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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control ..... Appellants,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control..... Respondents.

RECORD ON APPEAL
VOLUME I OF VII

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Chairman

Mark S. Lutz
Vice Chairman

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Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

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January 11, 2013

U.S. Mail - CERTIFIED – Return Receipt

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RE: ***Docket No. 13-RFR-01 – Decision dated December 18, 2012, to issue Permit #OCRM-12-054-B to make improvements to an existing waterfront building. The purpose of the project is to facilitate the relocation of the cruise passenger facility to Building #322.***

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

The South Carolina Board of Health and Environmental Control decided on January 10, 2013 not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Pamela Hawley

for Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 21680

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **ORDER DENYING PETITIONERS' MOTION TO REMAND**

On February 27, 2013, Petitioners filed a Motion to Remand, asking this court to remand the case to the Board of the South Carolina Department of Health and Environmental Control (Board) to conduct a final review conference for a permit issued by the South Carolina Department of Health and Environmental Control (DHEC). Petitioners argue that the Board's refusal to conduct a final review conference is in violation of S.C. Code Ann. § 44-1-60(F) (Supp 2012)[1] and deprives DHEC of its right and duty to apply its specialized expertise, to correct flaws in the staff decision, and to ensure consist application of regulations in staff decisions. DHEC and the South Carolina State Ports Authority (Ports Authority) filed responses to the Motion to Remand, requesting this Court deny the motion and proceed with the contested case. For the reasons set forth here, the Court denies Petitioners' Motion to Remand.

BACKGROUND

On December 18, 2012, the DHEC staff, through the Office of Ocean and Coastal Resource Management (OCRM), issued a permit authorizing the Ports Authority to make

[1] The Petitioner's cite S.C. Code Ann. §44-1-160(F) as authority for its position. It appears the Petitioners meant to cite S.C. Code Ann. §44-1-60(F) as the Petitioners actually quoted the language from this statute. The Court bases this Order on the language in S.C. Code Ann. §44-1-60(F).

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SC ADMIN. LAW COURT

improvements to Building #322, an existing waterfront building in the Union Pier Terminal (UPT), for the purpose of relocating a cruise passenger facility to Building #322. The permit authorizes the installation of five pilings within the existing footprint of Building #322 to support the installation of three elevators and two escalators. The permit also authorizes other structural changes to Building #322 as well as the construction of two covered staging areas designed to handle passengers, luggage, and the loading and unloading of ship supplies.

On January 2, 2013, Petitioners filed a request for final review conference with the Board. On January 11, 2013, the Board issued a memorandum in which it denied the request for final review conference. On February 11, 2013, Petitioners filed a Request for Contested Case Hearing with this Court. Petitioners thereafter filed this Motion to Remand (Motion) requesting the Administrative Law Court (ALC or Court) remand the case to the Board with instructions to conduct a final review conference. On March 14, 2013, DHEC and the Ports Authority filed separate responses to Petitioners' Motion to Remand requesting this Court deny the Motion and proceed with the contested case.

DISCUSSION

Petitioners argue the statutory amendments to Section 44-1-60 in 2010 established a mandatory process by which the Board is to fully and formally review a staff decision to ensure it is consistent with agency policy and supported by the administrative record. Petitioners aver that the Board's review is necessary because Section 44-1-60(F)(2) requires this Court to give deference to the DHEC decision in light of DHEC's specialized knowledge. DHEC asserts that the Board's decision not to schedule a final review conference is discretionary. As such, upon the Board declining to review a request, the decision becomes final and Petitioners' sole remedy is to pursue the case before the ALC. The Ports Authority likewise asserts Section 44-1-60(F), when read as a whole, provides the Board with the discretion to either conduct a final review conference or decline to do so in writing.

Construction of Section 44-1-60

Section 44-1-60 establishes the entire process for the consideration, issuance, and review of a permit that might give rise to a contested case review such as the one at issue in this case. Petitioners' argument is based on the first sentence contained in Section 44-1-60(F) which sets forth that the Board "must" conduct a final review conference no later than sixty calendar days after the receipt of such a request. Initially that language may lead to the conclusion that

whenever a request is made, the Board must conduct a review. However, a thorough reading of the statute reflects otherwise. The complete opening paragraph of Section 44-1-60 (F) provides:

> (F) No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. **If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision,** and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court. The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten calendar days' written notice of the conference; and advise the applicant that evidence may be presented at the conference. The final review conference must be held as follows. . . .

S.C. Code Ann. § 44-1-60(F) (Supp. 2012)(emphasis added).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (quoting Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). Additionally, "[t]he true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). Thus, statutory sections that are part of the same general statutory law must be construed together and each one given effect. Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002).

Logically, if something is mandatory, there is no discretion. See 3 Sutherland Statutory Construction § 57:1 (7th ed.); McDaniel v. South Carolina Dept. of Public Safety, 325 S.C. 405, 481 S.E.2d 155 (Ct. App. 1996) ("the Department has no discretion in the performance of its mandatory duty to suspend the driver's license of one convicted of DUI."). Here, Section 44-1-60 establishes that the Board has discretion in whether to conduct a final review conference. As noted above, Section 44-1-60 (F) states that "[i]f the board declines in writing" the staff decision becomes the final agency decision.[2] By stating that the Board can decline to consider a request,

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[2] S.C. Code Ann. § 44-1-60(G) (Supp. 2012) also sets forth, in part, that a request for contested case hearing must be filed "within thirty calendar days after: (1) notice is mailed to the applicant, permittee, licensee, and affected

Section 44-1-60 (F) obviously recognizes the existence of discretion. The Board could not decline to do a mandatory act. Likewise, Section 44-1-60 (F) states that if the Board does not "schedule" or "conduct[]" a final review conference within sixty calendar days, the staff decision becomes the final agency decision. Again, a mandatory requirement cannot be waived by inaction.

When the statute is read as a whole, it is clear the Board has the discretion to decline to conduct a final review conference, as it did here, effectively adopting the staff decision as the final agency decision. Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control, No. 27065, 738 S.E.2d 455 (S.C. Sup. Ct. Feb. 27, 2013) (because the DHEC Board refused to conduct a final review conference, the staff decision became the final agency decision). In other words, the statute does not **require** the Board to conduct the final review conference. To read the statute otherwise would render the authority for the Board to waive the final decision meaningless. See South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008) (a "court must presume the legislature intended to accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile.").

The language that "a final review conference must be conducted" thus means that in those instances in which the Board decides to conduct a final review conference, that conference must be conducted within sixty calendar days.

Specialized Knowledge

Petitioners express concern that if the Board's review is not mandated, the deference granted to the Board's specialized knowledge would be thwarted. Specifically, Petitioners argue that because this Court must give deference to the DHEC decision, the Board's reasoning in reaching its decision is necessary for a fair decision by the ALC.

The statute in question provides that: "The court shall give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2012). Section 44-1-60(F)(2) however does not required the ALC to defer to the **Board's** findings of fact. Instead, the application of that principle applies to evidence presented by DHEC before the ALC. Following a request for a contested case hearing,

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persons that the board **declined** to hold a final review conference..." (empasis added). Thus, the Board's discretion to decline to hold final review conference is further recognized in Section 44-1-60 (G).

this Court conducts a *de novo* hearing and serves as the finder of fact, assessing the credibility of the evidence and testimony and weighing them appropriately. Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 712 S.E.2d 428 (2011); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002). All parties, including DHEC, will have the opportunity to present testimony and evidence regarding the permit and the issues central to this case. At that time, the Court must give appropriate weight to the testimony and evidence in light of DHEC's experience, technical expertise, and specialized knowledge.

Furthermore, though it is the Board's interpretations, not its staff, which is entitled to deference from the courts, Petitioners' argument simplistically theorizes that deference mandates the Board's review.[3] Section 44-1-60 clearly grants the Board the option of taking a legal position regarding the interpretation of its own regulations. However, as explained above, the Board is not required to take such a position.[4] In fact, even if the Board expresses an interpretation of its legal regulation, all expressions of an interpretation of a regulation are not necessarily entitled to deference.

In Coastal Conservation League, 363 S.C. 67, 610 S.E.2d 482 (2005), the court recognized that courts typically defer to an administrative agency's interpretation of the meaning of its own regulations unless there is a compelling reason to differ. Nevertheless, this deference has limits. A significant limitation was recently recognized in Media General Communications, Inc. v. South Carolina Dept. of Revenue, wherein the Supreme Court stated that:

> An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language.

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[3] In S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 363 S.C. 67, 610 S.E.2d 482 (2005), the Supreme Court recognized that:

> Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ. The Panel, not OCRM staff, is entitled to deference from the courts.

363 S.C. at 75, 610 S.E.2d at 498 (citations omitted)

[4] Paradoxically, the Petitioners' espouse the need for the Board's input to warrant application of deference, yet DHEC, itself, argues that the ~~DHEC~~ Board's declination of a final review conference rendered the staff decision the final agency decision. The significance of the Board's implied interpretation that it is not required to consider all request for a final review conference is not lost upon this Court. It is certainly reasonable that a longstanding interpretation of that authority would be entitled to deference inversely to Petitioner's position.

388 S.C. 138, 149, 694 S.E.2d 525, 530-31 (2010), citing Etiwan Fertilizer Company v. S.C. Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950). In Etiwan Fertilizer, the Supreme Court explained that:

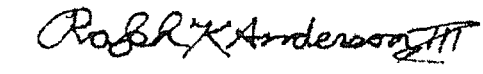
> We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons.

217 S.C. at 359, 60 S.E.2d at 684. Thus, an underlying requirement to draw upon the agency deference doctrine is that the construction of the statute has been uniform for many years so as to lead to the conclusion the General Assembly acquiesced to that construction. To find otherwise would allow an agency to construe it regulations on a case by case basis and grant deference to that irresolute interpretation.[5] Therefore,

ORDER

IT IS HEREBY ORDERED that Petitioners' Motion to Remand is **DENIED**.

AND IT IS SO ORDERED.



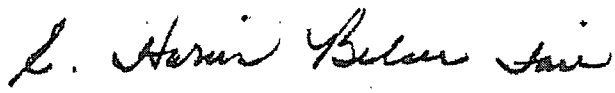
Ralph K. Anderson, III
Chief Administrative Law Judge

May 3, 2013
Columbia, South Carolina

[5] The importance of this doctrine was exemplified in Harry v. South Carolina Department of Health and Environmental Control, Docket No. 09-ALJ-07-0255-CC; 2010 WL 8425978. In Harry, an OCRM staff member who had had been a section manager for only approximately eight months took a diametrically divergent view of the interpretation of a disputed Regulation from the interpretation of the previous section manager who occupied that position for many years. Yet, DHEC contended that the new manager's interpretation was entitled to agency deference.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

May 3, 2013
Columbia, South Carolina

State of South Carolina
Administrative Law Court

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control,	)	Docket No.: 13-ALJ-07-0056-CC
Petitioners,	)	**ORDER FOR PREHEARING STATEMENTS**
v.	)	
South Carolina Department of Health and Environmental Control and South Carolina Ports Authority,	)	
Respondent.	)	

IT IS HEREBY ORDERED that each party who intends to appear at the hearing must file with the undersigned's office a Prehearing Statement stating the following:

1. The nature of this proceeding;

2. Statutory provisions(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations;

3. The issues presented for determination, including any claims or defenses expected to be raised;

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;

5. A brief summary of the facts to be presented at the hearing;

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6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;

7. A list of proposed witnesses and exhibits;

8. A statement regarding the necessity for discovery, if any;

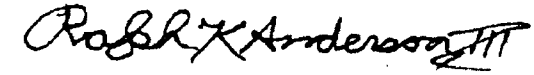
9. The estimated length of the hearing;

10. Any dates in the next ninety (90) days when you will **not** be available for a hearing; and

11. An email address where you can be reached.

IT IS FURTHERMORE ORDERED that the Prehearing Statement must be filed with the Court and served on all parties within fifteen (15) days of the date of this Order. The parties have a continuing obligation to update the information during the course of the proceedings.

AND IT IS SO ORDERED.

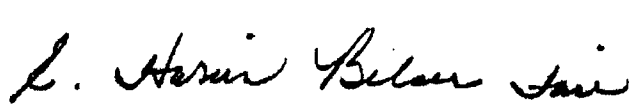


Ralph King Anderson, III
Chief Administrative Law Judge

May 6, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

May 6, 2013
Columbia, South Carolina

State of South Carolina
Administrative Law Court

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina Ports Authority, Respondent.	)	Docket No.: 13-ALJ-07-0056-CC **NOTICE OF HEARING**

IT IS HEREBY ORDERED that this action will be heard on the merits before the Honorable Ralph King Anderson, III, Administrative Law Judge, **beginning at 10:00 a.m. on Tuesday, November 12, 2013 through Monday, November 18, 2013** at the Administrative Law Court (ALC or Court), Edgar Brown Building, Second Floor, 1205 Pendleton Street, Columbia, South Carolina.

1. This hearing will be conducted in accordance with the Rules of Procedure of the Administrative Law Court, a copy of which is available from the Clerk of the Court.

2. Unless otherwise determined by the Administrative Law Judge, the hearing will proceed as follows:

   a. Call of the case;

   b. Motions and other preliminary matters such as stipulations, agreements, or consent orders to be entered into the record;

FILED
May 31, 2013
SC ADMIN. LAW COURT

c. Opening statements, not to exceed ten (10) minutes, with the party requesting the contested hearing proceeding first;

d. Presentation of evidence;

e. Final arguments, not to exceed fifteen (15) minutes, with the party requesting the contested hearing opening and closing.

3. All parties are notified to bring to the hearing all documents, records and witnesses needed to present the party's case. NOTE: IF SPECIAL EQUIPMENT IS REQUIRED FOR THE PRESENTATION OF EVIDENCE, THE PARTY PRESENTING THE EVIDENCE IS RESPONSIBLE FOR OBTAINING THE EQUIPMENT AND ITS CUSTODY.

4. Subpoenas are available to the parties pursuant to SC Code Ann. § 1-23-320(d) (Supp. 2009) and the rules of the Court, to compel the attendance of witnesses or for the production of documents at the hearing. The parties are responsible for service of subpoenas.

5. A party may represent himself or may be represented by an attorney at the hearing. An attorney representing a party must file a Notice of Appearance within ten (10) days of service of this Notice, unless previously filed with the Court.

6. TAKE NOTICE THAT A FAILURE TO APPEAR AT THE HEARING MAY RESULT IN:

a. A finding that the party who fails to appear does not object to the relief of which notice has been given;

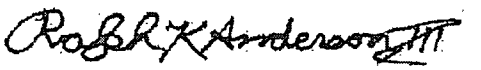
b. Dismissal of the case or striking of the pleading of the party who fails to appear;

c. Exclusion of evidence proffered by the party who fails to appear; or

d. Such other rulings as are deemed appropriate by the Administrative Law Judge.

7. **Continuances will be granted only when extraordinary circumstances exist.** Parties may request continuances no later than 24 hours prior to the scheduled hearing date.

8. In case of settlement or dismissal, failure of the parties to inform the Court prior to the scheduled hearing that the hearing is not necessary may result in imposition of Court costs and Court Reporter fees against the parties.

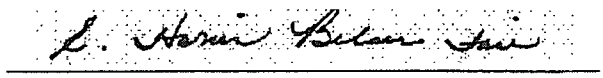


Ralph King Anderson, III
Chief Administrative Law Judge

May 31, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

May 31, 2013
Columbia, South Carolina

State of South Carolina
Administrative Law Court

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina Ports Authority, Respondent.	)	Docket No.: 13-ALJ-07-0056-CC **AMENDED NOTICE OF HEARING**

IT IS HEREBY ORDERED that this action will be heard on the merits before the Honorable Ralph King Anderson, III, Administrative Law Judge, **beginning at 10:00 a.m. on Monday, January 27, 2014 through Friday, January 31, 2014** at the Administrative Law Court (ALC or Court), Edgar Brown Building, Second Floor, 1205 Pendleton Street, Columbia, South Carolina.

1. This hearing will be conducted in accordance with the Rules of Procedure of the Administrative Law Court, a copy of which is available from the Clerk of the Court.

2. Unless otherwise determined by the Administrative Law Judge, the hearing will proceed as follows:

   a. Call of the case;

   b. Motions and other preliminary matters such as stipulations, agreements, or consent orders to be entered into the record;

FILED
June 12, 2013
SC ADMIN. LAW COURT

c. Opening statements, not to exceed ten (10) minutes, with the party requesting the contested hearing proceeding first;

d. Presentation of evidence;

e. Final arguments, not to exceed fifteen (15) minutes, with the party requesting the contested hearing opening and closing.

3. All parties are notified to bring to the hearing all documents, records and witnesses needed to present the party's case. NOTE: IF SPECIAL EQUIPMENT IS REQUIRED FOR THE PRESENTATION OF EVIDENCE, THE PARTY PRESENTING THE EVIDENCE IS RESPONSIBLE FOR OBTAINING THE EQUIPMENT AND ITS CUSTODY.

4. Subpoenas are available to the parties pursuant to SC Code Ann. § 1-23-320(d) (Supp. 2009) and the rules of the Court, to compel the attendance of witnesses or for the production of documents at the hearing. The parties are responsible for service of subpoenas.

5. A party may represent himself or may be represented by an attorney at the hearing. An attorney representing a party must file a Notice of Appearance within ten (10) days of service of this Notice, unless previously filed with the Court.

6. TAKE NOTICE THAT A FAILURE TO APPEAR AT THE HEARING MAY RESULT IN:

a. A finding that the party who fails to appear does not object to the relief of which notice has been given;

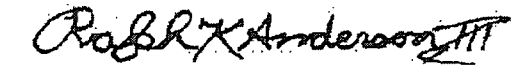
b. Dismissal of the case or striking of the pleading of the party who fails to appear;

c. Exclusion of evidence proffered by the party who fails to appear; or

d. Such other rulings as are deemed appropriate by the Administrative Law Judge.

7. **Continuances will be granted only when extraordinary circumstances exist.** Parties may request continuances no later than 24 hours prior to the scheduled hearing date.

8. In case of settlement or dismissal, failure of the parties to inform the Court prior to the scheduled hearing that the hearing is not necessary may result in imposition of Court costs and Court Reporter fees against the parties.



Ralph King Anderson, III
Chief Administrative Law Judge

June 12, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **CONSENT SCHEDULING ORDER**

The Court, based upon the consent of the parties finds that it is appropriate to set forth the following schedule for the conduct of this matter. Therefore, it is hereby **ORDERED** that:

1. Except as otherwise modified or set forth in this order, discovery may be had by each party in accordance Rules 26-37 of the South Carolina Rules of Civil Procedure (SCRCP). The limitations on discovery set forth in Rule 21, RPALC are hereby modified accordingly.

2. Any party may depose any witness listed by any party or any person identified as having information relevant to the subject matter of the disputes and issues in this matter. The parties and their counsel shall work together and cooperate to schedule depositions in a convenient and reasonable manner and timeframe.

3. Each party may serve upon any other party written interrogatories pursuant to Rule 21, RPALC and Rule 33, SCRCP, provided, however, that the number of interrogatories posed to

a party by another party shall be limited to 75, including subparts and excluding standard interrogatories.

4. Each party may serve upon any other party requests for admission pursuant to Rule 21, RPALC and Rule 36, SCRCP, provided, however, that the number of requests for admission posed to a party by another party shall be limited to 30, including subparts.

5. Petitioners shall designate their expert(s) no later than **August 2, 2013.**

6. Respondents shall designate their expert(s) no later than **August 16, 2013.**

7. Any motions challenging expert qualifications shall be filed no later than ten (10) days following the deposition of the expert in question.

8. All discovery in this matter shall be served in sufficient time to allow for all responses to discovery to be received and all depositions concluded no later than **November 15, 2013.**

9. Parties shall file any dispositive motions no later than **December 13, 2013.**

10. The parties shall exchange exhibits intended to be introduced into evidence no later than **January 13, 2014.**

11. The parties shall exchange final witness lists no later than **January 13, 2014.**

12. The parties shall file any objections to exhibits no later than **January 20, 2014.**

13. Any prehearing motions must be filed no later than **January 18, 2014.**

14. Pursuant to the Amended Notice of Hearing issued by the Court on June 12, 2013 in this matter, this case is set for hearing **January 27-31, 2014.**

15. The foregoing discovery schedule and framework is subject to the right of any party to move for a continuance upon good cause shown and to seek a protective or other order on any

grounds available under Rule 21 of the Rules of Procedure for the Administrative Law Court and under Rules 27-37, SCRCP.

AND IT IS SO ORDERED.

_____
Ralph K. Anderson, III
Chief Administrative Law Judge

Columbia, South Carolina
June ____, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina Ports Authority, Respondent.	)	Docket No.: 13-ALJ-07-0056-CC **ORDER ON MOTION FOR CONTINUNANCE AND AMENDED NOTICE OF HEARING**

This matter is before the Administrative Law Court (ALC or Court) on a Motion for a Continuance filed by Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control (Petitioners). The Petitioners request that the hearing scheduled for Tuesday, August 27, 2013 be continued. The Respondents do not object to the continuance.

IT IS THEREFORE ORDERED that the Motion for a Continuance is Granted.

IT IS FURTHER ORDERED that the hearing on South Carolina State Ports Authority's Motion to Dismiss and for Sanction and on South Carolina State Ports Authority's Motion to Dismiss for Lack of Standing is continued to **10:00 a.m. on Friday, September 6, 2013** at the Administrative Law Court (ALC or Court), Edgar Brown Building, Second Floor, 1205 Pendleton Street, Columbia, South Carolina.

1. This hearing will be conducted in accordance with the Rules of Procedure of the Administrative Law Court, a copy of which is available from the Clerk of the Court.

2. TAKE NOTICE THAT A FAILURE TO APPEAR AT THE HEARING MAY RESULT IN:

FILED

August 14, 2013

SC ADMIN. LAW COURT

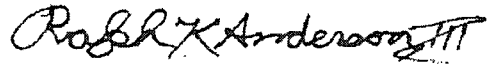
a. A finding that the party who fails to appear does not object to the relief of which notice has been given;

b. Dismissal of the case or striking of the pleading of the party who fails to appear;

c. Such other rulings as are deemed appropriate by the Administrative Law Judge.

3. **Continuances will be granted only when extraordinary circumstances exist.** Parties may request continuances no later than 24 hours prior to the scheduled hearing date.

AND IT IS SO ORDERED.

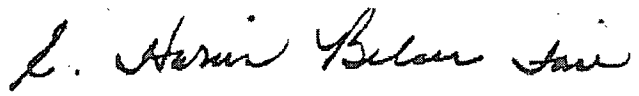


Ralph King Anderson, III
Chief Administrative Law Judge

August 14, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

August 14, 2013
Columbia, South Carolina

Fwd: RE: Preservation Society of Charleston et al v. SCDHEC and SCSPA, 13-ALJ-07-0056-CC

From: Jessie White <jessie@scelp.org>
To: Margaret Sands <margaret@scelp.org>
Subject: Fwd: RE: Preservation Society of Charleston et al v. SCDHEC and SCSPA, 13-ALJ-07-0056-CC
Date: Thursday, April 09, 2015 12:21 PM
Size: 5 KB

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Jessie White
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
Phone: (843) 527-0078
Fax: (843) 527-0540
jessie@scelp.org

—— Original message ——
From: Harvin Fair <hfair@scalc.net>
To: "jessie@scelp.org" <jessie@scelp.org>, "churdabd@dhec.sc.gov" <churdabd@dhec.sc.gov>, Chad Johnston <cjohnston@willoughbyhoefer.com>, "jl@leathbouchlaw.com" <jl@leathbouchlaw.com>, "rlowell@willoughbyhoefer.com" <rlowell@willoughbyhoefer.com>, Philip Lawrence <PLawrence@SCSPA.com>
Cc: Amy Armstrong <amy@scelp.org>
Subject: RE: Preservation Society of Charleston et al v. SCDHEC and SCSPA, 13-ALJ-07-0056-CC
Date: Tue, 20 Aug 2013 12:41:53 +0000

Judge Anderson has determined that he will not accept the Sur-Reply in this matter.
Sincerely,

Harvin Fair
Law clerk to the Honorable Ralph King Anderson, III
office phone 803-734-6409

——Original Message——
From: Jessie White [mailto:jwscelp@fastmail.fm]
Sent: Monday, August 19, 2013 11:03 AM
To: Harvin Fair; churdabd@dhec.sc.gov; Chad Johnston; jl@leathbouchlaw.com; rlowell@willoughbyhoefer.com; Philip Lawrence
Cc: Amy Armstrong
Subject: Preservation Society of Charleston et al v. SCDHEC and SCSPA, 13-ALJ-07-0056-CC

Harvin,

Attached please find a copy of the Petitioners' Motion to Strike, or in the alternative, Motion for Leave to File Sur-Reply, filed by mail on Friday, August 16 in the above-referenced case.

Thank you,

—

Jessie White
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
Phone: (843) 527-0078
Fax: (843) 527-0540
jessie@scelp.org

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina Ports Authority, Respondents.	)	Docket No.: 13-ALJ-07-0056-CC **ORDER DENYING MOTION TO QUASH SUBPOENA**

This matter is before the Administrative Law Court (Court or ALC) pursuant to a Motion to Quash Subpoena (Motion) filed by the Petitioners, Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control (Petitioners) on August 28, 2013. Petitioners are seeking to quash a subpoena issued by Respondent South Carolina State Ports Authority (SPA) on August 19, 2013, to Disher, Hamrick and Myers Residential, Inc. (DHM Residential) for production and inspection of certain documents in its possession, custody, or control.

Petitioners filed this contested case opposing the issuance of a permit for SPA to install five (5) pilings for the renovation at the Union Pier Terminal (UPT). Petitioners allege, in part, that currently the cruise ships that frequent the UPT have had a negative impact on property values of their members and that by granting the permit at issue, South Carolina Department of Health and Environmental Control (DHEC or Department) and SPA have failed to take into consideration the impact of increased cruise activity on the surrounding area.

Petitioners' Prehearing Statement asserts that one of the issues for the Court is "whether DHEC properly considered the 'extent to which the proposed use could affect the value and enjoyment of the adjacent owners.'" The same prehearing statement lists Carrie Agnew (Ms. Agnew), the Executive Director for Petitioner Charleston Communities for Cruise Control (C4), as a proposed witness. Consistent with those allegations, Ms. Agnew submitted a sworn affidavit to the South Carolina Supreme Court attesting to alleged injuries she has suffered to person and property, including excessive noise and soot deposition, from cruise operations as a result of living in the Historic Ansonborough Neighborhood near the UPT.

It appears that on or about June 2013, Ms. Agnew finalized the sale of her home on Hasell Street in Charleston, South Carolina.[1] DHM Residential served as Ms. Agnew's listing agent for this property. On August 19, 2013, SPA issued a subpoena requesting:

> All communications, documents, emails, letters, agreements, memoranda, notes, consultations, or correspondence related to the sale and conveyance of real property being known and designated as [redacted] Hasell Street, Charleston, S.C. 29401 by and from Carolyn W. Agnew ("Grantor") to [redacted] ("Grantees") in or about June 2013 and pertaining to the condition of said real property, including, but not limited to, the State of South Carolina Residential Property Condition Disclosure Statement.

On August 28, 2013, Petitioners filed the Motion asserting that (1) the information sought is not relevant to the subject matter involved and is not likely to lead to discovery of admissible evidence and (2) any relevant information can be sought through other methods, specifically through requests for production, depositions of named parties to this action or depositions of witnesses identified by Petitioner. SPA filed a response asserting that the Petitioners lack standing to challenge a third-party subpoena and alternatively, even if standing existed, the information sought is directly relevant to issues raised by and regarding witnesses named by the Petitioners.

DISCUSSION

Rule 21 of the Rules of Procedure for the ALC (SCALC Rule) provide that "[d]iscovery shall be conducted according to the procedures in Rules 26-37, SCRCP[2]." SCRCP 26(b)(1) provides that

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[1] According to the Petitioners' Responses to Respondent SPA's First Set of Interrogatories to Petitioner C4, dated April 22, 2013, Ms. Agnew has knowledge of the area around the UPT. Ms. Agnew's home on Hasell Street was in the Historic Ansonborough Neighborhood Association.

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Petitioners have generally made allegations of significant harm as a result of on-going cruise operations at UPT, which they claim will be exacerbated by the issuance of the challenged pilings permit. In the Request for Contested Case Hearing, one of the allegations made by the Petitioners was that operation of the cruise ships amounted to a public and private nuisance. In particular, Petitioners assert the cruise ship operations negatively impacted their property values due to traffic congestion, noise, soot and visual pollution. They assert that soot settled in the interior and exterior of some of the Petitioners' members' homes requiring clean-up. In addition, in Petitioners' responses to SPA's First Set of Interrogatories, Petitioners identify Ms. Agnew as a witness in this case to testify to the airborne pollutants intruding into her home.

Third Party Standing

As a threshold matter, Petitioners lack standing to challenge the subpoena to DHM Residential, a third party. The ALC Rules provide that: **"[a] person to whom a subpoena has been issued** may move before the administrative law judge for an order quashing or modifying the subpoena." Rule 22(C), RPALC (emphasis added). In this instance, the subpoena was served on DHM Residential, not Cruise Opponents. Therefore, Petitioners are **not** "[a] person to whom a subpoena has been issued." Rule 22(C), RPALC (emphasis added); *see, e.g.*, *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) (stating that where "a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning" and "[w]here the terms of the statute are clear, the court must apply those terms according to their literal meaning") (internal citations omitted); *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.").

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[2] South Carolina Rules of Civil Procedure.

Further, "[a] party generally lacks standing to challenge the validity of a subpoena issued to a third party. However, a party has standing to move to quash a subpoena addressed to another if that subpoena infringes upon the movant's legitimate interests." 81 Am. Jur. 2d *Witnesses* § 11 (2013); *see also* Wright & Miller, 9A FED. PRAC. & PROC. CIV. § 2459, *Subpoena for the Production of Documents and Things—Quashing or Modifying a Subpoena* (3d ed.) ("Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action, unless the objecting party claims some personal right or privilege with regard to the documents sought."). For instance, "[a] party has the standing to seek to quash a subpoena served on a third party based on a claim of privilege relating to the documents being sought." 98 C.J.S. *Witnesses* § 52 (2013).

Here, however, Petitioners did not establish a personal right or privilege with regard to the documents sought. Accordingly, Petitioners have no standing to challenge SPA's subpoena.

Relevance of SPA's Request

SPA requests production of documents from DHM Residential arising from a real estate transaction pertaining to the sale of Ms. Agnew's former property on Hasell Street. Petitioners aver that they "can fathom no reason why a real estate agent's records related to the condition of a property is relevant to the subject matter involved or how that information could possibly lead to the discovery of admissible evidence." However, I find that the filings and representations of the Petitioners to this Court demonstrate the reasonableness and relevance of the subpoena request. Rule 26(b)(1), SCRCP, provides:

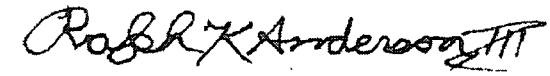
> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... [and][i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Here, Petitioners have directly placed property values and alleged nuisances at these witnesses' residential properties at issue. Ms. Agnew has been named as a witness for her knowledge of "airborne pollutants intruding into her home" and "decrease in property values resulting from ongoing and future cruise ship operations at Union Pier Terminal." Moreover, they have named Brown Hamrick—a real estate agent, principal, and registered agent for DHM Residential—as a fact witness in this case. Thus, documents in the possession or control of DHM Residential pertaining to the condition of Ms. Agnew's former property on Hasell Street may shed further light on Petitioners' allegations, especially given the allegations made by Ms.

Agnew and the Petitioners regarding alleged nuisances at the property location and property values. Therefore, I find that even if Petitioners have standing to challenge the subpoena, the Motion to Quash must be denied because SPA's subpoena is narrowly tailored and relevant to the subject matter in this case.[3]

IT IS THEREFORE ORDERED that Petitioners' Motion to Quash Subpoena is denied.

AND IT IS SO ORDERED.



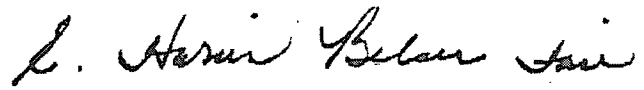
Ralph King Anderson, III
Chief Administrative Law Judge

November 8, 2013
Columbia, South Carolina

[3] Petitioners cite *Oncology & Hematology Associates of S.C., LLC v. South Carolina Department of Health & Environmental Control*, 387 S.C. 380, 692 S.E.2d 920 (2010) in support of their argument that SPA's request is abusive, not reasonably tailored to relevant matters or to admissible evidence, and should be quashed. However, in *Oncology & Hematology*, Respondent Spartanburg Regional Healthcare System made blanket demand for years' worth of business records, physician and patient data, communications of strategic plans, etc. even though the case turned on a decidedly narrow issue. *See Oncology & Hematology*, 387 S.C. at 383-85, 388, 692 S.E.2d at 922-23, 925. The Court therefore found the discovery request "not remotely relevant" to the controversy and a "scorched-earth approach." *Oncology & Hematology*, 387 S.C. at 389, 692 S.E.2d at 925. Here, SPA is seeking information pertaining to a specific piece of property.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

November 8, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **ORDER DENYING PORTS AUTHORITY'S MOTION TO DISMISS**

FILED
December 2, 2013
SC ADMIN. LAW COURT

APPEARANCES: For the Petitioners: Amy E. Armstrong, Esquire
W. Jefferson Leath, Jr., Esquire
J. Blanding Holman, IV Esquire

For the Respondents: Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Bradley D. Churdar, Esquire

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on the Motion to Dismiss filed by the South Carolina State Ports Authority (Ports Authority) on July 1, 2013. In this Motion, the Ports Authority asserts this case should be dismissed on the grounds that Petitioners lack standing to challenge the permit in this case and, in the alternative, the issues presented amount to a non-justiciable political question. On September 6, 2013, this Court held a hearing on several motions, including this Motion to Dismiss. At the hearing, the Court asked the parties to file supplemental memoranda regarding the standard of review and applicable law.[1] After reviewing the filings by the parties and hearing oral arguments, the Court denies the Motion to Dismiss.

[1] This court will not consider Petitioners' additional argument that was included in their supplemental memorandum. Petitioners asserted that as a result of a decision issued in federal court after this court's hearing on

BACKGROUND

On December 18, 2012, the Department of Health and Environmental Control (DHEC) staff, through the Office of Ocean and Coastal Resource Management (OCRM), issued a Critical Area Permit and Coastal Zone Consistency Certification (Permit No. OCRM-12-054-B) authorizing the Ports Authority to make improvements to Building #322, an existing waterfront building in the Union Pier Terminal (UPT), for the purpose of relocating a cruise passenger facility. The permit authorizes the installation of five pilings within the existing footprint of Building #322 to support the installation of three elevators and two escalators. The permit also authorizes other structural changes to Building #322 as well as the construction of two covered staging areas designed to handle passengers, luggage, and the loading and unloading of ship supplies.

Petitioners filed a request for contested case hearing at the ALC to challenge DHEC's decision to issue the permit. Petitioners allege that DHEC's decision violates the South Carolina Coastal Zone Management Act, S.C. Code Ann. 48-39-10, et seq., the South Carolina Code of Regulations 30-1, et seq., and the Coastal Management Program (CMP).

On July 1, 2013, the Ports Authority filed a Motion to Dismiss on the grounds that Petitioners have failed to establish standing to challenge Permit No. OCRM-12-054-B. The Ports Authority asserts Petitioners have not suffered an injury-in-fact because the alleged injuries pertain to existing cruise operations and not the permitted activity to install five cluster piles. The Ports Authority further asserts that even if Petitioners have alleged an injury-in-fact, the alleged injuries are not traceable to or caused by the Permit and are not redressable by a favorable decision of this Court. Finally, the Ports Authority asserts Petitioners do not satisfy the associational standing requirement for bringing claims. As an alternative to the arguments regarding Petitioners' lack of standing, the Ports Authority argues that the case should be dismissed because the question of whether the State of South Carolina and the City of Charleston should adopt a policy favorable to cruise operations is a non-justiciable political question. The Ports Authority attached twenty exhibits to its Motion to Dismiss, including affidavits, newspaper and magazine articles, and other information related to the project to renovate the UPT.

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the Motion to Dismiss, the Ports Authority was collaterally estopped from challenging Petitioners' standing to litigate this case. This court's request for supplemental memoranda was very narrow and it was thus inappropriate for Petitioner to raise a new argument.

Petitioners filed a Response to Motion to Dismiss and also moved to strike the exhibits attached to the Ports Authority's Motion to Dismiss. Petitioners assert that when reviewing this Motion to Dismiss, the allegations made by Petitioners must be taken as true and those allegations sufficiently establish standing to proceed with this case at this time. Petitioners attached the affidavits of five individuals to support Petitioners' allegations. Moreover, Petitioners assert the Court should not only disregard but should strike the exhibits attached to the Ports Authority's Motion as there is no basis for consideration of exhibits offered by the Respondent at this stage of the proceedings. Finally, Petitioners dispute the Ports Authority's assertion that this case involves a non-justiciable political question.

