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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

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

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, 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,

v.

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

BRIEF OF RESPONDENT ROPER POND, LLC

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COUNTER-QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE DREDGING AND EXCAVATION OF THE POND WAS NOT AN IMPACT TO BE REVIEWED BY DHEC IN CONNECTION WITH THE GRANT OF COVERAGE UNDER THE STATE GENERAL PERMIT FOR CONSTRUCTION ACTIVITIES?**
- II. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE PROPOSED PROJECT HAD A 401 CERTIFICATION FOR COVERAGE UNDER NWP 29?**
- III. IS THE COURT OF APPEALS' RULING ON STANDING CONSISTENT WITH WELL-ESTABLISHED LAW ON THE REQUIREMENT TO PRESENT EVIDENCE TO ESTABLISH STANDING?**

INTRODUCTION

Respondent Roper Pond, LLC ("Roper Pond") is the owner of approximately 13 acres of real property on Trenholm Road in an unincorporated area of Richland County ("Property"). The arguments in this case involve two separate authorizations by Respondent South Carolina Department of Health and Environmental Control ("DHEC") in connection with Roper Pond's construction of a multi-family residential housing development on this Property ("Proposed Project"). The first authorization is for stormwater discharges during the construction of the Proposed Project. By letter dated December 15, 2008, DHEC authorized coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("State General Permit"), authorizing land-disturbing activities on 9.6 acres of the Property in association with the Proposed Project. The second DHEC authorization is a 401 water quality certification of a the U.S. Army Corps of Engineers ("Corps") Nationwide General Permit to fill 0.075 acres of jurisdictional wetlands in connection with the

construction of a building pad and sidewalk. While Petitioners argue that these two separate and distinct DHEC decisions are interdependent with respect to Roper Pond's Proposed Project, there is simply no statutory or regulatory basis for this argument.

Fundamental to Petitioners' arguments is the erroneous claim that the dredging and excavation of the on-site Pond required DHEC's approval under a 401 certification. However, Petitioners acknowledge that dredging and excavation of the Pond does not require a 404 Corps permit. (Petitioners' Brief, p. 8). Additionally, Petitioners concede that DHEC's 401 certification is only triggered by the issuance of a 404 permit. (Petitioners' Brief, p. 7). Since the excavation of the Pond does not require a 404 permit, this proposed activity does not trigger a 401 certification. It is well established that a 401 certification is only required for a federal action. Therefore, the Administrative Law Court ("ALC") and the Court of Appeal correctly held that the excavation and dredging of the Pond did not require a 404 permit or a 401 water quality certification prior to DHEC's authorization of coverage to Roper Pond under the State General Permit.

Petitioners contend that that DHEC's decision to authorize coverage to Roper Pond under the State General permit was improper because Roper Pond failed to meet "the requirement to obtain the appropriate State approvals for dredging and excavation of an on-site pond." (Petitioners' Brief, p. 2). Petitioners further argue that "DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on or limited by the Corps' jurisdiction." (Petitioners' Brief, p. 43). Petitioners correctly state that DHEC's authority over such activities is not dependent on or limited by the Corps' jurisdiction. However, such authority is limited by the statutory authority conferred on DHEC by the South Carolina General Assembly, which expressly

limits this regulatory authority to “[a]ll streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts.” S.C. CODE ANN. § 49-1-10. Indeed, while both federal and state laws regulate dredging activities in navigable waters, neither extends to the man-made Pond on the Roper Pond Property. Accordingly, Petitioners have failed to identify any “State approvals for dredging and excavation of an on-site pond” which Roper Pond failed to obtain.

With respect to the 401 water quality certification for NWP 29 authorizing Roper Pond to fill 0.075 acres of jurisdictional wetlands, the filling of these jurisdictional wetlands was authorized under a Nationwide Permit issued by Corps, and Roper Pond provided the required pre-construction notice to the Corps to conduct this activity under a Nationwide Permit. Critically, the DHEC 401 water quality certification for the Nationwide Permit was issued by DHEC in 2007 with general conditions which became conditions of the Nationwide Permit. The evidence on the record demonstrates that the Proposed Project satisfied these general conditions. Therefore, the ALC and Court of Appeals correctly found that the 401 certification for the Nationwide Permit allowed the filling of the 0.075 acres of jurisdictional wetlands without further approval from DHEC. Finally, both the ALC and the Court of Appeals applied the well-established test for standing and correctly held that Petitioners failed to meet their burden to establish all three prongs of the test for standing. Indeed, this Court’s recent ruling in *Carnival Corporation v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014), further supports the ALC’s finding that the Petitioners lacked standing to challenge DHEC’s decision in this case.

ARGUMENT

I. SUMMARY OF FACTS OF THE CASE

This case involves DHEC's authorization for coverage under the State General Permit to conduct land-disturbing activities on 9.6 acres of the Property in connection with construction of the Proposed Project. The Property is outside the corporate limits of the Town of Arcadia Lakes in an unincorporated area of Richland County. (App. p. 876). The Property includes 1.80 acres of jurisdictional wetlands and a pond ("Pond"). The Pond is man-made pond wholly within the boundaries of the Property. (App. pp. 470, 552). The Pond is approximately five feet deep at its deepest point. (Tr. p. 230, ll. 3-6, App. p. 367). The plan for the Proposed Project required the filling of 0.075 acres of jurisdiction wetlands on the Property. The Corps confirmed that this activity was authorized under a Nationwide Permit. (App. p. 772). Additionally, the stormwater management plan for the Proposed Project included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate. (App. p. 202). Neither DHEC nor the Corps require a permit for dredging of the Pond for this use.

A. Coverage under the State General Permit

State regulations require a permit for stormwater discharges from land-disturbing activities associated with the Proposed Project. 24 S.C. CODE ANN. REGS. § 61-9.122.26(c). DHEC administers this permitting program pursuant to 24 S.C. CODE ANN. REGS. § 61-9.122.26 *et seq* ("State NPDES Regulations") and 26 S.C. CODE ANN. REGS. § 72-300 *et seq*. ("State Stormwater Regulations"). Section 61-9.122.28(a)(2) of the State NPDES Regulations authorizes DHEC to issue general permits for discharges for categories or subcategories of storm water point sources. 24 S.C. CODE ANN. REGS. §

61-9.122.28(a)(2)(i). On August 1, 2006, DHEC re-issued the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities, Permit No. SCR100000 ("State General Permit"). (App. p. 493). The State General Permit covers stormwater discharges from the commencement of construction activities until final stabilization of the construction site. (App. pp. 197, 493).

On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project pursuant to the provisions of the State General Permit. Roper Pond also submitted its storm water pollution prevention plan ("SWPPP") to DHEC as required by the State General Permit and the State Stormwater Regulations. (App. pp. 675-771). Jill Stewart, a licensed professional engineer in South Carolina and Manager of the DHEC's Stormwater Permitting Section, conducted the review of Roper Pond's SWPPP. Under the State Stormwater Regulations, the SWPPP must address both the quality and the quantity of the stormwater runoff associated with a proposed project. 26 S.C. S.C. CODE ANN. REGS. § 72-307(C). In reviewing a SWPPP, the reviewing entity assesses the proposed best management practices ("BMPs") to determine if those measures are adequate to meet the requirements of the State Stormwater Regulations and the State General Permit. The SWPPP for any proposed project can be revised as needed to incorporate the appropriate combination of BMPs and implementation procedures necessary to meet the requirements of the State General Permit. (App. pp. 211-12). The SWPPP approved by DHEC for the Proposed Project utilized a number of BMPs to control erosion and sedimentation to maintain water quality during construction. (App. pp. 200-015). Ms. Stewart testified that the Roper Pond SWPPP, with the revisions requested by DHEC,

complied with the requirements of the State General Permit and the State Stormwater Regulations. (App. pp. 194-95, 208).

