR 1008. Even if the Ports Authority maintained its voluntary cap of 104 cruise ship visits per year, this would represent a 131% increase over the 2005-2009 five year average and a 24% increase from 2012.

In addition to the projected growth in the number of cruise ship visits, the Ports Authority data indicate a likely significant increase in the number of cruise passengers in the newly designed passenger terminal. The new terminal would be designed to accommodate and home port a 3,450-passenger ship. AR 765. Currently, the *Fantasy*, the only ship which uses Charleston as its home port, has a passenger capacity of 2,052 and the average passenger load per cruise ship for the year 2010 (the last year such information was provided in the record) was 1,612.⁵ AR 735. Under the Ports Authority's plan for its new terminal, the "recommended design vessel size (post-Panamax)" would be a passenger capacity of 3,000 to 3,500 and estimates submitted by the Ports Authority to the Army Corps regarding projected traffic volumes with the new passenger terminal were based on an average 3,450-passenger vessel. AR 765, 779. Relying upon the Ports Authority's announced goal of 104 cruise ships per year and the estimate of 3,450 passengers per vessel, the annual passenger total would be 358,800, or more than triple the number of passengers in 2010. Further, to service such a volume of passengers, the Ports Authority has estimated that on an average embarkation and disembarkation day up to twenty tractor trailers, sixteen small trucks, thirty-two buses, ninety taxis, and 1600

⁵ According to Ports Authority data, there were sixty-nine cruise ships visiting Charleston in 2010 with 111,240 total passengers. AR 735.

passenger vehicles would need access to the very confined area of the proposed new passenger terminal that lies immediately adjacent to the Charleston Historic District and the Ansonborough neighborhood. AR 779.

Plaintiffs have also asserted that the size and scale of the cruise ships, particularly the home port docking of the *Fantasy*, negatively impact the historic character of the Charleston Historic District. The *Fantasy* is 855 feet long and weighs 70,367 gross tons.⁶ Under the Ports Authority's proposal, the "recommended design vessel size," which would be "post-Panamax," would be far larger, with a length of 950 to 1,100 feet and weight of 100,000 to 150,000 gross tons. AR 765.

The Ports Authority correctly notes that cruise ships have serviced Charleston since at least 1973, following the dedication of a 30,216-square-foot facility on the south end of Union Pier. AR 758, 1007. The Ports Authority applied for a permit from the Army Corps on March 1, 1971, "to construct a passenger facility at State Pier 2 . . . behind the south end of the existing dock." AR 465. In January 1972, the Ports Authority modified the application by submitting revised drawings of the proposed facility. AR 466. The Army Corps then issued a permit on February 18, 1972, to "construct a passenger facility on existing dock," including necessary dredging, and mandating that the "structure" authorized "shall be in accordance with the plans and drawings attached." AR 440. The permit required the Ports Authority to "maintain the structure authorized herein in good condition in accordance with the approved plans." AR 442.

The Ports Authority has continuously used the passenger terminal facility at the southern

⁶ Carnival, <http://www.carnival.com/cruise-ships/carnival-fantasy.aspx> (last visited Sept. 17, 2013).

end of Union Pier for approximately forty years. The structure is known as Building 325. The increase in cruise ship visits and demands for greater port security have understandably caused the Ports Authority to seek some alternative to this rather modest and apparently antiquated passenger terminal. In fact, the Ports Authority is currently operating the existing passenger terminal under a Memorandum of Understanding with United States Customs and Border Protection that recognizes that Building 325 “has limited capacity to meet current passenger workloads resulting in less than optimal processing time.” AR 846. The Ports Authority has agreed with Customs and Border Protection to “improve and upgrade the facility to meet federal security requirements.” *Id.*

The Ports Authority proposes to move the passenger terminal northward approximately a quarter of a mile to another previously permitted structure known as Building 322. This structure has its own distinct permit history. The Ports Authority applied for a permit from the Army Corps on July 21, 1972, that included a request to authorize construction of a “dock extension with a transit shed 750 ft. by 400 ft.” AR 550. The application included a drawing of a rectangular building in accord with the dimensions that was demarcated “transit shed.” AR 569. The Army Corps issued a permit to the Ports Authority on November 7, 1972, authorizing the construction of the dock extension and transit shed. AR 524. In approving the Ports Authority application, the Army Corps District Engineer stated “IT SHALL NOT BE LAWFUL TO DEVIATE FROM SUCH PLANS EITHER BEFORE OR AFTER COMPLETION OF THE WORK.” AR 564. Any modifications in the plans had to be submitted to the Army Corps for review and approval. *Id.* The permit issued by the Army Corps to the Ports Authority further provided that the Army Corps could revoke the permit and require the Ports Authority at its own

expense to “restore the waterway to its former condition.” AR 527.

