THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Shirley C. Robinson, Presiding Judge

Case No. 12 ALJ-07-0434-CC

Ken Bruning, Janet Bruning, David Feron, individually and as Trustee, Mary Feron, individually and as Trustee, Sally Saegmuller Haley and Terrell Page Haley, individually and as Co-Trustees, Martha James and Don Haarmeyer, individually and as Co-Trustees, and Pamela S. North.....Appellants,

v.

SCDHEC and Cat Island POA, c/o Gary Meyer..... Respondents.

Case No. 12 ALJ-07-0436-CC

In Re: Garfield Park, Phase 3

Cat Island POA, c/o Gary Meyer.....Petitioner,

v.

SCDHEC.....Respondent.

INITIAL REPLY BRIEF OF THE APPELLANTS

John E. North, Jr., # 06570
North & Black, P.C.
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorney for Appellants

TABLE OF CONTENTS

ARGUMENT.....1

1. The inline filters permitted by DHEC do not "store" stormwater as mandated by the CMP.....1

2. The Retrofit Project was a modification of an existing permit precluded by S.C. Code Reg. § 61-9-122.62.....5

3. DHEC failed to consider the adverse effects of the "project" when it granted the necessary detention waiver and violated the CMP when it did so..... 10

4. The Retrofit Project affected the critical area and was subject to review under the Coastal Tidelands Act, § 48-39-150 and the CMP Guidelines.....13

5. The evidence established that the Retrofit Project was within 1,000 feet of shellfish beds and should not have been approved.....15

6. The Retrofit Project will result in destruction of freshwater wetlands in contravention of the policies of the State.....16

7. Approving the Retrofit Project negates the required stormwater detention for an adjacent subdivision.....20

8. Delay and administrative machinations should not deprive Homeowners of a remedy.....21

9. The standing of Pamela North has already been resolved.....24

CONCLUSION.....24

TABLE OF AUTHORITIES

Cases

Murphy v. S.C. Dept. of Health and Envtl. Control, 396 S.C. 633, 640, 723 S.E. 2d, 191, 195 (2012) 5

Statutes

Coastal Tidelands Act, 48-39-150 13

Regulations

CMP Policies, III-59 16
CMP Policies, III-6 16
CMP Policies III-60 1
Reg. § 72-307(B)(2) 10
Reg. § 72-307(C)(4) 10
Reg. § 72-307(C)(5)(g) 12
Reg. § 61-9-122.62 5

ARGUMENT

1. The inline filters permitted by DHEC do not "store" stormwater as mandated by the CMP.

The Respondents concede that the S. C. Coastal Management Program ("CMP") requires that treatment of stormwater within one-half mile of the coastal zone must be through storage. (Respondents' Brief, p. 8). Respondents also concede that the CMP provides for three permissible methods of providing the required storage. (Respondents' Brief, p. 8). Respondents quote the CMP, which states that:

"*Storage* may be accomplished through retention, detention or infiltration systems, as appropriate for the specific site." (CMP, III-60, Exhibit 19).

Respondents concede that "detention" and "retention" involve "storage" of stormwater, and that "infiltration" involves capturing the stormwater "in some form of custody within the infiltration practice" and filtering it through the soil profile. (Respondents' Brief, p. 9). Respondents further admit that "the testimony is clear that the proposed treatment of stormwater for GPP3 is not infiltratration...". (Respondents' Brief, p. 9). By Respondents' admission, the inline filters approved by DHEC are not one of the three permissible methods of stormwater storage specified in the CMP.

Where the views of the parties diverge is that the Respondents contend that: (a) the proposed method for treating GPP3 stormwater by filters inserted into stormwater inlets share similar characteristics to treatment by infiltration of stormwater through the soil profile, (b) that inline filters can provide similar quality treatment, and (c) without any citation of any authority, that "An inline filtration system has an inherent storage capacity, and is a permissive method to to

accomplish the mandatrory requirement under the CMP". (Respondents' Brief, p. 10). The Respondents further contend that the language of the CMP, that mandates that the required storage "may be accomplished through retention, detention, or infiltration systems, as appropriate for the specific site", simply provides examples of methods to accomplish the required storage (Respondents' Brief, p. 8) and that inline filters are a permissible method to accomplish the mandatory requirement of the CMP. (Respondents' Brief, p. 10).

In order to agree with the position of the Respondents, this Court must ignore the testimony of both the DHEC personnel and the testimony of the engineers of both the Developer and the Homeowners, and interpret the requirements of the CMP in a manner that is completely unreasonable and inconsistent with the clear languare of the CMP.

With regard to the unsubstantiated assertion that inline filters have "an inherent storage capacity, the Developer's own engineer, Ryan Lyle, testified that the inline filters do not meet the description of the storage requirements on page III-60 of the CMP. (617:4-11, Exhibit 19). He testified that the inline filters do not provide treatment by "retention, detention or infiltration". (616:6-10). He acknowledged that, at times of heavy rains, the filters would be overtopped and the stormwater released into Chowan Creek with no treatment at all. (503:20–25). That testimony was consistent with that of Homeowners' engineer who testified that the inline filters had no capacity for storage of stormwater. (834:11-17). DHEC's Mr. Geer further agreed that the proposed inline filters were not a means of "infiltration".

