THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Case No. 13-ALJ-07-0494-CC

Appellate Case No. 2014-001939

James Weatherholtz, Appellant,

v.

South Carolina Department of Health and Environmental Control, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises out of DHEC's Office of Ocean and Coastal Resource Management (OCRM) denying James Weatherholtz a permit to build a dock at his home. At issue are the interpretations of two dock regulations that DHEC—and later, the ALC—employed to deny Weatherholtz the permit.

The DHEC Regulations

DHEC and the ALC denied Weatherholtz a dock permit based on two dock-permitting regulations. First, OCRM will not issue permits for docks to be built on creeks less than ten feet wide, "as measured from marsh vegetation on each side" of the creek. 2 S.C. Code Ann. Regs. 30-12(A)(2)(c)(i) (2013) (the "Ten-Foot Rule"). Second, if a creek is less than twenty feet wide, OCRM will not issue a dock permit unless the applicant's lot has over 500 feet of water frontage or there is no potential for a dock to be built on the opposite side of the creek. 2 S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) (2013) (the "Opposite-Side Rule"). The decisions, evidence, and arguments in this appeal all relate to those two regulations and to the way they were applied to Weatherholtz's permit application.

Weatherholtz's Land, and Kushiwah Creek

James Weatherholtz lives in a home and on land along a tributary of Kushiwah Creek[1] on James Island in Charleston. (R. pp. 18; 99:10-19; 101:5-7). His lot has approximately 112 feet of water frontage. (See R. p. 329; *see also* R. p. 102:12-19).

Like all natural creeks, the creek is not uniform in width. (R. pp. 295:8-9; 337; 342). DHEC acknowledges that some parts of the creek are more than ten feet wide, and

[1] In the record on appeal, people refer to the tributary as "the creek." For the sake of clarity and consistency, Weatherholtz is continuing to call it "the creek" in his briefs.

Weatherholtz acknowledges that others are not. (R. pp. 294:23-296:24; 337; 342).

There are no docks on the other side of the creek within or near the extended property lines that run from the edge of Weatherholtz's lot to the creek.[2] (*See* R. pp. 209:16-210:15; 329; 357). Across the creek, a pie-shaped lot has extended property lines that encompass nearly half the creek, including all of the section on which Weatherholtz could conceivably build a dock. (R. pp. 105:21-106:2; *compare* R. p. 329 *with* R. p. 527). That lot already has a dock on the creek, approximately 300-350 feet upstream of the nearest extended property line of Weatherholtz's lot.[3] (R. p. 342). DHEC's regulations allow only one dock per lot. 2 S.C. Code Ann. Regs. 30-12(A)(1)(a) (2013).

The Dock Permit Application

Weatherholtz wants to build a crabbing and fishing dock from his back yard to the creek. (R. p. 101:18-22). He hired Island Surveying, Inc. to perform a survey of his land and the creek, to prepare drawings based on that survey, and to help him prepare a dock permit application. (R. pp. 101:23-102:3; 120:14-19; 178:20-23).

Tom Bessent owns and operates Island Surveying. (R. p. 118:6-7). Bessent has been a registered professional land surveyor since 1986 has performed surveys since 1979. (R. p. 117:8-12). He has a degree in marine biology and has worked for the Department of Natural Resources. (R. p. 117:18-25). He is a former director of the South Carolina Society of Professional Land Surveyors, as well as a past president of the Society's coastal division. (R.

[2] Extended property lines are "straight-line extension[s]" of a lot's two "generally shore perpendicular, upland property lines." 2 S.C. Code Ann. Regs. 30-1(D)(53) (2013). The extended property lines for Weatherholtz's lot are depicted in a survey admitted at the contested case hearing as Petitioner's Exhibit 1. (R. p. 329).

[3] An aerial photograph admitted at the contested case hearing as Respondent's Exhibit 5 shows the lot, its extended property lines, and its existing dock. (R. p. 527). The existing dock is the short one roughly in the middle of that lot's extended property lines. Most of Weatherholtz's lot is visible on the photograph as well. It is marked "135" and appears at the bottom of the photograph, just above and between the words "Search by Address" and "Search by Name."

pp. 118:23-119:5). He has testified in court as an expert in marsh tidal boundaries. (R. p. 119:13-24). Bessent has experience measuring creek width from vegetation on one side of the creek to vegetation on the other side. (R. p. 127:14-17). His company performs a variety of surveying services, including surveys for critical-area dock permit applications. (R. pp. 118:6-19; 173:17-20).

Bessent's survey team measured the width of the creek using an instrument called an electronic total station, which surveyors commonly use for dock permitting surveys and other types of work. (R. pp. 121:15-122:3). Accurate to one eighth of an inch, it measures distances by shooting a laser beam to a glass prism and back, and then electronically recording data generated from that beam. (R. pp. 121:20-24; 136:3-11; 157:19-158:15).

Using a hypothetical diagram of the creek as a guide, Bessent told his team to measure the creek by placing the prism at the main edge of the marsh grass on each side of the creek, rather than at isolated sprigs that might be sticking out of the water. (R. pp. 123:13-124:7; 159:14-21; 172:15-173:14; 336). To conduct the survey, one surveyor set up the total station in Weatherholtz's back yard. (R. p. 112:5-6). Another paddled a kayak into the creek and held the prism, which was mounted on a rod, at the edge of the marsh grass on each side of the creek. (R. pp. 112:13-17; 134:24-41:4; *see* R. pp. 334-35). The team measured the creek's width at six locations along the creek, including the proposed location for the dock and pierhead. (R. pp. 124:11-18; 334-35).

Using the data points from the survey, Island Surveying prepared survey drawings showing the proposed location of the dock and the creek's width at that location—ten feet. (R. pp. 124:19-126:19; 329-33). The survey measurements actually showed widths of 10.1 or 10.2 feet in multiple locations, so, rounding down, Bessent indicated on the drawings the

width was ten feet. (R. pp. 150:3-9; 174:10-175:7; *see also* R. p. 126:12-19). Bessent certified the drawings' accuracy with his professional stamp. (*See* R. pp. 329-31). With Bessent's help, Weatherholtz submitted the drawings to OCRM as part of his dock permit application. (R. pp. 178:20-23; 473).

Initial OCRM Inspection, and Weatherholtz's Measurements

OCRM employee Jeff Thompson evaluated Weatherholtz's application. (R. pp. 242:23-243:1). Thompson has worked for OCRM for twenty-seven years. (R. p. 241:12-15). He has evaluated critical-area permit applications for twelve years. (R. p. 242:15-18).

When Thompson saw the ten-foot measurement on Bessent's drawings, he considered it to be a "red flag." (R. pp. 260:2-261:11). Using Charleston County's online aerial photography system, he measured the creek's width using a digital measurement tool that is "fairly accurate" but is "not a survey-quality measurement." (R. pp. 261:11-20; 262:22-23). He measured the creek to be "about 8 feet." (R. p. 338; *see also* R. p. 262:20-22). Recognizing that his measurement may not be accurate, Thompson and another OCRM employee then drove a boat up the creek to measure and photograph it. (R. pp. 262:24-263:13; 264:25-265:1). Using a survey rod, they measured several spots within Weatherholtz's lot's extended property lines. (R. pp. 267:7-268:12). They measured the creek in those spots to be less than nine feet wide. (R. p. 269:4-5).