The Ports Authority subsequently requested approval of changes in its proposed project at Building 322 that included a modification of the configuration of the proposed transit shed. The proposed building was now 250 feet long by 400 feet wide. AR 120, 585. The Army Corps approved the requested changes on March 5, 1974. The Ports Authority submitted other proposed modifications for the project in 1978 that indicated only a portion of the proposed and approved transit shed had been constructed as of October 3, 1978. The submitted plans sought approval of the completion of the originally authorized work completing the transit shed and an additional area to be added to the structure at its northern end. AR 591. The Army Corps issued a new permit on November 3, 1978, approving the project “in accordance with the plans and drawings attached hereto which are incorporated in and made a part of the permit.” AR 586. The permit further provided that the permit could be modified or revoked if the Secretary of the Army determined that the action was in the public interest and the Ports Authority had no right to damages or any property rights as a result of the issuance of the permit. AR 587.

Building 322, as ultimately permitted and constructed, is a large cavernous structure, over 108,000 square feet, with embedded railroad tracks and is large enough to accommodate railroad cars. AR 582, 758, 768, 1075. It sits on Union Pier over the navigable waters of the United States. The building has warehouse-type lights and is ventilated by electronically operated fans. AR 769. Like the permit issued for Building 325, the permit for Building 322 required the Ports Authority to maintain the structure in accordance with the approved plans. AR 587.

The Ports Authority now proposes “the conversion of an existing cargo handling building [Building 322] into a functional and attractive passenger terminal.” AR 188. The new “world

class passenger terminal” would include a mezzanine serviced by escalators, elevators, passenger waiting areas and lounges, state-of-the-art security systems, cruise line offices, baggage handling areas, and much more. AR 17, 40, 165, 776, 982. As the Ports Authority has explained, Building 322, “as presently configured” with its vast open spaces, “provides a flexible platform to renovate into a workable cruise passenger terminal.” AR 769. In order to support the proposed escalators and elevators to service the terminal’s cruise passengers, the Ports Authority has indicated a need to add five additional concrete pile clusters under the existing Union Pier at Building 322. AR 105.

The Ports Authority submitted on January 23, 2012, a joint federal-state application for approval of a proposed project involving the “general renovation” of Building 322 into a modern passenger terminal and “relocating” the terminal from its present location on the southern end of Union Pier. AR 103-05. The Ports Authority indicated that the “continued growth of the cruise industry” in Charleston and the current security requirements made the need “for a new facility . . . critical.” AR 105. The “improvements” to Building 322 under the Ports Authority’s proposal included three elevators, two escalators, five concrete pile clusters to support the newly installed escalators and elevators, “renovation of the building’s exterior and interior, canopies over pedestrian areas, and a loading dock for transferring ship stores from delivery trucks to the cruise ship.” *Id.* The Ports Authority asserted that it was “reasonably anticipated that the work planned will cause no adverse impacts to jurisdictional areas.” AR 104.

Shortly after the Ports Authority submitted its application, various neighborhood groups and Plaintiffs wrote the Army Corps and other federal agencies on March 16, 2012, expressing concerns about a broad range of environmental and historic district impacts from the proposed

new passenger terminal, including traffic congestion, air pollution, noise pollution, and damage to the “scenic treasure . . . [of] the Holy City.” AR 50-54. They asked to be consulted in any review the Army Corps conducted. AR 51. They also reminded the Army Corps of its duty under Section 106 of NHPA to “afford the Advisory Council on Historic Preservation and the general public a reasonable opportunity to comment.” AR 53.

On April 20, 2012, less than three months after the Ports Authority filed its initial application for authorization for “Building No. 322 renovation,” and only four days after the application was determined to be complete, the Army Corps authorized “the proposed project” under NWP # 3. AR 112-14. This authorized the Ports Authority to proceed with construction without the necessity of complying with the assessment and consultation provisions of NEPA, including a careful and independent assessment of the environmental impact, an objective evaluation of all reasonable alternatives, and the broad dissemination of information to the public to allow public comment on the proposal.

In reaching its determination, the Army Corps found that the existing “structure” (which included Building 322) as well as the concrete pilings were “located in navigable waters of the United States” and that “authorization pursuant to Section 10 of the Rivers and Harbors Act is required.” AR 120. However, despite its finding that Building 322 was located in the navigable waters of the United States, and thus subject to federal jurisdiction, and the proposed passenger terminal involved a significant construction activity, the scope of analysis for NEPA review was “limited to the footprint of the new pilings.” *Id.* Using this very confined scope of analysis of the activity under review, the Army Corps concluded that the “activity will result in minimal individual and cumulative adverse environmental effects.” AR 112. The Army Corps further

concluded that the project satisfied the requirements for NWP # 3, finding that the activities involved “repair, rehabilitation, or replacement” of a previously authorized structure, there was no change in use since a passenger terminal had been present on Union Pier for the past forty years, and any changes were “minor deviations” to comply with new federal regulations regarding terminal safety. AR 121-22.

