STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, ... Petitioners,

vs.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, ... Respondents.

BRIEF OF PETITIONERS ON WRIT OF CERTIORARI

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October 2, 2014

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B. Injecting a New Requirement that a Plaintiff Must Have a Property Interest in the Area where the Challenged Activity is Located to Establish an Injury-in-Fact?; and

C. Requiring Proof on the Merits or Proof of a Future Permit Violation in order to Establish a Causal Connection for Purposes of Standing, Despite the Fact that the Challenged Activity in this case is a Permit Authorizing the Excavation of the Lily Pad Pond that Petitioners Enjoy Viewing?

II. When the Court of Appeals Agreed with Petitioners that DHEC's Scope of Review Requires it to Consider the "Overall Project" and not just the area covered by the Nationwide Permit, did it err in failing to remand the decision to DHEC with instructions to consider the impacts of the "Overall Project," especially in light of information that impacts to the Lily Pad Pond, as a Water of the State, were not included in DHEC's Nationwide Permit review?

III. Did the Court err in concluding that Roper Pond has valid 401 Certification when the project includes impacts beyond those reviewed and authorized by the Nationwide Permit and DHEC's 401 Certification of that permit?

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STATEMENT OF THE CASE

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a storm water permit and thereby grant coverage under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") General Permit to Roper Pond, LLC ("Roper Pond"). Roper Pond requested the storm water permit and coverage under the NPDES permit to build a high density apartment complex on a 12.75 acre tract that includes 1.8 acres of wetlands, lying immediately adjacent to the Town of Arcadia Lakes in Richland County, South Carolina. The Petitioners challenge the storm water permit and corresponding coverage under the NPDES permit because Roper Pond's project fails to meet all of the legal requirements for those authorizations, including the requirement to obtain the appropriate State approvals for dredging and excavation of an on-site pond.

A hearing was conducted on September 4-5, 2009, in the Administrative Law Court. Administrative Law Judge John D. McLeod issued a final order and decision on January 21, 2010, affirming the DHEC decision and ruling that the Petitioners lacked standing to maintain this action. The Petitioners filed a Motion to Reconsider and For Stay on February 1, 2010. A hearing on the motion was held on March 23, 2010. Also on March 23, 2010, the Administrative Law Court issued an Order for Temporary Stay pending a decision on the Motion to Reconsider. On April 1, 2010, the Administrative Law Court issued an Order Denying Motion for Reconsideration and For Stay.

On April 20, 2010, Petitioners filed a Notice of Appeal. The Court of Appeals heard oral arguments on May 8, 2012 and issued an Opinion on March 6, 2013, affirming

the ALC's Order. The Appellants filed a Petition for Rehearing on March 21, 2013. On June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion.

On July 12, 2013, the Petitioners filed a Petition for Writ of Certiorari, which was granted by this Court's Order of August 22, 2014.

ARGUMENT

Summary of Argument

This case presents issues of environmental standing and the scope of the South Carolina Department of Health and Environmental Control's authority to review water quality impacts to waters of the State.

The Court of Appeal's Opinion contradicts this Court's well-established law on standing in environmental cases by: (1) creating a new requirement that a Plaintiff must have a property interest in the property where the challenged activity will occur in order to establish an injury-in-fact; (2) requiring that a Plaintiff must prove success on the merits or a future permit violation to establish a causal connection between the injury and the challenged activity; and (3) dismissing aesthetic and recreational interests as insufficient to confer standing. The Court of Appeals' Opinion is in direct conflict with prior standing decisions of this Court, which make it plain that a Plaintiff may challenge state agency authorizations for activities that occur on another's property if those activities injure the Plaintiff's recreational or even aesthetic interests. The ALC erroneously confused the gatekeeping role of standing – i.e., a test for whether a citizen has sufficient stake to challenge state action to grant a particular administrative authorization – with the

subsequent step of resolving the merits of the challenge the citizens seeks to bring. In effect, the ALC has made it harder to challenge a faulty DHEC permit for a major, polluting project than it would be to challenge a corner store's liquor license.

The new, unjustifiably burdensome requirements for standing that a Plaintiff have a property interest in the area over which the challenged activity will occur, as well as prove either the merits or a future permit violation, are a significant divergence from well-established standing law.[1] Neither of these standards has been applied by this State's appellate courts or any federal court, and, indeed, both federal and South Carolina courts hold the contrary. Instead these new requirements muddy the waters of this state's carefully crafted standing law and will likely have far-reaching implications for citizens and municipalities in their efforts to protect the aesthetic, recreational and environmental qualities of their communities.

On the merits, the Opinion inconsistently addresses the question of DHEC's scope of review under the Section 401 water quality certification program. The Court of Appeals first agrees with Petitioners that DHEC has broad authority, and indeed is required to consider the "overall project," including impacts beyond those specifically authorized by a United States Army Corps of Engineers ("Corps") permit, but then arrives at a conclusion which limits DHEC's scope of review under the 401 certification program to the Corps' scope of review under the CWA. The lower court's conclusion is contrary to this Court's

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[1] This new standard of proving success on the merits or a future permit violation as a prerequisite to standing has already been cited by the Administrative Law Court in granting a motion for summary judgment for lack of standing in the case of *Preservation Society of Charleston, et al. v. S.C. State Ports Authority*, Docket No. 13-ALJ-07-0056-CC, filed April 11, 2014.

prior interpretations of state versus federal jurisdiction of waters, holding that DHEC is required to review impacts to waters of the State beyond those governed under the Federal Clean Water Act. *Spectre v. DHEC*, 386 S.C. 357, 688 S.E.2d 844 (2010); *Georgetown County LWV v. Smith Land Co. Inc.*, 393 S:C. 350, 713 S.E.2d 287 (2011).

The Court of Appeals agrees with Petitioners' arguments that DHEC has broad authority to consider the "overall project," including impacts beyond those specifically authorized by a Corps Nationwide Permit, but then fails to apply its conclusions to the certification and General Permit coverage at issue in this appeal.

Overview of the Case

Roper Pond, LLC's Proposed Residential Development Project

Roper Pond, LLC, owns 12.75 acres of property which includes 1.8 acres of wetlands and waters of the United States delineated by the U.S. Army Corps of Engineers as being protected under the federal Clean Water Act. (App. pp. 546-553; 554-560; 567-574). A majority of this jurisdictional water consists of a pond, known as the "lily pad pond" or "Roper Pond," depicted on plans submitted by Roper Pond, LLC. (App. pp. 546-553; 554-560; 567-574). The Roper Pond property and the lily pad pond are located on Trenholm Road directly adjacent to the Town of Arcadia Lakes. The pond is visible from Trenholm Road when entering the Town of Arcadia Lakes and is covered in lily pads. (R. pp. 931-35). The pond drains through a pipe under Trenholm Road directly into Cary Lake, a portion of which lies within the Town of Arcadia Lakes. (App. pp. 546-553; 554-560; 567-574).

As part of its development, Roper Pond, LLC sought authorization to fill 0.075 acres of wetlands for a road crossing and a building pad. (App. pp. 567-574). Roper Pond, LLC, plans also included dredging and excavation of all of the lily pad pond, which is the majority of the remaining 1.8 acres of federally jurisdictional wetlands on the property. Roper Pond, LLC, seeks to use the lily pad pond as a storm water treatment facility, namely a retention pond.

Summary of Permitting Requirements for the Proposed Residential Development

In order to undertake the proposed multi-family residential construction activities on the 12.75 acre tract, Roper Pond, LLC, has to obtain a number of approvals from the S.C. Department of Health and Environmental Control ("DHEC") and the U.S. Army Corps of Engineers. One of those approvals is a DHEC stormwater permit for land-disturbing activities in connection with the proposed residential development.[2] *See* 24 S.C. Code Ann. Regs. § 61-9.122.26(c). Regulation 61-9.122.28(a)(2) authorizes DHEC to issue general

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[2] Prior to conducting any land-disturbing activities, an applicant must apply for a stormwater permit from DHEC. DHEC issues the stormwater permit in the form of granting coverage under the NPDES General Permit for Storm Water Discharges for Small and Large Construction Activities, as in the case of Roper Pond, LLC's permit.

Section 402 of the Clean Water Act established the NPDES program and delegates authority to the States to operate the NPDES permit program. The NPDES program is the Clean Water Act's permitting system for both point and nonpoint sources of pollution. In this case, we are dealing with a permit for nonpoint source pollution in the form of stormwater and other runoff from the Roper Pond construction site.