Meanwhile, Thompson told Weatherholtz he thought the creek was not ten feet wide, and that "didn't seem right to" Weatherholtz. (R. p. 180:9-11). It was not consistent with Bessent's measurements or with Weatherholtz's experience; he had been able to turn his eleven-foot paddleboard around in the creek. (R. p. 180:11-24). Weatherholtz decided to take his own measurements. (R. pp. 180:3-9; 337; 361-70; 374-77). He first paddled a canoe

into the creek and, using a metal tape measure, measured the creek width from marsh grass on each side at the proposed dock location. (R. pp. 189:25-190:12; 218:15-22; 361-63). Weatherholtz found the creek was over ten feet wide and photographed his measurements. (R. pp. 189:22-190:3; 361-63). Weatherholtz emailed Thompson to say he had measured the creek to be over ten feet wide and had pictures. (R. p. 337). Weatherholtz offered, however, to adjust the size and location of the dock in order to address any concerns Thompson might have had. (R. p. 337).

Weatherholtz later measured the creek's width again. This time, he mounted a piece of PVC pipe measuring ten feet, five-sixteenths of an inch long to his canoe. (R. pp. 190:15-191:5; 192:15-17; 364-65; Pet'r's Ex. 17). With his father's help, Weatherholtz measured the creek at the proposed dock location by taking the canoe into the center of the creek and photographing the pipe and the surrounding marsh grass on either side of it.[4] (R. pp. 191:7-193:14; 329; 366-70). The photographs show that the creek is more than ten feet wide. (R. pp. 192:25-194:7; 366-70).

Thompson's Denial of the Application

On August 7, 2013, Thompson issued a staff decision on behalf of OCRM denying Weatherholtz's application. (R. pp. 339-40). Thompson wrote that based on the measurements he took, he determined the creek was 7.5 feet wide and thus was too narrow for a permit under the Ten-Foot Rule. (R. p. 339). Thompson also wrote, without explanation, that the proposed dock site did not have either of the special geographic circumstances required under the Opposite-Side Rule. (R. p. 339).

Weatherholtz asked DHEC's Board to review Thompson's decision. (R. pp. 341-42).

[4] Bessent testified this method is a valid way to measure creek width. (*See* R. p. 154:23-25).

In his request, Weatherholtz pointed out that Bessent's survey showed the creek was ten feet wide at the proposed location for the dock. (R. p. 342). Weatherholtz added that he also measured the creek in several places and found places within his lot's extended property lines where the creek was ten feet wide. (R. p. 342). Finally, Weatherholtz reiterated his offer to adjust the size and location of the dock. (R. p. 342).

Weatherholtz also challenged Thompson's finding that no special circumstances existed. (R. p. 342). He stated there was no potential dock access on the opposite side of the creek because the two lots across the creek from him already had docks; one dock was at least 300 feet upstream from the proposed dock site, and the other one was connected to a different creek altogether. (R. p. 342).

Thompson submitted a response. (R. pp. 347-49). In the response, Thompson continued to assert that based on his measurements, the creek was less than ten feet wide. (R. pp. 347-48). As to the Opposite-Side Rule, Thompson argued that the existing dock 300 feet upstream from Weatherholtz's lot constituted "potential access" under the Rule. (R. p. 348).

The Board took no action on Weatherholtz's request, which made Thompson's staff decision DHEC's final decision. *See* S.C. Code Ann. § 44-1-60(F) (Cum. Supp. 2013).

Proceedings in the Administrative Law Court

On October 14, 2013, Weatherholtz filed a contested case request in the ALC. (R. p. 346).

While the case was pending, Weatherholtz invited DHEC's lawyer and Thompson to inspect the creek with him so that they could explore the discrepancies between Thompson's measurements and Weatherholtz's and Bessent's measurements. (R. pp. 200:18-201:4). The

three of them met and went to the creek by boat. (R. p. 201:4-12). Thompson measured the creek's width in one or two spots that he selected. (R. pp. 201:10-18; 285:13-286:6). He measured the creek at those spots to be less than ten feet wide. (R. pp. 201:22-23; 286:5-7). Weatherholtz asked Thompson to measure at the proposed location for the dock, but Thompson refused. (R. pp. 201:23-202:4; 286:8-11).

Weatherholtz and DHEC submitted pre-hearing statements, and then on March 5, 2014, the ALC held a hearing. (R. pp. 28-35, 95). The ALC admitted exhibits from both parties into the record. (R. pp. 96-97). Weatherholtz testified on his own behalf. (R. pp. 178-240). Bessent testified for Weatherholtz as an expert and fact witness, discussing his experience measuring creek width and the survey his company performed for Weatherholtz. (R. pp. 117-77). Thompson testified as an expert and fact witness for DHEC, discussing his measurements of the creek and his interpretations of the Ten-Foot Rule and the Opposite-Side Rule. (R. pp. 241-326). At the end of the hearing, the ALC asked the parties to submit proposed orders in lieu of making closing arguments. (*See* R. p. 327:5-22).

After the hearing, Weatherholtz made a motion to admit several photographs the ALC had excluded from evidence at the hearing. (R. pp. 61-76). DHEC opposed the motion, and the ALC denied it. (R. pp. 7, 77-78).

DHEC and Weatherholtz then submitted proposed orders to the ALC. (R. pp. 36-60). The ALC adopted DHEC's proposed order and issued it as a final order and decision on June 17, 2014. (R. pp. 8-16). As to the Ten-Foot Rule, the ALC deferred to what it believed was DHEC's interpretation of the Rule, held Bessent lacked expertise to determine creek width, and found the creek was less than ten feet wide. (R. pp. 13-14). As to the Opposite-Side Rule, the ALC held Weatherholtz could not build a dock because there was an existing dock

upstream and because that dock could theoretically be replaced with another dock somewhere else. (R. p. 15).

Weatherholtz filed a motion for reconsideration, challenging a number of the ALC's factual findings and most of its legal analysis. (R. pp. 79-85). DHEC filed a response. (R. pp. 86-94). On August 12, 2014, the ALC issued an amended final order that corrected some of its factual findings but kept the previous order's legal analysis with few changes. (R. pp. 17-25).

Weatherholtz served his notice of appeal of the ALC's decision on September 11, 2014.

STANDARD OF REVIEW

Subsection 1-23-610(B) of the South Carolina Code (Cum. Supp. 2013) governs how this Court reviews the ALC's decision and what it may do to that decision:

> 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 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.

See also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014) (applying subsection 1-23-610 in review of ALC's decision).

ARGUMENTS

The regulations involved in this appeal "are intended to . . .[e]nsure consistent permit evaluations by" DHEC. 2 S.C. Code Ann. Regs. 30-1(A)(2)(b) (2013). Thompson's applications of those regulations, which the ALC adopted, thwart that intent. Instead of deferring to those unreasonable applications, this Court should instead look to the language and purposes of the regulations. Because Weatherholtz's proposed dock complies with that language and those purposes, this Court should reverse the ALC's decision and order DHEC to grant Weatherholtz's permit application.

I. THE ADMINISTRATIVE LAW COURT'S HOLDING THAT THE CREEK IS NOT TEN FEET WIDE WAS THE PRODUCT OF ERRORS OF LAW AND UNSUPPORTED FACTUAL FINDINGS.

The ALC denied Weatherholtz's application because it held the section of the creek within the extended property lines of Weatherholtz's lot was less than ten feet wide. (R. pp. 22-23). It based that ruling solely on Thompson's measurements and his testimony about DHEC's approach to applying the Ten-Foot Rule. (R. p. 23). The ALC rejected Bessent's testimony, measurements, and drawings, and it disregarded Weatherholtz's testimony and exhibits showing the measurements he took. (R. pp. 22-23). The ALC's ruling was the product of several errors.

A. The ALC Misstated Principles of Agency Deference.

A threshold issue is that the ALC apparently misunderstood the role of agency deference in its decision.

The ALC first stated it was "required to give deference to [DHEC]'s specialized knowledge in environmental matters because '[t]he agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.'