Q. Now, with the catch basin inserts proposed in the retrofit, would you agree that those fall under the category of catch basin inserts that are pre-fabricated control

devices?

A: Yes.

Q. And they are not in any way, shape or form a method of treating stormwater by infiltration, are they?

A: No. (255: 2- 10)

Q: I mean, just to be perfectly clear, an inline filter is completely different than stormwater treatment by infiltration where it soaks down into the ground to clean it; is that correct?

A: From a stormwater flow standpoint, yes. (182: 15-20).

On cross-examination, the POA's attorney elicited Mr. Geer's opinion that the methods of storage specified in the CMP were "discretionary". However even this testimony was clear that any other method of treatment would have to provide "storage".

Q. Do you consider the word may discretionary, say, instead of must, which would not be discretionary.

A. Yes.

Q. So, it could be detention, retention, infiltration or another type of BMP **that could provide storage**?

A. Correct.

Q. Now, do you think that storage guidelines is focusing on water quality in the coastal zone.

A. These **storage** guidelines, yes. (310: 9 – 20).

The death knell for Respondents' argument is that Mr. Geer not only testified that, under the CMP, storage was required, but also clearly testified that the in-line filters did not "store" stormwater.

Q: Tell me how the retrofit permit stores the first one half inch of runoff from the entire site?

A: It doesn't store. It filters that half-inch of runoff. (178: 9 -13).

When the Respondents concede that treatment of stormwater in the coastal zone requires storage and all of the evidence shows that inline filters do not store stormwater, approval of the Retrofit Permit cannot be affirmed by this Court.

The testimony of Mr. Geer, above, also confirms that the inline filters do not share material characteristics to infiltration. With infiltration, every drop of stormwater is captured and filtered through the earth. The inline filters are specifically designed to never allow stormwater to back up into the streets and have overflow mechanisms that dump all of the stormwater without any treatment if the filter is clogged. As the POA engineer, Ryan Lyle, testified, in times of heavy rains, the filters would be overtopped and the stormwater released into Chowan Creek with no treatment at all. (617: 4-11; 503:20–25).

With regard to the unsubstantiated claim that the inline filters provide a similar quality treatment to the storage described in the CMP, DHEC admitted that that the proposed in-line filters did not meet even the minimum standard of pollution removal mandated by the stormwater regulations for non-coastal sites. Under the regulations, filtering devices such as those proposed for the Retrofit Project are required to remove 80% of pollutants. It was undisputed that the in-line filters Cat Island proposed to use do not meet that requirement. (223:23–224:19; 499:18-21).

Finally, after admitting that the CMP requires storage, the Respondents argue that use of the word "may", in describing the three methods by which the mandatory storage "may be accomplished", somehow gives to DHEC discretion to consider other methods of treating stormwater in the coastal zone.

In an attempt to support the approval of inline filters, Respondents' counsel

elicited the following testimony from Mr. Geer:

Q. So, it could be detention, retention, infiltration or another type of BMP **that could provide storage**?

A. Correct. (310: 9 – 20).

The clear wording of the CMP does not contain the words "or another type of BMP that could provide storage". DHEC's "interpretation" of the regulation is entitled to deference on if it is reasonable and consistent with the plain language of the CMP. *Murphy v. S.C. Dept. of Health and Envtl. Control,* 396 S.C. 633, 640, 723 S.E. 2d, 191, 195 (2012). DHEC has no authority to "interpret" the regulation by inserting additional language.

There is no basis in the CMP or the record to say that the three specified means for "storage" of stormwater set forth in the CMP as are merely "examples" of what is acceptable. There is no basis in the record for Respondents' contention that inline filters provide "similar quality treatment" or that they "store" stormwater when every witness, including DHEC's Mr. Geer, confirmed that filters do not "store".

This Court should find that the CMP clearly provides that stormwater within one-half mile of the coastal zone must be stored, that the required storage is to "be accomplished through retention, detention, or infiltration systems, as appropriate for the specific site", that the permit issued by DHEC allowing treatment by inline filters was in violation of the requirements of the CMP, and that the Final Order of the ALC should be reversed.

2. The Retrofit Project was a modification of an existing permit precluded by S.C. Code Reg. § 61-9-122.62.

The Respondents concede that the 2004 stormwater permit for treatment by

detention remains in effect until the Retrofit Permit is approved. (Respondents' Brief, p. 11, R. p. 611:16-612:3). It is undisputed that the detention provided by the Cat Island Lake was permitted and approved by DHEC in 2004 as the stormwater treatment system for the project site and that permit is still in effect. (165:22-25). There was further no dispute that, if DHEC issued a permit for the Retrofit Project, the use of Cat Island Lake as a means of stormwater treatment for that site would be abandoned in favor of the use of in-line filters.

As set forth in the Homeowners' Brief, under S.C. Code Reg. § 61-9-122.62, existing permits can be modified only if the applicant makes certain showings to justify that modification. Subsection (d) of that regulation sets forth "Causes for modification". The only arguably applicable "cause" is section (d)(1) that allows for modification if there are:

> ...material and substantial alterations to the permitted facility....which justify the application of permit conditions that are different or absent in the existing permit. (Homeowners Exhibit 82).