DISCUSSION

This Court did not convert the Ports Authority's Motion to Dismiss to a Motion for Summary Judgment. All the parties asserted that they intended to treat this Motion solely as a Motion to Dismiss. Furthermore, at the time of the hearing, the parties were still in the process of conducting discovery. As such, it would not be appropriate to treat the motion as one for summary judgment. See Baird v. Charleston Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999) ("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"). With this in mind, the Court first must rule on the propriety of considering evidence offered outside the pleadings prior to ruling on the Ports Authority's Motion to Dismiss.

In civil cases, the general rule is that a court will not consider evidence outside the pleadings when ruling on a motion to dismiss. See, e.g., Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) ("A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case."). In cases filed at the ALC, parties are not required to file traditional civil pleadings such as a complaint. In fact, in 2013, the ALC Rules of Procedure were amended to eliminate the rule regarding the filing of a Petition and an Answer, filings that resembled traditional civil pleadings. Compare ALC Rule 18 (eff. May 1, 2011) with ALC Rule 18 (eff. May 1, 2013). Nonetheless, generally in ALC contested cases, there are documents that are filed to initiate a case and set forth the core position of the parties. In this instance, Petitioners filed a Request for Contested Case which set forth, in part, who the Petitioners are and the relief

requested. More importantly, the Court thereafter issued an Order for Prehearing Statements. See ALC Rule 14. In that Order the Court requested that the parties set forth:

- Statutory provisions(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations;
- The issues presented for determination, including any claims or defenses expected to be raised;
- The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;
- A brief summary of the facts to be presented at the hearing

The Request for Contested Case Hearing along with the Prehearing Statements establish a core statement of the facts and issues for determination that is comparable to the pleadings in a civil trial. Thus, since the Court's review is limited to the "pleadings," the Court must limit its review to the Request for Contested Case Hearing and Prehearing Statements to determine whether Petitioners have failed to state facts sufficient to state a claim unless otherwise provided by law.

While the general rule is that the court will not consider evidence outside the pleadings when ruling on a motion to dismiss, an exception applies when the motion to dismiss is based on lack of subject matter jurisdiction. Baird v. Charleston Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999). A plaintiff may submit affidavits to show jurisdiction exists, Brown v. Investment Management & Research, Inc., 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996), while the defendant may submit affidavits or other evidence proving lack of jurisdiction, Baird, 333 S.C. at 529, 511 S.E.2d at 74.

Subject matter jurisdiction "refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 169, 485 S.E.2d 371, 372 (1997). By statute, all DHEC decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions that may give rise to a contested case are subject to review by the ALC. S.C. Code Ann. § 44-1-60 (Supp. 2012); see also S.C. Code Ann. § 1-23-600(A) (Supp. 2012) ("[a]n administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505..."); S.C. Code Ann. § 1-23-505(3) (Supp. 2012) (a contested case is a proceeding "in which the legal rights, duties, or privileges of a party are required by law. . . to be determined by an agency or the Administrative Law Court after an opportunity for hearing"). Regarding DHEC decisions,

Section 44-1-60 sets forth procedures, which include the opportunity for an applicant, permittee, licensee, or affected person to contest the final agency decision by filing a request for a contested case hearing before the ALC. S.C. Code Ann. § 44-1-60(F)(2), -60(G) (Supp. 2012). It is undisputed that this case is before the ALC pursuant to a request for review of a permit issued by DHEC, through its Office of Ocean and Coastal Resource Management. Therefore, there is no doubt that the ALC has jurisdiction to hear the subject matter of this case, i.e., a challenge to the issuance of a permit by an office of DHEC.

The question then is whether the Ports Authority's allegations that Petitioners lack standing, if true, deprive this Court of subject matter jurisdiction to hear this case. The Ports Authority asserts that under federal law, if a plaintiff fails to establish "constitutional standing," the federal court lacks subject matter jurisdiction to hear the plaintiff's case. According to the Ports Authority, it follows that because the South Carolina Supreme Court adopted the three elements of the "constitutional standing" test as set forth by the U.S. Supreme Court, a South Carolina court will also be deprived of subject matter jurisdiction when a plaintiff fails to meet the "constitutional standing" test.

Doctrines of Standing under Federal and State Law

Under federal law, there are two types of standing: Article III standing, derived from the U.S. Constitution's case-or-controversy requirement, and prudential standing, derived from the judicially self-imposed limits on a federal court's exercise of jurisdiction. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004); 25 Federal Procedure, Lawyers Edition § 59:1 (2013).[2] The U.S. Supreme Court's decision in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) set forth the elements of what is often called "Article III standing" or "constitutional standing." In Lujan, the Court sought to define the federal courts' judicial power by analysis of Article III of the U.S. Constitution. Quoting an earlier opinion, the Court explained that the case-or-controversy requirement of Article III, which "serves to identify those disputes which are appropriately resolved through the judicial process," Whitmore v. Arkansas, 495 U.S. 149, 155 (1990), is the basis for the doctrine of standing in federal courts. The Court concluded that "the core component of standing is an essential and unchanging part of the case-or-controversy

[2] In Elk Grove, the U.S. Supreme Court explained that even when cases are within the federal court's jurisdiction under Article III, the federal court may apply the prudential limitations on standing and decline to consider a case as a matter of judicial self-governance. Elk Grove, 542 U.S. at 11.

requirement of Article III." Lujan, 504 U.S. at 560. The Court then established that the "irreducible constitutional minimum of standing" consists of three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-561 (citations omitted). In federal court, it is critical that a party meet all three elements to establish that the party's case is a justiciable case or controversy. Absent this showing, the federal court's jurisdiction under Article III of the U.S. Constitution cannot be invoked. For this reason, a showing by a defendant that the plaintiff does not have standing to pursue his case in federal court, i.e., he has not properly invoked the jurisdiction of the federal court, deprives the federal court of the judicial power to hear the case. 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1542 (3d ed.) (when standing acts as an element of the case-or-controversy requirement, "it acts as a limitation on the subject-matter jurisdiction of the federal courts"). Thus, when standing is an element of the case-or-controversy requirement of Article III, objections to standing "cannot be waived and may be raised by a federal court sua sponte." Id. As a result, in federal court, the lack of standing can deprive the court of subject matter jurisdiction.

In 2001, the South Carolina Supreme Court adopted the three-part test of Lujan in Sea Pines Ass'n for Protection of Wildlife, Inc. v. S.C. Department of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001) without an explanation as to its reasoning. Since that decision, our state courts have analyzed standing by applying various tests including the Lujan test, often referring to it as the "constitutional standing" test. See, e.g., Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007) (held Smiley sufficiently alleged standing under the elements of the Lujan test); Charleston Trident Home Builders, Inc. v. Town Council of Summerville, 369 S.C. 498, 632 S.E.2d 864 (2006) (held Trident had standing under the elements articulated in Sea Pines); Sloan v. Dep't of Transp., 365 S.C. 299, 618 S.E.2d 876 (2005) (held Sloan had standing under the public importance exception); St. Andrews Pub. Serv. Dist. v. City Council of Charleston, 349 S.C. 602, 564 S.E.2d 647 (2002) (held special purpose

district lacked statutory standing to challenge annexation); Powell ex rel. Kelley v. Bank of America, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008) (held Bank lacked standing according to the Lujan test); Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Envtl. Control, 370 S.C. 296, 634 S.E.2d 664 (Ct. App. 2006) (held Commander lacked standing according to the Lujan test); Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) (held Sloan, as a taxpayer, had standing under the Lujan test and also because the issue was of sufficient public importance).

In 2008, however, the South Carolina Supreme Court succinctly clarified the doctrine of standing under South Carolina law. In ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008), Charleston County rezoned property owned by SCANA Communications, Inc. (SCI) to a classification that would permit SCI to construct a cell-phone tower. ATC, a competitor of SCI, challenged the rezoning by filing a declaratory judgment action. The circuit court dismissed the case finding ATC lacked standing to challenge the rezoning. On review, the Supreme Court explained that "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." ATC, 380 S.C. at 195, 669 S.E.2d at 339. The Court first determined that no applicable statute provided a basis for ATC to assert statutory standing. The Court then determined that ATC did not meet the requirements of the Lujan test given that it failed to meet the first requirement of a concrete and particularized injury. Finally, the Court analyzed the public importance exception and concluded "ATC's efforts to cloak its zoning challenge as a matter of 'public importance' for the purpose of acquiring standing finds no traction in this record." ATC, 380 S.C. at 200, 669 S.E.2d at 341-342.

Since ATC, the Supreme Court has reiterated its three-part test in determining standing under South Carolina law.[3] In Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012),

[3] The Court of Appeals issued a decision in 2010 involving a dock permit granted by DHEC in 2007. Bailey v. S.C. Dep't of Health & Envtl. Control, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). In that case, Bailey was challenging DHEC's decision to approve modifications to a dock permit for a property upstream from Bailey's property. The ALC found Bailey lacked standing to challenge the permit because Bailey did not meet all three elements of the Lujan test. Neither the ALC's decision nor the Court of Appeals' decision mentioned or discussed whether Bailey had standing under a state statute or the public importance exception. However, in that case the Court was reviewing an order issued by the ALC on July 23, 2008, prior to the ATC decision.

In a later decision, the Court of Appeals acknowledged the three ways a party can acquire standing, as clarified in the ATC decision. Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013). In that case, the Town along with various individuals challenged a DHEC decision authorizing certain land-disturbing activities under a state general permit. The ALC found that the Town and individuals lacked

Freemantle asserted a claim under the Freedom of Information Act to challenge the severance agreement entered between the county and its former administrator.[4] The circuit court dismissed the claim on the basis that Freemantle's status as a taxpayer did not establish standing to pursue his claim. The Supreme Court agreed that Freemantle did not meet the requirements of the Lujan test. The Court, however, found that Freemantle had standing to pursue his claim based on a specific provision in Section 30-4-100(a). The Court held that by virtue of enacting Section 30-4-100(a), the General Assembly "specifically conferred standing upon any citizen of South Carolina to bring a FOIA claim against a public body for declaratory or injunctive relief, or both." Freemantle, 398 S.C. at 195, 728 S.E.2d at 45. Because Freemantle properly pled that he was a citizen of South Carolina and that the Freedom of Information Act had been violated, the Court concluded he had satisfied the requirements to establish statutory standing and "[n]othing more is required." Id.

In Youngblood v. S.C. Department of Social Services, 402 S.C. 311, 741 S.E.2d 515, (2013), the Supreme Court again recognized that standing may be established in one of three ways. In that case, the Court considered whether former foster parents have standing to petition to adopt a child placed by the Department of Social Services (DSS) with a different family. The Court found that Section 63-9-60, the statute relied upon by the family court to find standing, actually deprived the Youngbloods of standing because the broad grant of standing in that statute specifically excluded situations where the child is placed for adoption by DSS. The Court next found that Section 63-9-310(D), which the Court of Appeals relied upon to find standing, did not confer standing because it did not apply to the Youngbloods and did not provide a right to judicial review. Because the Court found the Youngbloods lacked statutory standing, the Court analyzed "whether the denial of consent implicates a legal interest held by the Youngbloods, and thus whether due process requires judicial review and they possess constitutional standing." Youngblood, 402 S.C. at 321, 741 S.E.2d at 520. The Court ultimately found that the foster

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standing to challenge DHEC's decision. On appeal, the Court of Appeals presumed that no statute conferred standing, quoting the language from the Youngblood case, and noted that the ALC did not consider and Appellants did not raise the public importance exception. Town of Arcadia Lakes, 404 S.C. at 528, 745 S.E.2d at 392. Thus, while the Court recognized there were three ways a party could acquire standing, the Court only analyzed whether the Town and individuals met the elements of the Lujan test.

[4] Interestingly, in Freemantle, the Supreme Court referred to "constitutional standing" and the "public importance exception" as the "traditional standing principles" distinguishing those tests from standing acquired by statute.

parent relationship in and of itself is insufficient to create a legally protected interest in a child and, thus, does not create standing.

Most recently, in Bodman v. State, 403 S.C. 60, 742 S.E.2d 363 (2013), the Supreme Court heard an action in its original jurisdiction, wherein a taxpayer challenged the exemptions and caps on the State's sales and use tax and requested the Court strike them down as being unconstitutional. The Court first considered the State's argument that Bodman lacked standing to bring the action. The Court explained that "*[u]nder our current jurisprudence*, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called 'constitutional standing'; and (3) under the public importance exception." Bodman, 403 S.C. at 66-67, 742 S.E.2d at 366 (citing ATC, 380 S.C. at 195, 669 S.E.2d at 339) (emphasis added). Because Bodman did not claim standing under any statute, the Court proceeded with its analysis under constitutional standing. The Court held that Bodman did not meet the first requirement of suffering a concrete and particularized injury because any harm he would suffer is shared by all taxpayers in the State. The Court, therefore, concluded that Bodman, as a mere taxpayer, did not have standing to proceed under the Lujan test. The Court then turned to the public importance exception. The Court explained that it had "tempered the application of the public importance exception somewhat in ATC" clarifying that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." Bodman, 403 S.C. at 68, 742 S.E.2d at 367 (quoting ATC, 380 S.C. at 198-199, 669 S.E.2d at 341). The Court ultimately declined to analyze whether Bodman had standing under the public importance exception, instead finding that his claims failed on the merits.

This line of cases reflects that the doctrine of standing under South Carolina law has evolved from reliance on primarily one test to consideration of three distinct and separate ways a party can establish standing to pursue a claim in this State. Moreover, the ATC case in 2008 serves as a line of demarcation, at which point our state Supreme Court more comprehensively established "our current jurisprudence" regarding standing. As a result, for cases filed in South Carolina state courts, standing may be acquired: (1) by statute; (2) under the Lujan test; or (3) under the public importance exception.

It is important to note that even though the South Carolina Supreme Court adopted the Lujan test as a basis for analyzing a party's standing to pursue a claim in state court, the Court never opined that a party's failure to prove standing under the Lujan test would deprive a state court of subject matter jurisdiction.[5] In fact, since a statute can confer standing even though it does not exist via the constitutional test, logic would dictate otherwise. Furthermore, in what may be obvious yet profoundly significant, the Supreme Court's adoption of the Lujan test did not change the statutory means by which the ALC acquires subject matter jurisdiction. This Court, therefore, concludes that under South Carolina law, a party's lack of standing to pursue a claim does not deprive the ALC of subject matter jurisdiction to hear the case. Instead, it simply means that party is not the proper party to pursue the case.

Because standing is not a jurisdictional question in South Carolina, the Court may not consider evidence outside the pleadings in resolving a motion to dismiss based on lack of standing. Thus, for the purposes of considering the Ports Authority's Motion to Dismiss, this Court's review will be limited to those allegations set forth in Petitioners' Prehearing Statement.

Petitioners' Standing

"Standing to sue is a fundamental requirement in instituting an action." Bodman v. State, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013) (quoting Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)). The party seeking to establish standing has the burden of proving it. Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013). Further, "'[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice' to withstand a motion to dismiss." Id. (quoting Lujan, 504 U.S. at 561). Standing must be proven "with the manner and degree of evidence required at the successive stage of the litigation." Id.; see also Beaufort County v. Trask, 349 S.C. 522, 563 S.E.2d 660 (Ct. App. 2002) (affirmed trial court's determination that County's failure to prove allegations supporting standing at the merits hearing ultimately defeated County's claim to standing).

For cases filed in South Carolina state courts, standing may be acquired: (1) by statute; (2) under the Lujan test; or (3) under the public importance exception. Bodman, 403 S.C. at 66-

[5] South Carolina's approach is not unlike other states' application of standing in state cases, including environmental disputes. See 2 State Environmental L. § 14:2 (2012) ("Unlike the federal law of standing, which is rooted in the Constitution's 'case or controversy' requirement, standing in the state courts is not normally viewed as a constitutional doctrine.").

67, 742 S.E.2d at 366 (citing ATC, 380 S.C. at 195, 669 S.E.2d at 339). "The traditional concepts of constitutional standing [Lujan test] are inapplicable when standing is conferred by statute." Freemantle, 398 S.C. at 194, 728 S.E.2d at 44; see Youngblood, 402 S.C. at 317, 741 S.E.2d at 518 ("When no statute confers standing, the elements of constitutional standing must be met."). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." Youngblood, 402 S.C. at 317, 741 S.E.2d at 518.

In determining the meaning of a statute, the primary rule of statutory interpretation is to ascertain and give effect to the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010). In fact, when a statute's terms are clear and unambiguous on their face, there is no room for statutory construction. S.C. Coastal Conservation League, 390 S.C. at 425-426, 702 S.E.2d at 250 (citing Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)).

In this case, Section 44-1-60 provides that an applicant, permittee, licensee, or affected person may contest a final agency decision of DHEC by filing a request for a contested case hearing before the ALC. S.C. Code Ann. § 44-1-60(F)(2), -60(G) (Supp. 2012). This remedy is available for all DHEC decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions. S.C. Code Ann. § 44-1-60(A), -60(G) (Supp. 2012). The statute is clear that if DHEC had denied the Ports Authority's application for a permit, the Ports Authority would have been able to establish statutory standing simply by alleging it was the applicant and it was challenging DHEC's decision to deny the Ports Authority's application. See Freemantle, 398 S.C. at 195, 728 S.E.2d at 45. Similarly, in the case at hand, Petitioners should be able to establish statutory standing by alleging they are affected persons and are challenging DHEC's decision to grant the permit to the Ports Authority.

The self-imposed moniker that a person is "affected" by a decision does not automatically confer standing. In some DHEC statutes, the General Assembly has defined the term "affected person" to specifically include certain individuals, and thereby exclude other individuals. See, e.g., S.C. Code Ann. § 44-7-130(1) (2002) (defining "affected person" for

purposes of the State Certification of Need and Health Facility Licensure Act to include, among others, the applicant, a person residing within the geographic area to be served by the applicant, persons located in the health service area and who provide similar services to the proposed project, and the State Consumer Advocate). In those instances, the General Assembly has specified those individuals who need not jump the hurdles of the Lujan test to establish standing but are able to establish that they have standing by simply alleging they meet one of the categories listed in the definition. Here, however, the General Assembly did not define "affected person" for purposes of the permit at issue. Nevertheless, though the Lujan test is separate from Petitioners' ability to establish standing under the statute, in this instance where a clear, specific definition of "affected person" is not available, the test provides a sufficient framework to determine whether the Petitioners have been sufficiently affected to have standing to survive this motion to dismiss.[6] Indeed, if Petitioners sufficiently allege an injury-in-fact, with a causal connection between the injury and the conduct complained of, which is redressable by a decision of this Court, it seems to follow that Petitioners will have sufficiently alleged that they are affected persons under the statute.

As referenced above, the first consideration to determine if a party has standing under Lujan test is whether the person has suffered an "injury in fact." An "injury in fact" is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). To be particularized, the injury must affect Petitioners "in a personal and individual way." Sea Pines, 345 S.C. at 602, 550 S.E.2d at 292. It is settled that "a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." ATC, 380 S.C. at 196, 669 S.E.2d at 339 (quoting Evins v. Richland Cnty. Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000)).

Our courts have found that "even those concerns reflecting aesthetic or recreational interests have been recognized as 'judicially cognizable injur[ies] in fact'." Town of Arcadia Lakes, 404 S.C. at 531, 745 S.E.2d at 394 (quoting Sea Pines, 345 S.C. at 602, 550 S.E.2d at 292); see also Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 698 S.E.2d 612 (2010);

[6] If Petitioners wish to rely on statutory standing rather than the Lujan test at a later stage in this case, Petitioners must be prepared to argue how standing as an "affected person" under Section 40-1-60 differs from the Lujan test, in light of our Supreme Court's recent cases, and also how Petitioners qualify as affected persons under that statute.

Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007). In S.C. Wildlife Federation v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988), a case cited with approval in Sea Pines, the Court held that where parties "alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment of the fish and wildlife of the wetlands" that would be affected by a Coastal Council certification, "these allegations are sufficient to show standing." 296 S.C. at 190, 371 S.E.2d at 523. In Smiley, the Court held that Smiley had standing where he alleged an adverse effect on his use and enjoyment of the beach at Isle of Palms from a permit that authorized the scraping of sand on that beach. In Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000), the Court found the plaintiffs had standing where affidavits and testimony asserted that "Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." 528 U.S. at 183-184. The Court explained that "[t]hese submissions present dispositively more than the mere 'general averments' and 'conclusory allegations' found inadequate" in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

Here, Petitioners allege the permit will enable cruise ship home-basing operations to expand the number and size of the ships at the UPT. Petitioners allege that as a result of the expansion, there will be environmental and social impacts including increased air shed emissions, traffic volumes, traffic noise, and health impacts. Petitioners specifically express concern about emissions from docked cruise ships of nitrogen oxides and sulfur dioxide, which are known to negatively impact human health. Petitioners assert that in addition to increased emissions, there will be increased truck and car traffic, increased noise and congestion, decreased property values, and adverse health impacts. Petitioners have asserted they will suffer an injury to their aesthetic and recreational interests as well as their property interests. Petitioners, therefore, have alleged an injury-in-fact.

The second element of the Lujan test requires that "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly...trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court.'" Lujan, 504 U.S. at 560 (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)). In this case, the conduct complained of is the permit authorizing the construction of pilings in the critical area which are necessary for a new

cruise ship terminal at the UPT. Petitioners allege the new pilings are necessary for the relocation and expansion of the cruise terminal, which will result in the alleged injuries of increased emissions, increased traffic congestion and noise, and adverse health impacts. Petitioners, therefore, allege that without the permitted pilings to provide necessary structural support for the cruise terminal, the Ports Authority will not be able to expand cruise services or serve larger cruise ships. Petitioners have alleged sufficient facts to show a causal connection at this point.

The third and final element of the Lujan test is that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan, 504 U.S. at 561 (quoting Simon, 426 U.S. at 38, 43). Petitioners request this Court review the permit and issue an order reversing the decision to issue the permit or, in the alternative, remand the case to DHEC with instructions to conduct an analysis of alternative terminal locations, traffic impacts, noise impacts, air emissions, and impacts on the historic qualities of Charleston. Petitioners allege that the permit will allow the Ports Authority to relocate and expand the cruise ship terminal, resulting in increased emissions, increased traffic congestion and noise, and adverse health impacts. Petitioners, therefore, also allege that if the permit is denied, the Ports Authority will not be able to expand cruise services or serve larger cruise ships. While the existing injuries allegedly suffered by Petitioners will not be altered by the denial of the permit in this case, Petitioners allege that the exacerbation of those injuries will be redressed.

Organizational Standing

Where the petitioner is an organization, the organization has standing "only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." Beaufort Realty Co. v. Beaufort Cnty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). An organization has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Id. (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

Here, Petitioners allege they represent diverse and broad interests, including seeking protection for Charleston's historic neighborhoods and residents; protection of air and water quality; protection of the architectural, historical, and cultural character of Charleston;

appropriate management of mass tourism downtown; appropriate location of the terminal to provide broad regional preservation and economic benefit; and protection of the quality of life in historic Charleston. At this stage of the proceedings, the Court finds that Petitioners have sufficiently alleged that the organizations have standing in that they assert their members will suffer an individualized injury and the protection of the members' interests is germane to the organizations. For example, the Historic Ansonborough Neighborhood Association (HANA) is an organization created to address matters of importance to this historic residential neighborhood. An individual who is a resident of the Ansonborough neighborhood would have standing on his own by making allegations of increased emissions, decreased property values, and adverse health impacts as a result of the permit allowing the relocation and expansion of the cruise terminal at UPT.[7] This Court finds that Petitioners have sufficiently alleged standing to proceed with this case at this time.

Non-justiciable Political Question

The Ports Authority alternatively argues that this case should be dismissed because Petitioners are not challenging the OCRM permit but rather are challenging the policy of the UPT serving as a home port for cruise ships. Petitioners assert that while cases involving environmental issues often touch on policy choices and involve conflicting opinions among different branches of government, this particular case involves the issue of whether OCRM's permitting decision complies with the applicable statute and regulations.

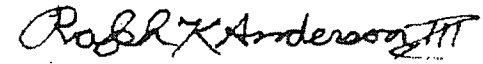
Courts will not rule on questions that are exclusively or predominantly political in nature rather than judicial. S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n, 369 S.C. 139, 632 S.E.2d 277 (2006). The case before this Court involves the discrete matter of whether the permit issued to the Ports Authority complies with state law. This Court's jurisdiction over this matter is both established and limited by statute, including Sections 1-23-600 and 44-1-60. Even if the Petitioners' motives are political in nature, this Court's review is restricted to consideration of whether the permit was lawfully issued in this case. The Court will not consider evidence of support for or opposition to the cruise industry in general. This Court is not the proper venue for airing such grievances and opinions. The Ports Authority's Motion to Dismiss on this basis, therefore, is denied.

[7] Our courts have not resolved the question of whether increased truck and car traffic as well as increased noise and congestion are legally sufficient to establish standing. This Court is not ignoring these allegations but rather is delaying any ruling on these until this question is resolved in this case or by the appellate courts.

ORDER

IT IS HEREBY ORDERED that the South Carolina State Ports Authority's Motion to Dismiss is **DENIED**.

AND IT IS SO ORDERED.

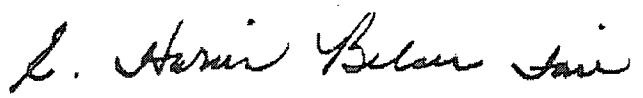


Ralph K. Anderson, III
Chief Administrative Law Judge

December 2, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

December 2, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **ORDER DENYING PETITIONERS' MOTION TO VACATE**

APPEARANCES: For the Petitioners: Amy E. Armstrong, Esquire, W. Jefferson Leath, Jr., Esquire, J. Blanding Holman, IV Esquire

For the Respondents: Randolph R. Lowell, Esquire, Chad N. Johnston, Esquire, Bradley D. Churdar, Esquire

FILED
December 20, 2013
SC ADMIN. LAW COURT

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on the Motion to Vacate (Motion) filed on November 1, 2013. In this Motion, Petitioners moved for an Order vacating the Critical Area Permit and Coastal Zone Consistency Certification issued by the South Carolina Department of Health and Environmental Control (DHEC) to the South Carolina State Ports Authority (Ports Authority). On November 25, 2013, the Ports Authority filed a response to this motion. DHEC concurred with the analysis in the Ports Authority's response but did not agree with two of the conclusions contained therein.

BACKGROUND

On December 18, 2012, DHEC staff, through the Office of Ocean and Coastal Resource Management (OCRM), issued a Critical Area Permit and Coastal Zone Consistency Certification (Permit No. OCRM-12-054-B) authorizing the Ports Authority to make improvements to

Building #322, an existing waterfront building in the Union Pier Terminal (UPT), for the purpose of relocating a cruise passenger facility. The permit authorizes the installation of five pilings within the existing footprint of Building #322 to support the installation of three elevators and two escalators. The permit also authorizes other structural changes to Building #322 as well as the construction of two covered staging areas designed to handle passengers, luggage, and the loading and unloading of ship supplies.

Petitioners filed a request for contested case hearing at the ALC to challenge DHEC's decision to issue the permit. In this case, Petitioners allege that DHEC's decision violates the South Carolina Coastal Zone Management Act, S.C. Code Ann. 48-39-10, et seq., the South Carolina Code of Regulations 30-1, et seq., and the Coastal Management Program (CMP). Some of the Petitioners in this case also filed a separate action in federal court challenging the decision of the United States Army Corps of Engineers (Corps) to authorize the Ports Authority's project based on a nationwide permit. By Order dated September 18, 2013, the federal court granted Petitioners' motion for summary judgment and remanded the case to the Corps to conduct further analysis. Petitioners subsequently filed this motion, requesting this Court vacate the Critical Area Permit and Coastal Zone Consistency Certification or, in the alternative, remand this case to DHEC to review the project using a proper scope of analysis.

DISCUSSION

This case involves permit applications for the Union Pier Terminal Project (Project) at both State and Federal regulatory bodies. While factually intertwined in the same project, the jurisdiction of the State and Federal permitting agencies are distinct.

Federal Permitting Requirements

Section 10 of the Rivers and Harbors Act (RHA) requires the authorization of the Corps prior to the obstruction or alteration of any navigable water of the United States. *See* 33 U.S.C.A. § 403. Specifically, Section 403 prohibits, *inter alia*, the (1) construction of any structure in or over any navigable water of the United States; (2) excavation or deposition of dredge or fill material; and (3) the accomplishment of any other work affecting the course, location, condition, or capacity of a navigable water. 33 U.S.C.A. § 403; *see also* 33 C.F.R. § 320.2(b). The instrument through which obstruction or alteration of navigable waters may be approved is a Section 10 permit from the Corps. *See* 33 C.F.R. § 320.2(b).

Congress has allowed the Corps to streamline some of its permitting responsibilities for similar categories of activities by authorizing the Corps to issue general permits that do not require applicants to undergo the individual permit review process. *See* 33 U.S.C.A. § 1344(e). These general permits are known as nationwide permits (NWPs), and authorize certain activities that require Corps approval under, *inter alia*, Section 10 of the RHA. The purpose of NWPs is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b) - 2(b).

In instances in which a Federal permit or license is sought for construction or operation of facilities that may result in a discharge into navigable waters, the applicant is required to obtain a water quality certification (401 Certification) from the State in which the proposed discharge is to take place pursuant to Section 401 of the Clean Water Act (CWA). 33 U.S.C.A. § 1341. Therefore, in order for the Corps to finally issue a Section 10 permit to the Ports Authority authorizing the Project to move forward under the RHA, the Corps must first obtain a 401 Certification from the State of South Carolina. In South Carolina, the agency that assesses and issues 401 Certifications under the CWA is DHEC.[1] *See* S.C. Code Ann. Regs. 61-101.A.2 ("Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department."). In response to and in conjunction with NWPs issued by the Corps, state agencies like DHEC are permitted to review the Corps' NWPs and issue similarly streamlined 401 Certifications that offer authorization for projects determined by the Corps to fall under the general NWPs.

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[1] The CWA's requirement that a State provide a certification that a project complies with the State's water quality standards is also subject to additional parameters; namely, the State must issue a 401 Certification within one year of the submission of the permit application. Specifically, the CWA provides:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

33 U.S.C.A. § 1341(a)(1). Similarly, Regulation 61-101.A.6 provides that "[t]he Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended." This requirement imposes a consequence on the failure to "act" within the one year, as DHEC is deemed to have waived its responsibilities under the CWA and the Corps is under no obligation to incorporate into its Section 10 permit any of the terms and conditions that may have been imposed in the 401 Certification.

State Permitting Requirements

In addition to the Federal permitting requirements, projects that occur within a "critical area"[2] of the coastal zone[3] of South Carolina require additional review and State permitting requirements. Specifically, a person proposing to implement such a project must obtain a critical area permit from OCRM prior to the utilization of the critical area. *See* S.C. Code Ann. § 48-39-130(A).[4] These permits are subject to the requirements of the Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (CZMA), and associated regulations that govern the management, development, and protection of the critical areas and coastal zone of the State. S.C. Code Ann. Regs. 30-1 to -21. Further, the CZMA requires DHEC to certify State and Federal permits for consistency with the Coastal Management Program (CMP), commonly referred to as a Coastal Zone Consistency Certification (CZC Certification). *See* S.C. Code Ann. § 48-39-80(B)(11).[5]

Thus, projects requiring a Federal permit or license and implicating DHEC's 401 Certification requirement which *also* take place within the coastal zone require a critical area permit under the CZMA and a CZC Certification certifying the project's compliance with the CMP. When 401 Certification is required, Regulation 30-2(H) provides that the OCRM staff should coordinate with the appropriate DHEC staff regarding water quality impacts, and that ultimately the ***critical area permit serves as the 401 Certification***. S.C. Code Ann. Regs. 30-2(H) (emphasis added); *See also* S.C. Code Ann. Regs. 61-101.A.8 ("The Department will not issue a separate 401 water quality certification for an activity which requires a direct permit for

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

[3] The "coastal zone" is defined as all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas (i.e., Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown counties). *See* S.C. Code Ann. § 48-39-10(B).

[4] OCRM is charged with carrying out South Carolina's coastal zone policies and issuing permits in the critical areas of the coastal tidelands and waters. *See* S.C. Code Ann. Regs. 30-4(C); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005).

[5] Although the CMP has neither been codified nor made part of a DHEC regulation, it has been applied and enforced by the Supreme Court of South Carolina. *See, e.g., Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 370, 688 S.E.2d 844, 851 (2010) (holding the General Assembly meant the CMP policies to be enforceable in the consistency review of state and federal permits).

alteration of the critical area of the coastal zone. . . . The direct permit will serve as the 401 water quality certification for an associated Federal permit."). Additionally, for permit applications that require both a 401 Certification and a CZC Certification—i.e., projects that are both located within the coastal zone and require a Federal permit—"the [CZC Certification] shall be issued as a component of, and concurrently with, the [401] water quality certification" in accordance with the requirements of a CZC Certification under the CMP, and "the [401] water quality certification will serve also as the [CZC Certification]." S.C. Code Ann. Regs. 61-101.A.7. In other words, the analysis by OCRM of the criteria found in the CMP is to be conducted in conjunction with and as a part of the water quality certification analysis, essentially merging the two authorizations into one license document. Thus, in coordination with other DHEC staff, OCRM issues the critical area permit, which serves as the 401 Certification, and issues the CZC Certification as a component of and concurrently with a 401 Certification.

Analysis of this Permit under State Law

Petitioners argue that because the Federal Order vacated the Corps' NWP 3 authorization for the Project, DHEC's statewide 401 Certification for NWP 3 does not exist. Petitioners next argue that the Federal Order vacating the authorization under NWP 3 removed the predicate for exempting the Ports Authority from obtaining a separate, individual 401 Certification. Finally, Petitioners argue that the Ports Authority did not seek a separate 401 Certification and the Critical Area Permit and CZC Certification issued by DHEC did not include the required 401 Certification.

There is no dispute that in January 2012, the Ports Authority submitted joint applications for federal and state permits to the Corps and DHEC, respectively, regarding the Project. Because the Project involves driving pilings in a navigable water, it implicates the Corps' jurisdiction under Section 10 of the RHA. In April 2012, the Corps notified the Ports Authority that the Project was authorized under NWP 3, although the authorization was provisional pending receipt from DHEC of verification of the Project's compliance with Section 401 of the CWA and the CMP. Pursuant to its certification requirements under Section 401 of the CWA, DHEC evaluated, *inter alia*, NWP 3 for its compliance with State water quality standards, and on April 23, 2012, certified activities authorized under NWP 3 as compliant with the State's water quality standards.

Separate from the necessary Federal permits, because the Project takes place in the coastal zone and involves the alteration of a critical area, the Project also required a critical area permit and a CZC Certification certifying the Project's compliance with the CMP. As discussed, OCRM issues the critical area permit in coordination with other DHEC staff and issues the CZC Certification as a component of and concurrently with the 401 Certification. Under state law, the critical area permit serves as the 401 Certification and the 401 Certification serves as the CZC Certification.

On December 18, 2012, DHEC issued the critical area permit and CZC Certification for the Project. This was separate from the 401 Certification regarding NWP 3 as issued by DHEC in April 2012. Consequently, and notwithstanding the applicability of DHEC's 401 Certification for NWP 3, water quality issues were a part of DHEC's analysis in its critical area permit evaluation, *see* S.C. Code Ann. Regs. 30-2(H), and the critical area permit issued by DHEC for the Project also serves as the 401 Certification. Moreover, since the critical area permit is "project specific" and by law it "serves as the 401 water quality certification," it appears that the existing critical area permit document may serve as the 401 Certification as it was issued later in time and subsequent to DHEC's general certification for NWP 3.

Effect of the Federal District Court Order

Petitioners contend that the Federal Court vacated the Corps' determination that NWP 3 would be applicable to the Project. However, the Federal Court found that the Corps did not use the proper scope of analysis in evaluating the Project, and thus remanded the Project to the Corps for reconsideration under a broadened scope of analysis. In fact, the Federal Order distinctly held that:

> In reversing and remanding the Army Corps' authorization in this matter, ***the Court does not reach or in any way address the type of permit or level of review which the Corps must undertake*** once it evaluates the proposed project under the proper 'scope of analysis.'

(emphasis added). Therefore, the Federal Order does not negate the critical area permit and CZC Certification at issue in this case.

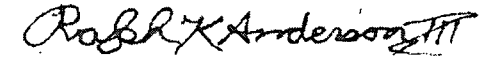
Since the Project may still be eligible for general, NWP approval, it appears premature to dismiss this case upon the presumption that an analysis under NWP 3 is improper. Furthermore, the application form for the Project submitted by the Ports Authority includes a reference to "33 USC 403" and "33 USC 1341," which is the Section 10 permit required under the RHA and the

attendant 401 Certification. At this stage of the litigation, there is not sufficient evidence for this Court to determine the extent of DHEC's review or the procedures that were followed in issuing the permit. Moreover, in presenting their challenge to DHEC's determination, Petitioners can certainly dispute whether review of this matter should be based, in part, on the 401 Certification associated with NWP3 or the critical area permit and CZC Certification. The ALC can then determine based upon the facts of this case in keeping with its *de novo* review what is the appropriate scope of review for this project and whether the project complies with the standards of that review. Thus, the motion to vacate must be denied at this stage of the litigation.

