

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Carolyn C. Matthews, Administrative Law Judge
Trial Court Case No. 2013-ALJ-07-0494-CC

Case No. 2014-001939

James Weatherholtz, Appellants,

v.

South Carolina Department of Health and
Environmental Control, Respondents.

**Initial Brief of Respondent South Carolina Department
of Health and Environmental Control**

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Statement of Issues on Appeal

- I. There is no dispute between the parties regarding the Department’s application of the “ten foot minimum width rule” per S.C. Code Ann. Reg. 30-12(A)(2)(c)(i). Because Appellant’s dispute with the Department is not about the *location* where the Department measured the creek width, but rather the results of such measurement, this case should be dismissed 17**
- II. The ALC did not err in deferring to the Department’s application and interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) because (a) the regulation is both silent and ambiguous regarding *how* the Department should measure creek width; and (b) the Department’s interpretation is not “arbitrary, capricious, or manifestly contrary to the statute” 20**
- III. The ALC did not err in deferring to the Department’s application and interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) based on the Department’s July 11, 2013 site visit, rather than the Department’s December 6, 2013 site visit 28**
- IV. Substantial evidence supported the ALC’s decision to accept the Department’s creek width measurements and the ALC properly rejected both Mr. Weatherholtz’ and Mr. Bessent’s creek width measurements 35**
- V. The ALC did not err in deferring to the Department’s application and interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) by holding that potential access via dockage from the opposite side of the creek exists 39**

Statement of the Case

This case arises from a decision by the Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (“DHEC” or the “Department”) to deny Appellant, Mr. James Weatherholtz’ (“Mr. Weatherholtz”) application for a critical area permit.¹ (R. pp. __). Mr. Weatherholtz applied to DHEC for a critical area permit to construct a dock. (R. pp. __). The application giving rise to the permit denial was submitted to the Department on June 13, 2013. (R. p. __). The Department denied the application on August 7, 2013 based on the following two reasons: (1) the creek is less than ten feet wide as measured from marsh vegetation on each side;² and (2) there is potential access via dockage from the opposite side of the creek.³ (R. p. __). Mr. Weatherholtz filed a request for final review with the Board of Health and Environmental Control (the “Board”) on August 20, 2013. (R. p. __). On September 16, 2013, the Board declined to conduct a review conference. (R. p. __). Notice of this decision was mailed to appellant on September 16, 2013. (R. p. __).

On October 14, 2013, Mr. Weatherholtz filed a written request for a contested case hearing at the Administrative Law Court (“ALC”). (R. pp. __). The contested case was assigned to the Honorable Carolyn C. Mathews, Administrative Law Judge. (R. p. __). Judge Mathews held a contested case hearing at the ALC on March 5, 2014. (R. p. __). After hearing from the parties and receiving proposed orders and additional briefing from

¹ “Critical area” is defined as coastal waters, tidelands, beaches, and the beach/dune system. *See* S.C. Code Ann. § 48-39-10(J). “Coastal waters” are “the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark.” S.C. Code Ann. § 48- 39-10(F). “Tidelands” are defined to include “all areas at or below mean high tide....” S.C. Code Ann. § 48-39-10(G).

² S.C. Code Ann. Regs. 30-12(A)(2)(c)(i).

³ S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii).

the parties, Judge Mathews issued a written Final Order and Decision on June 17, 2014. (R. p. __).

Mr. Weatherholtz filed a motion to reconsider the June 17th Order on June 27, 2014. (R. p. __). The Department filed a Return to Mr. Weatherholtz' Motion for Reconsideration on July 17, 2014. (R. pp. __). Judge Mathews issued an Amended Final Order and Decision (the "Order") on August 12, 2014 again upholding the Department's denial, and Mr. Weatherholtz filed a Notice of Appeal on September 30, 2014. (R. pp. __).

Statement of Facts

Mr. Weatherholtz owns property on and adjacent to a small tributary of Kushiwah Creek (hereinafter referred to as "the creek") at 949 Compass Point in Stiles Point Plantation in Charleston, Charleston County, South Carolina. He applied for a permit to build a dock out to the creek with a five foot by ten foot fixed pierhead and a four foot by two-hundred forty-five foot walkway.

Mr. Weatherholtz' permit application included a survey from Mr. Thomas Bessent (a local land surveyor) indicating that the creek was *exactly* ten feet wide. (R. pp. __, Petitioner's Exhibits 1, 2 and 3).

The permit application was received by the Department and assigned to Mr. Jeff Thompson as Project Manager.

Facts pertaining to the creek width measurement

When Mr. Thompson reviewed the permit application and saw the survey showing the creek was exactly ten feet wide, he decided to go out on a site visit with another OCRM Project Manager in a jon boat and measure the creek width. Because S.C. Code

Ann. Reg. 30-12(A)(2)(c)(i) provides “docks will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side,” Mr. Thompson wanted to confirm the actual creek width.⁴

He recorded the results of this site visit in a File Memo dated July 11, 2013. (R. pp. ___, Respondent’s Ex. 1, page 3).⁵ Mr. Thompson and Mr. Fred Mallett (the other OCRM Project Manager) visited the site by boat on July 13, 2013 between 10:00-10:20 a.m. (R. pp. ___, Respondent’s Ex. 1, page 3).

Mr. Thompson indicates the following in his July 13, 2013 File Memo:

- “The tide chart information indicated a high tide at 10:44 a.m. with a projected 4.7’ high tide, so this site visit was about half an hour before high tide.” (R. pp. ___, Respondent’s Ex. 1, page 3).
- “The purpose of the site visit was to determine the width of the creek *at the proposed location of a dock described in the referenced permit application.*” (R. pp. ___, Respondent’s Ex. 1, page 3) (Emphasis added).
- “The mouth of the creek was very narrow, 5-6’ in width. *At the location of the proposed dock, the creek was measured to be slightly under 8’ in width,* measured marsh grass to marsh grass. Areas both floodside and ebbside of the proposed dock location were also less than 10’ in width. Photographs were taken of the survey rod used to measure the width and of locations ebbside and floodside. It was determined that this creek is less than 10’ in width and does not qualify for

⁴ In fact, at trial he (Mr. Thompson) testified that when he saw Mr. Bessent’s assertion that the creek was *exactly* ten feet wide at Mr. Weatherholtz’ property, this raised a “red flag” regarding the actual creek width, since ten feet is the smallest creek width allowable to obtain a dock permit. (R. pp. ___, Transcript 166:10-16).

⁵ At trial, the July 13, 2013 File Memo (as part of Respondent’s Exhibit 1) was admitted into evidence without objection from Mr. Weatherholtz. (R. pp. ___, Transcript 22:14-25).

permitting of a dock per current OCRM Regulations.” (R. pp. __, Respondent’s Ex. 1, page 3) (Emphasis added).

This File Memo was prepared three weeks before the permitting decision was issued on August 7, 2013 and was available to Mr. Weatherholtz along with the entire permitting file had he requested the file in pretrial discovery. However, Mr. Weatherholtz did not engage in any pretrial discovery at all, despite the fact that he is a practicing attorney. Although he submitted a pre-litigation FOIA request for a separate, unrelated permitting file associated with his house from the previous owner, he chose not to submit Interrogatories or Requests for Production of Documents to the Department. Furthermore, he chose not to depose Mr. Thompson or take anyone else’s deposition. Nonetheless, the Department mailed this Memo along with the other Respondent’s trial exhibits to Mr. Weatherholtz and the ALC on February 18, 2013, two weeks before the March 5, 2014 contested case hearing. (R. p. __, February 18, 2014 letter).

At trial, Mr. Thompson provided extensive testimony regarding his July 13, 2013 site visit, including descriptions of the small size of this creek as well as his methods of measuring the creek width in accordance with S.C. Code Ann. Reg. 30-12(A)(2)(c)(i). Specifically, regarding the small size of this creek, Mr. Thompson testified at trial as follows:

1. The mouth of the creek is so small that when he and Mr. Mallett “came up the main part of Kushiwah Creek, and we were looking for the creek to turn off to go into the site, [we] actually rode past it the first time because you couldn't see it. The mouth of it [the creek] is almost closed off.” (R. pp. __, Transcript 169:12-24).

