STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS



**Appeal from the Administrative Law Court**
**Honorable Shirley C. Robinson, Administrative Law Judge**
**Appellate Case No. 002010**

Ken Bruning; Janet Bruning; David Feron, individually and as Trustee; Mary Feron, individually and as Trustee; Byrnal Haley, individually and as Trustee; Salley Haley; Martha James, individually and as Trustee; Don Haarmeyer, individually and as Trustee, and Pamela S. North, Appellants,

v.

South Carolina Department of Health and Environmental Control and Cat Island POA, c/o Gary Meyer, Respondents.

In Re: Garfield Park, Phase 3.

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

v.

SCDHEC, Respondent.

In Re: Garfield Park Phase 3.

# JOINT FINAL BRIEF OF THE RESPONDENTS, CAT ISLAND POA, C/O GARY MEYER AND THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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# I. STATEMENT OF THE ISSUES ON APPEAL

A. Whether The Storage Requirements For Stormwater Management Within The Coastal Zone Are Permissive In Method, But Mandatory In Compliance?

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E. Whether The Lower Court Correctly Concluded That The Appellants Failed To Establish BY A Preponderance Of The Evidence That The Stormwater Retrofit Project Is Located Within 1,000 Feet Of Shellfish Beds?

F. Whether The Stormwater Retrofit Project IS Consistent With The Policies Of The South Carolina Coastal Management Program?

G. Whether The Lower Court Correctly Approved The Stormwater Retrofit Project When The Respondents Established That Restoration Of The Natural Saltwater March Has Occurred Since The Breach And That The Proposed Project Does Not Alter That Environment?

H. Whether The Lower Court Erred In Determining That The Department Was Not Required To Consider Whether Loss Of The Impoundment Would Impact Tabby Park, Another Development Within Cat Island?

I. Whether An Order By The Lower Court Or This Court Of Appeals To Repair The Dike Is Appropriate?

## II. STATEMENT OF THE CASE

This case is an appeal from a Final Order of the South Carolina Administrative Law Court (the "ALC" or "lower court") in a contested case filed in accordance with *S.C. Code Ann.* §§ 1-23-610 and 44-1-60 (Thomson Reuters West 2012). The Appellants are all owners of property within a development known as "The Rookery" located on Cat Island, in Beaufort County, South Carolina.[1]

This case arises from the action of the Respondent, Cat Island POA c/o Gary Meyer ("POA"), when it submitted an application for a "drainage system retrofit" (the "Stormwater Retrofit Project") on 10 October 2010, to the Respondent, South Carolina Department of Health and Environmental Control ("DHEC"). The Stormwater Retrofit Project, which consisted of a proposal to install water quality filters within the stormwater system for a development known as Garfield Park Phase 3 ("GPP3"), was necessary because of a previous failure of the impoundment. The Appellants objected to the Stormwater Retrofit Project and wanted the impoundment restored. On 18 June 2012, following the required Public Notice and comment period, DHEC granted a detention waiver as allowed under *S.C. Code Ann. Reg.* § 72-302(B)(2), and, in turn, authorized installation of the water quality filters described as "Curb Inlet Baskets", and issued General Permit coverage to the POA for the Stormwater Retrofit of GPP3.

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1 The Appellants, David Feron, Mary Feron, Sally Haley, Martha James, Don Haarmeyer, and Pamela North, own lots and/or improved property adjacent to a tidal marsh that was, formerly, impounded and is at the center of this controversy. The former impoundment has been colloquially referred to as "Cat Island Lake." The remaining two Appellants, Ken Bruning and Janet Bruning, own property that is not adjacent to the former impoundment.

Shortly thereafter, on 26 June 2012, the Appellants challenged DHEC's authorization of the Stormwater Retrofit Project by submitting a Request for Final Review Conference to the DHEC Board.[2] Subsequently, the DHEC Board granted the request for Final Review Conference, conducted a review hearing, and issued a Final Agency Decision rescinding the coastal zone consistency determination for the Stormwater Retrofit. The Final Agency Decision states the basis for the DHEC Board's decision "related only to the Requestors' arguments surrounding the project's proximity to shellfish grounds." Specifically, a three-member Committee of the DHEC Board found that no party had presented sufficient evidence at the hearing to determine the exact distance of the Stormwater Retrofit to the shellfish beds. (R.pp.1674-1678).

The Appellants and the POA filed respective requests for contested cases with the ALC. Those requests were consolidated for a hearing which was held on 14-17 January 2014. The ALC issued its Final Order on 23 July 2014, reinstating the coastal zone consistency certification and affirming DHEC's issuance of the Stormwater Retrofit authorization. This appeal followed.

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2 *See* S. C. Code Ann. § 44-1-60 (Thomson Reuters West 2011).

## III. STATEMENT OF THE FACTS

GPP3 is one of several phased developments located on Cat Island in Beaufort County. Gary Meyer ("Meyer"), the developers and the POA's designee, purchased Cat Island in 1982. At that time, the impoundment which has been called Cat Island Lake already existed. Review of historical aerial photography of the area indicates that the impoundment was created sometime between 1960 and 1965. During that time, an earthen dike was installed to separate the impoundment from Chowan Creek. It is likely that the impoundment was created as a habitat for ducks and for water fowl hunting.

The dike included a water control structure or outfall device which Meyer identified as a "flashboard riser" and was comprised of three boards and an outfall pipe. This flashboard riser maximized the water level in the impoundment when all three boards which could be used in the riser were installed. However, even with all three boards in place, the impoundment was subject to the ebb and flow of the tide over the riser and through the outfall pipe. (R.p.546:3-25).

Having been constructed in the 1960's, the dike and outfall device were built before the promulgation of South Carolina's stormwater management regulations.[3] Nevertheless, the impoundment was considered a stormwater management pond for purposes of GPP3's development and satisfied state requirements for controlling the release of stormwater and for providing water quality treatment to stormwater running off of that particular phased development. GPP3 obtained a stormwater permit from DHEC for GPP3 on 9

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[3] *See* S.C. Code Ann. Reg. §§ 61-9.122.26 and §§ 72-300 *et seq.*

June 2004. No evidence was presented at the hearing to establish any degree of treatment provided by the former impoundment to any part of Cat Island aside from GPP3 or to show that the impoundment could qualify as a "wet detention pond" for areas other than GPP3. In fact, the impoundment was only ever authorized by DHEC to detain stormwater which drained from GPP3. While it may be true that the impoundment detained whatever drained into it, including stormwater, from the surrounding shores, no other phase of development on Cat Island was shown to be reliant on the impoundment for control and treatment of stormwater flows.

The dike was breached in June 2009, allowing tidal flow from Chowan Creek to enter and leave the formerly impounded area on every tidal cycle. After the dike was breached, the POA obtained authorizations from DHEC to perform "maintenance and repair" and the POA's first attempted repair by hiring a contractor who used a barge to haul dirt to fill the breach (R.p.516:4-14). This attempt failed due to the tides, and disagreements about access to approach the dike from land did not allow a second repair attempt. (R.p.513:15-20). After that, the POA sought authorization from DHEC for an alternative method for treating the stormwater. (R.p.519:14-17). The suggestion that the POA simply "abandoned" the impoundment immediately following the breach is inaccurate and unfair.

Moreover, neither the POA nor Meyer was ever cited for non-compliance with South Carolina stormwater laws or regulations, as the Appellants incorrectly suggest. The Appellants mischaracterize three letters sent from DHEC to

Chowan Creek Partners about the breach. (R.pp.1646-1649; pp.1868-1871). Upon review, it is easily seen that these letters are simply not "citations." Specifically, the first letter, dated 6 July 2010, is merely notification to the POA that an NOI and Storm Water Pollution Prevention Plan ("SWPPP") would be required if the POA decided not to repair the dike and to seek alternative treatment methods. The second letter, dated 6 December 2010, was DHEC's request for additional information needed for evaluation of the POA's NOI, which had been submitted on 1 October 2010.[4] Finally, the Appellants erroneously interpret language regarding sediment deposition from DHEC's third letter dated 8 March 2011. (R.pp.1870-1871).[5] In short, none of the letters were "citations" against the POA or Mr. Meyer. In fact, as shown in the 8 March 2011 letter, DHEC was and remained amenable to treatment other than detention of stormwater flows through re-impoundment.

