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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Docket No. 09-ALJ-07-0029-CC

Kiawah Development Partners, II,Respondent,

v.

South Carolina Department of Health and Environmental Control,Appellant.

Docket No. 09-ALJ-07-0039-CC

South Carolina Coastal Conservation League,Appellant,

v.

South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II,

Of whom

South Carolina Department of Health and Environmental Control isAppellant,

and Kiawah Development Partners, II, isRespondent.

SAVANNAH RIVER MARITIME COMMISSION'S
AMICUS BRIEF

Alan Wilson, Esquire
Attorney General of South Carolina
John W. McIntosh, Esquire
Chief Deputy Attorney General
Robert D. Cook, Esquire
Deputy Attorney General
T. Parkin Hunter, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

C. Mitchell Brown, Esquire
A. Mattison Bogan, Esquire
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Savannah River Maritime Commission

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Pursuant to Rule 213 of the South Carolina Appellate Court Rules, the Savannah River Maritime Commission (Maritime Commission), through its statutory representative, the Attorney General for the State of South Carolina (Attorney General) as provided by S.C. Code Ann. § 54-6-10(D), respectfully submits this *amicus curiae* brief in the above-captioned appeal to address issues raised in the two opinions issued previously by the Court in this matter. See *Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27065 (S.C. Sup. Ct. filed Nov. 21, 2011) (Shearouse Ad. Sh. No. 41 at 24) (Opinion #1), (Rehearing Granted Feb. 3, 2012; Argument Held April 17, 2012); Op. No. 27065 Reissued (S.C. Sup. Ct. Filed Feb. 27, 2013) (Shearouse Ad. Sh. No. 9 at 28) (Opinion #2), (Rehearing Granted May 1, 2013; Argument Scheduled for June 5, 2013) (collectively, "Opinions").

The Maritime Commission submits this second *amicus curiae* brief in order to address certain statements contained in the Opinions pertaining to the scope of review and the authority of the Administrative Law Court ("ALC" or, for individual judges, an "ALJ") and the South Carolina Department of Health and Environmental Control (DHEC) as it relates to the issuance of licenses by DHEC. This brief also addresses what the Maritime Commission believes to be a significant departure from established law and practice as suggested in Opinion #2's dissent,¹ which could serve to expand and alter the authority and jurisdiction of an agency beyond what current case law would find

¹ The analysis put forward by the dissent was initially the majority opinion in this case, as published in the November 21, 2011, Opinion of the Court. Following rehearing, this analysis became that of the dissent; however, in a separate opinion concurring in the result of the majority, Justice Kittredge nevertheless indicated some degree of agreement with the dissent's construction of the relevant statutes and regulations. This *dicta* creates uncertainty within the practice of administrative and environmental law in the State.

permissible. This is an area of continuing interest and concern for the Maritime Commission, due to its statutory jurisdiction and regulatory authority over “all matters pertaining to the navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels.” See S.C. Code Ann. § 54-6-10; *Savannah Riverkeeper v. S.C. Dep’t of Health & Envtl. Control*, 400 S.C. 196, 733 S.E.2d 903 (2012).² These issues will also affect contested case proceedings before the ALC in which DHEC and the Maritime Commission are or may be involved.

For the reasons discussed below, the Maritime Commission respectfully requests that the Court clarify the applicable framework for addressing agency deference due in *de novo* contested case hearings before the ALC, at the appellate level, and the scope of agency authority because the Maritime Commission is concerned that the Opinions may signal a potential departure from prior case law on these issues (or be construed by the ALC or other parties as a departure). The Maritime Commission submits that granting this request will benefit regulators, the regulated community, administrative law practitioners, and the general public.

² The Maritime Commission, as with all state agencies, need to understand the parameters and scope of authority within which it may operate. For example, a misunderstanding of the delegation of authority between the Maritime Commission and DHEC resulted in this Court’s November 2, 2012 opinion that helped confirm such boundaries. As the Maritime Commission’s and DHEC’s continuing cooperation on regulatory authority and jurisdiction over the same projects evolves, understanding the proper and appropriate analytical framework is crucial to avoid further confusion, uncertainty, and litigation between regulatory agencies and permittees.

