STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

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

vs.

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

vs.

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

FINAL BRIEF OF APPELLANT

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II. **Where it was possible for Deertrack Golf's proposed project to comply with all regulatory requirements, did the ALJ's rejection of one of those requirements on the basis of a purported regulatory conflict simply effectuate his preference for one regulation over another?**

III. **Did the ALJ err by correcting DHEC's failure to identify existing ponds on the property as "waters of the State," but then ignoring the regulatory standards and requirements specifically applicable to those waters?**

IV. **Where "waters of the State" will be impacted by the proposed project, but neither DHEC nor the ALJ has made findings on whether those impacts are in compliance with the applicable regulations, is remand required?**

V. **Where the Permit at issue in this case was conditioned on the fact that no federal waters were present on the project site, and where the ALJ refused to admit any evidence of the presence of federal waters, finding the lack of federal waters conclusively established, does a federal agency's subsequent finding of federal waters on the property necessitate reversal of the ALJ's Final Order and remand of the Permit?**

VI. **In light of the subsequent finding of federal waters, would affirming the ALJ's Final Order clear the way for Deertrack Golf to begin construction of a project that no longer has a valid Permit?**

STATEMENT OF THE CASE

On April 29, 2008, the Petitioner-Appellant (hereinafter, "Appellant") Deerfield Plantation Phase IIB Property Owners Association ("Phase IIB POA") filed a contested case hearing seeking review of the South Carolina Department of Health and Environmental Control's ("DHEC") decision to grant a Stormwater Permit and Coastal Zone Consistency Certification to Deertrack Golf, Inc. ("Deertrack Golf"). The permit and certification at issue approve the development plan for a 287-unit residential subdivision on a tract of land in the Surfside Beach area of Horry County, South Carolina.

The development tract, which formerly served as a golf course, contains a series of ponds, channels, and ditches. The development plan that has been permitted and certified by DHEC calls for filling the majority of the ponds, ditches, and channels on the tract and for utilizing some of the ponds for stormwater detention. The Appellant contends that the project does not satisfy a number of the regulatory preconditions underlying the Stormwater Permit, including S.C. Code Ann. Reg. 61-9, S.C. Code Ann. Reg. 61-68, and the NPDES General Permit for Stormwater Discharges. Respondent Deertrack Golf asserts that the project complies with the applicable standards.[1]

A hearing was conducted before the Administrative Law Judge March 10-12, 2009 at the Administrative Law Court in Columbia. The parties submitted proposed orders to the Court, and on June 9, 2009, the ALJ issued a Final Order and Decision ("Final Order"), affirming DHEC's issuance of the Stormwater Permit and Coastal Zone Consistency Certification. The Appellant

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[1]Respondent Bill Clark Homes, who previously intervened in this action, no longer has a contractual interest in the development tract and is not participating in this action.

filed a Motion for New Trial and to Alter or Amend in the Administrative Law Court on June 22, 2009. Pursuant to Rule 29(d) of the Rules of Procedure for the Administrative Law Court, that motion was deemed denied when no order was filed by Judge McLeod, the Administrative Law Judge ("ALJ") within 30 days of the filing. The Appellant filed its notice of appeal in this case on July 29, 2009.

Subsequent to the filing of this appeal, the United States Corps of Engineers declared federal jurisdiction over a portion of the waters on the development tract, based on a Clean Water Act suit filed by the Appellant. Given the potential implications of that declaration on these proceedings, this Court has separately stayed, held in abeyance, and remanded this appeal over the last several years. On July 9, 2010, this Court ordered the appeal held in abeyance for 60 days. On October 6, 2010, this Court stayed the appeal upon joint motion of the parties. Most recently, on January 12, 2012, this Court remanded the case "to the ALC to further remand the matter to DHEC for additional administrative action." On May 17, 2013, with no additional administrative action having occurred, this Court dismissed the appeal. Upon Petitions for Rehearing filed by the Respondents, this Court reinstated the appeal on September 20, 2013.

ARGUMENT

Summary of Argument

This appeal centers around Deertrack Golf's proposal to construct a new stormwater management system overtop an existing drainage network composed of ponds, channels and other waters. The Appellant will demonstrate through this appeal that the ALJ made legal errors both in his interpretation of the requirements for the new stormwater system and in his treatment

of the existing waters. Beyond these legal errors, the Appellant will explain how a subsequent declaration of federal jurisdiction, now on record with the ALJ and this Court, invalidates the Stormwater Permit for Deertrack Golf's proposal and necessitates reversal and remand.

As for the first error, in applying South Carolina's stormwater regulations to Deertrack Golf's proposed stormwater project, the ALJ incorrectly contorted those regulations to justify his preferred outcome. In particular, the ALJ generated a poorly described, purported conflict between stormwater regulations in order to justify his decision not to apply one of those regulations. The Appellant will explain that no conflict actually exists between these stormwater regulations, which are routinely applied in concert, and that even if such a conflict did exist, the ALJ applied an improper legal analysis in simply rejecting the regulation he deemed to be more broad. This legal error requires reversal.

The second error relates to the status of the existing ponds and channels as "waters of the State," a term defined in Respondent DHEC's regulations that connotes additional protections for those waters. DHEC testified that it did not consider the existing ponds and channels to be "waters of the State," but that if they were, a different permit review with different requirements would have been necessary. The ALJ, in contrast, held that the ponds and channels were "waters of the State," but then completely ignored the implications of that holding. In short, the ALJ's Order attempts to have it both ways, correcting an obvious error on the part of DHEC in applying the plain terms of a regulatory definition, while at the same avoiding the consequences of that error to affirm DHEC's permit as-is. The ALJ's Order requires remand for a consistent holding on "waters of the State" and for application of the legal standards and requirements applicable thereto.

Finally, this case has already once been remanded to the ALJ and then to DHEC for action on the basis of subsequently-declared federal jurisdiction over a portion of the existing waters on the property. In the end, no action was taken by DHEC during the remand and this appeal was *sua sponte* reinstated. The Appellant will explain that, more than the temporary remand this Court previously granted, the declaration of federal jurisdiction invalidates the ALJ's Final Order and DHEC's Stormwater Permit, necessitating reversal. Where the ALJ refused to admit any trial evidence on the existence of federally jurisdictional waters and based his Order on the conclusion that no such waters exist, and where federal jurisdiction eviscerates necessary preconditions for the Stormwater Permit, this Court has no legal footing from which to affirm the Order and Permit.

