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SC Court of Appeals

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 REPLY BRIEF OF APPELLANT

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ARGUMENT

Weatherholtz stands by the arguments he made in his opening brief. For the most part, however, DHEC's brief avoids responding to his arguments directly. Instead, DHEC makes a number of arguments that are incorrect, irrelevant, or both. Weatherholtz offers the following reply to them.

I. DHEC'S ARGUMENTS ARE BASED ON INACCURATE STATEMENTS OF THE FACTS.

First, several inaccurate statements of the facts in DHEC's brief need to be corrected.

A. Thompson Never Measured the Creek's Width at the Proposed Dock Site.

Throughout its brief, DHEC asserts that Jeff Thompson measured the creek's width at the proposed location of the dock. For example, on page 13, it states, "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." DHEC bases its statement on a line from Thompson's field notes and two excerpts of Thompson's testimony.[1] None of that supports DHEC's statement. Although the field notes say Thompson went to "the location of the proposed dock," Thompson's testimony shows he was referring to the general area of the creek within Weatherholtz's lot's extended property lines, not the specific proposed dock site. In the testimony DHEC cites, Thompson says he drove the boat to "the area of [Weatherholtz's] proposed dock," (R. p. 267:10-14), and then "took measurements on about four or so different locations," (R. p. 279:24-25). Other testimony clarifies that none of those places was the proposed dock location. For example, after Thompson testified some places on the

[1] DHEC cites no other evidence in support of its contention that Thompson measured and considered the proposed dock location. (*See* Resp't's Br. pp. 3-4, 7, 13-15 & nn.9-10, 21, 22, 25 & n.14, 29, 30, 34).

creek over ten feet wide did not count because they were not "representative" of the creek, Thompson explained where those places were. (R. pp. 277:16-278:8). Thompson testified they were "in that section between that western extended property boundary and a little bit west of that dock that's to the east" of Weatherholtz's lot—in other words, the proposed dock location. (R. p. 278:9-11; *see* R. p. 330, 359-60).

Testimony about the December 2013 joint site inspection further clarifies that Thompson refused to consider the location in his permitting decision. In that inspection, Weatherholtz showed Thompson the proposed dock location, but Thompson refused to measure there. (R. pp. 201:10-18; 285:13-286:13). Thompson testified that because 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). This confirms that the proposed dock location was one of the places "in that section" Thompson testified that he never considered.

Thus, contrary to what DHEC says in its brief, Thompson's own testimony shows he did not measure the creek at the proposed dock location as part of his permitting decision. And, contrary to DHEC's insistence that what happened at the December 2013 joint site inspection is irrelevant, those events confirm Thompson never even measured the proposed dock location back in July 2013, much less based his permitting decision on it.

B. Bessent's Team Found that the Creek Was over Ten Feet Wide.

DHEC's brief misstates two pieces of evidence relating to Tom Bessent.

First, DHEC states that Tom Bessent testified the creek was "precisely" ten feet wide at the proposed dock location. (Br. Resp't p. 12). DHEC copied that statement verbatim from a factual finding in its proposed order that the ALC adopted. (*Compare* R. p. 52 *with*

R. p. 9). In his motion to reconsider to the ALC, Weatherholtz demonstrated that the finding was inaccurate—Bessent actually testified the creek was either 10.1 or 10.2 feet wide, and so he felt comfortable stating on the survey drawings that the creek was 10 feet wide. (R. pp.79-80; R. pp. 148:22-150:9). Over DHEC's opposition, the ALC agreed with Weatherholtz and amended its finding. (R. pp. 87-88; 18).

Second, DHEC discusses a cross-sectional sketch of the creek Bessent drew. (Br. Resp't pp. 12-13). Bessent drew the sketch as a hypothetical representation of what the creek might look like and used to discuss with his team on where they should measure the creek's width. (R. pp. 159:14-21; 164:24-165:8). DHEC's brief, however, suggests the sketch reflects Bessent's actual measurements and shows Bessent found the creek was less than ten feet wide. Like the statement about Bessent's testimony, DHEC's statements about the sketch are copied verbatim from its proposed factual findings to the ALC. However, the ALC rejected some of those findings, including a finding that the sketch accurately stated the creek's width. (*Compare* R. pp. 52-53 *with* R. pp. 9-10). In his motion to reconsider, Weatherholtz emphasized that the sketch was merely hypothetical in nature.[2] (R. pp. 80-81). Although DHEC argued that the sketch accurately depicted the creek's width, the ALC amended its findings to make clear that the sketch was hypothetical in nature and was used to instruct the survey team. (R. p. 19).

In short, both the record and the ALC's findings in its amended final order (which DHEC has never argued are wrong) demonstrate that DHEC's characterizations of Bessent's survey are inaccurate.

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[2] After all—and as DHEC has emphasized below and on appeal—Bessent was not in the creek during the survey, so any distances in the sketch would not be based on his personal knowledge. With Bessent, DHEC wants it both ways: his computer-generated surveys prepared with laser-shot measurements are unreliable, but a sketch described by its author as "hypothetical," with question marks next to distances, is proof positive.

C. The Administrative Law Court Did Not Agree with Thompson's Criticism of Bessent.

In describing Bessent's survey in its statement of facts, DHEC suggests that during the contested case hearing, the ALC found Bessent's survey was unreliable. (Br. Resp't p. 11). Specifically, DHEC states that when Thompson criticized Bessent's survey of the creek, Weatherholtz objected to that criticism but the ALC said it was "valid." (*Id.*). DHEC has misstated the record. Although Thompson did criticize Bessent's survey of the creek, Weatherholtz did not object to that testimony. (*See* R. pp. 302:15-303:20). Rather, he objected to other comments Thompson made that were irrelevant and that did not respond to Weatherholtz's questions. (R. p. 203:10-20). Granting the motion, the ALC ruled Thompson's testimony on Bessent's survey of the creek was "valid" but his other testimony was not relevant. (R. p. 304:11-19). The ALC was only saying that some of Thompson's testimony was admissible, not that it agreed with him.