ANALYSIS

The level of deference that should be afforded an agency decision upon *de novo* review by the ALC, and then subsequently by our appellate courts to the ALC decision, has been a question that the ALC, regulators, the regulated community, and the bar alike have struggled to ascertain and apply based upon case law.³ The Maritime Commission respectfully seeks further guidance from the Court with respect to a standard of review that may be applied consistently across varying facts and circumstances. Further, the Maritime Commission respectfully requests clarification from the Court as to the appropriate analysis for the scope of agency authority.

I. Agency Deference Exists at Distinct Levels in the Administrative and Judicial Review Processes.

A. In South Carolina, the Administrative Agency Decision Occurs at Two Levels by Two Different Agencies.

The ALC is a creation of the General Assembly, formed during the 1993 government restructuring in an effort to modernize the executive branch, commonly referred to as the “Restructuring Act.” *See* 1993 Act No. 181. As the Court knows, through the Restructuring Act, the General Assembly replaced many boards and commissions with cabinet-style agency directors and empowered the directors to oversee the administrative and regulatory functions of the agencies. The Restructuring Act also

³ Without question, the issue of agency deference has been and continues to be the source of much debate in federal and state courts because its very nature lends itself to a multitude of interpretations in various circumstances. *See, e.g.*, Charles H. Koch, Jr., 3 *Admin. L. & Prac.* § 9:20 (3d ed. 2013) (“Although courts often denominate the limits on their authority as ‘deference’ or even ‘great deference,’ the law is more complex. Indeed use of the term deference often creates confusion as to the allocation of authority between the agency and the court.”). Thus, the Maritime Commission acknowledges that, generally speaking, the task of delineating the limits of agency deference is not an easy one.

created the ALC which, although quasi-judicial, is an *agency* of the Executive Branch to which the General Assembly delegated many of the adjudicatory functions of the former boards and commissions. The ALC's primary role is to conduct hearings and render decisions, thereby fulfilling its quasi-judicial function.

These contested cases are *de novo* proceedings in which the ALJ sits in a quasi-judicial capacity as the ultimate finder of fact, applying the facts to the law (and applicable policy) and renders the final agency decision after receiving evidence proffered by the parties in a trial-type proceeding. *See, e.g., Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) ("A trial *de novo* is one in which 'the whole case is tried as if no trial whatsoever had been had in the first instance.'") (quoting *Blizzard v. Miller*, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991)); *see also Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997) ("[T]he ALJ is not sitting in an appellate capacity and is not restricted to a review of the decision below. Instead, the proceeding before the ALJ is in the nature of a *de novo* hearing."). Thus, the General Assembly vested the ALC with the role and authority of conducting *de novo* contested case hearings for certain agency decisions and it is in this capacity as trial judge and finder of fact that an ALJ presides over challenges to permitting decisions of DHEC like the one at issue in this case.⁴ *See*

⁴ There was *procedural* restructuring in 2006. 2006 Act No. 387. Under the 2006 restructuring, DHEC Board review was merely shifted from *after* the contested case hearing of the ALC to *before*. Notwithstanding, the ALC's role as *de novo* trier of fact remained unchanged.

Opinion #1 erroneously stated that "[u]nder [the 2006] restructuring, the ALJ has become the agency fact-finder in a contested case such as this ... [d]espite the change in function [during the 2006 restructuring], DHEC retains the exclusive authority to issue a permit," citing *Oakwood Landfill, Inc. v. S.C. Department of Health and Environmental*

Rules of Procedure For the Administrative Law Court 9-32 (addressing contested case procedures, including discovery, motions, evidence, and trial conduct).

The ALC's broad scope of authority is supported by other provisions of the South Carolina Code, particularly those defining the ALC's role in contested cases, which includes "licensing"⁵ proceedings "in which the legal rights, duties, and privileges of a party are required ... to be determined by an agency or the [ALC] after an opportunity for hearing. S.C. Code Ann. §§ 1-23-505(3), -600(A). These provisions make clear that the ALC is the authority ultimately responsible for making the final agency decision in contested cases, including DHEC permitting matters. *See* S.C. Code Ann. §§ 1-23-600 (recognizing that the ALC renders a final agency decision that is followed by judicial review); 44-1-60(G) (recognizing that a "contested case" hearing of a DHEC permit follows the initial DHEC decision). Thus, the General Assembly has established a framework in which the ALC's decision will become the final executive branch agency decision subject only to judicial review.