ORDER

IT IS HEREBY ORDERED that the Petitioners' Motion to Vacate is **DENIED.**

AND IT IS SO ORDERED.

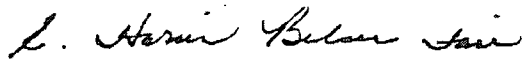


Ralph K. Anderson, III
Chief Administrative Law Judge

December 20, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

December 20, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **ORDER DENYING PETITIONERS' MOTION TO EXPAND DISCOVERY AND GRANTING PETITIONERS' MOTION TO FILE A SURREPLY**

APPEARANCES: For the Petitioners: Amy E. Armstrong, Esquire
W. Jefferson Leath, Jr., Esquire
J. Blanding Holman, IV Esquire

For the Respondents: Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Bradley D. Churdar, Esquire

This case is before the South Carolina Administrative Law Court (ALC or Court) on Petitioners' request for contest case hearing to challenge the Critical Area Permit and Coastal Zone Consistency Certification (Permit No. OCRM-12-054-B) issued by the Department of Health and Environmental Control (DHEC) staff, through the Office of Ocean and Coastal Resource Management (OCRM) on December 18, 2012. The Permit authorizes the South Carolina State Ports Authority (Ports Authority) to make improvements to Building #322, an existing waterfront building in the Union Pier Terminal.

Motion to Expand Discovery

Petitioners filed the request for contested case hearing on February 11, 2013. The Notice of Assignment was issued on February 19, 2013. The Rules of Procedure for the Court provide

FILED
March 3, 2014
SC ADMIN. LAW COURT

> [d]iscovery shall be conducted according to the procedures in Rules 26-37, SCRCP, except that only the standard interrogatories provided by SCRCP 33(b), as applicable to the pending contested case, are permitted; there shall be no more than three (3) depositions per party under Rule 30, SCRCP; and no more than ten (10) requests to admit per party, including subparts under Rule 36, SCRCP. All discovery shall be completed within 90 days of the receipt of the Notice of Assignment and Request for Information. Upon motion for good cause shown or upon his own motion, discovery may be expanded or curtailed by the administrative law judge.

ALC Rule 21(A). Thus, according to the ALC Rules, the discovery period in this case ended on or about May 20, 2013. The parties indeed participated in discovery during this period. While the parties discussed possibly expanding the discovery period, no party filed a motion with this Court to expand discovery until Petitioners filed this motion on December 23, 2013, more than seven months after the discovery period ended.

This Court finds disingenuous Petitioners' argument that it was not practical or cost effective to conduct discovery during the original discovery period due to the dispositive nature of the Ports Authority's Motion to Dismiss for lack of standing. The Ports Authority filed its Motion to Dismiss for lack of standing on July 1, 2013. Given that the discovery period under Rule 21(A) ended in May 2013,[1] the Petitioners could not have decided to postpone discovery based on the Ports Authority's Motion to Dismiss and the possibility that the Court's ruling on that motion could have disposed of this case. Furthermore, as Petitioners point out in their motion, both parties filed motions that could have been dispositive in this case. In fact, within days of filing the request for contested case hearing, Petitioners filed a Motion to Remand this case to the DHEC Board for review. In July 2013, the Ports Authority filed two Motions to Dismiss and in November 2013, Petitioners filed a Motion to Vacate. As a result of the extensive briefing of these motions by both parties as well as a motions hearing and a status conference to discuss at least six pending motions, there has been a dispositive motion pending in this case for most of the time this case has been pending with this Court. If the Court accepts Petitioners' argument that a dispositive motion effectively stays discovery until resolution of that motion by this Court, then the parties would have barely begun discovery at this stage of the litigation.

[1] In the Order Denying Ports Authority's Motion to Dismiss, this Court referenced that discovery was ongoing at the time of the motions hearing in September 2013. This finding was based on statements made at the motions hearing that, upon reflection, only referred to the fact that the parties were continuing to supplement responses to discovery requests that were made during the original discovery period that ended May 20, 2013.

The Court also does not accept Petitioners' argument that all parties knew that discovery was ongoing beyond May 20, 2013. There was no scheduling order in this case to expand or curtail the discovery period set forth in ALC Rule 21(A).[2] Although the parties have continued to supplement responses to discovery beyond the May 20 deadline, it appears no party attempted to initiate additional discovery, including noticing depositions, after that deadline. Petitioners have been afforded ample opportunity to conduct discovery and in no way have been hindered from seeking to expand the length and/or scope of discovery within the applicable ninety-day discovery period.

In sum, Petitioners are seeking to extend discovery on the eve of the filing of a Motion for Summary Judgment. Their request at this stage of the proceeding is simply unjustified and would unfairly prolong the advancement of this case.

Motion to File Surreply

On December 27, 2013, the Ports Authority filed a Motion for Summary Judgment asserting Petitioners lack standing to proceed with this case. Petitioners filed their response on January 21, 2014. The next day, the South Carolina Supreme Court issued a decision in a separate case brought in that Court's original jurisdiction. *Carnival Corp. v. Historic Ansonborough Neighborhood Assoc.*, Opinion No. 27355, 2014 WL 229894 (S.C. Sup. Ct. filed Jan. 22, 2014). In that case, the Historic Ansonborough Neighborhood Association, Coastal Conservation League, and Preservation Society of Charleston brought suit against the Ports Authority, *inter alios*, alleging unlawful use of the Union Pier Terminal by the Carnival Corporation's cruise ship. The Supreme Court concluded those parties did not have standing to bring that particular action alleging nuisance and zoning claims.

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[2] Originally, the Court scheduled a hearing on the merits for November 12-18, 2013, and served the Notice of Hearing on the parties on May 31, 2013. After receiving the Hearing Notice, attorney for the Petitioner emailed the Court about rescheduling the hearing due to a scheduling conflict and noted a need for additional time for discovery. In response, the Court's Law Clerk in an e-mail requested dates and times for a rescheduled hearing, noting that:

> As the scheduled date provided over four months for discovery, the Court was hopeful the parties could compete discovery within the time period.

Petitioners argue that this response by the Court's Law Clerk showed that no one understood discovery to have closed on May 20, 2013. However, that comment did not indicate that the Court was extending discovery. Clearly, the parties may have informally agreed to a discovery schedule. More importantly, the response emphasized that the Court believed that a hearing beginning on November 12, 2013 more than adequately provided sufficient time for discovery. Furthermore, if Petitioners believed that extending the date of the trial would have extended the discovery period, the Petitioners should have taken steps to protect their position by filing a Motion to Extend Discovery or requesting a Scheduling Order.

On February 5, 2014, the Ports Authority filed its Reply to Petitioners' Response in this case, including arguments regarding the analysis contained in the Supreme Court's decision. Petitioners thereafter filed a Motion to File Surreply and a proposed surreply, asserting the Ports Authority included a significant new argument regarding the Supreme Court's decision. In response, the Ports Authority consented to a surreply limited to the discrete argument made in the Ports Authority's Reply regarding the Supreme Court's decision but challenged the proposed surreply on the basis that it is beyond the scope of that distinct argument.

This Court will accept those portions of the Surreply that address the implications of the Supreme Court's holding in *Carnival Corp. v. Historic Ansonborough*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014). Nevertheless, arguments that exceed the parameters of that holding will not be considered. For example, the argument in Petitioners' Surreply in Opposition to Motion for Summary Judgment that are stricken in Exhibit 3 of the Port's Authority's response to Petitioner's Surreply relating to the argument of collateral estoppel will not be considered.[3]

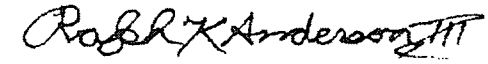
ORDER

IT IS HEREBY ORDERED that the Petitioners' Motion to Expand Discovery is **DENIED**.

IT IS FURTHER ORDERED that the Petitioners' Motion to File a Surreply is **GRANTED IN PART**. The Court will consider the arguments in the proposed surreply as filed by Petitioners distinguishing the decision of *Carnival Corporation*.

IT IS FURTHER ORDERED that the Ports Authority's Response to Surreply is due no later than March 10, 2014.

AND IT IS SO ORDERED.



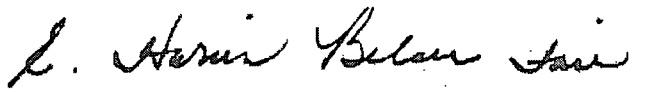
Ralph King Anderson, III
Chief Administrative Law Judge

March 3, 2014
Columbia, South Carolina

[3] This Court does not find that the holding in the *Carnival Corporation* case collaterally estops this case any more than the holding in the federal court case of *Preservation Society of Charleston v. United States Army Corps of Engineers*, C/A No. 2:12-CV-02942-RMG (Sept. 18, 2013).

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

March 3, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **ORDER GRANTING SANCTIONS**

This matter is before the Administrative Law Court (ALC or Court) pursuant to Respondent South Carolina State Ports Authority's (Ports Authority) July 1, 2013 Motion to Dismiss and for Sanctions (Motion for Sanctions). Ports Authority argues that sanctions are warranted because Petitioners'[1] February 27, 2013 Motion to Remand (Motion to Remand) was frivolous, unsupported by any reasonable legal theory, and was filed solely for purposes of delay. On July 26, 2013, Petitioners filed their Memorandum in Opposition and the Ports Authority filed a Reply on August 2, 2013.[2] Oral argument was held before this Court on September 6, 2013. As more fully discussed herein, the Ports Authority's Motion for Sanctions is granted.

[1] Preservation Society of Charleston (Preservation Society), Historic Charleston Foundation (HCF), Historic Ansonborough Neighborhood Association (HANA), South Carolina Coastal Conservation League (League), Charlestowne Neighborhood Association (CNA), Charleston Chapter of the Surfrider Foundation (Surfrider), and Charleston Communities for Cruise Control (Cruise Control) (collectively, Petitioners).

[2] On August 19, the Petitioners filed a sur-reply to the Respondent Ports Authority's reply. However, the Rules of Procedure of the ALC do not permit sur-replies and no leave of the Court was granted. *See Sierra v. LaManna*, C/A No. 0:08-3222-CMC-PJG, 2009 WL 1884492 at *3 n.3 (D.S.C. June 30, 2009) (noting the District of South Carolina Local Rules "make no provision whatsoever for sur-replies"). Thus, on August 20, this Court informed the parties that the unauthorized sur-reply would not be considered.

FILED
March 3, 2014
SC ADMIN. LAW COURT

BACKGROUND

On December 18, 2012, South Carolina Department of Health and Environmental Control (DHEC), through its Division of Ocean and Coastal Resource Management (OCRM), issued a staff decision granting a critical area permit and coastal zone consistency certification to the Ports Authority authorizing construction of five pilings to facilitate the relocation of cruise operations within Union Pier Terminal (UPT) in the City of Charleston. Permit (OCRM-12-054-B) (Dec. 18, 2012). On January 2, 2013, Petitioners filed a request for a final review conference by the DHEC Board of the OCRM staff decision. The Ports Authority and DHEC staff submitted responses to the request to the DHEC Board. Thereafter, on January 10, 2013, the DHEC Board voted unanimously to decline to conduct a final review conference and issued a written notice of its decision not to conduct a final review conference the next day. On February 11, 2013, Petitioners filed a request for contested case challenging the merits of DHEC's decision.

On February 27, 2013, Petitioners filed "Motion to Remand to DHEC Board." After reviewing Petitioners' filing, on March 6, 2013, counsel for Ports Authority consulted with Petitioners' counsel and advised Petitioners' counsel of the Ports Authority's belief that the motion was frivolous, and expressed the Ports Authority's intention to seek sanctions if Petitioners did not withdraw the motion. Petitioners elected to pursue the Motion. The Ports Authority filed a response to the Motion for Remand on March 14, 2013, and this Court issued an order denying the Motion on May 3, 2013 (May 3 Order).

STANDARD

Administrative Law Court Rule 72 provides that "[i]f the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCALCR. Furthermore, the 2009 Revised Notes to Rule 72, provide that "in determining whether a case is frivolous, the administrative law judge may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act." Rule 72, SCALCR, 2009 Revised Notes.

The Sanctions Act provides, in relevant part, that "[a]n attorney ... participating in a civil or administrative action or defense" may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

* * *

> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;[3]
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than . . . adjudication of the claim or defense upon which the proceedings are based[.]

S.C. Code Ann. § 15-36-10(A)(4)(a). Further, Section 15-36-10(B)(2) provides that "if ... an attorney ... has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances."

Additionally, in determining if a violation occurred under the Sanctions Act, the ALC applies a "reasonable attorney" standard for evaluating sanctionable conduct. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011). More specifically, court must take into account:

> (1) the number of parties;
>
> (2) the complexity of the claims and defenses;
>
> (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
>
> (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
>
> (5) previous violations of the provisions of this section;
>
> (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
>
> (7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E).

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[3] Respondent did not raise any defense that the laws addressing DHEC review should be extended, modified or reversed. Therefore, this aspect of the statute will not be addressed further.

DISCUSSION

In this case, the issue of a remand to the DHEC Board was a legal one requiring no case-specific factual development. Moreover, upon receipt of the Motion to Remand, Ports Authority's contacted Petitioners' counsel by letter which set forth specific authority why they believed the motion was frivolous, requested withdrawal of the motion, and indicated that the Ports Authority would seek sanctions should the Petitioners press forward with the Motion to Remand. The Petitioners and their counsel refused to withdraw the motion.

This Court ruled in its May 3, 2013 Order that the Motion had no basis in law and was contrary to the language and intent of the statute. As discussed in the May 3 Order, S.C. Code Ann. § 44-1-60(F) clearly sets forth a discretionary standard in the DHEC Board that permits it to choose whether or not to conduct a final review conference. Petitioners' Motion to Remand relied upon a single word in a sentence within S.C. Code Ann. § 44-1-60(F) while ignoring the remainder of subsection -60(F). As this Court noted, "[b]y stating that the Board can decline to consider a request, Section 44-1-60(F) obviously recognizes the existence of discretion.... When the statute is read as a whole, it is clear that the Board has the discretion to decline to conduct a final review conference...." *Id.*

Moreover, this statutory scheme and the DHEC Board's role in it have been in place since 2006. A reasonable attorney would be on notice that the discretionary nature of conducting a review conference is well established. For instance, the discretionary nature of conducting a review has been recognized repeatedly by the ALC.[4] More importantly, the DHEC Board's

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[4] *See, e.g., Trident Medical Center, LLC, v. S.C. Dep't of Health & Envtl. Control*, Docket Nos. 09-ALJ-07-0332-CC, 09-ALJ-07-0333-CC (Consolidated), 09-ALJ-07-0336-CC (Consolidated), 2012 WL 7187635, (Sept. 26, 2012) (McLeod, J.) ("If the Department Board does not hold a final review conference, the staff decision becomes the final agency decision unless an applicant or affected person timely requests a contested case hearing before the Administrative Law Court."); *Wise v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0851-CC, 2011 WL 2413274 (Feb. 23, 2011) (McLeod, J.) ("The Board can either conduct a review conference and issue a final agency decision, or decline to conduct a review conference, in which case the staff decision becomes the final agency decision.") (citing S.C. Code Ann. § 44-1-60(F)), *rev'd on other grounds* Op. No. 2013-UP-072 (Ct. App. Filed Feb. 13, 2013); *Hill v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666, (Dec. 9, 2010) (Anderson, C.J.) ("The DHEC Board [ ] has sixty days within which to hold a review conference. [ ] The Board may (1) hold a final review conference and issue a decision; (2) decline in writing to hold a final review conference; or (3) take no action within the sixty-day period. [ ] If the Board either declines in writing to schedule a final review conference or allows the sixty days to lapse without any action, then the staff decision becomes the final agency decision and an affected party may request a contested case hearing before the ALC pursuant to Section 44-1-60(G).") (citing S.C. Code Ann. § 44-1-60(F)); *Pinckney Point, LLC v. S.C. Dep't of Health & Envtl. Control*, Docket No. 08-ALJ-07-0363-CC, 2009 WL 6527323, (Nov. 13, 2009) (Anderson, C.J.) ("A staff review does not require the presentation of evidence in a hearing, and *the Board's review is discretionary, not a matter of right.*") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); *McNair v. S.C. Dep't of Health & Envtl. Control*, Docket No. 09-ALJ-07-0040-CC, 2009 WL 6527328, (Nov. 9, 2009) (Anderson, C.J.) (same);

discretionary right to conduct a final review conference has also been recognized by appellate courts of this State. *See, e.g., Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference rendering the staff decision the final decision).

This statutory scheme and the DHEC Board's role in it have also been recognized by Petitioner and counsel. Petitioner South Carolina Coastal Conservation League (League) and its counsel (including counsel representing Petitioners in the present case)[5] affirmatively represented to the South Carolina Supreme Court that a final review conference is optional and discretionary with the DHEC Board in a case challenging a DHEC permit issued to the Ports Authority. Specifically, the League stated: "*The Board has the option of conducting a conference or not after a request for review is made.* If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F)." League Pet. for Writ of Cert. at 5 n.3, Nos. 07-ALJ-07-0107-CC, -0108-CC (Jan. 20, 2009) (emphasis added). Thus, the League and Petitioners' counsel previously acknowledged that final review by the DHEC Board is optional and made that representation to the Supreme Court.

Petitioners contend that a contemporary finding of nefarious intent and bad faith is necessary for a sanction. However, the law simply requires that the Court find the filing was "frivolous." Black's Law Dictionary defines frivolous as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful." *Black's Law Dictionary* 739 (9th ed. 2009). Similarly, Webster's New World Dictionary defines frivolous as something that is "of little value or importance" or "not properly serious or sensible." *Webster's New World Dictionary* 560 (2d College Ed. 1986). The Motion to Remand falls squarely within both of these definitions.

Petitioners also submitted two affidavits in opposition to a finding of frivolousness. One affidavit was submitted by a member of a law firm representing the Petitioners and the other by

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Charles Sarrio v. S.C. Dep't of Health & Envtl. Control, Docket No. 08-ALJ-07-0381-CC, 2009 WL 8167917, (Oct. 23, 2009) (Anderson, C.J.) (same).

[5] Counsel for the Petitioners in this case and the League in the referenced Supreme Court matter, which also involved a challenge to a DHEC permit granted to the Ports Authority, included Jefferson Leath and J. Blanding Holman, IV. The Motion to Remand was filed by Jefferson Leath, Amy Armstrong, and Michael Corley. Mr. Holman entered an appearance on behalf of all Petitioners on August 30, after the Motion to Remand was ruled upon but before the hearing on the Motion for Sanctions. Mr. Holman has been representing the Petitioners in their parallel federal and state court actions against the cruise terminal operations at UPT.

an attorney who has no demonstrable practice experience in the administrative arena before DHEC or this Court. Neither affidavit is persuasive especially in light of the fact that the plain language of the statute clearly sets forth the DHEC Board's discretion.

Given the clear statutory language, the case law directly recognizing the discretionary nature of DHEC Board review and prior affirmations by Petitioners, a reasonable attorney under these circumstances would not have filed the Motion to Remand.[6] I thus find that the Motion to Remand was filed in violation of Rule 72, RPALC, and the Sanctions Act.

Having found a violation, the Court turns to the appropriate sanction. Section (G) of the Sanctions Act offers guidance in this determination. Section 15-36-10(G) provides that sanctions may include:

> (1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;
>
> (2) an order for the attorney to pay a reasonable fine to the court; or
>
> (3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

S.C. Code Ann. § 15-36-10(G). The Court finds that award of reasonable attorneys' fees and costs in responding to the Motion for Remand is an appropriate remedy. This sanction is specifically referenced in the statute and under the facts and circumstances of this case is appropriate.

Ports Authority seeks reimbursement for attorneys' fees in the amount of Nine Thousand Three Hundred and No/100 Dollars ($9,300.00) attributable to the Motion to Remand.[7] It has not sought reimbursement for "hard" costs, contract attorney fees, or internal legal and senior management time devoted to addressing these motions. In determining the reasonableness of the

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[6] I recognize based upon oral argument that the belief that this legal position was sound emanated from one attorney who has not frequently appeared before the ALC. However, all the legal counsel supported his frivolous position.

[7] Respondent also requested attorneys' fees and costs in the amount of Eleven Thousand Six Hundred Seventy-two and 50/100 Dollars ($11,672.50) related to the filing of the Motion for Sanctions. While that request certainly has merit because it remunerates the Port's Authority for **all** its cost regarding the Motion to Remand, under the facts of this case I find that limiting the sanction to the cost of defending the remand of the case is appropriate. Nevertheless, if this award was found to be required, I find that the requested amount is reasonable.

fees associated with this sanction the Court reviewed the affidavits submitted by Counsel for Ports Authority attesting to the hours devoted to litigating the Motion to Remand. Furthermore, Ports Authority submitted an affidavit from John S. Simmons, Esquire, attesting to the necessity and reasonableness of the time, rates, and effort expended by Ports Authority counsel on the Motion to Remand. Having reviewed the affidavits, the Court finds the attorneys' fees sought to be necessary and reasonable.

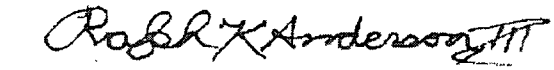
Therefore, having fully considered the motion, the legal authorities submitted by the parties, and the arguments of counsel,

IT IS HEREBY ORDERED that the Ports Authority's Motion for Sanctions is **GRANTED**; and

IT IS FURTHER ORDERED that the Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control are jointly and severally liable for the Sanction Award; and

IT IS FURTHER ORDERED that the Petitioners must tender full payment of the Sanctions Award in the amount of Nine Thousand Three Hundred and No/100 Dollars ($9,300.00) to the Ports Authority within ten (10) days of the date of this order.

AND IT IS SO ORDERED.

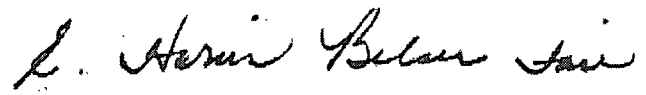


Ralph King Anderson, III
Chief Administrative Law Judge

March 3, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

March 3, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **ORDER GRANTING SUMMARY JUDGMENT FOR LACK OF STANDING**

FILED
April 11, 2014
SC ADMIN. LAW COURT

APPEARANCES: For the Petitioners: Amy E. Armstrong, Esquire
W. Jefferson Leath, Jr., Esquire
J. Blanding Holman, IV, Esquire

For the Respondents: Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Bradley D. Churdar, Esquire

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on the Motion for Summary Judgment (Motion) filed by the South Carolina State Ports Authority (Ports Authority) on December 27, 2013. In this Motion, Ports Authority asserts Petitioners lack standing to proceed with this contested case. After reviewing the filings by the parties, the Court grants the Motion.

BACKGROUND

On December 18, 2012, the Department of Health and Environmental Control (DHEC) staff, through the Office of Ocean and Coastal Resource Management (OCRM), issued a Critical Area Permit and Coastal Zone Consistency Certification (Permit No. OCRM-12-054-B) authorizing Ports Authority to make improvements to Building #322, an existing waterfront

building in the Union Pier Terminal (UPT), for the purpose of relocating a cruise passenger facility. The permit authorizes the installation of five pilings within the existing footprint of Building #322 to support the installation of three elevators and two escalators. The permit also authorizes other structural changes to Building #322, as well as the construction of two covered staging areas designed to handle passengers, luggage, and the loading and unloading of ship supplies.

Petitioners filed a request for a contested case hearing at the ALC to challenge DHEC's decision to issue the permit. Petitioners allege DHEC's decision violates the South Carolina Coastal Zone Management Act, S.C. Code Ann. 48-39-10, *et seq.*, the South Carolina Code of Regulations 30-1, *et seq.*, and the Coastal Management Program (CMP). In July 2013, Ports Authority filed a Motion to Dismiss asserting Petitioners lacked standing to challenge the permit at issue in this case. After reviewing the filings by the parties and hearing oral arguments, the Court denied the Motion to Dismiss, concluding Petitioners had made sufficient allegations in the pleadings before this Court to survive the motion. *See Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987) ("A ruling on a [Rule] 12(b)(6)[, SCRCP,] motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.").

On December 27, 2013, Ports Authority filed this Motion asserting Petitioners lack standing to proceed with this contested case at this stage of the litigation. On January 21, 2014, Petitioners filed a Response to the Motion for Summary Judgment. The next day, the South Carolina Supreme Court issued a decision in a separate case brought in that court's original jurisdiction. *Carnival Corp. v. Historic Ansonborough Neighborhood Assoc.*, 407 S.C. 67, 753 S.E.2d 846 (2014). Subsequently, Ports Authority filed its Reply to Petitioners' Response with the benefit of the Supreme Court's analysis in *Carnival Corp.* Petitioners thereafter filed a Surreply to address what it argued was a significant new argument by Ports Authority based on *Carnival Corp.*[1] Ports Authority filed a Response to the Surreply on March 10, 2014.

[1] Ports Authority consented to a surreply limited to the discrete argument made in Ports Authority's Reply regarding the Supreme Court's decision in *Carnival Corp.*, but it challenged the proposed surreply on the basis that it is beyond the scope of that discrete argument. In an order dated March 3, 2014, this Court granted Petitioners' Motion to File a Surreply and accepted those portions of its Surreply responding to Ports Authority's contentions regarding the implications of *Carnival Corp.*

DISCUSSION[2]

The Rules of Procedure for the Administrative Law Court provide "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." ALC Rule 68. Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Although the evidence and inferences drawn therefrom generally must be construed against the moving party, "the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but a response by affidavit or otherwise . . . must set forth specific facts creating a genuine issue for trial." Rule 56(e), SCRCP. Affidavits proffered by the non-movant must consist of more than conclusory or speculative allegations of fact or subjective beliefs to survive a summary judgment motion. *See, e.g., Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994); *see also*, 49 C.J.S. *Judgments* § 332 ("[S]tatements made in an affidavit . . . in opposition to, the motion for summary judgment, must be statements of fact, and not mere conclusions or opinions.").

In the context of a challenge to standing, although "general factual allegations of injury resulting from the defendant's conduct may suffice" at the pleading (and motion to dismiss) stage, "[i]n response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,'" but, instead, must provide specific facts, whether by affidavit or other evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990); *Arcadia Lakes v. S.C. Dep't of Health and Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013) (finding that neither the Town nor its residents had standing to challenge DHEC's decision and noting that the elements of standing

[2] Petitioners argue Ports Authority's Motion regarding lack of standing is precluded by collateral estoppel because the issue was litigated in federal court and directly decided against Ports Authority. However, as explained in the Order Denying Petitioners' Motion to Vacate, issued December 20, 2013, the federal court order addressed the federal process, and it did not negate the critical area permit and coastal zone consistency certification at issue in this case.

"'are not mere pleading requirements but rather an indispensable part of the plaintiff's case;' therefore, 'each element must be supported . . . with the manner and degree of evidence required at the successive stage of the litigation'" (quoting *Lujan*, 504 U.S. at 561)). Thus, Petitioners must provide sufficient evidence of standing in order to proceed with this contested case.

For cases filed in South Carolina state courts, standing may be acquired: (1) by statute; (2) through what is called constitutional standing;[3] or (3) under the public importance exception. *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013) (citing *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)).[4] "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012); *see also Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) ("When no statute confers standing, the elements of constitutional standing must be met."). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. Nevertheless,

> [i]f . . . a statute does not clearly and specifically address who may bring suit pursuit to it . . . case law seems to suggest that the traditional constitutional standing analysis still applies. Thus, the specificity of a statutory standing provision may be critical to determining whether statutory standing exists and, if not, whether a constitutional analysis is appropriate.

Richard H. Seamon, Paige J. Gossett, & John D. Geathers, *Administrative Agencies – General Concepts and Principles*, *in* South Carolina Administrative Practice and Procedure 1, 76-77 (Randolph R. Lowell ed., 2013).

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[3] In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001), the South Carolina Supreme Court adopted the federal test for "constitutional standing" as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The three elements of the test are:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-561 (citations omitted).

[4] An association may also have standing to bring suit on behalf of its members under certain circumstances. *See* discussion *infra*.

In this case, section 44-1-60 provides that an "applicant, permittee, licensee, or affected person" may contest a final agency decision of DHEC by filing a request for a contested case hearing before the ALC. S.C. Code Ann. § 44-1-60(F)(2) & (G) (Supp. 2010). This remedy is available for all DHEC decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions. § 44-1-60(A) & (G). Petitioners thus may establish statutory standing by establishing they are "affected persons" and are challenging DHEC's decision to grant the permit to Ports Authority. Here, however, the General Assembly did not define "affected person" for purposes of the permit at issue.[5] Therefore, Petitioners may not establish standing simply by adopting the self-imposed moniker that they are "affected persons." Furthermore, in this instance, where a clear, specific definition of "affected person" is not available, the *Lujan* test provides a sufficient framework to determine whether the Petitioners qualify as affected persons for the purpose of establishing standing.[6] Petitioners thus must satisfy the elements of the *Lujan* test to sufficiently establish standing, defeat this motion for summary judgment, and proceed to the next stage of litigation.

Standing under the *Lujan* Test

Injury in Fact

The first element of the *Lujan* test requires Petitioners to show an "injury in fact," which is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)). To be particularized, the injury must affect Petitioners "in a personal and individual way." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. It is settled that "a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." *ATC*, 380 S.C. at 196, 669 S.E.2d at 339 (quoting *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000)).

Furthermore, in a recent opinion evaluating the standing of many of Petitioners' organizations to bring an action seeking an order permanently enjoining cruise operations at the

[5] *Cf.* S.C. Code Ann. § 44-7-130(1) (2002) (defining "affected person" for purposes of the State Certification of Need and Health Facility Licensure Act to include, among others, the applicant, a person residing within the geographic area to be served by the applicant, and persons located in the health service area).

[6] The South Carolina appellate courts have followed this approach in application. *See Carnival Corp., supra; Town of Arcadia Lakes*, 404 S.C. at 529, 745 S.E.2d at 392; *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 33 (2007).

UPT, the Supreme Court of South Carolina rejected the allegations of injury-in-fact advanced by Petitioners as insufficient to satisfy their burden of proving standing. *See Carnival Corp.*, 407 S.C. at __, 753 S.E.2d at 849-53. Although the Supreme Court's decision was based upon a nuisance claim, which is not the legal issue before this Court, the allegations of injury-in-fact in this case, as well as the parties advancing them, are quite similar, if not the same.[7] For instance, the allegations include the same injuries to person and property as asserted in this contested case, including complaints that "vessels emit noise pollution . . . and burning diesel fuel emits visible particulate soot from ship funnels," traffic problems related to cruise passengers embarking and debarking ships, and pollution to surrounding waters.

Nevertheless, Petitioners suggest that the Supreme Court's injury-in-fact analysis should not be applied to this case because the nuisance and ordinance causes of action required a "special injury." That argument ignores the clear parallel drawn by the Supreme Court between the "special injury" requirement and particularized harm. In setting forth the level of proof required to allege a "special injury," the Supreme Court applied the same test as it did in *Lujan* for determining whether the plaintiff has suffered a concrete and particularized harm under the constitutional injury-in-fact analysis:

> A special injury is "individual or specific damage in addition to that suffered by the public," *Brown* [*v. Hendricks*], 211 S.C. [395,] 400, 45 S.E.2d [603], 605 [(1947)], and must be "of a special character, distinct and different from the injuries suffered by the public generally," *Bowlin v. George*, 239 S.C. 429, 433–34, 123 S.E.2d 528, 530 (1962). In other words, the public nuisance cause of action does not obviate the requirement of a particularized injury. Rather, for a private party to bring a public nuisance cause of action, the private party must have suffered a particularized injury.

Carnival Corp., 407 S.C. at __, 753 S.E.2d at 852.[8] Therefore, because the test for "special injury" and "affected person" under the facts of this case are the same —*i.e.*, the "particularized injury" requirement under *Lujan/Sea Pines*—the Supreme Court's evaluation and rejection of the

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[7] *Compare* Request for Contested Case, *with* Ports Authority Motion for Summ. Judg., Ex. 73, Petitioners' First Am. Compl., *Carnival Corp. v. Historic Ansonborough*, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012).

[8] Petitioners suggest the Supreme Court's analysis in this regard is *dicta* and was not necessary to support the Supreme Court's dismissal of Petitioners' claims. *See* Surreply at 3-4 (stating that the Supreme Court's "findings were not a 'necessary' basis for its decision"). This unusual approach appears to be an attempt to establish a doctrine akin to a reverse "two-issue rule" argument, suggesting that where a court makes multiple dispositive holdings, neither a party nor a reviewing court may rely upon any individual holding. However, Petitioners cite no case law for this novel approach to rejecting dispositive holdings.

same allegations of harm, advanced by many of the *same parties*, applies to the analysis of Petitioners' standing in this case.

Finally, Petitioners also contend that, since the Supreme Court evaluated the allegations of injury-in-fact at the motion to dismiss stage, the procedural posture of that dismissal prevents this Court from employing the Supreme Court's analysis here. However, the burden of proof to demonstrate standing is not stagnant; it changes as the litigation progresses, becoming progressively more difficult for Petitioners to demonstrate. *See Town of Arcadia Lakes,* 404 S.C. at 529, 745 S.E.2d at 392-93 ("Elements of standing, however, 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case'; therefore, 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stage of the litigation.'" (quoting *Lujan*, 504 U.S. at 561)). The Supreme Court dismissed Petitioners' claims at the motion to dismiss stage, where the bar is at its lowest point to clear. Consequently, the Supreme Court's analysis suggests this Court's review at the motion for summary judgment stage be one of greater scrutiny.

Having determined the Supreme Court's reasoning in *Carnival Corp.* is instructive, we now turn to the specific facts of this case and evaluate Petitioners' claims under *Lujan*. Petitioners must demonstrate an injury-in-fact derived from DHEC's review and issuance of the permit. In applying *Lujan*, it is evident Petitioners have failed to show an "injury in fact," which is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560. Petitioners provided several affidavits from members of their organizations to support their standing in this case. In the affidavits, the members complain about several alleged injuries, including a reduced quality of life, diminished property values, aesthetic and health effects of air pollution, and water pollution. The Court will address each allegation of injury in turn.

Quality of Life

First, Petitioners allege the permit will result in a decrease in their quality of life. For example, Stephen F. Gates, a resident of 59 Meeting Street and President of the Charlestowne Neighborhood Association, provided an affidavit in which he asserts the cruise ships at the UPT have resulted in unbearable and unmanageable traffic congestion in the historic downtown. He further contends Charleston's historic integrity and aesthetic beauty is being eclipsed by the

presence of the disproportionately large cruise ships next to the historic district. Mr. Gates complains that on the days the cruise ships are in port he has reduced access to a convenient grocery store, and he is forced to waste his time, energy, gas, and peace of mind to endure or attempt to avoid cruise traffic. While the Court has sympathy for Mr. Gates' difficulties in navigating downtown traffic, these alleged injuries are not personal or individual to him.[9] All downtown citizens or visitors are equally affected by traffic and visual impairments generated by the presence of the cruise ships. *See Carnival Corp.*, 407 S.C. at __, 753 S.E.2d at 849-50 (holding visual disruptions of Charleston's historic skyline and major traffic congestion as a result of cruise ships in port are "generalized grievances suffered by the public as a whole" and do not constitute a "particularized harm"); *Sea Pines Ass'n for Prot. of Wildlife, Inc.*, 345 S.C. at 600, 550 S.E.2d at 291 ("[Injury] must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public.").

Furthermore, Petitioners have failed to show the injury to their quality of life is "actual or imminent." *Lujan*, 504 U.S. at 560. As demonstrated by the affiants' complaints, Petitioners complain of traffic congestion and aesthetic issues that have been affecting their quality of life since the Carnival *Fantasy* made Charleston its home port in 2010. The harms Petitioners describe are pre-existing; therefore, they are not pertinent to whether the permit at issue will cause a particularized injury to Petitioners. Rather, Petitioners rely on speculation that the permit will increase cruise activities to argue the existing injuries they are suffering will be exacerbated by the permitted activity. Essentially, the injury Petitioners assert is the exacerbation of pre-existing injuries. However, Petitioners' affiants' conclusory statements and opinions in support of this alleged injury are not sufficient to create a genuine issue of fact to survive summary judgment.[10] *See Germann v. New York Life Ins. Co.*, 286 S.C.34, 39, 331 S.E.2d 385, 388 (1985) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a

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[9] Indeed, the affidavits of Christina Dodd and Virginia Lane also complain of increased traffic congestion in the Charleston peninsula area on days the *Fantasy* is in port, and of the effects of the cruise ship's presence on Charleston's aesthetic beauty.

[10] An affidavit of a fact witness "shall set forth facts as would be admissible in evidence" and is prohibited from offering opinion testimony which would also be inadmissible at trial. Rule 56(e), SCRCP; *see also Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (holding "a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training" (citing Rules 602 and 701 of the South Carolina Rules of Evidence)). The information offered by Mr. Gates and the other affiants is of limited evidentiary value because much of it relies on hearsay and consists of conclusory statements of the affiants' personal opinions and speculations.

genuine issue of fact for purposes of resisting summary judgment."). Petitioners fail to provide evidence conclusively demonstrating (1) cruise activities will increase if the permit is granted and (2) reliable expert testimony to support their contention that the increased cruise activities will result in increased traffic congestion and aesthetic degradation. Without expert testimony or evidence presenting a foundation for the affiants' claims, any effect the permit will have on Petitioners' quality of life is conjecture.