Factual Background

Respondent Deertrack Golf applied to Respondent DHEC for a Stormwater Permit and Coastal Zone Consistency Certification ("CZC Certification" or "Certification") to construct a 287-unit residential subdivision on a 85-acre tract of land in the Surfside Beach area of Horry County. (R. p. 10, ¶ 6). Specifically, Deertrack Golf proposes to construct the subdivision within Deerfield Plantation, a large, multi-phase developed community near Surfside. The new subdivision would be built on a parcel that formerly served as the "front nine" holes of the southern Deerfield Plantation golf course ("the Old South Course"). Deertrack Golf is the owner of the Old South Course property and made the decision to close the course to golf and to pursue residential development. (R. p. 6). DHEC issued the Permit and consistency Certification for this

development in February 2008.[2] (R. p. 6).

Development of Deerfield Plantation began in the late 1970s. Deerfield Plantation was developed as a golf course community, with two golf courses surrounded by residential lots and townhouses. Deerfield Plantation Phase IIB ("Phase IIB") encompasses a section of those golf course community lots. (R. pp. 107-108). Specifically, Phase IIB is a single-family residential community within Deerfield Plantation that was platted and recorded in 1978. (R. p. 9, ¶ 2). All homeowners in Phase IIB are members of the Appellant group Deerfield Plantation Phase IIB Property Owners Association, and Phase IIB POA represents the interests of those homeowners. Phase IIB was built surrounding and intertwined with the front nine holes of the Old South Course. (R. p. 6). Consequently, the proposed residential development will be constructed among, around, and adjacent to lots within Phase IIB.

Critical to this case, a drainage system consisting of interconnected ponds, channels, swales, and underground pipes runs through the Old South Course, including the portion adjacent to Phase IIB. (R. p. 124-141). Phase IIB was constructed so that almost all of its residential lots drain toward and through that golf course drainage system. Id. The ponds and channels on the Old South Course are linked together and ultimately drain to a single exit point on the eastern edge of the property, and then to the Atlantic Ocean. (R. pp. 289-290, 300). In short, under the existing configuration, Phase IIB's stormwater drainage crosses the Old South Course property, and Phase IIB cannot drain without utilizing the drainage system on the golf course property. (R. p. 140-141).

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[2]The arguments in this brief relate primarily to the content and validity of the Stormwater Permit, but reversal or modification of that Permit will necessarily require a new CZC Certification. See S.C. Code Ann. § 48-39-80(B)(11).

The development plan submitted by Deertrack Golf and approved by DHEC calls for an almost complete reworking of the drainage system on the Old South Golf Course – the system relied on by Phase IIB POA. (R. pp. 27-30). Of particular relevance here, the development plan calls for the permanent alteration of nearly every pond, channel and ditch on the site, including the filling of some of these areas. Further, the development plan calls for raising the elevation of the golf course property to establish new residential lots. In fact, just about everything to be built in the proposed new development would be at a higher elevation than the houses it would surround in Phase IIB. (R. pp. 342-343). Some Phase IIB POA homes would sit as much as four feet below adjacent lots in the new development. (R. p. 411; p. 30, ¶ 75). In short, the plan approved by DHEC constitutes a major modification of the drainage system and mechanisms directly utilized by Phase IIB POA for decades and has the potential to significantly impact Phase IIB POA.

These proposed drainage modifications are particularly critical to Phase IIB POA in light of its problematic drainage history. Phase IIB was built before the advent of modern stormwater regulations and generally with little regard to drainage. (R. p. 23, ¶ 51). As a result, both Phase IIB and the Old South Course were built in flat, low-lying areas naturally prone to flooding. (R. pp. 315-316). The precarious location of Phase IIB makes proper management of its stromwater imperative.

Indeed, the Old South Course and Phase IIB have historically experienced a significant flooding problem. (R. pp. 298, 304-307). Phase IIB POA presented the testimony of three homeowners/members who testified about past flooding events and their continuing concern about future flooding events. At least a dozen flooding events were described. Each noted a

history of major floods, which resulted in road closings and as much as 3-4 feet of water entering some homes. (R. pp. 154, 326-327). The members of Phase IIB POA testified that their objections to this proposed development were not to redevelopment of the golf course property in itself, but rather to the manner that redevelopment was proposed in relation to flooding. (R. p. 218-221). In short, the members of Phase IIB POA expressed concerned that entirely reworking the drainage system to add more houses at an elevation four feet higher than phase IIB homes will exacerbate flooding Phase IIB.

Admittedly, since the height of the flooding problem, Horry County has committed significant resources to alleviating Phase IIB POA's drainage problem through offsite infrastructure changes. (R. pp. 23-26). The ALJ heard a great deal of testimony from both sides about the effectiveness of these changes, and there was disagreement among witnesses on the extent to which the flooding problem had been cured. The ALJ resolved this factual disagreement in favor of the Respondents, concluding that Horry County's drainage improvements were working as intended. (R. p. 34, ¶81). Similarly, the ALJ heard a great deal of testimony from both sides about the impact the new development (and its new stormwater system) would have on flooding in Phase IIB. Again, there was disagreement among the witnesses on the extent to which the new development would contribute to Phase IIB POA's flooding, and, again, the ALJ resolved this factual disagreement in favor of the Respondents, concluding that flooding in Phase IIB would not be exacerbated by the new development. To be clear, Phase IIB POA is not asking this Court to disturb the ALJ's conclusions on flooding in Phase IIB.

While the issue occupied a great deal of testimony at trial, the likelihood and extent of flooding in Phase IIB is not a question presented in this appeal. Rather, this appeal focuses on

discrete legal determinations and preconditions and does not challenge the ALJ's weighing of witness testimony to conclude that historical flooding problems in Phase IIB have been alleviated. While Phase IIB POA does not agree with the ALJ's findings on these points, its history of, and concern for, flooding is only raised here so as to give context for the Appellant's involvement in this case.

Regulatory and Permitting Background

Stormwater is regulated on both a state and federal level. The basic function of stormwater regulation is to ensure control of stormwater runoff that is generated when precipitation from storms flows over land and impervious surfaces, picking up and transporting pollutants and sediment. Uncontrolled or untreated stormwater runoff can cause significant adverse impacts downstream by both increasing the quantity of water being released offsite and impacting downstream water quality through the transportation of common pollutants found in stormwater runoff. The quantity and quality of stormwater runoff is necessarily tied to development. At the most basic level, more development means more impervious surfaces, which yields more stormwater runoff with higher concentrations of pollutants.

Stormwater runoff from construction sites is particularly problematic, as construction activities significantly increase the chances that stormwater runoff will accumulate pollutants. As stormwater flows over the disturbed ground of a construction site, it can pick up pollutants like sediment, debris, and chemicals and transport these to a nearby river, lake, or coastal waterway.