Control, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009). *See* Opinion #1 at 4. However, the ALJ is and always has been the "finder of fact" since its creation in 1994; therefore, there was no change in "function" associated with the 2006 restructuring. As noted, the DHEC Board was simply moved in front of the ALC in the review process, and the circuit court was removed from the review process. All other "functions" remained the same.

Further, *Oakwood Landfill* is not instructive to the issues at hand and does not support the proposition that the ALC is unable to modify the terms and conditions of a permit during a *de novo* contested case hearing, as attributed to it in Opinion #1. Rather, *Oakwood Landfill* holds that DHEC is the sole agency with the authority to promulgate regulations governing the design of landfill facilities (as opposed to a county). 381 S.C. at 136, 671 S.E.2d at 655.

⁵ "License" includes "the whole or part of any agency permit...." S.C. Code Ann. § 1-23-505(4).

B. The ALC's Findings of Fact are Binding.

For agency decisions in which the ALC conducts a contested case hearing, the ALC conducts a *de novo* hearing and is not bound by the findings or determinations of the underlying agency decision.⁶ See S.C. Code Ann. § 1-23-600; see also *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 712 S.E.2d 428 (2011) (recognizing the long-established rule that the ALC is the ultimate finder of fact in a contested case and is free to draw its own conclusions). There can be no dispute that “[i]n administrative law cases, the ALC serves as the fact-finder and is not restricted by the findings of the administrative agency.” *Terry v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 569, 573, 660 S.E.2d 291, 293 (Ct. App. 2008); *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008) (same). In this respect, because the ALC is serving as the final adjudicator for the permitting agency in the administrative process, the ALC has the same authority to impose terms and conditions and works within the same parameters as the agency for which it is conducting the contested case. For example, as the finder of fact, the ALC can impose any term and condition in a

⁶ As two distinguished commentators have explained:

A *de novo* hearing is one in which the decisionmaker does not review the decision of someone else but makes the determination himself. Thus, the ALJ, while he may use the record compiled earlier as part of the evidence in the case, may receive additional evidence and decides the issue without regard to the decisions made by the agency.

William F. Funk and Richard H. Seamon, *Administrative Law: Examples & Explanations* at 71 n.1 (2001).

critical area permit as part of its final decision that DHEC could impose regardless of DHEC's initial decision on the permit.⁷

On appeal, for findings of fact, if substantial evidence exists in the record then the agency's factual conclusions are binding on the appellate court. This concept is embodied in the now-familiar appellate standard of review for ALC orders:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case

⁷ There may be instances, however, when all parties (including the licensing agency) to a contested case proceeding fail to offer evidence on particular matters or new issues may arise and be brought to light during the course of the contested case proceeding that may weigh in favor of the ALC exercising discretion in remanding the proceeding back to the licensing agency for additional consideration and evaluation. *See, e.g., Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010) (referencing an ALC remand to DHEC for further consideration).

The ALC (and the courts) should be wary, however, of petitioners challenging agency decisions requesting remand as relief. Appropriate circumstances for remand will be few, as the goal of many petitioners is not sound decisionmaking but mere delay to either leverage concessions from respondents and agencies based merely on time delay or hope that with enough delay the project will collapse under its own weight for other reasons. For example, the South Carolina Coastal Conservation League (among others) recently requested remand in a contested case by arguing—without any legal or factual basis—that the DHEC Board was required by law to conduct a final review conference in each and every request for final review to the DHEC Board, despite the plain language of the statute and having argued to this very Court that such DHEC Board review is discretionary. *Preservation Society of Charleston, S.C. Coastal Conservation League, et al. v. S.C. State Ports Auth. and S.C. Dep't of Health & Envtl. Control*, Docket No. 13-ALC-07-0056-CC, Motion to Remand to DHEC Board, filed Feb. 27, 2013 (denied without a hearing on May 3, 2013); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, Supreme Court Case Tracking No. 2009-113526, Petition for Writ of Certiorari of Petitioner South Carolina Coastal Conservation League at 5 n.3 (“The Board has the option of conducting a conference or not after a request for review is made. If the Board does not conduct a conference within 60 days, the staff decision becomes the ‘final agency decision’... S.C. Code Ann. § 44-1-60(F).”). Such unfounded positions arguments strain the credibility of the League and their brethren in advancing any argument related to process and procedure.