Construction activities that disturb more than one acre are regulated under the NPDES stormwater permit program. S.C. Code Ann. Regs. § R.61-9.122.26(b)(15). Operators of these regulated construction sites are required to obtain coverage under a state NPDES permit, also called a stormwater permit. S.C. Code Ann. Regs. § R.61-9.122.26(a)(9)(B). This portion of the Clean Water Act was enacted based on recognition that stormwater runoff had become a primary source of water pollution in many areas of the country. The purpose of the NPDES stormwater permit requirement is to ensure that operators of construction sites implement stormwater pollution control measures.

stormwater permits for discharges for categories of stormwater sources. On August 1, 2006, DHEC issued such a permit, Permit No. SCR100000, entitled "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities" pursuant to Regulation 61-9.122.28(a)(2). To have a valid stormwater permit, the residential construction activities proposed by Roper Pond, LLC require approval under this NPDES General Permit for Storm Water Discharges (hereinafter "NPDES General Permit").

Roper Pond, LLC submitted a Notice of Intent for Stormwater Discharges seeking approval for coverage under the NPDES General Permit for its land-disturbing activities. (App. pp. 561-562). The Notice of Intent requires the applicant to identify all jurisdictional wetlands in the project area, whether there will be any impacts to those wetlands from the project, and the amount of wetlands proposed to be impacted.

Critically, the NPDES General Permit requires an applicant to obtain any required wetlands permit before DHEC will grant coverage under the NPDES General Permit.

The wetlands permit is a Clean Water Act §404 permit from the U.S. Army Corps of Engineers ("Corps"), which is triggered if an applicant proposes to place fill material in wetlands that are waters of the U.S. 33 U.S.C.A. § 1344(a). The Corps §404 permit in turn triggers the requirement for a §401 Water Quality Certification from DHEC that the §404 Permit is consistent with the §401 water quality regulations and State water quality standards. *See* 33 C.F.R. § 330.4 & S.C. Code Ann. Regs. 61-101, *et seq*. DHEC Regulations 61-101 govern the process and standards DHEC must follow and apply in its 401 certification review. S.C. Code Ann. Regulation 61-101.A.(2) states that "no Federal

license or permit is to be granted until such [401 water quality] certification is obtained." *See also* 33 U.S.C. § 1341.

The dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC's review authority over waters of the State derives from the Pollution Control Act at § 48-1-10, *et seq.*, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.

The Clean Water Act also authorizes categories of general permits under § 404 called Nationwide Permits for certain activities deemed to have minimal adverse environmental impacts. 33 U.S.C.A. § 1344(e)(1). If a proposed project falls under one of these NWPs, the Corps will not undertake an individual 404 review. Specific to this case, the U.S. Army Corps of Engineers issued Nationwide Permits #29 and #39 on March 12, 2007. 72 FR 11092 (11123). Nationwide Permit #29 applies to residential developments and Nationwide Permit #39 applies to commercial and institutional developments.

DHEC may issue 401 water quality certifications for Nationwide Permits, and it did so on May 11, 2007 for NWPs #29 and #39, along with a number of other NWPs not relevant to this appeal. The certifications included general conditions that must be met in order for the DHEC §401 water quality certification to be valid and the Nationwide Permits to be effective. (App. p. 585; S.C. Code Ann. Reg. 61-101.A). The general conditions of that certification require DHEC to consider the "overall proposed project," including "all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by the NWP." (App. p. 585). The general conditions say

that "Impacts to . . . adjacent waterbodies or wetlands resulting from the activity will be considered during the review of these actions." (App. p. 585).

In summary, for the Corps § 404 permit to be issued and effective, the project must have a DHEC 401 water quality certification. In this case, where there is a Clean Water Act § 404 Nationwide Permit for which DHEC has issued a 401 water quality certification with conditions, the project must meet the conditions of DHEC's NWP 401 water quality certification in order to qualify for coverage under that NWP certification. (App. p. 585). To qualify for coverage and have an approved and effective Section 404 Nationwide Permit, DHEC must determine that the project meets its Section 401 water quality certification general conditions.

Again, the NPDES General Permit conditions expressly require that any Corps of Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (App. p. 499). Section 2.1(C) of the NPDES General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective."[3] (App. p. 499)

Neither a §404 NWP nor a §401 water quality certification of the NWP were properly issued to Roper Pond, LLC prior to DHEC's approval under the NPDES General

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[3] On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 ("Guidance Document"). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

Permit. And the Roper Pond project does not qualify for NWP 401 certification because the dredging and excavation were not disclosed in its application nor considered by DHEC in reviewing the project for compliance with the general conditions of the NWP 401 certification.

There are 1.8 acres of wetlands and waters of the United States on the subject property. As part of its development plans, Roper Pond, LLC, proposed to fill 0.075 acres of these wetlands and to dredge and excavate the lily pad pond, which composes the majority of the 1.8 acres of wetlands. Roper Pond, LLC, sought approval to fill those 0.075 acres of wetlands under the Corps' 404 NWP program; however, Roper Pond, LLC, did not properly disclose the dredging and excavation of the pond in its joint application and did not seek or obtain the requisite approval for the dredging and excavation activities from DHEC.

In this case, DHEC did not conduct a review to ensure that its 401 certification conditions of the Nationwide Permit had been met. Indeed the project fails to meet those qualifying conditions. Because of this failure Roper Pond does not have a valid 401 water quality certification for its Nationwide Permit. DHEC granted coverage under the NPDES General Permit despite the fact that Roper Pond, LLC, did not have that certification – a fatal flaw in the permit at issue.

The ALJ and Court of Appeals compounded DHEC's error by upholding the DHEC decision and by concluding that DHEC has no authority to consider water quality impacts resulting from the dredging and excavation of the pond.

DHEC's Review of the Proposed Project

Roper Pond, LLC, submitted two applications – one to DHEC's storm water department seeking coverage under the NPDES General Permit, and one to the Corps and to DHEC's 401 water quality certification department seeking approvals under a Nationwide Permit and certification. Both of these applications were required because Roper Pond, LLC, needed both a stormwater permit and a 404 wetlands permit and certification.

Jill Stewart is the manager of the Stormwater Permitting Section at the S.C. Department of Health and Environmental Control ("DHEC"). She received the application from Roper Pond, LLC, seeking coverage under the NPDES General Permit in connection with a multi-family residential development. (App. pp. 167; 561-562).

Roper Pond, LLC's consultant, George Whatley of BP Barber, submitted Roper Pond, LLC's other application to the Corps and DHEC seeking approval of wetland impacts in the form of a Corps 404 Nationwide Permit and DHEC 401 certification of that NWP. The application identified 0.075 acres of wetland impacts. (App. pp. 565-566). Chuck Hightower in DHEC's 401 water quality certification program reviewed this 404/401 application. The application did not identify any impacts to the lily pad pond. (App. pp. 565-566). The application did not identify any dredging or excavation on the subject property. (App. pp. 565-566). In fact, at the time that George Whatley submitted the 404/401 application, he was not even aware that the applicant intended to excavate the pond. (App. p. 444). When he filled out the application, Whatley left the line identifying the area to be dredged or excavated blank, even though he admits that under the developer's plan dredging is included. (App. pp. 565-566; 479-480).

Roper Pond, LLC, eventually submitted engineered plans to DHEC's stormwater section showing that, in fact, it intended to make alterations to the pond. (App. p. 170). The alterations included excavation and dredging of the lily pad pond and lowering the water level and outfall structure to allow use of the pond for stormwater detention. (App. pp. 592-593).

In issuing a stormwater permit, Ms. Stewart did not evaluate impacts to the pond or water quality resulting from the excavation. (App. p. 173). She said she just assumed the project "was in compliance with the standards and therefore [would] have no impact on the pond." (App. p. 173, lines 12-14). Ms. Stewart was operating under the assumption that DHEC's 401 water quality certification section had issued a water quality certification, based on a letter she received from the 401 section. (App. p. 171). When Ms. Stewart asked Roper Pond's consultant, BP Barber, whether excavation of the pond was covered under Nationwide Permit 39, the wetlands consultant "stated that lowering of the water surface elevation is included and covered under the Nationwide Permit 39." (App. pp. 172-173; 563-564; 933). Further, she specifically asked Roper Pond, LLC, whether impacts to the lily pad pond were covered under the 401 section's approval, and was told that impacts to the pond were included in the 401 certification approval. (App. pp. 563-564; 171). Rather than determining whether there was an effective Corps permit with 401 water quality certification, Ms. Stewart relied on statements made by the applicant that there was full approval and improperly issued coverage under the NPDES General Permit. (App. p. 184).