Both DHEC and the POA agree that the Stormwater Retrofit allowed the breach in the dike to remain open. While this meant that the impoundment would be exposed to tidal flows, the testimony elicited before the ALC established that this situation had always been the case, even with all three boards of the

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**4** Though this second letter admittedly warns that the lack of water quality structure may be a violation, the letter then clearly asks for information from the POA required for DHEC to ***continue the evaluation*** and determine whether the alternative treatment proposed, the installation of water quality filters to treat stormwater flows as it entered the stormwater management system, is consistent with South Carolina's Stormwater and Sediment Reduction Act and accompanying regulations.

**5** The sediment deposition referred to in this third letter is not directly related to the POA's proposed alternative treatment method, but rather, deposition due to the erosion of the banks of the former dike. This letter discusses stabilization of the dike to prevent further deposition of sediment. This letter ***also confirms*** DHEC's continuing evaluation of the proposed alternative treatment method.

flashboard riser were in place. The Stormwater Retrofit essentially maintained the *status quo* since the dike, in 2009, spontaneously breached from no known cause. As a result, the formerly impounded area is returning to its natural state as a tidal marsh. This amounts to a restoration, which condition is supported by the policy stated by South Carolina law valuing all wetlands and prohibiting their filling or other alteration to allow residential development.[6] The Appellants failed to produce any evidence at the hearing showing that the natural receiving waterway, Chowan Creek, has been degraded or that its designation as shellfish harvesting waters has been negatively impacted by the loss of the dike and the exchange of tidal flow into and out of the impoundment.

## IV. ARGUMENT AND CITATION OF AUTHORITY

*Standard of Review*

The standard specifically applicable to review by this Court of Appeals vis-à-vis a Final Order and Decision issued by the ALC is as follows:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;

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[6] The policy regarding alteration of wetlands stated in the "State of South Carolina Coastal Management Program and Final Environmental Impact Statement" published by the South Carolina Coastal Council, DHEC's regulatory predecessor, in 1978 says "Residential development which would require filling or other permanent alteration of salt, brackish or freshwater wetlands will be prohibited, unless no feasible alternatives exist or an overriding public interest can be demonstrated, and any substantial environmental damage can be minimized. (R.p.1536).

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[7]

1. ***The Storage Requirements For Stormwater Within The Coastal Zone Are Permissive In Method, But Mandatory In Compliance.***

The Appellants assert the ALC erred in ruling that the stormwater storage requirements within the coastal zone are permissive, not mandatory. This is based on an incorrect interpretation of the controlling law. The applicable section of the Coastal Management Program Document (the "*CMP*") requires that treatment of stormwater within the critical area must be through storage. The statute provides three ways storage *may* be accomplished:

> For all projects, regardless of size, which are located within one-half (½) mile of a receiving water body in the coastal zone, this criteria shall be storage of the first ½ inch of runoff from the entire site or storage of the first one (1) inch of runoff from the built-upon portion of the property, whichever is greater. Storage may be accomplished through retention, detention, or infiltration systems, as appropriate for the specific site. *CMP* XIII-A, 'Stormwater Runoff Storage Requirements'.

The *CMP* contains three examples of permissible methods to store stormwater: through (1) retention, (2) detention, or (3) infiltration systems. The term "storage" is neither plainly defined in the *CMP*, nor in *S.C. Code Ann. Reg.*

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[7] *See* *S.C. Code Ann.* § 1-23-610(B) (Thomson Reuters West 2013).

§ 61-9, nor in S.C. Code Ann. Reg. §. 72-300. "Storage" is simply a term used to describe a situation where something is in some form of custody prior to use. The Appellants assert the only options to store stormwater are by detention, retention, or infiltration. (R.p.317). The Appellants fail to put any value towards the words "may" or "as appropriate for the specific site."

A detention structure is defined as "a permanent stormwater management structure whole primary purpose is to temporarily ***store*** stormwater runoff and release the ***stored*** runoff at controlled rates."[8] A retention structure is defined as "a permanent structure whose primary purpose is to permanently store a given volume of stormwater runoff. Release of the given volume is by infiltration and/or evaporation."[9] Infiltration is defined as "the passage or movement of water through the soil profile.[10] The term "storage" or any variation of the term is plainly absent from the regulatory definition of infiltration, though inevitability there will be water in some form of custody within the infiltration practice that waits in line to be filtered through the soil profile.[11]

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8 S.C. Code Ann. Reg. § 72-301(11) (Thomson Reuters West 2014) (Emphasis added).

9 S.C. Code Ann. Reg. § 72-301(35) (Thomson Reuters West 2014) (Emphasis added).

10 S.C. Code Ann. Reg. § 72-301(22) (Thomson Reuters West).

11 The *CMP* lacks specific guidance in regard to the rates of release for infiltration. However, S.C. Code Ann. Reg. § 72-307(11) provides specific design criteria for infiltration practices. This regulation focuses on the amount of time the water must be infiltrated through the soil profile. S.C. Code Ann. Reg. § 72-307(11)(c) (Thomson Reuters West) requires the water to completely drain within 72 hours and S.C. Code Ann. Reg. § 72-307(11)(d) (Thomson Reuters West) requires an infiltration rate of at least 0.30 inches per hour. Both of these requirements focus on filtering to occur in an expedient fashion.

Although the testimony is clear that the proposed treatment of stormwater for GPP3 is not infiltration since the treatment of stormwater would be through a filter media as opposed to the soil profile, the two systems share many similar characteristics. Richard Geer, Engineer Associate with DHEC's Bureau of Water Coastal Stormwater Permitting Section, testified that although the proposed inline filters are a different mechanism than infiltration, it can still provide similar quality treatment. An inline filtration system has an inherent storage capacity, and is a permissive method to accomplish the mandatory requirement under the *CMP*.

As a matter of law, DHEC and its staff are due deference as a state agency. This long-standing precedence on agency deference on statutory interpretation was recently revisited in a similar context by the South Carolina Supreme Court: "We give deference to the interpretation of a regulation by the agency charged with it enforcement . . . . Because [the] interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application."[12]

Due to the lack of a regulatory definition of the term storage and because inline filters inherently satisfy the storage requirement under the *CMP*, and represent a consistent and reasonable interpretation of the regulations, the ALC was correct to rule in DHEC's and the POA's favor on this issue.

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

## 2. ***The ALC Correctly Determined That DHEC's Authorization For The Stormwater Retrofit Project Was Proper And Was Supported By Both The Law And The Evidence.***

The Appellants assert that modification of the existing permit was implicit in the Stormwater Retrofit. (*Appellants' Brief*, p.15). DHEC and the POA disagree that this situation was a permit modification.[13] In this case, the POA filed a Notice of Intent for a new permit. (R.pp.1609-1616). The request was not framed as a modification of an existing permit nor was it evaluated as one. (R.pp.1859-1867).

The Appellants suggest Richard Geer, the engineer associate who ultimately reviewed and approved the Stormwater Retrofit application, "agreed" that the Stormwater Retrofit was a modification of the existing 2004 permit. (*Appellants' Brief*, p.15). The Appellants misrepresent Geer's testimony on the subject of modification as directly relating to the POA's application. (R.pp.622:11-623:17). A review of the entire line of testimony shows the questions posed to Mr. Geer regarding modification were general questions pertaining to "a development" (R.p.621:9-11), "an applicant" (R.p.621:22), and "a developer" (R.p.622:7-9) who might be seeking "a change to a previously approved permit". (R.p.622:11-12). ***None*** of the questions asked Geer to confirm that the POA's application requested a modification of the 2004 permit.