for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610. While most of these standards address questions of law, subsection (e) requires that a decision be based on factual findings and evidence. Subsection (e) sets forth the “substantial evidence” test through which an appellate court assesses whether support exists for the ALC’s order. “Substantial evidence is not a mere scintilla of evidence but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.” *Whitworth v. Window World, Inc.*, 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008). As this Court has recognized, when conflicting evidence exists, the Court’s “substantial evidence” standard of review requires adherence to the findings of the fact-finder once that test has been satisfied. *See Bursey v. S.C. Dep’t of Health & Envtl. Control*, 369 S.C. 176, 631 S.E.2d 899 (2006); *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control*, 363 S.C. 67, 610 S.E.2d 482 (2005). This makes sense because the ALC (or other agency conducting a contested case) acts as the trier of fact and is in the best position to assess the credibility of witnesses and assess evidence.

C. The ALC Defers to an Agency’s Interpretation of Law, and the Courts Defer to an ALC’s Interpretation of Law.

For questions of law, the ALC should afford due deference to the licensing agency’s interpretation of the governing statute and regulation that the licensing agency

implements in the same manner that the courts apply to the ALC decision. In the judicial setting, the decision under review is the ALC decision, not the initial agency determination. While an agency may argue that the ALC erred, the decision that is the subject of judicial review is the ALC decision and thus the ALC is entitled to deference in its interpretation.⁸

This Court recently provided a summary of South Carolina law on agency deference in *Savannah Riverkeeper v. S.C. Department of Health and Environmental Control*, 400 S.C. 196, 733 S.E.2d 903 (2012).

[A]s a general rule, “agencies charged with enforcing statutes ... receive deference from the courts as to their interpretation of those laws.” Thus, the reviewing tribunal will defer to the relevant administrative agency’s decision unless there is a compelling reason to differ. An agency’s interpretation of a statute or regulation that is erroneous or controlled by an error of law presents a compelling reason not to defer to the agency’s interpretation. Thus, where the plain language of the statute is contrary to the agency’s interpretation, the agency’s interpretation should be rejected.

Id., 400 S.C. at 205-06, 733 S.E.2d at 908 (internal citations omitted); *see Media Gen. Communic., Inc. v. S.C. Dep’t of Revenue*, 388 S.C. 138, 149-50, 694 S.E.2d 525, 530-31 (2010) (if an agency’s interpretation of law is contrary to the plain meaning of the statute or regulation, the agency’s interpretation must be rejected); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 437-40, 581 S.E.2d 836, 837-39 (2003) (rejecting statutory interpretation of Workers’ Compensation Commission as inconsistent with plain language of statute);

⁸ The ALC, as an administrative central panel, embodies a professional corps of adjudicators that specialize in administrative adjudications and through the limited administrative jurisdiction develop a certain degree of expertise in their jurisdictional areas (such as environmental regulation or taxation) that warrants deference to their decisions as the final agency decisions.

Triska v. Dep't of Health & Env'tl. Control, 292 S.C. 190, 194-96, 355 S.E.2d 531, 533-34 (1987) (rejecting agency's interpretation of its powers under the state Pollution Control Act as inconsistent with plain language of statute). This rule of deference generally only attaches to longstanding and consistent agency interpretations. *See, e.g., Brown v. S.C. Dep't of Health & Env'tl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (observing that consistent application of a statute by the responsible governing agency "has been given considerable judicial deference in the construction of ambiguous statutes"); *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992) (referring to a prior longstanding position of the agency in rejecting a contrary current position); *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) (deferring to Commission's interpretation of income tax statute); *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 389, 49 S.E.2d 564, 567 (1948) (deferring to agency interpretation that had "been an administrative practice for some years" without judicial or legislative challenges or amendments); *Comm'rs of Pub. Works v. S.C. Dep't of Health & Env'tl. Control*, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007) ("We find the statute is ambiguous and, therefore, defer to the Board's interpretation.").

As a result of the two-tiered agency decisionmaking structure established by the General Assembly, the ALC accords the same level of deference to the agency that the courts accord to the ALC as the final decisionmaker for the Executive Branch and as the statutorily authorized adjudicator of agency decisions. *See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env'tl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010) (recognizing that "judicial review may only be sought from a *final* decision of the ALC") (emphasis in original).