Effects on Property Values and Businesses

Next, Petitioners express *concern* that the permit will have deleterious effects on their property values and businesses. Virginia Lane, a member of the Board of Trustees for the Historic Charleston Foundation, stated in her affidavit that the new terminal *would likely* impact her architecture business and reduce the value of her property; however, she provided no evidence to support these speculative claims.[11] Mr. Gates stated he was *concerned* the new terminal would result in more and/or bigger cruise ships calling in Charleston, and therefore more soot would damage his house, effectively decreasing the value of his property. Concern, without evidence of declining property values and business reasonably attributed to granting the permit, does not constitute actual or imminent harm. Moreover, in reviewing a permit request, DHEC is charged with considering "the extent to which the proposed use could affect the value and enjoyment of *adjacent* owners." S.C. Code § 48-39-150(A)(10) (2008); S.C. Code Ann. Regs. 30-11(B)(10) (2011) (emphasis added); *see also L. E. Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 164, 130 S.E.2d 363, 369 (1963) ("'[A] use of property which does not create a nuisance cannot be enjoined or a lawful structure abated merely because it renders neighboring property less valuable.'" (quoting 66 C.J.S. *Nuisances* § 19d)). None of Petitioners' members own property adjacent to the UPT. Furthermore, Petitioners provide no evidence linking diminishing property values to the proposed permitted activity.[12] Thus, diminished property values and diminished business prospects are not injuries-in–fact, but purely hypothetical injuries.

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[11] Moreover, any potential impact to Ms. Lane's architecture business is personal to her and may not be used to establish standing on behalf of the Foundation.

[12] Petitioners did not submit evidence of real estate appraisals or another probative measure of real estate values even though one of the affiants, Christina Dodd, sold her home in the Ansonborough neighborhood during the pendency of this case.

Emissions from Ships

Several of Petitioners' affiants further complain they have been injured by oily soot on the window sills and piazzas of their homes. Mr. Gates asserted he was concerned about the real and substantial risks posed by increased soot and air emissions from expanded cruise activities as a result of the permit.[13] Similarly, Tommie Robertson claimed she has been on her porch when the *Fantasy* has docked and, within seconds of breathing in the ambient air, experienced a sore throat and difficulty breathing as a result of the ship's emissions. Robertson contends the permit will exacerbate this issue. However, Petitioners' provided no expert medical testimony substantiating their claims, nor did they provide any evidence linking the proposed permit with the alleged potential harm. While air pollution is certainly a concern for the public at large, Petitioners have failed to demonstrate that their affiants are affected any differently from any other downtown Charleston resident. Moreover, the case before this Court is based on a DHEC permit related to water quality, not air quality. Thus, the allegations of possible air pollution are not relevant to the issue before this Court and cannot establish an injury in fact sufficient to confer standing upon the Petitioners.

Water Pollution

Finally, Petitioners allege the permit will injure them because it will increase water pollution and, therefore, exacerbate related health and safety issues. Katherine Zimmerman, who is a Program Director for the Coastal Conservation League, discussed the issue of water quality in her affidavit. Ms. Zimmerman described and attached several reports discussing issues involving water quality and the cruise industry as a whole. However, the hearsay[14] reports offer no discussion of, or connection with, the cruise industry in Charleston. Reports discussing the cruise industry in general do not satisfy the personal and particularized requirement of an injury-in-fact, which Petitioners are required to demonstrate. Likewise, Marty Morganello's[15] affidavit asserting he is concerned the permitted activity is a precursor to expanded cruise ship operations,

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[13] Specifically, Mr. Gates contends he must scrub his porch and windows more often and more vigorously as a result of purportedly imminent soot deposition. Ms. Dodd also complained of soot deposition on her window sills and piazzas, but she has since sold her home. Accordingly, her concerns in this regard are now moot.

[14] *See* Rule 56(e), SCRCP (requiring affidavits to be "made on personal knowledge" and "set forth facts . . . admissible in evidence").

[15] Morganello is the President of the Charleston Chapter of the Surfrider Foundation. He resides at 1620 Oak Island Drive, which is several miles from Charleston's historic district. He enjoys Charleston and its surrounding waterways.

which will result in increased water pollution, does not constitute a particularized injury. Even if Mr. Morganello's speculations are true, they remain unsubstantiated speculations without evidence showing how the permit will result in increased cruise activities, and increased cruise activities will result in increased water pollution. The Court is not concerned with predictions of general future harm based on conjecture. Accordingly, Petitioners fail to show potential increases in water pollution is an injury-in-fact.

Identifiable Trifle

Petitioners also contend the injury required for standing purposes need not be a substantial injury but an "identifiable trifle" is enough. This Court's conclusions, however, are not based on an analysis of whether the injuries are substantial or an "identifiable trifle." Rather, this Court's analysis is based on whether the injuries are "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560. Here, as in *Carnival Corp.*, Petitioners' alleged injuries do not affect them in a personal and individual way different from the way they affect the general public. Petitioners' affidavits do not provide material facts to establish a concrete and particularized injury distinguishable from the harm suffered by the general public. Further, Petitioners fail to show how their allegations are not conjectural or hypothetical, given that they are tied to current conditions with existing cruise operations as opposed to any actual or imminent injury deriving from the permitted activity. Accordingly, this Court finds Petitioners have failed to show an injury-in-fact under *Lujan* for the purpose of establishing standing.

Causal Connection

Even if Petitioners were able to show an injury-in-fact, this Court finds they cannot satisfy the second element of the *Lujan* test, which requires "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly...trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). In this case, the conduct complained of is the permit authorizing the construction of pilings in the critical area which are necessary for relocating the cruise ship terminal to the northern end of the UPT. Petitioners allege the relocation of the cruise ship terminal under the permit will result in more and/or bigger cruise ships docking at Charleston,

which will, in turn, exacerbate the alleged injuries Petitioners are already suffering.[16] Petitioners cite to *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) in support of their claim, arguing *Duke Power* stands for the principle that causation can be proven by a "but for" test. In this case, Petitioners claim that but for the granting of the permit, the alleged harms to Petitioners would not be exacerbated. However, *Duke Power* is inapplicable here for two reasons. First, in *Sea Pines*, South Carolina adopted the test for standing as provided in *Lujan*, not *Duke Power*. Second, even if *Duke Power* was applicable, Petitioners have provided no evidence, in the form of expert testimony or otherwise, to prove a "but for" causal connection between the permit and the alleged potential harms.

Applying the correct, stricter standard under *Lujan*, Petitioners' claim of a causal connection fails. The facts of this case are analogous to the situation in *Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). In *Bailey*, the petitioner contested DHEC's decision to grant a nearby property owner a permit to change part of his fixed dock to a floating dock. *Id.* at 2, 693 S.E.2d at 427. The petitioner expressed "concern" that the dock would become a marina, and the Court of Appeals upheld this Court's determination that his concern was "conjectural and speculative." *Id.* at 7, 693 S.E.2d at 429. Moreover, the Court of Appeals upheld this Court's finding of no causal connection between the petitioner's alleged injury and the permitted conversion of the fixed dock into a floating dock because the neighbor's boats had been docked there for years, and they would continue to be docked there regardless of the permitting decision. *Id.* Here, like in *Bailey*, Petitioners raise concerns about potential future harms. Petitioners' complaints are merely based on speculation that the permit will exacerbate the existing alleged harms related to the cruise ships porting at the UPT. Petitioners, however, have provided no expert testimony connecting the permitted activities with the alleged exacerbation of harm. Further, like *Bailey*, even if this Court denied the permit, the UPT will remain an operational marine terminal servicing cruise ships.[17]

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[16] Petitioners also contend that without the permitted pilings to provide structural support for the relocated cruise terminal, Ports Authority will be forced to cease all cruise ship operations. However, cessation of current cruise ship operations is not at issue in this case. Moreover, Petitioners have failed to provide any evidence substantiating their claims that cruise operations would cease if the permit were denied.

[17] In fact, if the permit is denied, the Ports Authority represents that not only will UPT continue to service cruise vessels, but also cargo ships, which have already been moved to another terminal in anticipation of the renovation of the cruise terminal, will return to UPT, along with their associated rail and truck traffic.

Moreover, Petitioners' contention that the permit will increase cruise ship operations at the UPT relies on assumptions about the decisions of third parties, like Carnival Cruise Lines, who is not part of this action, and who must initially decide to expand the size of its fleet in Charleston. *See Simon*, 426 U.S. at 41-42 ("[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."). Thus, there is no evidence before this Court that the permitted activities at issue in this case are causally connected with the potential alleged injuries.

Redressability

The third element of the *Lujan* test requires that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). Petitioners request this Court review the permit and issue an order reversing the decision to issue the permit or, in the alternative, remand the case to DHEC with instructions to conduct an analysis of alternative terminal locations, traffic impacts, noise impacts, air emissions, and impacts on the historic qualities of Charleston. Although Petitioners allege that the existing complaints will be exacerbated as a result of the permit at issue in this case, Petitioners provided no evidence, particularly no expert testimony, to support those claims. Therefore, not only is it speculative that the permit will exacerbate Petitioners' alleged injuries, it is also speculative that a denial of the permit will redress the alleged harms.

Petitioners also argue the denial of the permit will redress existing injuries to its members from current cruise operations. Nevertheless, existing injuries from current cruise operations which are not connected to the proposed permitted activities are not at issue in this case. Petitioners further claim their injuries would be redressed if this Court denied the permit and instructed DHEC to conduct its permitting in a "legal manner," which would "allow for identification of specified historic, health and environmental impacts and adoption of measures to reduce them, such as shore power, standards for cruise operation and discharges, terminal redesign (e.g., less impervious parking) and terminal relocation away from the most congested and historically intact part of Charleston." However, this Court cannot address the issue of whether DHEC properly issued the permit unless Petitioners establish standing. Accordingly, there is no evidence before this Court that the denial of the permit in this case would redress Petitioners' alleged potential injuries.

Associational Standing

Where the petitioner is an association, the association has standing to bring an action on behalf of its members, but it is "substantially more difficult." *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). An association has standing "only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." *Id.* Specifically, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). As previously discussed, Petitioners have failed to provide evidence proving their members individually meet the elements of *Lujan*, particularly the requirement of an injury-in-fact. Because Petitioners cannot show their individual members have suffered an injury-in-fact, Petitioners likewise cannot show the members have standing to sue in their own right to satisfy the first element of associational standing under *Beaufort Realty*. *See id.* at 301, 551 S.E.2d at 589 (holding an organization has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right); *see also Carnival Corp.*, 407 S.C. at __, 753 S.E.2d at 851 ("[T]o possess standing, either Plaintiffs alone must have suffered a concrete, particularized injury or their members must have suffered such an injury and the other elements of associational standing must be satisfied."). This finding mirrors that of the Supreme Court in *Carnival Corp.*, which held plaintiffs, in an almost identical position as Petitioners,

> fail[ed] to allege a particularized injury either to themselves or their members. Rather, they assert[ed] only generalized grievances suffered by the public as a whole which are insufficient to establish associational standing.

Carnival Corp., 407 S.C. at __, 753 S.E.2d at 851. Thus, Petitioners fail to meet the first requirement for organizational standing.

Next, Petitioners, with the exception of Charleston Communities for Cruise Control (Cruise Control), also fail to satisfy the second element of *Beaufort Realty* because Petitioners fail to show the permitted activity is germane to Petitioners' associational purposes. For example, the Historic Ansonborough Neighborhood Association (HANA) states its purpose is to "address matters of importance to the historic residential neighborhood designated as Ansonborough . . . and to foster a spirit of community and cooperation with the Ansonborough

Neighborhood." While HANA has provided the affidavit of one of its members who alleges the permitted activity has injured her individually, it has not provided any evidence showing how the permitted activity is germane to addressing matters of importance to all members of the Ansonborough neighborhood.[18] Furthermore, HANA does not assert any of its members own property adjacent to the UPT. HANA thus presents no more than a mere interest in the permitted activity, which does not establish standing. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (holding "a mere interest in a problem" is not sufficient to establish standing). The Charlestowne Neighborhood Association (CNA) fails to satisfy the second element of organizational standing for similar reasons.[19]

The Preservation Society of Charleston (PSC) asserts its mission is to "inspire the involvement of all who dwell in the Lowcountry to honor and respect our material and cultural heritage." PSC fails to show how the permitted activities will hinder its ability to "inspire involvement" in its preservation activities. Similarly, the Historic Charleston Foundation (HCF) is "dedicated to preserving and protecting the architectural, historical and cultural character of Charleston and its Lowcountry environs, and educating the public about Charleston's history and the benefits that are derived from preservation." HCF argues the addition of five pilings and the relocation of the terminal will adversely impact Charleston's architectural, historical, and cultural heritage. However, HCF fails to specify what that impact is, particularly considering Charleston is a port city and has undeniably derived its cultural heritage from the maritime industry, to which the UPT has contributed for over one hundred years. Like HANA and CNA, PSC and HCF fail to present anything more than a "mere interest" in the permitted activity. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (holding "a mere interest in a problem is not enough" is not sufficient to establish standing).

The Charleston Chapter of the Surfrider Foundation (Surfrider) states it is an "environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through conservation, activism, research and education."

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[18] Furthermore, HANA's individual member who submitted an affidavit, Christina Dodd, no longer lives in the Ansonborough neighborhood. Accordingly, the concerns expressed in her affidavit are now moot, and her affidavit may not be relied upon to confer standing upon the Petitioner, Historic Ansonborough Neighborhood Association.

[19] CNA's membership is limited to residents living south of Broad Street, which is located many blocks south of the UPT.

Surfrider has not presented evidence showing how the permitted activity will affect its ability to protect and enjoy the world's oceans, waves and beaches. Furthermore, Surfrider's affiant, Mr. Morganello, provided no admissible or substantiated evidence useful to this Court. Accordingly, Surfrider fails to satisfy the second element of organizational standing.

The permitted activity arguably is germane to CCL's broadly stated purpose to "protect the natural resources and quality of life in South Carolina communities, to promote appropriate development and to prevent projects that would excessively harm the state's natural resources and interfere with its residents' quality of life." However, CCL, like the other associations, does not specifically state how the permitted activity hinders its purpose, other than speculating about potential future harms. In light of its broad purpose, it is more important for CCL to show the permitted activity is germane to its purpose, its members, and is not merely of interest to it. This Court finds CCL failed to show it has more than a mere interest in the permitted activity. Furthermore, to the extent CCL rests its claim for standing on the affidavit of Zimmerman, her testimony is largely inapplicable or inadmissible.[20] Similarly, Robertson asserts that CCL represents her interest in the "use and enjoy[ment of] the aesthetic, historic, cultural and natural resources of the City of Charleston and the greater coastal zone in which it sits." CCL's broadly stated purpose does include the protection of the "quality of life in South Carolina communities" which arguably includes the use and enjoyment of "aesthetic, historic, cultural and natural resources." However, Ms. Robertson did not provide any evidence showing how the permitted activity is germane to addressing matters of importance to all members. Rather, as discussed above, her allegations relate to interests which are not distinguishable from any other downtown Charleston resident.

Moreover, even if Robertson's claims relating to the emissions from cruise ships and their effect on her health and property could be connected to the permitted activity, those claims are personal to her and cannot be used to establish standing on behalf of CCL. An organization lacks standing where the claim asserted and the relief requested requires the participation of individual members in the lawsuit. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (holding an association has standing if neither the claim asserted nor the relief requested requires

[20] Zimmerman's affidavit purported to give opinions on the air and water quality impacts of the permitted activity. Zimmerman did not establish her expertise to give an opinion regarding these issues. Accordingly, her statements are mere speculation. Furthermore, the study she quoted on the use of shore-side power is hearsay and thus insufficient to establish a genuine issue of material fact.

the participation of individual members in the lawsuit). Furthermore, the recent decision of the South Carolina Supreme Court in *Georgetown County League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 358, 713 S.E.2d 287, 292 (2011), points out the flaws in Petitioners' use of Robertson's claims to establish standing. The dissenting opinion in *Smith Land*,[21] which was authored by Justice Hearn and joined by Justice Kittredge, concluded that, in order to satisfy the third prong of the *Beaufort Realty/Hunt* test, "the organization must show that the right it seeks to vindicate is common to the membership and the interest of the harmed members in the proceedings derives from their membership." *Id.* at 358, 713 S.E.2d at 293. The dissent recognized that while the League of Women Voters alleged that its members suffered and would continue to suffer harm as a result of the permitted activity, the evidence presented by the League of Women Voters was limited to harm alleged by only one member.[22] Pertinent to the issues at hand, the dissent recognized that injury as to one member of an organization does not extend to the rest of the organization. *Id.* at 361, 713 S.E.2d at 293 ("With harm occurring to only one member of the League [of Women Voters] and a cause of action thereby inuring only to that one member, the right the League is pursuing under the Act is not a common one."). Further, the dissent emphasized that the harm suffered by the individual does not, in and of itself, satisfy the associational standing requirement unless the injury suffered flows from the membership in the organization. *Id.* Applying that reasoning to this case reveals a similar disconnect between the injuries alleged and CCL's purpose. The experiences of Robertson regarding the effects of cruise ships' soot upon her personal property and breathing do not establish the third prong of the *Beaufort Realty/Hunt* test.

Therefore, this Court finds none of Petitioners satisfy all three requirements for associational standing.

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[21] The *Smith Land* majority found the issue of standing to be unpreserved for its appellate review; therefore, it took no position on the issue. *Smith Land*, 393 S.C. at 352 n.1, 713 S.E.2d at 288 n.1. The dissent, believing the majority had misapplied the rules of preservation, addressed the issue of associational standing in a manner that is problematic for Petitioners. *Id.* at 357-58, 713 S.E.2d at 291. Thus, to date, the only two Justices to have evaluated the *Beaufort Realty/Hunt* test under similar circumstances came down on the side of the Ports Authority's argument in this case, while the remaining three Justices have taken no position on the issue.

[22] Evidence was also presented by two other neighboring property owners; however, those neighbors were not members of the League of Women Voters. *Smith Land*, 393 S.C. at 360-61, 713 S.E.2d at 293.

Standing under the Public Importance Exception

In the alternative, Petitioners assert they have standing under the public importance exception. Where a court determines a case presents issues of important public interest, standing may be conferred "without requiring the plaintiff to show he has an interest greater than other potential plaintiffs." *Davis v. Richland Cnty. Council,* 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). However, "[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *Bodman*, 403 S.C. at 68, 742 S.E.2d at 367 (quoting *ATC South, Inc.*, 380 S.C. at 198-199, 669 S.E.2d at 341). Petitioners argue this Court should find they have standing under the public importance exception because the permitted activity will result in a "[thirty five] million [dollar] cruise terminal in the heart of the most historic area in all of South Carolina and impact that area for generations to come." However, the permitted activity will not change the existing footprint of the UPT, nor will it change the function of the UPT as a marine terminal, and the permit cost is not representative of its public importance or the need for future guidance. The core issue in this case is whether DHEC complied with state law when issuing the Critical Area Permit and Coastal Zone Consistency Certification authorizing the Ports Authority to make improvements to Building #322. Petitioners have not shown, and this Court fails to see, how the resolution of this case is needed for future guidance. Accordingly, this Court finds Petitioners fail to establish standing under the public importance exception.

Conclusion

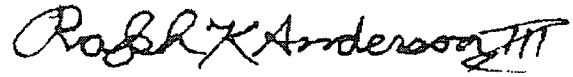
In response to a summary judgment motion, Petitioners can no longer rest on "'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561; *see* Rule 56(e), SCRCP (providing "the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but a response by affidavit or otherwise . . . must set forth specific facts creating a genuine issue for trial"). Petitioners have made many allegations and conclusory statements, but have failed to set forth specific, admissible facts to support their allegations and

statements. Consequently, Petitioners have failed to show they satisfy the elements of standing under any theory presented so as to defeat this summary judgment motion.[23]

ORDER

IT IS HEREBY ORDERED that Ports Authority's Motion for Summary Judgment for lack of standing is **GRANTED**.

AND IT IS SO ORDERED.



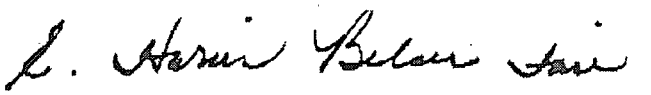
Ralph K. Anderson, III
Chief Administrative Law Judge

April 11, 2014
Columbia, South Carolina

[23] Petitioners filed a Motion for Reconsideration of this Court's Order of March 3, 2014, denying Petitioners' Motion to Expand Discovery on March 13, 2014. In response to the Court's e-mail inquiry on March 24, 2014, counsel for Petitioners represented to the Court that Petitioners sought expanded discovery in order to prepare for the hearing on the merits and not for purposes of responding to the Motion for Summary Judgment. Therefore, the Order denying Petitioners' Motion to Expand Discovery is vacated. Nevertheless, in light of the disposition of the summary judgment motion, the Motion for Expanded Discovery is moot and is thus denied. Likewise, all remaining outstanding motions are moot and are also denied.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

April 11, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **AMENDED ORDER GRANTING SANCTIONS**

This matter is before the Administrative Law Court (ALC or Court) pursuant to Respondent South Carolina State Ports Authority's (Ports Authority) July 1, 2013 Motion to Dismiss and for Sanctions (Motion for Sanctions). Ports Authority argues that sanctions are warranted because Petitioners'[1] February 27, 2013 Motion to Remand (Motion to Remand) was frivolous, unsupported by any reasonable legal theory, and was filed solely for purposes of delay. On July 26, 2013, Petitioners filed their Memorandum in Opposition and the Ports Authority filed a Reply on August 2, 2013.[2] Oral argument was held before this Court on September 6, 2013. As more fully discussed herein, the Ports Authority's Motion for Sanctions is granted.[3]

[1] Preservation Society of Charleston (Preservation Society), Historic Charleston Foundation (HCF), Historic Ansonborough Neighborhood Association (HANA), South Carolina Coastal Conservation League (League), Charlestowne Neighborhood Association (CNA), Charleston Chapter of the Surfrider Foundation (Surfrider), and Charleston Communities for Cruise Control (Cruise Control) (collectively, Petitioners).

[2] On August 19, the Petitioners filed a sur-reply to the Respondent Ports Authority's reply. However, the Rules of Procedure of the ALC do not permit sur-replies and no leave of the Court was granted. *See Sierra v. LaManna*, C/A No. 0:08-3222-CMC-PJG, 2009 WL 1884492 at *3 n.3 (D.S.C. June 30, 2009) (noting the District of South Carolina Local Rules "make no provision whatsoever for sur-replies"). Thus, on August 20, this Court informed the parties that the unauthorized sur-reply would not be considered.

[3] This Court issued an Order finding that a sanction was warranted on March 3, 2014. Following the issuance of that decision, Petitioners made a Motion for the Court to reconsider its decision and grant a stay if the Court

FILED
April 11. 2014
SC ADMIN. LAW COURT

BACKGROUND

On December 18, 2012, South Carolina Department of Health and Environmental Control (DHEC), through its Division of Ocean and Coastal Resource Management (OCRM), issued a staff decision granting a critical area permit and coastal zone consistency certification to the Ports Authority authorizing construction of five pilings to facilitate the relocation of cruise operations within Union Pier Terminal (UPT) in the City of Charleston. Permit (OCRM-12-054-B) (Dec. 18, 2012). On January 2, 2013, Petitioners filed a request for a final review conference by the DHEC Board of the OCRM staff decision. The Ports Authority and DHEC staff submitted responses to the request to the DHEC Board. Thereafter, on January 10, 2013, the DHEC Board voted unanimously to decline to conduct a final review conference and issued a written notice of its decision not to conduct a final review conference the next day. On February 11, 2013, Petitioners filed a request for contested case challenging the merits of DHEC's decision.

On February 27, 2013, Petitioners filed "Motion to Remand to DHEC Board." After reviewing Petitioners' filing, on March 6, 2013, counsel for Ports Authority consulted with Petitioners' counsel and advised Petitioners' counsel of the Ports Authority's belief that the motion was frivolous, and expressed the Ports Authority's intention to seek sanctions if Petitioners did not withdraw the motion. Petitioners elected to pursue the Motion. The Ports Authority filed a response to the Motion for Remand on March 14, 2013, and this Court issued an order denying the Motion on May 3, 2013 (May 3 Order).

STANDARD

Administrative Law Court Rule 72 provides that "[i]f the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCALCR. Furthermore, the 2009 Revised Notes to Rule 72, provide that "in determining whether a case is frivolous, the administrative law judge may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act." Rule 72, SCALCR, 2009 Revised Notes.

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determines that a sanction is nevertheless warranted. This Order clarifies the Court's initial decision in light of the reconsideration motion and addresses the request that it stay the implementation of the sanction.

The Sanctions Act provides, in relevant part, that "[a]n attorney ... participating in a civil or administrative action or defense" may be sanctioned for:

> (a) filing a frivolous pleading, motion, or document if:
>
> * * *
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;[4]
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than . . . adjudication of the claim or defense upon which the proceedings are based[.]

S.C. Code Ann. § 15-36-10(A)(4)(a). Further, Section 15-36-10(B)(2) provides that "if ... an attorney ... has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances."

Additionally, in determining if a violation occurred under the Sanctions Act, the ALC applies a "reasonable attorney" standard for evaluating sanctionable conduct. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011). More specifically, court must take into account:

> (1) the number of parties;
>
> (2) the complexity of the claims and defenses;
>
> (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
>
> (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
>
> (5) previous violations of the provisions of this section;
>
> (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and

[4] Respondent did not raise any defense that the laws addressing DHEC review should be extended, modified or reversed. Therefore, this aspect of the statute will not be addressed further.

(7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E).

DISCUSSION

In this case, the issue of a remand to the DHEC Board was a legal one requiring no case-specific factual development. Moreover, upon receipt of the Motion to Remand, Ports Authority's counsel contacted Petitioners' counsel by letter which set forth specific authority why the Ports Authority believed the motion was frivolous, requested withdrawal of the motion, and indicated that the Ports Authority would seek sanctions should the Petitioners press forward with the Motion to Remand. The Petitioners and their counsel refused to withdraw the motion.

This Court ruled in its May 3, 2013 Order that the Motion had no basis in law and was contrary to the language and intent of the statute. As discussed in the May 3 Order, S.C. Code Ann. § 44-1-60(F) clearly sets forth a discretionary standard in the DHEC Board that permits it to choose whether or not to conduct a final review conference. Petitioners' Motion to Remand relied upon a single word in a sentence within S.C. Code Ann. § 44-1-60(F) while ignoring the remainder of subsection -60(F). As this Court noted, "[b]y stating that the Board can decline to consider a request, Section 44-1-60(F) obviously recognizes the existence of discretion.... When the statute is read as a whole, it is clear that the Board has the discretion to decline to conduct a final review conference...." *Id.*

Moreover, this statutory scheme and the DHEC Board's role in it have been in place since 2006. A reasonable attorney in the same circumstances would be on notice that the discretionary nature of conducting a review conference is well established. For instance, the discretionary nature of conducting a review has been recognized repeatedly by the ALC.[5] More

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[5] *See, e.g., Trident Medical Center, LLC, v. S.C. Dep't of Health & Envtl. Control*, Docket Nos. 09-ALJ-07-0332-CC, 09-ALJ-07-0333-CC (Consolidated), 09-ALJ-07-0336-CC (Consolidated), 2012 WL 7187635, (Sept. 26, 2012) (McLeod, J.) ("If the Department Board does not hold a final review conference, the staff decision becomes the final agency decision unless an applicant or affected person timely requests a contested case hearing before the Administrative Law Court."); *Wise v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0851-CC, 2011 WL 2413274 (Feb. 23, 2011) (McLeod, J.) ("The Board can either conduct a review conference and issue a final agency decision, or decline to conduct a review conference, in which case the staff decision becomes the final agency decision.") (citing S.C. Code Ann. § 44-1-60(F)), *rev'd on other grounds* Op. No. 2013-UP-072 (Ct. App. Filed Feb. 13, 2013); *Hill v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666, (Dec. 9, 2010) (Anderson, C.J.) ("The DHEC Board [ ] has sixty days within which to hold a review conference. [ ] The Board may (1) hold a final review conference and issue a decision; (2) decline in writing to hold a final review conference; or (3) take no action within the sixty-day period. [ ] If the Board either declines in

importantly, the DHEC Board's discretionary right to conduct a final review conference has also been recognized by appellate courts of this State. *See, e.g., Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference rendering the staff decision the final decision).

While not necessary to the Court's finding herein in light of the unambiguous language of the statute and the established case law recognizing the discretionary nature of DHEC Board review, I further note that this statutory scheme and the DHEC Board's role in it have also been recognized by Petitioner and counsel. Petitioner South Carolina Coastal Conservation League (League) and its counsel (including counsel representing Petitioners in the present case)[6] affirmatively represented to the South Carolina Supreme Court that a final review conference is optional and discretionary with the DHEC Board in a case challenging a DHEC permit issued to the Ports Authority. Specifically, the League stated: "*The Board has the option of conducting a conference or not after a request for review is made.* If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F)." League Pet. for Writ of Cert. at 5 n.3, Nos. 07-ALJ-07-0107-CC, -0108-CC (Jan. 20, 2009) (emphasis added). Thus, the League and Petitioners' counsel have previously acknowledged that final review by the DHEC Board is optional and made that representation to the Supreme Court.

Petitioners contend that a contemporary finding of nefarious intent and bad faith is necessary for a sanction. However, the law simply requires that the Court find the filing was "frivolous." Black's Law Dictionary defines frivolous as "[l]acking a legal basis or legal merit;

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writing to schedule a final review conference or allows the sixty days to lapse without any action, then the staff decision becomes the final agency decision and an affected party may request a contested case hearing before the ALC pursuant to Section 44-1-60(G).") (citing S.C. Code Ann. § 44-1-60(F)); *Pinckney Point, LLC v. S.C. Dep't of Health & Envtl. Control*, Docket No. 08-ALJ-07-0363-CC, 2009 WL 6527323, (Nov. 13, 2009) (Anderson, C.J.) ("A staff review does not require the presentation of evidence in a hearing, and *the Board's review is discretionary, not a matter of right.*") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); *McNair v. S.C. Dep't of Health & Envtl. Control*, Docket No. 09-ALJ-07-0040-CC, 2009 WL 6527328, (Nov. 9, 2009) (Anderson, C.J.) (same); *Charles Sarrio v. S.C. Dep't of Health & Envtl. Control*, Docket No. 08-ALJ-07-0381-CC, 2009 WL 8167917, (Oct. 23, 2009) (Anderson, C.J.) (same).

[6] Counsel for the Petitioners in this case and the League in the referenced Supreme Court matter, which also involved a challenge to a DHEC permit granted to the Ports Authority, included Jefferson Leath and J. Blanding Holman, IV. The Motion to Remand was filed by Jefferson Leath, Amy Armstrong, and Michael Corley. Mr. Holman entered an appearance on behalf of all Petitioners on August 30, after the Motion to Remand was ruled upon but before the hearing on the Motion for Sanctions. Mr. Holman has been representing the Petitioners in their parallel federal and state court actions against the cruise terminal operations at UPT.

not serious; not reasonably purposeful." *Black's Law Dictionary* 739 (9th ed. 2009). Similarly, Webster's New World Dictionary defines frivolous as something that is "of little value or importance" or "not properly serious or sensible." *Webster's New World Dictionary* 560 (2d College Ed. 1986). The Motion to Remand falls squarely within both of these definitions.

Petitioners also submitted two affidavits in opposition to a finding of frivolousness. One affidavit was submitted by a member of a law firm representing the Petitioners and the other by an attorney who has no demonstrable practice experience in the administrative arena before DHEC or this Court.[7] Neither affidavit is persuasive in light of the fact that the plain language of the statute clearly sets forth the DHEC Board's discretion.

Given the clear statutory language, the case law directly recognizing the discretionary nature of DHEC Board review and prior affirmations by Petitioners, a reasonable attorney under these circumstances would not have filed the Motion to Remand.[8] I thus find that the Motion to Remand was filed in violation of Rule 72, RPALC, and the Sanctions Act.

Having found a violation, the Court turns to the appropriate sanction. Section (G) of the Sanctions Act offers guidance in this determination. Section 15-36-10(G) provides that sanctions may include:

> (1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;
>
> (2) an order for the attorney to pay a reasonable fine to the court; or
>
> (3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

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[7] The statute sets forth a standard of what a reasonable attorney in the same circumstances would believe. Therefore, an affidavit from an attorney who does not practice in the administrative arena is of limited probative value. Nevertheless, even if considered in the context of an inexperienced attorney in administrative practice, the assertions in that affidavit do not affect the Court's conclusion when viewed in light of the language in Section 44-1-60 and the existing interpretations of that statute.

[8] I recognize based upon oral argument that the belief that this legal position was sound emanated from one attorney who has not frequently appeared before the ALC. However, all the legal counsel for the Petitioners supported his frivolous position, even after being put on notice that the Ports Authority intended to seek sanctions.

S.C. Code Ann. § 15-36-10(G). The Court finds that award of reasonable attorneys' fees and costs in responding to the Motion for Remand is an appropriate remedy. This sanction is specifically referenced in the statute and under the facts and circumstances of this case is appropriate.

Ports Authority seeks reimbursement for attorneys' fees in the amount of Nine Thousand Three Hundred and No/100 Dollars ($9,300.00) attributable to the Motion to Remand.[9] It has not sought reimbursement for "hard" costs, contract attorney fees, or internal legal and senior management time devoted to addressing these motions. In determining the reasonableness of the fees associated with this sanction the Court reviewed the affidavits submitted by Counsel for Ports Authority attesting to the hours devoted to litigating the Motion to Remand. Furthermore, Ports Authority submitted an affidavit from John S. Simmons, Esquire, attesting to the necessity and reasonableness of the time, rates, and effort expended by Ports Authority counsel on the Motion to Remand. Having reviewed the affidavits, the Court finds the attorneys' fees sought to be necessary and reasonable.

Therefore, having fully considered the motion, the legal authorities submitted by the parties, and the arguments of counsel,

IT IS HEREBY ORDERED that the Ports Authority's Motion for Sanctions is **GRANTED**; and

IT IS FURTHER ORDERED that the Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control are jointly and severally liable for the Sanction Award; and

IT IS FURTHER ORDERED that the Petitioners must tender full payment of the Sanctions Award in the amount of Nine Thousand Three Hundred and No/100 Dollars ($9,300.00) to the Ports Authority within ten (10) days of the date of this order.

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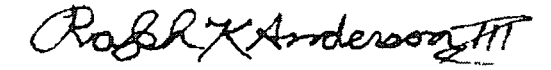
[9] Respondent also requested attorneys' fees and costs in the amount of Eleven Thousand Six Hundred Seventy-two and 50/100 Dollars ($11,672.50) related to the filing of the Motion for Sanctions. While that request certainly has merit because it remunerates the Ports Authority for **all** its cost regarding the Motion to Remand, under the facts of this case I find that limiting the sanction to the cost of defending the remand of the case is appropriate. Nevertheless, if this award was found to be required, I find that the requested amount is reasonable.

IT IS FURTHER ORDERED that the Petitioners request to stay the implementation of the sanction is denied.

AND IT IS SO ORDERED.

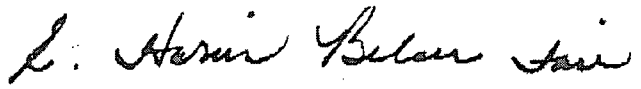


Ralph King Anderson, III
Chief Administrative Law Judge

April 11, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

April 11, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF THE DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

Preservation Society of Charleston, Charleston Communities for Cruise Control, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Anson House Condominium Owners Association and Charleston Chapter of the Surfrider Foundation,

Requestors,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control,

Respondents.

RE: Permit number OCRM-10-169-D

REQUEST FOR FINAL REVIEW CONFERENCE

The Preservation Society of Charleston, Charleston Communities for Cruise Control, the Historic Ansonborough Neighborhood Association, the South Carolina Coastal Conservation League, the Charlestowne Neighborhood Association, the Anson House Condominium Owners Association and the Charleston Chapter of the Surfrider Foundation pursuant to S.C. Code Ann. §44-1-60, hereby request that the Board of the South Carolina Department of Health and Environmental Control ("DHEC") conduct a Final Review Conference in connection with the DHEC staff decision to issue a Critical Area Permit and Coastal Zone Consistency Certification # OCRM-12-054-B to the South Carolina State Ports Authority authorizing the construction of pilings and structural changes to staging areas in and over the critical area to enable construction of new cruise ship terminal operations at SPA's Union Pier facility in the City of Charleston.

THE REQUESTORS

1. The Preservation Society of Charleston was founded in 1920 and is the oldest community based historic preservation organization in America. The Preservation Society of Charleston's mission is to inspire the involvement of all who dwell in the Lowcountry to honor and respect our material and cultural heritage. The Preservation Society of Charleston has a membership of over 1,100 households. The Society's sole interest in the cruise ship debate is to ensure maximum protection for the City's historic neighborhoods and residents and appropriate management of mass tourism downtown. The Preservation Society recognizes that while the Charleston Port is old, our modern mega-cruise ship industry is new, and it must be properly located and managed responsibly within an enforceable legal framework. The Preservation Society seeks to protect the historic neighborhoods that continue to be at risk from expanded cruise ship operations.