For purposes of this appeal, it is important to distinguish between temporary stormwater tools used on a construction site and the permanent stormwater drainage system that accompanies

a development. On a construction site, temporary "BMPs" are used, mostly for the purpose of limiting the amount of sediment eroding from the unsettled, "disturbed" site. For instance, a developer may erect a silt fence to prevent sedimented runoff from escaping into a nearby creek. Once construction is complete, these temporary BMPs (tools, basically) are removed. In contrast, developments today are also required to have a permanent stormwater/drainage management system, which usually consists of fixed landscape features like detention ponds, underground detention systems, storm water wetlands and bioretention areas. These features are permanently maintained to control the volume and quality of stormwater runoff leaving a developed area.

South Carolina has regulatory programs in place to minimize and manage the stormwater runoff from both construction sites and new developments. When Deertrack Golf proposed a 287-home development by way of an 85-acre construction site, it triggered these regulatory programs and the necessity of a Stormwater Permit.

Because of the way that stormwater law has developed, three sets of regulations come into play under a single "Stormwater Permit." The minutiae of these complementary regulatory frameworks are of limited relevance to this appeal. Rather, at the outset, the most important thing to note is that the ALJ considered all three sets of regulations in relation to this proposed development. (See, e.g., R. pp. 19-21). In other words, there is no question that this project implicates all three sets of stormwater-related regulations: R.61-9, R.61-68, and R.72-300 *et seq*. As will be discussed later, the question is whether the ALJ erred in favoring one regulation over another.

The regulations embodied in R.72-300 *et seq* state a stormwater permit requirement as follows: unless exempted, "a person may not undertake a land disturbing activity without an

approved stormwater management and sediment control plan." R.72-305(A). In other words, all (non-exempt) development construction sites must have a permitted plan for handling stormwater. Naturally, the larger the construction site, the more demanding the stormwater management requirements. See R.72-305(B). These regulations contain requirements for temporary stormwater management on a construction site (See R.73-307(B)) and for a permanent stormwater system (See R.73-307(C)). Just the same, the regulations embodied in R.61-9 state a stormwater permit requirement for development construction sites and contain additional stormwater management requirements. See R.61-9.122.26.

Rather than issuing separate stormwater permits under R.72-300 *et seq* and R.61-9, compliance under the interrelated stormwater requirements is accomplished in one permitting action. Most often, rather than issuing an individually crafted permit, DHEC grants coverage under a general permit it has crafted: the "NPDES General Permit for Stormwater Discharges from Large and Small Construction Activities." DHEC granted Deertrack Golf coverage under this general permit in this case. In other words, Deertrack Golf's "Stormwater Permit" at issue in this case is actually coverage under a general stormwater permit. This distinction makes no practical difference.

Having covered R.72-300 and R.61-9, the final stormwater-related regulation considered by the ALJ in this case is R.61-68, the State Water Classifications and Standards. This regulation establishes classifications for our State's waters and establishes standards to protect and maintain those classifications. While R.61-68 is more than a stormwater regulation, the standards in R.61-68 underlie and dictate the stormwater treatment requirements imposed under R.72-300 and R.61-9. As R.61-68 states in its very first words, its Preamble: "This regulation also governs the

control of . . . stormwater discharges."

In sum, Deertrack Golf's plan for handling the temporary stormwater from its construction site and the permanent stormwater from its residential development must comply with R.61-9, R.61-68, and R.72-300, the requirements of which are to be embodied in Deertrack Golf's Stormwater Permit. While the separate regulatory schemes could make stormwater regulation appear convoluted, these regulations are written to function together efficiently and complementary, and DHEC's system of stormwater management has been in place for decades.

I. The ALJ Improperly Negated a Fundamental Regulatory Requirement to Justify his Preferred Outcome

The ALJ's ultimate holding – that despite an error in regulatory analysis by DHEC, its Stormwater Permit could be affirmed without modification – rests on a strained legal maneuver whereby the ALJ cancelled a fundamental stormwater regulatory requirement. Specifically, the ALJ erred first in artificially generating a conflict between complementary regulations and second by resolving that "conflict" by completely negating an important regulation. The ALJ's legal error requires remand for proper application of R.61-68's "pretreatment requirement."

A. The ALJ's Final Order and "Waters of the State"

A central issue in this trial was the presence of "waters of the State" on the project property. "Waters of the State" is a term of art defined under South Carolina law, and those waters are assigned specific protections and requirements in the aforementioned regulations. See S.C. Code Ann. § 48-1-10(2); S.C. Code Ann. Regs. § R.61-9.122.1(b). DHEC did not apply the regulatory protections and requirements afforded waters of the State and undertook its analysis as

though the property contained no waters of the State.[3] (See R. p. 18, ¶ 33). At trial, the Appellant argued for the presence of waters of the State and for consideration of the standards applicable thereto. (R. p. 78).

The ALJ found that a strict reading of the regulatory definition of "waters of the State" would encompass the existing ponds on the property. (See R. p. 19, ¶ 36). The ALJ then considered a regulation that applies only to waters of the State – R.61-68(E)(4). Consideration of this regulation further demonstrates that the ALJ was rightfully treating the existing ponds as waters of the State. It is in the ALJ's consideration of R.61-68(E)(4) where he makes a significant legal error.

As an initial matter, it is important to make clear that Deertrack Golf's stormwater plan, as permitted by DHEC, would not satisfy R.61-68(E)(4). Regulation 61-68(E)(4), referred to during this trial as the "pretreatment requirement," requires a "degree of treatment" before stormwater can be discharged into a water of the State. In other words, under this regulation, stormwater cannot simply drain into a water of the State, unless some stormwater "BMP" has been used to bring that stormwater to a minimum level of quality. DHEC found no waters of the State on the property, so it did not apply R.61-68(E)(4). However, DHEC's only witness,

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[3]Shannon Hicks is DHEC's manager for coastal stormwater permitting, and she was the only DHEC witness to offer testimony at trial. Ms. Hicks testified that it was her understanding that the project property contained no waters of the State and that DHEC's staff review of the Stormwater Permit application was undertaken with the understanding that the ponds on the property were not waters of the State. (R. pp. 538-539).