The case of *South Carolina Coastal Conservation League v. S.C. Department of Health and Environmental Control*, 363 S.C. 67, 610 S.E.2d 482 (2005) (hereinafter *Coastal Conservation League*) is instructive on this point. In *Coastal Conservation League*, the Court evaluated the circuit court’s reversal of a decision of the ALC and DHEC involving Regulation 30-11(C). That case involved the pre-2006 process in which DHEC staff rendered an initial decision, the ALC conducted a contested case hearing, the ALC’s decision was heard by the DHEC Board or Coastal Zone Management Appellate Panel (in an appellate capacity), then entered the judicial branch by an appeal to the circuit court (in an appellate capacity), and then the Court of Appeals and onto this Court.⁹ The ALC rendered an interpretation of the regulation that was “affirmed without analysis” by the Panel. 363 S.C. at 72, 610 S.E.2d at 484. The circuit court, reviewing the Panel’s decision, reversed.¹⁰ In evaluating the circuit court’s analysis of Regulation 30-11, this Court reversed the decision of the circuit court, reinstating the Panel decision (and thus the ALC’s order). In analysis prescient to the issues at hand, the Court stated:

The record contains conflicting evidence concerning the direct and cumulative effects of building the bridge to Park Island. The evidence that the effects will be minimal constitutes substantial evidence supporting the finding that the permit complies with the Effects Regulation. The

⁹ As previously discussed, legislation in 2006 removed the two appellate review steps prior to the Court of Appeals and placed the DHEC Board between the staff decision and the ALC contested case. *See* 2006 Act No. 387.

¹⁰ Notably, the circuit court and this Court utilized the “Panel’s decision” as the administrative decision that was the subject of judicial review, even though it merely adopted and affirmed the ALC “without analysis.” The Panel decision was the final agency decision because it was the final word from the Executive Branch prior to judicial review. With the 2006 restructuring, the ALC was given the final word, and thus *Coastal Conservation League* supports the Maritime Commission’s contention that the ALC decision is the proper decision subject to judicial review and entitled to deference.

circuit court's view of the weight of the evidence did not justify vacating the grant of the permit.

363 S.C. at 77, 610 S.E.2d at 487. As the majority notes, this Court held that the circuit court erred and should have deferred to the final agency decision because, "there was no compelling reason to overrule the Panel's decision that the Transportation Regulation governed." 363 S.C. at 75, 610 S.E.2d at 486. As the Court held, the circuit court sat in an appellate capacity over the final agency decision and therefore was statutorily mandated to apply a deferential standard of review to the decision.

Thus, when a decision of the agency is improper or the result of legal error, the ALJ does not have to defer to the agency and can reverse the agency's decision, and when an ALC decision is improper or the result of legal error, the courts do not have to defer to the ALC and can reverse the ALC's decision. Further, South Carolina's courts recognize that deference is appropriate to an agency interpretation of an ambiguous statute or regulation for which the agency has a longstanding interpretation.

II. The Scope of Agency Authority is Limited to That Conveyed by the General Assembly But Includes Necessary Powers.

The laws that grant powers to South Carolina agencies take the form of statutes, and agencies are often described as "creatures of statute" with only those powers *expressly* provided for or *necessarily* implied to perform its functions. See *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control*, 363 S.C. 67, 610 S.E.2d 482 (2005) ("As a creature of statute" an agency "only has those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.") (quoting *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991)); *City of Rock Hill v. S.C. Dep't of Health & Env'tl.*

Control, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (“By necessity ... , a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged.”); *Wilson v. McLeod*, 274 S.C. 525, 527, 265 S.E.2d 677, 678 (1980) (“It is elementary that the power of the [agency] is derived solely from the statutes. To them alone we look for [its] authority and jurisdiction.”).

Agencies are left to “fill the gaps” and implement statutory schemes. As part of that process the agencies weigh and implement public policy, which complicates judicial review. Charles H. Koch, 4 *Admin. L. & Prac.* § 11:31 (3d ed. 2013) (“Review responsibility over the policy-related portions of administrative decisions continues to be the most dynamic and controversial aspect of the review system.”). For agencies like DHEC and the Maritime Commission, the implementation of regulatory schemes involves an inherent tension between the advancement of societal goals at large (such as environmental protection) with the protection of equally important individual rights (such as property rights). This impacts judicial review from the perspective of determining whether an agency’s interpretation properly balances the societal and individual rights and interests. Thus, the general rule is that

social legislation is liberally construed in favor of those intended to benefit from it. And statutes establishing comprehensive regulatory schemes form an exception to the rule of strict construction. Statutes which impinge on fundamental freedoms are strictly construed, and no law should be construed to deprive a person of his freedom unless that result is clearly compelled by the language used. The same approach applies to legislation interfering with long-established property rights.

Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 65:3 (7th ed. 2013).

While environmental protection is unquestionably a societal goal advanced by the General Assembly, individual property rights have also been protected by the General Assembly against overreaching environmental regulation and third party challenges. These types of competing interests wrestle with one another within the framework of the statutory jurisdiction of an agency, and the agency is bounded by that authority and cannot take an action that exceeds the authority granted by the General Assembly even if it concludes that the exercise of such authority is consistent with its own view of which interest should prevail.

In the instant case, the question arises whether the agency interpretation of the scope of analysis of Regulation 30-11(C) (which addresses cumulative impacts) exceeds the scope of authority granted to DHEC. DHEC and the ALC differed on the interpretation of the scope of analysis permitted under the regulation, with DHEC proffering a broader and more expansive view of its jurisdiction.

The Court of Appeals has addressed the applicability of the regulation and a brief review of those cases is useful in light of the prior discussion on deference and the applicable standard of review to the ALC decision and shed light on past interpretations of the scope of DHEC's jurisdiction and analysis under this regulation. In *Terry v. S.C. Department of Health and Environmental Control*, 377 S.C. 569, 660 S.E.2d 291 (Ct. App. 2008), the court recognized the fact-finding function of the ALC and affirmed its decision based on substantial evidence. In evaluating Regulation 30-11(C), the court cited administrative record and DHEC testimony that demonstrates that the "cumulative effects" analysis is meant to review the "whole project" to "avoid future 'piecemeal'

applications.” 377 S.C. at 576, 660 S.E.2d at 295. The implication is that the future *regulated* activities within DHEC’s jurisdiction are the concern, such as whether one dock permit will lead to a plethora of docks in the immediate area. In fact, this was the exact concern in *Terry*, as the question of the character of the area was the wholesale addition of docks in a subdivision.

In *Olson v. S.C. Department of Health and Environmental Control*, 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008), the court recognized the fact-finding function of the ALC and affirmed its decision based on substantial evidence. The court’s discussion of Regulation 30-11(C) and DHEC’s implementation of the regulation is instructive. DHEC’s “cumulative effects” and “area” analyses reflected in the opinion focused on the impacts on the immediate, regulated area. Specifically, DHEC considered the issue of whether the project construction could block a drainage easement, interfere with maintenance of a drainage ditch, and create a new precedent in permitting docks on non-waterfront property. All of these considerations appear to be properly focused on the project impact within the scope of DHEC’s clear jurisdiction. Again, the court affirmed the ALC’s decision on all of these points, finding that substantial evidence existed in the record based in large part on DHEC testimony.

The case of *Young v. S.C. Department of Health and Environmental Control*, 383 S.C. 452, 680 S.E.2d 784 (Ct. App. 2009) provides another illustration of permitting authority and jurisdiction under Regulation 30-11(C) and also acknowledging the proper role of the ALC as the finder of fact and the application of a deferential standard or review. The administrative record contained DHEC testimony regarding the analysis under Regulation 30-11(C) that the permitted dock was reasonable in size when

compared to others in the area and fit within the general character of the area. 383 S.C. at 459, 680 S.E.2d at 788. In its analysis, DHEC “considered the presence of comparable structures in the area as well as whether the dock satisfied all statutory and regulatory requirements. Moreover, ... heightened protection for the area would be available through the creation of a special area management plan, zoning, or enactment of appropriate local ordinances.” 383 S.C. at 460, 680 S.E.2d at 788-89. Again, the court affirmed the ALC’s decision on all points, finding that substantial evidence existed in the record based in large part on DHEC testimony.

Applying the analytical framework of deference discussed above requires consideration of what deference, if any, is due to differing interpretations of DHEC and the ALC on the scope of regulatory authority under Regulation 30-11(C). By virtue of these cases, it is clear that DHEC has authority to analyze the immediate and localized impacts of a project in the critical area and to examine whether the project is consistent with the existing uses and will not introduce activities or conduct wholly foreign to the area. The ALC decision is in accord with these prior decisions on the scope of analysis, but that does not mean that DHEC is precluded from changing its longstanding position and expanding its jurisdiction, provided that such expansion remains within the explicit authority conferred by the General Assembly or is necessary to exercise that explicit authority.¹¹

¹¹ Due process provides some limit on an agency’s discretion to change its policy. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (“As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.”).