2. Having missed the mouth of the creek on their initial approach, when Mr. Thompson and Mr. Mallett returned from the opposite direction, he (Mr. Thompson) had to use his portable GPS along with an aerial photograph to find the mouth of the creek. (R. pp. __, Transcript 169:17-19).
3. When he and Mr. Mallett entered the creek in their 48 inch wide jon boat, “the boat pushed marsh grass over to the side when we went in the mouth of the creek.” (R. pp. __, Transcript 169:23-24; Transcript 170:17-19).
4. Although they arrived about thirty minutes before high tide, the jon boat Mr. Thompson and Mr. Mallett were in “hit bottom a time or two.” (R. pp. __, Transcript 170:9-11).
5. When he and Mr. Mallett passed Mr. Weatherholtz’ next door neighbor’s dock in the 48 inch wide jon boat, they had to run the boat two feet into the marsh to pass by the dock and their boat still hit the side of the neighbor’s dock as they passed by.⁶ (R. pp. __, Transcript 170:17-23).

Regarding Mr. Thompson’s methods and results of measuring the creek width in accordance with S.C. Code Ann. Reg. 30-12(A)(2)(c)(i), he testified at trial as follows:

- a. He (Mr. Thompson) began measuring the distance from marsh vegetation on one side of the creek to the marsh vegetation on the opposite side of the creek starting at the point where “mature” *Spartina alterniflora* (commonly called marsh grass)

⁶ Mr. Weatherholtz asserts that Petitioner’s Exhibit 18 is probative in determining the width of Kushiwah Creek in 2013, since back in 2001 the Department issued a dock permit to the prior owner of his property and the Department did not dispute the applicant’s representation that Kushiwah Creek was ten feet wide in 2001. (Transcript 122:16-23). Mr. Thompson, testified at trial that a creek’s width in 2001 is not a reliable basis for determining a creek’s width in 2013, because creek widths change over time. (R., p. __, Transcript 163:5-20).

was growing. (R. pp. ___, Transcript 226:3-9). Mr. Thompson specifically stated that he did not measure the width of this creek starting with “sprigs” of *Spartina alterniflora*. (R. pp. ___, Transcript 226:3-9). Rather, he measured the creek width starting at a location with “a relatively dense stand of [*Spartina alterniflora*] vegetation.” (R. pp. ___, Transcript 224:1-7).

- b. He measured the creek width using a survey rod. He described this instrument as “a fiberglass rod that can be extended and locked into place... It's demarked in feet and tenths of feet so that we can take a measurement using that rod. It's stiff so that ... there is no sag in this. It's a very straight rod ...” (R. pp. ___, Transcript 171:6-15).
- c. He and Mr. Mallett measured the creek’s width from the marsh vegetation on each side of the creek at four different locations within Mr. Weatherholtz’ extended property lines including “the area of his proposed dock.” (R. pp. ___, Transcript 185:24-25; Transcript 173:10-14).
- d. They did not measure the creek’s width outside Mr. Weatherholtz’ extended property lines. (R. pp. ___, Transcript 184:20 to 185:5).
- e. The Weatherholtz extended property lines and the extended property lines of the neighboring property owner (depicted in Respondent’s Exhibit 5) who currently has actual access and potential access via dockage from the opposite side of the creek did *not* conflict.
- f. Mr. Thompson testified that the reason the extended property lines of these two parcels did not conflict is because extended property lines terminate at the edge of the waterbody closest to each parcel. (R. pp. ___, Transcript 151:1-25). This

testimony regarding non-conflicting extended property lines is in accord with S.C. Code Ann. Reg. 30-1(53).

- g. Mr. Thompson measured the portion of the creek within Mr. Weatherholtz' extended property lines to be seven and a half to eight feet wide (R. pp. ____, Transcript 186:1-2), but particularly at the location of the proposed dock, he measured the creek to be slightly under eight feet wide. (R. pp. __, Respondent's Ex. 1, page 3).
- h. Mr. Thompson does not interpret S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) as allowing him to permit a dock when just a few feet of the creek width may be greater than ten feet wide, because such a small portion of the creek would not be representative of either the creek width or "actually where the line of marsh vegetation was." (R. pp. __, Transcript 192:11-16; Transcript 184:3-6).
- i. The method of measuring creek width and the method of determining the beginning of marsh vegetation that he (Mr. Thompson) and Mr. Mallett used are the same methods for measuring creek width and marsh vegetation that the Department has historically used. (R. pp. __, Transcript 171-4, 173-18, 174-6).

*Facts pertaining to the potential access via dockage
from the opposite side of the creek analysis*

- a) During his trial testimony Mr. Thompson used a sharpie marker to draw the extended property lines of the property on the opposite side of the creek as represented by Respondent's Exhibit 5. (R. pp. __, Transcript 196:2-10). The extended property lines of the property on the opposite side of the creek form an uneven "pie shape" with a short dock directly in the middle of these two

extended property lines and on the opposite side of the creek from the Petitioner's upland property. (R. pp. __, Respondent's Exhibit 5).

- b) Mr. Thompson testified at trial that the property owner on the opposite side of the creek from Weatherholtz (as demonstrated in Respondent's Exhibit 5) has both actual and potential access via dockage from the opposite side of the creek. (R. pp. __, Transcript 199:14-21). This trial testimony is consistent with what Mr. Thompson said in his August 7, 2013 permit denial letter to Weatherholtz (i.e., "*potential access via dockage from the opposite side of the creek exist[s]*") referring to his application of S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) to this permitting decision). (Emphasis added). (R. pp. __, Respondent's Exhibit 1).
- c) Regarding "potential access via dockage from the opposite side of the creek," Mr. Thompson elaborated by testifying that "potential access means that a dock *could* be built. It doesn't mean that there is one or there will be one. It means there could be one, and *if you meet the other regulations for creek widths* and all that, a dock could be built out there if we met the rest of the regulations."⁷ (Emphasis added) (R. pp. ____, Transcript 217:2-8). But he went on to clarify that because the creek width is less than ten feet, the "potential access" analysis under S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) is "all hypothetical anyway." (R. pp. __, Transcript 219:2-3).

⁷ At another point during his trial testimony, Mr. Thompson also testified regarding "potential access via dockage from the opposite side of the creek" that such potential access "can be anything on the other side that there's potential for a dock to be built from the opposite side of the creek, not that a dock *will* be built directly across from another dock but that a dock *can* be built from the opposite side of the creek." (Emphasis added). (R. pp. __, Transcript 198:2-8).

d) Mr. Thompson further testified that this Reg. 30-12(A)(2)(c)(ii) determination is consistent with the Department's historical interpretation of this regulation. (R. pp. __, Transcript 200:3-6).

On August 7, 2013 Mr. Thompson issued his permitting decision denying Weatherholtz' dock permit application because he (on behalf of the Department) determined that (a) the creek was less than ten feet wide as measured from marsh vegetation on each side; and (b) that there was both actual and potential access via dockage from the opposite side of the creek.

The ALC found on page 7 of her Amended Final Order and Decision that Mr. Thompson was "a very credible witness who had many years of experience in taking such measurements [of creek widths]." (R. pp. __).

Facts pertaining to the December 6, 2013 site visit during litigation

Four months after the permitting decision was issued and seven weeks after Mr. Weatherholtz initiated this litigation by filing a Request for Contested Case before the ALC, Mr. Thompson, the undersigned counsel and Mr. Weatherholtz made a site visit in a jon boat to the creek adjacent to Weatherholtz' property. Mr. Weatherholtz was the party who requested this December 6, 2013 site visit. This site visit had no connection whatsoever to the Department's earlier August 7, 2013 permitting decision interpreting S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) that the ALC gave deference to at trial (i.e., regarding the measurement of the creek width from marsh vegetation on each side). Rather, Mr. Thompson's decision to meet with Mr. Weatherholtz during the midst of ongoing litigation was a good faith attempt by the Department to be responsive to his request to essentially settle one of the major issues in this case by providing him

(Weatherholtz) with another opportunity to show the Department that the creek met the ten feet minimum requirement.

Facts pertaining to Weatherholtz' surveyor

At trial, Weatherholtz' surveyor (Mr. Thomas Bessent) relied on measurements obtained by his field crew using an electronic total station instrument. (R. pp. ____, Transcript 27:15-16). However, Mr. Bessent testified that he did not operate either the electronic total station or the prism in collecting the data used to measure the width of the creek. (R. pp. ____, Transcript 36:25-37:4).