DHEC made no attempt to perform the analysis required by Reg. 122.62. Mr. Geer testified that, so long as the Retrofit Project met the applicable stormwater regulations, he was obligated to approve it, even if the proposal involved a modification or termination of an existing permit. (153:153:7-17). He testified that, had the Developer decided to keep the existing stormwater detention system, he would be obligated to approve it. (169:10-14). He was unaware of the requirements imposed by Reg. 122.62 for modifying an existing permit and he neither acquired nor considered any information with respect to the basis or justification for the changing the existing means of stormwater treatment. (153:18-154:17; 164:9-23).

The Respondents argue that issuing a permit for the Retrofit Project is not actually a "modification" of that 2004 permit. That argument is nonsensical. First, there cannot be two separate stormwater treatment permits in existence simultaneously for the same project site. If the Retrofit Project is approved and a different method of treating stormwater is implemented, then, obviously, the 2004 permit for treatment by detention has been modified. Even the Respondents concede that the "Retrofit would, as a practical matter, result in a 'change to' or 'modification of' the present stromwater treatment system". (Respondents' Brief, p. 13).

Second, the fact that the Respondents claim that the Retrofit Project was a "new application" doesn't make it so. The very name given to the application, "Retrofit", indicates that it is not a new system, but an application to modify the manner of treating stormwater and to change the existing permit to treat stormwater by the detention of the Lake.

As set forth in the Homeowners' Brief, in the scheme of the multi-phase real estate development on Cat Island, a leak in the dike that can be repaired for $24,760.00 is not a "material and substantial alteration" of the entire stormwater system installed and permitted for a multi-phase residential development. The stormwater system for GPP3 includes all of the storm sewers and inlets throughout the subdivision, the lake that served as the detention basin, and the entire length of the dike, almost all of which remained intact. The leak in the dike is especially not material and substantial when the "change" was the result of the Developer's failure to perform the routine maintenance that was its obligation (42:11-25; 78:5-7; 898:22-

899:12) and where the proposed substitute stormwater treatment system was less effective than the existing, permitted one.

Even if the leak in the dike were to be considered a "material and substantial" alteration of the existing stormwater facility, before the regulation allows for a change in the permit, there must additionally be proof of "permit conditions that are different or absent in the existing permit". There was no change in any of the permit conditions and certainly no factual basis in the record to show compliance with the limitations on modifications imposed by the regulation.

The permit conditions involved the need to provide stormwater treatment for Garfield Park. There is no evidence that the development had changed since 2004. There is no evidence of any change to the conditions, needs, or requirements of the stormwater system since the current permit was approved and issued in 2004 other than a break in the dike that can be easily repaired. The only thing that changed since 2004 with regard to the subdivision or its stormwater treatment was the failure of the Developer to do any of the required maintenance to the dike. Absent permit conditions that are different or absent in the existing permit, no modification of the existing permit is allowed.

The original stormwater system was constructed and permitted on the basis of the detention provided by the Lake. The Homeowners had constructed lake-front residences around the Lake that, without the leak in the dike being repaired, allowed tidal waters to encroach on their approved and platted subdivision. (605:7-15). It is wholly unreasonable to allow the Developer to change the manner of treating the stormwater when the conditions that existed included platted residential lots whose

owners had paid for that amenity and when abandoning the Lake impacted the economic and aesthetic impacts to those homeowners. A breach in the existing dike, which could be repaired at a cost of $24,760.00 and which the Developer was obligated to repair, is simply not a "material alteration" as to justify an entirely different and less efficient means of stormwater treatment that costs more than a repair to the dike.

The Homeowners have vested rights in the existing mode of treating stormwater and are adversely affected by the modification that DHEC approved. Property owners have a legal right to expect that the method of treating the stormwater will not be changed unless necessitated by a "material and substantial alteration" and unless there are "permit conditions that are different or absent in the existing permit". This regulation makes perfect sense. If DHEC were free to let developers change the manner of treating residential stormwater treatment systems any time that they chose, the result would be catastrophic. The precedent of this case and the protection of the rights granted by the regulation are very important. The negative result of letting permits be modified without the required cause is exemplified by the plight of the Homeowners, whose lake-front homes are subjected to tidal flows (605:7-15; 541:20-550:8; 603:18-604:1; and 571:19-24) and left without a lake because DHEC did not enforce the requirement of Reg. § 122.62 and merely deferred to the desires of the Developer.

Because the circumstances presented by this case show that the requirements of Reg. § 122.62 for modifying the 2004 stormwater permit were not properly considered and because just cause for modifying the 2004 permit is not

reflected anywhere in the record, the Final Order approving of the modification should be reversed.

3. DHEC failed to consider the adverse effects of the "project" when it granted the necessary detention waiver and violated the CMP when it did so.