Further, Ms. Hicks added that DHEC's decision at issue in this case was made on the assumption that there were no wetlands and no waters of the State on the property. (R. p. 547). In making this assumption, she relied on information provided by the developer's consultant. (R. p. 549).

stormwater manager Shannon Hicks, made clear that if the existing ponds were in fact waters of the State, DHEC "would have to do a different review" in relation to pretreatment. (See R. p. 546). In particular, Hicks noted that "if waters of the State are on site and stormwater flows to those waters of the State, a pretreatment mechanism must be implemented." (R. pp. 547-548).[4] Deertrack Golf's permitted stormwater plan calls for some of the existing ponds to serve as stormwater ponds and to thereby receive stormwater with no pretreatment mechanism. (See R. p. 548). In short, under the approved plan, untreated stormwater would be flowing into waters of the State, contrary to the terms of R.61-68(E)(4).

Of course, when the ALJ corrected DHEC and found the existing ponds to be waters of the State, the stormwater plan's noncompliance with R.61-68's pretreament requirement became a problem. In affirming the Stormwater Permt as-is, the ALJ dispensed with this obvious problem by concocting a flawed legal theory: that R.61-68(E)(4) is in conflict with other stormwater regulations and therefore must be rejected.

Specifically, the ALJ cites provisions from R.61-9 and R.72-300, *et seq,* relating to stormwater ponds and construction of stormwater ponds and casually concludes that these "specific regulations" flatly and entirely prevail over R.61-68(E)(4), a rule "generally applicable to all waters of the State." (R. p. 21, ¶ 40). The ALJ held that these other stormwater regulations implicitly repealed R.61-68(E)(4) in this context. (See R. p. 38, ¶ 6).

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[4]To once more emphasize the point, Ms. Hicks testified that if the existing ponds are considered waters of the State, "there would have to be pretreatment provided for any flow, any stormwater flow that enters waters of the State." (Tr. Hicks depo, pp. 17).

B. The ALJ's Final Order Applies the Wrong Legal Analysis to any Purported Regulatory Conflict

Even if some manner of regulatory conflict exists here, the ALJ made a legal error in resolving that conflict by simply negating R.61-68(E)(4) as the more "generally applicable" regulation.

The ALJ's resolution of these "conflicting" regulations relies primarily on citation to one case, Atlas Food Systems & Service, Inc., v. Crane, 319 S.C. 556 (1995), for the proposition that "a specific statutory provision prevails over a more general one." (See R. p. 20 ¶ 38). Atlas Food Systems is the epitome of an all-or-nothing regulatory conflict, where the court faced the question of whether to apply a 3-year or 6-year statute of limitations. The court, of course, had no way to apply both limitations periods to a single cause of action, and one of the regulations had to fall in-total. See Atlas Food Systems, 319 S.C. at 558. Under such circumstances, the basic principle that "a specific statutory provision prevails over a more general one," as relied on by the ALJ, may be enough to resolve the conflict. However, outside of this very narrow, very rare instance of direct and irreconcilable contradiction, regulatory conflict cannot be resolved by casually speculating about which regulation is of more "general application," as the ALJ has done here. (See R. pp. 20-21).

Further, the ALJ erred even in his application of this one general principle, confusing subject matter specificity with the specificity of the actual regulatory language. Regulation 61-68(E)(4) could not be more specific in its language and in the requirements it imposes. The ALJ nevertheless finds it to be a "general regulatory requirement" because 61-68(E) is "applicable to all waters." (See R. p. 20, ¶ 38). Under the ALJ's interpretation, the most significant regulations

– those crafted to apply most widely – receive the least weight. The fact that R.61-68(E)(4)'s specific requirements apply to all waters of the State make those requirements more fundamental, not more "general."

In attempting to force the most simple framework for regulatory conflict overtop the nuanced interaction involved here, the ALJ also entirely failed to apply a fundamental principle of statutory/regulatory conflict: "Statutes in apparent conflict **should be construed, if possible, to allow both to stand and give effect to each**." James v. South Carolina Dept. of Transp., 393 S.C. 440, 445 (Ct. App. 2011), citing Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, (1994) (emphasis added). This principle applies with particular force when the regulations address the same subject matter – in *pari materia* – as they do here. See Powell v. Red Carpet Lounge, 280 S.C. 142, 145 (1984); Hodges v. Rainey, 341 S.C. 79, 88 (2000); Adoptive Parents, 315 S.C. at 544. In such case, the regulations must be "liberally construed" in favor of validity. Powell, 280 S.C. at 145. The Final Order makes no attempt at all to reconcile the regulations, but instead simply rejects application of Regulation 61-68. (See R. p. 21, ¶ 40). Contrary to the ALJ's conclusion, choosing not to apply one regulation is not is not a valid way "to construe [ ] potentially conflicting requirements in a manner that reconciles any inconsistency." (See R. p. 38, ¶ 6).

A couple of South Carolina cases are illustrative of this point. In Adoptive Parents v. Biological Parents, the Supreme Court faced the issue of resolving competing definitions of the same term of art. 315 S.C. at 543. To avoid an "apparent conflict among the various statutes," the Court construed the statutory language to be read together: "**to read the statutes in *pari materia*, the standard must be narrowed**." Id. at 544 (emphasis added). Rather than entirely

abandoning one standard, the Court interpreted the related standards to be applied consistently. In S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 429 (2010), the ALJ had interpreted two notice provisions as conflicting, thus invalidating one of those provisions. The Supreme Court, on the other hand, explored the policies and purpose behind the overlapping notice provisions and held that both should stand. Id. at 430. According to our Supreme Court, "if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." Hodges v. Rainey, 341 S.C. 79, 88-89 (2000). The ALJ faced a relatively intricate interaction between related, complimentary regulations and made no effort to resolve those regulations, improperly repealing R.61-68(E)(4). (See R. p. 38, ¶ 6 (discussing repeal by implication)).

Furthermore, if the ALJ believed that a conflict potentially existed between R.61-68(E)(4) and the aforementioned stormwater regulations, the ALJ was compelled to give deference to DHEC's interpretation of how those regulations should be resolved. Courts, including the ALC, must give deference to an administrative agency's interpretation of an applicable regulation. See, e.g., Media Gen. Commc'ns, Inc. v. S. Carolina Dep't of Revenue, 388 S.C. 138, 149 (2010). This includes deference to the agency's interpretation as expressed through testimony at trial. An example that bears close resemblance to the situation at hand is Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 639 (2012), where the Supreme Court was similarly tasked with interpreting the requirements of a DHEC regulation. As a basis for their analysis, the Supreme Court noted as follows: "we give deference to the interpretation of a regulation by the agency charged with it enforcement." Id. at 640. Relying on this rule, the Supreme Court deferred to the *testimony of a DHEC project manager*, during which she expressed her interpretation and

application of the requirement in question. Id. at 640. On the basis of this testimony, the Supreme Court held as follows: "Because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." Id. at 640-41.