When Mr. Weatherholtz cross-examined Mr. Thompson about Mr. Bessent's survey that was submitted as part of the permit application, Mr. Thompson testified that even though he "verif[ies] critical area lines all the time," he could not rely on the lines in this survey depicting creek width, because it had no reference points, or distances and bearings or "any other information that would go with that to make this a recoverable point." (R. pp. __, Transcript 208:15-21; 209:2-5).

Following Mr. Thompson's testimony about the unreliability of Mr. Bessent's survey depicting a ten foot creek width, Judge Mathews said the following in response to Weatherholtz' objection to this testimony: "I think the points that were made by Mr. Thompson regarding that he thought it [survey data] was inadequate because there weren't distances and bearings on here for this survey are *valid*." (Emphasis added) (R. pp. __, Transcript 210:11-14).

On cross-examination, Mr. Bessent further testified that a man named Billy Ferguson was in a kayak holding the prism over the location where he (Billy Ferguson) thought the edge of the marsh vegetation began. (R. pp. __, Transcript 40:19-21; 41:21-

22 and 42:8-11). Mr. Bessent testified that since he was not actually out in the kayak on the creek, he was not the person making the decision about where the marsh vegetation began. Billy Ferguson made that decision. (R. pp. ___, Transcript 42:17-21). Mr. Bessent testified that he had no knowledge of Billy Ferguson's educational background regarding his ability to accurately identify various stages of marsh vegetation growth. (R. pp. ___, Transcript 59:9-12). Billy Ferguson was absent from the hearing, so he (Billy Ferguson) did not testify about where he placed the prism for purposes of measuring the edge of marsh vegetation. (R. pp. ___, Transcript 45:7-9).

During his trial testimony, Mr. Bessent reiterated his assertion that the creek width measured precisely ten feet in the area of the proposed dock.⁸ (R. pp. ___, Transcript 31:12-14). In contrast, Mr. Bessent also testified that he drew a cross-sectional sketch of the creek that was marked as the last page of Petitioner's Exhibit 5. (R. pp. ___, Transcript 65:14-24). In an email Mr. Bessent sent to the Appellant four days before trial (on February 28, 2014), he described this sketch as part of the "fieldwork on this job." (Respondent's Exhibit 2). Mr. Bessent further described this sketch in his February 28, 2014 email to Petitioner as "a hand sketch from my file that I made during my discussion with my field crew *at the time of the survey*." (Respondent's Exhibit 2). Mr. Bessent testified that the accuracy of this sketch was "pretty close." (R. pp. ___, Transcript 65:21-22). Mr. Bessent testified that his cross-sectional sketch showed the initial vegetation on each side of the creek to be seven feet to nine feet apart. (R. pp. ___, Transcript 66:4-6). Mr. Bessent referred to this initial vegetation on each side of the creek as "sprigs". (R.

⁸ MR. CHURDAR: What does this survey show as the width of the creek in the proposed dock location?

MR. BESSENT: It shows ten feet. (Transcript 31:12-14).

pp. ___, Transcript 66:4-8). Specifically, Mr. Bessent testified that the distance across the creek from “sprig to sprig” was seven to nine feet. (R. pp. ___, Transcript 66:4-8).

Argument

Before addressing the merits of Mr. Weatherholtz’ error allegations regarding deference to the Department’s application of the “ten foot minimum width rule” per S.C. Code Ann. Reg. 30-12(A)(2)(c)(i), it is important to point out that **there is no dispute between the parties on this issue**. Appellant’s interpretation and application of this regulation is consistent with the way Mr. Thompson actually measured the creek width. On appeal, Mr. Weatherholtz asserts that “to ensure consistency, width should be determined at the proposed dock site” and that “the only logical place to measure creek width is where the landowner wants to put the dock.” (Appellant’s Initial Brief, pp. 19 and 20). As previously noted, Mr. Thompson testified at trial that during his July 11, 2013 site visit, he measured the creek width at the location of the proposed dock and that the creek was slightly less than eight feet wide, measured from marsh grass to marsh grass.⁹ (R. pp. ___, Transcript 173:10-14; Transcript 185:24-25; Respondent’s Ex. 1, page

⁹ In Appellant’s Reply Brief, Mr. Weatherholtz will likely attempt to make much of the fact that the ALC’s Amended Final Order and Decision did not specifically mention this portion of Mr. Thompson’s trial testimony or the previously-mentioned July 11, 2013 File Memo where he testified that the creek width *at the proposed location of the dock* was slightly under eight feet wide. (R. pp. ___, Respondent’s Ex. 1, page 3). However, for appellate review purposes, the fact that the ALC recorded in both the Findings of Fact and Conclusions of Law portion of the Order that “Mr. Thompson measured the portion of [] [the creek] within the Petitioner’s extended property lines to be seven and a half to eight feet wide” was a sufficient basis for the ALC to affirm the Department’s decision (Amended Final Order and Decision, pp. 4 and 7). In I’on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), the South Carolina Supreme Court held that under the present appellate court rules, a respondent - the “winner” in the lower court - may raise on appeal any *additional* reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. (Emphasis added). I’on, L.L.C., 338 S.C. at 419. The only requirement

3). As such, Appellant's dispute with the Department is not about the *location* where Mr. Thompson measured the creek width, but rather the results of Mr. Thompson's measurements. Such an appellate argument based on results and not on the originally-alleged legal error is *a priori* beyond the scope of appellate review established by S.C. Code Ann. § 1-23-610(B) and should be dismissed.

Rule 220(b), SCACR maintains that an appellate court's opinion must express in writing "every point distinctly stated in the case which is necessary to the decision of the appeal . . ." (Emphasis added). In this case, deciding whether or not the ALC properly deferred to the Department's interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) is *not* necessary to this Court's decision per Rule 220(b), since the Department measured Mr. Weatherholtz' creek width at the location he (Mr. Weatherholtz) asserts is the correct location per the regulation (i.e., at the proposed dock site). As such, this lack of conflict between the parties' application of this regulation is a sufficient basis to deny the Appellants' appeal of the Order without addressing Mr. Weatherholtz' other arguments regarding either S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) or (ii).¹⁰ Such a course of action

for consideration on appellate review for the additional sustaining grounds is that those grounds appear in the record on appeal. I'on, L.L.C., 338 S.C. at 420. Respondent would argue that page three of Respondent's Exhibit 1 (July 11, 2013 File Memo) and Mr. Thompson's above-referenced trial testimony are not truly "additional sustaining grounds", because these more narrow facts are subsumed by the factual finding and conclusion that, broadly speaking, the creek width is seven and one half to eight feet wide between Mr. Weatherholtz' extended property lines. Nonetheless, in this case, as mentioned above, page three of Respondent's Exhibit 1 as well as Mr. Thompson's relevant trial testimony were both made part of the record on appeal as I'on, L.L.C. requires and are thus a valid basis for this Court to affirm the ALC decision.

¹⁰ Stated another way, since an appeal of the Department's less-than-ten-feet-creek-width determination, by itself, is beyond the scope of S.C. Code Ann. § 1-23-610(B), this factual finding and legal conclusion becomes the law of the case and no further analysis is required. A deference analysis of either S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) or S.C.

(i.e., denying the appeal of the Order without addressing deference) is consistent with the Supreme Court's long held position that an appellate court need not and should not address remaining issues on appeal where the determination of a prior issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); Whiteside v. Cherokee County School District No. One, 311 S.C. 335, 428 S.E.2d 886 (1993); Starnes v. S.C. Dep't of Public Safety, 342 S.C. 216, 222-23, 535 S.E.2d 665, 668 (Ct. App. 2000). To uphold the Order, based in part on a deference analysis when deference is not required to uphold the Order, amounts to an unnecessary advisory opinion; particularly since proper grounds for affirming the order plainly exist (namely, both parties agree on how to apply the ten-foot-creek-width regulation). This Court has consistently held that such advisory opinions are improper. See S.C. Labor Ltd., LLC v. E. Tree Serv., Inc., 362 S.C. 654, 658, 609 S.E.2d 305, 307 (Ct. App. 2005) ("We do not address this issue because we do not give advisory opinions."). Accordingly, affirmation of the Order need not be based on a deference analysis.