II. THE RECORD COMPELS REVERSING THE ADMINISTRATIVE LAW COURT'S DECISION, NOT DISMISSING THE APPEAL.

DHEC claims that because Thompson measured the creek at the proposed dock location, this Court should "dismiss" the appeal. As explained above, the factual premise of DHEC's position is false—the record demonstrates Thompson chose not to consider the creek's width at that determinative spot when he was processing Weatherholtz's application.

Based on that incorrect premise, DHEC first argues its creek-width determination is not subject to appellate review under South Carolina Code subsection 1-23-610(B), and therefore the factual finding and legal conclusion involved in that determination are the law of the case. (Br. Resp't p. 14 & n.10). That argument would fail even if its factual premise was correct. Technically, it is true that DHEC staff findings are outside the scope of

subsection 1-23-610(B); that statute involves this Court's review of *ALC* decisions. But where, as here, the ALC bases its decision on staff findings, the findings themselves and the methods used to make them are not immune from this Court's scrutiny.[3]

Second, DHEC contends that Thompson's file memo and the two excerpts of his testimony are analogous to additional sustaining grounds, in that this Court can use them to affirm the ALC even though the ALC did not specifically cite them in its decision. (Br. Resp't pp. 13-14 n.9). DHEC is mistaken. As DHEC recognizes, the ALC's erroneous decision on the Ten-Foot Rule was based on that evidence. (*See id.* p. 14 n.9). Conceptually, then, the evidence cannot constitute an independent basis to affirm the result below. All it can do is either support or undermine the correctness of what the ALC actually held. As discussed above, it does the latter.

III. THE ADMINISTRATIVE LAW COURT'S RULINGS ON THE TEN-FOOT RULE ARE UNSUPPORTABLE AND UNSUPPORTED.

DHEC's primary defense of the ALC's rulings on the Ten-Foot Rule is the inaccurate assertion that Thompson's creek-width determination was based on measuring the creek at the proposed dock site. DHEC also makes several straw-man arguments and incorrect statements of the law, while avoiding many of the points Weatherholtz raised in his brief. Ultimately, DHEC fails to justify its interpretation of the Rule or the ALC's rulings and findings on the issue.

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[3] Moreover, even if DHEC's width determination could not be reviewed, it would not constitute the law of the case. The law-of-the-case doctrine applies only to decisions that can be appealed, but are not. *See Dreher v. S.C. Dep't of Health & Envtl. Control*, No. 27507 (S.C. Sup. Ct. filed Mar. 18, 2015) (Shearouse Adv. Sh. No. 11, at 15, 19-20) ("[S]hould the appealing party *fail* to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case." (emphasis added); *Davis v. UniHealth Post Acute Care*, 402 S.C. 541, 546, 741 S.E.2d 770, 773 (Ct. App. 2013) (rejecting respondent's argument that a holding in an unappealable order constituted the law of the case).

A. DHEC's Arguments on Other Aspects of the Ten-Foot Rule Do Not Justify Its Use of the Representative Approach or the Administrative Law Court's Reliance on It.

Acting under a mistaken belief that Weatherholtz contends the Ten-Foot Rule speaks directly to the issue at hand, (*see* Br. Resp't p. 19), DHEC argues that the Ten-Foot Rule is "both silent and ambiguous"[4] and thus the issue should be decided under step two of the analysis in *Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control*, (*Id.*). To be clear, although it is logical—even obvious—that creek width has to be determined at the proposed dock location and that OCRM cannot use arbitrary means to disregard that location, Weatherholtz is not contending the Rule explicitly spells out those things. Rather, he contends that DHEC's interpretation is indefensible.

However, to be clear, DHEC's discussion of "silence and ambiguity" focuses on aspects of the Ten-Foot Rule that are not germane to this appeal. For example, DHEC asks rhetorically whether the Rule requires that width be measured at right angles perpendicular to the side of the creek. (Br. Resp't p. 18). No one has raised the question of what angle was used, or should be used, in measuring the creek.[5] Similarly, DHEC quotes two instances in which the ALC expressed some uncertainty about the Rule—specifically, whether a creek must be ten feet wide within the applicant's extended lot lines, and whether it must be at

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[4] DHEC does not explain how the Rule is both silent and ambiguous on this issue. A regulation is silent if it says nothing at all about an issue. It is ambiguous if it says something that could be reasonably construed more than one way.

[5] The ALC has already provided DHEC an answer to its questions about angle of measurement. In *Harry v. S.C. Department of Health & Environmental Control*, the ALC held that "measurement of the creek's width should be taken at a right angle from the centerline of the creek to marsh vegetation on each side." No. 09-ALJ-07-0255-CC, 2010 WL 8425978, at *4 (S.C. Admin. L. Ct. July 15, 2010). In reaching that decision, the ALC rejected OCRM's approach because it "requires a determination in and of itself as to what portion of a shoreline should be used from which to measure [creek width] . . . . In other words there may still be the need to evaluate whether the shoreline is representative of the length of the waterway." *Id.*

least ten feet wide for the entire length of the proposed dock. Neither of those specific questions has been raised in this appeal.