Here, the ALJ did just the opposite, interpreting the regulations in direct contradiction to the testimony of DHEC's Shannon Hicks without providing any basis to deviate from DHEC's interpretation. Ms. Hicks, a stormwater manager, was the only DHEC witness to offer testimony at trial. Hicks was asked specifically about application of R.61-68(E)(4)'s "pretreatment requirement" to the existing ponds and plainly testified that the terms of R.61-68(E)(4) would apply to the existing ponds as "waters of the State":

> *Hicks:* [I]f waters of the State are on site and stormwater flows to those waters of the State, a pretreatment mechanism must be implemented.
>
> *Q:* Okay. Is it your understanding that the ponds that are at the site now are going to be incorporated into and become part of the stormwater system for this proposed development?
>
> *Hicks:* Some ponds are being incorporated into the proposed system.
>
> *Q:* Okay. **And are you saying that if these ponds are considered waters of the State, then under your rules, they would have to have pretreatment** . . . ?
>
> *Hicks:* **Under our rules, there would have to be pretreatment provided for any flow, any stormwater flow that enters waters of the State.**

(R. p. 548 (emphasis added)).

Based on Ms. Hicks' testimony, DHEC clearly does not interpret R.61-68(E)(4) as conflicting with other stormwater regulations and would have applied that regulation in-full if it had considered the existing ponds to be waters of the State. After finding the ponds to be waters

of the State, The ALJ applied a contrary interpretation of R.61-68(E)(4) in order to affirm DHEC's Stormwater Permit without modification. In doing so, the ALJ failed to give deference to DHEC's interpretation of its own regulations, as required by Murphy and many other South Carolina cases.

In sum, the ALJ undertook a vague, cursory analysis in essentially repealing the core regulatory requirement found in R.61-68(E)(4). Clearly South Carolina law demands more before a regulation can simply be vacated as contradictory, especially when doing so would conflict with the interpretation of the very agency applying that regulation.[5]

C. The ALJ's Final Order Finds a Regulatory Conflict When There is None

The ALJ ignored and rejected R.61-68(E)(4) on the basis of a purported conflict with certain stormwater regulations in R.61-9 and R.72-300 *et seq*. As will be explained in this section, these regulations were specifically crafted to be applied in concert, and DHEC regularly does just that. The true conflict that exists in this case is between the requirements of R.61-68(E)(4) and the ALJ's desired outcome in this case.

As a starting point, a review of the "conflicting regulation" cases cited by the ALJ reveals the misguided nature of the ALJ's conflict analysis. Specifically, the ALJ cited only one case, Atlas Food Systems & Serv., Inc., v. Crane, 319 S.C. 556 (1995), where a court found a regulatory conflict to be so significant to warrant ignoring/rejecting one regulation in favor of the

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[5]The ALJ also made passing reference to the general rule that a later enactment gets priority over an earlier conflicting enactment. (R. p. 37, ¶ 4). Applying that standard, Regulation 72-300 *et seq* was adopted in 2002, and Regulation 61-68 has been rewritten several times since then, most recently in 2008 and 2012. The regulatory conflict supposedly present here in no way fits the mold of a subsequent regulatory enactment intended to effectively repeal an earlier regulation.

other. (See R. p. 20, ¶ 38). Again, Atlas Food Systems presents the most direct, irreconcilable regulatory conflict imaginable: alternate statutes of limitation for bringing a cause of action (3 year and 6 year). Id. at 558. As that court recognized, clearly only one of these regulations could apply, and the regulations were in complete conflict. The regulatory interaction at hand bears no resemblance to this stark all-or-nothing scenario, but the ALJ reached the same conclusion: irreconcilable regulatory conflict. The purported regulatory conflict put forward by the ALJ is incomplete and artificial.

i. *Regulatory Overlap and Cross-Reference*

The first clue that these regulations are not truly in conflict is apparent from the number of cross references and the amount of overlap in the regulations. As discussed above, certainly R.61-68 is "broader" to the extent that it applies to more than just stormwater permits, whereas R.61-9 and R.72-300 are specific to stormwater. However, R.61-68 makes perfectly clear and perfectly explicit at the outset that it is to apply in the very context at hand – the very context where the ALJ found it to be irreparably conflicted:

> The water quality standards [R.61-68] also serve **as a basis for decision making** in other water quality program areas. National Pollutant Discharge Elimination System **(NPDES) permit limitations** for waste discharges **are based upon the classifications and water quality standards** of the receiving waters. **This regulation also governs** the control of toxic substances, thermal discharges, **stormwater discharges**, dredge and fill activities, and other water related activities.

R.61-68, Preamble (emphasis added). In layman's terms, the very first message of R.61-68 is that it applies to the Stormwater Permit at issue here (an NPDES general permit) and that it governs

the stormwater discharge proposed by Deertrack Golf.[6]

Further, while R.61-68 can apply to many types of discharges, R.61-68(E)(4) itself specifically provides for its application to stormwater discharges like the ones at issue here. After announcing the "pretreatment requirement" for all "discharges," (E)(4) explains how that requirement is to be carried out for "control of stormwater runoff." R.61-68(E)(4). The idea that R.61-68(E)(4) has been implicitly repealed in the context of stormwater regulation is contrary to these plain terms.

Finally, R.61-68 in fact explains how the application of its requirements are affected by the issuance of a stormwater permit, and it of course does not provide that the pretreatment requirement is inapplicable. Rather, when a party is granted a stormwater permit, DHEC will not apply R.61-68's bacterial limit requirements. See R.61-68(E)(14)(c)(13). The fact that Regulation 61-68 specifically anticipates and addresses the potential for an actual conflict between its requirements and the regulation of stormwater even further diminishes the ALJ's conclusion.

ii. *The Regulations Themselves*

The ALJ does not identify a specific regulatory conflict per se, but rather generally references a number of stormwater provisions, all of which mention stormwater ponds or their construction.[7] Deertrack Golf's permitted stormwater plan calls for some of the existing ponds to be modified and serve as stormwater ponds for the new development. (See R. p. 548). The ALJ's

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[6]The Court can take judicial notice of the fact that Regulation 61-68 was most recently rewritten in 2012, at which time this language was obviously kept.