Code Ann. Reg. 30-12(A)(2)(c)(ii) is unnecessary when a creek is indisputably less than ten feet wide.

I. The Department’s application and interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) is entitled to deference because (a) the regulation is both silent and ambiguous regarding *how* the Department should measure creek width; and (b) the Department’s interpretation is not “arbitrary, capricious, or manifestly contrary to the statute.”

Mr. Weatherholtz asserts the ALC erred in according deference to the Department’s interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i). This assertion is without merit and the ALC properly deferred to the Department’s regulatory interpretation.

The Supreme Court recently addressed this deference issue in Kiawah Development Partners, II v. South Carolina Department Of Health And Environmental Control, 411 S.C. 16, 766 S.E.2d 707 (2014). In that case, the Court stated that

Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. See Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (“We recognize the Court generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency’s interpretation, the Court will reject the agency’s interpretation.” (citations omitted)); Brown v. S.C. Dep’t of Health & Env’tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (“Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.”). *If the statute or regulation “is silent or ambiguous with respect to the specific issue,” the court then must give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference.* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Brown v. Bi-Lo, 354 S.C. at 440, 581 S.E.2d at 838. (Emphasis added). Id. at 717.

According to the Supreme Court, unless the plain language of a regulation is contrary to an agencies' interpretation, the general rule is to defer to that interpretation. In this instance, S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) is both silent and ambiguous regarding *how* the Department should measure creek width. The regulation simply states without further guidance that docks "will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side."

A. Silence and Ambiguity

The following litany of questions that cannot be answered regarding how the Department should implement Reg. 30-12(A)(2)(c)(i) amply demonstrates the Regulation's silence and ambiguity, thus satisfying the first prong of the two-prong deference analysis:

- Does the Regulation require that the Department take only a single measurement of the creek width at the exact location of the proposed dock?
 - If not, then how many measurements must the Department take to determine creek width?
 - If more than one measurement is necessary to determine creek width, then how far away from the proposed dock should the Department take creek width measurements?
- Should the Department limit its creek width measurement data collection to the area between the permit applicant's two extended property lines at the edge of the water?

- ❖ If the Regulation allows the Department to measure creek widths *beyond* the point where the permit applicant's extended property lines reach the first navigable waterbody, then how far beyond those extended property lines should the Department be measuring a creek's width?
- Since creeks are not the same width uniformly from one extended property line to the other (like a pipe or a rod), how does the Department account for those differences in width when determining the distance across a creek?
- Does the Department measure creek width only at a right angle perpendicular direction from one side of the creek to the other?
 - If yes, then how does the Department make an exactly perpendicular measurement if the waterway in question is a meandering creek with irregular shorelines (which is often the case)?
 - If the creek width measurement can be taken from an angle that is less than a right angle perpendicular to the shoreline, then is any angled creek width measurement permissible under the regulation (no matter how severe the angle) as long as the measurement starts and ends at "marsh vegetation"?

- If, as Mr. Weatherholtz asserts, this regulation is unambiguous (and thus deference is improper), then the answer to this question would be “yes”. Under such a scenario, Mr. Weatherholtz could reasonably claim by way of example, that as long as the creek width measurement in his permit application was “measured from marsh vegetation on each side,” his surveyor could measure his creek’s width at a 10 degree angle from one side of the creek to the other, thus producing a legally defensible (and totally absurd) result claiming that his small creek is in reality 50 feet wide.

The plain language of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) fails to answer any of the above-referenced questions. Accordingly, the Regulation is both silent and ambiguous. Judge Mathews also acknowledged on the record the lack of clarity and guidance this regulation provides with the following colloquy with both counsel during trial:

THE COURT: **Well, I am trying to figure out the -- in the reg does it say [creek width measurements must be done]¹¹ within your extended lot lines; is that an absolute? I mean ---**

MR. WEATHERHOLTZ: I'll pull the reg.

THE COURT: I mean, I didn't realize that was an issue ---

MR. CHURDAR: Your Honor ---

THE COURT: --- for that -- I mean, I guess I thought if you had three things jammed up against each other and you would potentially have docks and it narrowed to ten feet it was -- I don't know. Anyway, sorry. I'm just thinking out loud. **I'm trying to figure out if it is a requirement of the reg that the creek must measure ten feet**

¹¹ Undersigned counsel added the words in brackets for context.

within the extended lot lines of the property owner applying for the permit.

MR. WEATHERHOLTZ: It doesn't say that, Your Honor.

THE COURT: Okay.

(R. pp. __, Transcript 108:21-25 thru 109:1-14) (Emphasis added).

THE COURT: But **is there anything in the regulation that says it [the creek width]¹² must be ten feet wide for the entire width of the proposed dock?**

MR. CHURDAR: Well, the regulation is fairly short. I mean, this particular language, and that's why I keep going to, you know, Mr. Thompson, is this in keeping with how the Department has interpreted it, because I mean we are dealing with the regulation ---

THE COURT: **Everything is not spelled out. I understand.**

MR. CHURDAR: --- so the Department's historical interpretation of something becomes crucial and along that line ---

MR. WEATHERHOLTZ: Well, if I could respond to that.

THE COURT: Yes.

MR. WEATHERHOLTZ: I mean, it's important to understand what the Department has historically done and how they have interpreted it, but what I'm challenging in this case is that interpretation, how that part of the regulation has been applied in this case, and it's up to the Court to determine whether based on the language of the regulation -- so I think that's a fair question.

THE COURT: Yes.

MR. WEATHERHOLTZ: What does the reg say? Does it say that?

THE COURT: And **it doesn't specifically say that, but that's why the historical interpretation Mr. Churdar is very important.**

MR. CHURDAR: The Court -- I mean the -- you know, agency deference is really what that's getting at.

¹² Undersigned counsel added the words in brackets for context.

(R. pp. __, Transcript 180:20-25; 181:1-25; 182:1-3) (Emphasis added).

B. Department's interpretation is not "arbitrary, capricious, or manifestly contrary to the statute."

The Supreme Court stated that "the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" Kiawah, 411 S.C. at 27, 766 S.E.2d 718 (2014) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

Mr. Thompson's application and interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) that received deference from the ALC involved the following five factors:

- 1) He measured the creek width while he was in a jon boat on the water *at the location of the proposed dock*. He measured both the floodside and the ebbside of the proposed dock location as well. (R. pp. __, Respondent's Ex. 1, page 3).
- 2) He measured the creek using a survey rod which is a very straight and stiff fiberglass rod that can be extended and locked into place and is marked in feet and tenths of feet so that he can take a measurement with that rod. (R. pp. __, Transcript 171:6-15).

- 3) He began measuring the distance from marsh vegetation on one side of the creek to the marsh vegetation on the opposite side of the creek starting at the point where there was a relatively dense stand of “mature” *Spartina alterniflora*. Mr. Thompson specifically stated that he did not measure the width of this creek starting with “sprigs” of *Spartina alterniflora*. (R. pp. __, Transcript 226:3-9; Transcript 224:1-7).
- 4) He and Mr. Mallett measured the creek’s width from the marsh vegetation on each side of the creek at four different locations all within Mr. Weatherholtz’ extended property lines. (R. pp. __, Transcript 185:24-25).
- 5) He does *not* interpret S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) as allowing him to permit a dock when just a few feet of the creek width may be greater than ten feet wide, because such a small portion of the creek would not be representative of the creek width. (R. pp. __, Transcript 192:11-16).Mr. Thompson’s interpretation and application of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) cannot be considered arbitrary, capricious, or manifestly contrary to the regulation in violation of the Kiawah standard under any reasonable use of those terms.

According to this Court, “[a] decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.” Deese v. S. Carolina State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citing Hatcher v. South Carolina District Council of Assemblies of God, Inc., 267 S.C. 107, 226 S.E.2d 253 (1976); Turbeville v. Morris, 203 S.C. 287, 26 S.E.2d 821 (1943)). Furthermore, “[a] conclusion is ‘capricious’ when there is no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence.” 73A C.J.S. Public Administrative Law and Procedure § 537.