Nonetheless, an agency must be free to adjust to innovations, changing circumstances, and public policy demands in the implementation of regulatory programs.

CONCLUSION

Based on the foregoing, the Maritime Commission respectfully requests that this Court clarify the deference standard for agency interpretations of ambiguous statutes and regulations from the ALC to an agency and from the courts to the ALC as well as the proper analytical framework for potential expansions of the scope of authority of an agency. As a regulatory agency, the Maritime Commission takes no position on the ultimate question of whether its sister agency DHEC has the expanded authority it seeks under Regulation 30-11(C). However, the Maritime Commission does desire that all agencies in the State utilize a coherent analytical framework to aid in determining the boundaries within which it must operate and for which its decisions will be judged.

[SIGNATURE PAGE FOLLOWS]

However, the regulated community and general public are entitled to a degree of certainty and expectation in regulatory application. In part for this reason, the law does not accord deference to agency interpretations of the law that are not longstanding and consistent. As a result, it is incumbent upon an agency to proffer some semblance of evidentiary support to the ALC to establish a record supporting its interpretation to justify deference by the ALC to the agency interpretation (the lack of which results in an agency argument of mere *ipse dixit*). See Charles H. Koch, 4 *Admin. L. & Prac.* § 11:31 (3d ed. 2013) (“Nonetheless the agency must build a record to support its policy judgments.”).

Respectfully submitted,

SAVANNAH RIVER MARITIME COMMISSION

By: Robert D. Cook

Alan Wilson
Attorney General of South Carolina
John W. McIntosh
Chief Deputy Attorney General
Robert D. Cook
Deputy Attorney General
Parkin Hunter
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: A. Mattison Bogan by n/a w/ permission

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Savannah River Maritime Commission

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph King Anderson III, Administrative Law Judge

Docket No. 09-ALJ-07-0029-CC

Kiawah Development Partners II, Respondent,
v.
South Carolina Department of Health and
Environmental Control,..... Appellant.

Docket No. 09-ALJ-07-0039-CC

South Carolina Coastal Conservation League,..... Appellant,
v.
South Carolina Department of Health and
Environmental Control and Kiawah Development
Partners II,
Of Whom South Carolina Department of Health and
Environmental Control is..... Appellant,
and Kiawah Development Partners II, is Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Savannah River Maritime Commission, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **Savannah River Maritime Commission's Amicus Brief**

Counsel Served:

Attorneys for SC Coastal Conservation League

Amy E. Armstrong, Esquire
SC Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585

Robert T. Bockman, Esquire
The Law Center
701 S. Main Street
Columbia, SC 29208

Attorneys for SC Dept of Health & Environmental Control

Bradley D. Churdar
Davis S. Whitfield-Cargile
SC DHEC – Ocean & Coastal Resource Management
1362 McMillan Avenue, Ste 400
Charleston, SC 29405-2047

Jacquelyn S. Dickmann
DHEC Office of General Counsel
2600 Bull Street
Columbia, SC 29201

Attorneys for Kiawah Development Partners II

G. Trenholm Walker
Pratt-Thomas Walker, PA
Post Office Drawer 22247
Charleston, SC 29413-2247

Gedney M. Howe III
Gedney M. Howe III, PA
Post Office Box 1034
Charleston, SC 29402

Attorneys for SC Manufacturers Alliance

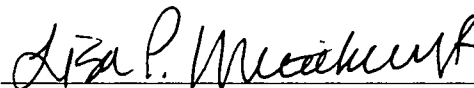
James B. Richardson, Jr., Esquire
1229 Lincoln Street
Columbia, SC 29201

Attorneys for Nature-Based Tourism Association

Frank S. Holleman III, Esquire
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, SC 27516-2355

Attorneys for Inlet Cove Homeowners Association; Kayak
Charleston, LLC; South Carolina Paddlesports Industry
Association; and Friends of the Kiawah River

Jordan R. Israel, Esquire
3621 Newark Street NW, Apt 110
Washington, DC 20016-3181



Lisa P. Whitehurst
Administrative Assistant

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