Ms. Stewart admitted that she does not know whether excavation of the pond will cause sedimentation. (App. p. 233). She does not know whether any Best Management

Practices will be used during excavation of the pond. (App. p. 233). She does not know what kind of discharge structure will be used during pond excavation. (App. p. 233). She does not know what will happen with the material dredged from the pond. (App. pp. 233-234). She does not know how excavation of the pond will affect the aquatic fauna and flora in the pond. (App. p. 234). And she does not know how excavation of the pond will affect the wetlands upstream from the pond. (*Id.*)

Charles Hightower has been the section manager of DHEC's 401 water quality certification program since November, 2007. (App. pp. 240-241). Mr. Hightower reviewed the Roper Pond, LLC's joint state and federal application to impact waters of the U.S seeking a 404 permit and 401 certification. He said that Roper Pond, LLC, applied for permission only to fill in 0.075 acres of federally jurisdictional wetlands. (App. p. 241; pp. 565-566). It did not ask for permission to impact any other wetlands or waters. (App. pp. 565-566).

As part of this 404 wetlands permit application, the Corps also requires a Pre-Construction Notification ("PCN") as a condition of Nationwide Permit #29 and #39. Based on the PCN submitted by Roper Pond, LLC, the Army Corps of Engineers issued a letter that the project meets the Corps' terms and conditions of NWP #39. (App. pp. 243; 567-574). The drawings attached to the Corps' PCN response letter depict only impacts to the 0.075 acres of wetlands proposed to be filled. (App. pp. 567-574). DHEC received the PCN and the Corps letter and then issued its water quality certification letter for NWP #39. The water quality certification letter is the only document related to DHEC's determination of whether the project meets the general conditions of its 401 water quality certification of the NWP. Impacts to the 0.075 acres of wetlands were the only impacts that DHEC

reviewed in making its certification decision on NWP #39. (App. p. 250). Mr. Whatley only notified the Corps of the dredging and excavation at some point after the application was submitted. (App. p. 480). DHEC did not consider impacts that would result from excavation of the lily pad pond because those impacts were not disclosed in the application. (App. p. 260).

The Corps initially approved the Roper Pond, LLC project under the wrong Nationwide Permit. Nationwide Permit #39 applies to commercial and institutional developments. (App. p. 253). Because the Roper Pond proposal is neither a commercial nor an institutional development, NWP #39 does not apply. Later, at Roper Pond, LLC's request, the Corps issued a letter approving the project under NWP #29, which covers residential developments. (App. p. 254). Although DHEC received a copy of the NWP #29 approval, DHEC did not issue a 401 certification authorization letter for the Roper Pond project under Corps Nationwide Permit #29. (App. pp. 254; 266). Mr. Hightower said that DHEC has to make a "specific determination" to insure that a project qualifies for the NWP 401 certification before it issues a certification letter. (App. p. 629). When asked why DHEC did not issue a certification letter on the NWP #29 approval, Hightower said that "we should have sent another [certification] letter," but that "we did not do it." (App. p. 268, lines 8-11).

In short, DHEC issued a flawed certification approval for Roper Pond, LLC's first NWP, which the Corps approved in error. When the Corps corrected its error and approved the project under the applicable NWP, DHEC conducted no review to determine whether the project qualified for its NWP 401 certification, nor did it issue a certification letter.

In its letter responding to Roper Pond, LLC's Pre-construction Notification letter, the Corps stated, in bold print, that "**Prior to beginning the authorized work, the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations, i.e., 401 water quality certifications . . . If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.**" (App. pp. 567-74). Because DHEC did not issue a certification letter stating that the project meets its conditions to qualify for coverage under NWP #29, Roper Pond, LLC did not obtain and provide the Corps with such certification.

Mr. Hightower admitted that DHEC's 401 water quality certification section never reviewed nor authorized impacts to the lily pad pond. (App. p. 257, lines 5-13). The Court of Appeals confirmed the affirmative requirement for review of impacts to the lily pad pond: "DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity." *Town of Arcadia Lakes v. S. Carolina Dep't of Health & Envtl. Control*, 404 S.C. 515, 522, 745 S.E.2d 385, 389 (Ct. App. 2013).

Water Quality Impacts Resulting from Excavation of the Lily Pad Pond

The Petitioners asked Seth Reice, a Professor of Ecology and Biology at the University of North Carolina, to assess the impacts on water quality and the pond. Dr. Reice testified as an expert in aquatic ecology. (App. pp. 310-12). He made a site visit on June 3, 2009. (App. p. 313). He looked at biodiversity, which is a measure of the distribution and variety of organisms, and the ecological health of the pond. He observed

that the pond is filled with water lilies that are aquatic plants growing about three to four feet above the bottom of the pond. (App. pp. 314-15). He took water samples and bottom samples to look at water chemistry and aquatic organisms living in the pond. (App. p. 316). He also caught some fish in the pond. (App. p. 316).

Dr. Reice examined the oxygen, salinity, conductivity, and pH of the pond water samples. (App. pp. 320-21). He said the water was very clear and clean with low pollutants. (App. p. 322). He also took the bottom samples back to his lab and identified the organisms he found living in the sediments. (App. pp. 319-20). He described the numerous organisms he identified and opined that "the presence of two species of fish and an assortment of benthic predators strongly implies that Roper Pond is a functioning aquatic system." (App. p. 325, lines 15-18). He said that "all the niches that you would expect in a pond are filled there now with the species that are present." (App. p. 359, lines 1-3). Looking at the entire system, Dr. Reice is convinced that the pond is a healthy system. (App. p. 326).

Dr. Reice said that if the pond level is dropped through excavation, the margin of the pond will be exposed to air and most of the organisms that live there will die. (App. p. 329). Organisms living in the dredged material will all die. (App. p. 359). He said it would take about ten years for the community to reestablish after the major disturbance. (App. p. 330). But even after a community reestablishes, it will not be the same type of community that exists there now because the chance that the same species will colonize the pond is "quite small." (App. pp. 329-30).

Dr. Reice also said that the upstream wetlands will be impacted. The area is in equilibrium now, but once the pond level is dropped, the wetland area will decrease. (App. p. 329). The wetland size will decrease because once the water level is lowered, upstream water will flow more rapidly downstream, drying out and removing a large amount of the upstream wetland. (App. pp. 329-30).

None of this testimony was contradicted.

In addition to the physical and chemical qualities of the water that he measured, Dr. Reice said that in order to assess the impacts of altering the pond, there are other factors that need to be evaluated. He said one would want to know the history of the pond, how it was formed, how long it has been there, the rate of sediment accumulation, how the excavation will be conducted and the extent of the excavation, as well as the nutrient loads coming into the pond. (App. p. 365-67). DHEC did not assess impacts using any of these factors.

DHEC's failure to perform the proper review in accordance with its NWP 401 certification and the applicable regulations, and failure to issue any approval of the impacts of the excavation, means that DHEC has not issued a certification of Roper Pond's NWP # 29. Without a proper certification, Roper Pond lacks the required state approval that is an express prerequisite to the storm water permit and coverage under the NPDES General Permit.

I. The Court of Appeals Erred in Denying the Petitioners Standing

A. Overview of Standing Law

In South Carolina there are three ways in which a party can acquire standing: "(1) by statute; (2) through what is called 'constitutional standing'; and (3) under the public importance exception." *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013) (citing *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Department of Social Services*, 402 S.C. 311, 317,741 S.E.2d 515, 518 (2013)).

In this case, South Carolina Code Section 44-1-60 provides that an applicant, permittee, licensee, or "affected person" may invoke an administrative process to have a DHEC staff decision reviewed by the DHEC Board and then the Administrative Law Court as a contested case hearing. S.C. Code Ann. § 44-1-60(F)(2) – 60(G) (Supp. 2012). This remedy is available for all DHEC decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions. S.C. Code Ann. § 44-1-60(A) – 60(G) (Supp. 2012). The question in this case is whether the Petitioners qualify as "affected parties" under the statute. Here, the statute is clear that the Petitioners should be able to establish statutory standing by alleging they are affected persons and are challenging DHEC's decision to grant the contested authorizations.