S.C. Code Ann. § 1-23-330(2013); S.C. Code Ann § 44-1-60(F)(2)." (R. p. 21). The statutes the ALC cited do not require such deference. Section 44-1-60 of the South Carolina Code (Cum. Supp. 2013) lays out procedures for DHEC permitting decisions and for challenging those decisions before the ALC. Subsection (F)(2) provides that when the ALC hears a contested case involving a permitting decision, the ALC must "give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge." Those provisions state as follows:

> Notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence and specialized knowledge *may be* utilized in the evaluation of the evidence.

S.C. Code Ann. § 1-23-330(4) (2005) (emphasis added). These statutes do not require the ALC to defer to DHEC. Rather, ALC "may"—if it wishes—take DHEC's experience, competence, or knowledge into account. The ALC interpreted the statutes incorrectly.

The ALC also stated that "[a]n agency's construction of . . . a regulation which it is charged with administering is generally entitled to deference by the courts and should be overturned only if 'plainly erroneous or inconsistent with the regulation.'" (R. p. 21).[5] This statement suggests that deferring to the agency is courts' default position. Instead,

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[5] The ALC's amended final order appears to quote both *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 723 (1973), and *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 117 (4th Cir. 2009). However, it really was quoting only the latter case; *Seatrain Lines* does not contain the language the ALC quotes. Further, in the portion of *Seatrain Lines* that the ALC cited, the Supreme Court rejected a federal agency's interpretation of a statute, stating:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a reasonable basis in law. . . . But the courts are the final authorities on issues of statutory construction, and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.

411 U.S. at 745-46 (citations and quotation marks omitted).

interpreting a regulation "is a two-step process." *Kiawah Dev. Partners, II*, 411 S.C. at 32, 766 S.E.2d at 717. "First, a court must determine whether the language of a . . . regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the . . . regulation." *Id.* But if the regulation is silent or ambiguous on an issue, the court defers to the agency's interpretation if it is "worthy of deference"—that is, if there are no "compelling reasons" not to defer to it. 411 S.C. at 33, 766 S.E.2d at 717.

One compelling reason to reject an agency's interpretation is that it conflicts with the regulation's text. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002) ("While the Court typically defers to the Board's construction of its own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation."). Others are that the agency's interpretation is based on an error of law, conflicts with the General Assembly's intent, is subjective or arbitrary, or amounts to an unpromulgated rule. *See Savannah Riverkeeper v. S.C. Dep't of Health & Envtl. Control*, 400 S.C. 196, 206, 733 S.E.2d 903, 908 (2012) (Toal, C.J.) (stating "[a]n 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," and giving DHEC's permitting decision no deference because it was based on DHEC exercising power it did not have); *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 314, 322, 709 S.E.2d 626, 630 (2011) (refusing to defer to DHEC's application of its regulations because the application was "affected by an arbitrary factor that strayed substantially from legislative intent"); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 74-75, 610 S.E.2d 482, 486 (2005) (holding that regulation's subjectivity made regulation void for vagueness and that an unpromulgated

interpretation of the regulation could not save it from being held void); *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490-91, 413 S.E.2d 13, 14 (1991) (invalidating a statutory interpretation OCRM's predecessor used to evaluate permit applications because it was not promulgated as a regulation).

In short, the agency deference doctrine does not make deference the rule, and independent judicial analysis the limited exception. Rather, it allows a court faced with an ambiguous regulation to resolve the ambiguity with an agency's interpretation, provided that the court satisfies itself that the interpretation is appropriate in light of the legal context of the regulation.

The ALC made its misstatements about deference in the course of explaining its jurisdiction. (R p. 21). Then, without finding the Ten-Foot Rule ambiguous, the ALC deferred to Thompson's testimony. (*See* R. pp. 20, 22-24). This indicates the ALC believed it had no room to disagree with Thompson. As Weatherholtz will explain, however, DHEC's interpretations do not deserve deference.

B. The Approach to Measuring Creek Width to Which the ALC Deferred Is Invalid, Is Improperly Arbitrary, Does Not Serve the Purposes of the Ten-Foot Rule, and Disregards ALC Precedent.

Thompson did not measure the creek's width at the proposed location of the dock. (R. pp. 201:23-202:4; 292:8-11). Rather, he measured other places of his choosing that were within the extended property lines of Weatherholtz's lot. (*See* R. pp. 201:10-18; 279:24-25; 285:13-286:6).

Thompson's failure to measure the creek at the proposed dock location was not inadvertent. Rather, when Weatherholtz and Thompson toured the creek together, Weatherholtz pointed out that location to Thompson, but Thompson refused to measure

there. (R. pp. 201:10-18; 285:13-286:13). Thompson testified that, in applying the Ten-Foot Rule, DHEC disregards locations within an applicant's lot's extended property lines that are "not representative" of the creek. Because Thompson felt that Weatherholtz's proposed dock location was not "representative of the width of the creek," he would not measure its width. (R. pp. 269:6-270:1; 286:10-13).

Finding that DHEC had historically employed this "representative" approach to determining creek width, the ALC deferred to it. (R pp. 20, 23). The ALC should not have deferred to an approach that amounts to an unwritten rule, that calls for arbitrary evaluations, that does not relate to the purposes of the Rule, and that contradicts a court's previous instruction on how to measure creek width.

OCRM has the duty to approve or deny applications for critical-area project permits. *S.C. Coastal Conservation League*, 363 S.C. at, 74, 610 S.E.2d at 485. It must fulfill that duty by evaluating permit applications under objective standards that DHEC has promulgated through written regulations. *See id.* at 74-75, 610 S.E.2d at 485. Recognizing that requirement, DHEC issued its dock regulations with the goal of "[e]nsur[ing] consistent permit evaluations by" OCRM. 2 S.C. Code Ann. Regs. 30-1(A)(2)(b). For several reasons, however, the "representative of the creek" approach Thompson uses does not comply with OCRM's statutory duty or with DHEC's goal of consistency in permit evaluations.

1. DHEC's "Representative" Approach Is an Invalid, Unwritten Rule.

OCRM does not have the authority to make permitting decisions based on tests that have not been formally promulgated as regulations. *See S.C. Coastal Conservation League*, 363 S.C. at 74, 610 S.E.2d at 486 (invalidating test OCRM's appellate panel used for

applying provision of Regulation 30-12 because the test had not been not promulgated by regulation); *Captain's Quarters Motor Inn, Inc.*, 306 S.C. at 490-91, 413 S.E.2d at 14 (invalidating a test used by OCRM's predecessor in evaluating permit applications because it was not promulgated by regulation); *see also* S.C. Code Ann. § 1-23-10(4) (2005) ("Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law."). In other words, OCRM exceeds its authority when it makes permitting decisions based on unwritten rules. *See Captain's Quarters Motor Inn, Inc.*, 306 S.C. at 490-91, 413 S.E.2d at 14.

Captain's Quarters Motor Inn involved a statute prohibiting damaged seawalls from being rebuilt at their original location unless OCRM's predecessor, the South Carolina Coastal Council,[6] determined they were less than 50% damaged. 306 S.C. at 489, 413 S.E.2d at 13. In making those determinations, the Coastal Council considered only damage to the above-grade portions of a wall that were parallel to the shore; it ignored damage to "wing-walls" and to the wall's foundation. *Id.* The Supreme Court held that even though the Coastal Council's test was a reasonable interpretation of the statute, it had to be disregarded because the Council had not promulgated it as a regulation. 306 S.C. at 490, 413 S.E.2d at 14. In reaching that conclusion, the Court pointed out that the Council's authority was defined by statute and that the statutes creating the Council "mandated Coastal Council promulgate regulations to govern the evaluation of permit applications." 306 S.C. at 490, 491, 413 S.E.2d at 14.