Although coverage under the State General Permit terminates once the site is stabilized following the conclusion of construction activities, Section 3.4(F) of the State General Permit requires the applicant to include “a description of all post-construction storm water management measures that will be installed during a construction process to control pollutants and storm water after the construction operations have been completed.” (App. p. 510). Roper Pond’s post-construction stormwater design exceeded the requirements of the State Stormwater Regulations. (App. pp. 204-05). The State Stormwater Regulations also require an applicant to demonstrate that the development of the site does not result in a post-construction stormwater runoff rate that is greater than the pre-construction stormwater runoff rate. 26 S.C. CODE ANN. REGS. § 72-307(C)(4)(a). Roper Pond provided DHEC with pre-construction and post-construction runoff rates for the two-year 24-hour duration storm event and the ten-year 24-hour duration storm event in order to demonstrate that the design for development of the site met this regulatory requirement. (App. pp. 201-02). The approved design included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate. (App. p. 202). Both the State General Permit and the State Stormwater Regulations allow an existing pond to be used for control of the post-construction stormwater runoff rate on a developed site. (App. p. 186).

By letter dated December 15, 2008, DHEC granted Roper Pond coverage under the State General Permit for stormwater discharges associated with construction of the

Proposed Project. Petitioners offered no evidence that the SWPPP did not meet the regulatory requirements of the State Stormwater Regulations or the terms of the State General Permit. Petitioners' only expert did not even review the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and offered no opinion regarding the sufficiency of such measures. (App. pp. 338-39, 348). In fact, none of Petitioners' witnesses reviewed the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (App. pp. 338-39, 413). Petitioner thus failed to present any evidence that DHEC's approval of the SWPPP did not meet the regulatory requirements.

B. Corps Permit for Filling of Wetlands

The Proposed Project included the filling of 0.075 acres of jurisdictional wetlands in an area upland of the Pond. The Corps administers the permitting program for filling of wetlands under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 *et seq.*, ("Clean Water Act"). 33 U.S.C.A. § 1344. Pursuant to Section 404 of the Clean Water Act, a Corps permit is required "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C.A. § 1344(a). Section 404 of the Act authorizes Corps to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C.A. § 1344(e)(1). On March 12, 2007, the Corps published the final decision to re-issue Nationwide Permits, including Nationwide Permit 29 for Residential Developments ("NWP 29") and Nationwide Permit 39 ("NWP 39")

for Commercial and Institutional Developments in the Federal Register. 72 Fed. Reg. 11092, 11123 (Mar. 12, 2007). Both NWP 29 and NWP 39 authorize the fill of up to 0.10 acres of jurisdictional wetlands. (App. p. 277).

Section 401 of the Clean Water Act provides, in relevant part, that “[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . .” See 33 U.S.C. § 1341(a)(1). A federal permit cannot be issued unless the state issues its certification or fails to act on a request for certification within a reasonable time, not to exceed one year, and thereby waives certification. *Id.* Pursuant to Section 330.4 of the Corps Regulations, a state water quality certification is required prior to re-issuance of a Nationwide Permit. 33 C.F.R. § 330.4(c)(1). DHEC issued its 401 Water Quality Certification for the 2007 Nationwide Permits in accordance with 25A S.C. CODE ANN. REGS. § 61-101 (“State Water Quality Certification Regulations”). (App. pp. 255-56). DHEC determined that the certification of these Nationwide Permits was appropriate in light of the requirements of the Water Quality Certification Regulations because the activities authorized under the Permits would have minimal individual or cumulative impacts. (App. pp. 255-56). Accordingly, in 2007 DHEC issued its 401 Water Quality Certification for a number of Nationwide Permits, including NWP 29 and NWP 39, with certain general conditions. (App. pp. 254-55, 279). Pre-construction notification to DHEC is not required under the 401 Water Quality Certifications for either NWP 29 or NWP 39. (App. pp. 270-72, 280).

George Whatley, the wetlands scientist for Roper Pond, consulted with the design engineers for the Proposed Project to minimize the impacts to wetlands and to prepare a Corps submittal for authorization to fill jurisdictional wetlands as required by Section 404 of the Clean Water Act. (App. p. 436). On May 5, 2008, Mr. Whatley submitted a pre-construction notification (“PCN”) to the Corps to fill 0.075 acres of jurisdictional wetlands under a Nationwide Permit. (App. p. 774). The PCN for the Proposed Project did not specify a particular Nationwide Permit under which the activities would be conducted. (App. pp. 446, 774). By letter to Mr. Whatley dated September 9, 2008, the Corps verified that “the activity meets the terms and conditions of Department of Army Nationwide Permit(s) #39.” (App. p. 567). In early 2009, Mr. Whatley contacted Colt Bowles of the Corps to request clarification on the verification of the PCN for activities under NWP 39 for Commercial and Institutional Development instead of NWP 29 for Residential Development. (App. pp. 447-50, 792). By letter to Mr. Whatley dated February 25, 2009, the Corps verified that the fill of 0.075 acres in association with the Proposed Project was actually authorized under NWP 29. (App. p. 772).

Charles Hightower, Section Manager of DHEC’s 401 Wetlands Section, testified that the filling of 0.075 acres as proposed by Roper Pond conforms to the conditions of the 401 Water Quality Certifications for both NWP 29 and NWP 39. (App. pp. 270, 273). Mr. Hightower further testified that an individual 404 permit and accompanying 401 Water Quality Certification is not required unless a proposed activity does not meet the conditions of an applicable NWP and the corresponding 401 Water Quality Certification issued by DHEC for that applicable NWP. (App. pp. 258-59; 292-94; 301).

C. The Petitioners

Petitioners in this case are the Town of Arcadia Lakes, residents of Kaminer

Station, a residential subdivision which borders the Roper Pond Property, and residents of the Cary Lake subdivision. The Property lies outside of the corporate limits of the Town of Arcadia Lakes ("Town"). (App. p. 386). The Town contends that the Proposed Project will cause harm to the environmental interests of the town because Roper Pond drains into Cary Lake and the Town is responsible for the water flowing into Cary Lake. Cary Lake is privately owned and maintained by the Cary Lake Homeowners Association. (App. pp. 836-37). The Town has no ownership interest in Cary Lake. (App. p. 837). The water from Cary Lake does not drain into any other water body within the corporate limits of the Town. (App. pp. 837-38). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (App. pp. 839-42). The Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake. (App. pp. 839-42). The Town has never budgeted any funds for the maintenance or repair for any of the seven lakes within its corporate limits. (App. pp. 842-43).

The Kaminer Station Subdivision is adjacent to the Roper Pond Property and hydraulically upgradient of the Roper Pond Property. (App. pp. 378-79, 262-63, 393-94). Ms. Linda Jackson, a resident of the Kaminer Station Subdivision, testified that she enjoys the view of the Pond on the Roper Pond Property and Cary Lake during walks in the area. (App. pp. 380-83). Ms. Jackson further testified Cary Lake is privately owned, and there is no public access to Cary Lake. (App. p. 391). Ms. Jackson testified that any negative impacts to Cary Lake would be the result of Roper Pond's failure to follow the General Permit and the SWPPP during the construction of the Proposed Project. (App. pp. 387-90).

Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. (App. p. 400). Elaine Starr, a resident of the Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. (App. p. 401). Ms. Starr testified that the condition of Cary Lake has deteriorated over the years. (App. p. 401). Ms. Starr testified that Cary Lake has been impacted by sediment from previous development in the area. (App. pp. 414-17). Ms. Starr testified that she had not reviewed the SWPPP for the Proposed Project. (App. p. 413). Ms. Starr testified that any development in the area would exacerbate the condition of Cary Lake. (App. p. 414). Ms. Starr further testified that the stormwater from the Proposed Project will negatively impact Cary Lake even if the SWPPP approved by DHEC is implemented as designed. *Id.* Ms. Starr testified that she believed that any increase in density of the Property would have a detrimental impact because the impervious surfaces, such as the roof tops, garages, pavement, and sidewalks, would increase the rate of stormwater runoff. (App. pp. 414-18).

II. A 401 CERTIFICATION IS NOT REQUIRED FOR THE DREDGING AND EXCAVATION OF THE POND BECAUSE SUCH ACTIVITY DOES NOT REQUIRE A 404 PERMIT FROM THE CORPS.