Additionally, the Army Corps determined that the Ports Authority was not required to provide Section 106 review under NHPA because the project was the type of activity that had no potential to cause adverse effects on historic landmarks. AR 125-26. In reaching this conclusion, the Army Corps again considered the scope of the project to be limited to the additional pilings that directly came into contact with the navigable waters and found that these additional pilings had “no potential to cause effects to historic properties in or outside of the ‘permit area’” AR 126. As a consequence of this decision, the Army Corps did not “afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment” regarding the proposed project. 16 U.S.C. § 470f.

Discussion

Before the Army Corps could evaluate the proposed activity under NEPA and NHPA, it had to determine the “scope of analysis” that is subject to federal review. The Ports Authority’s application clearly set forth its intention to convert Building 322, an existing structure previously permitted as a transit shed, into a passenger terminal. AR 103-06. The Ports Authority asserted that the only activity that would affect United States waters involved the installation of five concrete pile clusters and that the renovation of Building 322 constituted “landside improvements.” AR 105. The Army Corps, in determining the “scope of analysis,” found that

both the existing structure and the new pilings “are located in the navigable waters of the United States” and for that reason the activity required authorization under Section 10 of the Rivers and Harbors Act. AR 120. However, the Corps, without further elaboration, stated that “our evaluation is limited to the footprint of the new pilings.” *Id.*

The Army Corps’ determination to limit the “scope of analysis” to the impact of the five concrete pile clusters, rather than the new passenger terminal, dramatically and improperly constricted the assessment of the potential environmental and historic landmark impacts of the proposed activity. The concrete pilings comprise no more than 0.01 acres and have, standing alone, no discernible adverse environmental or landmark impact. On the other hand, the proposed new passenger terminal would be 108,000 square feet and potentially would bring an estimated 350,000 cruise passengers to the area immediately adjacent to the landmark Charleston Historic District, more than tripling the number of cruise passengers visiting Charleston in 2010. Plaintiffs assert that the new and substantially enlarged cruise passenger terminal would result in worsening of problems with air and noise pollution, traffic congestion, and a loss of the aesthetics and historic authenticity of the landmark Charleston Historic District. AR 50-54. Since the Army Corps limited the “scope of analysis” to the concrete pilings, its review did not evaluate or consider the potential adverse impacts of the proposed new passenger terminal.

The “scope of analysis” issue was hotly litigated several decades ago, with the issue primarily arising where a portion of a proposed project lay within federal jurisdictional waters or wetlands and the remainder of the project was landward outside of federal jurisdiction. *See Save Our Sonoran, Inc v. Flowers*, 408 F.3d 1113 (9th Cir. 2005). Following several significant appellate court decisions, the Army Corps adopted new regulations, found at Title 33 of the Code

of Federal Regulations, Part 325, Appendix B, to sort out when an entire project would fall within the “scope of analysis” and thus be subject to federal review. The regulations provide that the “scope of analysis” should include all portions of a proposed activity requiring a Rivers and Harbors Act permit and that portion of the project outside of federal jurisdiction in which there is “sufficient control and responsibility to warrant federal review.” 33 C.F.R. Pt. 325, App. B, para. 7b(1). In official comments issued by the Army Corps explaining its final action in adopting the regulations, the agency explained that the “scope of analysis” would “normally . . . cover the regulated activity,” which includes all “activities . . . subject to Section 10 of the Rivers and Harbors Act.” 53 Fed. Reg. at 3121. The Corps further explained that the agency had the obligation to “address all aspects of the activity within its jurisdiction.” *Id.*

Federal jurisdiction under the Rivers and Harbors Act extends to all structures which are located riverward from the OHWL. 33 U.S.C. § 403; *Vieux Carre I*, 875 F.2d at 455 (stating the OHWL is “the Corps’ benchmark for determining its jurisdiction under the RHA”); 33 C.F.R. § 329.11(a)(1). Federal jurisdiction includes structures directly in contact with the navigable waters, such as piers, as well as wharves and other structures constructed over the navigable waters of the United States. *Vieux Carre I*, 875 F.2d at 455, 463; 33 C.F.R. § 320.2(b) (“Section 10 of the Rivers and Harbors Act . . . prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over the navigable water of the United States . . . is unlawful unless the work has been . . . authorized by the Secretary of the Army.”).