Further, the testimony of Ryan Lyle ("Lyle"), the POA's engineer, that the 2004 permit would remain in effect until the Stormwater Retrofit was approved is completely correct. (R.pp.1081:16-1082:3). Again, however, the Appellants

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[13] *See* S.C. Code Ann. Reg. § 61-9.122.62 (Thomson Reuters West 2013).

have misrepresented a portion of Mr. Lyle's testimony. A review of the actual testimony shows that the Appellants' attorney, John North, asked a different question than what the Appellants' brief represents:

> Q: (by North) And [the 2004 permit]'s still in effect until it's changed, isn't it?
>
> A: (by Lyle) Until it's changed? It's ---
>
> Q: *Until some retrofit application or some modification becomes final*?
>
> A: Meaning a retrofit permit being granted?
>
> Q: Yes.

(R.pp.1081:16-22) (Emphasis added). Clearly, Attorney North's own question was not limited solely to a permit modification, but also allowed Lyle to agree that the 2004 permit ***would remain in effect*** (and unmodified) until the retrofit permit was granted. As was subsequently clarified, the POA's application, although granted, is not final due to the Appellants' appeal. (R.p.1081:23-25). This fact is what led to Mr. Lyle's agreement that the 2004 permit is still in effect.

Though Geer later did testify as to his opinion that *S.C. Code Ann. Reg.* § 61-9.122.62 appears to allow for "the modification that was requested" (R.p.747:6-8), no questions were asked to follow up to clarify what Geer meant by "modification". He did not testify that the POA had requested a modification under *S.C. Code Ann. Reg.* § 61-9.122.62, but rather, continued on to comment upon whether the Stormwater Retrofit could be allowed under the regulation. Geer was asked to identify which of the circumstances in the regulations could be relied upon to "say there was some ability to modify the original stormwater

permit." (R.p.747:11-14). After qualifying his answer with the statement that he had not read through the circumstances in detail, Geer testified that a Request for Modification, if made under S.C. Code Ann. Reg. § 61-9.122.62, could be allowed because "there are material and substantial alterations or additions to the permitted facility or activity after permit issuance which justify the application of permit conditions that are different or absent in the existing permit." (R.p.748:6-11). Geer was referring to the dike's failure and the former impoundment's subsequent inability to provide detention for the stormwater from GPP3. Nevertheless, Geer never confirmed that the POA's submission was either made as or considered by DHEC as a Request for Modification. In fact, his unfamiliarity with S.C. Code Ann. Reg. § 61-9.122.62 confirms that he did not review the application as a Request for Modification submitted in accordance with this regulation.

Obviously, the POA's requested Stormwater Retrofit would, as a practical matter, result in a "change to" or "modification of" the present stormwater treatment system. It is logical to deduce that this is what Geer meant when referring to the "modification that was requested." (R.p.747:6-8).

### 3. ***DHEC's Properly Issued A Waiver Of The Stormwater Quantity Requirements Imposed By S.C. Code Ann. Reg. § 72-302(B)(2).***

The Appellants assert DHEC's issuance of a waiver was improper because the scope of DHEC's review[14] should focus on effects of tidal events. (*Appellants' Brief*, p. 25). The ALC correctly found "a waiver of stormwater

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[14] *See* S.C. Code Ann. Reg. § 73-302(B)(2) (Thomson Reuters West 2013).

management for water quantity control is based on a consideration of whether an un-detained stormwater discharge or flow could adversely impact downstream properties and not whether a tidal event, unaffected by a storm event, adversely impacts downstream properties." (R.p.7).

Mr. Geer testified the waiver was only granted for quantity control and not for quality control. (R.pp.656:25-657:5). Quantitative control is defined as "a system of vegetative or structural measures, or both, that control the increased volume and rate of stormwater runoff caused by manmade changes to the land."[15] This definition clearly further supports the ALC's finding that DHEC's consideration of this waiver was proper.

DHEC's analysis of any potential adverse consequences when considering a request for a stormwater quantity waiver is limited to those resulting from stormwater only, and does not take into account potential adverse consequences stemming from tidal water. Regulation 72-302(B)(2) provides "a project may be eligible for a waiver or variance of stormwater management for quantity control if ... the applicant can demonstrate that: a) the proposed project will have no significant adverse impact on the receiving natural waterway or downstream properties."[16]

The Appellants argue that there are no provisions in the *CMP* authorizing a waiver of water quality provisions. (*Appellants' Brief*, pp.28-29.) While this is a

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[15] *See* S.C. Code Ann. Regs. § 72-301(40)(b) (Thomson Reuters West 2014).

[16] *See* S.C. Code Ann. Regs. § 72-302(B)(2) (Thomson Reuters West 2014).

correct assertion; the waiver at issue was for "water quantity control", not "quality control" as the Appellants argue. The stormwater regulations provide "[f]or activities in the either coastal counties of Beaufort . . . additional water ***quality*** requirements may be imposed to comply with the S.C. Coastal Council Stormwater Management Guidelines."[17] This regulation, authorizing the additional requirements at issue in this matter, makes explicitly clear these additional requirements pertain to water quality, not water quantity. This language is also included and reemphasized in the introductory paragraph of the stormwater management guidelines within the *CMP*. To conclude that the lack of any provision allowing for a waiver of water ***quantity*** standards in guidelines which impose additional water ***quality*** requirements somehow creates a violation would be misplaced. Had our Legislature intended for these additional requirements to apply for both water quality and quantity, they would have provided as such.

The Appellants further argue a detention waiver was improper because there are adverse effects on the receiving water body. (*Appellants' Brief*, p.22). The Appellants admit in their reconsideration motion that "[n]one of the parties presented evidence of water quality degradation based upon testing or sample." (R.p.324). The Appellants' own expert, Chris Moore ("Moore"), testified that he did not know if any alleged, untreated pollutants that may be running through the lake are degrading those waters. (R.pp.1362:21-1363:16). The standard under

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[17] *S.C. Code Ann.* § 72-307(C)(5)(g) (Thomson Reuters West 2014) (Emphasis added).

*S.C. Code Ann. Reg.* § 72-302(B)(2) is one of significant adverse impacts. Though the Appellants may argue they have met their burden as to a potential adverse impact, to which DHEC and the POA disagrees, the Appellants certainly have not produced sufficient evidence to establish a significance adverse impact. In fact, the Appellants have provided no evidence establishing any significant adverse impacts directly from stormwater and have failed to meet their burden. The POA's engineer, Ryan Lyle, testified that the POA checked monitoring stations in Chowan Creek and did not find that shellfish harvesting had been "shut down." (R.pp.1173:6-1174:11). Further, in addition to the Appellants lack of evidence in this regard, there has been no notification to DHEC regarding a complaint about the water quality in the receiving water body. (R.pp.810:23-812:23).

The Appellants claim that the detention pond removed 94% of the sediment from stormwater before it entered Chowan Creek. The inline filter is projected to filter 74% of sediment. Therefore, the Appellants argue that this 18% "decline" represents a significant adverse impact. However, ***stormwater has run untreated*** entirely from the GPP3 site ***since the 2009 collapse*** of the dam, and the Appellants presented no evidence of any adverse impact since 2009 or that such an impact has been reported to DHEC. (R.pp.810:23-812:23).

Richard Geer was questioned about the applicability of the Best Management Practices Manual standards for stormwater treatment. Geer states that the proposed catch basins "do not meet the 80% TSS removal goal." (R.p.693:16-20). Further, the Appellants base this argument solely on sediment percentage, when sediment is not the only pollutant that is present in stormwater.

Geer testified the proposed filters satisfied the requirements of stormwater quality treatment of all pollutants. (R.pp.823:25-825:21). The documents Appellants' referred to while questioning of Mr. Geer were contained in a Checklist for Design Professionals. (R.pp.1418-1422). The 80% removal efficiency which the Appellants refer to in this document is for projects in which the disturbed acres are greater than 10 acres. (R.p.1421).[18] Geer testified this area is less than 10 acres and the 80% terminology is not applicable. (R.p.653:7-16).