The Homeowners contend that DHEC erroneously granted a waiver of water quantity requirements. In response, Respondents intertwine a waiver of water quantity requirements, i.e. a detention waiver, with issues relating to water quality. The Homeowners have never contended that DHEC granted a water quality waiver. What Homeowners have argued is that DHEC could not grant a water quantity waiver when the waiver resulted in significant adverse impacts on the receiving natural waterway, including adverse water quality impacts, and adverse impacts on downstream property owners like the Homeowners.

The Stormwater Management and Sediment Reduction regulations, which apply to all areas of the State, provide that "water quantity control is an integral component of the overall stormwater management", that "discharge velocities shall be reduced to provide nonerosive velocity flow" and that the reduction in velocity may be accomplished "from a structure, channel, or other control measure". (Reg. § 72-307(C)(4), Pet. Ex. 3, p. 22).

The requirements of § 72-307 may be waived, but only if the "proposed project" will have no significant adverse impact on the receiving natural waterway or downstream properties". (Reg. § 72-307(B)(2).

In granting the waiver, DHEC considered only impacts from stormwater, and not from the "proposed project", as a whole. Mr. Geer admitted that he did not

consider the complaints of the Homeowners concerning tidal encroachment onto their residential property, loss of value to their homes, destruction of the Lake habitat, or loss of the enjoyment of the Lake because those impacts were not related to stormwater discharges and thus not within his purview. (190:3-191:22; 191: 23-25; 255:15-257:12).

The language of the regulation speaks in terms of adverse impacts from "the project", and is not limited to adverse impacts solely from stormwater.

Mr. Geer acknowledged that the Retrofit Project contemplated leaving the dike unrepaired and allowing the lakebed to become tidal and part of the critical area. (150:25–151:18). The Developer's engineer further admitted that the Homeowners' properties were downstream of the project site and that having tidal flows over their residential properties would be an adverse impact to the Homeowners. (603:18-604:1 and 571:19-24). He testified that any change from the currently permitted Lake and dike for the treatment of stormwater, whether by in-line filters or any other method that did not include repair of the dike, would result in saltwater tides reaching the Homeowners' property. (605:7-15).

The "impact" of "the project" is to leave the Homeowners properties subjected to the ebb and flow of tidal salt water instead of surrounding a lake with controlled water levels and transforming the formerly pristine lake into a mudflat. The Homeowners' Brief, on pages 22-29, sets forth the abundant evidence of the significant negative impacts on the Homeowners and to the receiving natural waterway.

The stormwater regulations further provide that "additional water quality requirements may be imposed to comply with the S.C Coastal Council Stormwater Management Guidelines" and that "If conflicting requirements exist for activities in the eight coastal counties, the S.C Coastal Council guidelines will apply". (Reg. § 72-307(C)(5)(g).

Likewise, the CPM notes that the stormwater regulations, including those cited above, "establish the procedure and minimum standard for a statewide stormwater program", but that, in the eight coastal counties, additional requirements apply, and that "if conflicting requirements exist for activities in the eight coastal counties, OCRM guidelines will apply". (CMP, p. III-60). The CMP then sets forth the additional requirements, applicable to the eight coastal counties, which include the necessity for "permanent water quality ponds having a permanent pool designed to store" the stormwater runoff and the manner of treating that stormwater. (CMP, p. III-60). Nowhere in the CMP is there any provision that would authorize or allow a variation or waiver of the CMP requirements for stormwater discharges within the coastal zone. In fact, permits in the eight coastal counties must be certified as "consistent to the maximum extent practicable". (CMP, p.vi).

Because the CMP imposes the heightened the requirement in the eight coastal counties that there be "permanent water quality ponds" and "storage" and does not provide for any waiver of these requirements, the ALC erred as a matter of law in approving a detention waiver that is not consistent with the controlling requirements of the CMP with respect to coastal counties and further erred by affirming DHEC's limited view of "impacts" as only those resulting from stormwater

and not the "project" as a whole. The Final Order should be reversed.

4. The Retrofit Project affected the critical area and was subject to review under the Coastal Tidelands Act, § 48-39-150 and the CMP Guidelines.

The Coastal Tidelands Act, § 48-39-130 provides that "no person shall fill,...drain...or in any way alter any critical area without first obtaining a permit. § 48-39-150 sets forth the matters that are required to be considered in determining whether the permit is denied. Many of those considerations apply to the Retrofit Project, including "The extent to which the proposed use could affect the value and enjoyment of adjacent owners".

In order to avoid the statutory considerations, Respondents argue that the Retrofit Permit does not alter the critical area and thus no critical area permit is required. However, the Cat Island engineer acknowledged that the Retrofit project involved stabilization of areas that might be covered at high tide and that such areas were, by definition, an effect on the critical area. (508:24-509:7). He also confirmed that, by leaving the breach of the dike open, the acreage of the lakebed would be added to the critical area. (505:2-9).

The position of the Respondents is completely refuted by the very CMP Consistency Determination made by DHEC in connection with the Retrofit Permit. In it, DHEC clearly states that a critical area permit is required because "plans show alteration of critical area..." (POA Exhibit 40, p. 3). Even DHEC personnel agreed that the Retrofit Project would affect the critical area. Mr. Madlinger testified that allowing the dike to remain open as contemplated by the Retrofit Project would have three effects on the critical area: 1) the addition of 4 to 8 acres of freshwater lake

bottom to it; 2) the entire drainage basin of the Lake would flow out; and 3) the pollutants from the last fifty years which had settled to the bottom of the Lake would wash back and forth in the critical area. Mr. Madlinger characterized these effects as negative effects. (755:23–575:1).