Later, in *Coastal Conservation League*, the Supreme Court held that part of Regulation 30-12, which governed "small" islands, was void for vagueness because the

[6] *See* 2 S.C. Code Ann. Regs. 30-1(A)(1) (2013) (explaining that the Coastal Council became OCRM).

regulation contained no test for determining whether an island is "small." 363 S.C. at 75, 610 S.E. 2d at 486. In the proceedings below, the ALC developed a test, and OCRM adopted it. 363 S.C. at 71, 75 & n.13, 610 S.E. 2d at 484, 486 & n.13. Without commenting on the merit of the test, the Supreme Court rejected the test because it had not been promulgated. 363 S.C. at 75, 610 S.E. 2d at 486.

Like the tests rejected in *Captain's Quarters Motor Inn* and *Coastal Conservation League*, DHEC's representative approach is an unwritten test. Although the Ten-Foot Rule contemplates that creek width will be "measured from marsh vegetation on each side," it places no explicit restrictions on the types of locations where that measurement can be taken. It does not state that only locations that represent creek width can be measured, it does not provide any guidance on what constitutes a "representative" location, and it does not give OCRM the power to decide what parts of a creek can and cannot be measured. The only authority for the approach is Thompson's testimony that DHEC uses it.

Because DHEC's approach was never promulgated as a regulation in accordance with the Administrative Procedures Act, it is an invalid test. As the cases discussed above explain, OCRM cannot base permitting decisions on invalid tests, and yet Thompson did so. Therefore, the ALC based its decision on a width determination that was, in turn, based on a test OCRM has no authority to use. This was error.

2. The Representative Approach Impermissibly Makes Width Determinations Depend on the OCRM Employee's Subjective Impression of the Creek.

The second problem with DHEC's approach is that it is utterly arbitrary, contravening the General Assembly's intent in passing the Coastal Zone Management Act and in promulgating Regulation 30-12.

As mentioned above, in *Coastal Conservation League*, the Supreme Court held invalid a portion of Regulation 30-12 that, by its own terms, applied only to "small" islands. 363 S.C. at 75, 610 S.E.2d at 486. The Court stated that because "'[s]mall' is a term of subjective relativity, and the regulations provide[d] no benchmark for comparative size," OCRM had no constraints in determining whether an island was "small." 363 S.C. at 74, 610 S.E.2d at 486. The regulation therefore "allow[ed] OCRM to exercise unrestrained discretion," which the Supreme Court noted is inconsistent with OCRM's statutory obligation to apply only fixed, published regulatory standards in evaluating permit applications. 363 S.C. at 74-75, 610 S.E.2d at 486. For that reason, the Court voided the rule. 363 S.C. at 74, 610 S.E.2d at 486; *see also MRI at Belfair, LLC*, 392 S.C. at 322, 709 S.E.2d at 630 (refusing to defer to DHEC's application of its certificate-of-need regulations because the application "affected by an arbitrary factor that strayed substantially from legislative intent").

Tidal creeks vary in width as they meander through salt marshes. Even within one landowner's extended property lines, creeks are not perfectly uniform. DHEC's unwritten approach sets no objective criteria for reconciling this geographic reality with the Ten-Foot Rule. Instead, it allows an OCRM employee to decide what places he or she feels best represent that uneven width and then ignore places that are inconsistent with that feeling. As 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. But whether a particular spot is "representative" of the creek is so slippery a concept that it gives OCRM unlimited discretion in determining where to measure width. The OCRM employee chooses what counts and what does not.

With there being no objective standards to guide the employee's choice or to judge its correctness after the fact, the creek's width is literally in the eye of the beholder. Thus, DHEC's approach permits OCRM to make arbitrary width determinations that permit applicants can neither predict nor refute.

Like the written regulation in *Coastal Conservation League*, DHEC's unwritten approach here flouts the General Assembly's intent for how OCRM is to evaluate permit applications. Moreover, it is contrary to DHEC's own stated intent that OCRM evaluate permit applications consistently. Therefore, DHEC's representative approach does not deserve deference. Rather, to ensure consistency, width should be determined at the proposed dock site.

Because Thompson used an inappropriate approach to measure the creek, and because the ALC based its decision on Thompson's measurements, the ALC erred.

3. DHEC's Approach Does Not Support the Purposes of the Ten-Foot Rule.

Even if DHEC's "representative" approach was valid and was not impermissibly arbitrary, the ALC still should not have followed it because it does not serve the purposes of the Ten-Foot Rule.

Thompson testified the Rule's main purpose is navigational: preserving boat access to creeks. (R. p 251:6-7; *see also* R. p. 250:9-21). He also testified it has an ecological purpose: protecting marine life in those creeks from boats.[7] (R. pp. 249:16-250:3). DHEC's approach does not serve those purposes.

As to navigation, Thompson indicated the concern underlying the Rule is that people

[7] These purposes antagonize one another. One seeks to preserve the ability of boats to travel on small creeks so that people can catch bait, while the other is aimed at protecting that bait from boats. (*Compare* R. p. 250:4-8 *with* R. pp. 249:18-250:2).

in boats may not be able to go around docks that extend into smaller creeks. (R. p. 250:4-21). But if the concern underlying the regulation is that a proposed dock might extend too far into the creek, the only logical place to measure creek width is where the landowner wants to put the dock. Only by measuring at that location can OCRM staff (or, for that matter, an applicant or a surveyor) determine whether the proposed dock would impede navigation by extending too far into the creek.

DHEC's representative approach does not serve the Ten-Foot Rule's navigational purpose. It is simultaneously too lax and too strict. For example, if the places that an OCRM employee believes "represent" the creek are all over ten feet wide, but the landowner plans to put the dock in a "non-representative" spot that is eight feet wide, then the Rule is satisfied even though the dock will create the precise navigation impediment DHEC issued this Rule to prevent. Conversely, if the places deemed "representative" are less than ten feet wide, but the landowner plans to build the dock at a "non-representative" location that is more than ten feet wide, the permit will be denied even though the proposed dock would have met the decided threshold for acceptable width.

As to ecology, Thompson testified the ecological concern underlying the Rule is that small creeks and the things living in them are "very susceptible to ecologic damage from boat traffic." (R. p. 249:18-20). DHEC's approach does not address that concern. The absence of a dock on a relatively narrow creek will not eliminate boat traffic, and likely will not even reduce it. While someone might, in theory, be more inclined to drive a boat in a creek if he had a dock,[8] he may also be less inclined to use a boat because he can instead use the dock

[8] Or perhaps not. He could not keep his boat at the small dock he would have. *See* 2 S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) (providing that on creeks less than twenty feet wide, "total allowable dock square footage will be restricted to 50 square feet. Boat lifts, davits, and boat storage docks will not be permitted on any dock allowed in creeks less than 20 feet wide."); 2 S.C. Code Ann. Regs. 30-12(A)(2)(c)(ix) (2013) ("Boats moored at docks

for fishing, swimming, and other recreational activities. Moreover, harkening back to the navigation concern, a creek without obstructions is more conducive to boat traffic than one with them. In that sense, DHEC's approach can subvert the ecological concern in situations where, as here, OCRM staff chooses to measure the more narrow locations instead of a location that, if considered, would satisfy the ten-foot requirement.

That DHEC's approach fails to advance the purposes of the Rule further demonstrates why the approach does not deserve deference.

4. An Administrative Law Judge Has Previously Told OCRM that under Regulation 30-12, Creek Width Must Be Determined at the Proposed Dock Location.

In *Schulz v. S.C. Department of Health & Environmental Control*, two landowners applied for a permit to build a 160 square-foot dock on Shem Creek in Mount Pleasant. No. 01-ALJ-07-0212-CC, 2001 WL 1502472, at *1 (S.C. Admin. L. Ct. Nov. 1, 2001). Regulation 30-12 allowed construction of docks up to 160 square feet on creeks between 51 and 150 feet wide, "as measured from marsh vegetation on each side." *Id.* at *6 (citing 23A S.C. Code Ann. Regs. 30-12(A)(2)(q)(iii) (Supp. 2000)). The maximum dock size for creeks between 20 feet and 50 feet wide was 120 square feet. *Id.* (citing 23A S.C. Code Ann. Regs. 30-12(A)(2)(q)(ii) (Supp. 2000)). The Schulzes' application included a measurement that the creek was 59 feet wide where they wanted a dock. *See id. at* *3.