Petitioners repeatedly argue that the 401 certification for NWP 29 is not valid for the Proposed Project because the General Conditions of the NWP certification require DHEC to review impacts beyond those authorized by NWP. Specifically, Petitioners argue that this General Condition requires DHEC to review impacts from excavation of the Pond. This argument is flawed because a 401 certification is triggered only if a 404 permit from the Corps is required for the proposed activity. As the Petitioners acknowledge, the excavation of the on-site Pond does not require a 404 permit.

The dredging activities alone do not require a 404 permit from the Corps. Section 404 of the Clean Water Act requires a permit issued by the Corps “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C.A. § 1344(a). The discharge of dredged and fill material is defined in 33 C.F.R. § 323.2, which provides in relevant part as follows:

(j) The term “discharge of dredged material” means *any addition of dredged material into the waters of the United States*. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

* * *

(l) The term “discharge of fill material” means the *addition of fill material into waters of the United States*. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The terms does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 CFR 323.2 (j) and (l). It is clear that a 404 permit for “the discharge of dredged or fill material” is required only in those circumstances in which such material is being added to waters of the United States. Under the plans for excavation of the Pond, the dredged

material will be placed in an area upland from the Pond. (Tr. p. 318, l. 19 – p. 319, l. 16, App. pp. 455-56; p. 327, l. 13 – p. 329, l. 5, App. p. 464-66). As such, there is no 404 permit required for the dredging and excavation of the Pond for use as a post-construction water control structure for the Proposed Project. Indeed, Petitioners concede that the “dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act.” (Petitioners’ Brief, p. 8). Still, Petitioners argue that the dredging and excavation of the Pond requires a permit and approval by the Department.

The basis for Petitioners’ argument is a general condition applicable to the 401 certification of Nationwide Permits issued by DHEC in 2007. Petitioners misconstrue this general condition in the 401 certification. While Petitioners concede that the dredging of the Pond is not regulated under Section 404 of the Clean Water Act, Petitioners nonetheless argue that Section 2.1(C) of the State General Permit imposes an absolute requirement for a 404 permit for use of the Pond as a water control structure. (Petitioners’ Brief, p. 49-50). There is simply no basis for this argument. Specifically, Section 2.1(C) of the State 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.

(Pet. Ex. 3, p. 4, R. p. 487) (emphasis added). Petitioners argued to the Court of Appeals that the Pond was used by Roper Pond as a water control structure and thus required a 404 permit from the Corps. The Court of Appeals correctly held that the issue had not been preserved for appeal. *Town of Arcadia Lakes v. South Carolina Dep’t of Health and Envtl. Control*, 404 S.C. 515, 536, 745 S.E.2d 385, 396 (Ct. App. 2013). However, even if it had been so preserved, the argument nonetheless fails. Although Petitioners have

repeatedly conceded that no 404 permit is required for the excavation of the Pond, Petitioners continue to argue in circular fashion that DHEC improperly granted Roper Pond coverage under the State General Permit because Roper Pond did not have the Corps permitting as required by that Permit: “Again, DHEC’s NPDES General Permit expressly requires that any Corps 404 permit required under the CWA be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (Petitioners’ Brief, p. 9). Section 2.1(C) of the State General Permit cannot create a requirement for a Corps permit were none is required by the federal statutes. Indeed, this condition of the State General permit only applies “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.” As fully discussed above, no such permit is required for the excavation and dredging of the Pond to provide the needed capacity for use as a stormwater control structure.

Additionally, contrary to the Petitioners’ assertions, NWP 29 authorizing Roper Pond to fill 0.075 acres of wetlands is not a requirement of Section 2.1(C) of the State General Permit Petitioners. Section 2.1(C) of the State General Permit addresses only Corps permitting required for “permanent or temporary storm water control structures.” Roper Pond provided the required pre-construction notification to the Corps for coverage under NWP 29 to authorize the filling of 0.075 acres of jurisdictional wetlands for construction of buildings and sidewalks—not storm water control structures. (App. p. 565). There is simply no basis for Petitioner’s contention that certification of NWP 29 was a prerequisite to DHEC’s decision on coverage pursuant to Section 2.1(C) of the State General Permit.

III. THERE ARE NO FEDERAL OR STATE PERMITS REQUIRED FOR DREDGING AND EXCAVATION OF THE POND.

While both federal and state law regulate dredging, such regulatory authority is limited to dredging in navigable water as that term is defined under Federal Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.*, and the State Construction in Navigable Waters Permitting Regulation, 23 S.C. CODE ANN. REGS. § 19-450 (“State Navigable Waters Regulation”). Pursuant to Section 10 of the Federal Rivers and Harbors Act, a Corps permit is required for dredging of “any navigable water of the United States.” 33 U.S.C.A. § 403. Section 10 of the Act provides in relevant part:

[I]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Army] prior to beginning the same

Id. However, the definition of “any navigable water of the United States” in the Rivers and Harbors Act is much narrower than the terms “navigable waters” and “waters of the United States” as used in the Clean Water Act.

Under the Clean Water Act, ““navigable waters” means the waters of the United States, including the territorial seas.” 33 U.S.C.A. § 1362(7). The Corps’ regulations implementing the Clean Water Act define “waters of the United States” to include the following:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie

potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ;

- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a). In contrast, the navigable waters of the United States subject to the Rivers and Harbors Act as defined in 33 C.F.R. Part 329 is limited to “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use **to transport interstate or foreign commerce.**” 33 C.F.R. § 329.4 (emphasis added). “The term ‘navigable waters of the United States’ as used in the Rivers and Harbors Act of 1899 has a substantially different, and more limited, meaning than the term as used in the Clean Water Act.” *1902 Atlantic Ltd. v. Hudson*, 574 F.Supp. 1381, 1392 (D.C. Va. 1983). “In contrast to the Clean Water Act, Congress did not intend the term ‘navigable waters of the United States’ to reach to the full extent of congressional power over commerce as granted by Article 1, Section 8 of the Constitution. Rather, the term is restricted to the traditional definition of navigable waters as of 1899, the time of enactment of the Rivers and Harbors Act.” *Id.* (citations omitted). Accordingly, the ALC correctly held that “the excavation of the Pond would require a permit under Section 10 of Rivers and Harbors Act only if the Pond were in fact navigable.” (Final Order and Decision, p. 26, App. p. 35).

Petitioners argue that “DHEC’s review authority over dredging and excavating wetlands and waters of the State is not dependent on or limited by the Corps’ jurisdiction.” (Petitioners’ Brief, p. 43). Petitioners correctly state that DHEC’s authority over such activities is not dependent on or limited by the Corps’ jurisdiction. However, such authority is limited by the statutory authority conferred on DHEC by the South Carolina General Assembly, which expressly limits this regulatory authority to “[a]ll streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts.” S.C. CODE ANN. § 49-1-10. Consistent with this statute, the State Navigable Waters Regulation also defines navigable water as navigable in fact. Section 19-450.2 of the Regulation provides as follows:

Navigable waters means those waters which are now navigable, or have been navigable at any time, or are capable of being rendered navigable by the removal of accidental obstructions, by rafts of lumber or timber or by small pleasure or sport fishing boats. Navigability shall be determined by the Department.

23 S.C. CODE ANN. REGS. § 19-450.2(C). Again, a permit for dredging of the Pond would only be required if the Pond is navigable in fact. Petitioners have made no claim that the Pond is or ever has been navigable in fact. Indeed, there is no evidence in the record to support such a claim. The evidence on the record clearly demonstrates that the Pond is not a navigable water and is not navigable in fact. The jurisdiction determination issued by the Corps on January 5, 2005, indicated that there are no “navigable waters of the United States” on the Property. (Roper Pond Ex. 6, App. p. 556). Charles Hightower and George Whatley also testified that the Pond is not a navigable water of the United States under Section 10 of the Federal Rivers and Harbors Act. (Tr. p. 140, l. 13 – p. 141, l. 7, App. pp. 277-78; p. 332, ll. 5-9, App. p. 469). Accordingly there is substantial

evidence on the record supporting the ALC's finding that the Pond is not a "navigable water of the United States" under the Rivers and Harbors Act or a navigable water under the State Navigable Water Regulations. Therefore, there is no basis in federal or state law that a permit is required for the dredging of the Pond.