In this instance, at the beginning of S.C. Code Ann. Reg. 30-12(A), the regulation states the following purpose for establishing project standards: “[d]ocks and piers are the most popular method of gaining access to deep water. Docks and piers sometimes pose navigational problems, restrict public use of the water and, under certain circumstances, possess potential for creating environmental problems.” Mr. Thompson’s decision to measure the creek width at the proposed location of the dock as well as measuring at multiple other locations both ebbside and floodside is a rational basis for interpreting S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) in view of the stated navigational concern. It is also worth pointing out the incongruity between the regulatory language (i.e., docks “are the most popular method of gaining access to *deep* water”) and Mr. Thompson’s testimony that a mere thirty minutes before high tide during the July 11, 2013 site visit, Mr. Thompson’s jon boat “hit bottom a time or two” in the vicinity of Mr. Weatherholtz’ proposed dock. A creek as small and shallow as this one was plainly not contemplated in this regulation as qualifying for a dock permit and Mr. Thompson’s application and

interpretation of the regulation was not “manifestly contrary” to its stated purpose. Kiawah, 411 S.C. at 27, 766 S.E.2d 718. Accordingly, the ALC’s deference to Mr. Thompson’s interpretation was not legal error.

II. Appellant’s Argument “I.B.” and all five subpoints (pages 14-23 of Appellant’s Brief) are premised on the mistaken understanding that the ALC was giving deference to Mr. Thompson’s December 6, 2013 site visit with Appellant, rather than the July 11, 2013 site visit that was the basis for the permitting decision.

At the beginning of Appellant’s Argument “B”, Mr. Weatherholtz references what he believes to be a crucial conversation he had with Mr. Thompson while going on a site visit in a jon boat on December 6, 2013.¹³ Specifically, Mr. Weatherholtz cites pages 107:23-108:4; 192:8-11 from the trial transcript as proof that “Thompson’s failure to measure the creek at the proposed dock location was not inadvertent.” For the next nine pages of his Brief (from page 14-23), Mr. Weatherholtz relies on the mistaken belief that this December 6, 2013 site visit and conversation were somehow connected to the permitting decision issued four months earlier on August 7, 2013 that the ALC gave deference to. For example, Weatherholtz says that at the top of page 15 of the Appellant’s Brief that “[b]ecause Thompson felt that Weatherholtz’s proposed dock location was not ‘representative of the width of the creek,’ he would not measure its width. (Hr’g Tr. pp. 175:6-176:1; 192:10-13).” Another example of Mr. Weatherholtz mistakenly attempting to connect the December 6, 2013 site visit with the deference

¹³ As previously mentioned in the Statement of Facts, this December 6, 2013 site visit had no connection whatsoever to the Department’s earlier August 7, 2013 permitting decision interpreting S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) that the ALC gave deference to at trial (i.e., regarding creek width measurement). Rather, Mr. Thompson’s decision to meet with Mr. Weatherholtz during the midst of ongoing litigation was a good faith attempt by the Department to be responsive to his desire to essentially settle one of the major issues in this case (i.e., creek width). The fact that this effort to accommodate Mr. Weatherholtz is now being used as a misguided basis of appeal demonstrates the maxim that “no good deed goes unpunished.”

accorded the Department's August 7, 2013 interpretation and analysis of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) is found near the bottom of page 18 of Appellant's Brief. There Mr. Weatherholtz asserts that "[a]s Thompson's testimony and his evaluation of Weatherholtz's permit show, OCRM will ignore even the proposed dock location if the permit evaluator feels the location does not meet his view of what width represents the creek." Then, with unintended irony, Mr. Weatherholtz asserts on page 19 of Appellant's Brief that "to ensure consistency, width should be determined at the proposed dock site." As demonstrated by Mr. Thompson's July 11, 2013 File Memo, when he conducted his site visit, he not only measured the creek width "at the proposed location of a dock described in the referenced permit application" as Mr. Weatherholtz recommends (R. pp. __, Respondent's Ex. 1, page 3), but he also measured "[a]reas both floodside and ebbside of the proposed dock location" as well and found the creek width at the proposed dock location to be slightly under eight feet wide measuring from marsh grass to marsh grass. (R. pp. __, Respondent's Ex. 1, page 3).¹⁴

Despite hearing Mr. Weatherholtz' testimony about the December 6, 2013 site visit, the ALC never mentions this site visit in her Final Order and Decision, because it occurred several months after Mr. Thompson had already made his permitting decision that was the subject of judicial deference. Conflating the July 11th and December 6th site visits serves no purpose other than to possibly confuse this Court into thinking that the December 6th site visit is what the ALC was deferring to in her Amended Final Order and Decision.

¹⁴ His testimony at trial corroborated this fact when he testified that he and Mr. Mallett measured the creek's width from the marsh vegetation on each side of the creek at four different locations within Mr. Weatherholtz' extended property lines including "the area of his proposed dock." (R. pp. __, Transcript 185:24-25; Transcript 173:10-14)

A. **Captain's Quarters Motor Inn, Inc., South Carolina Coastal Conservation League and Schulz are distinguishable from the Department's permitting decision.**

As mentioned above, all five subparts of Mr. Weatherholtz' Appellant's Argument under section "I.B." of his brief (pages 14-23) are fatally flawed because of the Appellant's mistaken understanding that the ALC was giving deference based on Mr. Thompson's December 6, 2013 site visit with Appellant, rather than his July 11, 2013 site visit. Nonetheless, Weatherholtz mentions three cases that Respondent will address.

1) **Captain's Quarters Motor Inn is not applicable.**

Weatherholtz asserts that "OCRM exceed[ed] its authority when it [made] permitting decisions based on unwritten rules" and cites as authority Captain's Quarters Motor Inn, Inc. v. S. Carolina Coastal Council, 306 S.C. 488, 490-91, 413 S.E.2d 13, 14 (1991). (Appellant's Brief, p. 16). In Captain's Quarters, the South Carolina Coastal Council "developed a test to determine whether a seawall was less than fifty percent damaged as required by § 48-39-290(C). Under this test, only the above-grade portion of the shore-parallel wall, excluding the perpendicular wing walls and underground foundation, would be considered for damage assessment. The trial court concluded [and the Supreme Court affirmed that] Coastal Council's interpretation of § 48-39-290(C) was invalid because: (1) the statute itself was clear and unambiguous; (2) Coastal Council's interpretation was arbitrary and capricious; and (3) Coastal Council's interpretation was not promulgated as a regulation." Captain's Quarters Motor Inn, Inc. v. S. Carolina Coastal Council, 306 S.C. 488, 489, 413 S.E.2d 13, 13-14 (1991).

In this case, the Captain's Quarters opinion is inapplicable because Mr. Weatherholtz' appellate argument cannot satisfy the three part test stated above. Unlike

the statute at issue in Captain's Quarters, S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) is certainly ambiguous in its application.¹⁵ The regulation provides the Department with no guidance regarding *how* creek widths are supposed to be measured “from marsh vegetation on each side.” As such, deference was properly accorded the Department’s regulatory interpretation.

For the reason’s previously articulated in section I.B. of Respondent’s Brief, Mr. Weatherholtz also fails to satisfy the second part of the three part test articulated in Captain’s Quarters (i.e., arbitrary and capricious interpretation). Accordingly, Respondent’s counsel will not repeat those reasons here, but would refer this Court back to section I.B. of Respondent’s Brief.

Mr. Weatherholtz also fails to satisfy the third part of the three part test articulated in Captain’s Quarters (i.e., interpretation was not promulgated as a regulation). In Spectre, LLC v. S. Carolina Dep’t of Health & Env’tl. Control, 386 S.C. 357, 688 S.E.2d 844 (2010), the property owner (like Mr. Weatherholtz) also attempted to use Captain’s Quarters “for the proposition that where an agency is authorized to promulgate certain regulations, it may not impose requirements by other means. [In reversing the ALC, the Supreme Court found] Captain’s Quarters inapplicable as it involved a specific statutory directive for DHEC to publish final rules and regulations, unlike the instant case.” Spectre at 490–491, 413 S.E.2d at 14. Likewise, the regulation at issue here is more like the various provisions of the CMP at issue in Spectre than the statute in dispute in Captain’s Quarters. In Captain’s Quarters, the Supreme Court stated that “[a]s a creature of statute, a regulatory body is possessed of only those powers expressly conferred or

¹⁵ The regulation simply provides that “docks will not be permitted on creeks less than 10 feet wide as measured from marsh vegetation on each side.”

necessarily implied for it to effectively fulfill the duties with which it is charged. Captain's Quarters, 306 S.C. at 490-91, 413 S.E.2d at 14-15 (Emphasis added) (citing City of Rock Hill v. South Carolina Department of Health and Environmental Control, 302 S.C. 161, 394 S.E.2d 327 (1990); City of Columbia v. South Carolina Department of Health and Environmental Control, 292 S.C. 199, 355 S.E.2d 536 (1987)). In order for the Department to effectively fulfill the duties with which it is charged under S.C. Code Ann. Reg. 30-12, it is *necessarily implied* that the Department will have to interpret how measuring creek widths from marsh vegetation on each side is actually implemented when making a permitting decision.