Turning to the merits of DHEC's deference argument, DHEC's does brief does not explain why its representative approach, particularly as applied here, deserves deference. Likewise, DHEC does not challenge the soundness of Weatherholtz's construction of the Ten-Foot Rule. Rather, it makes two arguments that not only miss the point but lack merit.

First, it contends "Mr. Thompson's decision to measure the creek width at the proposed location as well as measuring at multiple other locations both ebbside and floodside is a rational basis for interpreting [the Ten-Foot Rule] in view of" the potential for docks to sometimes pose navigational problems. (Br. Resp't p. 23). Weatherholtz agrees that measuring at the proposed dock location is rational, but, as discussed above, the record shows Thompson did not measure it. However, basing a permitting decision on creek width at other locations—that is, places where the dock will not be installed—is not logically related to the concern that a dock may impede navigation. The way that a dock can "pose navigational problems," 2 S.C. Code Ann. Regs. 30-12(A) (2013), is by extending into the waterway. Thus, if a creek is too narrow for boating at some points upstream or downstream, the dock is not what causes that to be so. In any event, DHEC's argument fails to address the propriety of a staff member eyeballing the creek and deciding subjectively what parts do and do not count.

DHEC's analysis of Weatherholtz's application flowed from that non-sequitur. As the record demonstrates, Thompson based his creek-width determination only on upstream and downstream measurements. That irrational analysis does not deserve deference, and the ALC erred in following it.

Second, DHEC contends its application of the Ten-Foot Rule was not manifestly contrary to the Rule's purpose. Noting that Regulation 30-12(A) states docks "are the most popular method of gaining access to deep water," and that Thompson testified his boat "hit bottom" in the creek, DHEC argues it was proper to not let a dock be built on a shallow creek. (Br. Resp't pp. 23-24).

DHEC's argument distracts from the issue at hand—whether DHEC can arbitrarily choose what spots "represent" the edge of the marsh. Moreover, the argument is flawed in at least three ways. First, Regulation 30-12 makes this creek's depth irrelevant to the issue of its width. "For purposes of determining creek width, *if marsh vegetation does not exist*, the Department will use other indicators of channel width such as changes in grade and the critical area boundary." 2 S.C. Code Ann. Regs. 30-12(A)(2)(c) (2013) (emphasis added). Because marsh grass unquestionably exists along the banks of the creek, unscientific evidence of the creek's other characteristics is not relevant.[6] To the extent that either the ALC or DHEC relied on Thompson "hit[ting] bottom," they erred.

Second, Thompson never stated in his permitting decision that creek depth played a role in his decision on creek width.[7] (*See* R. pp. 337-40; 347-49). "A Permit denial shall cite facts upon which the denial was based and the reasons for denial." 2 S.C. Code Ann. Regs.

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[6] Moreover, the ALC's decision mentions that Thompson and Mallet had difficulty getting around a downstream dock. Under Regulation 30-12(A)(1)(c), that fact is not relevant. *See also Brownlee v. S.C. Dep't of Health & Envtl. Control*, 382 S.C. 129, 140-41, 676 S.E.2d 116, 112 (2009) (holding obstructive dock did not make creek nonnavigable, as "the test for navigability does not hinge on the existence of man-made impediments or other obstructions"). To the extent that the ALC relied on that difficulty, and to the extent DHEC continues to rely on it, that reliance is misplaced.

[7] Nor, for that matter, did Thompson mention that he based his creek-width decision on his initially overlooking the creek's mouth, the width of the creek at its mouth, or his difficulty getting his boat around the downstream dock. (*See* Br. Resp't pp. 5-6). In any event, reliance on those factors would be inappropriate, as DHEC believes that creek width outside the area where Weatherholtz could build a dock is irrelevant. (R. pp. 267:18-268:2; 278:19-279:5).

30-4(B) (2013); *see also* S.C. Code Ann. § 48-39-150(C) (2008) ("In the event a permit is denied the department shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter."). Accordingly, the absence of that fact in Thompson's communications indicates he did not base his width determination on it. DHEC cannot defend its position using grounds it failed to disclose (or perhaps even consider) at the appropriate time.

Finally, DHEC's argument rests on two dubious assumptions. First, it assumes that a factual statement about a popular use for docks is a criterion for evaluating permit applications. It is not. It merely gives a preface to the rules; such general, background statements do not have the force of law. *See* S.C. Code Ann. § 1-23-10(4) (2005) (providing that policy or guidance issued by an agency other than in a regulation does not have the force of law); *Doe v. S.C. Dep't of Health & Human Servs.*, 398 S.C. 62, 68 n.7, 727 S.E.2d 605, 608 n.7 (2011) ("[A]n agency guideline does not have the force of law . . . .").

Second, DHEC's argument assumes that under the factual statement in Regulation 30-12, docks should be built only if they would sit on "deep water"—presumably, water deep enough for motor boats to navigate. However, dock permit evaluations must take into consideration the intended uses for the dock. *See* 2 S.C. Code Ann. Regs. 30-12(A)(1)(c) (2013) ("The size and extension of a dock or pier must be limited to that which is reasonable for the intended use."). Although the creek is deep enough for motor boats, Weatherholtz does not want a dock for that purpose.[8] He wants the dock for crabbing, fishing, canoeing, and kayaking. (R. pp. 101:8-22; 285:4-7). Both Thompson's and Weatherholtz's

[8] Indeed, even if Weatherholtz wanted to use a motor boat, he could not keep it at his dock even temporarily. *See* 2 S.C. Code Ann. Regs. 30-12(A)(2)(c)(ii) (2013) (prohibiting boat lifts, davits, and boat storage docks on creeks less than twenty feet wide); 2 S.C. Code Ann. Regs. 30-12(A)(2)(c)(ix) (2013) (prohibiting boats from being moored at docks if doing so will impede navigation or public use of the water).

measurement photographs indicate that the creek is more than deep enough for those activities, even below high tide. (*See* R. pp. 361-63, 366-77; 433-34). The fact that Thompson might have had a momentary problem doing something Weatherholtz cannot do with his dock, and has no intention of doing, is therefore irrelevant.