The Appellants suggest Geer's testimony states that the proposed Stormwater Retrofit would result in large areas that previously had stormwater detention in Cat Island Lake are now discharging untreated stormwater into Chowan Creek. (R.p.637:2-8). This attempted justification for the reinstatement of the impoundment and for detention is outside the scope of this case: DHEC cannot require a developer to provide stormwater treatment for developments constructed prior to the promulgation of the applicable statutes.[19] Moreover, S. C. Code Ann. Reg. § 72-307(E) specifically exempts residential subdivisions which were approved prior to the effective date of the regulation.

The Appellants assert Geer did not give proper consideration to homeowner complaints of tidal waters encroaching on their property when considering the proposed project. (*Appellants' Brief*, p.27). However, this is

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**18** This requirement is derived from S.C. Code Reg. Ann. § 72-307(C)(5)(b) (Thomson Reuters West 2013), which applies to "[s]tormwater runoff and drain to a single outlet from land disturbing activities which disturb ten acres or more."

**19** "A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. The statute must contain express words evincing intent that it be retroactive or words necessarily implying such intent." State v. Brown, 402 S.C. 119, 125, 740 S.E. 2d 493, 496 (2013).

another mischaracterization. Geer testified about his consultation with the Department of Natural Resources ("DNR") regarding homeowner complaints about loss of wildlife (R.pp.724:15-726:12) and the consideration he gave to the complaints DHEC received from homeowners when making his decision. (R.pp.791:20-793:19).

The Appellants contend that photographs from nearby residences taken a week before trial show that the tidal marsh is no more than a "mud pit." (R.pp.870:24-871:4). The photos Appellant Pamela North ("Ms. North") testified to are contained in Homeowners Ex. 1 (R.pp.1383-1435), which the Appellants proffer as a depiction of the "mud pit," (*Appellants' Brief,* pp.25-26), were taken in advance of the DHEC Board review of the permit – an event occurring nearly two years ago. DHEC witness George Madlinger ("Madlinger") reviewed with the ALC more current photos of the lakebed and identified new growth of marsh grasses in many areas exhibiting a naturalization of the area. (R.pp.1233-1236; pp.1681-1688).

The Appellants justify the loss of aesthetics and the inability to observe wildlife as a "legally cognizable injury."**20** While this may be the case, Mr. Madlinger also confirmed that the wood storks pictured in Homeowners Ex. 1, pp.31-34 (R.pp.1414-1417), could still use the lake area. (R.p.1231:1-5). Ms. North admitted seeing ibis continuing to use the area. (R.p.859:23). Moreover,

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**20** The Appellants cite to Sea Pines Assn. for the Prot. Of Wildlife, Inc., v. S.C. Department of Natural Resources, 345. S.C. 594, 600-601, 550 S.E.2d 287, 291 (2001) to justify loss of aesthetics as a legally cognizable injury. While this is correct, the Supreme Court in Sea Pines speaks to the issue as it relates to standing. In this case, there is no similar standing issue nor a loss of wildlife, but rather a change in the wildlife.

she did not deny that the lakebed continues to be a natural environment that can support birds and other types of wildlife. (R.p.886:1-11). No such loss has occurred.

The Appellants argue that there has been a loss of vegetation as a result of exposure to saltwater tides; however, on cross-examination David Feron conceded that he could not confirm the cause of vegetation loss. (R.p.925:1-22). Salley Haley, also appearing for the Appellants, testified she as well did not know what the cause of lost vegetation could have been. (R.pp.938:20-939:10). This testimony is the only evidence that the Appellants presented to the ALC to show that saltwater encroachment was the alleged culprit for vegetation loss.

Ms. North testified it was her opinion that the naturalization of Cat Island Lake had caused the value of her property to decrease. (R.pp.880:18-881:3). However, Ms. North purchased her home for $740,000, and she confirmed that it was currently on the market, listed for $1.55 ***million*** dollars and was advertised as being located on a ***beautiful tidal marsh***. (R.pp.1895-1896).

The Appellants failed to bear the burden of proof at trial. "In environmental permitting cases, the [ALC] presides as the finder of fact."**21** DHEC correctly issued the waiver after a full review of the proposed project. The Appellants failed to present evidence establishing that the untreated stormwater from GPP3 flowing into a large receiving water body amounted to a "significant

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**21** Brown v. S.C. Dept. of Health and Envt'l Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002).

adverse impact on the receiving natural waterbody or downstream properties." [22] The ALC, as the ultimate finder of fact in this matter, correctly ruled on this issue.

### 4. ***The Stormwater Retrofit Project Will Not Alter The Critical Area And, Therefore, Is Not Subject To The Critical Area Analysis Provided For By The CMP Or S.C. Code Ann. § 48-39-130.***

The Appellants argue the *Coastal Tidelands and Wetlands Act* and the regulations promulgated thereunder are applicable to this matter. (*Appellants' Brief*, p.29).[23] However, the Appellants' argument is misplaced. The Appellants have challenged a stormwater permit and its associated coastal zone consistency determination, both of which require a permittee to obtain any other necessary state or federal permits. (R.pp.1839 and 1842). If DHEC determined the work encompassed in stabilizing the dike effects or alters the critical area, a critical area permit will be required prior to conducting such activity. Both the POA's engineer and the Appellants' engineer testified they are aware of this requirement. (R.pp.1096:6-1098:9; pp.1338:1-1339:8).

South Carolina law defines critical area as "any of the following: 1) coastal waters, 2) tidelands, 3) beaches, 4) beach/dune system . . . as determined by [*S.C. Code Ann.* §] 48-39-280."[24] The ALC correctly determined an alteration to the critical area occurred when the dike was constructed. (R.p.9). Any potential impact after the construction of the dike to critical area raised by the Appellants occurred in 2009 with the failure of the dike, when tidal flow into the lake bed was

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[22] S.C. Code Ann. § 72-302(B)(2)(a) (Thomson Reuters West 2014).

[23] *See* S.C. Code Ann. § 48-39-130(C) (Thomson Reuters West 2014) (No person "shall erect any structure on or in any way alter any critical area without first obtaining a permit from [DHEC].").

[24] S.C. Code Ann. § 48-39-10(J) (Thomson Reuters West 2013).

fully restored. The installation of inline filters does not alter the critical area, but instead treats the stormwater that flows from GPP3.

The ALC correctly ruled "[i]f, as the Petitioners argue, the addition of the former lake bed to the critical area is an effect on the critical area as contemplated in S.C. Code Ann. § 48-39-130, the project is exempt from the requirement for a critical are [sic] permit by virtue of S.C. Code Ann. § 48-39-130(D)(3)." (R.p.9).

In that vein, S.C. Code Ann. §48-39-130(D) provides:

> It shall not be necessary to apply for a permit for the following activities: (3) [t]he discharge of treated effluent as permitted by law; provided, however, that the department shall have the authority to review and comment on all proposed permits that would affect critical areas.

Blair Williams, Manager for DHEC's Wetland Permitting Section ("Williams"), testified that activities which alter the critical area, like building a dock or creating an earthen structure to re-impound trigger a critical area permit, but nothing here triggered a critical area permit. (R.p.1250:17-25). Williams testified "[Section] D itself lists a set of activities within the critical area that are exempt or is an exception to require an authorization from [DHEC], essentially a critical area permit." (R.p.1246:10-13). Williams also testified that, in accordance with section (D)(3), DHEC has the authority to review and comment on proposed permits regarding potential discharge of treated effluent. (R.p.1246:20-25). He interpreted this section to apply to stormwater applications which would be permitted under the Stormwater Management and Sediment Reduction Act within the coastal zone. (R.p.1247:2-5). He further stated that the critical area section

of DHEC has the ability to review and comment on any state or federal permit which triggers review by his section. (R.p.1248:3-10).