2) **S.C. Coastal Conservation League is not applicable.**

Mr. Weatherholtz asserts that South Carolina Coastal Conservation League is applicable to his case, because like the Department's interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i), "the Supreme Court held that part of Regulation 30-12, which governed 'small' islands, was void for vagueness because the regulation contained no test for determining whether an island is 'small.'" (Appellant's Brief, pp. 16-17). The Supreme Court articulated the problem in South Carolina Coastal Conservation League by stating that "[s]mall' is a term of subjective relativity, and the regulations provide no benchmark for comparative size." In contrast, the regulation in question in this case clearly articulates that ten feet is the minimum creek width necessary for a dock permit. So in applying S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) the Department is not making a determination of which creeks are wide enough to allow dock permits based on a subjective standard of "small", "medium" or "large". Rather, as stated above, the Department has to interpret how measuring creek widths from marsh vegetation on each

side is actually implemented when making a 10-foot-creek-width permitting decision. But it is important to remember the fact that Mr. Thompson measured the creek width at the location of the proposed dock just as Weatherholtz asserts is the correct measuring location.

3) **Schulz is not applicable.**

Schulz v. South Carolina Department of Health & Environmental Control, No. 01-ALJ-07-0212-CC, 2001 WL 1502472 is an ALC Final Order and Decision that Mr. Weatherholtz claims is proof that the Department measured Shem Creek in a similarly-defective manner to how Mr. Thompson measured the creek in this case. According to Mr. Weatherholtz, because the ALC reversed the Schulz permitting decision, this is supposedly proof that the Department’s historical interpretation and application of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) does not deserve deference, because such interpretation was previously rejected.

The Department’s application of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) in Schulz is fundamentally different from the manner in which Mr. Thompson measured the creek in this case. The chart below highlights the differences between how Department staff decided Shem Creek’s width and how Mr. Thompson actually measured the creek width adjacent to Mr. Weatherholtz’ property on July 11, 2013:

	<u>Schulz dock permit decision</u>	<u>Weatherholtz dock permit decision</u>
1.	The OCRM Project Manager took <i>no field measurements</i> at all before deciding Shem Creek’s width. Specifically, the OCRM Project Manager did not even field measure the creek width at the location of the proposed dock. (Final	On July 11, 2013, Mr. Thompson was physically in a jon boat on the water at Weatherholtz’ creek taking actual measurements with a survey rod. He measured the creek width at the location of the proposed dock and at multiple

	Order, page 2).	other locations as well within Weatherholtz' extended property lines.
2.	The OCRM Project Manager relied completely on the aerial photographs obtained by using the Geographic Information System ("GIS") to determine creek width. (Final Order, page 2).	Mr. Thompson testified that he attempted to measure the creek width via GIS "several different ways" and kept coming to an eight foot measurement. Knowing that GIS does not provide "a survey quality measurement," and seeing "ten feet on the [permit] application," he decided that he "needed to go to the site" to physically measure the creek width. (R. pp. __, Transcript 168:20-25 thru 169:1-5).
3.	Using the GIS only, the OCRM Project Manager took two measurements of Shem Creek which were some distance from the proposed location of the fixed pierhead and the floating dock. (Final Order, page 2).	Mr. Thompson took four measurements of Weatherholtz' creek width all within the parameters of his (Weatherholtz') extended property lines. Mr. Thompson did not measure creek width outside his extended property lines. (R. pp. __, Transcript 185:24-25).
4.	The OCRM Project Manager (collecting data only from GIS) came up with an "average width" of Shem Creek upstream and downstream of the dock site without collecting any data from a site visit. (Final Order, page 4).	Mr. Thompson's creek width data collection was done in a jon boat on the water; not merely calculating average creek widths from the confines of his office.

Even if the Schulz Final Order was factually identical to this case, that Order would only be persuasive authority at most. However, as the above chart demonstrates, the process Department staff used in Schulz to determine Shem Creek's width is fundamentally different from how Mr. Thompson actually measured Mr. Weatherholtz' creek width. Physically measuring creek width on site in multiple locations within Mr. Weatherholtz' extended property lines (including measuring at the location of the proposed dock) is far different from determining the "average" creek width from the confines of a Project Manager's office. The ALC in the case before this Court did not defer to an application of S.C. Code Ann. Reg. 30-12(A)(2)(c)(i) that is even remotely

similar to how Department staff determined the width of Shem Creek in Schulz. Accordingly, the Schulz Final Order is irrelevant to a deference analysis in this case.

III. The ALC properly rejected both Mr. Weatherholtz' and Mr. Bessent's creek width measurements.

Mr. Weatherholtz asserts that “the ALC's decision about Bessent's measurements ultimately had no factual basis. Accordingly, that decision [to accept Mr. Thompson's creek width measurements and reject Mr. Weatherholtz' and Mr. Bessent's creek width measurements] was an abuse of discretion.” (Appellant's Brief, p. 26).

In addressing the abuse of discretion standard and the trial court's evidentiary gatekeeping role, the Supreme Court stated that “[t]he qualification of a witness as an expert *and admissibility of his testimony* are matters largely within the discretion of the trial judge; however, the exercise of this discretion will be reversed where an abuse of discretion has occurred.” (Emphasis added). Risher v. S. Carolina Dep't of Health & Env'tl. Control, 393 S.C. 198, 206, 712 S.E.2d 428, 432 (2011). The Supreme Court additionally held that

“In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to ‘weight, not admissibility’ may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.”

Id. (citing State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009)). Furthermore, in addressing the ALC's duty to weigh and evaluate evidence, this Court held that the trial court “has the prerogative to believe one part of a witness's testimony while simultaneously disbelieving other parts of the same witness's testimony.” Tims v. J.D. Kitts Const., 393 S.C. 496, 508, 713 S.E.2d 340, 346 (Ct. App. 2011). When “there is a

conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the [ALC] as triers of the fact are conclusive.” Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985).

In this case, the ALC plainly found Mr. Thompson’s testimony regarding creek width to be more reliable than the testimony and evidence from either Mr. Bessent or Mr. Weatherholtz. On page 7 of her Amended Final Order and Decision, the ALC found that Mr. Thompson was “a very credible witness who had many years of experience in taking such measurements [of creek widths].”(R. pp. __).

As mentioned in the Statement of Facts, the results of Mr. Bessent’s survey rely on data collected by a man named Billy Ferguson who was in a kayak holding the prism over the location where he (Billy Ferguson) thought the edge of the marsh vegetation began. (R. pp. __, Transcript 40:19-21; 41:21-22 and 42:8-11). Without the data collected by Billy Ferguson, Mr. Bessent could offer no opinion on creek width. On cross-examination, Mr. Bessent testified that since he was not actually out in the kayak on the creek at Mr. Weatherholtz’ property, he was not the person making the decision about where the marsh vegetation began. Billy Ferguson made that decision. (R. pp. __, Transcript 42:17-21). Mr. Bessent testified that he had no knowledge of Billy Ferguson’s educational background regarding his ability to accurately identify various stages of marsh vegetation growth. (R. pp. __, Transcript 59:9-12).