[7]Stormwater ponds are a permanent stormater management tool frequently utilized in development.

conclusion is that these "specific regulations governing the construction and use of stormwater ponds" prevail over the pretreatment requirement. (See R. p. 21, ¶ 40). In other words, the ALJ believes that the stormwater regulations which allow Deertrack Golf to convert the existing ponds (waters of the State) into stormwater ponds are superior to the requirement in R.61-68(E)(4) that discharges into waters of the State (into the ponds) receive "pretreatment." To put it simply, the ALJ has provided no reason why it has to be an either-or proposition.

First of all, the ALJ received no testimony from DHEC on what R.61-68(E)(4)'s requirements would entail in this case. Again, the relevant portion of (E)(4) requires that all stormwater discharges into waters of the State "receive a degree of treatment and/or control" to make that discharge consistent with applicable water quality law. Not a single witness testified about what a viable "degree of control" or "degree of treatment" would mean in relation to the existing ponds. Nevertheless, the ALJ concluded that because the existing ponds would be used to hold stormwater, it would be illogical to require a degree of control/treatment for discharges into the ponds. (See R. p. 37, ¶ 5).

In this way, the ALJ's effective repeal of R.61-68(E)(4) is not at all based on a conflict in regulations, but on the fact that the ALJ does not agree with the requirements of R.61-68(E)(4). It is entirely possible to provide a degree of treatment/control to the stormwater discharging into the existing ponds, even if those ponds are themselves being used to hold stormwater. But the ALJ concludes, contrary to the plain terms of R.61-68(E)(4), that Deertrack Golf should not have to do so. Again, this conclusion is based on an assumption of what treatment/control means in this instance, a point on which there is no testimony of record. From Appellant's perspective, control/treatment could mean any number of things in this context, and could potentially include

measures to further limit the Appellant's flooding risk. For DHEC's part, it apparently believes that it would be possible and plausible to apply a degree of treatment/control to water entering the ponds. See supra, testimony of Shannon Hicks.

In each of the "regulatory conflict" cases cited by the ALJ, the court is able to point to specific opposing regulations and to explain why these regulations *can not* be applied together. The ALJ has pointed to regulations that are intended to be complementary and attempts to explain why the *should not* be applied together. The existing ponds are waters of the State, and neither the ALJ nor Deertrack Golf can point to a permit, statute, or regulation under which those ponds are exempt from the "pretreatment requirement" of R.61-68. The "regulatory conflict" found by the ALJ is a legal and factual fiction intended to sidestep this conclusion.

II. The ALJ Failed to Make any of the Necessary Findings Related to the Presence of Waters of the State on the Project Site

As previously discussed, DHEC did not consider any waters of the State in conducting its review. (R. p. 548). When the ALJ found waters of the State on the site, he considered the application of R.61-68(E)(4) to those waters (and improperly rejected that application), but did not consider any of the other regulatory protections specifically applicable to waters of the State. As outlined in this section, the proposed project's impact on waters of the State is a significant factor in a number of regulatory standards applicable in this case, but neither DHEC nor the ALJ has undertaken the required analysis of these standards. Because DHEC's "review was based on the assumption that there were [ ] no waters of the State on this property," it fell to the ALJ to consider whether that review was still viable in light of his finding that waters of the State

actually are present on the property. However, the ALJ's only consideration of the regulatory requirements applicable to waters of the State was when he rejected application of R.61-68(E)(4). In short, the ALJ has failed to consider or account for the additional regulatory standards that would be applicable now that waters of the State are present on the property.

For instance, the Final Order and Decision, while referring to Section 61-68(E)(4) of the DHEC regulations, flatly ignores a number of other important provisions in Regulation 61-68 relating to waters of the State. The entire purpose of R.61-68 is in fact to "provide a minimum level of protection to all waters of the State." R.61-68(A)(1)(c). In doing this, "the Department shall emphasize a preventive approach in protecting waters of the State." R.61-68(A)(3). Further, in protecting "waters of the State, consideration needs to be given to the control of nutrients reaching the waters of the State." R.61-68(E)(11). The regulation also provide a number of specific provisions applicable to waters of the State, which have not been considered in relation to this Stormwater Permit. A good example is Section 61-68(E)(10), which states that "[d]ischarge of fill into waters of the State is *not allowed unless* the activity is consistent with Department regulations and will result in enhancement of classified uses with no significant degradation to the aquatic ecosystem or water quality." (emphasis added). Deertrack Golf's plan calls for the discharge of fill into waters of the State, but neither DHEC nor the ALJ has considered whether this limitation is satisfied. See also, 61-68(A)(4), 61-68(E)(1), Section 61-68(F)(1)(a), and Section 61-68(G).

Some of the other stormwater authorities similarly give special attention to waters of the State. Regulation 61-9.122.26(a) directs DHEC to consider the location of the stormwater "discharge with respect to waters of the State," "[t]he quantity and nature of the pollutants

discharged to waters of the State," and whether a stormwater discharge is "a significant contributor of pollutants to waters of the State." Deertrack Golf's Stormwater Permit itself requires a permit applicant to identify waters of the State (General Permit, §§3.3(B)(4), (C)(6)) and to account for certain impacts thereto (General Permit, §§3.4(G)(1), (G)(2); (H)).

The bottom line here is that the ALJ's Order attempts to have it both ways. The ALJ recognized that DHEC's failure to consider the existing waters to be "waters of the State" was contrary to the plain definition of that term. To correct that potential error while at the same time affirming DHEC's Permit, the ALJ issued a vague conclusion on the presence of waters of the State, vacated an important regulatory protection for waters of the State, and ignored the remaining applicable regulations. The presence of waters of the State may or may not require a change in the plan permitted by DHEC, but what is clear is that neither DHEC nor the ALJ have considered it.[8]

III. The Subsequent Declaration of Federal Jurisdiction Eviscerates the ALJ's Final Order and Terminates Permit Coverage

Affirming the ALJ decision would mean approving a Stormwater Permit and Coastal Zone Consistency Certification that, without significant modifications, do not and cannot authorize Deertrack Golf's development plan.

Starting at the earliest stages of this case, the Appellant has maintained that the golf course property contains federally jurisdictional waters – "waters of the United States." (See

[8]Indeed, this Court remanded the case to DHEC because DHEC stated that it needed to take additional administrative action.

Amended Prehearing Statement, R. pp. 77-84). This is a critical question, as will be explained below, because the presence of federal waters would mean that a federal permit is required as a *precondition* of the Stormwater Permit and would be a significant factual and legal consideration in the permitting process.