In the context of a challenge to an agency permitting decision, standing is satisfied where parties allege "an individualized injury in the adverse effect of a specific decision of

the Coastal Council on their members' use and enjoyment" of an affected area. *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988).

The Petitioners submit that the statutory term "affected person" turns more on the injury element than traceability and redressability, since the statute uses the term "affected person" to delineate the universe of citizens entitled to notice of a DHEC decision and to invoke administrative review of it. By proscribing in detail the administrative procedure for those "affected" by a DHEC decision, the statute presumes that the provided procedure could and would provide redress. Notwithstanding their statutory standing as "affected persons," however, the Petitioners satisfy all three elements of Article III standing.

In *Sea Pines Association v. S.C. Dept. of Natural Resources,* 345 S.C. 594, 550 S.E.2d 287 (2001), this Court adopted the "constitutional standing" test for Article III courts announced in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992).[4] *See also Sloan v. Greenville County,* 356 S.C. 531, 590 S.E.2d 338 (2003); *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). The three-pronged test arising from *Lujan* is as follows:

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The South Carolina Supreme Court's rulings on "constitutional standing" in environmental cases have consistently followed the rulings of the United States Supreme Court and other federal courts. *See, e.g., Sea Pines Association for the Protection of Wildlife, Inc. v. S.C Department of Natural Resources*, 345 S.C. 594, 550 S.E. 2d 287 (2001), *citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) and *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Energy Research Foundation v. Waddell,* 295 S.C. 100, 367 S.E.2d 419 (1988), *citing Sierra Club, supra., United States v. SCRAP,* 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), and *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498 (4th Cir.1974). Accordingly, decisions of the federal courts are pertinent to this case.

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan, 112 S. Ct. at 2136 (internal citations omitted).

In assessing whether a party has standing, this Court held that "one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 547, 590 S.E.2d 338, 347 (Ct. App. 2003) (citing *Charleston County Sch. Dist. v. Charleston County Election Comm'n,* 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999)). This Court has also held that an "affected person" must satisfy the "injury" requirement of Article III standing, i.e., the injury must be concrete and particularized, and actual or imminent. *Smiley v. S. Carolina Dept. of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007).

Our courts have held that precisely the type of aesthetic and recreational interests at stake here are sufficient to confer standing. In *Smiley* the Supreme Court held that a plaintiff must make claims as to "use and enjoyment" of an affected area. *Smiley*, 374 S.C. 326, 333, 649 S.E.2d 31 (2007). The court in *Pye v. U.S.* reaffirmed the principle that "aesthetic and environmental injuries can constitute an injury in fact sufficient to support a plaintiff's standing." 269 F.3d 459, 469 (4th Cir. 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000); *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361 (1972); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 73-4,

98 S.Ct. 2620 (1978)). The court in *Pye* noted that if those who are seeking to protect the environmental quality of the areas they use do not have standing, then "the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action." *Pye v. U.S.*, 269 F.3d 459, 468 (4th Cir. 2001) (citing *Society Hill Towers Owners' Assn. v. Rendell*, 210 F.3d 168, 176 (3rd Cir. 2000)).

Commonality of Injury Does Not Defeat Standing

A plaintiff must generally have a "personal stake" in the subject matter of the case, such that the injury is not "merely a general interest common to all members of the public." *Florence Morning New, Inc. v. Building Comm'n.*, 265 S.C. 389, 218 S.E.2d 881 (1975) (quoting *Ex parte Levitt*, 302 U.S. 633 (1937)). The injury must be of a personal nature to the party bringing the action. *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 639-40, 528 S.E.2d 647, 650 (1999) (citing *Citizens for Lee County v. Lee County,* 308 S.C. 23, 416 S.E.2d 641 (1992)). The fact that a plaintiff has a personal stake, once established, is not negated by the fact that others may have similar interests or rights at stake. The point is to ensure that the plaintiff is among the injured and has a stake in the outcome. In this case, the Court of Appeals failed to recognize or respect case law holding that an injury that is sufficiently personal to a specific individual to give the individual standing to sue is not defeated because the plaintiff is not the only person, or even one of a few, so effected. *Federal Election Comm'n. v. Akins*, 524 U.S. 11, 118 S. Ct. 1777 (1988) (where a harm is concrete, though widely shared, the Court has found "injury in fact."). As the United States Supreme Court stated in *Sierra Club v. Morton*, not all citizens suffer an impact from a project affecting publicly owned or open resources:

> The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort.

405 U.S. at 735, 92 S. Ct. at 1366. The difference between those who have standing and those who do not, the Court concluded, was actual use of the affected area.

"Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* at 734. The principles from *Sierra Club v. Morton* have been repeatedly affirmed and elaborated on in federal courts. The Fourth Circuit ruled that "[w]hile it is true that the Court has stressed that a generalized grievance shared by the population at large cannot be a basis for standing, . . . it is equally true that merely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . ***So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury***." *Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) (internal citations omitted). *See also, Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, concurring) ("injury to all is injury to none" theory would "deny standing to every citizen such that no matter how badly the whole may be hurt, none of the parts could ever have standing to go to court to cure a harmful violation."); *U.S. v. SCRAP*, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973) ("To deny standing to persons who are in fact injured because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion.").

In this case it matters not whether others share the injuries alleged by the Petitioners, it matters only that these Petitioners themselves will suffer an injury to their aesthetic and recreational interests. However, in this case, the Court of Appeals failed to give proper consideration to case law indicating that an injury can be common to a great many members of the public, and still be sufficiently personal to a specific individual to give the individual standing to sue. *See Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

B. The Petitioners' Evidence of Aesthetic and Recreational Harm Far Exceeds the Minimal Showing Needed

In *Smiley v. DHEC* and *Energy Research Found. v. Waddell*, 295 S.C. 100, 367 S.E.2d 419 (1988), this Court cited with approval the United States Supreme Court's decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* , 412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973). In *SCRAP*, the court stated that the injury required for standing purposes need not be a substantial injury, an identifiable trifle will suffice:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, . . . a $5 fine and costs, . . .; and a $1.50 poll tax . . . . [W]e see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 613. See also K. Davis, Administrative Law Treatise ss 22.09--5, 22.09--6 (Supp. 1970).

Id. (Internal citations omitted).

The "identifiable trifle" standard was also re-affirmed by the Fourth Circuit in *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149 (4th Cir. 2000): "the claimed injury 'need not be large, an identifiable trifle will suffice.'" 204 F.3d 149, 156, *quoting Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation marks omitted). *See also, Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498 (4th Cir.1974).

The lower court loses sight of the fact that a plaintiff need only show that he or she will suffer some "identifiable trifle" of injury. In applying this standard, the court in *Pye v. U.S.* noted that if "**the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this ... grant.**" 269 F.3d 459, 468 (4th Cir. 2001) (citing *Society Hill Towers Owners' Assn. v. Rendell*, 210 F.3d 168, 176 (3rd Cir. 2000)). If those who are seeking to protect the environmental quality of the areas they use do not have standing, then "the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action." Id.

The Petitioners Linda and Robert Jackson live on Kaminer Road, which is adjacent to the lily pad pond and Roper Pond, LLC's property. Ms. Jackson has walked or run past the pond "thousands and thousands" of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. (App. p. 379). She testified the pond is very special to the community and it is "absolutely beautiful." (App. p. 380). She also walks around Cary Lake, which is downstream from the lily pad pond. (App. p. 381). She has seen sedimentation and garbage coming from upstream, as well as witnessed flooding

associated with stormwater problems in that area. (App. p. 381). She testified that if the pond were excavated, her use and enjoyment of seeing the pond would be adversely affected. (App. p. 382). She is also concerned about more sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired. (App. p. 382-83). Ms. Jackson knows the other Petitioners, has participated in community meetings regarding the proposed project, and said that the other Petitioners share her concerns.[5] (App. p. 385).

As to the Kaminer Station Petitioners that live upstream of the lily pad pond, Dr. Reice's uncontroverted testimony is that the upstream wetlands would be impacted as a result of the dredging and excavation of the pond. (App. 385). Once the pond is dredged and the water level dropped, as indicated by the permit, the upstream wetland area will decrease. (App. pp. 329-30).