The relevant considerations under the Coastal Tidelands Act and the CMP for the issuance of a critical area permit are the same. They include the extent to which the Retrofit Project could cause erosion, the extent that it could impact the habitats of endangered species of wildlife, the extent to which all feasible safeguards are taken to avoid adverse environmental impacts, and the extent to which the proposed use could affect the value and enjoyment of adjacent owners. While DHEC simply ignored these considerations, the record is clear that the Retrofit Project had "adverse impacts" which would preclude the issuance of a critical area permit. As noted and cited to the record in the Homeowners' Brief, there are negative impacts to the habitats of wildlife, including wood storks, there have been absolutely no safeguards imposed to avoid adverse environmental impacts, and the value and enjoyment of adjacent properties has been decimated..

Because a critical area permit was necessary for the Retrofit Project, DHEC and the ALC should have reviewed it under § 48-39-150 of the Coastal Tidelands Act, as well as the CMP Guidelines pertaining to activities in the critical area. (CMP, Homeowners' Ex. 19, Guidelines, p. III-5). Had the ALC reviewed the factors which must be considered before issuing the necessary critical area permit, it would have found that the Retrofit Project could not be approved because it was inconsistent with the objectives of the Coastal Tidelands Act and the CMP.

5. The evidence established that the Retrofit Project was within 1,000 feet of shellfish beds and should not have been approved.

There was no disagreement among the parties that, if the Retrofit Project was within 1,000 feet of the shellfish beds in Chowan Creek, the provisions of the CMP precluded the Retrofit Project. (212:2-18). The language of the CMP simply refers to "projects that are located within 1,000 (one thousand) feet of shellfish beds". The regulation does not specify any means of measurement and there is no authority for utilizing a means of measuring this distance other than a straight line from the site of the Retrofit Project to the shellfish waters.

The evidence at trial clearly established that the distance was less than 1,000 feet. The following is a summary of that evidence:

1. The Notice of Intent ("NOI") submitted to DHEC in support of Cat Island's request for a permit for the Retrofit Project, signed and certified by both the Developer and its engineer, stated that the distance between the Retrofit Project and Chowan Creek was 600 feet. (Homeowners' Exhibit 2).[1]

2. Although DHEC's Mr. Geer initially calculated the distance as 1,040 feet by using aerial photographs and following the serpentine drainage path[2] of stormwater flowing out through the former lakebed at low tide, he ultimately conceded that at it would be more appropriate to measure the distance at higher tides when the stormwater was not confined to a narrow channel and would flow more directly to the shellfish beds. (Petitioners' Request for Contested Case Hearing, Ex. D, p. 2; 237:1-15).

3. A survey obtained by the Homeowners demonstrated the distance to be 700 feet. (Homeowners' Ex. 53).

4. The Cat Island engineer measured the distance as 1,005 feet by beginning the measurement from the middle of project site, rather than from the outfall device nearest the lakebed[3], which Mr. Geer of DHEC said was proper[4]. (Homeowners'

[1] In their Brief, the Respondents did not discuss this clear contradiction of their position.
[2] The DHEC Board was critical of this method and indicated that the distance should be calculated at higher tides.
[3] The Cat Island engineer ultimately admitted that there was a stormwater treatment device closer to the shellfish beds than the one he used for his measurement. (536:1-23; 540:21-541:19; Homeowners' Ex. 64, Sheet 3)
[4] Mr. Geer initialed Exhibit 52 at the location the measurement should have begun.

Exhibit 52; 238:17-239:24; Homeowners' Ex. 72; 238:17-248:3). From the correct starting point the shellfish beds were 300 feet closer, making the Cat Island measurement 705 feet, only 5 feet different than the measurement of the Homeowners' engineer. (Homeowners' Ex. 52 and 53; Homeowners' Ex. 72; 245:15-247:23). Mr. Geer confirmed that the measurement, as made in the manner DHEC considered correct would be 705 feet. (246:9-248:3).

The ALC cannot ignore the written certification of distance by Cat Island and rely on the measurement of the Cat Island engineer, who admitted that his measurement commenced in the middle of the development and not at the location determined by DHEC to be correct. The Final Order should be reversed and this Court should find that no change to the existing and approved method of treating stormwater can be considered that does not comply with the retention requirements of the CMP for developments within 1,000 feet of shellfish beds.

6. The Retrofit Project will result in destruction of freshwater wetlands in contravention of the policies of the State.

The CMP Policies, III-59 provide:

Project proposals which would require fill or other significant permanent alteration of a productive fresh water marsh will not be approved unless no feasible alternative exists, or an overriding public interest can be demonstrated, and any substantial environmental impact can be minimized.

Similarly, CMP Policies, III-6, provide:

Residential development which would require filling or other permanent alteration of salt, brackish or freshwater wetlands will be prohibited unless no feasible alternatives exist. . These marshes are valuable habitat for wildlife and plant species. .