B. DHEC's Brief Fails to Validate the Representative Approach Under the Applicable Law.

DHEC contends Weatherholtz's arguments on the Ten-Foot Rule flow from a mistaken belief that the ALC based its decision on Thompson's measurements at the December 2013 joint site inspection. (Br. Resp't p. 26). Weatherholtz has never thought that. As Weatherholtz explained above, the December 2013 inspection sheds light on how Thompson conducted his July 2013 measurements, which the ALC used in its decision.

DHEC also attempts to distinguish cases establishing that the representative approach, and the decision the ALC made based on that approach, must be rejected. Weatherholtz will reply to those arguments below.

1. DHEC Misstates the Holding of *Captain's Quarters Motor Inn* and Fails to Distinguish What Actually Happened in that Case.

DHEC asserts that in *Captain's Quarters Motor Inn v. S.C. Coastal Council*, the Supreme Court established a three-pronged test that Weatherholtz cannot satisfy: (1) the regulation is clear and unambiguous; (2) the agency's interpretation is arbitrary and capricious; and (3) the agency's interpretation was not promulgated as a regulation. (Br. Resp't p. 26). DHEC has misread that opinion. Those three things were not elements of some test that the Supreme Court created. Rather, as the Supreme Court explained in its opinion, they were the trial court's three independent bases for rejecting the Coastal

Council's interpretation of a statute. 306 S.C. 488, 489, 413 S.E.2d 13, 14 (1991). And contrary to what DHEC says in its brief, the Supreme Court disagreed with the trial court on the first two grounds. 306 S.C. at 490, 413 S.E.2d at 14. However, the Supreme Court affirmed on the third ground, agreeing with the trial court that the Coastal Council's interpretation was invalid because it had not been formally promulgated. 306 S.C. at 490-91, 413 S.E.2d at 14.

As Weatherholtz explained in his opening brief, one of the problems with DHEC's representative approach to determining creek width is that it is an unpromulgated test; *Captain's Quarters Motor Inn* makes clear that such tests are invalid. Trying to distinguish *Captain's Quarters Motor Inn*, DHEC contends its power to create and apply the representative approach for selecting measurement sites is analogous to its power to create and enforce the provisions of the Coastal Management Program document.[9] (Br. Resp't p. 27). DHEC bases that position on *Spectre, LLC v. S.C. Department of Health & Environmental Control*, in which the Supreme Court held the Program was valid even though it had not been promulgated pursuant to the Administrative Procedures Act. 386 S.C. 357, 369-73, 688 S.E.2d 844, 850-52 (2010).

In that case, DHEC denied an application to fill freshwater wetlands because the proposed activity was not consistent with the Program. 386 S.C. at 361, 688 S.E.2d at 846. In holding the Program valid, the Supreme Court first pointed out that the Coastal Zone Management Act specifically required DHEC to create the Program and review permit

[9] Specifically, DHEC states that "the regulation at issue here is more like the various provisions of the CMP at issue in *Spectre[, LLC v. S.C. Department of Health & Environmental Control]* than the statute in dispute in *Captain's Quarters*." (Br. Resp't p. 27). DHEC's argument misstates what is at issue here. It is not the Ten-Foot Rule Itself, but rather the unwritten representative approach OCRM uses to apply the Rule. Likewise, a statute was not at issue in *Captain's Quarters Motor Inn*; the case involved an unwritten test the Coastal Council used to apply a statute.

applications for compliance with its provisions. 386 S.C. at 369, 688 S.E.2d at 850. The Court then noted that although the Act requires DHEC to promulgate regulations governing the use of critical areas, it did not require DHEC to create regulations for performing consistency reviews. 386 S.C. at 370-71, 688 S.E.2d at 851. Finally, the Court held that the Program did not have to be promulgated under the Administrative Procedures Act because the Coastal Zone Management Act specifically set out a more rigorous enactment procedure for the Program, which DHEC followed. 386 S.C. at 372, 688 S.E.2d at 851-52.

Spectre could not be less helpful to DHEC. It dealt with a written document that the General Assembly specifically directed DHEC to create and apply. The same cannot be said of the representative approach. Moreover, *Spectre* involved freshwater wetlands. In contrast, the creek at issue in this appeal is a critical area,[10] and as the Court noted, the use of critical areas must be governed by regulations that are enacted in accordance with the Administrative Procedures Act. 386 S.C. at 371, 688 S.E.2d at 851. And unlike the Coastal Management Program or any established regulations, nothing in the record even suggests that the representative approach has ever been formally submitted to the General Assembly for its consideration. Finally, and following on the last point, the Program is a collection of detailed policies and rules set in writing and available to the public. In contrast, the representative approach is an internal rule with no real parameters. Nothing in *Spectre* suggests DHEC can legitimately use unwritten, unpublicized, and undefined permitting standards that have never been subjected to some type of formal rulemaking process.