Elaine and Gene Starr have lived on Sandy Shore Road, which is on Cary Lake, for 38 years. (App. p. 400). The Starrs swim, water ski, boat and fish with first their four children and now their grandchildren on Cary Lake. (App. p. 401). Ms. Starr testified that the water in Cary Lake is not as clear as it used to be due to sedimentation in the lake. (App. p. 401).

Ms. Starr said that based on her experience living on Cary Lake, a residential development will have an impact on the lake because of the increased density, regardless of whether the project proceeds according to the permit. (App. pp. 413-14). The ALC acknowledged Ms. Starr's testimony that the proposed project would "negatively impact Cary Lake even if the SWPPP approved by the Department is implemented as designed" and that "increased density . . . would have a detrimental impact . . ." (App. p. 29). She said that "if you

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The Parties stipulated that Mrs. Jackson's testimony would be representative of the Kaminer Station Petitioners.

change the whole landscape, then you'll have a problem" with stormwater, which is her primary concern. (App. p. 418, lines 13-14).

Ms. Starr has also enjoys viewing the lily pad pond and said it is "absolutely gorgeous." (App. p. 4406, lines 7-8). She said there are "white blooms, pink blooms, and you can see lots of life around it, like dragonflies" and that it is an aesthetic part of the community. (App. pp. 406, lines 12-13; 419). She is concerned about the affects of dredging the pond because there is a lot of life in the sediment itself and the lilies will not be there after it is dredged, resulting in a loss of her aesthetic interests in viewing the pond. (App. p. 406-08).

The Kaminer Station and Cary Lake Petitioners testified that their ability to enjoy recreational activities, along with their aesthetic interests, would be harmed by the proposed project. The Court of Appeals erred in dismissing these injuries as "speculative." The Petitioners use and enjoy the affected area on a daily basis and planned to do so in the future. These uses cannot be equated with the speculative "'some day' intentions" to visit endangered wildlife species halfway around the world that the Court had held insufficient to show injury in fact in *Lujan v. Defenders of Wildlife*. 528 U.S. 167, 184, 120 S.Ct. 693, 705-706 (2000).

Not only did the Petitioners identify harm to their aesthetic and recreational interests in viewing the lily pad pond, they went on to describe even more injuries that would result directly from the development project at issue in this appeal: degraded water quality as a result of the project; degradation and loss of upstream wetlands; sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired; impact on Cary Lake because of the increased density; impact to the character of the Town; diminished property values; the environmental

quality of the Town; and increased crime, traffic and congestion as a result of the project. These allegations are far beyond any "identifiable trifle" needed for standing.

C. The Court Imposed an Erroneous Property-Ownership Test for Establishing Injury-in-Fact

The court of appeals cited the correct test for standing, but then confusingly injected a new requirement that a plaintiff must have a property interest in order to establish an injury-in-fact. There is no basis for that holding, and the court's departure from binding precedent was clear and reversible legal error. The court first recited all of the injuries described Linda Jackson, Elaine Starr and Richard Thomas, Town Mayor, acknowledging the Petitioners' injuries. The court cited to the "visual appeal of Roper Pond" discussed by Mrs. Jackson and acknowledges that Mrs. Jackson's aesthetic and recreational interests are exactly the type of injury that courts have found sufficient to establish standing. *Id.* However, the court of appeals then discounts those findings, contending that these complaints **"primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact."**[6] *Town of Arcadia Lakes* at 533. (emphasis added). The lower court applies the same requirement to the Town, rejecting the Town's interest in protecting Cary Lake, based on the fact that "the Town ha[s] no ownership interest in Cary Lake."[7] *Id.* at 520. Neither the United States Supreme Court nor this Court have ever held

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6 Even applying this incorrect standard, when it comes to Elaine Starr's testimony, the Court overlooks the fact that Elaine Starr lives on Cary Lake and is a member of the Cary Lake Homeowners Association, who owns Cary Lake, the receiving water body for Roper Pond's stormwater. In other words, Ms. Starr does have an ownership interest in Cary Lake, even though that property interest is not a necessary element to establish standing.

7 The Town's proof of harm is discussed in detail in Section I.D. below. The lower court

that a plaintiff's injuries cannot stem from activities that occur on private land. To the contrary, actions on private land can and do give rise to injuries to neighboring and nearby citizens and property owners, and that injury suffices to support standing. *See, e.g., S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988); *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

In contrast to the lower court's holding, South Carolina courts have found environmental plaintiffs to have standing, despite the fact that an activity occurs on another's private property. In *S.C. Wildlife Fed'n v. S.C. Coastal Council*, the Court held that the appellants adequately alleged an individualized injury in the adverse effect of a certification decision on their members' use and enjoyment of wetlands proposed for dredging on a private development site. 296 S.C. 187, 371 S.E.2d 521 (1988). In *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision),* the Court held that plaintiffs that live adjacent to a privately owned wetland had standing to challenge the issuance of a permit to fill the wetland because the permit would adversely affect their use and enjoyment in viewing the wetland and surrounding wildlife. 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998). In *Spectre v. DHEC*, the Court upheld Appellants challenge to the filling of 32 acres of "isolated" wetlands on private property. 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010).

The lower court's holding that Petitioners' lack of property right or interests in Roper Pond (or Cary Lake) precludes an injury in fact is not only contrary to the law of standing, but also it leads to the result that only those with property interests in the affected area have standing. The practical effect of the Opinion is that only the permit applicant/site owner would

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adopts, and does not correct, the ALJ's exclusive reliance on whether the Town possesses an ownership interest in Cary Lake and Roper Pond. See Final Brief, App. 995.

have standing to challenge this project. That cannot be and has never been the law in South Carolina.[8]

D. The Court of Appeals Erred in Creating a "Proprietary Rights" Requirement for Municipal Standing

In addition to imposing the same property right requirement on the Town, the Court of Appeals cites to *Glaze v. Grooms*, 324 S.C. 249 (Ct. App. 1996) for its holding that a "municipality must allege an infringement of its own proprietary interests and statutory rights" distinct from that of its individual citizens. *Town of Arcadia Lakes* at 530. Neither *Glaze* nor any

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[8] The lower court appears to recognize that aesthetic and recreational interests are sufficient to establish an injury-in-fact in citing *Sea Pines*, but it then inexplicably inserts a new standard requiring Plaintiffs to have property rights in the areas over which an environmental permit is sought, citing *Conservation Council of N.C. v. Costanzo*, 505 F.2d 498 (4th Cir. 1974). *Costanzo* stands for the proposition that an injury in fact cannot be *assumed* when the challenge involves private property owned by a party other than the plaintiff. But in this case, Petitioners did not expect the court to *assume* anything. Rather, the Petitioners put forth evidence of injury in fact in the form of harm to recreational and aesthetic interests, similar to that alleged in *Smiley v. SCDHEC*, 374 S.C. 326, 649 S.E.2d 31 (2007); *Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001), *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), *Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000), and *American Canoe Assn. v. Murphy Farms*, 326 F.2d 505 (4th Cir. 2003). The lower court cites to, but summarily dismisses, these recreational and aesthetic interests in the pond and associated water quality.

Costanzo is further distinguished because that court found that the individuals' use of privately owned *highland* was insufficient to confer standing because there is no guarantee that the owner would continue to allow access to that highland; however, the court remanded the case to the district court for a determination of whether the use of the lowland/submerged areas would be adversely affected. Here, the claimed use and enjoyment is in viewing submerged areas which are given treated as special resources under state and federal law. Importantly, the court in *Costanzo* noted that the "claimed injury need not be great or substantial; an '**identifiable trifle**', if actual and genuine, gives rise to standing." Id. at 501 (citing *SCRAP*, 412 U.S. 669, 687-689, n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

other South Carolina case Petitioners have been able to uncover explains what it would mean for a municipality to suffer infringement of a "proprietary interest" or "statutory right" distinct from its citizens. However, reference to other jurisdictions that have applied these standing principles under circumstances similar to the ones at hand make clear that the Town's allegations are sufficient to establish an injury in fact.