In order to justify the Retrofit Project, which leaves the breached dike open with the Lake and its surrounding freshwater wetlands subjected to twice daily saltwater tidal flows, the Respondents argue that "the alteration of the wetlands and marshes on this site occurred when the impoundment was first created by

construction of the dike" and that "The area is merely returning to its natural state". (Respondents' Brief, p. 28).

The Lake and the dike had been in existence since the early 1960s. (509:8-23). Merely because, fifty-five years ago, the fresh water wetlands were created or enhanced by impoundment, does not deprive them of their right to be protected.

The Developer purchased Cat Island in 1982. (73:5-13). The Developer owned the Lake and the Rookery subdivision, where the Homeowners reside, and which was platted into lakefront lots in 1988. (Homeowners' Ex. 44). For the last 55 years, the Lake captured all of the stormwater for the Lake's entire drainage basin (509:8-512:13) and was a freshwater habitat for wildlife and freshwater vegetation. The CMP prohibits any alteration of any existing wetland, whether salt, brackish, or fresh. (CMP Policies, p. III-6). There is no authorization in the CMP to "restore" the wetlands to the state that they may have been in 55 years ago.

Respondents also attempt to argue that the Retrofit Project is not an alteration of the wetlands. The suggestion that when a Lake becomes a mudflat subjected to daily tidal flows, there is no alteration is absurd. Even DHEC admitted that allowing the Lake to become tidal would change the nature of the vegetation and transform a freshwater lagoon to a saltwater marsh. (219:21-220:1). Similarly, Mr. Madlinger acknowledged that the area was transforming from "the non-moving water of the Cat Island Lake" to a tidally influenced environment (741:5-13), that when saltwater enters freshwater wetlands, there is a change in the nature of the vegetation from freshwater vegetation to saltwater vegetation (753:5-18), and that he observed that a large number of Chinese Tallow trees, which live in freshwater

wetlands, had died. (751:1-10).

Finally, Respondents attempt to argue that the Lake was already tidal "even with all three boards of the flashboard riser were (sic) in place". (Respondents' Brief, p. 6). However, Cat Island's engineers established that the spillway elevation with all three boards in place was 4.66 feet and that the mean high tide elevation at the dike is 4.1 feet. (Homeowners' Ex. 56; 96:12-97:13; 523:13-25). Accordingly, saltwater could not enter the Lake through the pipe in the flashboard riser except when the tide was higher than six inches above an average high tide, and then only for the period of time that the tide remained six inches higher than an average high tide.[5] Whatever small amount of saltwater ever got into the Lake was not sufficient in quantity to change the freshwater nature of the 8 acre Lake as confirmed by all of the evidence:

a. The CMP notes that federal law mandates that the U.S. Army Corps of Engineers delineate wetlands. (CMP, p. III-58-59). It determined that the areas abutting the fringes of the Lake were freshwater wetlands. (Cat Island Ex. 11, p.1; Homeowners Exhibit 84). Mr. Williams, of DHEC, agreed that he would accept the designation of the Corps as establishing that the area was a freshwater wetland. (808:8-19).

b. The engineering drawings created by Cat Island's engineer showed freshwater wetlands along the Lake, consistent with the Corps designation, and he testified that all of the freshwater stormwater from the entire drainage basin of the Lake was stored in the Lake, and that, in the absence of the dike, the property delineated by the Corps as freshwater wetlands would be regularly saturated with saltwater during spring tides. (545:18-546:6). (Homeowners' Exhibit 58; 530:16-25; 545:18-546:6)

c. The Declaration of Restrictive Covenants for Wetlands Preservation ("Covenants") executed by Developer agreeing with the Corps not to alter the wetlands adjacent to the Lake and the site of the Retrofit Project which the Developer testified were freshwater. (Homeowners Ex. 37; 56:15-17). The Cat Island engineer confirmed that a spring tide would fill the entirety of the

[5] No saltwater could enter the Lake at any time during a normal 8-9 foot tidal cycle.

freshwater wetlands dedicated under the Covenants with saltwater. (544:9-545:23).

d. The Homeowners testified that the freshwater vegetation on their property along the boundaries of the Lake died when exposed to the saltwater tides after the dike was breached (412:9-22; 468:3–14; 452:6-22) and that, prior to the dike failure, alligators resided in the Lake (448:8-21) and deer drank from it. (462:12-15).

e. Homeowners' Exhibit 1, pages 31-34, establish the extent to which the wetlands and trees on the boundary of the Lake provided a valuable habitat for wood storks and other wading birds. Homeowners' Exhibit 5, p. 8–21, demonstrates the encroachment of saltwater tides on the North property. In Homeowners' Exhibit 63, photographs taken 4 ½ years after the breach of the dike, fully demonstrate the "alteration" of the area from a freshwater habitat to a saltwater tidal mud flat.

The ALC incorporated verbatim into its Final Order certain findings of fact proposed by Cat Island (Cat Island Proposed Order, R. p.) and found that the Lake was actually a salt marsh prior to the break in the dike and that no alteration would result from the Retrofit Project. This finding is in complete conflict with the formal designation of the wetlands by the Corp of Engineers, with the Cat Island engineer's testimony, and with the admissions of DHEC personnel cited above.