DHEC appears to be relying on *Spectre* by analogy—that is, as proof that not all of its

[10] *See* S.C. Code Ann. § 48-39-10(J) (2008) (defining "critical area" as coastal waters, tidelands, beaches, and beach/dune systems between the mean high-water mark and the setback line); 2 S.C. Code Ann. Regs. 30-1(D)(15) (2013) (same).

permitting standards must be promulgated in accordance with the Administrative Procedures Act. Citing *Captain's Quarters Motor Inn*, DHEC argues its duty to process permit applications in accordance with Regulation 30-12 comes with the implicit power to decide how to measure creek width. (Br. Resp't p. 28). However, neither that case nor *Spectre* suggests DHEC has the implied power to avoid its explicit duty to issue written rules through formal rulemaking.[11] *See also* S.C. Code Ann. § 48-39-130(B) (2008) (requiring that critical-area regulations be promulgated). If anything, *Captain's Quarters Motor Inn* and *Spectre* confirm that OCRM may use only APA-compliant tests to evaluate critical-area permit applications. Indeed, in *Captain's Quarters Motor Inn*, the Supreme Court faulted the Coastal Council for doing what OCRM is doing here—using an unpromulgated test to fill a gap in a written permitting standard.

The representative approach is invalid. The ALC erred by relying on measurements that were based upon it.

2. DHEC's Attempt to Distinguish *S.C. Coastal Conservation League* Turns on a Mistaken Comparison of the Issues in that Case and in this Appeal.

DHEC next contends this appeal is distinguishable from *S.C. Coastal Conservation League v. S.C. Department of Health & Environmental Control* because unlike the "subjective relativity" of the small-islands regulation that the Supreme Court invalidated in that case, the Ten-Foot Rule sets an objective standard of ten feet. (Br. Resp't p. 28). DHEC's argument incorrectly focuses on the Rule itself; the issue really is whether the representative approach DHEC applied to the Rule can survive *Coastal Conservation*

[11] Nor, for that matter, does DHEC have the implied power to act arbitrarily, which the representative approach allows its employees to do.

League. DHEC's brief does not respond at all to Weatherholtz's argument that the representative approach fails *Coastal Conservation League*. As that case demonstrates, the arbitrary, unrestrained discretion that the approach allows renders it void. *See* 363 S.C. 67, 74-75, 610 S.E.2d 482, 486 (2005).

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

In his opening brief, Weatherholtz explained how DHEC's interpretation of the Ten-Foot Rule fails to support the Rule's purposes and can even work against them. DHEC offers no response explaining how its arbitrary approach supports the purposes of the Ten-Foot Rule.

4. *Schulz* Is Not Materially Distinguishable.

Finally, DHEC argues *Schulz v. S.C. Department of Health & Environmental Control* is inapplicable because the measurement method OCRM used in that case was "fundamentally different" from what Thompson did in this case. (Br. Resp't pp. 29, 30). But the distinctions DHEC cites—that Thompson took field measurements from a boat, measured inside the applicant's extended property lines, and did not calculate an average width[12]—distract from the issue at hand and make no difference in this case. The question in this appeal is not whether Thompson did any of those things or if he had to do them. It is whether DHEC can cherry-pick measurement points and ignore the proposed dock location. *Schulz* demonstrates that it cannot.

But even if DHEC is correct in saying the approach OCRM used in *Schulz* was

[12] DHEC also states the OCRM employee in *Schulz* relied only on GIS aerial photographs. (Br. Resp't p. 30). That is incorrect. She also used a field assessment she performed at the site as well as dock permitting files for surrounding locations. *Schulz v. S.C. Dep't of Health & Envtl. Control*, No. 01-ALJ-07-0212-CC, 2001 WL 1502472, at *2 (S.C. Admin. L. Ct. Nov. 1, 2001).

fundamentally different from what Thompson did in this case, that would call into doubt the accuracy of Thompson's testimony that DHEC's historical interpretation of the Rule includes the using representative approach. If DHEC is not being consistent in its method for determining creek width, the representative approach is even less deserving of deference. *See, e.g., Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 56, 766 S.E.2d 707, 729 (2014) (Toal, C.J., dissenting) (noting that deference may be accorded to "an agency's well-established and consistent interpretation of statutes and regulations that the agency is charged with administering").

C. DHEC Does Not Defend the Administrative Law Court's Wetlands-Expertise Decisions, and Its Alternative Arguments for Affirming Have No Merit.

DHEC's brief attempts to frame the ALC's decision on the Ten-Foot Rule ultimately as the product of the ALC simply weighing conflicting evidence on the creek's width. *See* S.C. Code Ann. § 1-23-610(B) (Cum. Supp. 2013) (providing this Court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact). But Weatherholtz is not simply disagreeing with the purported weight the ALC gave the evidence. Rather, he is challenging errors that affected how the ALC weighed that evidence—namely, the ALC's deference to DHEC's interpretation of the Ten-Foot Rule and its rulings on the necessity of wetlands expertise. In other words, when the ALC went to weigh the evidence, those errors acted as thumbs on the scale.

The ALC improperly ruled that "wetlands experts" must be used in measuring creek width and that Weatherholtz did not prove Bessent had such expertise. (Br. App. pp. 23-27). DHEC's brief offers no defense of either of those decisions, and it does not dispute that those erroneous rulings guided the ALC to its decision on the Ten-Foot Rule. Instead of defending

the ALC's rulings or its assessment of the evidence, DHEC contends this Court should use Thompson's notes and an inference to affirm. DHEC's contention is incorrect.

1. The Missing-Witness Doctrine Does Not Apply Here.

DHEC offers no direct challenge to the legitimacy of Bessent's or Weatherholtz's assessments of the creek's width at the proposed dock location. Rather, DHEC argues Billy Ferguson's absence from the contested case hearing supports the ALC's assessment of the evidence. Invoking the missing-witness doctrine, DHEC suggests one can infer from Ferguson's absence that, had Ferguson testified, his testimony would have somehow undermined the reliability of his and Bessent's measurements. (Br. Resp't pp. 32-33).