Prior to the trial of this case, the U.S. Army Corps of Engineers[9] had issued a jurisdictional determination that the golf course property contained no federal waters. At trial, the Appellant attempted to introduce evidence and testimony countering that determination, but the ALJ, by order on motion in limine, refused to admit any such evidence, finding the Army Corps' determination conclusive. (R. pp. 1-4). On the presence of federal waters, the ALJ held in his Final Order as follows: "**It is uncontested that the U.S. Army Corps of Engineers determined that there are no waters of the United States on the site**. This conclusion involves considerations entirely of federal law turning on the presence of interstate commerce." (R. p. 39, ¶ 7 (emphasis added)). In short, because the Army Corps had found no federal waters, the ALJ did not consider the presence of federal waters in relation to the approvals at issue in this case.

However, after the ALJ's Final Order, on March 17, 2010, the Army Corps issued a new, superseding determination ("subsequent jurisdictional determination"), finding a section of federally jurisdictional "waters of the U.S." on the golf course property. (R. pp. 695, 700). In other words, there are now "waters of the United States" on the subject property, whereas there were no recognized federal waters when DHEC made its decisions at issue here or when the ALJ issued its affirming Order.

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[9]The federal agency charged with regulating "federal waters" in this context.

In the wake of the Army Corps' jurisdictional correction, this Court has held this appeal in abeyance (Order of July 9, 2010), stayed this appeal (Order of October 6, 2010), and remanded this case to the ALJ (Order of January 12, 2012), each time with the expectation of the parties resolving how the subsequently-declared federal waters would impact the Stormwater Permit, CZC Certification and this appeal. Despite the Court providing repeated opportunities, the parties have not been able to resolve that issue amongst themselves. What follows in this section is an explanation of why, in light of these "new" federal waters: the Permit at issue in this appeal no longer authorizes the construction activities proposed by Deertrack; the ALJ's Final Order is legally flawed; and reversal is required. A legal pillar on which the ALJ's Final Order rests– that the Army Corps' finding of no jurisdictional waters was accurate and conclusive– has been entirely undercut. This Court cannot affirm the Final Order, the Stormwater Permit or the CZC Certification without additional factual findings from DHEC and the ALJ.[10]

A. Federal Waters are a Critical Consideration in the Approvals at Issue Here

In light of the subsequent jurisdictional determination, the development plan permitted and certified by DHEC now requires a federal Clean Water Act permit. The fact that DHEC's

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[10]While this Court typically cannot consider new evidence that arises after a trial, this case presents unique circumstances. Namely, the issue of the subsequent jurisdictional determination, dated March 17, 2010, has already been before this Court and the ALC (the trial court) and is therefore proper for inclusion in the record on appeal.

On December 8, 2011, the Appellant filed a Motion to Remand with this Court, attaching a number of exhibits related to the subsequent jurisdictional determination, and arguing for remand to the ALC and DHEC for consideration of this new and additional evidence. (See R. p. 661). This Court granted that Motion on January 12, 2012, and the case was remanded to the ALC for "additional administrative action." (R. p. 43). In short, the March 17, 2010 jurisdictional determination by the Corps of Engineers, along with a number of related documents, have been "presented to the lower court or tribunal" under South Carolina Appellate Court Rule 210(c) and are proper content in the record on appeal.

Permit and Certification analysis, and the ALJ's review thereof, took place before the need for this federal permit arose creates significant problems with Deertrack Golf's project approvals.

i. *Federal Permit is a Precondition to State Stormwater Permit*

As previously discussed, Deertrack Golf's development plan calls for filling most of the ponds and channels on the golf course property. Some of the channels proposed and approved for filling have subsequently been declared "waters of the United States." (R. pp. 665). Placing fill into these federal waters triggers the requirement for a federal permit under Section 404 of the Clean Water Act, under a program administered by the U.S. Army Corps of Engineers. 33 U.S.C. § 1344.[11] However, Deertrack Golf has not sought or obtained a federal permit to fill the waters of the United States that would be filled under the development plan at issue in this case. The problem of course lies in the fact that when DHEC permitted and certified the development plan, and when the ALJ affirmed DHEC, this federal permit requirement was not evident.

When a Section 404 permit is required from the Army Corps, this permit must be obtained as a *prerequisite* and *precondition* to obtaining a stormwater permit from DHEC. This requirement is reflected at a number of places in the stormwater authority discussed above, most notably in the NPDES General Permit granted to Deertrack Golf – the very Stormwater Permit at issue in this case. Particularly, Deertrack Golf's Stormwater Permit provides as follows: "If a US

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[11]Details of the federal permitting program are not particularly relevant here, but the framework for that program is as follows.

The Clean Water Act establishes a comprehensive program designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the statute prohibits the discharge of pollutants, including dredged or fill material, into federal waters, except as in compliance with specific provisions of the Act. 33 U.S.C. § 1311(a). One of those provisions is Section 404, 33 U.S.C. § 1344, which authorizes the Army Corps of Engineers to issue permits for the discharge of fill into federal waters.

Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA Act for permanent or temporary storm water control structures, **DHEC may not grant you coverage under this [Stormwater Permit] until the 404 Permit has been issued and is effective**." (R. p. 485, Part 2.1(C) (emphasis added)). Because of the subsequent jurisdictional determination, the development plan for which Deertrack Golf obtained a Stormwater Permit requires a "404 Permit" which has not been obtained, and this requirement in Part 2, 2.1(C) has therefore not been met.

Critically, the Stormwater Permit goes on to explain the exact consequences of failing to meet such a prerequisite, even if, as here, that failure arises after Stormwater Permit coverage has been granted: "You may have to take certain actions to be eligible for coverage under this permit. **In such cases, you must continue to satisfy those eligibility provisions to maintain permit authorization. If you do not meet the requirements that are a pre-condition to eligibility, then resulting discharges constitute un-permitted discharges.**" (R. p. 482, Part 1.3 (emphasis added)). Under the plain language of Deertrack Golf's own Stormwater Permit, the only possible conclusion is that Deertrack Golf does not meet a necessary Permit precondition and that, without additional action, its development plan no longer has a valid Stormwater Permit.

The federal permit prerequisite is similarly stated in other applicable stormwater authority. For instance, R.61-9, which underlies the Stormwater Permit, makes clear that federal Clean Water Act approvals must be in place *prior to* DHEC's approval of a stormwater plan. In fact, R.61.9-122.4, entitled "Prohibitions," provides that "no [stormwater] permit may be issued" unless the permit provides for compliance with the federal Clean Water Act and any Clean Water Act certifications have already been obtained. This Court has no basis to determine whether the

Stormwater Permit ensures compliance with the Clean Water Act, as the ALJ declined to hear evidence on this point during the trial and as both DHEC and the ALJ declined to take any remedial action when this Court gave that opportunity on remand. In light of the subsequent jurisdictional determination, the Stormwater Permit does not comply with R.61-9, and this Court cannot affirm the non-compliant permit.