Given the admissions of DHEC and the Developer's engineer that the Lake was fresh water, there is no basis in the record to support the finding of the ALC. The "naturalizing" of the wetlands that Respondents suggest is taking place is the "alteration" prohibited by the CMP. Without regard to the nature of the area historically, at the time the Retrofit Project was approved it was a productive, freshwater habitat, which had been in existence for at least 55 years. Under the CMP, all wetlands are entitled to be protected and there is no authority for DHEC to destroy one type of wetland in preference for another. The Retrofit Project "alters" a freshwater wetland and is precluded by the requirements of the CMP. The Final

Order authorizing issuance of the General Permit and finding the project in compliance with the CMP should be reversed.

7. Approving the Retrofit Project negates the required stormwater detention for an adjacent subdivision.

Tabby Park subdivision, an area adjacent to the site of the Retrofit Project, which is within the drainage basin of the Lake, was required to meet stormwater treatment regulations currently in effect. (143:19–23; 281:13-22). As previously set forth, the CMP requires that, in the coastal zone, "storage" is required. (CMP III-60). Mr. Geer testified that the necessary storage and release is accomplished by a "structure". (134:18-22). The Homeowners' engineer, Mr. Moore, testified that there is no structure detaining the Tabby Park stormwater other than the Lake with the dike in place. (857:6-18; 900:11-16). The Cat Island engineer admitted that there was no detention structure that would detain and release the Tabby Park stormwater at a controlled rate. (584:2-20). DHEC admitted that the Lake detained the Tabby Park stormwater. (143:19-144:8).

Respondents argue that there was no evidence in the Tabby Park file that specifically stated that Tabby Park relied on the Cat Island Lake as a detention structure for its stormwater and, accordingly, DHEC did not have to take into consideration the effect of the Retrofit Project on Tabby Park stormwater treatment. The file simply indicated that detention would be provided by the existing lagoon system. That position elevates form over substance.

When the only detention structure in the lagoon system is the outfall device of the Lake, and when the stormwater of Tabby Park is detained by the Lake, failing to

repair the dike leaves Tabby Park without any detention structure for its stormwater.

For DHEC to merely ignore the practical effect on the Tabby Park stormwater of leaving the only "structure" between it and the receiving waterway unrepaired is contrary to the both the stormwater regulations and the Policies of the CMP. The Final Order should be reversed.

8. Delay and administrative machinations should not deprive Homeowners of a remedy.

As set forth in the Homeowners' Brief, the Developer had obtained two, successive authorizations from OCRM to repair the dike, the last of which was issued September 3, 2010. (Homeowners' Exhibit 33) That authorization was valid for two years. Pursuant to the Permit Extension Joint Resolution of 2010 the legislature suspended the running of any development approval until December 31, 2012. "Development approval" was defined to include "an approval issued by the State, an agency or subdivision of the State, or a unit of local government, **regardless of the form of the approval**...". There is no basis or authority for the Respondents to contend that that permit was not subject to the resolution. The clear language used by the legislature applies to "an approval" regardless of "the form of the approval".

Accordingly, the two-year period allowed to the Developer by OCRM for undertaking repairs to the dike did not begin to run until December 31, 2012, and was in effect at the time that this matter was before the DHEC Board. There was nothing preventing either DHEC or the DHEC Board from requiring the Developer to repair the dike. It was obligated to do so in accordance with the maintenance and

repair agreement it executed in 2004 as part of the permit to use the Lake as a stormwater treatment facility. It had the necessary approval to do so.

When DHEC staff failed to do so, the Homeowners asked the DHEC Board to order the repair. (Homeowners' Ex. 24). The DHEC Board did not address that request. The Homeowners asked the ALC to review that decision and to order the repair. (See Exhibit B, p. 2 to Petitioners' Request for Contested Case Hearing). That issue was before the ALC for decision. Under the facts presented, the failure of the ALC to reverse the DHEC Board and order the repair was error.

DHEC acknowledges that the 2004 permit for stormwater treatment by use of the detention provided by the lake is still in effect. (165:22-25). DHEC also concedes that the Lake, even with the breach in the dike, still provides some level of stormwater detention. (218:19-119:20). At each stage of the proceeding, the Homeowners have been asking for enforcement of the Developer's obligation to simply repair the dike. It is patently unreasonable for the Respondents to take the position that the passage of time now precludes that remedy.

Whether additional permitting at this point in time would be required for repair of the dike is totally irrelevant to whether or not the Homeowners are entitled to a remedy and whether the Retrofit Permit must be set aside. For years, the Homeowners tried in vain to get DHEC to take some action while DHEC allowed the Developer and the POA to drag out the proceedings by offering substitute stormwater treatment plans. Delay and potential further regulatory hurdles are no basis to deprive the Homeowners, the fresh water wetlands, and the coastal zone of the protections to which they are entitled.