The Army Corps seeks to justify what amounted to essentially a non-review of the proposed passenger terminal on the basis that its jurisdiction is limited to the portion of the

project physically touching the navigable waters of the United States. Since only the five concrete pile clusters actually touch the navigable waters, the Corps contends that its review cannot extend to the significant construction activity involving a structure located on the wharf situated over the navigable waters of the United States. (Dkt. No. 64 at 8-9). This argument is plainly inconsistent with the Army Corps' own regulation under the Rivers and Harbors Act which provides for jurisdiction involving any "structure in *or over* any navigable water of the United States." 33 C.F.R. § 320.2(b) (emphasis added). Moreover, despite the Army Corps' contention to the contrary, a structure situated over the navigable waters *is* an obstruction and this is the reason that the Army Corps has historically permitted Building 322 and determined that the park situated on a wharf over the navigable waters was under the Army Corps' jurisdiction in *Vieux Carre*.

The Fifth Circuit exhaustively and consistently addressed the Army Corps' jurisdiction over structures located on a wharf over the navigable waters in three decisions referenced as *Vieux Carre I, II, and III*. In *Vieux Carre I*, the Army Corps reviewed an application for a proposed aquarium and park which were to be built near the historic French Quarter in New Orleans. The aquarium was landward from the OHWL and the proposed park was to be constructed on a wharf which was built over the navigable waters. No portion of the park touched the navigable waters of the United States. In concluding that the park was subject to federal jurisdiction and the aquarium was not, the Fifth Circuit held that since the park was "riverward of the OHWL," it was "therefore indisputably within the Corps' jurisdiction" and "within the navigable waters of the United States." 875 F.2d at 455-56, 464; *see also Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown (Vieux Carre II)*, 948 F.2d 1436, 1439

(5th Cir. 1991) (stating the park required a federal permit “because it was to be built on the Wharf completely within the OHWL”); *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown (Vieux Carre III)*, 40 F.3d 112, 115 (5th Cir. 1994) (stating the provisions of the RHA were triggered by the proposed park because “some structures involved in the project were built on the Bienville Street Wharf”).

During oral argument, the Court repeatedly asked defense counsel to explain why a park situated on a wharf in New Orleans would be within the Army Corps’ jurisdiction while a major construction activity in a structure on a wharf in Charleston would not be. No reasonable distinction was articulated. Instead, Defendants argued that *Vieux Carre* recognized that the park was determined to be eligible for general permit treatment. While this is undoubtedly true, the Fifth Circuit determined that the entire park was subject to the Army Corps’ jurisdiction under the Rivers and Harbors Act and only then analyzed the park for general permit eligibility. In this case, the Army Corps evaluated the adverse environmental and historic effects arising from only a small fraction of the project which lay in United States waters, the five concrete pile clusters, and never evaluated the full scope of the passenger terminal project. This was clearly in error.

Further, a review of the permitting history of Building 322 demonstrates that the Army Corps has consistently recognized and exercised its jurisdiction over the construction and modification of the structure. The Ports Authority applied for a permit in July 1972 to construct a “transit shed” at what is now Building 322. AR 550. The plans the Ports Authority submitted showed a rectangular building 750 feet long and 400 feet wide. AR 567, 569. The Army Corps approved the project on October 14, 1972, but specifically prohibited any deviation from the plans submitted and approved either during construction or thereafter. AR 564. The Ports Authority

later submitted a request to modify the previously approved plans for a transit shed, with the modified plans providing for a transit shed 250 feet long and 400 feet wide. AR 120, 585. The Army Corps approved these modifications on March 5, 1974. AR 580. The Ports Authority made an application for still additional modifications to the transit shed in 1978, indicating that only a portion of the previously approved structure had actually been constructed. AR 591. The Ports Authority requested authorization in the newly submitted plans to alter the configuration of the proposed transit shed by adding additional square footage at the northern portion of the structure. AR 591. The Army Corps authorized the alterations in a new permit issued on November 3, 1978, "in accord with the plans and drawings attached hereto which are incorporated and made part of this permit," with a single exception allowing "any modification or minor addition" required by the state of South Carolina as a precondition for issuing a state permit. AR 586, 588. Both the 1972 and 1978 permits vest in the Secretary of the Army the authority to revoke the permit authorizing the structure, with the 1972 permit explicitly providing for the right of the Secretary to require the restoration of the "waterway to its former condition." AR 527.⁷

The Army Corps contended at oral argument that the Rivers and Harbors Act was not a general zoning board regulation and the Army Corps had no interest in or jurisdiction over

⁷ The Army Corps now contends that the Building 322 permits only authorized "pier construction." (Dkt. No. 64 at 13). The 1972 permit explicitly referred to the transit shed, and the approved plans for both the 1972 and 1978 permits clearly set forth the configuration and dimensions of the structure and designated it as a transit shed. AR 524, 564, 569, 586, 588, 591. These permits conditioned the authorization to proceed on the requirement that the Ports Authority construct and maintain the approved structures in accord with the plans. The Court finds the present Army Corps characterization of the 1972 and 1978 permits to be convenient revisionist history to justify its present non-review of the proposed passenger terminal and such characterization of those earlier permits as limited to pier construction is arbitrary, capricious, and unreasonable.