2. Charleston Communities for Cruise Control ("C4") is a non-profit (educational status) founded in 2010 for the purpose of finding a more appropriate location for the proposed new cruise ship terminal; establishing legally binding limits on the number, size and frequency of cruise ship visits; requiring onshore power to be used by cruise ships docking in Charleston; and providing all cruise lines visiting Charleston with the Charleston Cruise Ship Code of Conduct. C4represents 464 members concerned with the delicate balance between the historical residential port City of Charleston and the tourist experience of the City. C4 has played an active role in the efforts to regulate the cruise ship industry.

3. The South Carolina Coastal Conservation League ("League") is a non-profit membership corporation organized and existing under the laws of the State of South Carolina.

The League represents over 4,000 members throughout South Carolina and the U.S., in particular members that live in Charleston and use and enjoy the aesthetic, historic, cultural and natural resources that would be adversely affected by an increase in size and quantity of cruise ships at Union Pier Terminal. Members of the League breathe the air into which cruise ship emissions are discharged; commute along the streets in Charleston which are congested by cruise ship traffic; and enjoy the historic and cultural beauty of the City, which will be adversely impacted by increased size and quantity of cruise ships.

4. The Historic Ansonborough Neighborhood Association ("HANA") is a membership organization created to address matters of importance to the historic residential neighborhood designated as Ansonborough by the City of Charleston, South Carolina, and to foster a spirit of community and cooperation within the Ansonborough neighborhood. HANA represents its 110 members who are residents of the Ansonoborough Neighborhood, which is adjacent to Union Pier Terminal and the proposed project. HANA has passed resolutions seeking legally binding regulations on the cruise industry in Charleston and supporting an amendment that alternative locations to the Union Pier property be considered.

5. Charlestowne Neighborhood Association ("CNA") is a membership organization created to give Charleston residents a concerted voice when considering matters that concern the peace, tranquility and orderly well-being of the historic Charleston neighborhood. CNA represents its 620 members consisting of residents living south of Broad Street. CNA membership overwhemingly passed resolutions expressing concerns about congestion, pollution, noise, scale, calling for enforceable limits and standards and for study of an alternative terminal location.

6. Anson House Condominium Owners Association represents the thirty-two (32)

condominium units within Anson House. Anson House is located on the corner of Laurens and Concord Streets within the historic Ansonborough neighborhood. Anson House is adjacent to the Union Pier facility.

7. The Charleston Chapter of the Surfrider Foundation ("Surfrider") is a non-profit environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through conservation, activism, research and education. Surfrider represents 270 members in the Charleston area.

BACKGROUND OF THE PROJECT AND THE DHEC DECISION

8. SPA's Union Pier facility is located on and adjacent to the Cooper River and is within the City of Charleston. The Union Pier facility is near and adjacent to the Charleston Historic District, listed on the National Register of Historic Places, including the historic neighborhoods of Ansonborough and Charlestowne. Charleston is one of this nation's most historic cities, with one of the most intact inventories of National Register-listed and National Historic Landmark districts and properties. National Historic Landmark and National Register-listed historic districts were qualified for and depend on the maintenance of the character-defining qualities—such as historic setting, context, and small scale. These historic resources are immediately adjacent to the proposed cruise terminal and are clearly within the project's area of potential effects.

9. The atmosphere, ambience and historic scale of the downtown neighborhoods are the primary reasons why Charleston is recognized as a world-class city in which to live, visit and invest. The National Trust for Historic Preservation has formally recognized the endangerment to Charleston's historic resources by placing Charleston on "Watch Status" on the National Trust's 2011 List of America's Most Endangered Places. In addition, the World Monuments Fund listed

Charleston as a 2012 Watch Site to draw attention to the dangers of cruise tourism's adverse impacts there. More recently, an objective study by Columbia, SC-based Miley & Associates, Inc., *The Cruise Industry in Charleston: A Clear Perspective*—the first and only attempt to conduct an objective study of the costs associated with the cruise tourism industry and its impacts on Charleston residents—has identified a "non-alignment" of benefits and costs.

10. Both the Charleston Historic District and the Port of Charleston have been designated Geographic Areas of Particular Concern ("GAPCs") under DHEC's Coastal Management Program. GAPC designation requires heightened consideration in reviewing activities for consistency with the CMP.

11. The Advisory Council on Historic Preservation, the nation's leading independent agency charged with protecting historic resources, and which advises the President and Congress on historic preservation policy, has expressed concern to the U.S. Army Corps of Engineers related to the expansion of the proposed Union Pier facility.

12. On December 18, 2012, the DHEC staff issued notice that it was authorizing the construction five (5) pilings consisting of 16" precast pile driven into the marl necessary to construct two elevators and two escalators and make structural changes to Building #322 and two covered staging areas designed to handle passengers, luggage and loading and unloading of cruise ship supplies. See attached Critical Area Permit, Exhibit A.

13. The permit is a necessary step towards construction of a new cruise ship terminal that would enable cruise ship home-basing operations in Charleston. Currently, SPA conducts cruise ship operations out of several dated buildings a quarter mile away. The existing facilities were not designed to serve as a home base for large, modern cruise vessels, i.e., those having 2,500 passengers or more, and without significant alteration and refurbishment, these structures do not

meet the operational and security requirements for such operations going forward.

14. The new cruise terminal authorized by the DHEC decision would enable cruise ship home-basing operations to continue and indeed expand both in number and size of ships. The Carnival Fantasy currently utilizing the Union Pier facility has a capacity of 2,054 passengers and ten decks. The next generation of Carnival ships has a capacity of 3,650 passengers and fifteen decks.

15. Cruise ships utilize diesel fuel and emit large amounts of air pollution. Pollutants include particulate matter, nitrogen oxides, air toxics and sulfur dioxide ("SO2"). These pollutants are known to to negatively impact human health.

16. The permit contains special conditions that have become binding requirements under the permit. Of particular relevance to this request, the permit contains a requirement that SPA operate the new passenger cruise facility "in accordance with the attached Voluntary Cruise Management Plan (Attachment A)." Exhibit A, special condition #1. The Voluntary Cruise Management Plan attached to the permit limits the number of cruise ships to no more than 104 calls per calendar year; limits the port to no more than one ship per day; and limits the size and profile of cruise ships to that which has been used in the past, i.e., 1,900 to 3,500 passenger design capacity.

17. Currently the fuel burned by cruise ships is 667 times dirtier than diesel fuel burned by 18-wheel trucks. New standards for cruise ship fuel should reduce the sulfur dioxide ("SO2") emissions from cruise ships, but those standards will not be in place until 2015, and even then, the fuel burned will be to 67 times dirtier than diesel trucks.

18. Because the proposed project will enable cruise operations to continue and expand, impacts beyond the critical area itself include harmful air emissions of SO2 and other pollutants;

increased truck and car traffic; increased noise and congestion; decreased property values; and adverse health impacts. Evidence of these impacts can be found within the agency's file for this permit, and will be supported by live testimony should a final review conference be granted.

19. Upon information and belief, to be supported by testimony should final review conference be granted, air pollutant emissions and attendant adverse health impacts can be mitigated by the implementation of onshore power sources. Onshore power is currently utilized at numerous other ports world-wide in an effort to reduce air emissions.

ANALYSIS AND GROUNDS FOR REVIEW

20. The Requestors are informed and believe that the staff's permit decision was made in violation of applicable statutes, regulations and rules contained in the S.C. Coastal Zone Management Act, S.C. Code Ann. §48-39-10, *et seq.*, OCRM Regulations 30-1, *et seq.*, and the Coastal Management Program. Staff erred in issuing the permit, as this project is inconsistent with the applicable laws more fully discussed below.

21. The permit as issued violates Critical Area Regulation 30-11(C) and the Coastal Management Program in that DHEC failed to give proper weight to cumulative impacts in evaluating this project. Both the CMP and the critical area regulations call for the consideration of cumulative impacts resulting from the project. In particular, both call for consideration of the "long-range, cumulative effects" in the context of "other possible development and the general character of the area." R.30-11.C(1); CMP, III-14. Regulation 30-11(c) requires DHEC to consider the "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area." The Court in *Kiawah Development Partners v. DHEC and SCCCL* 2011 WL 5840326, reached important conclusions relating to the scope of this consideration for projects like this one. Under the

Court's ruling, though this is a request for a critical area permit, the Department must consider impacts beyond "the critical area upon which the device is to be constructed." Id. at 3. The Court in fact held that, "[b]y law, OCRM **must** take into account the impact of any critical area permit" on factors such as upland sprawl and general over development. Id. In short, the *Kiawah Development Partners* case makes clear that OCRM's assessment of this critical area permit is "concerned with the coastal zone, and its vulnerability to manmade alterations." Id. at 4. Indeed, the staff denied *Kiawah Development Partners'* permit request based solely on the direct and indirect impacts flowing from that project.

The Court's holding in *Kiawah Development Partners* is best embodied by its ruling that "While OCRM's permitting authority is limited to critical areas, it is charged with managing the entire coastal zone, and thus **permitting decisions are not to be made in a vacuum.**" Id. Rarely will this ruling be more important or more strongly implicated than it is for the project at hand. Yet the agency isolated the impacts flowing from the proposed project in a vacuum. This project creates a host of detrimental impacts that will splinter across the surrounding communities and ecosystems.

Examples of cumulative impacts on the general character of the area, which will be supported by testimony should final review conference be granted, include historic skyline obstruction, water view obstructions, the gridlock on small neighborhood streets caused by massive cruise ship and harmful air emissions.

DHEC staff recognized those impacts by including, as a condition of this permit, limitations on the cruise terminal's operation, including the number and size of calling vessels. However, DHEC failed to conduct a complete analysis of cumulative and secondary effects of its permitting decision by evaluating further measures to minimize impacts on human health,

livability and historic structures.

22. The DHEC staff failed to conduct a feasibility analysis as contemplated by the Coastal Zone Management Act and Critical Area Regulations. "Feasibile" means that the staff decision must be "based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose." The staff failed to undertake the required feasibility analysis in the following respects:

A. The CZMA and Regulations require that "all feasible safeguards are taken to avoid adverse environmental impact resulting from a project." S.C. Code Ann. §48-39-150(A)(9); R. 30-11(B)(9). Upon information and belief, which will be supported by testimony should a final review conference be granted, DHEC staff failed to give consideration to environmental, social and economic factors. Specifically, staff failed to consider the impact that ongoing and expanded cruise ship operations will have on the residents and tourists of Charleston, including the serious health impacts resulting from burning fuel high in sulfur that generates SO2 and other air pollutants. This omission is particularly troublesome given that, when in port, emissions from cruise ships are concentrated in a very highly populated area. SO2 is known to create a variety of health issues, particularly in those with breathing problems, which generates a corresponding spike in medical costs and diminishment of property values.

B. The Regulations require that transportation project "avoid the critical areas to the maximum extent feasible." R. 30-12.F(2)(b). The staff decision fails to ensure that critical areas are avoided and fails to consider alternatives that would avoid critical areas, such as alternative site locations for expanded cruise ship operations.

23. DHEC failed to weigh the "extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state" by failing to consider the impacts to adjacent neighborhoods and businesses from noise pollution, air pollution, traffic congestion, and the historic qualities of the City of Charleston. S.C. Code Ann. §48-39-150(A)(7); R. 30-11(B)(7).

24. The project fails to comply with the Coastal Zone Management Act's requirement that DHEC consider the "extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. §48-39-150. Upon information and belief, to be supported by Affidavit and testimony, increased cruise ship operations will adversely affect property values. Decreases in property values will result from increased noise pollution, increased congestion, and emission of particulate matter that falls on and around houses located near the terminal.

The Requestors will demonstrate that cruise ship operations amount to a public and private nuisance because of the traffic congestion, noise, soot and visual pollution. In particular, traffic from cruise tourism is a major inconvenience and causes serious traffic in and around the surrounding neighborhoods, of whom HANA, C4, CNA, and SCCCL have members. One member and resident has reported that soot emitted from the Carnival Cruise Ship, the Fantasy, settles on the interior and exterior of her property, requiring cleaning and maintenance, posing

health concerns, and significantly degrading her use and enjoyment of her property. Requestors will demonstrate that the activities permitted by the SPA have negatively impacted her property values, as well as the property values of her neighbors.

25. The staff decision fails to give the highest priority to the identified primary value of the GAPC, the Charleston Historic District. In the case of a historic site, the priority is placed on uses "which preserve the historical or cultural values for which the site was placed on the National Register of Historic Places." CMP, IV-25. Those values, enumerated in the Charleston Historic District's site nomination, include "the unique visual appeal of old Charleston, a picturesqueness created by the close proximity of buildings, in a wide variety of architectural styles, general harmony in terms of height, scale and proportion, materials, textures, colors and characteristic forms and a flavor of an earlier America." Yet the staff decision fails to give priority to the preservation of these historic and cultural values in violation of the CMP policies.

The scale of the ships are incompatible with the height, scale and mass of Charleston's buildings and are enormous when compared to the historic scale of shipping on Charleston's waterfront. Indeed, the presence of the ship is felt all over the district including bridges leading to and from Charleston on the opposite side of the peninsula, with noise and pollution impacts occurring in areas distant from the terminal itself. This is radically different from the much smaller scale, quieter and otherwise unobtrusive cargo ships which do not require street closures and sandwich board signs to announce their presence.

26. The Requestors are informed and believe that the impacts of the proposed expansion of the Union Pier Terminal will result in significant degradation of air quality; the living and

working environment of Charleston; property values; and the overall historic and cultural values of Charleston.

2. As a direct and proximate result of these violations, the Requestors and their members will suffer injury in fact. Among other things, the natural resources and environment of this area will be degraded, resulting in material harm to the Requestors' recreational, environmental, aesthetic and property interests.

28. The Requestors reserve all rights under Section 44-1-60 and other applicable laws to present evidence and argument during the review proceeding.

RELIEF REQUESTED

WHEREFORE, the Requestors request that the Board conduct a final review proceeding and issue an order reversing the proposed decision to issue the permit and certifications, or in the alternative remanding the decision back to staff with instructions to conduct an analysis of alternative terminal locations and to impose a condition for onshore power to minimize adverse air emission impacts. Further, to the extent that limitations on ship numbers or sizes are asserted to be a non-binding condition of the permit by SPA, the Requestors ask the DHEC Board to clarify that these conditions are mandatory.

Respectfully submitted,

Amy E. Armstrong

Michael G. Corley

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Georgetown, South Carolina

January 2, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07- _____-CC **REQUEST FOR CONTESTED CASE HEARING**

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, pursuant to Administrative Law Court Rule 11, hereby request that the Administrative Law Court conduct a Contested Case Hearing in connection with the DHEC staff decision to issue a Critical Area Permit and Coastal Zone Consistency Certification # OCRM-12-054-B to the South Carolina State Ports Authority authorizing the construction of pilings and structural changes to staging areas in and over the critical area to enable construction of new cruise ship terminal operations at SPA's Union Pier facility in the City of Charleston.

THE PETITIONERS

1. The Preservation Society of Charleston was founded in 1920 and is the oldest community based historic preservation organization in America. The Preservation Society of Charleston's mission is to inspire the involvement of all who dwell in the Lowcountry to honor and respect our material and cultural heritage. The Preservation Society of Charleston has a membership of over 1,100 households. The Society's interest in the cruise ship debate is to ensure (1) maximum protection for the City's historic neighborhoods and residents; (2) appropriate management of mass tourism downtown and (3) the appropriate location of the terminal to provide broad regional preservation and economic benefit. The Preservation Society recognizes that while the Charleston Port is old, our modern mega-cruise ship industry is new, and it must be properly located and managed responsibly within an enforceable legal framework. The Preservation Society seeks to protect the historic neighborhoods that continue to be at risk from expanded cruise ship operations.

2. Historic Charleston Foundation ("HCF") was established in 1947, and is dedicated to preserving and protecting the architectural, historical and cultural character of Charleston and its Lowcountry environs, and to educating the public about Charleston's history and the benefits that are derived from preservation. Preserving the City of Charleston's historic resources and buildings adds to the quality of life, making for a livable community that is full of charm and appeal. To that end, HCF and its members are deeply concerned about the potential detrimental impacts that the proposed project will have on the historic resources of Charleston. HCF's concerns relate to DHEC's failure to demonstrate that the SPA produce data showing that it clearly analyzed the cumulative impacts of the proposed new terminal use on the surrounding

historic districts and neighborhoods, which are Geographic Areas of Particular Concern ("GAPC") under state law. HCF asserts that the cumulative impacts of this intensified use on the GAPCs could be substantial and irreversible. HCF commissioned a study entitled "The Cruise Ship Industry in Charleston: A Clear Perspective," which concludes that there is "non-alignment" of the costs and benefits associated with the proposed project inasmuch as the SPA stands to benefit substantially from the project, while the bulk of the burdens are borne by the residents and businesses in the historic districts.

3. The Historic Ansonborough Neighborhood Association ("HANA") is a membership organization created to address matters of importance to the historic residential neighborhood designated as Ansonborough by the City of Charleston, South Carolina, and to foster a spirit of community and cooperation within the Ansonborough neighborhood. HANA represents its 110 members who are residents of the Ansonoborough Neighborhood, which is adjacent to Union Pier Terminal and the proposed project. HANA has passed resolutions seeking legally binding regulations on the cruise industry in Charleston and supporting an amendment that alternative locations to the Union Pier property be considered.

4. The South Carolina Coastal Conservation League ("League") is a non-profit membership corporation organized and existing under the laws of the State of South Carolina. The League represents over 4,000 members throughout South Carolina and the U.S., in particular members that live in Charleston and use and enjoy the aesthetic, historic, cultural and natural resources that would be adversely affected by an increase in size and quantity of cruise ships at Union Pier Terminal. Members of the League breathe the air into which cruise ship emissions are discharged; commute along the streets in Charleston which are congested by cruise ship traffic; and enjoy the historic and cultural beauty of the City, which will be adversely impacted

by increased size and quantity of cruise ships.

5. Charlestowne Neighborhood Association ("CNA") is a membership organization created to give Charleston residents a concerted voice when considering matters that concern the peace, tranquility and orderly well-being of the historic Charleston neighborhood. CNA represents its 620 members consisting of residents living south of Broad Street. CNA membership overwhemingly passed resolutions expressing concerns about congestion, pollution, noise, scale, calling for enforceable limits and standards and for study of an alternative terminal location.

6. The Charleston Chapter of the Surfrider Foundation ("Surfrider") is a non-profit environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through conservation, activism, research and education. Surfrider represents 270 members in the Charleston area, and seeks to protect the air quality and quality of life in Charleston which are threatened by the proposed activity.

7. Charleston Communities for Cruise Control ("C4") is a non-profit (educational status) founded in 2010 for the purpose of finding a more appropriate location for the proposed new cruise ship terminal; establishing legally binding limits on the number, size and frequency of cruise ship visits; requiring onshore power to be used by cruise ships docking in Charleston; and providing all cruise lines visiting Charleston with the Charleston Cruise Ship Code of Conduct. C4 represents 464 members concerned with the delicate balance between the historical residential port City of Charleston and the tourist experience of the City. C4 has played an active role in the efforts to regulate the cruise ship industry.

BACKGROUND OF THE PROJECT AND THE DHEC DECISION

8. SPA's Union Pier facility is located on and adjacent to the Cooper River and is within

the City of Charleston. The Union Pier facility is near and adjacent to the Charleston Historic District, listed on the National Register of Historic Places, including the historic neighborhoods of Ansonborough and Charlestowne. Charleston is one of this nation's most historic cities, with one of the most intact inventories of National Register-listed and National Historic Landmark districts and properties. National Historic Landmark and National Register-listed historic districts were qualified for and depend on the maintenance of the character-defining qualities—such as historic setting, context, and small scale. These historic resources are immediately adjacent to the proposed cruise terminal and are clearly within the project's area of potential effects.

9. The atmosphere, ambience and historic scale of the downtown neighborhoods are the primary reasons why Charleston is recognized as a world-class city in which to live, visit and invest. The National Trust for Historic Preservation has formally recognized the endangerment to Charleston's historic resources by placing Charleston on "Watch Status" on the National Trust's 2011 List of America's Most Endangered Places. In addition, the World Monuments Fund listed Charleston as a 2012 Watch Site to draw attention to the dangers of cruise tourism's adverse impacts there.

10. More recently, the Historic Charleston Foundation commissioned an objective study by Columbia, SC-based Miley & Associates, Inc., "The Cruise Industry in Charleston: A Clear Perspective" —the first and only attempt to conduct an objective study of the costs associated with the cruise tourism industry and its impacts on Charleston residents. The study has identified a "non-alignment" of benefits and costs.

11. Both the Charleston Historic District and the Port of Charleston have been designated Geographic Areas of Particular Concern ("GAPCs") under DHEC's Coastal Management

Program. GAPC designation requires heightened consideration in reviewing activities for consistency with the CMP.

12. The Advisory Council on Historic Preservation, the nation's leading independent agency charged with protecting historic resources, and which advises the President and Congress on historic preservation policy, has expressed concern to the U.S. Army Corps of Engineers related to the expansion of the proposed Union Pier facility.

13. On December 18, 2012, the DHEC staff issued notice that it was authorizing the construction of five (5) pilings consisting of 16" precast pile driven into the marl necessary to construct three elevators and two escalators and make structural changes to Building #322 and two covered staging areas designed to handle passengers, luggage and loading and unloading of cruise ship supplies. See attached Critical Area Permit, Exhibit A. The permit purports to authorize a change of use by "re-purposing" the new proposed site from a storage shed into a modern day cruise terminal.

14. The permit is a step towards construction of a new cruise ship terminal that would enable cruise ship home-basing operations in Charleston. Currently, SPA conducts cruise ship operations out of several dated buildings a quarter mile away. The existing facilities were not designed to serve as a home base for large, modern cruise vessels, i.e., those having 2,500 passengers or more, and without significant alteration and refurbishment these structures do not meet the operational and security requirements for such operations going forward.

15. The new cruise terminal authorized by the DHEC decision would enable cruise ship home-basing operations to continue and indeed expand both in number and size of ships. The Carnival Fantasy currently utilizing the Union Pier facility has a capacity of 2,054 passengers and ten decks. The next generation of Carnival ships has a capacity of 3,650 passengers and fifteen

decks.

16. Cruise ships utilize diesel fuel and emit large amounts of air pollution. Pollutants include particulate matter, nitrogen oxides, air toxics and sulfur dioxide ("SO2"). These pollutants are known to negatively impact human health.

17. The permit contains special conditions that have become binding requirements under the permit. Of particular relevance to this request, the permit contains a requirement that SPA operate the new passenger cruise facility "in accordance with the attached Voluntary Cruise Management Plan (Attachment A)." Exhibit A, special condition #1. The Voluntary Cruise Management Plan attached to the permit limits the number of cruise ships to no more than 104 calls per calendar year; limits the port to no more than one ship per day; and limits the size and profile of cruise ships to that which has been used in the past, i.e., 1,900 to 3,500 passenger design capacity.

18. Currently the fuel burned by cruise ships is 667 times dirtier than diesel fuel burned by 18-wheel trucks. New standards for cruise ship fuel should reduce the sulfur dioxide ("SO2") emissions from cruise ships, but those standards will not be in place until 2015, and even then, the fuel burned will be up to 67 times dirtier than diesel trucks. Moreover, the Cruise Line Industry Association, which represents all of the cruise trade organizations, is lobbying to overturn these new standards for cruise ship fuel.

19. Because the proposed project will enable cruise operations to continue and expand, impacts beyond the critical area itself include harmful air emissions of SO2 and other pollutants; increased truck and car traffic; increased noise and congestion; decreased property values; and adverse health impacts. Evidence of these impacts can be found within the agency's file for this permit, and will be supported by live testimony should a final review conference be granted.

20. Upon information and belief, to be supported by testimony should final review conference be granted, air pollutant emissions and attendant adverse health impacts can be mitigated by the implementation of onshore power sources. Onshore power is currently utilized at numerous other ports world-wide in an effort to reduce air emissions.

THE AGENCY PROCEEDING

21. The DHEC staff decision to issue the certification and permit was made on December 18, 2012. The Petitioners filed a timely request for a final review conference before the DHEC Board on January 2, 2013. The Board issued written notice of its decision not to conduct a final review conference on January 11, 2013. Copies of the staff decision and the letter stating that the Board will not conduct a review conference are attached hereto as Exhibits A & B.

ANALYSIS AND GROUNDS FOR REVIEW

22. The Petitioners are informed and believe that the staff's permit decision was made in violation of applicable statutes, regulations and rules contained in the S.C. Coastal Zone Management Act, S.C. Code Ann. §48-39-10, *et seq.*, OCRM Regulations 30-1, *et seq.*, and the Coastal Management Program. Staff erred in issuing the permit, as this project is inconsistent with the applicable laws more fully discussed below.

23. The permit as issued violates Critical Area Regulation 30-11(C) and the Coastal Management Program in that DHEC failed to give proper weight to cumulative impacts in evaluating this project. Both the CMP and the critical area regulations call for the consideration of cumulative impacts resulting from the project. In particular, both call for consideration of the "long-range, cumulative effects" in the context of "other possible development and the general character of the area." R.30-11.C(1); CMP, III-14. Regulation 30-11(C) requires DHEC to consider the "extent to which long-range, cumulative effects of the project may result within the

context of other possible development and the general character of the area." The Court in *Kiawah Development Partners v. DHEC and SCCCL* 2011 WL 5840326, reached important conclusions relating to the scope of this consideration for projects like this one. Under the Court's ruling, though this is a request for a critical area permit, the Department must consider impacts beyond "the critical area upon which the device is to be constructed." Id. at 3. The Court in fact held that, "[b]y law, OCRM **must** take into account the impact of any critical area permit" on factors such as upland sprawl and general over development. Id. In short, the *Kiawah Development Partners* case makes clear that OCRM's assessment of this critical area permit is "concerned with the coastal zone, and its vulnerability to manmade alterations." Id. at 4. Indeed, the staff denied *Kiawah Development Partners'* permit request based solely on the direct and indirect impacts flowing from that project.

The Court's holding in *Kiawah Development Partners* is best embodied by its ruling that "While OCRM's permitting authority is limited to critical areas, it is charged with managing the entire coastal zone, and thus permitting decisions are not to be made in a vacuum." Id. Rarely will this ruling be more important or more strongly implicated than it is for the project at hand. Yet the agency isolated the impacts flowing from the proposed project in a vacuum. This project creates a host of detrimental impacts that will splinter across the surrounding communities and ecosystems.

Examples of cumulative impacts on the general character of the area will be supported by testimony, and include historic skyline obstruction, water view obstructions, the gridlock on small neighborhood streets caused by massive cruise ship and harmful air emissions. Yet DHEC staff failed to consider these impacts and failed to conduct the required analysis of cumulative and secondary effects of its permitting decision. In so doing, DHEC failed to give the required

consideration and weight to the long-range, cumulative effects of the project and failed to require measures to minimize impacts on human health, livability and historic structures.

22. The DHEC staff failed to conduct a feasibility analysis as contemplated by the Coastal Zone Management Act and Critical Area Regulations. "Feasibile" means that the staff decision must be "based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose." The staff failed to undertake the required feasibility analysis in the following respects:

A. The CZMA and Regulations require that "all feasible safeguards are taken to avoid adverse environmental impact resulting from a project." S.C. Code Ann. §48-39-150(A)(9); R. 30-11(B)(9). Upon information and belief, which will be supported by testimony at the hearing, DHEC staff failed to give consideration to environmental, social and economic factors. Specifically, staff failed to consider the impact that ongoing and expanded cruise ship operations will have on the residents and tourists of Charleston, including the serious health impacts resulting from burning fuel high in sulfur that generates SO2 and other air pollutants. This omission is particularly troublesome given that, when in port, emissions from cruise ships are concentrated in a very highly populated area. SO2 is known to create a variety of health issues, particularly in those with breathing problems, which generates a corresponding spike in medical costs and

consideration and weight to the long-range, cumulative effects of the project and failed to require measures to minimize impacts on human health, livability and historic structures.

22. The DHEC staff failed to conduct a feasibility analysis as contemplated by the Coastal Zone Management Act and Critical Area Regulations. "Feasibile" means that the staff decision must be "based on the best available information, including, but not limited to, technical input from relevant agencies with expertise in the subject area, and consideration of factors of environmental, economic, social, legal and technological suitability of the proposed activity and its alternatives. Use of this word includes, but is not limited to, the concept of reasonableness and likelihood of success in achieving the project goal or purpose." The staff failed to undertake the required feasibility analysis in the following respects:

A. The CZMA and Regulations require that "all feasible safeguards are taken to avoid adverse environmental impact resulting from a project." S.C. Code Ann. §48-39-150(A)(9); R. 30-11(B)(9). Upon information and belief, which will be supported by testimony at the hearing, DHEC staff failed to give consideration to environmental, social and economic factors. Specifically, staff failed to consider the impact that ongoing and expanded cruise ship operations will have on the residents and tourists of Charleston, including the serious health impacts resulting from burning fuel high in sulfur that generates SO2 and other air pollutants. This omission is particularly troublesome given that, when in port, emissions from cruise ships are concentrated in a very highly populated area. SO2 is known to create a variety of health issues, particularly in those with breathing problems, which generates a corresponding spike in medical costs and

diminishment of property values. The Petitioners will present evidence that "feasible safeguards" that DHEC should have imposed a requirement for shore power, which greatly reduces pollutants resulting from cruise ship operations.

B. The Regulations require that transportation project "avoid the critical areas to the maximum extent feasible." R. 30-12.F(2)(b). The staff decision fails to ensure that critical areas are avoided and fails to consider alternatives that would avoid critical areas, such as alternative site locations for expanded cruise ship operations. Petitioners will present evidence that there are feasible alternatives that will avoid the critical areas, while still allowing the project purpose to be accomplished.

23. DHEC failed to weigh the "extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state" by failing to consider the impacts to adjacent neighborhoods and businesses from noise pollution, air pollution, traffic congestion, and the historic qualities of the City of Charleston. S.C. Code Ann. §48-39-150(A)(7); R. 30-11(B)(7). The Petitioners will present evidence that the project will result in negligible economic benefits to the residents and business in the historic district, but in fact will result in substantial adverse economic impacts to the residents and business in the historic district.

24. The project fails to comply with the Coastal Zone Management Act's requirement that DHEC consider the "extent to which the proposed use could affect the value and enjoyment of adjacent owners." S.C. Code Ann. §48-39-150. Upon information and belief, to be supported testimony, increased cruise ship operations will adversely affect property values. Decreases in property values will result from increased noise pollution, increased congestion, and emission of

particulate matter that falls on and around houses located near the terminal.

The Petitioners will demonstrate that cruise ship operations amount to a public and private nuisance because of the traffic congestion, noise, soot and visual pollution. In particular, traffic from cruise tourism is a major inconvenience and causes serious traffic in and around the surrounding neighborhoods, of whom HANA, C4, CNA, HCF, PSC and SCCCL have members. One member and resident has reported that soot emitted from the Carnival Cruise Ship, the Fantasy, settles on the interior and exterior of her property, requiring cleaning and maintenance, posing health concerns, and significantly degrading her use and enjoyment of her property. Petitioners will demonstrate that the activities permitted by the SPA have negatively impacted property values of their members.

25. The staff decision fails to give the highest priority to the identified primary value of the GAPC, the Charleston Historic District. In the case of a historic site, the priority is placed on uses "which preserve the historical or cultural values for which the site was placed on the National Register of Historic Places." CMP, IV-25. Those values, enumerated in the Charleston Historic District's site nomination, include "the unique visual appeal of old Charleston, a picturesqueness created by the close proximity of buildings, in a wide variety of architectural styles, general harmony in terms of height, scale and proportion, materials, textures, colors and characteristic forms and a flavor of an earlier America." Yet the staff decision fails to give priority to the preservation of these historic and cultural values in violation of the CMP policies.

The scale of the ships are incompatible with the height, scale and mass of Charleston's buildings and are enormous when compared to the historic scale of shipping on Charleston's waterfront. Indeed, the presence of the ship is felt all over the district including bridges leading to and from Charleston on the opposite side of the peninsula, with noise and pollution impacts

occurring in areas distant from the terminal itself. This is radically different from the much smaller scale, quieter and otherwise unobtrusive cargo ships which do not require street closures and sandwich board signs to announce their presence. In addition, there is a proven economic benefit to the cargo operations, whereas there is clearly an extensive negative set of impacts borne by the community in relation to the increase in cruise ships.

26. The Petitioners are informed and believe that the impacts of the proposed expansion of the Union Pier Terminal will result in significant degradation of air quality; the living and working environment of Charleston; property values; and the overall historic and cultural values of Charleston.

2. As a direct and proximate result of these violations, the Petitioners and their members will suffer injury in fact. Among other things, the natural resources and environment of this area will be degraded, resulting in material harm to the Requestors' recreational, environmental, aesthetic and property interests.

RELIEF REQUESTED

WHEREFORE, the Petitioners request that the Administrative Law Court conduct a contested case hearing and issue an order reversing the proposed decision to issue the permit and certifications, or in the alternative remanding the decision back to staff with instructions to conduct an analysis of alternative terminal locations, traffic impacts, noise impacts, air emissions, and impacts on the historic qualities of the Historic District of Charleston.

Respectfully submitted,

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Georgetown, South Carolina

February 11, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07- _____-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing Request for Contested Case Hearing in the U.S. Mail addressed to:

Randolph R. Lowell, Esquire
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202

Marshall Taylor,
DHEC Legal Office
2600 Bull Street
Columbia, SC 29201

Amy E. Armstrong

Georgetown, South Carolina

February 11, 2013

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

December 18, 2012

Derrick Bellamy
SC State Ports Authority
P.O. Box 22287
Charleston, SC 29413-2287

SEE SPECIAL CONDITIONS(S)

Re: **P/N# OCRM-12-054-B**
SC State Ports Authority

Dear Mr. Bellamy:

The SCDHEC Office of Ocean and Coastal Resource Management has reviewed your application to make improvements to an existing waterfront building and adjacent to Cooper River at 32 Washington Street, South Carolina State Ports Authority - Union Pier Terminal, Charleston, Charleston County, South Carolina, and has issued a permit for this work. You should carefully read the description of the authorized project and any special conditions that have been placed on the permit, as these conditions may modify the permitted activity. In addition, there are a series of general conditions that should be reviewed. The original and one photocopy of the permit, as issued, are enclosed. After carefully reading the permit, if you wish to accept the permit as issued, sign and date in the signature block entitled "PERMITTEE" on the original version of the permit and return it to this Department. Keep the photocopy for your records.

PLEASE READ CAREFULLY: You are required to sign and return the original version of your permit to this Department. If this permit is not signed and returned within thirty (30) days of issuance, *OR* appealed within 15 days as described on the enclosed "Notice of Appeal Procedure", the Department reserves the right to cancel this permit. Please carefully review the enclosed "Notice of Appeal Procedure" for information and deadlines for appealing this permit.

We have also enclosed a "request for a construction placard" card. You must send in this card before the time you wish to start construction. At that time a construction placard will be sent to you to post at the construction site.

PLEASE NOTE: You are not authorized to commence work under the permit until we have received the original version of the entire permit signed and accepted by you, and a construction placard has been issued and posted at the construction site. The receipt of this permit does not relieve you of the responsibility of acquiring any other federal or local permits that may be required.

Sincerely,

Steven Brooks

Steven Brooks
Senior Regulatory Project Manager
Regulatory Programs Division

EXHIBIT A

Cc: Blair Williams, Wetland Section Manager
Patrick Moore, SCSPA
Nathaniel Ball, USACOE

Enclosure

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

Notice of Appeal Procedure
Pursuant to S.C. Code Section 44-1-60

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 calendar days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review accompanied by a filing fee in the amount of $100 is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a timely written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393. A filing fee in the amount of $100 made payable to SC DHEC must also be received by the Clerk within the time allowed for filing a request for final review. However, if a request for final review is filed by facsimile, the filing fee may be mailed to the Clerk of the Board if the envelope is postmarked within the time allowed for filing a request for final review.

SEE SPECIAL CONDITIONS(S)

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

3. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 calendar days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due. A request for final review will be returned to the requestor if the filing fee is not received on time as described above.

4. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding whether to conduct a final review conference
   c. a copy of the Department's decision for which review is requested

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures. If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within 30 calendar days after notice is mailed that the Board declined to hold a final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

July 1, 2010

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

SEE SPECIAL CONDITIONS(S)

Permittee(s):	SC State Ports Authority
Permit Number(s):	OCRM-12-054-B
Date of Issuance:	December 18, 2012
Expiration Date:	December 18, 2017
Location:	**On and adjacent to Cooper River at 32 Washington Street, South Carolina State Ports Authority - Union Pier Terminal, Charleston, Charleston County, South Carolina. TMS#: 459-00-00-009.**

This permit is issued under the provisions of S. C. Code Ann. Section 48-39-10, *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2005). Please carefully read the project description and any special conditions that may appear on this permit/certification as they will affect the work that is allowed. If there are no special conditions, then the work is authorized as described in the project description and as modified by the general conditions. The general conditions are also a part of this permit/certification and should be read in their entirety. The S. C. Contractor's Licensing Act of 1999, enacted as S.C. Code Ann. Section 40-11-5 through 430, requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. **All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.**

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The work as shown on the attached plans will consist of making improvements to an existing waterfront building. Specifically, the permittee will install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of pile supported Building #322. Additionally, additional structural changes will be made to building 322 and two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies will be constructed. The purpose of the overall project is to facilitate the relocation of the cruise passenger facility to Building #322.