The OCRM project manager who reviewed the application disregarded the Schulzes' measurement and did not take her own measurement of the creek's width at the proposed dock location. *Id.* at *3, *6. Instead, she picked out two other locations, measured their width, and used those measurements to determine the creek's average width. *Id.* Concluding

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cannot restrict the reasonable navigation or public use of state lands and waters.").

that the creek's average width in the vicinity of the proposed dock location was less than 51 feet, OCRM granted the Schulzes a permit to build only a 118 square-foot dock. *See id.* at *2, *3.

After an unsuccessful request for OCRM to reconsider, the Schulzes filed a contested case hearing with the ALC. The sole issue was the width of the creek. *See id.* at *1. OCRM argued that when a creek is narrower in locations other than the proposed dock site, the width at that site is not the controlling factor. Rather, in those situations, width was to be determined using the average of several locations along the creek. *Id.* at *6. The ALC rejected that interpretation. *Id.* at *6-*7. Finding the regulation "clear and unambiguous," the ALC held the regulation made the width of a creek at a proposed dock's location the only relevant width. *Id.* at *7. Because the Schulzes proved Shem Creek was 59 feet wide at the proposed dock site, the ALC ruled for them. *Id.*

Thompson's "representative" method is very similar to the "average" method rejected in *Schulz*.[9] Both methods allow OCRM to ignore the creek's width at the proposed dock location—the most logical measuring point conceivable. Instead, they both focus on the overall area, using whatever measurement points the OCRM employee picks out. Given those similarities, as well as the ALC's decision in *Schulz* that Regulation 30-12 unambiguously requires that creek width be measured only at the proposed dock site, the ALC in this case should have followed *Schulz*. Doing so would have been consistent with the purposes of the Ten-Foot Rule.

Moreover, the existence of *Schulz* shows that Thompson used an approach nearly

[9] The method Thompson used might actually be the "averages" method. Because all the points Thompson claimed he measured were between 7.5 and 8 feet wide, there was no need for Thompson to determine whether the average of those measurements equaled at least 10 feet. Moreover, Thompson testified the approach he used is DHEC's historical interpretation. (*See* R. pp. 267:18-277:6; 269:15-270:5).

identical to one that, more than a decade earlier, the ALC told his office it could not do. As such, DHEC's approach ignores *Schulz*. An approach that reincarnates something flatly rejected under judicial review is not one that deserves deference.

5. The ALC Should Have Rejected DHEC's Approach and Focused on Creek Width at the Proposed Dock Site.

"A court should give agency decisions such respect as the agency and its decisionmaking process justify. . . . [A]n agency earns, or forfeits, deferential judicial review by its performance." Richard H. Seamon, Hon. John D. Geathers, and Hon. Paige J. Gossett, *Administrative Agencies—General Concepts and Principles*, in *South Carolina Administrative Practice and Procedure*, at 20 (Randolph L. Lowell ed., 3d ed. 2013) (citation, brackets, and internal quotation marks omitted). DHEC's approach to the Ten-Foot Rule justifies no deferential treatment. In addition to being beyond OCRM's authority, the approach ignores, the mandate that applications be evaluated consistently, the purposes of the Rule, and *Schulz*.

Instead of deferring to DHEC's approach, the ALC should have approached the issue of creek width by focusing on the evidence of width at the proposed dock location. Such a focus serves the Rule's purposes, fulfills the requirement that permit evaluations be consistent and based on objective standards, and, as the *Schulz* court indicated, flows directly from the clear language of the Rule. By not doing so, the ALC erred.

C. The ALC's Holding Resulted from the Unsupported Factual Finding that "Wetlands Experts" Must Be Used in Measuring Creek Width.

Tom Bessent testified for Weatherholtz at the contested case hearing. The ALC qualified Bessent as an expert in land surveying. (R. p. 120:11-13). Additionally, over an

objection by DHEC that Bessent lacked expertise to testify about marsh vegetation for the purposes of measuring creek width, the ALC ruled he could testify about "where the grass begins to grow." (R. pp. 128:9-129:13). After the hearing, however, the ALC changed its mind *sua sponte*. Finding that "DHEC's historical interpretation [of the Ten-Foot Rule] includes . . . using a wetlands expert to determine where the marsh vegetation begins," the ALC held that Weatherholtz "failed to establish that [Bessent] had the requisite expertise to establish where marsh vegetation begins." (R. p. 14 (footnote omitted)). On that basis, the ALC discounted Bessent's measurements, saying "[s]uch expertise is a crucial component in accurately determining the width of the creek in accordance with the Department's regulations." (R. p. 14). The ALC also summarily disregarded Weatherholtz's measurements. (*See* R. pp. 13-14).

Weatherholtz challenged the ALC's ruling in his motion for reconsideration, arguing the law does not require that creek width measurements be taken by a wetlands expert and, in any event, Bessent was in fact qualified to testify about where marsh vegetation begins. (R. pp. 82-83). In its amended final order, the ALC stood by its ruling and continued to disregard Bessent's and Weatherholtz's measurements. (R. pp. 22-23).

The ALC made several errors.

1. The Record Does Not Support the ALC's Finding that Wetlands Experts Have to Determine Where Marsh Vegetation Begins.

First, the ALC's ruling rests on an unsupported factual premise—that DHEC has historically used a "wetlands expert" to delineate the point where marsh vegetation begins for the purposes of measuring creek width. (R. p. 23). The record does not support that finding. Thompson testified several times that particular things he was saying about the regulations

reflected DHEC's historical interpretation of those regulations. (*See, e.g.*, R. pp. 248:7-14; 267:18-268:6; 293:22-294:6). However, Thompson never testified that DHEC or even OCRM requires the use of a wetlands expert for measuring creek width. And although Thompson is knowledgeable in wetlands ecology, the fact that he measured the creek does not provide the substantial evidence needed to sustain the ALC's finding. On the contrary, Thompson has performed on-site creek measurements six times, at most. (R. p. 276:4-12). That small portfolio of experience does not show a historical requirement of using wetlands experts to establish where marsh vegetation begins. Because there is not substantial evidence to support the ALC's finding, this Court should disregard it.

The ALC's unfounded finding prejudiced Weatherholtz. The ALC's rejection of Bessent's and Weatherholtz's measurements and its ultimate decision on creek width all flowed directly from that finding. Based on that finding, the ALC believed it was "crucial" that a "wetlands expert" be used to measure creek width. (R. p. 23). Because Weatherholtz and, in the ALC's view, Bessent did not have that expertise, the ALC discounted all the evidence Weatherholtz offered on creek width, which established without contradiction that the creek is at least ten feet wide at the proposed dock location and in several other places nearby. Therefore, the ALC's erroneous factual finding warrants reversal. *See Byers v. S.C. Alcoholic Beverage Control Comm'n*, 281 S.C. 566, 568-69, 316 S.E.2d 705, 706-07 (Ct. App. 1984) (affirming circuit court's reversal of commission's denial of permit, where substantial evidence did not support the factual determination on which the denial was based).

2. The ALC Abused Its Discretion in Rejecting Bessent's Measurements.

The ALC's basis for rejecting Bessent's measurements was its belief that Weatherholtz failed to prove Bessent had the required expertise in wetlands. The premise of that decision was that wetlands experts are to be used in creek width determinations. As discussed above, that premise lacks support in the record. One of the upshots of that premise being unfounded is that the ALC's decision about Bessent's measurements ultimately had no factual basis. Accordingly, that decision was an abuse of discretion. *See, e.g., Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012) ("An abuse of discretion occurs when the conclusions of the [trial] court are either controlled by an error of law or are based on unsupported factual conclusions.").