Billy Ferguson did not appear at the ALC hearing, so he did not testify about (1) his educational background, (2) his ability to accurately identify various stages of marsh vegetation growth or (3) where he placed the prism for purposes of measuring the edge of marsh vegetation. (R. pp. __, Transcript 45:7-9). In evaluating the weight to be given

Mr. Bessent's opinion when a key witness such as Billy Ferguson fails to testify at trial, the Fourth Circuit and the United States Supreme Court offer the following guidance:

"It is well settled that the unexplained failure of a party litigant to call a material witness to give evidence in his behalf supports an inference that *such witness, if permitted to testify, would testify against the interests of the party failing to present this testimony.*" Blow v. Compagnie Mar. Belge (Lloyd Royal) S. A., 395 F.2d 74, 79 (4th Cir. 1968) (citing Southern Cross Steamship Co. v. Firipis, 285 F.2d 651, 659, 84 A.L.R.2d 895 (4th Cir. 1960)). See also Wisconsin Motor Corp. v. Green, 224 S.C. 460, 464, 79 S.E.2d 718, 720 (1954) ("It is well settled that if a party fails to produce the testimony of an available witness or witnesses on a material issue in the cause, or produce available records, *it may be inferred that the testimony, or the contents of the records, if presented, would be adverse to the party who fails to call the witness or present the records.*").¹⁶ (Emphasis added).

As previously mentioned, without the data collected by Billy Ferguson, Mr. Bessent can offer no opinion regarding creek width. Thus, without knowing the reliability of Billy Ferguson's data, the ALC did not abuse its discretion in choosing to accept Mr. Thompson's data, the ALC did not abuse its discretion in choosing to accept Mr. Thompson's testimony over Mr. Bessent's or Mr. Weatherholtz' testimony and evidence regarding creek width.

Mr. Weatherholtz' asserts on page 27 of Appellant's Brief that his testimony and evidence "proved the creek is more than ten feet wide." Such an assertion demonstrates a misunderstanding of the substantial evidence standard established by S.C. Code Ann. § 1-23-610(B).

¹⁶ In further evaluating whether the ALC abused its discretion by accepting Mr. Thompson's creek width measurements over Mr. Bessent's or Mr. Weatherholtz' measurements, the United States Supreme Court has offers the following additional guidance: "[t]he production of weak evidence when strong is available can lead *only* to the conclusion that the strong would have been adverse. Clifton v. United States, 4 How. 242, 247, 11 L.Ed. 957. Silence then becomes evidence of the most convincing character." Interstate Circuit v. United States, 306 U.S. 208, 226, 59 S. Ct. 467, 474, 83 L. Ed. 610 (1939). (Emphasis added).

When conflicting testimony and evidence is presented to the ALC such as the testimony of Mr. Thompson, Mr. Bessent and Mr. Weatherholtz, the Court must obviously weigh the evidence and then make factual findings and legal conclusions. In determining whether the ALC properly accepted Mr. Thompson's creek width measurements and rejected Mr. Weatherholtz' and Mr. Bessent's measurements, this Court provides the following guidance:

“[t]he ALC's findings are supported by substantial evidence if, looking at the record as a whole, there is evidence from which *reasonable minds could reach the same conclusion the administrative agency reached.*” Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 64, 663 S.E.2d 497, 501 (Ct. App. 2008) (citing Neal, 374 S.C. at 648, 649 S.E.2d at 167). (Emphasis added). “The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.” Id. (citing DuRant v. S.C. Dep't of Health & Env'tl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004)).

Mr. Thompson's July 11, 2013 File Memo alone satisfies the substantial evidence standard. Mr. Weatherholtz did not object to the admissibility of this File Memo when it was offered and admitted into evidence at trial as part of Respondent's Exhibit 1 (R. pp. ___, Transcript 22:14-25) nor did he appeal its admissibility to this Court. Without even considering Mr. Thompson's extensive trial testimony regarding how and why he applied the “ten foot rule”, the File Memo is “evidence from which *reasonable minds could reach the same conclusion the administrative agency reached.*” Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 64, 663 S.E.2d 497, 501 (Ct. App. 2008) (citing Neal, 374 S.C. at 648, 649 S.E.2d at 167).

IV. The ALC did not err in deferring to the Department's application and interpretation of S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) by holding that potential access via dockage from the opposite side of the creek exists.

Before addressing the merits of Mr. Weatherholtz' argument regarding S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii), it is important to note that such an analysis is only required if a creek is at least ten feet wide, but less than twenty feet wide. Specifically, this regulation states that “[d]ocks will not be permitted on creeks less than 20 feet wide as measured from marsh vegetation on each side unless one of the following two special geographic circumstances exists: a lot has greater than 500 feet of water frontage¹⁷ or no potential access via dockage from the opposite side of the creek.” The practical effect of this regulation is to limit docks on small creeks that are at least ten feet wide, but less than twenty feet wide. If a creek *does* have potential access via dockage from the opposite side of the creek, then *neither* property owner on both sides of the creek satisfies this special geographic circumstance exception. As such, the general prohibition on dock permits applies to *both* property owners on either side of the creek and *neither* property owner will get a dock permit. In this case, the property owner on the opposite side of the creek from Mr. Weatherholtz has a dock that is a grandfathered structure, built before this regulation was in effect. As such, there is no disparate treatment between Mr. Weatherholtz and this property owner. Obviously nothing requires this property owner to keep this grandfathered dock.

As Mr. Thompson testified at trial, because the creek in this case is less than ten feet wide, the “potential access” analysis under S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) is

¹⁷ Mr. Weatherholtz conceded at trial that his lot has less than 500 feet of water frontage, so he is not arguing that he should get a dock permit based on this particular special geographic circumstances exception. (R., p. ___, Transcript 8:17-19).

“all hypothetical anyway.”¹⁸ (R. pp. __, Transcript 219:2-3). Nonetheless, because this regulation was referenced in the permitting decision as a basis for denying Mr. Weatherholtz’ permit application and the ALC also found there *was* potential access via dockage from the opposite side of the creek, Mr. Weatherholtz challenged this determination.

He (Weatherholtz) argues that an exception to S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) applies to his property, which allows a dock to be constructed on a creek less than twenty feet if there is no potential dock access from the opposite side of the creek. However, the ALC rightly noted that the opposite side of the creek includes the area within the neighboring property owner’s extended property lines, per the “waterfront property” definition found in S.C. Code Ann. Regs. 30-1(D)(53). (Final Order and Decision, p. 8). Thus, the ALC correctly affirmed the denial of Weatherholtz’ permit application in accordance with S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii).

Mr. Weatherholtz claims that the ALC’s interpretation of the regulation is inconsistent with the plain language of the regulation. Specifically, he asserts that the reference to “opposite” in S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) implies a dock only directly “opposite” Petitioner’s lot. However, Mr. Weatherholtz’ argument fails to recognize that “the regulation must be construed as a whole rather than read in its component parts in isolation.” Spruill v. Richland Cnty. Sch. Dist. 2, 363 S.C. 61, 64, 609 S.E.2d 524, 526 (2005). Additionally, courts “generally give deference to an agency’s interpretation of its own regulation.” S.C. Dep’t of Revenue v. Blue Moon of

¹⁸ Again, at page 216, lines 23-24 of the Trial Transcript, Mr. Thompson testified that “there’s no potential [access via dockage from the opposite side of the creek], because the creek doesn’t qualify for a dock [because it is less than ten feet wide].” (R., p.__).

Newberry, Inc., 397 S.C. 256, 260-61, 725 S.E.2d 480, 483 (2012). Here, using the regulatory definition of waterfront property¹⁹, Mr. Thompson testified that the opposite side of the creek would properly include the area within the neighboring property owner's extended property lines as shown in Respondent's Exhibit 5. (R., p. __). As such, Weatherholtz' lot has a neighboring lot on the opposite side of the creek with actual dock access as well as potential dock access within his extended property lines, which would include the possibility or potentiality of a dock directly across the creek from the location of Mr. Weatherholtz' proposed dock. (Trans. 199:20-21). Due to this potential access via dockage from the opposite side of the creek, the ALC correctly determined that Mr. Weatherholtz' permit application does not fall within the "special geographic circumstances" exception established by S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii). Thus, Mr. Weatherholtz' claim that the ALC's interpretation is inconsistent with the plain language of the regulation is incorrect.