Petitioners further contend that "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." (Petitioners' Brief, p. 8). While the excavation and dredging activity alone does not require a federal or state permit, the use of the existing Pond as a post-construction water control device was in the stormwater design for the Proposed Project as reviewed and approved by DHEC. The approved design for the post-construction stormwater management system includes dredging the Pond to provide additional storage volume for control of the post-construction runoff rate. (Tr. p. 65, ll. 16-19, App. p. 202). Accordingly, the use of the Pond as a post-construction water control device was approved through DHEC's grant of coverage under the State General Permit. The cover page of the State General Permit states that the Permit authorizes operators "to discharge pollutants to Surface Waters of the State in accordance with the conditions and requirements set forth herein." (App. p. 493). The cover page further states that this authorization is made "[i]n compliance with the provisions of the SC Pollution Control Act (S.C. Code section 48-1-10 *et seq.*, 1976) and with the provisions of the Clean Water Act 33 U.S.C. § 1251 *et seq.*" (App. p. 493). Petitioners' argument thus disregards the DHEC's regulation of the Roper Pond project, including the use of the Pond as a post-construction water control device, under the S.C. Pollution Control Act, the State General

Permit and the applicable regulations.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE PROPOSED PROJECT HAD 401 CERTIFICATION FOR COVERAGE UNDER NWP 29.

The Court of Appeals correctly held that DHEC had issued a water quality certification in 2007 for the activities authorized by NWP 29 and found that DHEC's certification of NWP 29 was sufficient for Roper Pond to undertake the proposed filling of the 0.075 acres of wetlands without further approval from DHEC. *Town of Arcadia Lakes*, 404 S.C. at 535, 745 S.E.2d at 396. Accordingly, there is no merit to Petitioners' assertion that there was no 401 certification for filling of jurisdictional wetlands to be conducted by Roper Pond under NWP 29.

The Corps issued NWP 29 in 2007, authorizing those insignificant impacts described therein. DHEC issued the 401 water quality certification for NWP 29 in 2007 with certain limited general conditions. The only requirement for authorization to fill the 0.075 acres of wetlands under the NWP was pre-construction notification to the Corps. As the Court of Appeals correctly held:

The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

Town of Arcadia Lakes, 404 S.C. at 535, 745 S.E.2d at 396. This holding acknowledges that DHEC had already issued a 401 certification for projects to be authorized under NWP 29. NWP 29 did not require further action or approvals by DHEC for activities within the scope of those authorized by NWP 29. As the Court of Appeals noted, the Corps was aware of the excavation of the Pond when it "determined that the project

would result in ‘minimal individual and cumulative environmental effects’ and met the conditions of NWP 29.” *Town of Arcadia Lakes*, 404 S.C. at 534, 745 S.E.2d at 395. As discussed below, pursuant to Corps Regulations and the State Water Quality Certification Regulations, the Corps—not DHEC—is the regulatory agency authorized to review a notification to proceed under a Nationwide Permit and to determine whether the proposed activity is consistent with the conditions of that Nationwide Permit.

Petitioners contend that “[b]ecause the project did not qualify for coverage under DHEC’s NWP certification, it was not entitled to coverage under the General Permit.” (Petitioners’ Brief, p. 49). Petitioners base this argument on the following general condition for the 2007 401 Water Quality Certification:

1. SCDHEC considers a “single and complete project” to mean the overall project proposed or accomplished by a single owner/developer and it includes all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by each NWP request. Impacts to Geographical Areas of Particular Concern (GAPC) sites or adjacent waterbodies or wetlands resulting from an activity will be considered during the review of these actions.¹

(Pet. Ex. 23, App. p. 585). Petitioners contend that DHEC’s review necessitated by this general condition requires a comprehensive review of the entire development, including DHEC’s approval for the dredging and excavation of the Pond. Such interpretation is plainly contrary to the basic rationale for issuing Nationwide Permits. Indeed, as discussed more fully below, this general condition to the 401 certification is intended to prevent a developer from dividing a proposed development into phases or geographic

¹ S.C. CODE ANN. REGS. 30-1(D)(24) defines “Geographic Areas of Particular Concern” as “areas within South Carolina’s coastal zone which have been identified in the State’s Coastal Management Program as being of such importance as to merit special consideration during the Department review of permit applications.” Accordingly, the final sentence of this general condition is inapplicable to the Proposed Project.

areas in order to use the same Nationwide Permit multiple times and thus avoid individual permitting.

Section 404 of the Clean Water Act authorizes Corps to “issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C.A. § 1344(e)(1). In *Crutchfield v. County of Hanover, Virginia*, the Court of Appeals for the Fourth Circuit examined the authorization requirements for activities to be conducted under a Nationwide Permit. The *Crutchfield* Court explained:

The general permits at issue in this case are all Nationwide Permits (NWP). Activities falling within the scope of an NWP are automatically authorized without any individualized inquiry, although preconstruction notification of the Corps is required in some cases. 33 C.F.R. § 330.1(e) (2003). In cases where preconstruction notification is required, the Corps will verify the applicability of the NWP to the proposed activity. 33 C.F.R. § 330.1(e)(2). Since NWPs are “designed to regulate with little, if any, delay or paperwork certain activities having minimal [environmental] impacts,” NWP verification is much simpler than the individual permit process. 33 C.F.R. § 330.1(b) (2003). If the Corps has concerns about a proposed project, however, the Corps may exercise “discretionary authority” to restrict the otherwise automatic application of the NWP program while its concerns are addressed. 33 C.F.R. §§ 330.1(d), 330.5 (2003). The Corps’ regulations also direct the Corps to review any incoming individual permit application for potential eligibility under existing NWPs, even if the application itself does not so request. 33 C.F.R. § 330.1(f) (2003).

325 F.3d 211, 214-15 (4th Cir. 2003). Petitioners’ interpretation of the general condition of the 2007 401 Water Quality Certification is directly at odds with this streamlined authorization process. Indeed, as the Fourth Circuit noted, activities authorized under a number of Nationwide Permits are authorized to proceed without any notice to the

Corps—the permitting authority for these Permits. Under the Clean Water Act and the Corps Regulations, Nationwide Permits are authorized upon a determination by the Corps that a category of activities will cause only minimal impacts. Accordingly, it would be illogical to place a condition on the 401 Water Quality Certification to require a full determination of no impact for all activities associated with an entire project. Moreover, Petitioners offered no evidence at the hearing to support this interpretation. In this case, the regulated activity for the entirety of the Proposed Project involves the filling of only 0.075 acres of wetlands.

The proper interpretation of this general condition to the 401 Water Quality Certification, and the interpretation which is supported by the evidence on the record, is that an applicant may not segment a project into phases or geographic areas to avoid an individual 404 permit when the overall impacts exceed that authorized in a Nationwide Permit. As Chuck Hightower explained:

That is what it says, and the reason we put that condition on there, my understanding is, we were having applicants come in and they would apply for a coverage under a Nationwide Permit, and then they would get that one, and then as they developed a project in phases, they would come back for another Nationwide, and they would come back for another Nationwide, and they would come back for another Nationwide, and the intent was that we'd look at all the jurisdictional activities that required 404 permits at one time rather than piecemeal the projects.

(Tr. p. 154, ll. 2-13, App. p. 291). This interpretation is consistent with anti-segmentation principles for assessing environmental impacts under federal law. *See, e.g., State of S.C. ex rel., Campbell v. O'Leary*, 64 F.3d 892, 898-99 (4th Cir.1995) (holding that segmentation of one phase of a larger project prior to the completion of the environmental review of the entire project under NEPA constitutes impermissible segmentation if the component action has a “direct and substantial probability” of

influencing the agency's decision on the larger project); *One Thousand Friends v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004) (noting that courts have found segmentation improper under NEPA when the segmented project "has no independent justification, no life of its own, or is simply illogical when viewed in isolation"). Indeed, when considering the language of the general condition in the 2007 401 Water Quality Certification in its entirety, it is clear that this condition is merely a further clarification of the prohibition against multiple use of the same Nationwide Permit in a "single and complete project" in the Corps Regulations.