The ALC properly determined "[w]ith regard to the lake bed, no alternation is occurring." (R.p.9). Further, assuming the Appellants' assertion for argument sake, DHEC reasonably and properly applied the plain language of S.C. Code Ann. § 48-39-130(D)(3) and the ALC was correct in its review of the decision. The permit clearly provides a Special Condition requiring the permittee to be "responsible for obtaining any other federal, state, or local permit that may be required for this project" and the consistency determination states "[n]o Critical Areas as determined by OCRM shall be disturbed or altered without authorization by [DHEC]." (R.pp.1839 and 1842; pp.765:18–766:2). Therefore, the ALC correctly ruled upon this issue.

**5. *The ALC Correctly Concluded The Appellants Had Failed To Prove That DHEC's Method Of Measurement Used To Determine Whether The Stormwater Retrofit Project "Is Located Within 1,000 Feet Of Shellfish Beds" Was Inconsistent With The Requirement.***

Much of the hearing below was devoted to the method of measurement of the 1,000 feet, since proximity to the shellfish beds was the issue identified in the DHEC Board's Final Agency Decision as the basis for rescinding the coastal zone consistency determination for the Stormwater Retrofit. (R.p.1829).**25**. The testimony focused upon the actual methods of measurement DHEC used and the

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**25** The Final Agency Decision specifically states, "... the Committee held that the basis for the decision related only to the Requestors' arguments surrounding the project's proximity to shellfish grounds." (R.p.1829). The Final Agency Decision does not mention "the winding drainage path" or direction of the flow (of stormwater runoff) as the Appellants suggest. (*Appellants' Brief*, p.33).

parties' engineering and surveying consultants to determine distance to the nearest shellfish beds.

DHEC and the POA agree that the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements do not describe the 1,000 foot distance. Though *S.C. Code Ann. Reg.* § 72-307(C)(5)(d) and (e) and Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993) provide a design criteria for stormwater runoff, and the Coastal Zone Management Program Refinements further requires that the first one and one half (1½) inches of runoff from the built-upon portion of the property to be retained on site of those projects which are located within 1,000 feet of shellfish beds, none of the regulations state a method for measuring that distance. As such, the ALC correctly concluded that the method of measurement is subject to construction.

DHEC's and the POA's witnesses testified as to DHEC's method of measurement and then compared measurements of alternative paths the stormwater flow might follow. First, Richard Geer clarified that the nearest shellfish beds in Chowan Creek, the nearest "receiving waterbody," were located using GIS data requested by DHEC from DNR. (R.pp.717:11-718:1). Second, Geer established that DHEC staff did not simply look at aerial photography to make the measurement, but rather, the staff (a) used GIS applications to check and measure the drainage path, (b) reviewed the 2004 development plans, and

(c) compared the findings to the submittal by the POA's engineer, which verified the Department's measured distance. (R.p.1637).

At the hearing, Geer agreed "that considering the tides would be an appropriate way to measure it, and the drainage path of the storm water runoff." (R.p.706:10-15). He then explained that DHEC used the edge of the limits of the GPP3 project, at the stormwater outfall, as the starting point for its measurement of the distance to shellfish beds identified by the DNR's GIS data. (R.p.699:14-22; pp.717:11-718:1).

The POA's engineer, Ryan Lyle, provided an explanation of an exhibit his firm prepared to compare the methods of measurement used by the parties. First, using the same starting and end points chosen by DHEC, the POA's engineers mapped the distance to the shellfish beds along the drainage path that the engineers believed the stormwater flow would follow, conforming with a channel clearly visible in aerial photography of the lakebed. (R.pp.1157:22-1158:11; p.1964 (the pink line))**26**. This measured **1,100** feet. (R.p.1153:4-9). (*See also* R.pp.1965-1966).

For clarity of comparison, the engineers also illustrated the measurement using the starting point chosen by the Appellants' surveyor, David Youmans - a 15 inch outfall pipe just outside the project boundary that totaled **1,100** feet as well. (R.p.1154:7-25; R.p.1964 (the blue line)).**27**. They also illustrated a third

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**26** Cat Island Ex. 1A (R.p.1964) is also labeled and referred to in the hearing transcript as Pet. Ex. 72 (R.p.1961).

**27** This 15 inch pipe was not selected by the POA's engineers as the starting point because, as Lyle explained, it was outside of GPP3 proper. (R.pp.1148:24-1149:2).

path of possible flow – outside of the channel and nearer to the perimeter of the property - that the Appellants had proffered would be most similar to the flow at high tide (the "High Tide measurement"). (R.p.1155:1-15; p.1964 (the hatched line)). This measurement totaled **1,002** feet. (R.p.1155:16-21). Again, Lyle explained that this High Tide measurement was put on the exhibit to "entertain" the Appellants' proposed path of flow and compare it to the others and ***not*** was reflective of Lyle's opinion as a Professional Engineer as to how the water would flow. (R.pp.1144:11-1146:13; p.1155:1-21).

The ALC's conclusion turns on the weight assigned to the evidence produced by the Appellants at the hearing. The Appellants made the conscious choice to introduce the deposition of their surveyor, David Youmans ("Youmans"), rather than having him appear as a live witness. Youmans' deposition testimony contained several inconsistencies. For example, Youmans first answered in the affirmative when Attorney North asked "[a]nd did you use that to actually identify in your eyeglasses actually [sic] oysters in the oyster bed?" But when asked to explain where he was in relation to the oyster bed to make that observation, Youmans replied "I think the crew was set up on the dike being a little bit higher and having a good view out there at low tide to see where the edge of the oyster rake was." (R.p.1693). When asked if he was actually on the dike, Youmans said, "No ma'am, I didn't go out there with them that day when they did that." Later in his deposition, when asked if he ever physically stood on the dike and looked at the oysters, Youmans confirmed "No, I have not." (R.p.1693). Clearly, Youmans' testimony was inconsistent. Nonetheless, it

established that Youmans never personally observed the oyster beds in the field before he prepared his survey drawing.

In fact, Youmans' testimony further established that (a) he did not visit the site until after the date of the drawing, (b) he never observed the flow of water through the impoundment into Chowan Creek, and (d) he only used his judgment of how the water would flow when preparing his drawing. (R.pp.1689-1702).

The Appellants did proffer testimony of an expert engineer, Chris Moore ("Moore"). However, Moore testified to a similar failure to observe the flow of water through the impoundment and confirmed that he did not take any actual measurements. (R.pp.1348:16-1349:9). In fact, Moore testified that he had only visited the site one time, in 2011 during low tide. (R.pp.1348:16-1349:9). During the contested case hearing Moore attempted to endorse, for the first time, a measurement of 1,000 feet. (R.pp.1358:20-1359:4). Moore agreed that it might be helpful to have observed the flow of water at high tide before assuming the pathway of water at high tide, which Moore and Youmans did not do. (R.p.1359:6-17). Moore testified that much of the information submitted to DHEC under his signature and letterhead was information submitted to him by his client (the Appellants) which he did not, in turn, actually verify. (R.pp.1340:13-1346:25).

With regard to expert testimony, it is generally recognized that "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence" and that "the triers of the facts cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding to the contrary to

the opinion."[28] However, the trier of fact may give an expert's testimony the weight he or she determines it deserves,[29] and may accept the testimony of one expert over that of another.[30] In weighing such expert testimony, the general principles for determining whether evidence warrants a finding remain applicable; accordingly, "an expert's opinion which is based on guess, surmise, or conjecture has little evidentiary value, and expert opinion evidence lacks probative force where the conclusions are contingent, speculative or merely possible."[31]

### 6. ***The Stormwater Retrofit Project Is Consistent With The Policies Of The South Carolina Coastal Management Program.***

The ALC correctly determined the project is consistent with the Coastal Zone Management Program. (R.p.18). Under South Carolina law, DHEC is required to "[d]evelop a system whereby the Department shall have the authority to review all state and federal permit applications, and to certify that these do not contravene the management plan."[32]

The Appellants' argument centers upon their Exhibit 19 which is the Policies and Procedures of the South Carolina Coastal Management Program, *An excerpt of the South Carolina Coastal Management Program Document.* That document provides Guidelines for Evaluation of All Projects. (R.pp.1533-1535). Specifically, DHEC staff must consider the extent to which the project will further

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[28] *See* 32 C.J.S., Evidence, § 727, at 82-83 (West Group 1996).