To be clear, the ALC drew no such inference in its amended final order, even though DHEC suggested it do so during and after the hearing. (*See* R. pp. 168:3-5, 170:9-14; 91-92). Thus, DHEC's argument is a post-hoc invitation for this Court to salvage the ALC's decision under Rule 220(c), SCACR, by drawing that adverse inference. This Court should decline that invitation.

"A party need not produce every witness who might testify in his favor, and a failure to do so does not necessarily imply an attempt on his part to suppress the truth." *In re Gonzalez*, 409 S.C. 621, 631, 763 S.E.2d 210, 215 (2014). But when it appears that a party is trying to suppress the truth, the missing-witness doctrine provides a remedy: the trier of fact may infer from the witness's absence that, had the witness appeared, he would have provided testimony adverse to the party who did not call him. 409 S.C. at 629, 763 S.E.2d at 214; *see also* 409 S.C. at 630, 763 S.E.2d at 214 ("'The fact that the unfavorable inference may be drawn does not require that the jury draw it.'" (quoting *Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 476, 200 S.E.2d 681, 683-84 (1973))). However, the mere absence of a

witness does not permit the inference to be drawn. Rather, there must be evidence suggesting the party is trying to keep evidence out of the case. *See Baker*, 261 S.C. at 475-76, 200 S.E.2d at 683 (stating an unfavorable inference may be drawn only where the failure to produce a witness creates suspicion of a willful attempt to withhold competent evidence). Among other things, the absent witness "must be under the control of the party failing to call him," which means "the uncalled witness [must be] an agent, employee, relation, or associate of the party failing to call him."[13] 409 S.C. at 635, 763 S.E.2d at 217.

DHEC's suggestion that Weatherholtz was trying to suppress the truth is meritless. Ferguson has never been under Weatherholtz's control. He is a surveyor who works with Bessent. (R. p. 134:19-23). Thus, the key element of the missing-witness doctrine does not exist here. Moreover, it is not as if Weatherholtz produced Bessent's survey drawings and then noticeably failed to provide any testimony that could support them. He produced Bessent, who oversaw the creek survey and instructed Ferguson[14] on where to measure the creek's width, who personally certified the survey drawings submitted to OCRM, and who

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[13] Indeed, even in the cases DHEC cites, the missing witness was under the penalized party's control. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225 (1939) (distributors failed to produce any of their officers or agents); *Blow v. Compagnie Mar. Belge (Lloyd Royal) S. A.*, 395 F.2d 74, 79 (4th Cir. 1968) (ship owner failed to produce member of ship's crew); *S. Cross S.S. Co. v. Firipis*, 285 F.2d 651, 659 (4th Cir. 1960) (ship owner failed to produce members of ship's crew), *disapproved of on other grounds by Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *Wis. Motor Corp. v. Green*, 224 S.C. 460, 464, 79 S.E.2d 718, 720 (1954) (defendants failed to produce their bookkeepers).

[14] DHEC attempts to portray Ferguson as someone lacking expertise in wetlands vegetation. (*See* Br. Resp't pp. 12, 32). Although Bessent did not know what school courses Ferguson had taken on that topic, (R. p. 141:17-21), Bessent testified Ferguson was a professional land surveyor, that he had worked with Ferguson for twenty years, and that he instructed Ferguson on where to measure the creek for Weatherholtz's survey. (R. pp. 134:19-23; 172:15-173:2).

has decades of experience in surveying tidal areas. (*See* R. pp. 117:8-120:13, 123:2-5, 172:15-173:2; 329-36). The missing-witness doctrine just does not apply.[15]

DHEC also contends Ferguson's absence justifies the rejection of both Bessent's measurements and the measurements Weatherholtz took himself. (Br. Resp't p. 33). Even if the missing-witness doctrine applied, and thus an inference could be drawn, that inference could go only to the probative value of Bessent's measurements. It would not affect the value of the objective measurements Weatherholtz took himself, as Ferguson was not involved in those measurements. *See In re Gonzalez*, 409 S.C. at 629, 631, 763 S.E.2d at 214, 215 (indicating that one of the premises of the missing-witness doctrine is that the evidence is "within [the absent witness's] knowledge," and stating that for the doctrine to apply, the party must appear to be attempting to withhold "competent evidence").

Because Ferguson's absence does not warrant an adverse inference, the absence has no effect on the width assessments Bessent and Weatherholtz separately performed at the proposed dock location.

2. Substantial Evidence Does Not Support the Administrative Law Court's Decision.

DHEC offers no other argument in support of its contention that the ALC properly disregarded Bessent's and Weatherholtz's measurements. Moving on to the substantial-evidence standard, DHEC contends that Thompson's notes about his July 2013

[15] Weatherholtz does not accuse DHEC of trying to suppress the truth, but if any missing-witness inference is to be drawn in this case, it should be drawn against DHEC. DHEC did not produce its own employee, Fred Mallett, for the hearing. DHEC also told the ALC it was going to produce Blair Williams (Thompson's supervisor) and Joshua Boulware, another OCRM employee, at the hearing. (R. p. 35). Yet, without explanation, it did not produce either of them.

measurements provide a sufficient basis for this Court to affirm.[16] (Br. Resp't p. 34). But as Weatherholtz explained above, Thompson's testimony shows that Thompson did not actually measure at the proposed dock location, as he did not feel it merited consideration. In other words, Thompson's testimony makes clear that the word "location" in the notes refers to the general portion of the creek within Weatherholtz's extended property lines. The substantial-evidence standard does not obligate this Court to evaluate pieces of evidence in isolation; to the contrary, the Court considers the entire record. *See* S.C. Code Ann. § 1-23-610(B)(e) (Cum. Supp. 2013). When Thompson's notes are considered properly—that is, in conjunction with his testimony on the same topic—they cannot sustain the ALC's decision. Rather, the record as a whole demonstrates that the creek is at least ten feet wide at the proposed dock location.