SPECIAL CONDITIONS

1. Provided that operations for the new passenger cruise facility at Union Pier Terminal are conducted in accordance with the attached Voluntary Cruise Management Plan (Attachment A). If there are any future changes proposed to the Voluntary Cruise Management Plan, the Department must be included in the notification process as outlined on the second page of the Voluntary Cruise Management Plan titled "Clarification Process of City Consultation Regarding Cruise Management Plan Alteration".

2. Provided that the construction detailed in this permit does not begin until after the Memorandum of Agreement, dated March 26, 2007 (as amended), between the State Ports Authority and the SCDHEC has been revised and finalized.

3. Provided that the SPA require its contractors, for the activities addressed under this permit, to:

   a. perform work in compliance with all applicable local, state, and federal environmental laws and requirements.

   b. use low emission vehicles that conform to the federal Tier 2 or higher emissions standards for all non road equipment between 100 and 750 horsepower.

   c. turn off construction equipment and vehicles not in active use.

   d. implement dust control using the best management practices that may include but not be limited to, water spraying, applying mulch and establishing vegetation, applying polymers, and spraying tackifiers in compliance with state and federal environmental regulations.

   e. require that all diesel vehicles, construction equipment and generators on site use ultra-low sulfur diesel (15 ppm), a biodiesel blend approved by the original engine or equipment manufacturer with sulfur content of 15 ppm or less, or other clean burning alternative fuel such as propane, where such fuel is commercially and reasonably available.

4. Provided that any disturbed critical area adjacent to the construction site be restored to original contours and conditions upon project completion.

5. Once the project is initiated, it must be carried to completion in an expeditious manner in order to minimize the period of disturbance to the environment.

6. Provided that an as-built survey of the modified terminal facility must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all components of the new terminal facility, and must list the starting and ending coordinates of the new terminal facility in the SC State Plane Coordinate System, which can be obtained by survey-grade Global Positioning System equipment.

7. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5). BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

SEE SPECIAL CONDITIONS(S)

Permit Number: **OCRM-12-054-B**

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(PERMITTEE(S) (DATE)
SC State Ports Authority

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

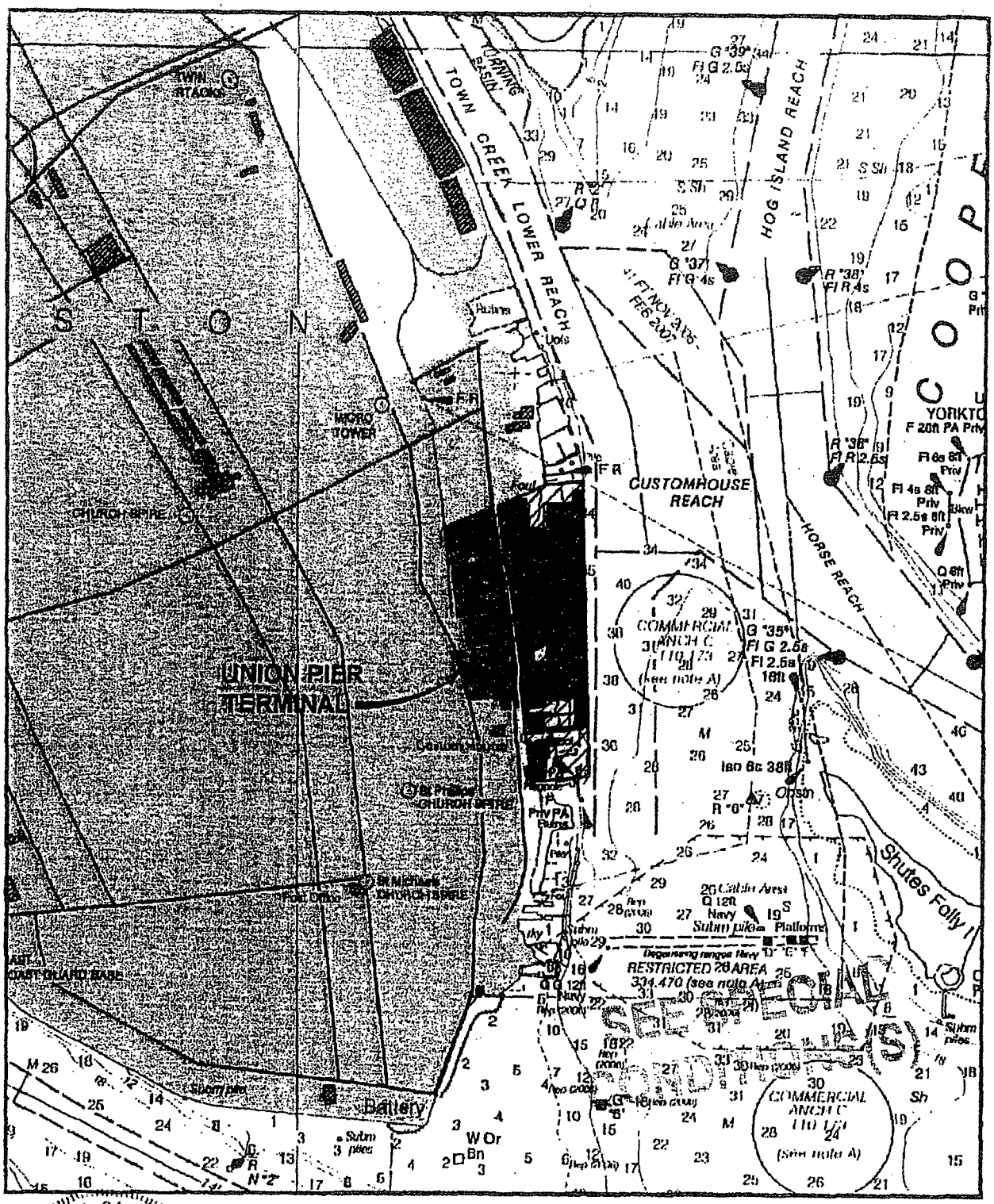
Steven Brooks 12/18/12

(PROJECT MANAGER, WETLAND SECTION) (DATE)
Steven Brooks
or her Designee
Other Authorized State Official

GENERAL CONDITIONS:

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than sixty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further, to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM.
8. That this permit may not be transferred to a third party without prior written notice to OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition, shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public's health, safety, or welfare, or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee, agent, or representative of OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.



SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

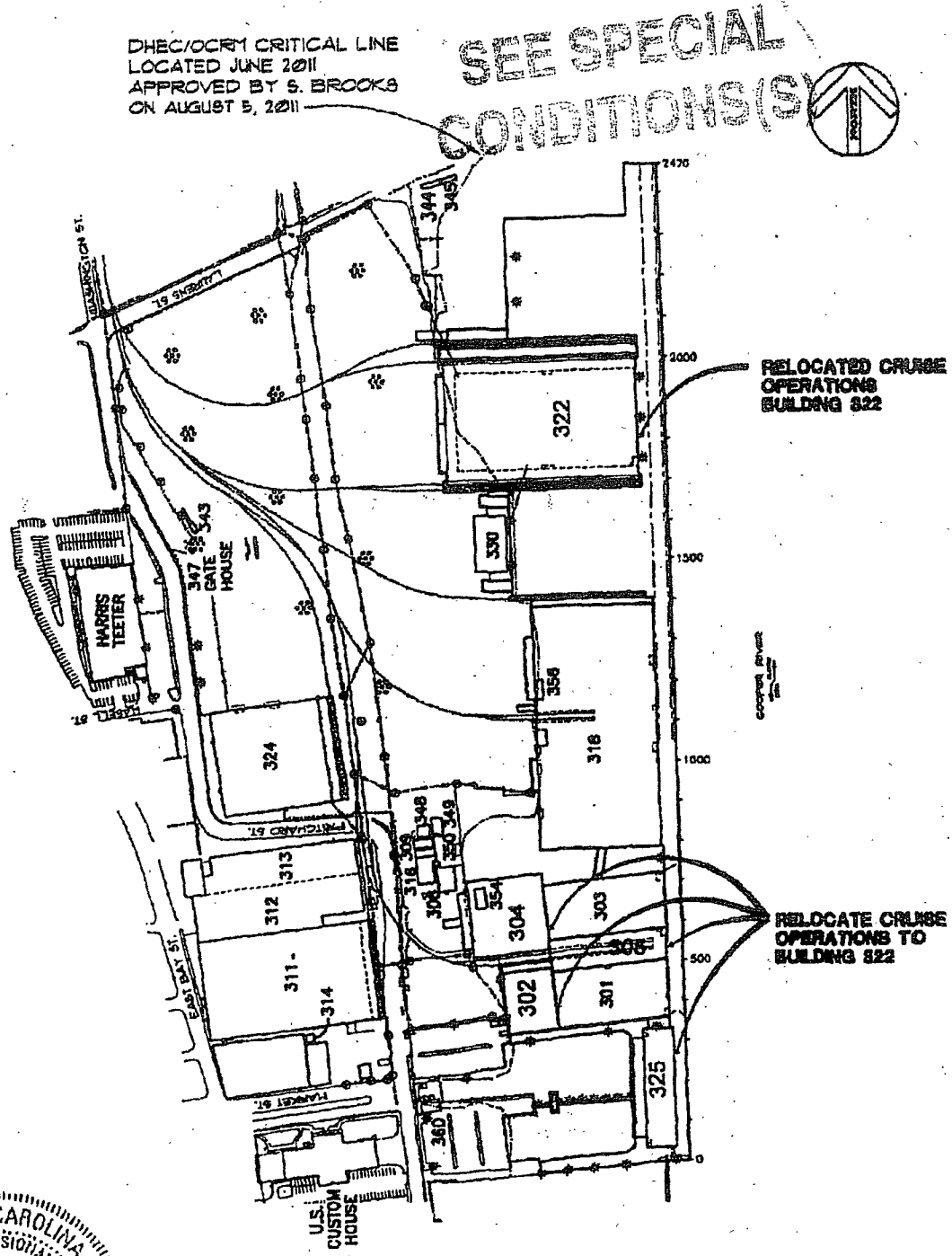
Derrick L. Bellamy

LOCATION

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

PROJECT NO.: CIF11E005B
FILE NAME: Upcplp1
DATE: JULY 2012
SHEET: 1 OF 11



SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

Derrick L. Bellamy

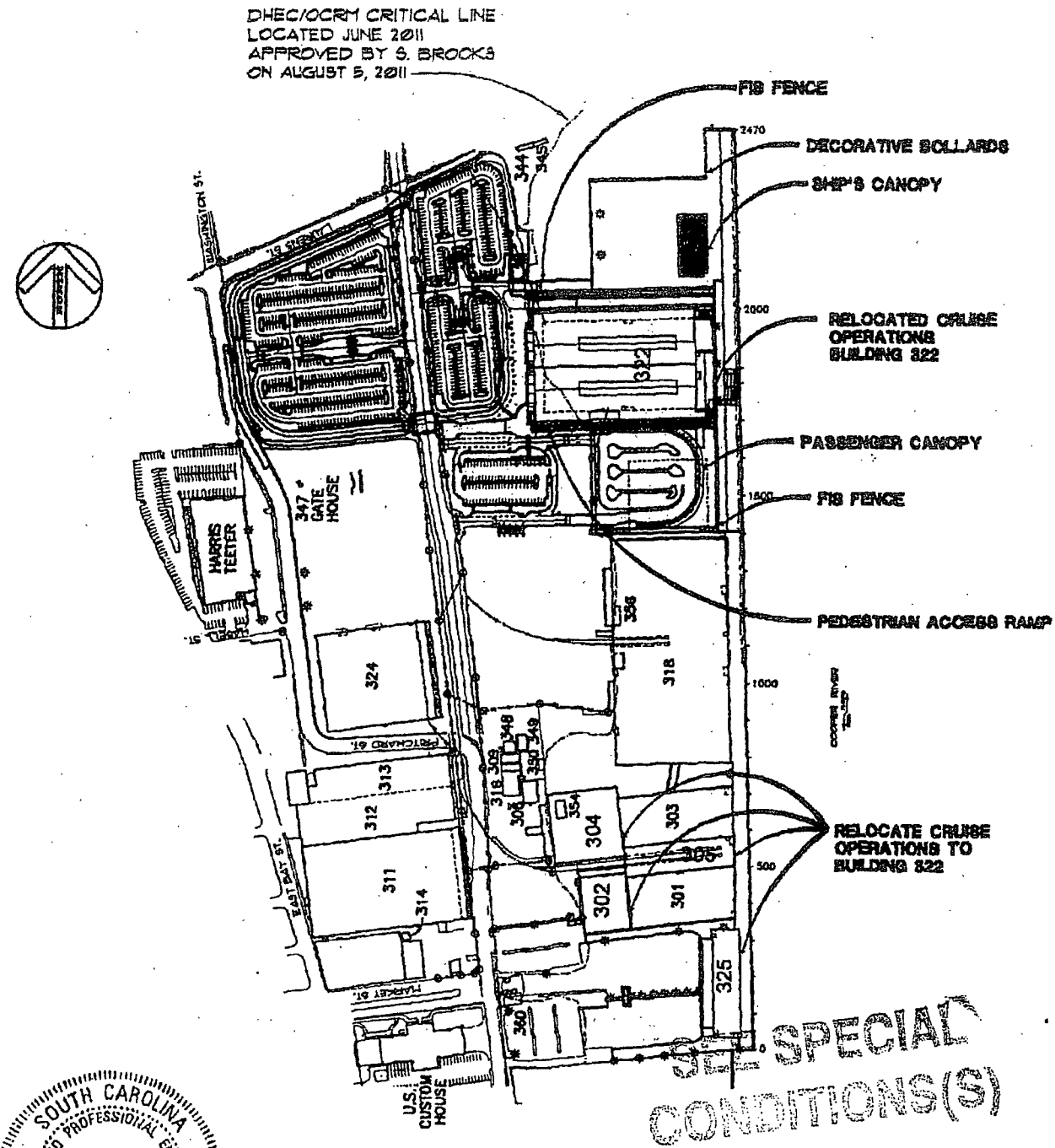
400 0 400
SCALE IN FEET

BUILDING LOCATION PLAN
UNION PIER TERMINAL

OCRM-12-054-B

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E006B
FILE NAME: Upcplp2
DATE: MARCH 2012
SHEET: 2 OF 11



SEE SPECIAL CONDITIONS(S)

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

Derrick L Bellamy

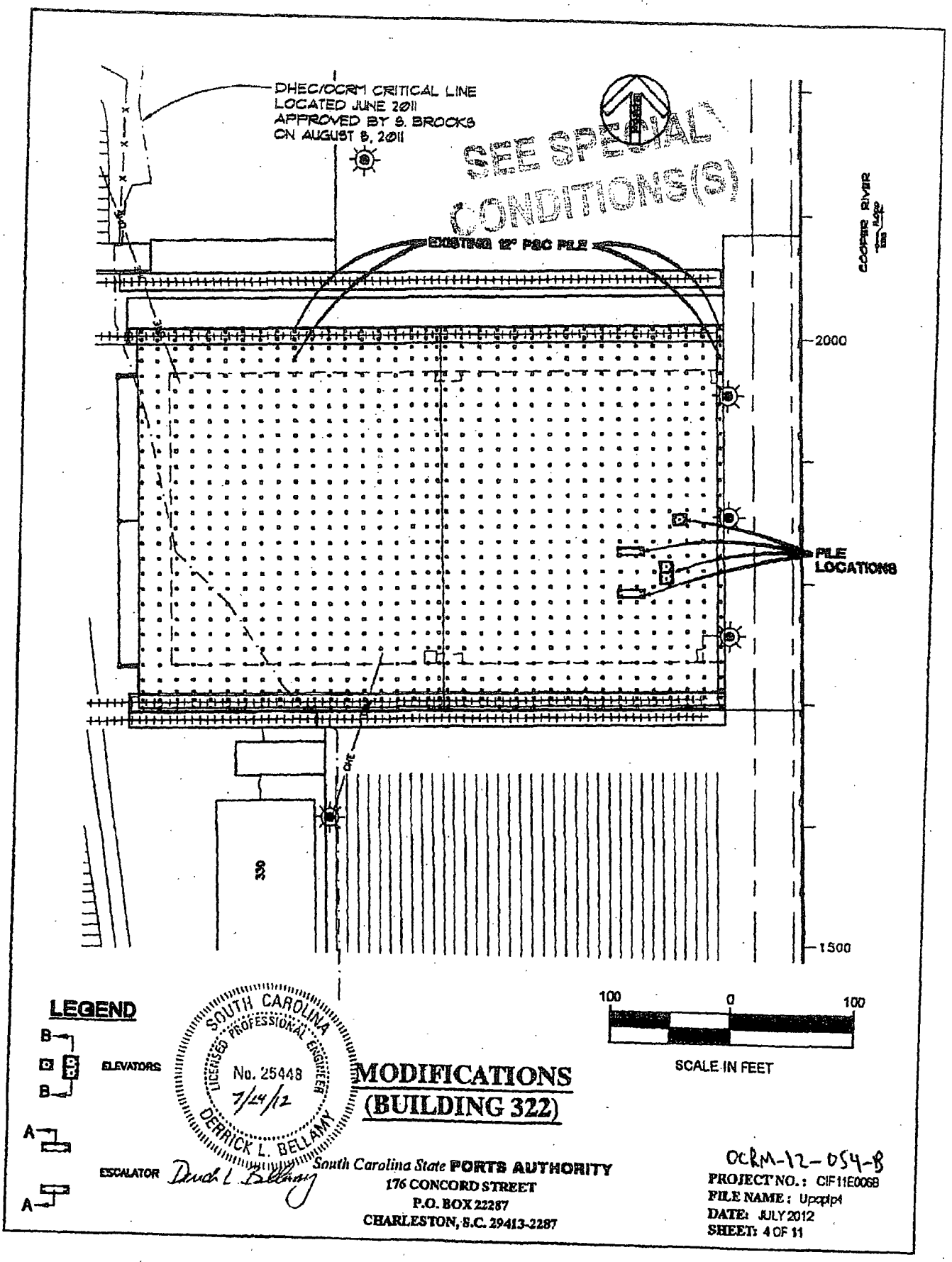
NEW BUILDING LOCATION PLAN
UNION PIER TERMINAL

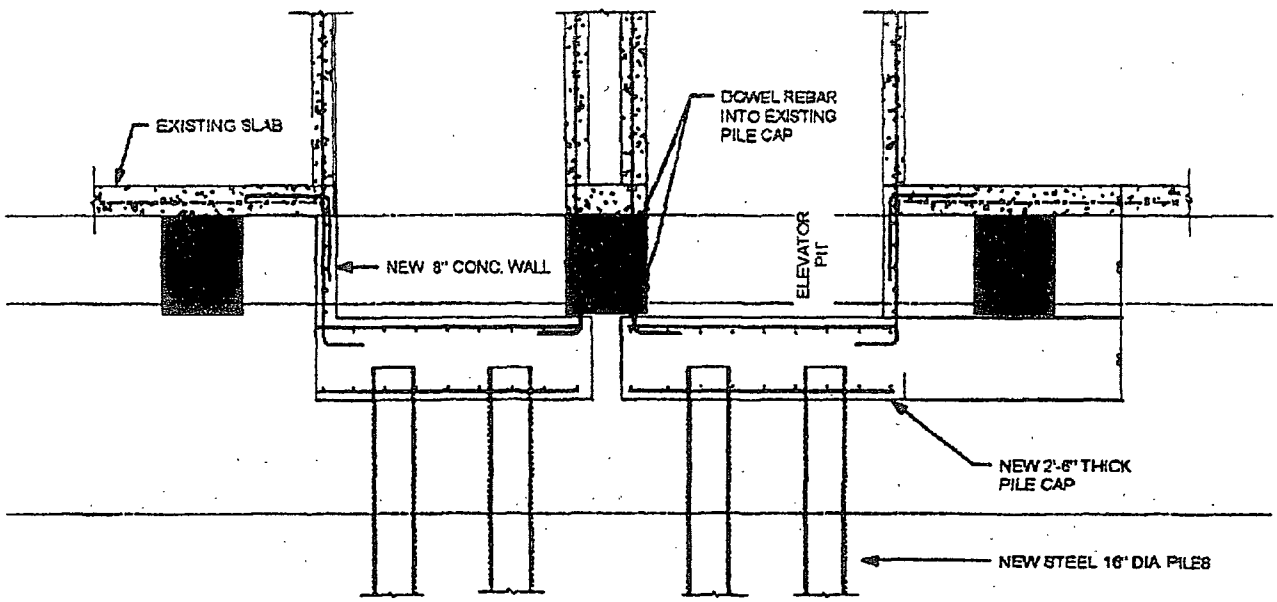
400 0 400
SCALE IN FEET

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

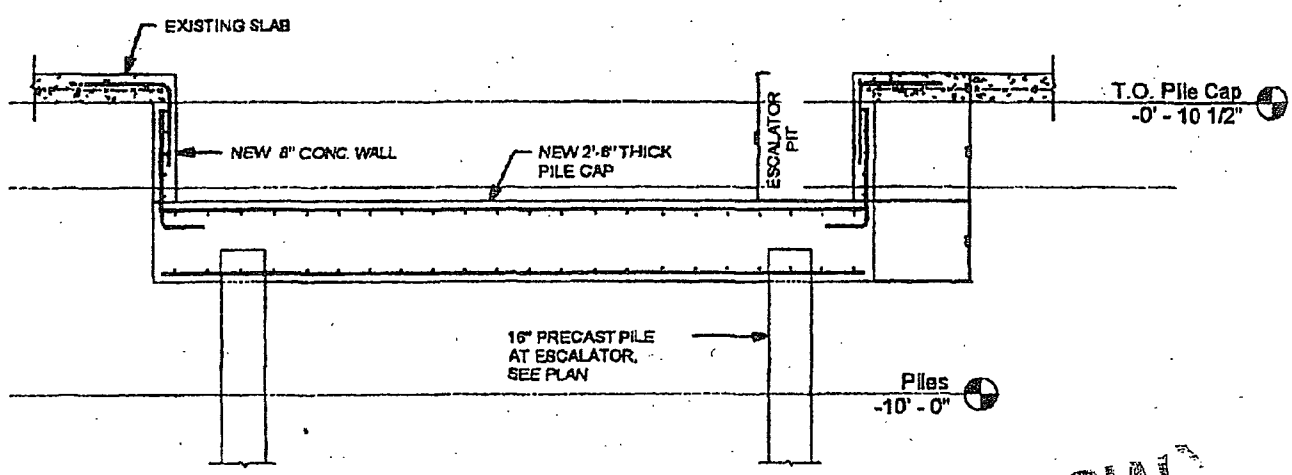
OCRM-12-054-B

PROJECT NO.: CIF11E006B
FILE NAME: Upcptp3
DATE: MARCH 2012
SHEET: 3 OF 11


DHEC/OCRM CRITICAL LINE
LOCATED JUNE 2011
APPROVED BY S. BROOKS
ON AUGUST 5, 2011
SEE SPECIAL CONDITIONS(S)
EXISTING 12" P&C PILE
COOPER RIVER
2000
PILE LOCATIONS
1500
LEGEND
ELEVATORS
ESCALATOR
100
0
100
SCALE IN FEET
SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY
MODIFICATIONS
(BUILDING 322)
South Carolina State PORTS AUTHORITY
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287
OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcplp4
DATE: JULY 2012
SHEET: 4 OF 11



A/65 SECTION ELEVATOR



B/65 SECTION ESCALATOR

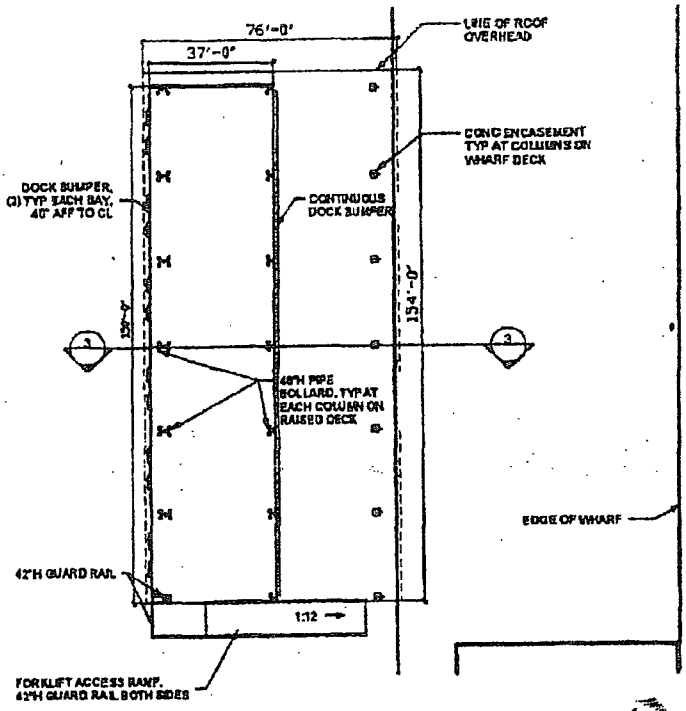
SEE SPECIAL CONDITIONS(S)

SOUTH CAROLINA PROFESSIONAL ENGINEER LICENSED No. 25440 7/24/12 DERRICK L. BELLAMY

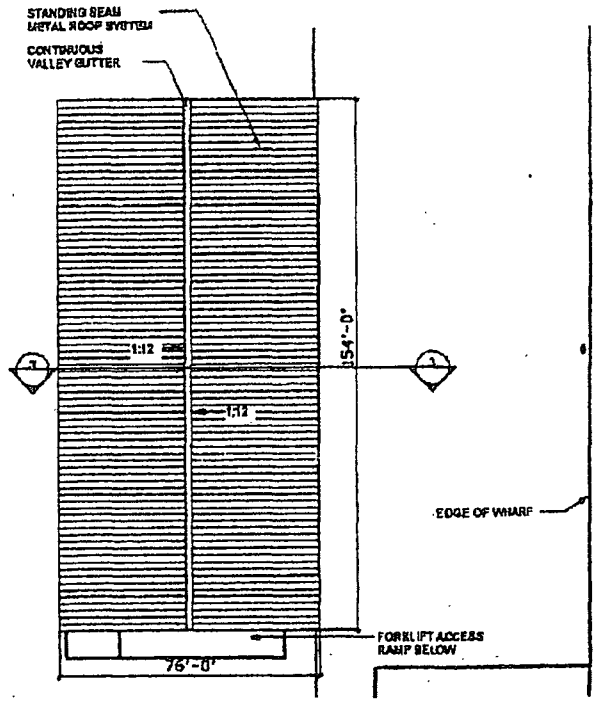
MODIFICATIONS (CROSS SECTION)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

GCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcplp5
DATE: JULY 2012
SHEET: 5 OF 11

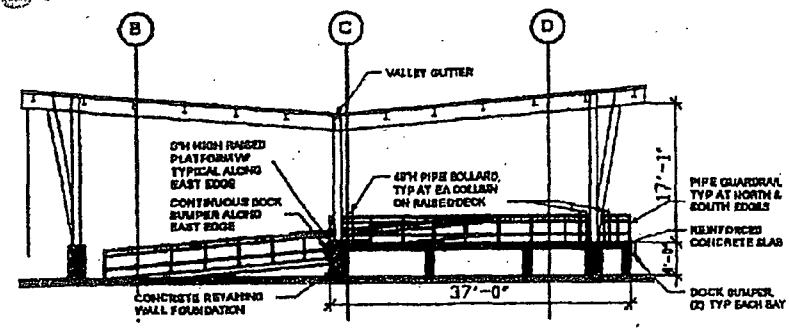


1 STORES CANOPY FLOOR PLAN



2 STORES CANOPY ROOF PLAN

SEE SPECIAL CONDITIONS(S)



3 STORES CANOPY E-W SECTION

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

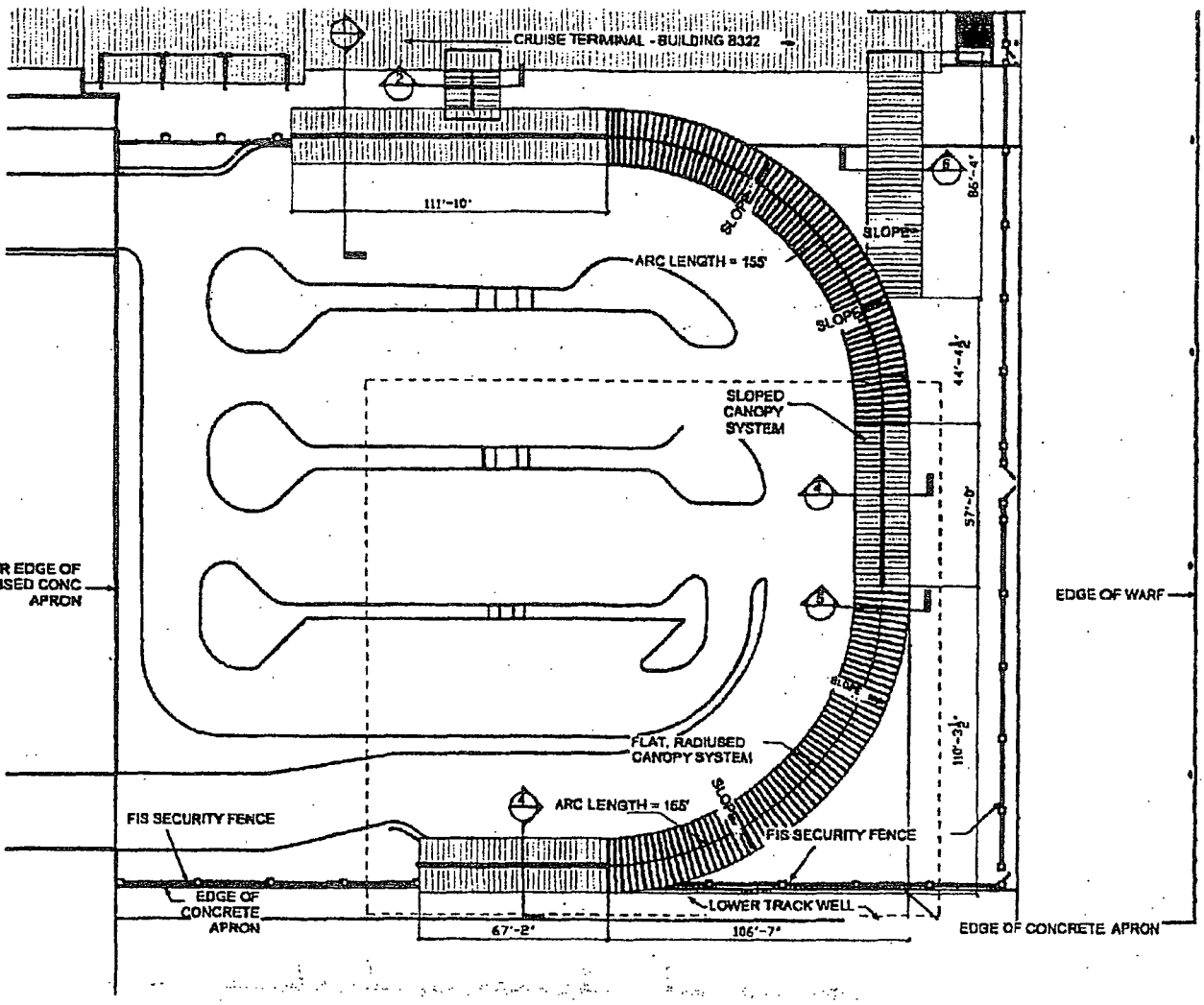
MODIFICATIONS
NORTH APRON

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

PROJECT NO.: CIF11E006B
FILE NAME: Upcplp6
DATE: JULY 2012
SHEET: 6 OF 11

SEE SPECIAL CONDITIONS(S)



PAX CANOPY PLAN

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

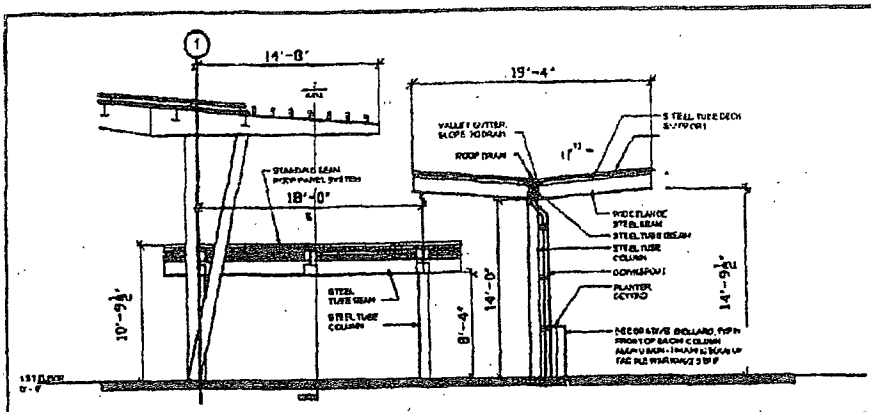
Derrick L. Bellamy

MODIFICATIONS
SOUTH APRON

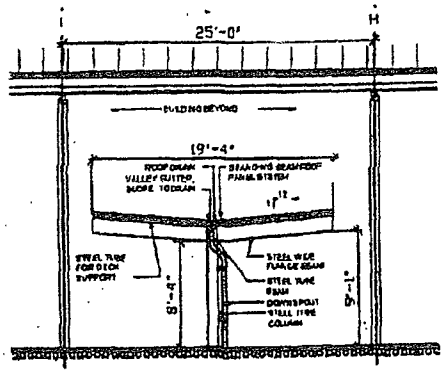
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

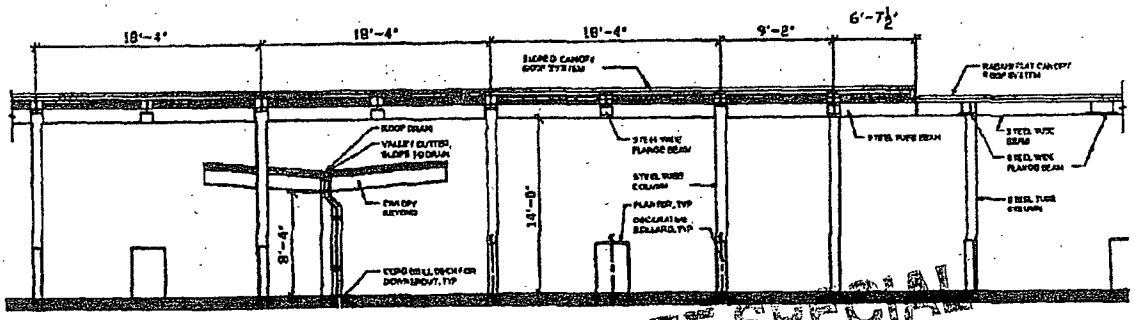
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp7
DATE: JULY 2012
SHEET: 7 OF 11



SECTION - PAX DROP OFF ZONE CANOPY

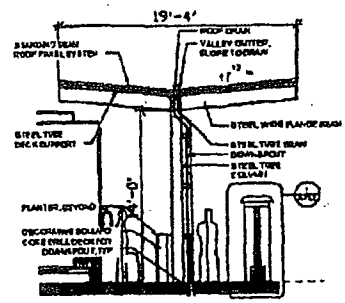


SECTION - PAX DROP OFF ZONE CANOPY @ BLDG INTERSECTION

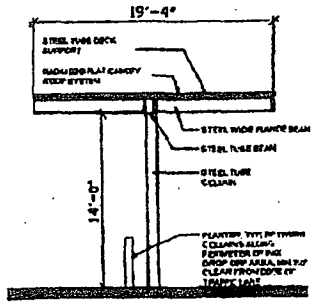


SECTION - PAX ACCESS CANOPY

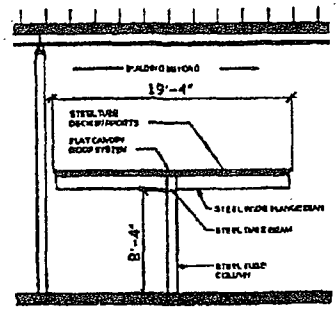
SEE SPECIAL CONDITIONS(S)



SECTION - SOUTH PAX ACCESS CANOPY



SECTION - FLAT PAX ACCESS CANOPY



SECTION - FLAT POV BAG CANOPY

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25143 7/24/12 CHRISTOPHER L. BELLAMY