[29] Florence County Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct.App. 1992).

[30] S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992).

[31] 32A C.J.S., Evidence, § 730 at 87 (West Group 1996).

[32] S.C. Code Ann. § 48-39-80(B)(11) (Thomson Reuters West 2008).

the policies of the South Carolina General Assembly. One of the two policies listed is "[t]o protect and, where possible, ***to restore***[,] or enhance the resources of the State's coastal zone for this and succeeding generations. (R.p.1534) (Emphasis added).

The Appellants argue that increasingly stringent regulations should apply to this consistency determination due to the proximity and alleged degradation that would result from the proposed project to shellfish beds in Chowan Creek. While shellfish bed proximity is still a matter of controversy before this court, the ALC determined "[t]he testimony provided by SCDHEC and Cat Island's engineer Mr. Lyle regarding the measurement of the distance to the shellfish beds is probative and persuasive, and of higher evidentiary value than the testimony of the Appellants' expert civil engineer, Mr. Moore, and surveyor, Mr. Youmans." (R. p.13).

The former Cat Island impoundment has naturalized, and it now exists as a tidal marsh due to the failure of the dike. It must be recognized that alteration of the wetlands and marshes on this site occurred when the impoundment was first created by construction of the dike. (R.pp.1850 and 1853). As a result of the failure of the 2009 dike the area is merely returning to its natural state. It is not proper to characterize the fact of this return ***as an alteration***. It is most properly identified as a restoration, which condition is supported by the policy stated by South Carolina law, as previously discussed, and by the Corps of Engineers, who did not find any violation with leaving the breach open. (R.p.1853). The POA's decision not to repair the dike has allowed this restoration

of the natural state to be maintained. The proposed Stormwater Retrofit will serve to ***protect, enhance, and maintain*** the restored natural character of the Cat Island tidal marsh and Chowan Creek.

The proposed Stormwater Retrofit does not contravene the management plan. The installation of the inline filters will provide stormwater treatment where there currently is none. The adverse impacts that the Appellants contend will result from this project in reality stem from the dike's construction, and its 2009 failure; the installation of the proposed filters will remedy this, in a manner entirely consistent with the *CMP*, and more pertinently, consistent with the requirements of the Act that created the *CMP*.

### 7. *The ALC Correctly Approved The Stormwater Retrofit Project Since DHEC And The POA Established That Restoration Of The Natural Saltwater Marsh Had Occurred Since The 2009 Breach And The Proposed Project Does Not Alter That Environment.*

The ALC correctly understood and appreciated that any critical area identifiable around or near the former impoundment was initially altered and impacted when the impoundment was created, and then again when the breach occurred in the dike. Obviously, the natural saltwater marsh and the surrounding wetlands were most significantly altered when the dike was built to create the former impound.

South Carolina's policy regarding alteration of wetlands is stated in the *South Carolina Coastal Zone Management Program Refinements* as follows:

> Residential development which would require filling or other permanent alteration of salt, brackish or freshwater wetlands will be prohibited, unless no feasible alternative exist or an overriding public interest

> can be demonstrated, and any substantial environmental damage can be minimized.

(R.p.1536). As such, the policy recognizes all wetlands to be marshes that are valuable natural habitats and hydrologic buffers whose destruction should be avoided wherever possible. The policy discourages filling of the wetlands, which it goes on to identify as one type of permanent alteration. As such, the plain language of the policy refers only to artificial actions, *i.e.*, actions that are undertaken by man, as examples of permanent alterations.

All parties have agreed that the breach of the dike was a spontaneous *force majeur* - an unexpected and uncontrollable event – for which no cause has been identified. And, there was no evidence presented at the hearing to suggest otherwise. At the hearing, the POA's and DHEC's expert engineer, Mr. Lyle, testified that the breach in the dike had naturalized over the years it has been open to the tide and would not widen further. (R.p.977:12-19). He further confirmed his personal observation of the dike a few months before the hearing showing that marsh grass had started growing back near the breach. (R.p.1131:14-18). Existing wetlands or marshes are not incorporated into stormwater management plans or used as best management practices ("BMPs"),**33** but natural wetlands are the model for man-made wetlands that are sometimes incorporated. (R.p.1132:2-24). Marsh grass filters stormwater. (R.p.1133:15-18).

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**33** The term Best Management Practices is defined in *S.C. Code Ann. Reg.* § 72-301(5) (Thomson Reuters West 2014) as "a wide range of management procedures, schedules of activities, prohibitions on practices and other management practices which have been demonstrated to effectively control the quality and/or quantity of stormwater runoff and which are compatible with the planned land use. (R.p.773:7-13).

Testimony of DHEC witness Blair Williams supported DHEC's and the POA's position that the former impoundment contained saltwater. According to Williams, prior to the breach, the Cat Island impoundment was a brackish system having a certain degree of salinity. (R.p.1275:1-16; pp.1278:25-1279:2). In Williams' opinion this was due to tidal influence inside the impoundment confirmed by the presence of saltwater vegetation. (R.pp.1274:3-1275:16). Moreover, Mr. Williams explained that it is not unusual for properties to have saltwater and freshwater "transitional" areas, especially in brackish systems such as the former impoundment. (R.pp.1277:17-1279:2).

DHEC and the POA agree that the Army Corps of Engineers is mandated by federal law to delineate wetlands. (*Appellants' Brief*, p.42). At the hearing, Williams noted that the Corps stopped short of identifying the impoundment itself as a freshwater body in its Jurisdictional Determination ("JD") and delineation. (R.pp.1279:23-1280:3 "[t]hey're not calling the actual lake itself freshwater."). The Appellants' own attorney has recognized this difference on the delineation: "... here we have a U.S. Army Corps of Engineer doing a certification of what is and what's freshwater wetland, what's saltwater marsh." (R.p.686:3-5).

As a result of the 2009 spontaneous breach of the dike, the former impoundment has been allowed to return to its natural state. As has already been explained, this cannot be properly characterized as an alteration of any part of the area. Of course, the breach does allow regular saturation of the identified freshwater wetlands with saltwater during spring tides, as the POA's engineering expert – Ryan Lyle - confirmed. (R.pp.1015:18-1016:6). But this again would be

restoration of the natural condition that predated construction of the dike and impoundment. The evidence discussed by the Appellants (*Appellants' Brief*, p.42) is also evidence of such restoration, also referred to as naturalization. The decision by the POA not to repair the dike has allowed this restoration of the natural state to be maintained. The area is filling in with new marsh grasses (R.pp.1233-1236) that are used by ibis and other types of birds and wildlife. (R.p.859:23; p.886:1-11).

The Appellants argue that the POA has violated an agreement made in a Declaration of Restrictive Covenants not to alter certain wetlands adjacent to the impoundment. (R.pp.1664-1673). The Restrictive Covenants that were signed by Mr. Meyer on behalf of Chowan Creek Partners and Chowan Creek Development Corporation ("CCP/CCDC") are contractual in nature and bind the parties - the Corps of Engineers and CCP/CCDC – thereto.**34** DHEC, which was not a party to the Covenants, has no enforcement authority over them, but did appropriately seek the input of the Corps during the evaluation of the POA's applications. George Madlinger, DHEC's project manager who requested the Corps' input, testified as to his understanding of the Corps' position in the memo he prepared for Richard Geer. (R.p1232:1-11; p.1887, para. 6). At the time, the Corps advised that no violation of the restrictive covenants had been observed. (R.p.1853). As such, any further consideration of the covenants is irrelevant to this action and not warranted. The ALC's decision appropriately recognized the lack of any jurisdiction over the United States Army Corps of Engineers, a federal agency. The Restrictive Covenants

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**34** Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974); Seabrook Island POA v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct.App. 1987).

were a permit condition imposed on a federal permit issued by the Corps and are not a part of a state permit.