modifications of permitted buildings and had no concern regarding uses that a particular permitted structure might be put. The Army Corps certainly does not function as a zoning board but its jurisdiction extends to approval of “specific projects, such as construction . . . activities located in a defined geographic area” and “for construction and modification of structures in the navigable waters.” 40 C.F.R. § 1508.18(b)(4); 2007 Stockdale Memo. Further, the Army Corps provides by way of regulation the requirement that any application for a Rivers and Harbors permit set forth “the location, purpose and need for the proposed activity.” 33 C.F.R. § 325.1(d)(1). Thus, when the Ports Authority applied for a permit in 1972 for authorization to construct Building 322, it properly designated its purpose as a transit shed, and it also acted consistent with the Army Corps’ regulations when it sought and obtained authority in 1974 and 1978 to modify the permit for Building 322. AR 550, 567, 569, 580, 582, 586, 588, 591; *see* 42 Fed. Reg. 37122, 37149 (July 19, 1977).

Under the Army Corps’ regulations, the determination of the “scope of analysis” required for the proposed project before the Court should have been relatively straight forward because the Army Corps found that Building 322 was located in the navigable waters of the United States and thus subject to Section 10 of the Rivers and Harbors Act. AR 120. This avoided the necessity of evaluating the level of federal control and responsibility to determine whether a portion of the project outside of federal jurisdiction was subject to federal review, which is the most common source of conflict in “scope of analysis” disputes. Since the Army Corps found that Building 322 was located in the navigable waters of the United States and subject to Section 10 of the Rivers and Harbors Act, and the agency was mandated to “address all . . . activity within its jurisdiction,” the entire passenger terminal conversion project, and not just the concrete pilings, should have

been included in the “scope of analysis.” 53 Fed. Reg. at 3121.

Defendants further suggest that the federal interest under the Rivers and Harbors Act in a structure located on a wharf situated over the navigable waters is not particularly great, thereby justifying exclusion from federal review. *Vieux Carre I* makes it clear, however, that even the placement of a structure such as a park located on a wharf is subject to federal jurisdiction and review. 875 F.2d at 455, 464. Further, regardless of the level of federal interest in certain activities within the agency’s jurisdiction, this “does not diminish the Corps’ jurisdiction, the scope of its analysis, or its obligation to consider the environmental effects under NEPA of its permit action.” *Fla. Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 401 F. Supp. 2d 1298, 1313 (S.D. Fla. 2005). Moreover, the Courts should not allow a “convenient” and “invalid” limitation on the Army Corps’ “scope of analysis” to serve to “excuse a most inadequate consideration of the environmental consequences of the action for which it had responsibility.” *Ark. Nature Alliance, Inc. v. U.S. Army Corps of Eng’rs*, 266 F. Supp. 2d 876, 891-92 (E.D. Ark. 2003).

Finally, the Ports Authority challenges that Plaintiffs lack Article III standing to bring this action. “Article III, Section 2 of the Constitution restricts the federal courts to deciding actual cases and controversies. Among [t]he several doctrines that have grown up to elaborate that requirement, the one that requires a litigant to have standing to invoke the power of a federal court is perhaps the most important.” *Friends of Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 319 (4th Cir. 2002) (internal quotations omitted). “To demonstrate standing in the context of the [APA], not only must a plaintiff show that he has suffered an injury in fact that is fairly traceable to the defendant’s conduct and that a court can provide relief to redress the injury, but also he must show that the injury in fact is within the zone of interests protected by the statute.” *Pye v*

United States, 269 F.3d 459, 466-67 (4th Cir. 2001). “In addition, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germane to the group’s purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit.” *Friends of Ferrell Parkway*, 282 F.3d at 320 (citing *Friends of the Earth, Inc v. Laidlaw Envtl Servs.*, 528 U.S. 167, 181 (2000); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

The Ports Authority argues that Plaintiffs lack standing because they cannot demonstrate (1) an injury in fact, (2) a causal connection between their injury and the challenged action, or (3) that the alleged injury will be redressed by a favorable decision of this Court. (Dkt. No. 57-1 at 25). The Ports Authority’s standing argument, however, suffers from the same defect as its argument under NEPA and NHPA. Specifically, the Ports Authority’s standing argument depends on the Court adopting an artificially narrow view of this controversy. The Ports Authority insists the Court limit its standing analysis to the installation of the five concrete pile clusters and ignore the renovation of Building 322 into a state-of-the-art cruise ship terminal. As above, the Court cannot ignore this reality. When this case is viewed within the framework of a proper “scope of analysis,” it is clear that Plaintiffs have a “sufficient personal stake” in the outcome of this dispute to satisfy Article III. *Friends of Ferrell Parkway*, 282 F.3d at 319. Plaintiffs’ members include residents of the Ansonborough neighborhood which abuts the north side of Union Pier where Building 322 is located and where the alleged detrimental effects of the proposed new cruise ship terminal—including increased traffic congestion and airborne pollution from cruise ships—are expected to be felt. The Court’s finding that the Army Corps’ authorization granted to the Ports