"The term 'proprietary' is somewhat misleading, for a municipality's cognizable interests are not confined to protection of its real and personal property. "The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-98 (9th Cir. 2004). In elaborating on the type of interests that are sufficient to confer standing on a municipality the court noted as follows:

> [A] municipality has an interest in, inter alia, its ability to **enforce land-use and health regulations**, *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990), and its **powers of revenue collection and taxation**, *Colorado River*, 776 F.2d at 848-49. A municipality also has a proprietary interest in **protecting its natural resources from harm**. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002), amending 271 F.3d 911(9th Cir. 2001). We have also found constitutionally sufficient injury to proprietary interests where "**land management practices of federal land could affect adjacent [city]-owned land**." *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995).

Id. at 1198 (emphasis added).

Here, the interests of the Town of Arcadia Lakes – even as recited by the Court of Appeals – match those very interests, whether they be termed "proprietary" or not. The

Town's interest in "protecting the environmental quality of Cary Lake" and its interest in "maintaining its character and desirable attributes, including aesthetic appeal" are aimed at protecting natural resources from harm. The Town's testimony that there would be a "diminution of property values within the Town" is an interest in its powers of revenue and tax collection. The Town's interest in its "ability to comply with federal law" is an interest in application and enforcement of land use regulations. Each of the injuries dismissed by the lower court are sufficient to establish an injury in fact.

The lower court's casual dismissal of the Town's sworn concerns about the project's impact on the Town's ability to comply with federal law is especially troubling. The Town operates a Municipal Separate Stormwater System ("MS4") that necessitates an NPDES permit and requires compliance with NPDES standards and limitations. (App. pp. 840; 856). The Town is legally required to prevent pollution within its MS4,[9] which includes runoff entering its storm drains and pipes from Roper Pond's development. (App. pp. 840). The court misapprehends the relationship between the challenged project and the Town's CWA

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See 33 U.S.C. § 1342(p)(4) ("the Administrator shall establish regulations setting forth the permit application requirements for [MS4] stormwater discharges . . . Any such permit shall provide for compliance as expeditiously as practicable"); *see also* 33 U.S.C. §§ 1311, 1312, 1314, 1316, 1317, 1318, 1342, 1343, 1362. When an MS4 operating municipality does not comply with the NPDES requirements, that municipality is subject to suit and liability under the CWA, which can be initiated by either the government or private citizens. *See, e.g., Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008); *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011).

obligations, and thereby dismisses exactly the type of interest identified in *City of Sausalito v. O'Neill.*

E. Causal Connection Does Not Require Proof on Merits or Proof of a Potential Future Violation

The causation component of standing requires that "there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Smiley v. S. Carolina Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992)). In this case, the conduct complained of is DHEC's issuance of coverage under the stormwater General Permit which authorizes the land-disturbing construction activities. The loss of aesthetic enjoyment in viewing the lily pad pond is "fairly traceable" to the challenged activity in that DHEC's approval of Roper Pond's construction activities under the NPDES General Permit includes excavation of the pond. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). But for DHEC's decision to grant coverage under the NPDES stormwater General Permit to Roper Pond, the dredging and excavation of the lily pad pond would not occur.

In concluding that the Kaminer Station Petitioners "have not established a causal connection between their alleged injuries and the conduct giving rise to their complaint," the Court of Appeals' inquiry turns on whether the land-disturbing activities would be "managed

properly," rather than evaluating the impact of the "conduct giving rise to their complaint," i.e., the dredging and excavation of the lily pad pond. (App. 1214). That in itself was error, since the Petitioners presented uncontroverted evidence that the dredging and excavation would cause them injury.

Instead of applying this traceability analysis, the lower court's opinion requires that the Petitioners' injury in fact result from a future permit violation or noncompliance on the part of Roper Pond. This contested case is not about a permit violation; it is a challenge to an agency decision to grant a permit in the first instance. The lower court erroneously focuses on lack of proof of mismanagement or a violation of a permit, neither of which is an issue.

Two United States Supreme Court opinions explain the distinction between a plaintiff's injury in fact and proof of violations, inadequacy of a permit or the merits of an agency's decision. In *Allen v. Wright*, the U.S. Supreme Court explained the distinction as follows:

> **The "fundamental aspect of standing" is that it focuses primarily on the party seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated,"** (citing *United States v. Richardson*, 418 U.S. 166, 174, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (quoting *Flast*, 392 U.S., at 99, 88 S.Ct., at 1952). . . . the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief. If a plaintiff presents a nonjusticiable issue, or seeks relief that a court may not award, then its complaint should be dismissed for those reasons, and not because the plaintiff lacks a stake in obtaining that relief and hence has no standing. **Imposing an undefined but clearly more rigorous standard for redressability for**

> **reasons unrelated to the causal nexus between the injury and the challenged conduct can only encourage undisciplined, ad hoc litigation**, a result that would be avoided if the Court straight-forwardly considered the justiciability of the issues respondents seek to raise, rather than using those issues to obfuscate standing analysis.

Allen v. Wright, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984).

As succinctly put in another U.S. Supreme Court case, the "relevant showing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry ... is to raise the standing hurdle higher than the necessary showing for success on the merits . . ." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

Although the Petitioners presented testimony showing declines in water quality from previous construction projects that caused sedimentation in Cary Lake, the court unilaterally discounted these harms as being due to "possible mismanagement" in the past. *Town of Arcadia Lakes* at 534. This turns the standing analysis on its head and requires a standing plaintiff to *disprove* all possible confounding factors that could result in a reasonably anticipated injury *not* coming to pass. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84, 120 S. Ct. 693, 705, 145 L. Ed. 2d 610 (U.S.S.C. 2000) ("affiant members' **reasonable concerns** about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests" sufficient to establish injury in fact); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387,

394 (4th Cir. 2011) (Plaintiff "established an injury in fact by asserting a reasonable fear and concern about the effects of the facility's discharge on his use and enjoyment of his lake").

By failing to focus its inquiry on the conduct giving rise to the complaint and instead requiring proof on the merits of the case the Court of Appeals set an impossible standard for establishing a causal connection – one that is entirely unsupported by relevant case law. The focus of the injury is the degradation of a prized and often admired nearby aesthetic naturalized feature – a lily pad pond – due to activities authorized by DHEC authorizations in this case.

The Court applied a similarly erroneous standard to the Town, finding a lack of traceability because Petitioners failed to prove that Best Management Practices ("BMPs") envisioned by the Stormwater Pollution Prevent Plan ("SWPPP") were inadequate to prevent sediment from leaving the construction site. *Town of Arcadia Lakes* at 531. The BMPs are required as part of the permit at issue, though the adequacy of the BMPs has never been an issue in dispute. Ms. Starr testified that based on her experience living on Cary Lake, a residential development will have an impact on the lake because of the increased density, regardless of whether the project proceeds according to the permit and attendant BMPs. (R. pp. 407-408). Town does not have to prove a future violation of a permit requirement that is not in dispute in order to demonstrate an injury in fact. *Allen v. Wright*, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984). To require proof on the merits or a violation prior to its occurrence imposes "an undefined but clearly more rigorous standard for

redressability unrelated to the causal nexus." *Id.*

The court's misapplication of the "fairly traceable" standard is further illustrated by analogy to similar cases. In *Friends of the Earth, Inc., v. Gaston Copper Recycling Corp. (Gaston I)*, the Fourth Circuit held that a plaintiff established an injury in fact by asserting a reasonable fear and concern about the effects of a smelting facility's discharge on his use and enjoyment of his lake, which was located four miles downstream of Gaston's facility. 204 F.3d 149 (4th Cir. 2000). The plaintiffs were not required to present evidence of actual harm to the environment so long as a direct nexus existed between the plaintiffs and the "area of environmental impairment." 204 F.3d at 159. In addressing traceability the court stated that the plaintiffs do not have to prove with scientific certainty that the defendant's discharges resulted in harm to the plaintiffs. *Id.* (citing *Natural Resources Defense Council, Inc. v. Watkins,* 954 F.2d 974, 980 n. 7 (4th Cir.1992)). "If scientific certainty were the standard, then plaintiffs would be required to supply costly, strict proof of causation to meet a threshold jurisdictional requirement—even where, as here, the asserted cause of action does not itself require such proof." *Id.* at 161.