All of this evidence supports the lower court's conclusion that no alteration of the environment would result from approval of the Stormwater Retrofit. On this basis, the lower court correctly approved the project.

**8. *The ALC Correctly Understood That Since Cat Island's Tabby Park Development Did Not Rely On The Impoundment To Meet Stormwater Quality Treatment And Storage Regulatory Requirements, DHEC Was Not Required To Consider Whether Loss OF The Impoundment Would Affect Tabby Park.***

The Appellants have repeatedly argued at every stage of this litigation that the former impoundment must be restored because it treated stormwater for all the land surrounding it. However, the Appellants have produced no evidence proving that the detention provided by the former impoundment was equivalent to "treatment." The Appellants' argument also ignores the fact that none of the developments on Cat Island, aside from Tabby Park and GPP3, were required by South Carolina law to have stormwater treatment.

The Appellants produced no evidence to refute the DHEC staff's conclusion during the processing of the Stormwater Retrofit permit application that none of the other phases or developments relied on the impoundment to meet stormwater quality treatment and storage requirements. Mr. Geer testified that South Carolina's stormwater regulations, set forth at *S.C. Code Ann. Reg. §* 72-300, did not apply to projects built before the enactment (effective date) of the regulations in 1992. (R.pp.611:13-612:4). Mr. Geer agreed that Tabby Park was developed after 1992. (R.p.612:14-21). The Appellants produced no other evidence at the hearing

to show that any phase or portion of Cat Island was developed after 1992 (aside from GPP3) to be subject to stormwater regulations.

The Appellants have no basis for labeling the detention formerly provided by the impoundment to adjacent sites as "proper stormwater treatment." Due to exemption of all parts of Cat Island except Tabby Park and GPP3 from the stormwater regulation requirements, Mr. Geer did not review stormwater calculations for any other development, nor did he require any such calculations to be submitted. (R.p.613:19-21; p.614:11-12. As a result, Mr. Geer could not say that the impoundment provided stormwater treatment "that met the requirements of the regs," *i.e.*, was "proper", to any of the pre-1992 developments. (R.pp.611:13-612:4). He did, however, review the file from Tabby Park and found no indication that Tabby Park relied upon the impoundment for stormwater treatment. (R.p.821:13-25). In other words, the impoundment was not part of Tabby Park's authorized stormwater treatment system. (R.p.822:1-4). At the hearing, the Appellants' expert engineer, Mr. Moore, confirmed that he also reviewed the Tabby Park file and agreed with DHEC's conclusion of no reliance on the impoundment. (R.p.1362:1-11; p.1370:1-10).

As such, there was no reason for DHEC to consider any effect absence of the impoundment would have on Tabby Park. Its stormwater would continue to be treated as it has always been, independent of any detention provided by the impoundment. The Appellants are flatly incorrect in their assertion that the impoundment previously served as an approved detention structure for Tabby Park's storm water treatment. (*See* R.pp.1716-1721). They also failed to produce

any evidence to show that the impoundment could qualify as a "detention pond" for Tabby Park or any other development on Cat Island other than GPP3. And, since no other part of Cat Island is subject to the stormwater regulations, *i.e.*, required to treat stormwater, there is no reason to consider the effect of loss of the impoundment on any other development.

Moreover, the Appellants also failed to produce any evidence that the natural waterway receiving flow from the impoundment, Chowan Creek, has been degraded or that its designation as shellfish harvesting waters has been negatively impacted through the exchange of water through the breach with the tides.**35** Through calculations requested by DHEC to evaluate water flow and exchange between the impoundment and Chowan Creek with the breach flowing full, the POA's engineer was able to demonstrate during the application process and again at the hearing that stormwater flow from GPP3 had very little effect on the water level in the impoundment at mean high high tide. (R.pp.997:14-998:1).**36**. In short, Mr. Lyle found little difference in the elevation of the impoundment even at mean high high tide, because the volume of water in Chowan Creek is much greater than the volume of stormwater runoff. (R.p.986:10-15). Thus, despite the Appellants' claims the stormwater presented very little potential for flooding adjacent properties.

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**35** As noted previously, the POA's engineer, Ryan Lyle, testified that the POA checked monitoring stations in Chowan Creek and did not find that shellfish harvesting had been "shut down." (R.pp.1173:6-1174:11).

**36** The calculation of rate of flow through the breach was modeled against mean high water and then mean high high water to allow comparison. (R.p.989:14-21; pp.997:14-998:1). The mean high water level used for the calculations was 4.10 feet and mean high high was 4.48 feet. (R.p.993:13-18). The elevations were provided to the POA's engineer by a surveyor. (R.pp.994:21-995:13).

### 9. ***A Remedy Herein Which Included An Order From This Court Of Appeals To Repair The Dike Would Be Improper.***

The Appellants argue "[t]he Permit Extension and Joint Resolution of 2010 suspended until December 31, 2012, any 'Development approval ...' " (*Appellant's Brief*, p.46). While this statement is true, its application to this matter is misplaced.

As DHEC witness Blair Williams explained during his testimony, maintenance and repair is not considered to be included under the Joint Resolution. (R.pp.1285:13-1286:17). Maintenance and Repair is an exception from the permit requirements as set forth in *S.C. Code Ann.* § 48-39-130. Neither DHEC approval nor authorization is required to conduct any activity that is an explicit exception from the statute and regulations. However, in many instances information is submitted to DHEC to insure the proposed activity falls within the limits of an excepted activity.**37** In such a situation, the person will complete Maintenance and Repair request form containing information pertaining to the proposed activity. If an activity does fit within the exception, DHEC issues a letter acknowledging the proposed activity conforms to the normal Maintenance and Repair criteria.**38** Clearly an activity that conforms to the Maintenance and Repair requirements and is specifically excepted from the permitting process would not be covered under a Joint Resolution which primary purpose is to extend the life of the expiration of a permit.

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**37** The POA, much like many other persons, wanted to verify the proposed activity fit within the exception as seen in DHEC's Exhibit 4 (R.pp.1872-1886).

**38** DHEC issued such a letter in response to the POA's submission (R.pp.1873 and 1878).

Further, the repair of the dike as a remedy is improper due to the amount of time that has passed and the naturalization of the former impoundment. DHEC testified that due to the naturalization that has occurred in the lake bed, the POA will not be able to repair the dike without at least three separate state and federal permits. (R.p.9).[39]

According to Blair Williams' testimony, if someone wanted to re-impound this area a critical area permit would be required.[40] (R.p.1250:16-25). In addition to the critical area permit, Williams also provided that a Section 404 permit would need to be issued by the United States Army Corps of Engineers and that 404 permit would then trigger a Section 401 water quality permit.[41] (R.p.1256:13-20). Williams then continued to describe to this Court of Appeals at length the applicable regulations that would be required for an evaluation as to whether a critical area permit could be issued. (R.pp.1257:6-1269:24).

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**39** DHEC concurs with the ALC's determination that an evaluation of the applicability of the Critical Area permitting requirements is unnecessary due to the ALC's correct determination the project is consistent with the Coastal Zone Management Program. However, DHEC and the POA present this argument to address the Appellants' contention this Court of Appeals should order the repair of the former impoundment.

**40** "If there's -- what triggers a critical area permit, if there's an alteration to that critical area, such as someone wanted to put a dock in there, if someone wants to re-impound it, put an earthen structure, some type of structure back into that critical area, yes. That would trigger a critical area permit, but there's nothing here that's triggered a critical area permit." (R.p.1250:16-25; pp.1255:25-1256:5).