Section 330.6 of the Corp Regulations allows a developer to use more than one Nationwide Permit in a single project, but prohibits the use of the same Nationwide Permit more than once in the project. 33 C.F.R. § 330.6(c). This provision of the Regulations provides as follows:

(c) Multiple use of nationwide permits. Two or more different NWPs can be combined to authorize a "single and complete project" as defined at 33 CFR 330.2(i). However, the same NWP cannot be used more than once for a single and complete project.

Id. The general condition of the Nationwide Permits provides in relevant part: "SCDHEC considers a 'single and complete project' to mean the overall project proposed or accomplished by a single owner/developer and it includes all land within the project boundary under single ownership." (Pet. Ex. 23, App. p. 585). The reference to "single and complete project" is in quotations and therefore unquestionably a reference to a defined term. The only use of this term in the relevant federal and state law is in Section 330.6 of the Corps Regulations. As such, there can be no doubt that the Department's use of this term in the general conditions to the Nationwide Permits was a further clarification of the term as a prohibition of multiple use of the same Nationwide Permit

within a single project. Accordingly, there is no validity to Petitioners' contention that this general condition requires the Department's evaluation of the impacts of the all activities associated with the Proposed Project. As long as the activities fall within the scope of NWP 29, those impacts are deemed to be minimal and no assessment by either the Corps or the Department is required. Other unregulated activities would therefore fall outside the jurisdiction of the Corps and the State. The Court of Appeals thus correctly held that since no 404 permit was required for the excavation and dredging of the Pond, such activity was not subject to the general conditions of the 401 certification for NWP 29.

Significantly, the comprehensive review of the project which Petitioners advocate would render the 2007 401 Water Quality Certification, and the Nationwide Permits themselves, completely meaningless. The general condition relied on by Petitioners is applicable to every Nationwide Permit certified by the Department in 2007. In essence, Petitioners contend that this review by the Department is the same scope of review required for certification of an individual permit. As a preliminary matter, a review of this magnitude cannot be conducted within the time frame for pre-construction notification under the Corps Regulations. Specifically, Section 330.1 of the Corps Regulations provides in relevant part:

In most cases, permittees may proceed with activities authorized by NWPs without notifying the [District Engineer of the Corps]. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. **The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 30-day period.**

33 C.F.R. § 330.1(e)(1) (emphasis added). As such, for those Nationwide Permits which

do not require pre-construction notification to the Corps, a party may proceed with activities authorized by the Nationwide Permit at any time without notice to the Corps. When pre-construction notification to the Corps is required, the permittee is entitled to proceed within 30 days of the Corps' receipt of such notification. Even where there is notification to the Corps, it would be impossible for the Department to conduct a review of the scope advocated by Petitioners within this time period. Moreover, and significantly, the requirement to conduct a review of this scope would negate any benefit of proceeding under a Nationwide Permit and is directly in conflict with the fundamental rationale allowing Nationwide Permits for those activities which have been deemed to cause minimal impacts.

Additionally, pursuant to Corps Regulations and the State Water Quality Certification Regulations, the Corps—not the Department—is the regulatory agency authorized to review a notification to proceed under a Nationwide Permit and to determine whether the proposed activity is consistent with that Nationwide Permit. The state water quality certification is not a permit. The state water quality certification is a prerequisite to a federal 404 permit which upon issuance by the state merges into the 404 permit. Any conditions of a 401 Water Quality Certification issued by the Department become a condition of the Corps permit. 33 C.F.R. § 330.4(c); *see also* S.C. CODE ANN. REGS. § 61-101(H)(1) (“Any certification condition is intended to become a condition of the Federal or State license or permit as specified in Federal or State law.”). Pursuant to the Corps Regulations, the Corps district engineer has the discretionary authority to determine whether an activity complies with the conditions of the Nationwide Permit and whether the activities would have more than minimal impacts. 33 C.F.R. § 330.4(d).

The Corps district engineer has the authority to modify the Nationwide Permit or to require an individual permit for the proposed activity. *Id.* Likewise, the State Water Quality Certification Regulations acknowledge that the agency issuing the permit is authorized to enforce the conditions of the permit: “Certification conditions which are included as conditions of such license or permit are subject to enforcement mechanisms available to the Federal or State agency issuing the license or permit.” 25A S.C. CODE ANN. REGS. § 61-101.H.2 (emphasis added).² Although the Department may impose conditions on its issuance of the 401 water quality certification for a Nationwide Permit, or any other federal permit affecting water quality, the authority to enforce those conditions is held by the Corps—the agency issuing the Nationwide Permit. Accordingly, there is no basis for Petitioners’ contention that the general condition of the 2007 401 Water Quality Certification for the Nationwide Permits requires a further action by the Department.

Petitioners further argue that standard language in the Corps letter to Roper Pond concurring in its notification to proceed under a Nationwide Permit requires certification by the Department prior to proceeding under that Permit. (Petitioners’ Brief, p. 15). Specifically, the Corps letter advised Roper Pond that the Proposed Project must comply with a number of general conditions, including the following:

1. 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 Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

² In this case the agency issuing the license or permit would be the Corps, not the Department, as the Department is merely certifying the Corps permit.

(Pet. Ex. 10, App. p. 567). Contrary to the Petitioners' assertion, this standard language does not impose on Roper Pond a requirement to secure a 401 water quality certification prior to proceeding under NWP 29 where none is otherwise required. This standard language merely reminds the party proceeding under a Nationwide Permit that other authorizations, including a 401 water quality certification, may be required for the proposed activity. Specifically, when the Corps issues Nationwide Permits, a state may certify, certify with conditions, or deny certification of a Nationwide Permit. However, a party may still proceed under a Nationwide Permit for which a state denied certification at the time the Nationwide Permit was issued if that party obtains an individual water quality certification to conduct activities under the Nationwide Permit. *See* 33 C.F.R. § 330.4(C)(6) ("In instances where a state has denied the 401 water quality certification for discharges under a particular NWP, permittees must furnish the DE with an individual 401 water quality certification or a copy of the application to the state for such certification."). In this case, the 401 Water Quality Certification for NWP 29 was issued by the Department in 2007. Accordingly, no further certification or review by the Department was required prior to Roper Pond's proceeding with the proposed activities under NWP 29.

V. THE COURT'S RULING ON STANDING IS CONSISTENT WITH WELL-ESTABLISHED LAW ON THE REQUIREMENT TO OFFER EVIDENCE SUFFICIENT TO ESTABLISH STANDING.

Petitioners correctly state that South Carolina law provides "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.'" (Petitioners' Brief, p. 18 (quoting *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013))). Petitioners now argue for the first time in this case that South Carolina Code 44-1-60, which requires

that DHEC provide notice to an “affected person,” confers statutory standing any person who meets the statutory definition of “affected person.” As a preliminary matter, this argument is not preserved for appeal since this issue not raised to and ruled on by the ALC. *Brown v. S.C. Dep’t of Health & Env’tl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (“[I]ssues not raised to and ruled on by the ALJ are not preserved for appellate consideration.”). The ALC did not rule on this argument in the Final Order and Decision. (App. pp. 10-38). While the Petitioners filed a motion for reconsideration, this issue was not raised in the motion. *MRI at Belfair, LLC v. South Carolina Dep’t of Health and Env’tl. Control*, 394 S.C. 567, 576, 716 S.E.2d 111, 115 (Ct. App. 2011) (holding that issue is not preserved for review on appeal if the motion for reconsideration does not specifically raise the issue in the motion). (See Motion to Reconsider and for Stay, App. pp. 112-15). Accordingly, Petitioners may not raise the argument that South Carolina Section 44-1-60 confers standing on “affected persons.”