D. Conclusion as to the Ten-Foot Rule.

DHEC's brief fails to disprove what Weatherholtz's brief makes clear: under a proper construction of the Ten-Foot Rule and under a view of the evidence consistent with that view, the ALC's decision was clearly erroneous in view of the substantial evidence in the record. This Court should reverse that decision.

[16] Noting that Weatherholtz did not challenge the memo's admissibility, DHEC also appears to contend Weatherholtz is barred from making any other arguments about it. (*See* Br. Resp't p. 34). DHEC makes similar suggestions in other parts of its brief. (*See* Br. Resp't pp. 4 n.5, 40). However, the admissibility of evidence and the framework for assessing its probative value are separate issues. Conceding that evidence is admissible at trial does not bar a party from later arguing that the court used erroneous legal conclusions and unsupported factual findings in its assessment of that evidence's weight.

IV. DHEC'S ARGUMENTS ON THE OPPOSITE-SIDE RULE DO NOT SUPPORT THE ADMINSTRATIVE LAW COURT'S DECISION ON THAT ISSUE.

DHEC's brief provides no meaningful defense of its two positions on the Opposite-Side Rule or of the ALC's decision on that issue. Rather, it consists of *ipse dixit* and legally incorrect arguments on peripheral matters.

A. DHEC's Position Lacks Merit and Explanation.

Without elaboration, DHEC maintains that the existing dock outside Weatherholtz's extended property lines constitutes "potential access" under the Opposite-Side Rule, as does the hypothetical chance that someday, the owner of that dock will successfully apply for a permit to rip it out of the marsh and build a new one. DHEC offers no explanation of how either of those positions comports with the language of the Opposite-Side Rule or with its purposes. Indeed, with one exception discussed below, DHEC does not really assert that Weatherholtz's explanation of the Rule's meaning and purposes is incorrect.

As to the ALC's decision, DHEC's only defense is to say "the ALC rightly noted that [']the opposite side of the creek['] includes the area within the neighboring property owner's extended property lines" as defined in Regulation 30-1(D)(53). (Br. Resp't p. 36). But just claiming the ALC was right merely begs the question. *Why was it right?* DHEC does not say. Weatherholtz, on the other hand, has explained why using Regulation 30-1(D)(53) is not an appropriate means for construing "opposite" in the Opposite-Side Rule. (Br. App. pp. 34-36).

Instead, DHEC attacks Weatherholtz's construction of the Opposite-Side Rule. It first contends Weatherholtz fails to construe the regulation as a whole—specifically, that Weatherholtz has not accounted for the role of Regulation 30-1(D)(53). (Br. Resp't p. 36).

But as just mentioned above, Weatherholtz has properly accounted for that definition; it has no place here. Indeed, Weatherholtz's construction takes into account a number of other provisions from Regulations 30-1 and 30-12, (*see* Br. App. pp. 30-33 & nn.10-12), far more than the one inapplicable definition that DHEC's interpretation considers.

Second, DHEC claims Weatherholtz has failed to account for agency deference. (Br. Resp't p. 36). On the contrary, Weatherholtz's construction treats agency deference as the law requires. Even DHEC agrees that this issue can be resolved using "plain language." (R. p. 93). Thus, deference to the agency's decision is not warranted. *See Kiawah Dev. Partners, II*, 411 S.C. at 32, 766 S.E.2d at 717 (stating that when the language of a regulation speaks directly to an issue, "the court must utilize the clear meaning of the statute or regulation"); 411 S.C. at 39, 766 S.E.2d at 720-21 ("Where the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper"); *see also Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("[W]here, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.").

B. Weatherholtz Is Not to Blame for DHEC's Omission.

In his opening brief, Weatherholtz pointed out that until the contested case hearing, DHEC did not take the position that the possibility of the upstream dock being moved constituted potential access. DHEC contends that its position has never changed; instead, it alleges, Weatherholtz just failed to understand its position because he did not issue discovery requests or take depositions "to find out everything possible regarding the Department's permitting decision." (Br. Resp't pp. 39-40).

As a threshold matter, whether DHEC's position has been consistent, and whether

Weatherholtz misunderstood DHEC's position, are not dispositive. The Opposite-Side Rule's clarity makes DHEC's interpretation immaterial, and in any event, it is not worthy of deference. Weatherholtz mentioned the apparent evolution of DHEC's position only as part of his point that, to the extent the ALC may have deferred to DHEC's interpretation, doing so was error for several reasons. What ultimately matters is whether the ALC's decision followed the Rule. It did not.

Weatherholtz will respond to DHEC's claim, but not because DHEC concedes it is impertinent. (Br. Resp't p. 39). The argument's real problem is that it ignores the law.