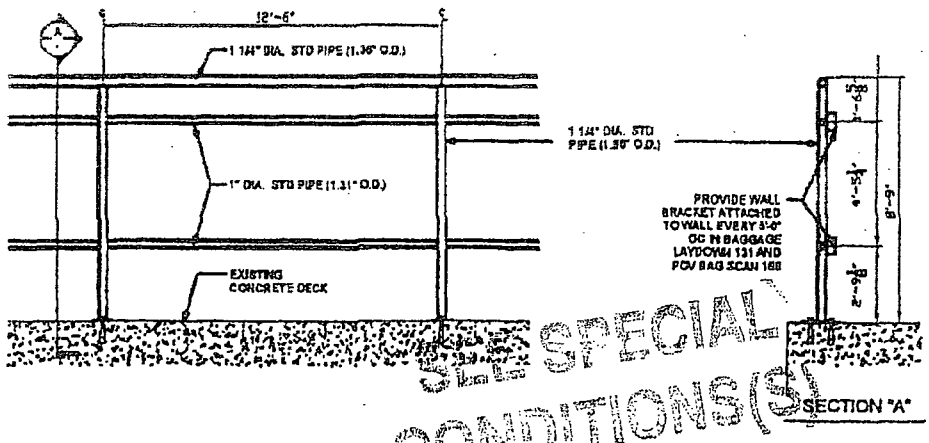
Denise L. Bellamy

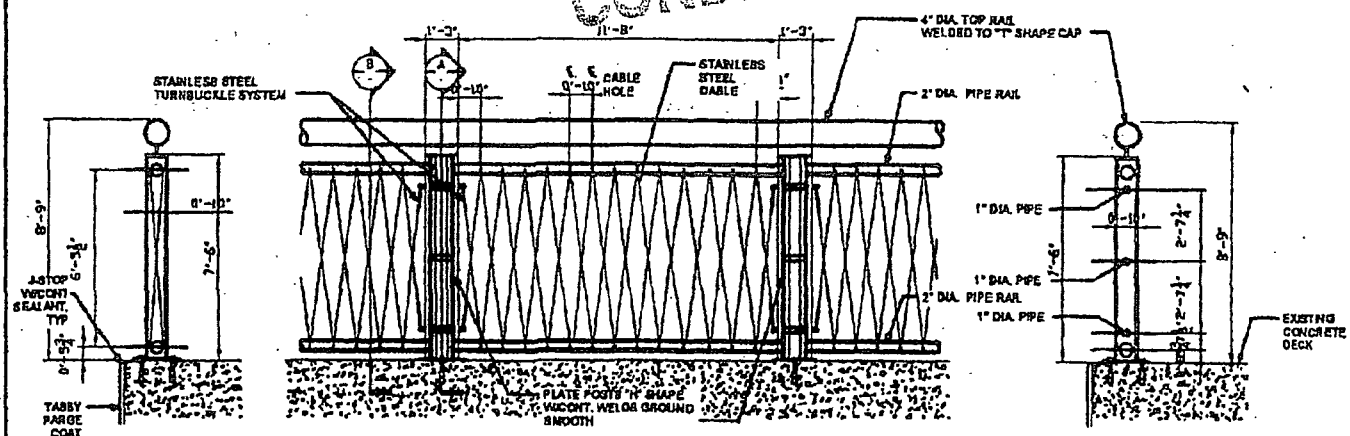
MODIFICATION
SOUTH APRON - DETAILS

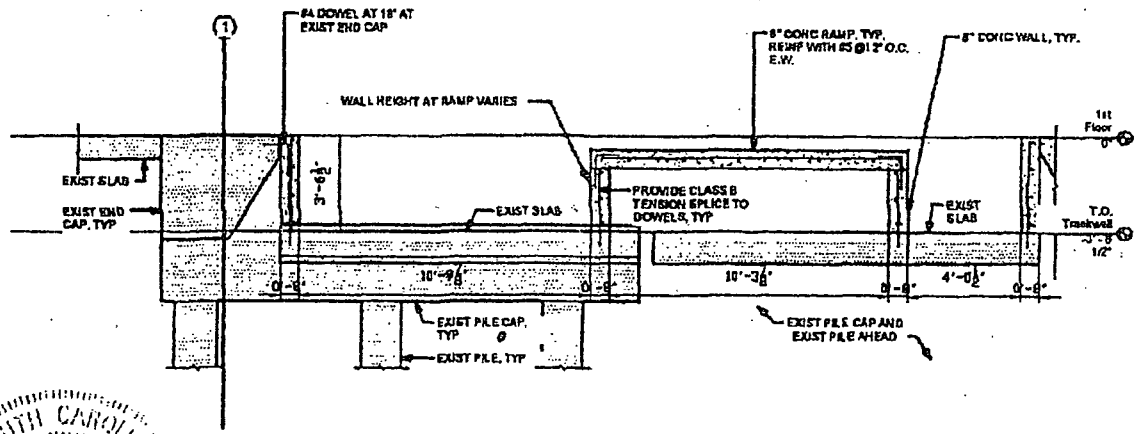
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCFM-12-054-8

PROJECT NO.: CIF11E006B
FILE NAME: Upcptp8
DATE: JULY 2012
SHEET: 8 OF 11







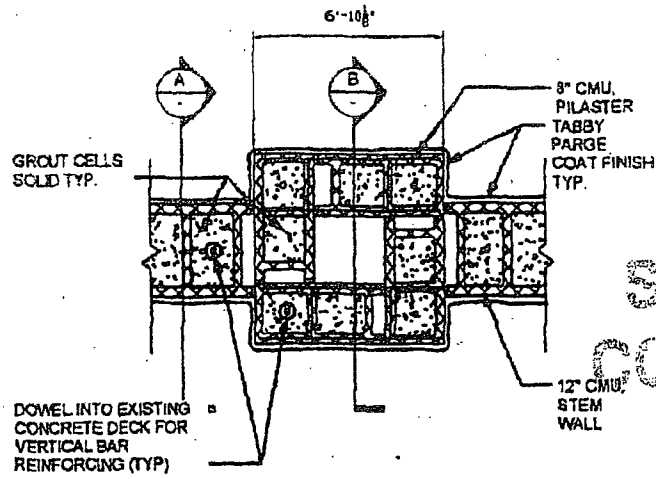
SOUTH CAROLINA PROFESSIONAL ENGINEER No. 25448 7/24/12 DERICK L. BELLAMY

Derick L. Bellamy

MODIFICATIONS
PEDESTRIAN ACCESS RAMP DETAIL

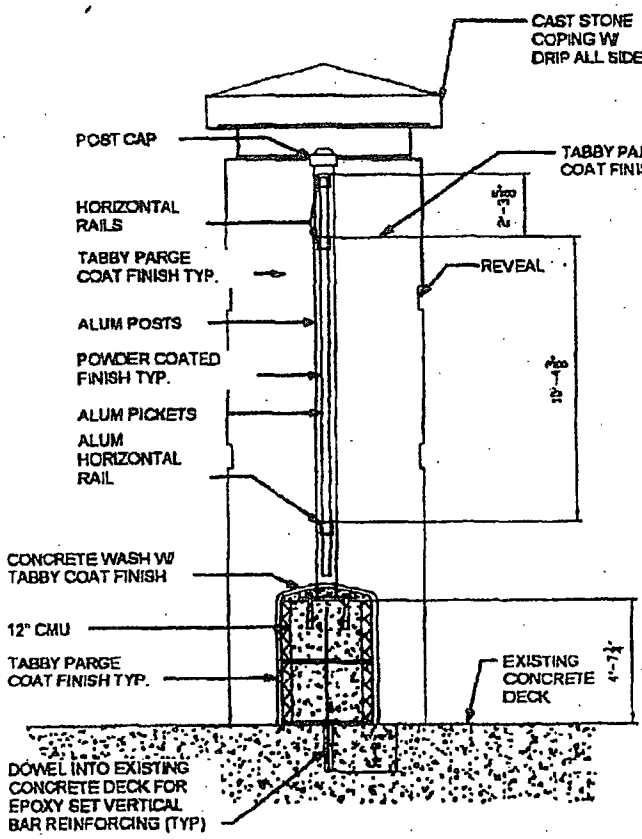
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp9
DATE: JULY 2012
SHEET: 9 OF 11

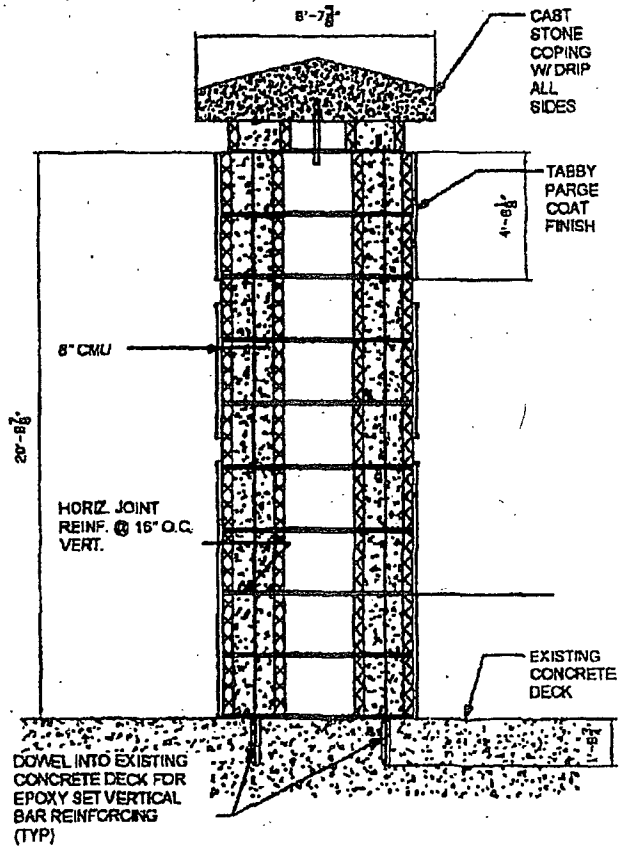


SEE SPECIAL CONDITIONS(S)

PLAN DETAIL @ MASONRY PILASTER



WALL SECTION "A" @ MASONRY STEM WALL



WALL SECTION "B" @ MASONRY PILASTER

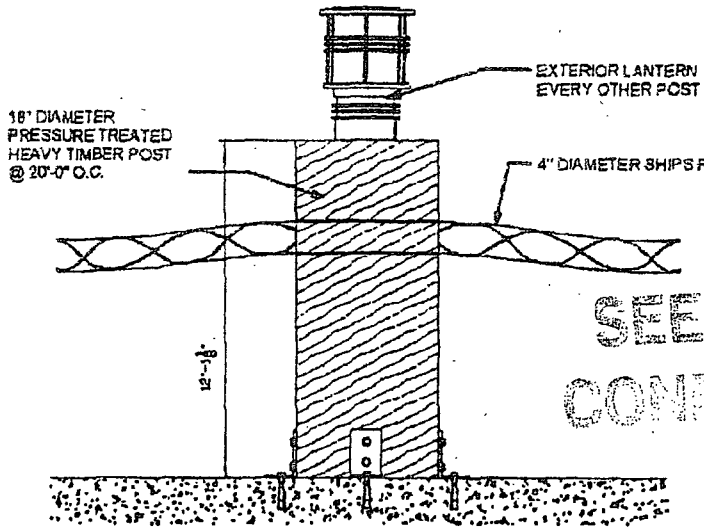
SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

Derrick L. Bellamy

MODIFICATIONS
SECURITY FENCE DETAILS

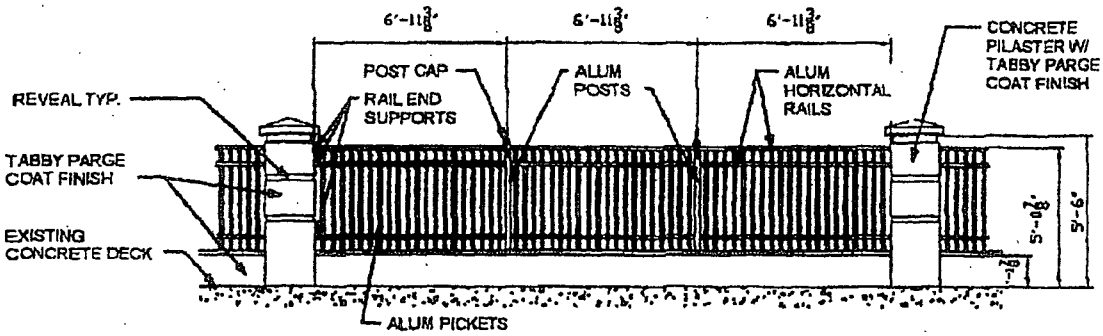
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp10
DATE: JULY 2012
SHEET: 10 OF 11



SEE SPECIAL CONDITIONS(S)

NORTH APRON DECORATIVE BOLLARDS



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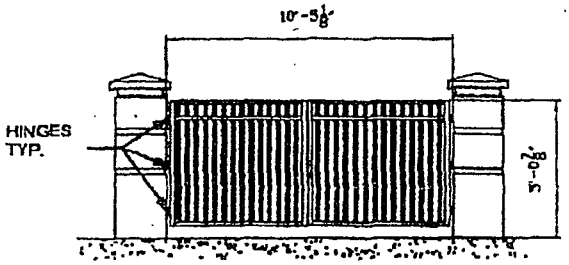

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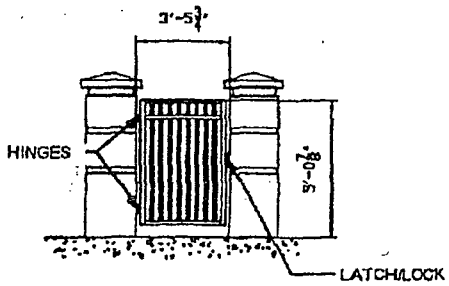


ELEVATION @ PED GATE

SOUTH CAROLINA
No. 15449
7/24/12
Donald L. Bellamy

MODIFICATIONS
SECURITY FENCE DETAILS

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

6CRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp11
DATE: JULY 2012
SHEET: 11 OF 11

ATTACHMENT A

CLARIFICATION OF PROCESS OF CITY CONSULTATION REGARDING CRUISE MANAGEMENT PLAN ALTERATION

Should the SCSPA, at any future date, deem that any material change should be made to the Voluntary Cruise Management Plan, at least one year prior to effecting any such change the following will be done:

(1) Written notification to the Mayor and City Council.

(2) Written notification to the Cruise Neighborhood Advisory Council.

(3) Written notification to Charleston Metro Chamber of Commerce and the Maritime Association of South Carolina.

(4) Written notification to the Historic Charleston Foundation and the Preservation Society.

(5) The convening of a community forum to discuss any material change to the plan.

(6) The solicitation of public input through one or more public hearings, including a public hearing at a City Council meeting.

(7) Careful and thoughtful consideration of the public input.

(8) Report to the Mayor and City Council of the SCSPA board and staff findings and decision.

ATTACHMENT A

VOLUNTARY CRUISE MANAGEMENT PLAN
SOUTH CAROLINA STATE PORTS AUTHORITY
AND
CITY OF CHARLESTON

(1) The number of cruise ships will be no more than 104 calls per calendar year.

(2) The port will host no more than one ship at a time at the cruise terminal.

(3) The terminal will be designed at the northern end of Union Pier to accommodate ships consistent with the size and profile that have called Charleston in the past (1,900 to 3,500 passenger design capacity)

(4) A Traffic Management Plan which removes maritime cruise traffic from City streets as soon as possible as well as continued coordination and communication with the Charleston City Police Department and the City Special Events Committee.

(5) A continued commitment by the SCSPA to contribute an allocation to the DASH Downtown Shuttle program, as described in the City Agreement with the SCSPA, providing free shuttle rides to those traveling in the downtown areas of the City.

SEE SPECIAL CONDITIONS(S)

BOARD:
Allen Amsler
Chairman

Mark S. Lutz
Vice Chairman

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

BOARD:
R. Kenyon Wells

L. Clarence Batts, Jr.

Ann B. Kirol, DDS

John O. Hutto, Sr., MD

South Carolina Board of Health and Environmental Control, 2600 Bull Street, Columbia, S.C. 29201
Telephone (803) 898-3309 Fax: (803) 898-3393

January 11, 2013

U.S. Mail - CERTIFIED – Return Receipt

91 7199 9991 7031 3717 3561

Winslow Hastie
Chief Preservation Officer
Historic Charleston Foudation
P.O. Box 1120
Charleston, SC 29402

91 7199 9991 7031 3717 3554

Amy E. Armstrong, Esq.
S.C. Environmental Law Project
P.O. 1380
Pawleys Island, SC 29585

91 7199 9991 7031 3717 3547

Randolph R. Lowell, Esq.
Willoughby & Hoefer, P.A.
P.O. Box 8416
Columbia, SC 29202

Via Interagency Mail Delivery
Bradley Churdur, Esq.
Nathan Haber, Esq.
SCDHEC – Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

EXHIBIT B

RE: ***Docket No. 13-RFR-01 – Decision dated December 18, 2012, to issue Permit #OCRM-12-054-B to make improvements to an existing waterfront building. The purpose of the project is to facilitate the relocation of the cruise passenger facility to Building #322.***

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone (803) 898-3399

The South Carolina Board of Health and Environmental Control decided on January 10, 2013 not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

Pamela Hawley

for Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 21680

S:\ALL\MATTERS\21680 SCSPA Cruise Ship Terminal\RFR\review conference denial.doc

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, vs. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	**NOTICE OF ASSIGNMENT** **(Contested Case)** DOCKET NO. 13-ALJ-07-0056-CC

NOTICE IS GIVEN that a request for a contested case hearing was filed on February 11, 2013. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2012), the **Honorable Ralph King Anderson, III,** Chief Administrative Law Judge, has been assigned to preside in this matter. The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550.

Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, **www.scalc.net**.

A copy of any document or any other item filed with the Court shall be sent to all other parties at the time of filing. If a mailing address changes, or if an address is incorrect, the Court must be notified immediately of the correct address.

This the nineteenth day of February, 2013.

Ralph King Anderson, III
Chief Administrative Law Judge

By: Jana E. Shealy
Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

FILED
FEB 19 2013
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-0056-CC **MOTION TO REMAND TO DHEC BOARD**

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control ("Petitioners"), pursuant to Administrative Law Court Rule 19, hereby move the Administrative Law Court to remand this matter to the Board of the S.C. Department of Health and Environmental Control ("DHEC") to conduct a Final Review Conference.

The basis of this motion is that Petitioners properly filed their Request for Final Review Conference before the DHEC Board on January 2, 2013, pursuant to S.C. Code § 44-1-160. On January 11, 2013, the DHEC Board issued a memorandum in which it denies the Request for Final Review Conference. The DHEC Board's failure to conduct a review is in violation of S.C.

FILED
FEB 27 2013
SC ADMIN. LAW COURT

Code Ann. § 44-1-160(F)'s mandatory language: "No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair." The failure to conduct a review conference deprives the Agency of its right and duty to apply its specialized expertise, to correct flaws in the staff decision prior to this Court's review and to ensure that the staff decision consistently applies the applicable regulations.

DISCUSSION

S.C. Code § 44-1-160 was enacted in 2006 by Act 387 and later amended in 2010. Prior to the passage of Act 387 in 2006, a party wishing to challenge an Agency decision was required to first file a Request for Contested Case Hearing in the Administrative Law Court ("ALC"). After a decision from the ALC, the party's next avenue of review was requesting DHEC Board review of the ALC's Final Decision and Order. The DHEC Board review was mandatory.

A reading of the statutory scheme established through Act 387 clearly demonstrates an effort by the drafters to establish a process by which the agency would continue to formally review a staff decision to ensure that those decisions are consistent with Agency policy and supported by the administrative record. The requirement of a request for final agency review, and a mandatory requirement for a final review conference containing administrative review procedures, safeguards consistency within the Agency, allows it to ensure even-handed application of its regulations, and allows it to apply its specialized knowledge.

The statute sets forth requirements in Section (F) for open public review conferences, presentation of evidence, required staff explanations with an administrative record necessary to support staff decisions. Additional information is also available to be supplied. After the final review conference, a written final agency decision is required, and it is required to be based upon the evidence presented. This written decision must explain the basis for the decision and must inform the parties of their right to request a contested case hearing before the Administrative Law Court.

The reasoning behind this statutory procedure is obvious: To permit the DHEC Board to fully review staff decisions and to ensure that the staff decision is both supported by the administrative record and consistent with the agency's application of the statutes and regulations. This procedure has the beneficial effect of correcting errors, and giving citizens, both applicants and opponents, the benefit of review by the governing body of DHEC. This is necessary due to the fact that at the Administrative Law Court level, Section (F) of this statute requires that the DHEC decision be given deference in light of DHEC's specialized knowledge. S.C. Code Ann. § 44-1-60(F)(2). What the Final Review Conference does is to place that "specialized knowledge" in an evidence-based setting, so that the Administrative law Court is provided with the agency's rationale (as opposed to staff's rationale) necessary for a fair decision.

A central problem with this permit, as the Ports Authority inferentially admits, is that what is sought is not "maintenance" of an existing structure, but, rather, a "repurpose", in other words, a CHANGE in use. Thus, building 322 morphs from a shed having very occasional break-bulk cargo usage, to a full-time dedicated cruise line facility. The Ports Authority submitted Affidavits to the DHEC Board in a Response to the Request for Final

Review Conference which underline the concept that a massive, and long-term cruise line presence is contemplated, and the Ports Authority and Carnival are only awaiting this final permitting process to ink a contract providing those terms. *See* Affidavits of James Newsome and Arnaldo Perez, attached as Exhibit A & B. The change in use from an occasional arrival of a relatively small cargo ship to an essentially permanent presence of 3,000-plus passenger hotels, docked, and idling, while burning bunker fuel, warrants review by the governing body of DHEC.

It is this fact, among others, which calls out for a full Agency review as contemplated by the above Statute, and which is required to allow the Agency to apply its expertise and allow this Court to make an informed decision. DHEC has the responsibility under law to conduct itself as the front line protector of the environmental health of the citizens of this State. It must ensure that its staff decisions are well-founded, based upon empirical data and consistent with the Agency's application of its regulations.

In that connection, a Final Review Conference must and will explore staff conclusions regarding pollution and other environmental impacts of this permit. For example, statements made regarding "Air Emissions" must be critically examined, especially where, as here, they are directly challenged. The Technical Summary of Review at section IX states, "Shore power is prohibitively expensive infrastructure. Shore power is extremely costly, and is usually required only in areas that face air quality challenges. Charleston does not face air quality challenges." *See* Exhibit C. Since the Petitioners directly challenge these assertions and are prepared to present credible evidence to the contrary, the Board has a right and duty to hear this evidence and ensure that its staff's decision is supported by the evidence before being subject to review by this Court.

Similarly, the staff conclusion regarding "New Location Potential Impact," in Section IX, states: "The S.C. State Ports Authority is not undertaking any new activity that would threaten the architectural integrity of the historic district." Exhibit C. Again, since this statement is directly contradicted by the Ports Authority's admission as to the "repurposed" building and the "Voluntary Cruise Management Plan" providing for a minimum of 104 Cruise Liner parkings of several days each in the middle of the historic district, then again, these conclusions and their alternatives, must be examined in the light of a Final Review Conference.

CONCLUSION

A Final Review Conference is required with all of the safeguards and evidentiary requirements S.C. Code § 44-1-160(F) mandates. This permit - and the activities sought to be permitted pursuant to it-are of national significance. Only after a DHEC Board review, and with any necessary additional conditions, should this permit be allowed to issue. Only in this way can the health and welfare of the public be balanced against the revenues which the Ports Authority places at the forefront of its mission. Only with a DHEC Board review will the agency have the ability to properly utilize its "special expertise" and ensure that the staff's decision is consistent with the agency's application of its rules and regulations.

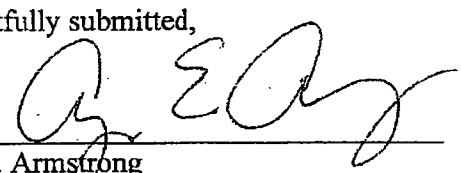
This Agency has begun a careful analysis of these issues, it simply needs to continue that process and verify - or not - staff conclusions and ensure that the staff decision is consistent with Agency policy. The decision to require implementation of the Voluntary Cruise Management Plan as a permit condition, is an excellent first step. The contractor work provisos including emission controls and ultra-low diesel fuel, again, demonstrate a

sensitivity to those very issues about which the Petitioners are voicing concerns.

RELIEF REQUESTED

WHEREFORE, the Petitioners request that the Administrative Law Court remand this matter to the DHEC Board with instructions to set the Final Review Conference, give the parties the requisite ten days written notice, and inform the parties of their ability to present evidence. Petitioners are ready and willing to comply.

Respectfully submitted,



Amy E. Armstrong
Michael G. Corley
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380 Pawleys Island, SC 29585
Office address: 430 Highmarket Street Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
(843) 937-881

Attorneys for the Petitioners, Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of Surfrider and Charleston Communities for Cruise Control

Georgetown, South Carolina

February 27, 2013

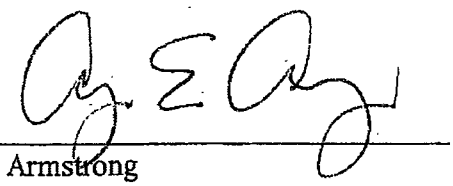
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing Motion to Remand in the U.S. Mail addressed to:

Randolph R. Lowell, Esquire
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202

Marshall Taylor,
DHEC Legal Office
2600 Bull Street
Columbia, SC 29201



Amy E. Armstrong

Georgetown, South Carolina

February 27, 2013

Exhibit A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Carnival Corporation d/b/a Carnival Cruise Lines;
South Carolina State Ports Authority;
and City of Charleston.....Petitioners, Defendants

v.

Historic Ansonborough Neighborhood Association,
Charlestowne Neighborhood Association, the
Coastal Conservation League, and Preservation
Society of Charleston.....Respondents, Plaintiffs.

AFFIDAVIT OF JAMES I. NEWSOME, III

PERSONALLY, appeared before me, James I. Newsome, III, who, being duly sworn, says:

1. That he is President and Chief Executive Officer for the South Carolina State Ports Authority, that he is over the age of eighteen years and the following statements are true from his own personal knowledge, except where it is expressly based on information and belief, in which case he is informed and believes that the statements are true..

2. SCSPA was created by 1942 Act No. 626 of the South Carolina General Assembly. See S. C. Code Ann. §54-3-110, et seq. The statutory scheme creating SCSPA details numerous responsibilities with respect to the South Carolina Port resources. However, a general synopsis of its overall charter is stated in §§ 54-3-110, -120 and -130 which provide:

§ 54-3-110. Improvement of certain harbor or seaports.

Through the authority the State may engage in promoting, developing, constructing, equipping, maintaining, and operating the harbors or seaports within the State, namely Charleston, Georgetown and Jasper, and works of internal improvement incident thereto, including the acquisition or construction, maintenance, and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

§ 54-3-130. Purposes of Authority.

The Authority is created as an instrumentality of the State for the accomplishment of the following general purposes, all or any of them, which are intended to broaden and not to restrict any other powers given to it in this chapter, namely:

(1) To develop and improve the harbors or seaports of Charleston, Georgetown, and Jasper for the handling of water-borne commerce from and to any part of the State and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve such harbors or seaports and their port facilities;

(3) To foster and stimulate the shipment of freight and commerce through such ports, whether originating within or without the State, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To cooperate with the United States of America, and any agency or any department, corporation or instrumentality thereof in the maintenance, development, improvement and use of such harbors and seaports in connection with and in furtherance of the war operations and needs of the United States;...

(9) In general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports.

3. The jurisdiction of SCSPA is established by § 54-3-120, S.C. Code Ann., which provides:

§ 54-3-120. Jurisdiction of Authority.

> The jurisdiction of the Authority in any of said harbors or seaports within the State shall extend over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flows and shall extend to the outer edge of the outer bar at such harbors or seaports.

4. Pursuant to the authority granted by the Legislature, SCSPA has utilized and operated Union Pier and the land adjacent thereto to promote maritime commerce, both in the commercial ocean going cargo trade and in the ocean going passenger cruise ship trade.

5. The Union Pier facility includes wharves, warehouses, rail sidings and other ancillary structures built thereon and thereabout, including a cruise passenger terminal and real property adjacent to the water's edge, all of which are properties owned, maintained, and operated by the SCSPA under its legislative mandate.

6. Cruise ships call at the Union Pier Terminal facility and the SCSPA, pursuant to its statutory obligation to promote maritime commerce has encouraged cruise ship calls and has planned to use the commercial ocean going cruise ship trade to support funding for SCSPA's mandated mission to effect improvements to the Union Pier facility, among other facilities and operations of SCSPA. The South Carolina General Assembly has recently emphasized the continued importance of cruise operations within the Ports Authority's statutory mandate, by stating in the Fiscal Year 2012 appropriations act: "The State Ports Authority will continue its cargo diversification strategy which enhances the marketing of all terminal capabilities in Charleston and Georgetown highlighting cruise, break-bulk, bulk, and roll-on/roll-off." H. 3700 (Rat #0106), Section 69.3.

7. Cruise ships have called at Union Pier Terminal every year since the dedication of the current passenger terminal in 1973; and, based on archived publications, I am informed and believe that historically cruise vessels have called at Union Pier since at least the early 1900's, prior to the creation of the State Ports Authority.

8. The planned improvements to the Union Pier facility include particular and detailed renovations to the existing buildings at the facility; demolition of older structures; dedication of much of Union Pier land to redevelopment to include public green spaces and private development undertakings thereby providing public and private access to the harbor which currently does not exist in the Union Pier Terminal, and done in a financially responsible manner that will generate revenues to be reinvested in the capital structures and operations to promote, facilitate and increase water-borne commerce in the State's harbors and seaports. In addition, cessation of rail operations at Union Pier is envisioned by the plan.

9. In furtherance of the plan to improve Union Pier much money and time have been expended in an effort to make the improvements something of which the State and City can be proud, and which provides significant positive economic impact to the benefit of the State and the City of Charleston.

10. To finance construction and improvement of a passenger cruise terminal at Union Pier, SCSPA revenue bonds have been issued and sold with proceeds generated of approximately $35,000,000.

11. A key component of the Union Pier Passenger Terminal improvement is long-term, predictable, commercial ocean-going cruise vessel calls at Union Pier. Toward this end, SCSPA and Carnival had made considerable progress toward forging a long-term contract under

which Carnival would regularly call at Union Pier. Carnival has now suspended further action on the long-term contract discussions unless and until this lawsuit is expeditiously ended.

12. Respondents have brought suit against Carnival Cruise Lines, the leading cruise customer and user of the marine terminal passenger facility in the subject action, seeking a declaration that certain of the commercial ocean going vessels which call at Union Pier are subject to zoning, violate the Zoning Ordinance and therefore call illegally when docked at Union Pier. Plaintiffs seek injunctive relief against these alleged illegal calls, which by necessity would prevent the vessels from calling at Charleston, if such action were to be successful.

13. Without the long-term cruise line commitment, the Union Pier improvement plan will not be economically viable and will be ended by the Ports Authority. Not only has this lawsuit cut off discussions of such a long term arrangement with Carnival, it sends a negative message to other cruise lines, producing a dampening effect and discouraging calls and commerce in South Carolina.

14. The current lawsuit alleges that Carnival vessels cannot legally call at Union Pier because its vessels (a) violate Charleston City Zoning Ordinances; (b) the vessels operate illegally because of certain discharges incidental to vessel operations which are not permitted by the South Carolina Department Health and Environmental Control; and (c) the calls by Carnival vessels constitute a nuisance.

15. If successful, Plaintiffs will prevent calls by Carnival vessels and other cruise vessels, and will impact the ability of the SCSPA to improve its Union Pier passenger facility and carry out its statutory duties to promote, facilitate and increase water-borne commerce.

Carnival's suspending action on the long-term contract is understandable in light of the consequences if Plaintiffs are successful in the lawsuit.

16. Virtually all claims made by Plaintiffs with respect to the calls of Carnival Cruise Line vessels would apply to every traditional cargo vessel which call at the Union Pier Terminal as well as the Columbus Street Terminal on the Peninsula City. These claims would also apply to nearly all other tall ships, foreign and U.S. military vessels, and other vessels associated with events of national significance at Union Pier Terminal and Columbus Street Terminal. For instance, Ro-Ro vessels which call at Columbus Street and have called at Union Pier have air-drafts of between 125 feet and 171 feet, well above the 60-foot Height Ordinance restriction, if applicable. These Ro-Ro vessels carry, among other cargo, BMWs manufactured in the Upstate. In addition, the break-bulk/heavy lift vessels which call there have air drafts of between 101 and 106 feet well above the Height Ordinance restriction of 60 feet. And as can be seen below, if successful, shut down of Peninsula Port terminal operations would have an enormously negative economic impact to the State.

17. Cargo valued at $50 billion passed through the Charleston Customs District in 2010. The total tonnage of cargo that passes through the Port of Charleston is approximately 15 million tons per year.

18. In calendar year 2010 approximately 64% of the SCSPA's total break-bulk, bulk and roll-on/roll-off cargoes in the Port of Charleston moved across piers at the Union Pier Terminal and Columbus Street Terminal, including large power generation projects for in-state companies and automobiles manufactured in South Carolina, which totaled $4 billion of exports in 2010, a significant amount of which is generated by BMW vehicles manufactured in the

Upstate. Columbus Street is the only terminal through which BMW vehicles pass. Enjoining these operations would be devastating not only to the Port, but also to BMW. Moreover, in 2010 15 % of the Port's total revenues were generated from cruise, break-bulk, bulk and roll-on/roll-off activities at these Terminals. If the revenue streams from the Columbus Street Terminal and the Union Pier Terminal cease, not only will it place the Port of Charleston at a competitive disadvantage to other ports, it may be extremely harmful to the economic viability of the SCSPA.

19. If the theories proposed by Plaintiffs are found to be legitimate, not only will the overall Union Pier improvement plan be scuttled, but all ocean going interstate and foreign maritime commerce, which is facilitated through the Ports Authority's Union Pier and Columbus Street Terminal facilities, will be at risk.

FURTHER AFFIANT SAITH NOT.

James I. Newsome, III

Sworn to and subscribed before me,

this 22nd day of August 2011.

Marsha A. Read

Notary Public for South Carolina
My Commission Expires: Nov. 13, 2016

MARSHA A. READ
Notary Public, South Carolina
My Commission Expires
November 13, 2016

Exhibit B

STATE OF SOUTH CAROLINA COUNTY OFCHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2011-CP-10-4139
HISTORIC ANSONBOROUGH NEIGHBORHOOD ASSOCIATION, CHARLESTOWNE NEIGHBORHOOD ASSOCIATION, COASTAL CONSERVATION LEAGUE, AND PRESERVATION SOCIETY OF CHARLESTON, Plaintiff, vs. CARNIVAL CORPORATION, d/b/a CARNIVAL CRUISE LINES, Defendant.	)	AFFIDAVIT OF ARNALDO PEREZ

PERSONALLY appeared before me, Arnaldo Perez, who, being duly sworn, says:

1. I am employed by Defendant Carnival Corporation ("Carnival") as a Senior Vice President and General Counsel.

2. Carnival, through its operating division, Carnival Cruise Lines, is in the business of owning and operating passenger cruise vessels which take passengers to various port destinations in the Caribbean, the United States and elsewhere.

3. Carnival Cruise Lines has from time to time operated cruises from the Port of Charleston, South Carolina, since 1999. In 2010, Carnival greatly increased its involvement with the Port of Charleston by making Charleston, and specifically the Union Pier terminal facility, the home port of the cruise ship *Carnival Fantasy*. Since that time, the *Carnival Fantasy* has operated approximately 80 cruises from Charleston, taking approximately 185,000 passengers on cruises to the Bahamas, Grand Turk and Bermuda.

4. Carnival is aware of plans by the South Carolina State Ports Authority ("SCSPA") to redevelop the Union Pier port terminal facility and construct a new, modern passenger terminal. Carnival agrees that the improvements planned by SCSPA would greatly enhance Charleston's attractiveness as an embarkation and destination point for cruises and would also improve the flow of pedestrian and vehicular traffic in and around the proposed passenger terminal.

5. Carnival has been engaged in discussions with the SCSPA over an agreement contemplating Carnival Cruise Lines' long term use of the planned passenger terminal at Union Pier. Carnival is excited about the prospect of such an arrangement and believes it could be very advantageous both to Carnival and to the City of Charleston. Carnival has, however, recently been sued by a group of plaintiffs who allege that its operations at Union Pier violate various local zoning ordinances and state laws. While Carnival does not believe the lawsuit has any merit, the prospect of a lengthy court battle and the possibility, however remote, of a determination that Carnival Cruise Lines' use of Union Pier is unlawful, make it difficult for Carnival Cruise Lines to justify the long term arrangement proposed by SCSPA. Carnival Cruise Lines has communicated its reservations to SCSPA in the course of their ongoing negotiations.

FURTHER, AFFIANT SAITH NOT.

ARNALDO PEREZ

Sworn to and subscribed before me, this ___ day of July 2011

Notary Public for _____
My Commission expires: _____

MARTHA DE ZAYAS
MY COMMISSION # EE 024310
EXPIRES: September 8, 2014
Bonded Thru Budget Notary Services

Exhibit C

Regulatory Programs Division Decision Document
Impact Assessment for COMMERCIAL DOCK
Office of Ocean and Coastal Resource Management – SCDHEC

TECHNICAL SUMMARY OF REVIEW

Permit Name: South Carolina State Ports Authority – Union Pier
Decision:

Permit:
Permit with Conditions: X
Deny:

I. Background Information: Database ID# 75114

Permit Number: OCRM-12-054-B

P/N Date: March 23, 2012 Date Received: April 27, 2012

Permit Type: Joint Other Agency Permits: SCDHEC-BOW & Corps

County: Charleston Water Body: Charleston Harbor/Cooper River

Location Description: On and adjacent to Cooper River at 32 Washington Street (Future 180 Concord Street), South Carolina State Ports Authority ~ Union Pier Terminal, Charleston, Charleston County, South Carolina. TMS#: 459-00-00-009.