Even if this argument had been preserved for appellate review, which it was not, Petitioners argument is without merit. In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, this Court recognized that “44–1–60(E) places an affirmative duty on DHEC to send simultaneous notification of appealable staff decisions to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail.” 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010). However, a request to be given notice under Section 44-1-60(E) does not confer standing on such person with respect to the department decision for which notice was requested. If that were the case, any person--even a person living outside the State could create standing merely by asking to be given notice. Petitioners take the argument one

step further and contend that the mere availability of notice under Section 44-1-60(E) confers standing on everyone “since the statute uses the term ‘affected person’ to delineate the universe of citizens entitled to notice of a DHEC decisions and to invoke administrative review of it.” (Petitioners’ Brief, p. 19). Petitioners’ use of the term “universe of citizens” parallels the breadth of this argument. Under this argument, any and every “department decision” under section 44-1-60(E) would be subject to challenge by any party--regardless of whether such party is personally affected by the decision or has a recognized interest in that decision. Adoption of this argument would completely eliminate any requirement to establish standing in challenges to DHEC permitting decisions.

Petitioners further contend that the Court of Appeals ruling creates a new test for establishing standing. To the contrary, the ALC and the Court of Appeals correctly applied the well-established law on standing and found that the Petitioners failed to present evidence to demonstrate an injury in fact causally connected to the action challenged by Petitioners. Petitioners’ contention that the Court of Appeals improperly applied well-established law on standing is based on Petitioners’ failure to recognize the distinction between the sufficiency of allegations to support standing at the pleading stage and the requirement to offer sufficient evidence to prove such allegations at trial. Contrary to Petitioners’ assertions, the Court of Appeals’ ruling does not require the Petitioners to prove success on the merits. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme stated the three-prong standing test and held that the plaintiff bears the burden of establishing each prong of this test. 504 U.S. at 561 (citations omitted). The Court further explained that this burden increases with each

stage of litigation such that “at the final stage, those facts (if controverted) must be ‘supported adequately by the evidence adduced at trial.’” *Id.* (citation omitted). The Court of Appeals thus applied the proper standard in finding that evidence presented at trial, including the lack of evidence presented at trial by Petitioners, supported the ALC’s ruling that the Petitioners failed to satisfy the requirements of standing to challenge DHEC’s decisions related to Roper Pond’s Proposed Project.

Petitioner further contend that “the Court of Appeals failed to give proper consideration to case law indicating that an injury can be common to great many members of the public, and still be sufficient personal to a specific individual to give the individual standing to sue.” (Petitioners’ Brief, p. 23). This argument negates the requirement that a person must have a “particularized harm” to establish standing. Petitioners contend that the Court of Appeals disregards a number of injuries resulting from the Proposed Project: “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.” (Petitioners’ Brief, p. 26). This Court’s recent decision in *Carnival Corporation v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014), further supports the ruling that standing in this case cannot be based on these potential harms to the community as a whole. In *Carnival Corporation*, four citizens’ groups brought a suit seeking to enjoin a cruise ship operator alleged unlawful use of a Charleston terminal owned by the South Carolina State Ports Authority. The

Court noted that the plaintiff associations alleged the following harms resulting from the cruise ship's operation at the terminal:

- “The crowds, pollution, and traffic associated with these unlawful operations create a nuisance for Charleston citizens. This lawsuit aims to protect Charleston's neighborhoods, families and the environment by having Defendant Carnival play by the longstanding rules and norms that have made—and make—Charleston a wonderful place to work, live, and visit.”
- “[T]he *Fantasy* visually disrupts the historic skyline.”
- “The influx of thousands of passengers, crew, and support personnel (and associated traffic) ... cause major traffic congestion downtown and the closure of public roads.”
- “The vessels emit noise pollution, including broadcast announcements and music, and the burning of diesel fuel emits visible particulate soot from ship funnels—all adjacent to the Old and Historic District.”
- “Home-porting cruise operations at an industrial scale could jeopardize the integrity, setting, and context that led to National Register designation and place maintenance of National Register status at risk.”
- “On *Fantasy* embarkation and debarkation days, portions of Concord and Washington Streets—which are public streets—are closed for cruise business. Because of those closures, displacement of traffic, and the concentration of cruise traffic in a limited area for a limited time, cruise embarkations and debarkations cause increased congestion along the east side of the downtown Peninsula.”
- “Cruise ships such as the Defendant's *Fantasy* also emit visible particulate soot and other pollutants, including nitrogen and sulfur oxides, which are harmful to human health when inhaled and are deposited into the surrounding waters and land.”
- “Defendant's actions including noncompliance with zoning and environmental laws have injured the above Plaintiff organizations and their members by among other things reducing their use and enjoyment of the local environment and Charleston's historic assets, including their homes, neighborhoods and protected structures.”
- “Cruise operations downtown and ineffective management of them cause, among other things, traffic congestion, pollution emissions, road closures, large crowds, loud noises, and obstructed views that are incompatible with the area's historic setting, scale, and residential character and impact health and the environment.”

Id. at 76-77, 753 S.E.2d at 851 (emphasis added). These alleged injuries, including that allegation of harm to the plaintiffs' aesthetic interest in viewing the city skyline, are similar to those alleged by Petitioners in this case. The Court held that none of the alleged harms was a particularized harm to the plaintiff associations or their members, explaining:

All members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons residing in or passing through the City of Charleston and therefore, Plaintiffs fail to establish the first element of standing.

Id. at 77, 753 S.E.2d at 851. Such is the case here. The allegations of harm which the Petitioners allege are common to all members of the public and therefore do not support standing to challenge DHEC's decision in this case. Accordingly, the ALC and the Court of Appeals correctly found that Petitioners failed to allege a particularized harm resulting for the DHEC decision in this case.

Petitioners also argue that the Court of Appeals improperly "requires that the Petitioners' injury in fact result from a future permit violation or noncompliance on the part of Roper Pond." (Petitioners' Brief, p. 33). Petitioners misconstrue the holding of the Court of Appeals. The Court of Appeals correctly held that Petitioners failed to present evidence of an injury in fact as the result of increased sedimentation in Cary Lake from the Proposed Project. Citing to the evidence on the record, the Court of Appeals found that the current increased sedimentation in Cary Lake of which Petitioners complained was the result of "prior occurrences involving possible mismanagement" and noted that Petitioners offered "no evidence that the project at issue here would lead to similar results." *Town of Arcadia Lakes*, 404 S.C. at 533, 745 S.E.2d at 394. Indeed, as

the Court of Appeals noted, Elaine Starr, who testified on behalf of the Cary Lake Petitioners, “admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC’s determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments.” *Id.* Ms. Jackson further testified that any negative impacts to Cary Lake would be the result of Roper Pond’s failure to follow the General Permit and the SWPPP during the construction of the Proposed Project. (Tr. p. 250, l. 16 – p. 251, l. 7, App. p. 387-88). Evidence of prior general harm from similar activities does not satisfy requirement of a threat of “imminent and concrete harm” to a party challenging governmental action “because it relates to past injury rather than imminent future injury that is sought to be enjoined.” *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1150 (2009). Accordingly, the testimony by Ms. Starr and Ms. Jackson regarding prior violations by other developers does not support a claim that Roper Pond’s activities under SWPPP and the State General Permit will result in an actual and imminent injury to Cary Lake. The Court of Appeals thus correctly held that such allegations do not satisfy the requirement to show harm from DHEC’s decision in this case.

With respect to the Kaminer Station Petitioners, the Court of Appeals upheld the ALC’s ruling on standing “to the extent that it found that Petitioners have failed to establish an injury that would be traceable to the permitting decision.” *Town of Arcadia Lakes*, 404 S.C. at 531, 745 S.E.2d at 393. Contrary to Petitioners’ assertions, the Court of Appeals did not hold that the aesthetic interest of the Kaminer Station could not be an injury in fact. Instead, the Court of Appeals affirmed the ALC’s determination that the

Kaminer Station Petitioners failed to offer evidence of a causal connection between the injuries alleged and the permitting decision at issue in this case:

When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves. Furthermore, Reice's inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Petitioners have failed to meet the second requirement for standing.