But even assuming the ALC properly found that wetlands expertise is "crucial" to determining creek width, the ALC also abused its discretion in ruling that Weatherholtz failed to prove Bessent had that expertise. The record does not indicate such a failure.

Bessent has been performing surveys for decades. (R. p. 177:10-12). He has a degree in marine biology and has worked for the Department of Natural Resources. (R. p. 117:18-25). He has testified as an expert in marsh tidal boundaries. (R. p. 119:13-24). He has experience measuring creek width from vegetation on one side of the creek to the other. (R. p. 127:14-17). His company performs several surveys per year for critical-area dock permit applications. (R. pp. 118:15-21; 173:17-20).

When it found Bessent qualified at the hearing, the ALC not only recognized the above facts but relied on them for its decision to let Bessent testify about marsh vegetation. The ALC said, "I think that since [Bessent] testified earlier that he has many times assisted

with dock placement and other sorts of things that where the marsh begins and ends would obviously be critical to those, so I'll overrule the objection." (R. p. 129:6-11). Given that statement, as well as the facts that (1) the ALC also found Bessent to be an expert in land surveying; (2) Bessent has performed a number of critical-area dock permit surveys, (3) and that—as the ALC recognized—that type of work entails understanding marsh boundaries, the record amply demonstrates Bessent had the wetlands expertise that the ALC (erroneously) believed he needed in order for it to consider his measurements. Put another way, the ALC's decision that Weatherholtz failed to prove Bessent had the expertise to determine where marsh vegetation begins lacks evidentiary support. *See Carson*, 400 S.C. at 229, 734 S.E.2d at 152.

D. Under a Proper Understanding of the Ten-Foot Rule and of the Evidence, Weatherholtz Proved the Creek Is More than Ten Feet Wide.

As discussed above, the Ten-Foot Rule contemplates that creek width is to be measured only at the location where the dock permit applicant wants to place a dock. Bessent testified, without contradiction, that the creek was at least ten feet wide at the location Weatherholtz proposed for his dock. (R. pp. 150:3-9; 174:10-175:7; *see also* R. p. 126:12-19). Likewise, Bessent's drawings, which he certified as accurate and which Weatherholtz submitted to OCRM in his permit application, show the creek being ten feet wide at that location. (R. pp. 329-331; 468-70). The testimony and drawings were based on measurements Bessent and his team of professional surveyors took, using computerized equipment that surveyors commonly use for dock permitting surveys and other types of work. (R. pp. 121:15-122:17; 134:24-135:4; 136:3-11; 157:19-158:15).

Also as discussed above, the record does not show that a wetlands expert must

determine the creek's width. Weatherholtz testified he measured the width of the proposed dock location twice, and it was over ten feet both times. (R. pp. 188:25-194:7; 218:15-22; 361-63; 366-70; Pet'r's Ex. 17). Weatherholtz submitted photographs showing his measurements. DHEC did not object to those photographs or question their accuracy. (*See* R. pp. 114:23-115:8).

Meanwhile, DHEC submitted no evidence regarding the creek's width at the proposed dock location. (*See* R. pp. 305:4-306:11). Instead, Thompson admitted he refused to measure it. (R. pp. 269:6-270:1; 286:10-13).

In sum, under the correct understanding of the Ten-Foot Rule, the relevant evidence all points one way—where it matters, the creek is at least ten feet wide. This Court should reverse the ALC's decision.

II. THE ADMINISTRATIVE LAW COURT COMMITTED LEGAL ERROR IN HOLDING THAT AN EXISTING DOCK OUTSIDE WEATHERHOLTZ'S LOT'S EXTENDED PROPERTY LINES, AND THE POSSIBILITY THAT ANOTHER DOCK COULD BE BUILT OUTSIDE THOSE LINES, MAKE WEATHERHOLTZ INELIGIBLE FOR A DOCK PERMIT.

The ALC also denied Weatherholtz's application under the Opposite-Side Rule, which provides:

> Docks 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 frontage or no potential access via dockage from the opposite side of the creek. . . .

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

In the proceedings below, Weatherholtz acknowledged that his lot does not have more than 500 feet of water frontage. (R. pp. 43; 102:13-19, 209:2-12). He claimed,

however, that there was no potential dock access from the opposite side of the creek. (R. pp. 103:8-13, 209:2-213:11; 342). He argued there was no such potential because the one lot across the creek that fell within his lot's extended property lines already had a dock, which was approximately 300 feet upstream from his lot's closest extended property line. (R. pp. 211:15-212:3; 342). Because DHEC's regulations allow only one dock per lot, there was no potential that the landowner on the other side of the creek could build a dock across from where Weatherholtz wanted to build a dock. (R. pp. 236:15-21;. 43-49).

DHEC's position on this issue evolved over the course of the case. First, in the denial letter, Thompson wrote, without explanation, that neither of the special geographic circumstances was present. (R. p. 339). Later, in his response to Weatherholtz's request for final review, Thompson wrote that the dock upstream from Weatherholtz's extended property lines provided actual creek access and therefore constituted potential access from the opposite side of the creek. (R. p. 348). DHEC reiterated that position at the contested case hearing. (R. pp. 106:2-13; 293:14-21). Also at the hearing, DHEC argued, for the first time, a second position: that there was potential access because, in theory, that existing upstream dock could be removed and the landowner could be granted a permit to build a new dock somewhere else within his or her extended property lines. (R. pp. 105:9-106:23; 184:1-11; 311:2-21; 326:12-19).

At the hearing, Thompson testified that when OCRM applies the Opposite-Side Rule, it considers whether a dock exists or could be built anywhere within the extended property lines of the lot across the creek from the applicant. (R. pp. 288:24-292:8; 293:14-294:6). In other words, OCRM will deny a dock permit under the Opposite-Side Rule, even if the existing or hypothetical dock on the other side of the creek would not be directly across from

the applicant's proposed dock or even within the applicant's extended property lines. (*See* R. pp. 292:2-7; 293:14-294:6).

The ALC found for DHEC. (R. p. 15). Defining "opposite side of the creek" as the entire section of the creek within the other lot's extended property lines, the ALC held there was potential access in this case because of the existing upstream dock and because a dock could be built within the extended property lines of the lot across the creek. (R. p. 15). Weatherholtz challenged that interpretation in his motion to reconsider. (R. pp. 83-84). The ALC did not change its decision. (R. p. 24).

The ALC's decision was based on a construction of the Opposite-Side Rule that is not faithful to the Rule's text or to its purpose.

A. The Meaning of the Opposite-Side Rule

The Ten-Foot Rule and the Opposite-Side Rule are meant to be considered together. They share a common origin[10] and, according to Thompson, they serve the same purposes. (R. p. 292:8-16). The Ten-Foot Rule reflects the legislature's judgment that putting a dock on even one side of a creek less than ten feet wide can create navigation problems. Read together, that Rule and the Opposite-Side Rule reflect a judgment that having a dock on one side of a creek ten feet wide will not create navigation problems, but having docks across

[10] The rules were first promulgated as part of the same subsection of Regulation 30-12. Originally, DHEC wanted to prohibit all docks on creeks less than twenty feet wide. *See* 25 S.C. Reg. (No. 2) at 28-29 (Feb. 23, 2001). However, the House Agriculture, Natural Resources, and Environmental Affairs Committee found the proposed regulation was too strict and asked DHEC to change the regulation to allow docks on creeks between 10 and 20 feet wide where either of the special circumstances applied. *See* 26 S.C. Reg. (No. 5) at 32, 34 (May 24, 2002). DHEC modified the regulation as requested. *See id.* Several years later, as part of an attempt to make Regulation 30-12 more clear, DHEC split the two rules into two subsections: one for creeks under ten feet wide, and another for creeks between ten and twenty feet wide. *See* 29 S.C. Reg. (No. 6) at 167-72, 175 (June 24, 2005).

from one another can.[11]

Without restrictions, that reality would encourage landowners to build docks. It would pit opposing landowners in a race to be the first to build a dock so that they would not later lose their ability to build, just because their neighbor beat them to it. The Opposite-Side Rule eliminates that scenario, and that incentive, by providing that if the landowners on both sides of the creek could potentially build a dock on a ten-foot wide creek, then neither of them can.