Authority is invalid could potentially redress these harms and lead to an appropriate assessment under NEPA and NHPA. See *Pye*, 269 F.3d at 467-68 (“adjacent landowners often have standing to challenge the government’s failure to follow statutorily prescribed procedures”); *Waterford Citizens’ Ass’n v. Reilly*, 970 F.2d 1287 (4th Cir. 1992) (organization of citizens has standing to challenge agency’s failure to comply with NHPA). In sum, when the proper scope of review is applied, it is clear that Plaintiffs have standing under Article III to bring this action.

Conclusion

The Army Corps had the affirmative duty to assess “all aspects of the activity within its jurisdiction,” which required the Army Corps to include in its “scope of analysis” all activities subject to Section 10 of the Rivers and Harbors Act. 33 Fed. Reg. at 3121. The Army Corps specifically found that “the existing structure” was “located in navigable waters” and required authorization under the Rivers and Harbors Act. AR 120. This finding was consistent with Army Corps regulations establishing its jurisdiction over structures “in or over navigable water,” past permitting practice regarding Building 322, and case law holding that structures located over a pier in navigable waters were “indisputably within the Corps’ jurisdiction.” *Vieux Carre I*, 875 F.2d at 456; 33 C.F.R. § 320.2(b); AR 550, 564, 580, 582, 586, 588, 591.

Despite these findings and the Army Corps’ well established legal duty to include all activities within its jurisdiction under the Rivers and Harbors Act in the “scope of analysis,” the Army Corps, unreasonably and unlawfully, constricted the “scope of analysis” to an insignificant fraction of the project that lay within the agency’s jurisdiction. By omitting more than 99% of the project within its jurisdiction from the “scope of analysis,” the Army Corps effectively denied the meaningful review mandated by NEPA and NHPA. Even using the highly deferential standard of

review under the APA, the Court finds that the Army Corps' limitation of the "scope of analysis" to five concrete pile clusters was arbitrary, capricious, unreasonable, and contrary to law.

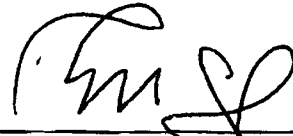
The Court is compelled under these circumstances to find that the authorization by the Army Corps for the Ports Authority to proceed by letter dated April 20, 2012, is unlawful and void. Since the duty to conduct the necessary review and make the appropriate findings based upon the administrative record rests by law with the Army Corps, remand is obviously necessary. The matter is therefore remanded to the Army Corps to place within its "scope of analysis" all activities within its jurisdiction (riverward of the OHWL), which the Court finds under this record must include, at a minimum, all activities concerning the Building 322 conversion project.⁸ Once the Army Corps uses the proper "scope of analysis," the agency must undertake an appropriate NEPA and NHPA review, which should include such issues as (1) whether the passenger terminal project is entitled to a general permit or must undergo the individual permitting process; (2) whether, if an individual permit is required, the Corps must perform an EIS; and (3) whether the passenger terminal is the "type of activity that does not have the potential to cause effects on historic properties." 16 U.S.C. § 470f; 33 C.F.R. § 330.1; 36 C.F.R. § 800.3(a)(1); 40 C.F.R. §§ 1501.4, 1508.4, 1508.9. 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

⁸ The Corps also contended at oral argument that the proposed passenger terminal was simply too "inchoate" for federal permit review. This is an odd argument since detailed renderings of the proposed structure are contained in the record and the proposed conversion project has been submitted and approved by the City of Charleston's Board of Architectural Review ("BAR"). Further, counsel for the Ports Authority acknowledged during oral argument that the proposed passenger terminal project is well beyond the concept stage and has been approved by the BAR.

analysis.”

Therefore, the Court GRANTS Plaintiffs’ motion for summary judgment, (Dkt. No. 58), DENIES Defendants’ motions for summary judgment, (Dkt. Nos. 57, 60), and REMANDS this action to the agency for further action consistent with this order.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Judge

Charleston, South Carolina
September 18, 2013

Exhibit K

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, Charleston)
Communities for Cruise Control,)

Petitioners,)

vs.)

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

Respondents.)