As mentioned above, when DHEC denies a permit application, it must explain its decision to the applicant. *See* S.C. Code Ann. § 48-39-150(C); 2 S.C. Code Ann. Regs. 30-4(B). Here, Thompson told Weatherholtz specifically that he was denying the permit under the Opposite-Side Rule because there was an existing dock upstream from Weatherholtz's lot. (R. p. 337). Thompson repeated that specific ground in his response to Weatherholtz's request for final review before DHEC's Board. However, Thompson did not articulate any other grounds to Weatherholtz or in his response. Until the contested case hearing, DHEC provided no indication that its decision on the Opposite-Side Rule involved any other facts or reasons. Between Thompson's explanation of his grounds and DHEC's duty to disclose, there was no reason to think DHEC's decision involved anything other than what Thompson disclosed to Weatherholtz.

DHEC's claim suggests that aggrieved permit applicants who want to learn why their permits were denied bear the burden of suing DHEC and then taking depositions to ferret out the alternative reasons it failed to disclose. That suggestion turns the laws mentioned above—and the notions of transparency and due process they promote—on their heads.

DHEC cannot blame applicants when it fails to follow its own regulation.

DHEC also contends that if Weatherholtz thought Thompson's alternative interpretation was improper, he should have objected. (Br. Resp't p. 40). That argument misses the point. The issue is not whether evidence of Thompson's second interpretation of the Opposite-Side Rule is admissible in court. It is whether that interpretation deserves to be taken seriously. Weatherholtz's point is that, even disregarding the interpretation's inconsistency with the Rule's language and purposes, the ALC should not have used an interpretation that DHEC may not actually be using. DHEC failed to show that Thompson used the interpretation in denying Weatherholtz's permit, let alone that DHEC's Board has ever adopted it or even considered it.[17] (*See* Br. Resp't p. 38).

C. Thompson Is Not DHEC's Policymaker.

Finally, Weatherholtz has pointed out that the ALC may have been improperly deferring to a single employee's interpretation, when courts may defer only to DHEC's Board. *See S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486.

DHEC asserts *Murphy v. South Carolina Department of Health & Environmental Control* overruled *Coastal Conservation League*, and now courts are to also defer to individual DHEC employees' interpretations of regulations. DHEC has misread *Murphy*. *Murphy* involved the meaning of the phrase "vicinity of the project" in a DHEC regulation. 396 S.C. 633, 640-41, 723 S.E.2d 191, 195 (2012). After defining "vicinity" for itself with a

[17] Although Thompson testified some things he was saying about the Opposite-Side Rule were consistent with DHEC's interpretation of the Rule, he did not specifically say that this second interpretation was how DHEC interprets the Rule. For example, DHEC claims in its brief that at page 200, lines 3-6 of the hearing transcript, Thompson testified the second interpretation was consistent with DHEC's historical interpretation of the Rule. (Br. Resp't p. 38). That is incorrect. At that point, Thompson was not discussing the possibility of moving the existing dock. Rather, he was saying that historically, DHEC will invoke the Opposite-Side Rule where there is an existing dock on the other side of the creek, even if that dock is outside the applicant's extended lot lines. (R. pp. 293:22-294:6).

dictionary, the Court held that a DHEC employee's application of the regulation in that case was "both reasonable and consistent with the plain language of the regulation." *Id.* The Court was not deferring to one lone employee's interpretation, and the opinion never mentions *Coastal Conservation League*.

As the Chief Justice recently noted, "The General Assembly placed significant authority *in the boards and directors of administrative agencies*, a decision which evinces the legislature's intent that courts defer to administrative agency decisions when appropriate." *Kiawah Dev. Partners, II*, 411 S.C. at 53, 766 S.E.2d at 728 (Toal, C.J., dissenting) (emphasis added). Nothing in *Murphy* suggests the Supreme Court decided to silently undermine the DHEC Board's authority to develop interpretations that would apply agency-wide by allowing individual staff members to create their own interpretations that—as in this case—the Board may never even consider. (*See* Br. Resp't p. 38).

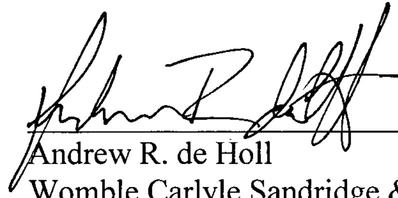
Again, however, DHEC's argument is beside the point. Even if DHEC is right about *Murphy*, deference to Thompson's interpretations would be warranted only if (1) the Rule is silent or ambiguous, and (2) Thompson's interpretations are "worthy of deference." *Kiawah Dev. Partners,* II, 411 S.C. at 34, 766 S.E.2d at 718. Neither condition exists.

CONCLUSION

For the reasons stated above and in Weatherholtz's original brief, 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.

[*A signature page follows.*]

Respectfully submitted this 18th day of May, 2015.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

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

Appellate Case No. 2014-001939

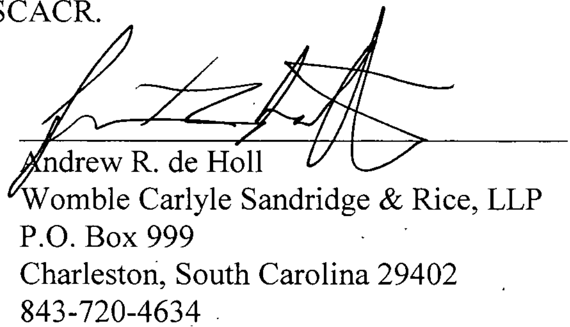
James Weatherholtz, Appellant,

v.

South Carolina Department of Health and Environmental Control, Respondent.

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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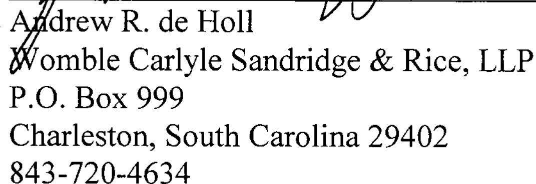

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