In short, the development plan DHEC approved under the Stormwater Permit now requires a federal permitting prerequisite; Deertrack Golf can either solidify its current Stormwater Permit by obtaining that federal permit or modify its development plan so that no federal permit is required, in which case DHEC would need to review those new plans for Storwater Permit coverage. In either case, this Court cannot affirm the Stormwater Permit as it now exists.

ii. *Impact on Federal Waters Must be Considered during State Permitting Process*

Aside from the explicit requirement that the federal permit be obtained before the Stormwater Permit, the impact of the development plan on federal waters *should have been* a significant factor in DHEC and the ALJ's consideration of this proposed project. But because DHEC and the ALJ were operating under the Army Corps' faulty finding of no jurisdiction, and because the ALJ excluded any evidence of the presence of federal waters at trial, neither has made the required findings on this point, and the Final Order therefore cannot be sustained.

The declaration of federal jurisdiction completely changes the factual and legal underpinning of the Permit and Certification at issue here. As such, quite a number of applicable provisions would prompt DHEC to consider this project's impact on federal waters in the context

of a stormwater permit and CZC certification. But more than that, Deertrack Golf's plan to place fill into waters that have been declared "waters of the U.S." implicates an entirely new regulatory requirement, no part of which has been considered by DHEC or the ALJ.

In particular, R.61-101 spells out the requirement that any party undertaking construction which may result in discharge of fill into federal waters is required to obtain a certification from DHEC under R.61-101.[12] See R.61-101.A(2). Under R.61-101, DHEC must prepare a written assessment of the water quality impacts of the proposed project, make conclusions about compliance with water quality standards and protection of classified uses, and issue a water quality certification for the project if it qualifies. See S.C. Code Regs. R.61-101.F(1).

Just like with the federal Army Corps permit, DHEC's certification under R.61-101, if implicated, is a *precondition* to Stormwater Permit coverage. See R.61-9.122.4(b).[13] DHEC did not issue a certification of this project under R.61-101, and because the ALJ excluded any evidence of the existence of federal waters, the ALJ did not consider whether DHEC should have issued such a certification.

As a result of the subsequent jurisdictional determination, the development plan at issue in this case now requires a R.61-101 certification from DHEC, and that certification must be issued before Deertrack Golf can receive coverage under the Stormwater Permit at issue in this

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[12]R.61-101 was enacted pursuant to Section 401 of the Clean Water Act. The regulation encompasses state water quality standards that are only implicated when federal waters – waters of the U.S. – will be filled. DHEC's certification pursuant to R.61-101 is also known as "401 certification" and "water quality certification."

[13]"No permit may be issued . . . [w]hen the applicant is required to obtain a State or other appropriate certification under section 401 of CWA . . . and that certification has not been obtained or waived."

case. The ALJ's affirmation of the Stormwater Permit and CZC Certification without the requisite R.61-101 certification cannot stand.

B. DHEC has Acknowledged that Additional Action is Necessary but has Declined to Voluntarily Take that Action

For DHEC's part, it has acknowledged the federal permitting prerequisite and the legal significance of the subsequent jurisdictional determination, but it has taken no action.

Shannon Hicks is DHEC's manager for coastal stormwater permitting, and she was the only DHEC witness to offer testimony at the trial of this case. Following the Army Corps' subsequent jurisdictional determination, while the case was pending before this Court, Ms. Hicks issued a letter to Deertrack Golf wherein she flatly informed Deertrack that it "**does not have authorization and certification from the Crops of Engineers and DHEC to impact waters of the United States.**" (R. p. 671). Further, because the Stormwater Permit was issued based on the representation that there were no federal waters on the golf course property, Ms. Hicks informed Deertrack Golf that "**[i]t is a condition of your [stormwater] permit that there be no waters of the United States on the site.**" Id. (emphasis added). Ms. Hicks letter could be no more unequivocally in support of the Appellant's argument on this issue: "Subsequent to the ALC hearing in this case, the Corps issued a modified jurisdictional determination that shows there are waters of the United States on the site. **This requires changes to your permit.**" Id. (emphasis added).[14] Ms. Hicks letter directly states the argument the Appellant has been making throughout this section: that the Stormwater Permit at issue in this case can no longer authorize Deertrack

[14]Ms. Hicks also variously stated that: "the permit needs to be modified," and "additional administrative action on the permit [is] warranted." Id.

Golf's existing development plan.

Despite DHEC's recognition, as evidenced in Ms. Hicks' letter, that the federal waters necessitate a new analysis with new findings, the agency has declined to take any additional administrative action and has not modified or revoked the Stormwater Permit, even though the Court has stayed this appeal and remanded this case for that very purpose. The Appellant respectfully submits that through its inaction, DHEC has forced the Court's hand, and reversal and remand of the Stormwater Permit is now necessary to compel additional administrative action. This conclusion is bolstered by consideration of the alternative course of action. Namely, if this Court were to affirm the ALJ's Final Order, and thereby the Stormwater Permit, it would be upholding a permit that without question cannot authorize the existing proposed project. In addition to being contrary to law, affirming an invalid permit would throw this case into even further confusion, potentially clearing the way for Deertrack Golf to proceed with the project as-is, and without meeting the legal requirements of R.61-101 or R.61-68.

Under the development plans proposed by Deertrack Golf and approved by DHEC, most of the areas that are now deemed "waters of the United States" would be filled. There can be no dispute then that the Stormwater Permit will have to be modified before construction can commence on the Deertrack Golf site. In short, the only alternative to reversal or remand of this case is upholding a Stormwater Permit that "requires changes" and "needs to be modified" through "additional administrative action," with the hopes that DHEC will find some mechanism to bring that Stormwater Permit back before the agency for the necessary changes. (See R. pp. 671-672.)

CONCLUSION

WHEREFORE, the Appellant seeks an Order: 1) reversing the Final Order and Decision of the Administrative Law Court affirming DHEC's Stormwater Permit and Coastal Zone Consistency Certification; 2) remanding the case to the ALC for application of the regulatory standards applicable to "waters of the State," including R.61-68(E)(4); and/or 3) remanding the case to DHEC for consideration of necessary modifications to the Stormwater Permit in light of federal waters.

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March 25, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

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

vs.

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

vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the Final Brief of Appellant and Final Reply Brief of Appellant counsel for the Respondents, by placing copies of same in the United States Mail, addressed to:

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March 25, 2014