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

**AFFIDAVIT OF
CHRISTINA DODD**

PERSONALLY APPEARED before me Christina Dodd who being duly sworn deposes and says.

I am a citizen and resident of Charleston, South Carolina. I reside at 42 Hassell Street, within the Ansonborough neighborhood of Charleston. I have resided on this property for the last ¹² 13 years. I am a member of the Preservation Society of Charleston ("PSOC"), the Historic Ansonborough Neighborhood Association ("HANA"), and Charleston Communities for Cruise Control ("C4"), all of which are Petitioners in this case

I am relying on these organizations to represent my opposition to Permit OCRM-12-054-B, which facilitates new cruise ship terminal operations at SPA's Union Pier facility in the City of Charleston. I am opposed to this permit and involved in this litigation because this permit threatens my quality of life, property value and health, and threatens the historic preservation values that I enjoy and appreciate with pollution and congestion.


In the last several years, with the Carnival Fantasy moving to Charleston and cruise operations increasing, I have already noticed a decrease in my overall quality of life. Specifically, for the past two years, I have been finding soot on the window sills inside my 1843 historic home, despite the fact that I have exterior storm windows. Additionally, this oily soot is now prominently found on our piazzas and outdoor furniture. It is very difficult to clean, and cleaning must be done much more frequently. I did not experience this problem before the influx of nearby cruise ships at Union Pier. I am obviously very concerned about what this residue from burned sulphur-heavy fuel is doing to my lungs and overall health, as I am breathing this pollution both inside and outside of my home.

With the influx of cruise traffic, I have also experienced problems with traffic congestion, including difficulty completing everyday errands and reaching my own residence. On occasion I have found myself ½ block from home, only to be redirected many blocks in the opposite direction. On days when the cruise ship is in town, between the increased automobile and pedestrian traffic, it has been very difficult to navigate and enjoy my neighborhood and community, with activities lasting many times longer than they normally would.

Through my involvement with PSOC, HANA and C4 I have seen many presentations and have reviewed a great deal of information related to the Union Pier project, and I have concluded that Permit OCRM-12-054-B will only make worse these problems that I have been experiencing over the last couple of years. The Permit facilitates more cruise ships and more people, without the limitations needed to combat the problems of pollution and traffic that I have already experienced.

In addition to making these existing problems worse, preservation is also at the heart of my concern with OCRM-12-054-B. I love Charleston because of the value it places on historical and architectural preservation, and I often observe and appreciate Charleston's historic aesthetic, starting in my neighborhood of Ansonborough and extending outward across the peninsula. This is one of the primary reasons I choose to live in Charleston and in Ansonborough. But in my experience, the preserved backdrop that both the city and neighborhood have cultivated is fragile. I do not believe that the backdrop of an early 19th century neighborhood can coexist with a disproportionately modern behemoth of a vessel looming on the skyline, without that neighborhood losing the values and aesthetics that I appreciate. It is totally incongruous, out of character, and I feel most unacceptable, to compromise the truly unique setting of the Charleston historic district, especially when alternative sites are available. Needless to say, I am confident that OCRM-12-054-B will detrimentally impact my enjoyment of the historically preserved setting that surrounds my home and neighborhood, as setting that I have paid a premium to live in and enjoy.

A new cruise ship terminal located just a couple blocks from my home would be a most unwanted addition to my historic neighborhood, a neighborhood which has already seen its quality of life diminished by the impact of these larger vessels over the past two years. To put the new terminal closer to my home, where even more and potentially larger ships would discharge even more passengers and pollution, would pose a serious threat to many things I hold dear.


Christina Dodd

SWORN TO before me this

12 day of July, 2013.

Kimberly Taylor (SEAL)

Notary Public for South Carolina

My Commission Expires: Oct. 28, 2015

Exhibit L

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Savannah Riverkeeper, S.C. Coastal
Conservation League, S.C. Wildlife
Federation, and Savannah River Maritime
Commission,)

Petitioners,)

v.)

South Carolina Department of Health and
Environmental Control, Georgia Ports
Authority, and the U.S. Army Corps of
Engineers, Savannah District,)

Respondents.)

In re: Savannah Harbor Expansion Project)

Docket No. 11-ALJ-07-0618-CC

ORDER RECEIVED

JUL 18 2014

SC Court of Appeals

This matter is before the Administrative Law Court (ALC or Court) pursuant to Petitioners' request for a contested case hearing to challenge the November 15, 2011 decision of the Board (Board) of the South Carolina Department of Health and Environmental Control (DHEC) to issue a Section 401 Water Quality Certification (401 Certification), a Construction in Navigable Waters Permit (Navigable Waters Permit) and a Coastal Zone Consistency Determination (CZCD) (collectively, the DHEC Authorizations) for the proposed Savannah Harbor Expansion Project (SHEP). On May 1, 2012, Petitioner Savannah River Maritime Commission (Maritime Commission) filed a motion pursuant to S.C. Code Ann. § 1-23-600(H)(2) (Supp. 2011) for an order enforcing the automatic stay of the Board's decision. The Maritime Commission contends that the automatic stay was violated by the publication of a final Environmental Impact Statement (EIS) by the Savannah District of the U.S. Army Corps of Engineers (the Corps). A hearing was held on this matter on May 16, 2012. For the reasons set forth below, the Maritime Commission's motion is denied.