The language of the Rule confirms this. First, the word "potential" involves that which does not yet exist. *See Webster's New World Collegiate Dictionary* 1126 (4th ed. 1999) (defining "potential," when used as an adjective, as describing something "that can, but has not yet, come into being"); *see also Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) (stating an undefined term in a regulation is to be interpreted in accordance with its usual and customary meaning). Thus, "potential access via dockage" means a dock that could be built in the future, not a dock in existence when a dock permit application is filed. By implication, then, the Rule does not prohibit a dock from being built when there is actual access from another dock on the other side of the creek, especially when that dock is far away from the proposed dock site. *See Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or

[11] Other regulations also reflect DHEC's concern with competing docks, and its judgment that having docks on one side of a creek is acceptable. Subsections (iii) to (v) of Regulation 30-12(A)(2)(c) place square-footage restrictions on docks to be built on creeks ranging from 20 feet wide to over 150 feet wide. Each subsection, however, allows its restriction to be exceeded if "special geographic circumstances and land uses warrant a larger structure." As no potential access from the opposite side of the creek is a special geographic circumstance, 2 S.C. Code Ann. Regs. 30-1(D)(48) (2013), the subsections indicate that docks can be bigger if, among other "circumstances," a navigation problem could not be created by a dock being built across the creek. Likewise, the regulation defining "special geographic circumstances" provides that where such circumstances exist, DHEC can permit docks up to 50% larger than what Regulation 30-12(A)(2)(c) normally allows. 2 S.C.

include one thing implies the exclusion of another, or of the alternative.'" (citation omitted)). Rather, it contemplates there not being a dock on either side of the creek. Therefore, where, as in this case, there is already a dock on the other side of the creek, that lot does not have "potential access via dockage."

Second, the word "opposite" in the Rule pinpoints where that "potential" for another dock must exist in order to deny the permit—across from where the permit applicant proposes building a dock. "Opposite" is a relational word. Something has the quality of being "opposite" only through reference to the thing it opposes. *See Opposite*, Wiktionary, http://en.wiktionary.org/wiki/opposite (last visited Dec. 8, 2014) (defining "opposite" as "located directly across from something else, or from each other"); *Webster's New World Collegiate Dictionary* 1012 (defining "opposite" as "set against," "facing," and "in a contrary position or direction"). The purposes of the Rule indicate that the thing being opposed is the place where the permit applicant wants to build a dock. After all, to create a navigational impediment, the two docks would have to be placed on the same point on the creek, or at least very near one another. Thus, "the opposite side of the creek" means the location directly across from where the applicant proposes building her dock.

Putting this together, "potential access via dockage from the opposite side of the creek" refers to a situation in which there are no docks on either side of a creek at a given location and, but for this Rule, DHEC's regulations would allow construction of a dock directly across the creek from where the applicant proposes building a dock. Put another way, the Rule bars a permit only where there is "potential" for two opposing docks to impede navigation.

Code Ann. Regs. 30-1(D)(48).

In this case, no one disputes that the lot across the creek from Weatherholtz's lot already has a dock. Because the dock exists, it is not "potential access." Moreover, no one disputes that the dock is outside the extended property lines of Weatherholtz's lot. DHEC requires that docks generally be at least twenty feet away from extended property lines. 2 S.C. Code Ann. Regs. 30-12(A)(1)(p) (2013). Thus, there is no danger of Weatherholtz's dock and that existing upstream dock combining to impede navigation. They would be nowhere near one another.

Finally, the existence of that other dock demonstrates why the Opposite-Side Rule contemplates a scenario in which neither landowner has a dock. DHEC does not allow a lot to have more than one dock at a time. 2 S.C. Code Ann. Regs. 30-12(A)(1)(a). Accordingly, where a lot on the other side of the creek already has a dock when OCRM is evaluating a permit application, there is no potential for a dock to be built opposite of the applicant's proposed dock—the one-dock rule prevents it. In other words, the potential must exist at the time the landowner applies for a dock permit.[12] Because that upstream dock existed when Thompson reviewed Weatherholtz's permit, there was no potential access via dockage opposite the proposed dock location. There was not even potential access anywhere within the extended property lines of Weatherholtz's lot. Thus, under both the text and the purposes of the Opposite-Side Rule, there was no potential access via dockage opposite from Weathertholz's proposed dock. Thus, the Rule does not bar Weatherholtz from getting a dock permit.

[12] This is not to say, though, that a landowner could get a dock permit if there was an existing dock directly across the creek from where she proposes building her dock. If the two docks would create a navigation problem, the permit could not be issued. *See* 2 S.C. Code Ann. Regs. 30-12(A)(1)(a) (stating docks "shall not restrict the reasonable navigation or public use of State lands and waters").

B. The ALC's Analysis Strays from the Text and Purposes of the Opposite-Side Rule.

The ALC's decision on the Opposite-Side Rule is based on a reading of the Rule that does not flow from its text or its purposes. Instead of focusing on that text or those purposes, the ALC added language to the Rule, extending its reach in a manner that unjustifiably restricts creek access.

A threshold matter is the basis for the ALC's decision. Unlike its decision on creek width, the ALC's decision on the Opposite-Side Rule was not a product of agency deference. In contrast to its factual findings regarding the Ten-Foot Rule, the ALC made no findings regarding DHEC's interpretation of the Opposite-Side Rule. (*See* R. p. 20). Rather, the ALC recited Thompson's testimony on this issue and referred to that testimony as "his . . . analysis." (R. p. 20). Likewise, the ALC's order contains no indication that the ALC was deferring to DHEC's interpretation of the Rule.[13] (*See* R. p. 24). Thus, the ALC's decision was the product of the ALC's own interpretation of the Rule.

However, the ALC's analysis matched the interpretations of the Rule Thompson articulated at the hearing. Thus, whether one views the ALC's decision as a product of agency deference or as the ALC's own interpretation, the analytical flaws ultimately are the same.

1. The ALC Misinterpreted "Opposite Side."

The ALC ruled that "[t]he opposite side of the creek includes the land within the neighboring property owner's extended property lines." (R. p. 24). That interpretation is not faithful to the plain meaning of "opposite." As discussed above, "the opposite side" is the

[13] As even DHEC believes the Opposite-Side Rule is unambiguous, (*see* R. p. 93), agency deference would be inappropriate. *See Neal v. Brown*, 383 S.C. 619, 625, 682 S.E.2d 268, 270 (2009).

place across from where the permit applicant's proposed dock location. A section of creek outside the applicant's extended property lines is not "opposite" from that that location. It is not even opposite any part of the applicant's lot.

The words of a regulation must be given their plain, ordinary meaning without resorting to forced construction that expands the regulation's operation. *Jones v. S.C. Dep't of Health & Envtl. Control*, 384 S.C. 295, 309, 682 S.E.2d 282, 290 (Ct. App. 2009); *see also Neal v. Brown*, 383 S.C. 619, 625, 682 S.E.2d 268, 270 (2009) (holding Court of Appeals erred in its interpretation of an unambiguous provision in Regulation 30-12). The ALC failed to do that. Instead of following the plain, ordinary meaning of "opposite," the ALC borrowed DHEC's definition of "waterfront property" to define "opposite side of the creek." (R. p. 24). "Waterfront property" generally means "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." 2 S.C. Code Ann. Regs. 30-1(D)(53) (2013). That definition sheds no light on whether a particular location is opposite from another location. It does not even define the creek itself. Rather, it defines land that can be as far as 1000 feet away from a creek. Moreover, DHEC's regulations do not suggest that the waterfront-property definition applies to the Opposite-Side Rule or that "opposite" means something other than what it ordinarily means.