In *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, the merits of the case involved the validity of the provisions of the Price-Anderson Act, which limited maximum liability in the event of any single nuclear incident to $560,000,000. 438 U.S. 59 (1978). The plaintiffs, who lived near the proposed construction site for two nuclear power plants, challenged the constitutionality of that Act. *Id.* at 67. For purposes of standing, the plaintiffs

asserted injuries related to the possibility of a nuclear accident, as well as injuries related to the normal operation of the plants. *Id.* at 73-74. First, the Supreme Court concluded that it need not determine whether the injuries based on the possibility of a nuclear accident were "sufficiently concrete to satisfy constitutional requirements." *Id.* at 73. Rather, "several of the 'immediate' adverse effects'" of the nuclear plants, including "environmental and aesthetic consequences" were of "the type of harmful effect which has been deemed adequate in prior cases." *Id.* at 73-74. In the same way, Petitioners have asserted immediate adverse effects resulting from completion of the permitted activity, i.e., excavation of the pond leading to loss of aesthetic enjoyment.

As to the fairly traceable requirement, the *Duke Power* Court applied the but-for standard. *Id.* at 74-75. The plaintiffs position on causation was that but for the Act's limitation on liability, the nuclear plants would not be constructed, and the "immediate adverse effects" would then not occur. *Id.* at 74. The Court found a "substantial likelihood" of this "but for" relationship, and upheld the causal connection and standing. Note that actual operation of the nuclear plants was not an issue on the merits, yet formed the basis for plaintiffs' standing. **The plaintiffs' injuries in fact had nothing to do with the plaintiff's claims on the merits, and the Court found that no such nexus was required**. *Id.* at 78. In the same way, the Petitioners in this case have identified aesthetic and recreational injuries that would not occur but for the permit at issue in this case. Those injuries form a sufficient basis for standing, apart from any analysis of the merits of the case.

Mrs. Jackson and Mrs. Starr testified that if the pond were excavated, their enjoyment in viewing the pond would be gone. (App. pp. 380-82 & 407). The Town asserted its interests in the attractiveness of the Town based on the aesthetics of the lily pad pond upon entering the Town, which surrounds the project site on three sides. (App. pp. 834-35). These aesthetic and recreational injuries have a but-for causal connection to the permit at issue in this case – the permit authorizing the land-disturbing activity, which includes the excavation and dredging of the pond, leads to the "immediate adverse effects" of loss of aesthetic and recreational enjoyment. The requisite causal connection is established through uncontroverted evidence that the lily pads and wildlife will be eliminated by the excavation of the pond, coupled with the use and enjoyment of viewing the pond and its wildlife that will be lost. There is a direct link between the excavation of the pond and the injuries complained of by Mrs. Jackson, Mrs. Starr, and Mr. Thomas, i.e., loss or decrease of aesthetic and recreational interests, among other interests such as water quality, Clean Water Act's obligations for municipalities, property values and the like.

Similarly, standing in *Pye* was not based on the regulatory or technical propriety of the permitted activity, but rather the fact that the claimed injury would be fairly traceable to the permitted activity. *Id.* at 468-69. In this case the Petitioners need not offer evidence on the technical insufficiency of Roper Pond's stormwater plan in order to establish an injury in fact; they simply need to prove an injury that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the

court." *Smiley v. DHEC*, 374 S.C. 326, 649 S.E.2d 31 (2007) (citing *Lujan*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992)). Petitioners did just that by presenting uncontradicted testimony that they enjoy and benefit from viewing the pond and observing wildlife, and that if the pond were excavated as will occur by way of this challenged decision, their benefit and enjoyment would be lessened.

II. Validity of the 401 Certification and General Permit Coverage

As to the merits of the case, the Petitioners assert that: 1) the NWPs only cover certain clearly defined activities; 2) DHEC's 401 certifications of the NWPs provide additional limitations, including general conditions; 3) in order to receive coverage under DHEC's certifications the **activity must be limited to the impacts authorized by that certification and must meet the general conditions**; 4) the general conditions require DHEC to review the "overall project," not "only the land area directly impacted by the NWP;" and 5) when a project's impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly do in this case, they are not covered by DHEC's NWP certification.

The lower court's conclusions are based on a confusion between the federal Nationwide Permit review and the state's separate NWP 401 water quality certification review. The two programs require each agency to conduct its own review to determine whether the proposed project qualifies for coverage under the respective federal and state programs.

A. The Court Agrees with Petitioners that the General Conditions of the 401 Certification Authorize DHEC to Review the "Overall Project," Including Excavation of the Pond, But Overlooks the Legal Effect of Its Conclusion

The lower court clearly recognizes DHEC's broad authority to review impacts that go beyond those authorized by the specific NWP in concluding that DHEC must review the "overall project proposed" by the developer. *Town of Arcadia Lakes at* 395, 534. The Court states that:

> DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement **that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.**

Town of Arcadia Lakes at 522, 389.

The lower court also concludes that "the general conditions for water quality certification require DHEC to review the 'overall project proposed by a single owner/developer,' 'includes all land within the project bound under single ownership,' and is not confined to 'the land area directly impacted by each NWP request.'" *Town of Arcadia Lakes* at 534, 395. In order to determine whether a project meets the conditions of DHEC's NWP certification, DHEC must conduct a review and affirmatively conclude that the conditions are either met or not. (App. p. 629). The General Conditions of the NWP certifications, and Regulations 61-68 and 61-101,[10] require DHEC to review impacts beyond

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those authorized by the specific NWP, specifically excavation of the pond. The court agrees "that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site." *Town of Arcadia Lakes* at 534, 395. The fact that DHEC was not aware that Roper Pond intended to dredge and excavate the lily pad pond at the time it issues its certification authorization letter is undisputed. The lower court also cites the Corps' requirement that in order for the project to be valid under NWP 39, it "had to comply with the general conditions of the NWP, regional conditions, and **certain special conditions**, . . . including 'all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification' . . ." *Id.* at 524, 389.

The court should have taken the next logical step, and conclude that Roper Pond does not qualify for NWP certification because its project includes impacts on the overall project site that exceed the NWP certification and that were not reviewed by DHEC.[11] Instead, the Court inexplicably concludes that "Roper's proposed fill of the 0.075 acres of jurisdictional wetlands satisfied the necessary conditions to receive 401 water quality certifications for both

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Regulation 61-101 requires DHEC to consider: "whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts . . ." S.C. Code Ann. Reg. 61-101.F.(3). Regulation 61-68 water quality standards require DHEC to"maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . ." S.C. Code Ann. Reg. 61-68.A.(4).

[11] Even DHEC admits that a "specific determination" is required to insure that a project meets the conditions of its NWP certification. (App. p. 629). If a project does not meet the conditions of the NWP certification DHEC requires an individual certification. (R. p. 253).

NWP 29 and NWP 39 . . . because the requisite conditions had been met." *Town of Arcadia Lakes* at 526, 390-91. The court's ruling is fundamentally flawed in that it concludes that DHEC's review authority extends beyond the mere filling of wetlands, but fails to give effect to that conclusion.

The lower court provides no analysis as to why DHEC's failure to undertake a review of all impacts to waters and wetlands does not warrant a remand to DHEC to undertake that broader review (or a determination that DHEC improperly granted coverage under the General Permit for lack of a valid 401 certification), instead ending abruptly with a brief discussion of federal requirements. Notwithstanding the lack of analysis, it appears that the court determined that because the Clean Water Act only covers filling wetlands, DHEC's review of impacts to "all land within the project," not just the "land area directly impacted by each NWP request" is necessarily constrained by that CWA jurisdiction. In other words, the court determined that because no CWA approval is needed for excavation of the lily pad pond, there is no requirement for State review and approval. If DHEC's review of the project were constrained by CWA jurisdiction, there would be no need for it to impose requirements for broader review in its NWP general conditions nor to issue a 401 certification at all.

The lower court is correct in that the CWA permit is not needed for excavation. However, this Court has directly addressed the question of whether State authority to regulate wetlands and waters exceeds Federal regulation under the CWA, and has expressly ruled that "federal [CWA] jurisdiction is not essential to [State] consistency review." *Spectre, LLC v. S.*

Carolina Dept. of Health & Envtl. Control, 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010); *Georgetown Cnty. League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 352-53, 713 S.E.2d 287, 288 (2011) (Corps' jurisdiction "has no impact on DHEC's ability, as a state agency" to regulate waters of the State). While *Spectre* involved DHEC's regulatory authority under the S.C. Coastal Zone Management Act and this case presents the question of DHEC's regulatory authority under the S.C. Pollution Control Act, the parallel is that this Court has expressly ruled that the South Carolina General Assembly can and has given DHEC broader regulatory authority than Congress gave to the Corps in passing the CWA.