**41** "The requirement for a 404 permit from the Corps in turn triggers a requirement under section 401 of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards ("401 certification"). 401 certification is required "from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1) (2006); Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, 404 S.C. 515, 522, 745 S.E.2d 385, 388 (Ct.App. 2013).

Based on the above testimony it is clear the naturalized tidal marsh is now held in the public trust, and repairing the dike would sever lands currently held in public trust. "The public trust doctrine provides that tidelands are to be held in trust for the benefit of "*all* people of South Carolina."[42] The Appellant, George Feron, even testified at trial that he had witnessed a man fishing from a boat in the former impoundment. (R.pp.925:23-926:18). This exemplifies not only that the former impoundment is being used by members of the general public, but also that it is a navigable water and is covered under Section 404 of the *Clean Water Act*. A ruling by this Court of Appeals to order the repair of the dike would sever this public trust area from its natural system, circumvent the required DHEC analysis and evaluation of such activity, and would not affect the POA's requirement to obtain a federal permit.

Assuming *arguendo* that the Appellants are correct in their continued assertion that the proposed project lies within 1,000 feet of shellfish beds, the repair of the dike would still not be the proper legal remedy to redress the Appellants' complaints. If this Court of Appeals concluded the Stormwater Retrofit was located within 1,000 feet of shellfish beds, the proposed project would require heightened stormwater restrictions requiring on-site retention. (R.p.1545).

There are two primary reasons why a repair of the former impoundment does not meet this requirement. First, DHEC never considered the former

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**42** Estate of Tenney v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011) (Emphasis added).

impoundment a retention structure. (R.p.771:1-4). Thus, repair of the former impoundment could not meet the 'retention' prong. Next, the Cat Island former impoundment is a separate parcel, and is not 'on-site' of GPP3, as established by Richard Geer. (R.p.783:1-21). The ALC ruled that "[i]t is undisputed that the lake is a separate tract from GPP3." (R.p.16). Thus, the second prong must also fail. In assuming the Appellants' are correct in their assertion, upon which neither DHEC nor the POA contend the project is located within 1,000 feet of shellfish beds, a repair of the dike clearly does not meet the 'on-site' and 'retention' requirements.

Though the ALC correctly determined it was unnecessary to address these arguments after determining the project was consistent with the Coastal Zone Management Program, it would nonetheless be improper for this Court of Appeals to order the repair of the dike.

### 10. ***Additional Sustaining Ground As To The Appellant Pamela North***

In accordance with *South Carolina Appellate Court Rules*, DHEC and the POA set forth the following as additional sustaining grounds under Rule 220(c), *SCACR*, as a basis to sustain the ALC's order.

Counsel for the Appellants and his spouse, the Appellant, Pamela North, entered into a contract to sell their home in the Rookery located at 2 Rush Street. In offering their property for sale, Ms. North and her husband, the Appellants' counsel, acknowledged the following: 1) there were no problems with caused by fire, smoke, or water to the property during their ownership; 2) there were no problems with drainage, soil stability, atmosphere, or underground problems

affecting the property; 3) there was no erosion affecting the property; and 4) there were no flood hazards affecting the property. (R.p.1837). These facts, attested to by the Appellants' counsel and Appellant Pamela North, are inapposite to the allegations made by Attorney North on behalf of all of the Appellants, and would support affirmance of the ALC's order. Moreover, as of this writing Attorney and Mrs. North have a contract pending for purchase of 2 Rush Street, which contract may have closed or will likely close during the pendency of this appeal. Assuming Attorney and Mrs. North are divested of interest in their property on Cat Island, then the Appellant, Pamela North, should be excluded from this appeal based on lack of standing.

## V. CONCLUSION

Appellant's nine issues on appeal can be distilled to a single question of whether the lower court's legal conclusion that the Stormwater Retrofit is consistent with the Coastal Zone Management Program and that the Department's authorization for the Stormwater Retrofit was proper is supported by the law and the evidence.

In applying *S. C. Code Ann.* § 1-23-610(B) this Court of Appeals has held that "[a]s to factual issues, judicial review of administrative agency orders is limited to a determination of whether the order is supported by substantial evidence."[43] "Substantial evidence sufficient to support a finding of the ALC is evidence which, considering the record as a whole, would allow reasonable

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[43] Murphy v. S.C. Dep't of Health & Envt'l Control, 396 S. C. 633, 723 S. E. 2d 191 (2012).

minds to reach the conclusion that the administrative agency reached."[44] There is substantial evidence, and a lack of contradictory evidence, to support the lower court's conclusion that the Stormwater Retrofit is consistent with the Coastal Zone Management Program and that the Department's authorization for the Stormwater Retrofit was proper.

Respectfully submitted:

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9 July 2015

Charleston, South Carolina

***Additional Appellate Counsel On Following Page***

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[44] Greeneagle, Inc., v. S.C. Dep't of Health & Envt'l Control, 399 S.C 91, 730 S.E.2d 869, 871 (Ct.App. 2012).

*SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL*

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North Charleston, South Carolina
7 July, 2015

**STATE OF SOUTH CAROLINA**
**IN THE**
**COURT OF APPEALS**

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**Appeal from the Administrative Law Court**
**Honorable Shirley C. Robinson, Administrative Law Judge**
**Appellate Case No. 002010**

Ken Bruning; Janet Bruning; David Feron, individually and as Trustee; Mary Feron, individually and as Trustee; Byrnal Haley, individually and as Trustee; Salley Haley; Martha James, individually and as Trustee; Don Haarmeyer, individually and as Trustee, and Pamela S. North, Appellants,

v.

South Carolina Department of Health and Environmental Control and Cat Island POA, c/o Gary Meyer, Respondents.

In Re: Garfield Park, Phase 3.

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

v.

SCDHEC, Respondent.

In Re: Garfield Park Phase 3.



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**Proof of Service for the Joint Final Brief of Respondent, Cat Island POA c/o Gary Meyer and Respondent South Carolina Department of Health and Environmental Control**

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I, Angelica M. Colwell, Esquire, hereby certify that on 9 July 2015, served one copy each of the ***Final Brief*** submitted on behalf of the Respondent, Cat Island POA c/o Gary Meyer, and the Respondent, South Carolina Department of Health and Environmental Control, on all counsel of record herein via United Parcel Service, shipping pre-paid, and addressed as follows:

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Charleston, South Carolina

9 July 2015

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**Angelica M. Colwell**
Registered Patent Attorney
Admitted in MI, SC

July 9, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court Of Appeals
1220 Senate Street
Columbia, South Carolina 29201



**Re:** ***Kenneth Bruning, etc., et al. v. SCDHEC and Cat island POA, c/o Gary Meyer, Respondents,***
***Cat Island POA, c/o Gary Meyer, Petitioner v. SCDHEC,***
***In Re: Garfield Park Phase 3.***
Appellate Case No.: 2014-002010
Our File No. 52058-2

Dear Ms. Kitchings:

Enclosed please find the original and fifteen copies of **Joint Final Brief of the Respondents, Cat Island POA, c/o Gary Meyer and The South Carolina Department of Health and Environmental Control** in the above-referenced consolidated appellate matters. I also enclose a ***Proof of Service*** indicating service of the **Joint Final Brief of the Respondents, Cat Island POA, c/o Gary Meyer and The South Carolina Department of Health and Environmental Control** and the ***Proof of Service*** upon counsel for the Appellant.

I would greatly appreciate you filing the **Joint Final Brief of the Respondents, Cat Island POA, c/o Gary Meyer and The South Carolina Department of Health and Environmental Control** and the ***Proof of Service*** with the Court of Appeals and returning a date stamped copy of each to my attention in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving the Respondent's counsel with a copy of the referenced documents.

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If you need anything else or if I otherwise may be of any assistance to you or to the Court of Appeals regarding this matter, please feel free to contact me at your convenience. My direct telephone number is 843.720.1769, and the e-mail is acolwell@nexsenpruet.com.

Very truly yours,

Angelica Colwell
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