Finally, the ALC's interpretation of "opposite side of the creek" does not align with the navigational purpose of the Rule. As this case demonstrates, the interpretation allows OCRM to deny a dock permit when a dock exists, or could be built, far away from where a permit applicant wants to build a dock and far outside the outer limits of where he would be allowed to build one. Because such an interpretation does not advance DHEC's goal of

preventing opposing docks from bottlenecking creeks, it unnecessarily restricts landowners from accessing creeks with docks. This Court should reject it. *See Auto Now Acceptance Corp. v. Catawba Ins. Co.*, 351 S.C. 377, 381, 570 S.E.2d 168, 170 (2002) (rejecting interpretation that, in light of the regulation's purpose, was not reasonable).

2. The ALC Misinterpreted "Potential Access."

The ALC held "[t]here is currently a lot on the opposite side of the creek with actual dock access, as well as potential access within [the other landowner's] extended property lines." (R. p. 24). In other words, the ALC held Weatherholtz may not build because (1) there is an existing dock upstream from his lot, and (2) in theory, that dock could be removed and another built somewhere else within that landowner's extended property lines. Both of those holdings were wrong.

First, the "actual dock access" holding misconstrues the Rule's text. The Rule mentions only "potential access," not "actual dock access." It is highly unlikely that when the General Assembly considered and approved the Rule, it intended that the word "potential" be construed to include its antonym. *See Potential Synonym*, Synonyms.net, http://www.synonyms.net/synonym/potential (last visited Dec. 8, 2014) (listing "actual" as the first antonym for "potential"). Rather, had the Rule been intended to apply also to situations involving existing docks, language to that effect could have been included. The ALC erred by not only adding words to the Rule, but by adding words that give the Rule the opposite meaning of its text. *See Adkins v. Comcar Indus., Inc.*, 316 S.C. 149, 151, 447 S.E.2d 228, 230 (Ct. App. 1994) ("The court cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute; to legislate and not to

interpret." (citations omitted)), *aff'd*, 323 S.C. 409, 475 S.E.2d 762 (1996); *see also Kiawah Dev. Partners, II*, 411 S.C. at 39, 766 S.E.2d at 721 (holding ALC erroneously inserted a substantiality requirement into Regulation 30-12, as doing so "ignores its clear wording and effectively rewrites the regulation").

Moreover, the ALC's holding does not serve the concern underlying the Rule. Even if the existence of a dock across the creek would trigger the Opposite-Side Rule, the navigational concerns behind the Rule would warrant the denial of a permit only where the proposed dock and the existing dock would, together, create an impediment. As explained above, that could not happen in this case. Thus, the ALC's first holding is not faithful to the letter or the spirit of the Opposite-Side Rule.

The second holding is also problematic. Even though a lot can have only one dock, and even though the existing dock will be nowhere near Weatherholtz's proposed dock, the ALC held there is potential access because the owner of that other dock might someday decide to remove it and build a much longer one somewhere else. As discussed above, there is not potential access at this time. The other lot has a dock, and its owner cannot legally build another one. The wildly speculative analysis of what might happen someday to an existing dock, under whatever laws might be in effect at that future date, has no basis in the text or purposes of the Rule, and it does not fulfill DHEC's intent that OCRM evaluate permits consistently.

In addition, under DHEC's regulations, there would be no potential for that other landowner to build a dock across from Weatherholtz's dock in the future—ironically, the Opposite-Side Rule would bar that landowner from building a new dock. The lots across from that landowner have potential dock access, and one has a dock on it. (*See* R. p. 527).

Moreover, because putting a dock across from Weatherholtz's dock could well impede navigation, DHEC would not allow the dock to be built. *See* 2 S.C. Code Ann. Regs. 30-12(A)(1)(a). Thus, the ALC was incorrect in stating that a dock could potentially be built.

3. The ALC's Ruling on this Issue Is Irreconcilable with Its Ruling on the Creek's Width.

Even putting aside the interpretation problems above, the ALC's decision on this issue is flawed because it is inconsistent with the ALC's ruling on the creek's width. Thompson testified "potential access" means that a dock could be built in compliance with DHEC's regulations. (R. p. 311:2-8). The ALC held, however, the portion of the creek within Weatherholtz's lot's extended property lines is less than ten feet wide. (R. p. 23). Under that holding, there is no potential access from the opposite side of the creek—the Ten-Foot Rule would prevent any dock from being built on either side. In other words, the ALC's holding on the Opposite-Side Rule turns on a factual premise that the ALC denied one page earlier in its order. The ALC's order contains no indication that its two holdings were alternative to one another.

Weatherholtz of course does not concede that the creek is less than ten feet wide, or that there is potential access from the opposite side of the creek. The point is that the ALC made two factually irreconcilable holdings, which casts further doubt on the soundness of its analysis.

4. To the Extent the ALC May Have Deferred to Thompson's Interpretation, that Interpretation Was Not Entitled to Deference.

As discussed above, the ALC's decision indicates that the ALC based its decision on its own interpretation of the Opposite-Side Rule, rather than on agency deference. But even

if it was, the ALC should not have deferred. First, because DHEC's interpretation conflicts with the unambiguous Rule, the ALC had to reject it. *See Brown*, 348 S.C. at 515, 560 S.E.2d at 415.

Second, exactly what DHEC interprets the Rule to mean is unclear. As mentioned above, Thompson's explanations of why Weatherholtz could not satisfy the Rule evolved in the proceedings below. In fact, 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," (R. p. 184:1-11), 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. *See South Carolina Administrative Practice and Procedure* at 20.

Further muddying the waters, 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. (R. pp. 293:20-294:6). 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.

Finally, perhaps recognizing the above problems with Thompson's testimony, the ALC described Thompson's testimony as "his . . . analysis." (R. p. 20). It did not find that what Thompson said was DHEC's historical interpretation of the Opposite-Side Rule. In contrast, the ALC did made findings on how DHEC interprets the Ten-Foot Rule, and it based its decision on that issue on that interpretation. That contrast demonstrates the ALC

found that, with respect to the Opposite-Side Rule, Thompson's understanding of the Rule was just his own. If the ALC deferred to that understanding, it erred. *See S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486.

C. Conclusion as to the Opposite-Side Rule

Under the proper understanding of the Opposite-Side Rule, there is no potential access from the opposite side of the creek in this case. The Rule does not bar Weatherholtz from a dock permit, and the ALC erred in holding otherwise.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Administrative Law Court and order DHEC to issue James Weatherholtz the dock permit for which he applied.

Respectfully submitted this 18th day of May, 2015.

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THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF FINAL BRIEFS' COMPLIANCE WITH RULE 211

I certify that the Final Brief of Appellant and the Final Reply Brief of Appellant that I have filed in this appeal comply with Rule 211, SCACR.

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PROOF OF SERVICE

I certify that on May 18, 2015, I served a copy of the Final Brief of Appellant and the Final Reply Brief of Appellant on counsel for respondent, Bradley Churdar, by placing them in the United States Mail, postage prepaid and addressed to Mr. Churdar at the following location:

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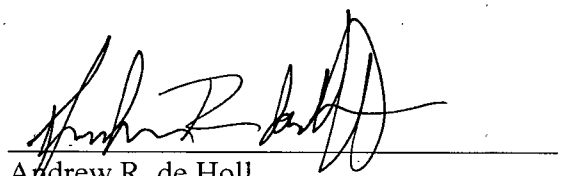

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