Town of Arcadia Lakes, 404 S.C. at 532, 745 S.E.2d at 394. Fundamental to this ruling is the recognition of the conduct complained of in this action—i.e., DHEC's approval of the SWPPP and authorization of coverage to Roper Pond under the State General Permit. Most, if not all, of Petitioners' alleged injuries in support of standing would result from Roper Pond's failure to manage sediment and erosion control in accordance with the approved SWPPP and the State General Permit. With respect to these allegations, the potential injuries alleged would not be caused by the issuance of coverage under the State General Permit, but by a failure to comply with the DHEC-approved SWPPP and the State General Permit. Petitioners cite to this Court's holding in *Smiley v. South Carolina Department of Health and Environmental Control*, 374 S.C. 326, 649 S.E.2d 31 (2007), as support for standing in this case. However, in *Smiley*, the plaintiff's alleged injury would be caused by interruption of his use of a public beach during a beach renourishment project. Unlike the Petitioner's allegations in this case, *Smiley's* alleged harm resulting from the activities authorized under the permit--not the violation of the permit which is the subject of the appeal. 374 S.C. at 332, 649 S.E.2d at 34. Moreover, as the Court of Appeals correctly held, Petitioners failed to offer any evidence that

“BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site.” *Town of Arcadia Lakes*, 404 S.C. at 531, 745 S.E.2d at 393. Indeed, Petitioners’ only expert had never seen the approved SWPPP and offered no opinion regarding the sufficiency, or lack thereof, of the BMPs in the approval SWPPP. The Court of Appeals thus properly held that Petitioners had failed to allege an injury that would be traceable to the permitting decision.

Petitioners further assert that the Court “injects a new requirement that a plaintiff must have a property interest in order to establish an injury-in-fact.” (Petition, p. 27). Petitioners contend that “[t]he 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, it leads to the result that only those with property interests have standing.” (Petition, p. 28). Petitioners mischaracterize the Court of Appeals’ consideration of the fact that Roper Pond and Cary Lake are privately owned in the context of specific findings that the Petitioners failed to demonstrate standing in this case. For example, Petitioners assert that the Town has standing because of its responsibility for the environmental quality of Cary Lake. However, the evidence on the record does not support this assertion. Cary Lake is privately owned and maintained by the Cary Lake Homeowners Association. (App. pp. 836-37). The Town has no ownership interest in Cary Lake. (App. p. 837). The water from Cary Lake does not drain into any other water body within the corporate limits of the Town. (App. pp. 837-38). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (App. pp. 839-40). The Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake. (App. pp. 839-40). The Town has never budgeted

any funds for the maintenance of repair for any of the seven lakes within its corporate limits. (App. pp. 842-43). As such, the absence of a property interest in Cary Lake is an appropriate consideration in the determination of the Town's claim to standing for alleged injuries related to the environmental condition of Cary Lake.

Similarly, Petitioners contend that the Court of Appeals interpreted the proprietary interests required for the Town's standing under *Glaze v. Grooms*, 324 S.C. 249 (Ct. App. 1996), too narrowly. However, in holding that the Town failed to satisfy the requirements of standing, the Court of Appeals did not reach the issue of whether the interests asserted by the Town were "'proprietary' or not." *Town of Arcadia Lakes*, 404 S.C. at 530, 745 S.E.2d at 393. The Court of Appeals found that the Town failed to present evidence to show that any of its "professed interests" would result in an injury in fact to the Town or that any alleged injuries "were 'fairly traceable to the challenged action in this case.'" *Id.* Petitioners further contend that Town's requirements to "prevent pollution within its MS4" under the Clean Water Act is sufficient to demonstrate standing. (Petitioner's Brief, p. 31). However, the evidence on the record does not support this contention. Indeed, Richard Thomas, Mayor of the Town, testified that the Town has delegated its responsibility for compliance with its MS4 requirements to Richland County through an intergovernmental agreement. (App. p. 857). The regulations governing MS4 permit requirements expressly provide for the Town's delegation of its compliance requirement to another MS4 through an intergovernmental agreement. As such, Petitioners' assertion that the Town's MS4 requirements support standing is contrary to the evidence on the record.

As noted above, Petitioners rely on the holding in *Smiley* for the holding that

generalized aesthetic and recreational interests are sufficient to confer standing. However, *Smiley* can be easily distinguished from this case. The petitioner in *Smiley* challenging the beach renourishment project, alleging an injury based on the interruption of his use to a “public beach on the Isle of Palms.” *Smiley v. South Carolina Dep’t of Health and Envtl. Control*, 374 S.C. 326, 330, 649 S.E.2d 31, 33 (2007) (emphasis added). Such is not the case here. The Court of Appeals correctly recognizes that the Pond on the Roper Pond property is a man-made pond wholly within the boundaries of the Property. Citing to the holding in *Conservation Council of N.C. v. Costanzo*, 505 F.2d 498 (4th Cir. 1974), the Court notes that an injury in fact will not be assumed when property at issue is privately owned. In *Costanzo*, the Fourth Circuit held as follows:

To the extent that standing is predicated upon plaintiffs’ recreational use as either a licensee or a trespasser, this Court finds little difficulty in holding that they have suffered no injury due to any impairment of their use of the highlands. There is no indication that Carolina Cape Fear Corporation will permit a continuation of such use and without the possibility of future use, the challenged construction cannot harm the plaintiffs.

Id. at 502. The Kaminer Station Petitioners offered no evidence that they had previously used the Roper Pond property for recreational purposes and make no claim to have the right or expectation of permission to do so in the future. Accordingly, unlike the plaintiff in *Smiley*, Petitioners cannot claim a recreational injury resulting from the land-disturbing activities on the Roper Pond property. Petitioners also cite to *Spectre, LLC v. South Carolina Department of Health and Environmental Control* as a case allowing a “challenge to the filling of 32 acres of ‘isolated’ wetlands on private party.” (Petition at p. 7 (citing *Spectre, LLC v. South Carolina Dep’t of Health and Envtl. Control*, 386 S.C. 357, 361, 688 S.E.2d 844, 846 (2010))). However, the party challenging DHEC’s action in *Spectre* was the property owner who had been denied a permit to fill wetlands on its

property. While third-parties intervened in the action, the holding does not address these third parties' right to intervene, the standard for which would have been determined pursuant to Rule 24, SCRCP.

Additionally, Petitioners oversimplify the test for standing based on a claim to an aesthetic and recreational interest in the challenged action. In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), the Fourth Circuit Court of Appeals examined the requirement for standing based on aesthetic or recreational interests:

In most kinds of litigation, there is scant need for courts to pause over the standing inquiry. One can readily recognize that the victim of an automobile accident or a party to a breached contract bears the kind of claim that he may press in court. In other sorts of cases, however, the nexus between the legal claim and the individual asserting the claim may not be so self-evident. Standing inquiry in environmental cases, for example, must reflect the context in which the suit is brought. In some instances, environmental injury can be demarcated as a traditional trespass on property or tortious injury to a person. In other cases, however, the damage is to an individual's aesthetic or recreational interests. The Supreme Court has made it clear that such interests may be vindicated in the federal courts. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 705, 145 L.Ed.2d 610 (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. at 562-63, 112 S.Ct. 2130 (purely aesthetic interest is cognizable for purposes of standing); *Sierra Club v. Morton*, 405 U.S. at 734, 92 S.Ct. 1361 ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society ... deserving of legal protection through the judicial process."); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (interest supporting standing "may reflect aesthetic, conservational, and recreational as well as economic values" (internal quotation marks omitted)). But because these and other noneconomic interests may be widely shared, the Supreme Court has cautioned that environmental plaintiffs must themselves be "among the injured." *Sierra Club v. Morton*, 405 U.S. at 735, 92 S.Ct. 1361. If it were otherwise, the Article III case or controversy requirement would be reduced to a meaningless formality.

Courts must therefore examine the allegations in such cases "to ascertain

whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” *Allen*, 468 U.S. at 752, 104 S.Ct. 3315. **Such scrutiny is necessary to filter the truly afflicted from the abstractly distressed.** Courts discharge this duty by asking such questions as: “Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?” *Id.* If the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and an adjudication of his rights.