With respect to Respondents' argument that the area is now tidal water belonging to the state, as DHEC itself has conceded, the 2004 permit is still in place and the Cat Island Lake is still the permitted and approved stormwater treatment system. Until the Retrofit Project is approved and the 2004 permit modified and superseded, the Lake is the approved stormwater detention basin for the development, the property remains that of the Developer, and its repair obligation remains intact.

Respondents argue that the Lake does not completely retain stormwater and thus does not comply with the CMP. Although it is not a perfect retention pond, and would be more accurately described as a detention pond, the fact remains that in 2004 DHEC approved it as the stormwater treatment system for GPP3. The issue before this Court is not whether the 2004 permit was properly issued. The issue is whether the proposed new method for treating stormwater is required to and does comply with the clear requirements of the CMP. The simple answer is no.

The DHEC Board and DHEC had the power to require the Developer to repair the dike and the permit granted by OCRM to do so was still in effect. When DHEC erroneously failed to order that repair, it cannot avoid the consequences of that error on the basis of the expiration of the OCRM permit during the time this matter was being litigated or the potential necessity of other permitting.

This Court should reverse the ALC and find that DHEC should have ordered the Developer to repair the dike in accordance with its obligation.[6]

[6] Because DHEC failed to take any action, the site has been without any stormwater treatment since 2009, the antithesis of the regulatory requirements for effective stormwater control and

9. The standing of Pamela North has already been resolved.

This Court has already ruled against Respondents on this issue. (Order Denying Motion to Dismiss).

CONCLUSION

In this case, DHEC joined with the Developer[7] in submitting a proposed order (Cat Island Proposed Order, R. p.) that was adopted virtually verbatim by the ALC. In that Order, the ALC found that the ruling of DHEC's own Board of Directors should be reversed. (Final Order, p. 19). In the view of Petitioners, when the order of the ALC, as well as the Brief of DHEC before this Court, has been drafted in whole or part by counsel for the Developer, extra scrutiny may be appropriate.

The Retrofit Permit must be set aside because inline filters do not provide storage of stormwaters as required by the CMP, the regulations do not allow for modification of an existing permit without "cause", and a detention waiver violates the CMP and can never be given when the project has adverse impacts to the environment and the Homeowners. The Retrofit Permit is further inconsistent with the considerations mandated by the CMP for coastal zone sites, and violates the CMP by failing to retain stormwater when the site is within 1,000 feet of shellfish beds. The Retrofit Project violates the CMP by impermissibly altering a freshwater wetland area and transforming it to a tidally influenced saltwater mudflat. Approval of the project further allows the stormwater of Tabby Park, the adjacent subdivision,

---

treatment. Even if DHEC were inclined to consider a substitute method, it could easily have required an interim repair to protect the environment and the Homeowners while it analyzed the proposal.

[7] The Developer is the holder of the 2004 permit and controls the POA, which is the applicant for the Retrofit Permit.

to discharge into Chowan Creek without detention.

To say that the Retrofit Project is not "consistent to the maximum extent practicable" with the policies of the CMP is a vast understatement. The Final Order must be set aside.

This Court should not condone the act of a Developer to abandon, for its own financial reasons, a permitted stormwater treatment system in favor of one which does not meet the requirements of the CMP and applicable regulations, which results in tidal flows onto residential lots platted and sold by the Developer, and which results in disastrous consequences to the environment. The Final Order approving the Retrofit Project should be reversed and the Developer and POA ordered to repair the dike in accordance with their repair and maintenance obligation.

Kenneth Bruning, Janet Bruning, David Feron, Individually and as Trustee, Mary Feron, Individually and as Trustee, Sally Saigmuller Haley, Individually and as Trustee, Terrell Page Haley, as Trustee, Martha James and Don Haarmeyer, Individually and as Co-Trustees, and Pamela North, Appellants,

By: John E. North Jr.

John E. North, Jr., #06570
North & Black, P.C.
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
north@northblack.com

RECEIVED
MAY 26 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Shirley C. Robinson, Presiding Judge

Case No. 12 ALJ-07-0434-CC

Ken Bruning, Janet Bruning, David Feron, individually and as Trustee, Mary Feron, individually and as Trustee, Sally Saegmuller Haley and Terrell Page Haley, individually and as Co-Trustees, Martha James and Don Haarmeyer, individually and as Co-Trustees, and Pamela S. North.....Appellants,

v.

SCDHEC and Cat Island POA, c/o Gary Meyer.....
Respondents.

Case No. 12 ALJ-07-0436-CC

In Re: Garfield Park, Phase 3

Cat Island POA, c/o Gary Meyer.....Petitioner,

v.

SCDHEC.....Respondent.

PROOF OF SERVICE

John E. North, Jr., # 06570
North & Black, P.C.
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorney for Appellants

The undersigned hereby certifies that he served the Initial Reply Brief of the Appellants and Appellants' Designation of Additional Material for the Record upon the attorney for Cat Island POA, Mary Shahid, P.O. Box 486, Charleston, SC 29402 and the attorney for DHEC, Nathan Haber, 1362 McMillan Avenue, Suite 400, Charleston, SC 29405 by United States Mail, postage prepaid on the 22d day of May, 2015.

John E. North, Jr.