The dredging and excavation of wetlands are not typically activities regulated under Section 404 of the CWA unless there is a discharge of dredged materials into waters of the U.S.; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on or limited by the Corps' jurisdiction. Rather, DHEC's broader review authority over waters of the State derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.[12] And in this case, the conditions of DHEC's NWP certification expressly retain the agency's authority to review those impacts. The lower court simply fails to give effect to this

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Even DHEC's Chuck Hightower testified that the Water Quality Certification regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (App. p. 257; R. 61-101.F). Dr. Reice provided uncontested testimony that it will take ten years for the community to reestablish after the major disturbance, describing in detail the types of impacts that will result from the excavation on pp. 12-14 of Appellants Final Brief in the Court of Appeals.

authority.

The Opinion points out that Petitioners have not argued that alterations to the pond resulted from filling of the wetlands, and the court is correct. This statement shows a fundamental misunderstanding of how the 404 and 401 programs relate to each other. They are two separate regulatory programs with two separate regulatory criteria and, in this case, present two separate sets of conditions imposed on NWPs by each agency.

Indeed, the CWA Section 1341(a)(1) cited in the Opinion specifically states that the State must certify that a discharge complies with "applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."[13] 33 U.S.C. § 1341(a)(1). The CWA further states that "[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. § 1341(b). Yet that is exactly what the ALC and the lower court have done – allow the Corps' NWP to act as a limitation on DHEC's authority to require compliance with State water quality requirements, despite the CWA's clear language that it not be construed as such.

The lower court acknowledges that DHEC did not conduct the overall review required by the NWP certification conditions, but does not hold DHEC accountable for its failure. If

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Section 1313 requires states to adopt water quality standards, and DHEC has promulgated those regulations in S.C. Code Ann. Reg. 61-68. 33 U.S.C. § 1313. DHEC also promulgated water quality certification regulations at S.C. Code Ann. Reg. 61-101.

DHEC does not conduct some review to ensure that the project meets the conditions of the NWP 401 Water Quality Certification, and DHEC does not consider "all land within the project boundary under single ownership," then the conditions applicable to the NWPs will be rendered superfluous.

The fact that the lower court agrees that DHEC does have authority to review the "overall project" should warrant reversal of its conclusion to the contrary (holding that DHEC has no authority to review the excavation portion of the project). Given the lower court's agreement that DHEC is required to review the overall project, including all lands within the project area and not just the specific land impacted by the NWP, and the court's agreement that DHEC failed to undertake this review, the court should have further concluded that the project fails to comply with the 401 Certification of NWP 39 and remanded the case back to DHEC to undertake a review of the impacts resulting from excavation of the lily pad pond and to impose any conditions necessary to protect water quality and the aquatic ecosystem of that State waterbody.

B. The Court of Appeals' Conclusion that Roper Pond Has a Valid 401 Certification is Not Supported by Its Previous Conclusion that DHEC's Certification Requires a Broader Review

The court's conclusion that DHEC's "authorization letter was only a formality for the applicant's benefit and was not required by the State General Permit" cannot be squared with its previous conclusion that "that no one at DHEC undertook a complete examination of the

impact of the project on all waters and wetlands at the project site." *Town of Arcadia Lakes v. DHEC*, 404 S.C. 515, 534-35, 745 S.E.2d 385, 395-96 (Ct. App. 2013).

DHEC's Chuck Hightower said that DHEC has to make a "specific determination" to insure that a project qualifies for the NWP 401 certification before it issues a certification letter. (App. p. 621). The water quality certification letter is the only document related to DHEC's determination of whether the project meets the general conditions of its 401 water quality certification. Because only filling of the 0.075 acres of wetlands was disclosed in the application at the time that DHEC reviewed it, DHEC did not and could not consider impacts that would result from excavation of the lily pad pond. (App. p. 260). Roper Pond's failure to disclose the impacts of dredging and excavating a nearly 1.8 acre pond deprived DHEC of the ability to make a determination of whether the project qualified for coverage under its NWP 401 certification. Since the time of the application, it is clear that there are significantly more impacts than initially disclosed; that DHEC did not review or consider those impacts; and that those impacts go beyond what is authorized under DHEC's NWP 401 certification. For these reasons, Roper Pond does not have a valid 401 certification which is a pre-requisite to a valid 404 permit necessary for coverage under the stormwater General Permit at issue in this appeal.

C. The Court of Appeals Arrives at the Illogical Conclusion that Roper Pond is the Proper Party to Object to Its Own Compliance or Noncompliance with DHEC's General Conditions

The lower court cites to DHEC's general conditions that "Roper was required to (1) demonstrate that impacts to wetlands have been avoided and that unavoidable impacts to wetland areas have been minimized; and (2) provide suitable compensation for any unavoidable impacts." *Town of Arcadia Lakes* at 535, 395. The court's recitation of these two general conditions is accurate, but its conclusion on how these conditions are applied and by whom they are enforced is entirely without logic or reason. The court states that "Roper, as owner of the property on which the pond is located,[14] would be the proper party to object to impacts that have not been avoided or minimized and to enforce compensation for any unavoidable impacts." The court seems to recognize that it would be an "illogical position" to place Roper Pond as the fox guarding the hen house, but then fails to undertake the logical analysis of who would be the party to object to impacts or require compensation.

It should go without saying, but DHEC has the authority to ensure compliance with those conditions, to ensure that Roper is avoiding and minimizing impacts and to require compensation for unavoidable impacts. Roper has the burden of demonstrating avoidance and minimization, not objecting that avoidance and minimization has not been achieved. That

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14 Petitioners note that even in discussing the merits the court continues to misplace reliance on ownership of the property.

determination lies squarely with DHEC and if DHEC makes an erroneous determination the Petitioners are those adversely affected parties to whom the APA gives the right to seek redress through the administrative process. And when DHEC fails to ensure compliance with the conditions, Petitioners, as persons with a personal stake in the aesthetic and other qualities of the area, have the right to seek administrative and judicial review of the permitted activity.

D. The Lower Court Overlooks the Requirement for a Certification Decision

The failure to make a determination of whether the project qualifies for coverage under the 401 Certification for NWP 29 and consider the pond dredging is central to the Petitioners' case. Instead, the lower court focuses on the fact that DHEC never issued a letter to Roper Pond concluding that the project qualified for the 401 Certification of the NWP, but assumed that the project does in fact qualify with that Certification, despite its previous conclusion that the general conditions of the Certification require DHEC to undertake a review of the impacts beyond those authorized by the NWP – an action that DHEC plainly did not undertake. The Court's opinion recognizes as much by agreeing "that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site." *Town of Arcadia Lakes* at 534, 395.

It is precisely because DHEC was required to undertake some review of the "overall project proposed by" the developer, including review of "all land within the project boundary under single ownership," which is not confined to "the land area directly impacted by each NWP request, that DHEC necessarily had to arrive at some decision regarding compliance

with those NWP certification conditions. DHEC's failure to conduct the review, make a determination of whether the project meets the NWP conditions and qualifies for coverage and issue a certification letter is fatal, and Roper Pond thus lacks 401 certification.

E. The Lower Court's Conclusions Overlook the Implications on the Stormwater General Permit Coverage

Section 2.1(C) of the NPDES General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective."[15] (App. p. 499) **If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.**" (App. p. 567). The NPDES General Permit conditions expressly require that any Corps of Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (App. p. 499). Because the project did not qualify for coverage under DHEC's NWP certification, it was not entitled to coverage under the General Permit. Thus, the Court erred in failing to conclude that DHEC

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15 On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 ("Guidance Document"). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

improperly granted coverage under the General Permit for its failure to comply with the conditions of the NWP certification and consider the "overall project," specifically the excavation of the pond.

CONCLUSION

WHEREFORE, the Petitioners respectfully request that this Court reverse the opinion of the Court of Appeals and conclude that the Petitioners are affected parties entitled to administrative review of the agency decision at hand; that the Petitioners have established Article III standing; and that the DHEC decision to grant NPDES stormwater general permit coverage to Roper Pond was in error for failure to review or consider water quality impacts resulting from the dredging of the lily pad pond.

Respectfully submitted,

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October 2, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, ... Petitioners,

vs.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, ... Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Petitioners' Brief of Writ of Certiorari upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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October 2, 2014