Id. at 154-55 (emphasis added). Petitioners interpret aesthetic interest so broadly as to confer standing on any party who has “enjoyed viewing” the property which is the general subject of the challenged action. Moreover, Petitioners have failed to present evidence as to how the DHEC decision at issue in this case negatively impacts its enjoyment of viewing the Roper Pond property in an actionable manner. As discussed in detail above, there is no federal or state law regulating the dredging of the Pond. While the SWPPP includes the use of the Pond as a post-construction water control structure, Roper Pond could have excavated the Pond for general maintenance purposes even if the Pond were not to be used for stormwater management. However, accepting Petitioners’ standing argument would suggest that they could assert standing if Roper Pond excavated the Pond for maintenance purposes. Similarly, under Petitioners’ arguments, Petitioners would have standing if Roper Pond could have constructed a fence obstructing the view of the pond from the public roadway. However, such actions would clearly not be actionable. Indeed, Petitioners’ claims to potential harm resulting from any deprivation of the enjoyment of the view of Roper Pond can be no more than a claim of being “abstractly distressed.” Petitioners’ interpretation of the test for standing based on aesthetic interests would unquestionably reduce the standing requirement “to a meaningless formality.”

Additionally, Petitioners advocate a broad interpretation of the requirement for demonstrating a causal connection between the alleged injuries and the proposed development. Citing to the United States Supreme Court holding in *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), Petitioners contend that “but-for standard” should be applied to causation under the test for the standing. (Petitioners’ Brief, p. 37). In *Duke Power Company*, individuals who lived and worked in proximity to the sites of two planned nuclear power plants filed suit against Nuclear Regulatory Commission, challenging the constitutionality of the Price-Anderson Ac. *Id.* at 62. The Act set a monetary cap on damages recoverable in consequence of nuclear accidents. The plaintiffs asserted a number of injuries resulting from the construction of the power plants, including exposure to radiation, thermal impacts to two lakes used for recreational purposes, reduction in property values, and fear of exposure to radiation and nuclear accident. *Id.* at 73. While the Court did not determine whether all the alleged injuries were “sufficiently concrete to satisfy constitution requirements,” the Court held that “it is enough that several of the ‘immediate’ adverse effects were found to harm appellees.” *Id.* At trial, the plaintiffs have put forth testimony from Duke Power officials at the trial level to demonstrate that they would have had to consider withdrawing their plans for the new nuclear plants in the absence of the act. *Id.* at 76-77. Based on that testimony, the district court “discerned a ‘but for’ causal connection between the Price-Anderson Act, which appellees challenged as unconstitutional, ‘and the construction of the nuclear plants which the [appellees] view as a threat to them.’” *Id.* at 74. In upholding the district court’s finding of standing, the Court held that the “but for” determination supporting the finding of standing was not clearly erroneous. *Id.* at

73-74, fn. 19. This could hardly be characterized as the adoption of a “but for” standard on the second prong of the standing test. Moreover, while concurring in the judgment, Justices Stewart and Stevens wrote separately on the standing issue—in particular, criticizing the “but for” standard. *Id.* at 95, 102-103. Therefore, contrary to the Petitioners’ argument, it cannot be stated that the *Duke Power* Court adopted a “but for” standard for standing. The Court merely held that the district court’s “but for” finding was not clearly erroneous. Based on the strong arguments in the concurring opinions, it certainly cannot be argued that a “but for” standard as to the second prong of the standing test was adopted by the Court. As such, there is no basis for the application of a “but for” standard in this case. Still, Petitioners argue that “[b]ut for DHEC’s decision to grant coverage under the NPDES stormwater General Permit to Roper Pond, the dredging of the lily pad pond would not occur.” (Petitioners’ Brief, p. 32). Such argument is not consistent with the applicable law and fails to support Petitioners’ claims that the Court of Appeals erred in affirming the ALC’s ruling that Petitioners lack standing in this case.

As noted above, Petitioners further contend that the Court of Appeals disregards the other injuries alleged: “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.” (Petitioners’ Brief, p. 26). With respect to allegations regarding the character of the Town, property values, and increased crime and traffic, Petitioners offered no credible evidence that the proposed development would result in the harm

alleged. These concerns are nothing more than mere speculation based on the perceived character and behavior of the residents of the multi-family residential development to be constructed. More significantly, such allegations are clearly unrelated to DHEC's decision at issue in this case, and therefore, not an injury in fact which is causally connected to the challenged agency action.

To the extent that Petitioners have alleged injuries which are at least generally related to DHEC's grant of coverage to Roper Pond under the State General Permit, the Court of Appeals noted that the Petitioners' expert failed to opine that the land-disturbing activities authorized under the State General Permit would adversely impact Roper Pond:

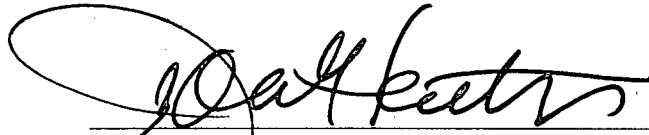
When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

Town of Arcadia Lakes, 404 S.C. at 526, 745 S.E.2d at 391. As both the ALC and the Court of Appeals recognized, Petitioners failed to present any evidence that the activities authorized by the DHEC decision at issue in this case would result in the injuries alleged by Petitioners. Under South Carolina and federal case law, Petitioners bear the burden of proof at trial to present such evidence. The Court of Appeals correctly held that Petitioners failed to meet this burden.

CONCLUSION

For the forgoing reasons, Respondent Roper Pond, LLC respectfully requests that the Court affirm the Court of Appeals' ruling in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. Thomas Lavender, Jr.", written over a horizontal line.

W. Thomas Lavender, Jr. (SC Bar No. 3143)

Joan W. Hartley (SC Bar No. 72735)

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November 3, 2013

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

NOV 6 2014

S.C. 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, 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,

v.

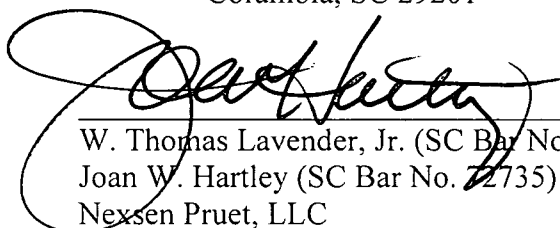
South Carolina Department of Health and Environmental Control and
Roper Pond, LLC Respondents.

PROOF OF SERVICE

I certify that I have served Brief of Respondent Roper Pond, LLC on all parties by depositing a copy of it in the United States Mail, postage prepaid, on November 3, 2014, addressed to their attorneys of record, as indicated below:

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Columbia, South Carolina
November 3, 2014

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Joan W. Hartley
Special Counsel
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S.C. SUPREME COURT

November 3, 2014

The Honorable Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

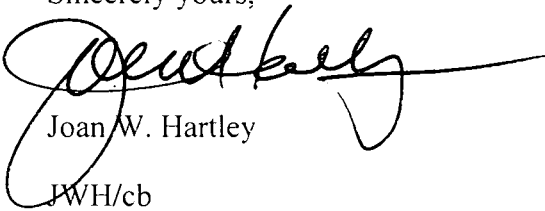
Re: *Town of Arcadia Lakes, et al v. South Carolina Department of Health
and Environmental Control and Roper Pond, LLC*
Appellate Case No. 2013-001521
Case No. 09-ALC-07-0069-CC

Dear Mr. Shearouse:

Enclosed for filing please find the original and fifteen (15) copies of brief of Respondent Roper Pond, LLC in the above-references matter. By copy of the letter, Respondent is serving same on counsel for Petitioners and Respondent South Carolina Department of Health and Environmental Control. Please return a clocked-in copy to us via the self-addressed stamped envelope.

Thank you for your assistance in this matter.

Sincerely yours,


Joan W. Hartley
JWH/cb

cc: Amy E. Armstrong, Esquire
Stephen Hightower, Esquire