A. **DHEC's position on "potential access via dockage from the opposite side of the creek" has been consistent throughout the permitting process, before the DHEC Board and before the ALC.**

Mr. Weatherholtz also asserts that DHEC's interpretation and application of S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) has "evolved over the course of the case." (Appellant's Brief, p. 39). In particular, Weatherholtz claims that

"because the contested case hearing was the first time Thompson or DHEC's lawyer mentioned their argument that the possibility of replacing an existing dock constituted 'potential access,' (Hr'g Tr. p. 90:1-11),

¹⁹ S.C. Code Ann. Reg. 30-1 (D)(53) "Waterfront property - For purposes of these regulations, waterfront property will generally be defined as upland sites where a straight-line extension of both, generally shore perpendicular, upland property lines reaches a navigable watercourse within 1000' of the marsh critical line. Waterfront property may also be identified via an approved dock master plan where designated corridors differing from upland property line extensions are delineated."

DHEC's Board never considered that argument. The interpretation may not even have existed until the contested case hearing. An interpretation that amounts to a moving target does not deserve deference.” (Appellant’s Brief, p. 39).

These statements are not true. Mr. Weatherholtz’ counsel is well aware of the fact that the DHEC Board did not consider *any* arguments from *either* party, because on September 16, 2013 the Board notified Mr. Weatherholtz and the Department that they (the Board) declined to conduct a final review conference in this matter. (R. pp. __).

Demonstrating the Department’s consistent regulatory interpretation in this case, on August 7, 2013 Mr. Thompson sent Mr. Weatherholtz a permit denial letter that provided as a basis for denial that “*potential access via dockage from the opposite side of the creek exist[s]*” referring to the Department’s application of S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) to this permitting decision. (Emphasis added). (R. pp. __, Respondent’s Exhibit 1). The Department’s staff summary also referenced this regulation as one of the reasons for denying the permit application.

At trial, Mr. Thompson testified that potential access via dockage from the opposite side of the creek “means that a dock *could* be built. It doesn't mean that there *is* one or there *will be* one. It means there could be one ...”²⁰ (Emphasis added) (R. pp. ____, Transcript 217:2-8). Mr. Thompson further testified that this Reg. 30-12(A)(2)(c)(ii) determination is consistent with the Department’s historical interpretation of this regulation. (R. pp. __, Transcript 200:3-6).

²⁰ At another point during his trial testimony, Mr. Thompson again testified regarding “potential access via dockage from the opposite side of the creek” that such potential access “can be anything on the other side that there's potential for a dock to be built from the opposite side of the creek, not that a dock *will* be built directly across from another dock but that a dock *can* be built from the opposite side of the creek.” (Emphasis added). (R. pp. __, Transcript 198:2-8).

One of the scenarios that the Department considered as a basis for the permit denial under S.C. Reg. Ann. § 30-12(A)(2)(c)(ii) became clear to Mr. Weatherholtz for the first time during the middle of the trial.²¹ This unfortunate circumstance is not due to the Department's "evolving" interpretation and application of S.C. Code Ann. Reg. 30-12(A)(2)(c)(ii) as he claims. Rather (at the risk of being impertinent) it is most probably due to the fact that Mr. Weatherholtz failed to fully prepare for trial. As previously mentioned, he was a *pro se* litigant before the ALC, yet he engaged in no discovery whatsoever. (R., p. __, Transcript 6:6). He submitted no Interrogatories or Request to Produce Documents to the Department. *Significantly, he chose not to depose Mr. Thompson* or anybody else to find out everything possible regarding the Department's

²¹ At trial Mr. Weatherholtz and Mr. Thompson engaged in the following colloquy:

MR. WEATHERHOLTZ: Prior to today, can you point to a time where it was ever explained to me, the permit applicant, that DHEC was denying based on (c)(2), Reg Section (c)(2) because of the possibility that that dock might be moved to another location that is within the extended lot lines?

MR. THOMPSON: I believe we sent you copies of the regulations.

MR. WEATHERHOLTZ: Right.

MR. THOMPSON: You know, I don't interpret regulations for attorneys. They usually try to interpret them for me.

MR. WEATHERHOLTZ: But that explanation was never given until today. I mean, did you ever give that explanation to me or anyone else?

MR. THOMPSON: I think the regulation is very clear when you read it.

MR. WEATHERHOLTZ: I read the regulation, but **I just never understood that DHEC's position** was there is potential for an existing dock to be torn out and replaced with a much longer dock that would be within the extended lot lines." (Emphasis added). (R. pp. __, Transcript 215: 24-25 to 216:1-21).

permitting decision. Weatherholtz is no novice in legal matters. He is a licensed attorney and an experienced litigator in complex litigation. (R., p. ___, Transcript 6:3). He is a Partner at Womble, Carlyle, Sandridge and Rice, LLP. He graduated from the University of Virginia Law School in 1999. If he thought the Department was introducing objectionable testimony regarding the basis for Mr. Thompson's permitting decision, he should have objected at trial. Instead, he made no objection and Mr. Thompson's testimony was admitted into evidence.

B. DHEC's staff decisions are also subject to deference, not just DHEC Board decisions.

On page 39 of Appellant's Brief, Weatherholtz asserts that

“when Thompson testified that the existing upstream dock disqualified Weatherholtz, even though that dock was outside his lot's extended property lines, Thompson was testifying in response to a question about OCRM's interpretation, not whether that was the *DHEC Board's* interpretation. (Hr'g Tr. pp. 199:20-200:6). That detail is critical—only DHEC's Board can be given deference. S.C. Coastal Conservation League, 363 S.C. at 75, 610 S.E.2d at 486. Thus, to the extent the ALC deferred to that testimony, it erred.”

Regarding the issue of deference to staff decisions, S.C. Coastal Conservation League was overruled by Murphy v. South Carolina Dept. of Health and Environmental Control, 396 S.C. 633, 723 S.E.2d 191 (2012). In Murphy, the Supreme Court said

"we give deference to the interpretation of a regulation by the agency charged with it [sic] enforcement. (citation omitted). During her testimony, Jennifer Haynes, who had been the DHEC project manager for the Chapin High School WQC, clarified that DHEC interpreted the 'vicinity of the project' on a case by case basis according to its best professional judgment as each project is different. Thus, Haynes testified that when applying Regulation 61–101, she 'considered the vicinity [to include] more than just the 727 feet of stream' and noted that although she did not have an exact area, it included many miles. Because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." Id. at 640-641.

Accordingly, whether this Court agrees with Mr. Weatherholtz or not regarding *who* Mr. Thompson was testifying on behalf of (OCRM or the DHEC Board), that distinction is no longer relevant since the Supreme Court issued the Murphy opinion. Accordingly, the ALC properly deferred to Mr. Thompson's interpretation of the regulations.

Conclusion

Based on the foregoing arguments and the well-reasoned decisions of Judge Mathews, DHEC respectfully requests that the Court of Appeals affirm the Amended Final Order and Decision issued by Judge Mathews.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

A handwritten signature in black ink that reads "Brad Churdar". The signature is written in a cursive style with a horizontal line underneath it.

Bradley D. Churdar, Chief Counsel
**SOUTH CAROLINA DEPARTMENT OF
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March 19, 2015
Charleston, South Carolina

*Attorney for Respondent
South Carolina Department of Health
and Environmental Control*

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Carolyn C. Matthews, Administrative Law Judge
Trial Court Case No. 2013-ALJ-07-0494-CC

RECEIVED
MAR 23 2015
SC Court of Appeals

Case No. 2014-001939

James Weatherholtz, Appellants,

v.

South Carolina Department of Health and
Environmental Control, Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on this date she has served the *Respondent SCDHEC's Initial Brief and Designation of Matter to be Included in the Record on Appeal* in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Andrew R. de Holl, Esquire
Womble Carlyle Sandridge & Rice, LLP
Post Office Box 999
Charleston, South Carolina 29402



M. Denise Crawford

March 19, 2015
Charleston, South Carolina



W. Marshall Taylor Jr., Acting Director

Promoting and protecting the health of the public and the environment

March 19, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
MAR 23 2015
SC Court of Appeals

Re: James Weatherholtz v. SCDHEC
Appellate Case No. 2014-001939

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy of the Respondent SCDHEC's Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above referenced case. I would appreciate your returning a clocked copy in the enclosed envelope.

By copy of this letter, I am serving all parties of the same.

Very truly yours,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc: Andrew R. de Holl, Esquire

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MAR 23 2015

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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