FILED

MAY 31 2012

SC ADMIN. LAW COURT

Carolina law, contested case hearings regarding Section 401 certifications are held *de novo* by the ALC after the DHEC Board makes its final decision. See S.C. Code Ann. § 44-1-60(F)(2), (G); Brown v. S.C. Dep't of Health and Env'tl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); Marlboro Park Hosp. v. S C Dep't of Health and Env'tl Control, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). Significantly, a “contested case” is a proceeding in which the “legal rights, duties, or privileges of a party” are decided after an opportunity for a hearing. See S.C. Code Ann. § 1-23-310(3) (2005); S.C. Code Ann. § 1-23-505(3) (Supp. 2011). In the present case, no contested case hearing has yet been held by this Court regarding the 401 Certification and thus no “legal rights” have yet been adjudicated. Accordingly, the 401 Certification is not yet effective.¹¹

Nevertheless, I find that the present motion does not provide this Court with an appropriate basis for taking action to remedy this situation. As the Maritime Commission acknowledges, “public misstatements are not in and of themselves a violation of the automatic stay.” Although the Commission contends that resolution of this issue is pertinent to determining the proper remedy to be assessed for the publication of the final EIS, as noted above, I have determined that the publication of the final EIS did not violate the automatic stay. Accordingly, I find no legal ground for this Court taking action here.

of the Savannah River Maritime Commission, hereinafter the Maritime Commission, superseded the responsibilities of the department for such approval, as established by Act 56 of 2007, and the approval by the department could present imminent and irreversible public health and environmental concerns for the South Carolina portion of the Savannah River

2012 S.C. Act No. 125, § 1 (effective March 1, 2012) (emphasis added)

¹⁰ On April 9, 2012, the South Carolina Supreme Court agreed to hear a petition by Savannah Riverkeeper, S.C. Coastal Conservation League, S.C. Wildlife Federation and Conservation Voters of South Carolina contending that the DHEC Board exceeded its authority and usurped the authority of the Maritime Commission in granting the DHEC Authorizations.

¹¹ Although the 401 Certification is not yet effective, DHEC (and thus the State of South Carolina) presumably “act[ed]” on the Corps’ request for certification within the one-year period set forth in Section 401 of the CWA. See 33 U.S.C. § 1341(a)(1) (“If the State 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.”), FPL Energy Me Hydro LLC v. Dep't of Env'tl Prot., 926 A.2d 1197, 1203 (Me. 2007) (holding no waiver of certification requirements occurred where agency took action within one year, and finding “no indication” that “Congress intended for all in-state appeals to be completed within the same one-year deadline”), City of Klamath Falls v. Environmental Quality Comm'n, 119 Ore. App. 375, 377-378 (Or. Ct. App. 1993) (finding no waiver where agency acted within one-year period and applicant then instigated contested case challenge that extended beyond year), aff'd on other grounds, 870 P.2d 825 (Or. 1994).

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

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, Charleston Communities for Cruise Control,..... Appellants,
vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Response to the Motion to Dismiss Appeal on Respondents S.C. State Ports Authority and SC DHEC by placing copies of same in the U.S. Mail addressed to:

Randolph R. Lowell, Esq.
Chad N. Johnston
Willoughby & Hoefler, PA
Post Office Box 8416
Columbia, SC 29202

Philip L. Lawrence, Esq.
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Bradley Churdar, Esq.
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405



J. Blanding Holman IV

Charleston, SC
July 14, 2014

RECEIVED

JUL 18 2014

SC Court of Appeals

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270

43 BROAD STREET SUITE 300
CHARLESTON, SC 29401-3051

Facsimile 843-720-5240

July 14, 2014

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

Re: Preservation Society of Charleston v. DHEC
Appellate Case No. 2014-000847

Dear Ms. Kitchings:

On behalf of Appellants 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, please find enclosed the original and six copies of the Return to Respondents' Motion to Dismiss.

Please file-stamp the additional copy and return it to me in the enclosed, self-addressed, stamped envelope.

Thank you very much for your kind cooperation and assistance.

Very truly yours,

J. Blanding Holman

J. Blanding Holman
Attorney for Appellants

*lypm
w/
permission*

Cc: All Counsel of Record

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JUL 18 2014

SC Court of Appeals