II. Project Description and Stated Purpose:

Description:

The work as proposed and shown on the attached plans consists of making improvements to an existing waterfront building. Specifically, the applicant seeks to install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of pile supported Building #322. Additionally, additional structural changes are proposed to be made to building 322 and the construction of two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies.

Purpose: The purpose of the overall project is to facilitate the relocation of the cruise passenger facility to Building #322

III. Summary of Public and Agency Comments (List by name, date & comment summary; if none, so indicate):

Federal Agencies: **None**

State Agencies: **SCSPA – NOBJ**
SCDNR – NOBJ

Local Agencies: **None**

Public Comment (Include all names from Public Hearing): **See the attached list**

Adjoining Property Owners (Include all names of those who commented:
See the attached list

IV. **Environmental Assessment:**

A. Describe the coastal resources (i.e., vegetation, habitat, etc.), which will be impacted:

Open water areas beneath an existing wharf and existing building over the water.

B. Watershed and vicinity information (include watershed name & size, classification; any impaired waters listed within impaired parameter; and shellfish status):

The proposed work will be situated within Shellfish Management Area 10B, which is classified as "Prohibited."

1) Vicinity information (include information on developments within watershed within 3 mile radius):
Site is located at an existing SCSPA commercial pier. This area of the Cooper River historically has been utilized directly and indirectly by commercial maritime shipping industry for many years, including the cruise ship industry. The area is currently surrounded by other commercial entities.

2) Existing system stressors (i.e. shellfish closures, 303d):
The proposed work will be situated within Shellfish Management Area 10B, which is classified as "Prohibited."

C. GAPC Review (List any GAPC's present on or adjacent to project site; include agency comments; attach GIS printout; and outline treatment methods):

There are no known endangered species, or SCORE sites resources at this site. The site is adjacent to the "Old and Historic Charleston" district and is designated as a GAPC. The SCSPA Union Pier is also designated as a GAPC.

D. Name and approximate width of water body: **The Cooper River**

V. **Policy Assessment:**

A. Regulatory History:

1) Previous OCRM authorizations (land disturbance, Federal cert.):

SC STATE PORTS AUTHORITY	**90-4T-172-P**
FLEET LANDING RESTAURANT, LLC	**OCRM-04-339-R**
SC STATE PORTS AUTHORITY	**99-1P-261-P-C**

2) Previous Enforcements (is project in compliance w/all previous permits, etc.): **None**

3) Master Plans (dock, archaeological, wetland): **No**

4) Date of O & M: **N/A**

5) Navigable tributary crossings proposed: **None**

6) Property frontage at highground and water, offsets these lines: **N/A. The existing commercial pier is a SC State Port Authority pier. It is also a permitted/grandfathered structure with permitted/grandfathered activities (including cruise ship operations), that will be modified within the existing pier footprint.**

7) Community or public marina: **Commercial Pier**

8) Water quality sampling/monitoring program required: **No.**

9) Stormwater permit submitted or approved for highground dev: **No. Facility is an existing commercial pier with buildings that have been approved in the past.**

10) Bathroom numbers: **N/A. Facility is an existing commercial pier.**

11) Dock masters office location and number: **No.**

12) SAMP restrictions: **N/A**

13) NERRS review area: **N/A**

14) Deed restrictions: **N/A**

15) Wetland delineation approved by ACOE: **N/A**

16) Development plan and parking approved by local government: **N/A**

17) Valid critical area line certified: **Yes**

18) Marsh ownership claims: **None**

B. Applicable Regulations and Policies (list those that apply only):

1) CZMA:

Approval or denial of permits; appeal to council	**48-39-150**
Legislative declaration of state policy	**48-39-30**
Legislative declaration of findings	**48-39-20**

2) Regulations (General Guidelines, Further Guidelines, Specific Project Standards):

Mitigation Criteria	**R.30-4(G)(2)**
General Considerations	**R.30-11(B)**
Further Guidelines	**R.30-11(C)**

R.30-12(A)(4) The following standards in addition to those in R.30-12(A)(1) apply to construction of commercial docks that are not marinas

R.30-12(E) Marinas, including commercial and community docks with more than 250 linear feet of effective docking space.

R.30-12(F)(2)(d) Transportation

3) CZ Policies (Management Program Document):

Policies for Port Facilities

1) **New port development should take place in existing industrialized areas where sufficient support facilities are available including public utilities, rail and highway transportation access, and navigational channels which are already maintained, unless there are no feasible alternatives or an overriding public interest can be demonstrated, and any substantial environment damage can be minimized.**

2) **Port development should occur in areas that have adequate high ground (non-wetland) acreage for proposed current development and near-term expansion plans, and related facilities. Port development should be located in areas where the filling of productive salt, brackish or freshwater wetlands will not be required or can be minimized. If site preparation does require filling in these wetlands, it must be clearly demonstrated that no other feasible alternatives exist or an overriding public interest can be demonstrated, and any substantial environment damage can be minimized.**

3) **To the extent feasible, port development and expansion should locate on existing channels so that the need for initial and maintenance dredging can be minimized.**

4) **New port development that will require maintenance dredging must identify adequate upland (non-wetland) spoil areas, ocean disposal, or other environmentally-acceptable alternative disposal techniques to meet the long-term demands for spoil disposal.**

5) **Port areas must provide for the handling of dangerous and volatile cargoes and materials in relatively isolated or restricted areas, so that in the event of accident, measures can be implemented to contain any spills or other contamination with minimal environmental damage and limited threat to the health, safety and welfare of the public.**

6) **Wharves, piers, mooring dolphins and other port-related structures should not restrict or block navigation or alter the natural pattern of water currents.**

7) **Proposed port development or expansion and operation must meet existing air and water quality standards, as regulated by the Federal Environmental Protection Agency and the South Carolina Department of Health and Environmental Control.**

8) **Port facilities developed by the State Ports Authority (SPA), as well as by private developers, must be sited, constructed and operated in a manner that is consistent with local and State development**

objectives as set forth in public documents such as comprehensive plans, zoning ordinances and performance standards.

9) Potential negative impacts on navigation which might restrict port and harbor activities in the area will be considered in evaluation of permits for marinas, docks and piers, transportation facilities (especially bridges), cables and pipelines and other relevant activities.

10) Port development or expansion plans must include provision for necessary breakwater or other wake protection measures along major navigable ship channels where appropriate in order to reduce erosion damage. These structures must be in compliance with other applicable policies and Rules and Regulations.

11) All bulkheads associated with a port area must meet the policies as stated in the Erosion Control Program [Chapter IV(C)].

12) All dredging and dredge spoil disposal policies, as stated in VIII (A) and (B) of the Resource Policies will be applied to port activities.

13) All piers and dockage must meet the policy requirements as stated in VI (C) of the Resource Policies.

14) Transportation projects associated with port development must follow the transportation policies stated in II (B)-(E) of the Resource Policies.

15) The policies for manufacturing will apply to port development and related industrial development (III (D) of the Resource Policies).

CZMP II – 1
CZMP II, Section II(A)
CZMP III – 5 General Considerations
CZMP III – 14 at I(7)
CZMP III – 14(8)
CZMP III – 19
CZMP III – 20
CZMP III – 22
CZMP IV

Priority of Uses

The following are the uses of priority for all state ports created and operated by the South Carolina State Ports Authority (SPA) beginning with the use of highest priority:

1) Uses which require water access or uses for which the water orientation is the central purpose of the activity, such as maritime shipping, fishing, marine industry, and recreational boating. Included in the uses of highest priority for state ports are provisions to assure safety within the ports. These water-dependent uses should have no prudent or feasible alternative;
2) Water-related uses which do not reduce or degrade the natural value or resources within the port;
3) Nonwater-dependent or nonwater-re1ated uses which retain future flexibility of the port for water-dependent needs.

Designated Sites

The South Carolina Ports Authority owns and manages the following facilities, which are designated as GAPCs: Beaufort County: Port Royal-State Pier 21; Charleston County:' Port of Charleston; Georgetown County: State Piers 31 and 32.

C. Does the project contravene any coastal zone regulations?

(If No, skip to section VII; if Yes, complete Section VI.) YES X NO

VI. Modifications for bringing the project into compliance with regulations:

A. Modifications required to minimize impacts (list avoidance & minimization measures; buffers; size and/or use restrictions; additional treatment measures; deed restrictions; and agency agreements):

See attached Special Conditions

B. If Permit is denied, explain contraventions of regulations and/or Coastal Zone Management Program.

N/A

VII. Field assessment by: **Steven Brooks/Blair Williams** **June 13, 2012**

(Name) **(Date)**

VIII: Reviewed By:

1. Project Manager: Steven Brooks 12/17/12

(Signature) **(Date)**

2. Section Manager 12/17/12

(Signature) **(Date)**

IX. Notes:
Previously, this project was advertised on public notice on March 9th and March 23rd as a proposal to install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. On April 18, 2012, A public hearing was held at the Sterett Hall Auditorium. Subsequently, DHEC-OCRM met with the SC State Ports Authority on July 18, 2012 to discuss additional information that was requested in a letter dated June 29, 2012. At the end of the meeting, it was agreed the SPA would be submitting the additional information as requested. On July 26, 2012, the requested information was received. The application was re-noticed on August 3, 2012 and the comment period was extended to September 2, 2012.

This project was re-public noticed to include proposed modifications consisting of additional structural changes that are to be made to building 322 and the construction of two covered staging areas. A second public hearing was held on Wednesday, September 19, 2012 at 6:00 pm at the Sterett Hall Auditorium. The record of the public hearing was kept open until October 10, 2012, in order to receive any additional comments.

LONGTERM CUMULATIVE AFFECTS

R.30-11(C)(1) The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area. The long-range cumulative effect of this project will not have any substantive impact to any type of development because development in this area has already been established and completed. Additionally, the long-range cumulative effect of this project will not have any substantive impact to the general character of the area because the general character of this area has been for more than a century an existing commercial pier that is a SC State Port Authority pier with grandfathered activities that include cargo and cruise ship operations.

This is an activity that would be occurring on an existing commercial pier that is a SC State Port Authority pier. The activity (cruise ship operation) currently exists on this facility and is considered grandfathered at this pier.

NEW LOCATION POTENTIAL IMPACT A DESIGNATED HISTORIC AREA

The Union Pier facility is adjacent to the "Old and Historic Charleston" district. The "Old and Historic Charleston" district was listed on the National Register of Historic Places in 1978 for its architectural integrity. The SC State Ports Authority is not undertaking any new activity that would threaten the architectural integrity of this historic district. The Port of Charleston and the historic district have co-existed for many years. In light of the afore-mentioned, it has been determined that there would be no potential adverse effect on the adjacent historic district.

CRUISE SHIP CALLS AFTER SHIFT TO NEW TERMINAL

The South Carolina State Ports Authority (SCSPA) has committed to a very responsible voluntary Cruise Management Plan to manage the number of cruise ship calls per year. The operations for the new passenger cruise facility at Union Pier Terminal will be conducted in accordance with the Voluntary Cruise Management Plan. The SCSPA will include the Department in the notification process as outlined on the second page of the Voluntary Cruise Management Plan titled "Clarification Process of City Consultation Regarding Cruise Management Plan Alteration".

AIR EMISSIONS

Air quality for vessel mobile source is governed by international treaty and federal regulation (MARPOL Annex VI), and Congressional adoption of that treaty. Regulatory authority is under the federal EPA and U.S. Coast Guard.

The cruise ships that will call at this facility are not equipped to connect with shore power. Shore power is prohibitively expensive infrastructure. Shore power is extremely costly, and is usually required only in areas that face air quality challenges. Charleston does not face the air quality challenges.

There will be a reduction in cruise ship related emissions on Union Pier as a result of the implementation of the North American Emission Control Area (ECA), which began in August of this year and will be completely implemented by August 2015. All cruise ships will be required to use lower sulfur fuel as a result of the directives of the North American Emission Control Area (ECA). Emissions will be decreased even further once construction has been completed for the passenger cruise terminal, as this will eliminate emissions associated with shuttling cruise passengers to and from the current offsite parking area and emissions associated with dropping off and picking up baggage, and processing passengers and vehicles near the cruise ship. Additionally, to further mitigate air emissions, the SCSPA has agreed that the space remaining on the south end of the terminal would not be re-utilized to handle cargo. The space remaining on the south end of the terminal would be redeveloped and reunited with the City of Charleston.

In summary, the applicant's request is permissible by law. The proposed work is in line with the general character of the surrounding area. Based on the foregoing, SCDHEC issued a permit authorizing the installation 5 pilings, additional structural changes to building 322, and the installation of two covered staging areas. These activities were issued with the following special conditions:

1. Provided that operations for the new passenger cruise facility at Union Pier Terminal is conducted in accordance with the attached Voluntary Cruise Management Plan (Attachment A). If there are any future changes proposed to the Voluntary Cruise Management Plan, the Department must be included in the notification process as outlined on the second page of the Voluntary Cruise Management Plan titled "Clarification Process of City Consultation Regarding Cruise Management Plan Alteration".

2. Provided that the construction detailed in this permit does not begin until after the Memorandum of Agreement, dated March 26, 2007 (as amended), between the State Ports Authority and the SCDHEC has been revised and finalized.

3. Provided that the SPA requires its contractors, for the activities addressed under this permit, to:

    a. perform work in compliance with all applicable local, state, and federal environmental laws and requirements.

    b. use low emission vehicles that conform to the federal Tier 2 or higher emissions standards for all nonroad equipment between 100 and 750 horsepower.

    c. turn off construction equipment and vehicles not in active use.

    d. implement dust control using the best management practices that may include, but not be limited to, water spraying, applying mulch and establishing vegetation, applying polymers, and spraying tackifiers in compliance with state and federal environmental regulations.

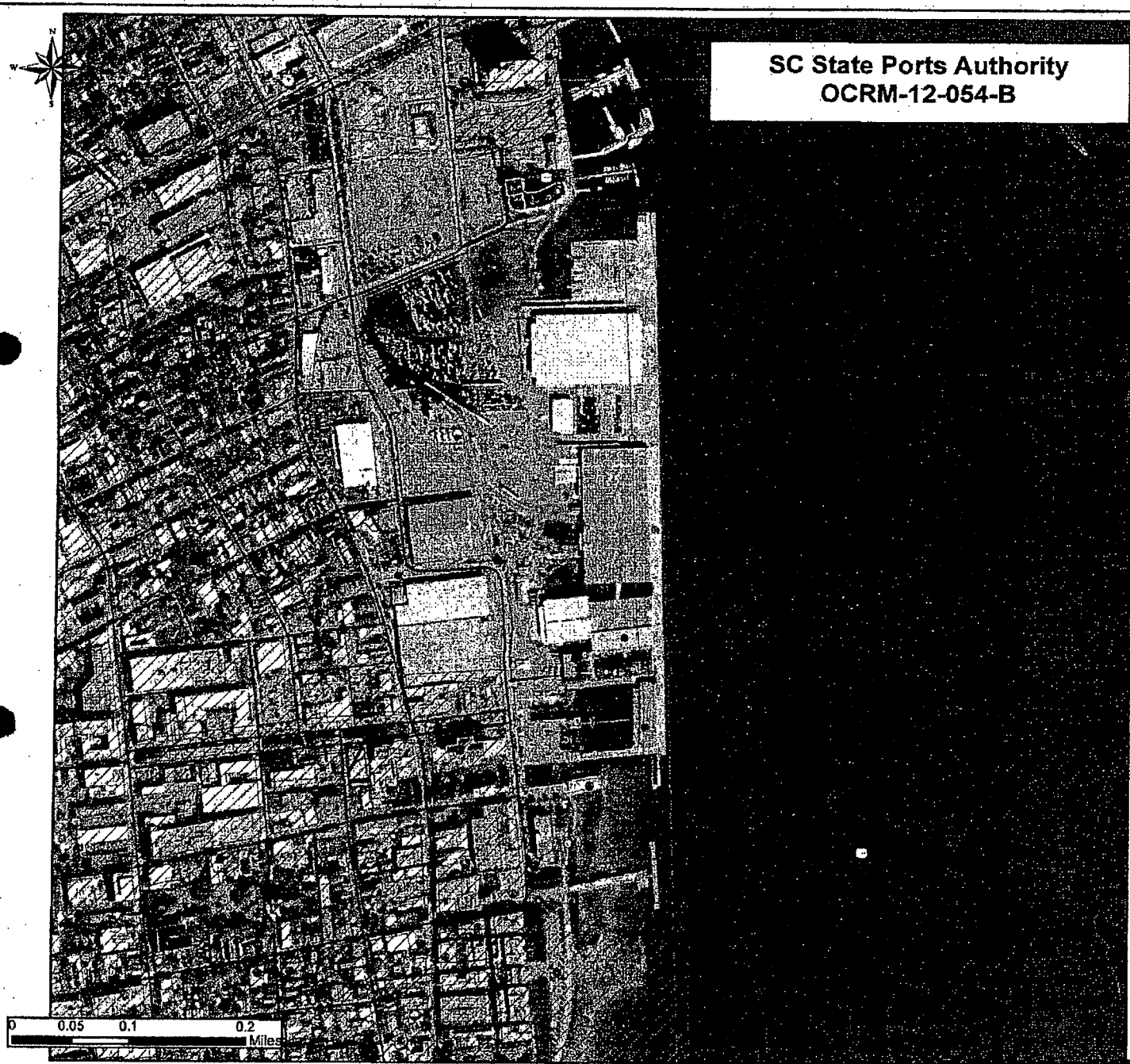
    e. require that all diesel vehicles, construction equipment and generators on site use ultra-low sulfur diesel (15 ppm), a biodiesel blend approved by the original engine or equipment manufacturer with sulfur content of 15 ppm or less, or other clean burning alternative fuel such as propane, where such fuel is commercially and reasonably available.

4. Provided that any disturbed critical area adjacent to the construction site be restored to original contours and conditions upon project completion.

5. Once the project is initiated, it must be carried to completion in an expeditious manner in order to minimize the period of disturbance to the environment.

6. Provided that an as-built survey of the modified terminal facility must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all components of the new terminal facility, and must list the starting and ending coordinates of the new terminal facility in the SC State Plane Coordinate System, which can be obtained by survey-grade Global Positioning

SC State Ports Authority
OCRM-12-054-B



- Base Line
- Set Back Line
- Critical Area
- Enforcements
- CA_Permits_12
- CA_Permits_09-11
- CA_Permits_05-08
- CA_Permits_01-04
- CA_Permits_92-00
- CA_Permits_80-91
- CA Maint Repair
- OCRM_Marinas
- Claimed Marsh
- Dock Master Plans
- Endangered_Species_Pts
- PIPING_PLOVER_HABITAT (USFWS)
- SCORE Sites
- SFMO
- DNR_Marinas
- Boat_Ramps
- Salt/Fresh Water Line
- SREAC Sites
- COBRAS
- LIVE OYSTER
- DEAD SHELL DEPOSITS
- Shellfish Lease/Permit Areas
- Civil War Earthwork
- Archaeological Points
- Archaeological Polys
- Historic Structures
- Historic Features
- Historic Areas
- National Register Points
- National Register Polys
- Restricted NR Points
- Restricted NR Polys
- Cultural Resource Survey Lines
- Cultural Resource Survey Polys
- Add_AMP_04-05
- AMP
- Chicora Sites
- Above Ground Storage Tanks
- Leaking UST
- UST
- CERCLA
- Not Listed on 303d List; Not Within TMDL
- Listed on 303d List
- Listed on 303d List; Within TMDL
- Not Listed on 303d List; Within a TMDL
- FISH MONITORING STATIONS
- APPROVED TMDL SITES
- Federally Protected
- Privately Protected
- State Protected
- ACE_BASIN_TASKFORCE_BOUNDARY
- NERR
- Edisto Island Trust
- FED_ADMIN_LAND
- Streets
- Parcels
- Coastal Zone Counties

charl06se.jp2

RGB

- Red: Band_1
- Green: Band_2
- Blue: Band_3

R.000181

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **SOUTH CAROLINA STATE PORTS AUTHORITY'S RESPONSE TO PETITIONERS' MOTION TO REMAND**

Pursuant to Rule 19, Rules of Procedure for the Administrative Law Court (RPALC), Respondent South Carolina State Ports Authority (Ports Authority) files this response to the Motion to Remand (Motion) filed by Petitioners Preservation Society of Charleston, Charleston Communities for Cruise Control, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Anson House Condominium Owners Association, Charleston Chapter of the Surfrider Foundation, and Historic Charleston Foundation (collectively, Cruise Opponents), seeking the remand of this contested case request to the Board of Respondent Department of Health and Environmental Control (DHEC). For the reasons detailed herein, the Motion is meritless and should be summarily denied.

PROCEDURAL HISTORY

This contested case arises from DHEC's approval, through its Office of Ocean and Coastal Resource Management (OCRM), and issuance of a Critical Area Permit for the installation of five new pile clusters in the marl to support renovations to an existing building on the terminal footprint of the Ports Authority's Union Pier Terminal (UPT). The purpose of the five pile clusters requiring a permit is to provide support for the installation of elevators and escalators which will provide boarding cruise passengers access to the mezzanine level of the UPT. Such access is necessary for the UPT to be in compliance with both the Americans with Disabilities Act (ADA) and United States Customs and Border Protection (CBP) regulations.

In order to initiate the required process to achieve compliance with the ADA and CBP regulations, on January 27, 2012,[1] the Ports Authority submitted a joint Federal (to the Corps) and State (to OCRM) application for activities affecting the waters of the United States and critical areas of South Carolina. On or about August 3, 2012, OCRM published the permit application public notice for the project requesting comment. OCRM subsequently issued notice on or about December 18, 2012 that it was authorizing the project and construction of the five pile clusters under Building #322 on UPT. Thereafter, on January 2, 2013, Cruise Opponents filed Requests for a Final Review Conference by the DHEC Board of the OCRM Staff Decision. On January 10, 2013,[2] the DHEC Board voted unanimously to decline to hear the matter in a Final Review Conference. In response, on or about February 11, 2013, Cruise Opponents filed a Request for Contested Case challenging the merits of DHEC's decision.[3]

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[1] The application was subsequently resubmitted on February 27, 2012.

[2] OCRM Staff also filed a response to the requests of Cruise Opponents on January 10, 2013, recommending that the DHEC Board confirm OCRM's decision to issue the Permit.

[3] Nowhere in the contested case request did Cruise Opponents reference the alleged procedural infirmity that forms the basis of this meritless Motion.

FACTUAL BACKGROUND

The UPT is a 63-acre property located along the Cooper River near the downtown portion of the Charleston peninsula. UPT is owned and operated by the Ports Authority as a fully operational marine terminal and, as currently configured, it accommodates upwards of 200 cargo ships annually, in addition to the requisite trains and trucks necessary to service those cargo ships, on the northern end of the property as well as the designated cruise passenger facility on the southern end of the terminal. In addition to the roll-on/roll-off cargo facilities used for shipping automobiles, trucks and heavy equipment, UPT has accommodated passenger vessel calls for over 100 years and continuously since 1973.

In order to efficiently accommodate the cruise passenger demand and minimize any adverse impacts on the community, as well as comply with current terminal security requirements, the Ports Authority undertook a capital improvement plan for UPT. This plan involves the relocation of certain cargo operations to other Ports Authority terminals and the renovation of facilities and relocation of the passenger cruise operations to the northern end of UPT. The planned improvements to the UPT involve renovations to existing buildings on the terminal footprint, demolition of older structures, the proposed dedication of much of the existing terminal acreage to redevelopment, including public green spaces, and restoration of the natural waterfront and other private development undertakings. Moreover, these improvements will all be done in an economically efficient and environmentally sustainable way.

Further, the planned renovations to the UPT cruise facilities are necessary in order to bring the facilities in compliance with current terminal security requirements mandated by federal law under the oversight of the United States Customs and Border Protection (CBP). See Exhibit A, Corps Mem. For Record, SAC-2003-13026, dated April 20, 2012 at 1 (The "proposed

renovations to Building 322 are considered minor deviations in the existing structure's configuration **that are required to comply with Federal regulations and current terminal security requirements that were established after September 11, 2001.**") (emphasis added). In 2007, the Ports Authority entered into a Memorandum of Understanding with the CBP for the conditional approval of ongoing cruise operations on a continuing trial basis, which has since been renewed annually, with the understanding that a passenger terminal facility with improved security would be needed for continued operations. See Exhibit B, Ports Authority Joint Federal and State Permit Application, dated January 27, 2012. In addition, the relocation of existing cargo facilities from the northern end of the UPT footprint will permit the cessation of existing rail operations to UPT, which serves as a traffic impediment, as a part of an overall traffic management plan that will result in a net neutral traffic impact on the UPT and surrounding areas. In short, the Ports Authority's capital improvement plan will aid the economic development and environment of Charleston.

Currently, the UPT cruise passenger operations are located on the southern end of the terminal footprint. The Ports Authority's proposed capital improvement plan involves renovating a warehouse located on the northern end of the UPT footprint, Building #322, and relocating the cruise passenger operations, in their entirety, to the renovated Building #322. The proposed actions which implicate OCRM's permitting jurisdiction for this renovation are the installation of five pile clusters driven into the marl to support the construction of three elevators and two escalators in the renovated Building #322. The pile clusters—an additional five to the existing thousands—will provide additional support for the existing structure of Building #322, within the existing footprint of the already-developed marine terminal.

The renovations to Building #322 also include other improvements which do not affect the waters of the United States, including remodeling of the mezzanine with ADA-compliant elevators and escalators, renovations to the interior and exterior of Building #322, canopies over pedestrian areas, and a loading dock for transferring ship store supplies from delivery trucks to the cruise ship. The entirety of the effect of this project is that current cruise operations will be moved to a location less than 600 yards to the north in a renovated warehouse, still within the existing boundary of the Union Pier Terminal footprint.

DISCUSSION

THE MOTION IS MERITLESS WITH THE DUAL GOALS OF DELAYING THE CONTESTED CASE PROCEEDING AND HARASSING THE PORTS AUTHORITY.

The Cruise Opponents base their Motion on the groundless contention that the DHEC Board's declination to conduct a final review conference violates S.C. Code Ann. § 44-1-160(F). However, the Motion deliberately ignores the plain language of S.C. Code Ann. § 44-1-60[4] in an effort to mischaracterize the statute's intent, perpetuate a legal fiction, and delay these proceedings. The operative portion of Section 44-1-60(F) provides:

> (F) No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. **If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court.** The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten calendar days' written notice of the conference;

[4] The Ports Authority notes that the Motion incorrectly and repeatedly cites to the wrong statutory section. Instead of citing to S.C. Code Ann. § 44-1-60, in which the procedures before the DHEC Board are discussed, the Cruise Opponents consistently cite S.C. Code Ann. § 44-1-160, which discusses the ability of persons to bring a nuisance action.

> and advise the applicant that evidence may be presented at the conference.

(Emphasis added). The Cruise Opponents quote only the first sentence and ignore the rest of the section, contrary to governing law for statutory construction. See infra at 7-8 (discussing the legal fallacies of the Cruise Opponents' statutory construction); see, e.g., Greenville Water v. S.C. Dep't of Health & Envtl. Control, Docket No. 11-ALJ-07-0514-CC, Am. Order Granting Summ. Judg., dated March 30, 2012 (J. Anderson) ("In construing statutory language, a court must read the statute as a whole in light of its manifest purpose.") (citing Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 25, 579 S.E.2d 334, 338 (Ct. App. 2003)).

What is clear, when this section is read in its entirety, is that the General Assembly instilled in the DHEC Board the *discretion* to conduct a final review conference. This discretionary standard is explicitly recognized in the unambiguous language of subsection (F), which gives the DHEC Board the option of either holding a review conference, or declining to do so in writing. Id. ("If the board declines in writing to schedule a final review conference ... the staff decision becomes the final agency decision...."). The DHEC Board's discretion is further recognized in S.C. Code Ann. § 44-1-60(G)(1), which provides that a person affected[5] by a DHEC staff decision may file a request for contested case with the ALC within 30 days after:

> (1) **notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference**; or
> (2) the sixty calendar day deadline to hold the final review conference lapses and no conference has been held; or
> (3) the final agency decision resulting from the final review conference is received by the parties.

[5] S.C. Code Ann. § 44-1-60(G)(1) defines this category of persons as the applicant(s), permittee(s), licensee(s), or affected person.

(Emphasis added). Undeniably, the General Assembly has set forth a straightforward statutory scheme that recognizes three separate ways a DHEC staff decision will become final, such that an affected party may exercise his or her rights and challenge the decision in a contested case at the ALC. The only options under the statute are that (1) the DHEC Board declines to conduct a final review conference, (2) no final review conference is conducted within the sixty-day deadline, or (3) a final agency decision is issued by the DHEC Board following a final review conference. Not only does the statute contemplate the DHEC Board's discretion to decline review of a staff decision, it specifically provides for it.

In its Motion, the Cruise Opponents completely ignore the discretionary standard set forth in S.C. Code Ann. § 44-1-60(F). In fact, the Cruise Opponents skip over and do not cite, *at all*, the portions of the statute referencing the DHEC Board's ability to decline to conduct a final review conference. Nonetheless, "the legislature intends to accomplish something by its choice of words, and would not do a futile thing." Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) (citing State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964)). Ignoring these sections represents a calculated attempt on Cruise Opponents' part to subvert the General Assembly's intent and distort the law. In place of reasoned analysis, Cruise Opponents advocate reading other portions of S.C. Code Ann. § 44-1-60(F) in isolation to achieve their desired, yet erroneous, result. However, "[a] statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006); see also Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). Therefore a court should not concentrate on isolated phrases within the statute. Jasper County, 368 S.C. at 398, 629 S.E.2d at 629. Instead, a court must read the statute

as a whole and in a manner consonant and in harmony with its purpose. State v. Sweat, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), aff'd, 386 S.C. 339, 688 S.E.2d 569 (2010). To that end, courts must read the statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous," because "[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law." Sweat, 379 S.C. at 377-82, 665 S.E.2d at 651-54; see also State v. Gordon, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) ("[T]he court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law."). Contrary to the strained arguments made by Cruise Opponents, the mandatory requirements applicable to final review conferences, including the time period and manner in which they must be conducted, as referenced in S.C. Code Ann. § 44-1-60(F), are clearly only applicable **if** the DHEC Board decides to conduct a final review conference.

Moreover, the Cruise Opponents' literal interpretation of an isolated phrase in one sentence of Section 44-1-60(F) providing that "a final review conference must be conducted by the board" flies in the face of well established South Carolina statutory construction law. In Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 815 (1942), the South Carolina Supreme Court stated:

> It often happens that the true intention of the Legislature, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which is the prime and sole object of all rules of construction, can be accomplished only by departure from the literal interpretation of the language used. Hence, Courts are not always confined to the literal meaning of a statute; the real purpose and intent of the lawmakers will prevail over the literal import of the words.

In other words, "[i]t is ... an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words." Id. at 816. It is clear in South Carolina that "courts are not confined to the literal meaning of a statute where the literal import of the words contradicts the real purpose and intent of the lawmakers," and, to this end, "[t]o obtain the real purpose and intent of the lawmakers a court must not look to the 'phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.'" Wade v. South Carolina, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002); see also Arkwright Mills v. Murph, 219 S.C. 438, 65 S.E.2d 665 (1951) (if necessary the court will reject literal import of words in a statute in determining legislative intent); Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948) (real purpose and intent of legislature prevails over literal import of a statute); Norman J. Singer and J.D. Shambie Singer, 2A Sutherland Statutory Construction § 46:7 (7th ed.) (2012) ("[I]t is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be construed to agree with the intention of the legislature.").

With regard to Section 44-1-60(F), the General Assembly's intent to instill in the DHEC Board the *option* to conduct a final review conference is unambiguous. As discussed herein, this discretionary standard is expressly recognized in the plain language of subsection (F), which gives the DHEC Board the option of either holding a review conference, or declining to do so in writing and is further recognized in S.C. Code Ann. § 44-1-60(G)(1), which provides, *inter alia*, a time frame wherein a person affected by a DHEC staff decision may file a request for contested case with the ALC after notice that the board declined to hold a final review conference.

By ignoring an operative section of S.C. Code Ann. § 44-1-60(F) and advocating for an isolated, literal interpretation of the relevant statutory language in contradiction of established

South Carolina law in favor of this frivolous motion, Cruise Opponents not only misrepresent the plain language of the statute, but also disregard case law of this Court, which has expressly and repeatedly recognized the DHEC Board's discretion to decline to conduct a final review conference. See e.g., Trident Medical Center, LLC, v. S.C. Dep't of Health & Envtl. Control, Docket Nos. 09-ALJ-07-0332-CC, 09-ALJ-07-0333-CC (Consolidated), 09-ALJ-07-0336-CC (Consolidated), 2012 WL 7187635, (Sept. 26, 2012) (J. McLeod) ("If the Department Board does not hold a final review conference, the staff decision becomes the final agency decision unless an applicant or affected person timely requests a contested case hearing before the Administrative Law Court."); Wise v. S.C. Dep't of Health & Entvl. Control, Docket No. 10-ALJ-07-0851-CC, 2011 WL 2413274 (Feb. 23, 2011) (J. McLeod) ("The Board can either conduct a review conference and issue a final agency decision, or decline to conduct a review conference, in which case the staff decision becomes the final agency decision.") (citing S.C. Code Ann. § 44-1-60(F)), rev'd on other grounds Op. No. 2013-UP-072 (Ct. App. Filed Feb. 13, 2013); Hill v. S.C. Dep't of Health & Envtl. Control, Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666, (Dec. 9, 2010) (J. Anderson) ("The DHEC Board [] has sixty days within which to hold a review conference. [] The Board **may** (1) hold a final review conference and issue a decision; (2) decline in writing to hold a final review conference; or (3) take no action within the sixty-day period. [] If the Board either declines in writing to schedule a final review conference or allows the sixty days to lapse without any action, then the staff decision becomes the final agency decision and an affected party may request a contested case hearing before the ALC pursuant to Section 44-1-60(G).") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); Pinckney Point, LLC v. S.C. Dep't of Health & Envtl. Control, Docket No. 08-ALJ-07-0363-CC, 2009 WL 6527323, (Nov. 13, 2009) (J. Anderson) ("A staff review does not require the

presentation of evidence in a hearing, and **the Board's review is discretionary, not a matter of right.**") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); McNair v. S.C. Dep't of Health & Envtl. Control, Docket No. 09-ALJ-07-0040-CC, 2009 WL 6527328, (Nov. 9, 2009) (J. Anderson) (same); Charles Sarrio v. S.C. Dep't of Health & Envtl. Control, Docket No. 08-ALJ-07-0381-CC, 2009 WL 8167917, (Oct. 23, 2009) (J. Anderson) (same).

The DHEC Board's discretionary right to conduct a final review conference has also been recognized by multiple appellate courts of this State. See e.g., Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control, No. 2010-155629 (Feb. 27, 2013) (C.J. Toal) (reciting the DHEC Board's decision not to conduct a final review conference and according the DHEC staff decision deference) (opinion and decision still subject to further consideration and revision); Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference rendering the staff decision the final decision); Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, No. 2010-159446 (March 6, 2013) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC); Dreher v. S.C. Dep't of Health & Envtl. Control, 399 S.C. 259, 730 S.E.2d 922 (Ct. App. 2012) (petition for *certiorari* pending) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC).

Moreover, Cruise Opponent South Carolina Coastal Conservation League (League) and its counsel (including the same counsel representing the Cruise Opponents in the present case) affirmatively represented to the South Carolina Supreme Court that a final review conference is optional and discretionary with the DHEC Board. Specifically, the League stated: "**The Board has the option of conducting a conference or not after a request for review is made.** If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency

decision'... S.C. Code Ann. § 44-1-60(F)." Exhibit C, League Petition for Writ of Certiorari at 5 n.3, Case Nos. 07-ALJ-07-0107-CC, -0108-CC, dated Jan. 20, 2009 (emphasis added). Thus, the League and its counsel and their fellow anti-cruise crusaders have acknowledged the plain and unambiguous operation of the statutory scheme before the South Carolina Supreme Court, conducted themselves in accordance with the statutory scheme for years and in numerous permitting challenges, and now reverse course in an effort to advance this frivolous motion.

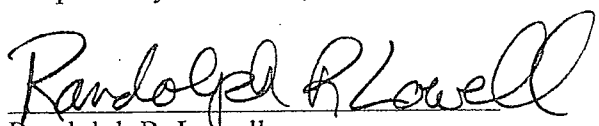
Proper procedure was followed in this case when the DHEC Board declined, in writing, to conduct a final review conference of the staff decision. At bottom, this motion is intended only to harass and delay the Ports Authority as a part of Cruise Opponents' overarching goal of extinguishing the cruise industry in Charleston and justifies the imposition of sanctions, including dismissal of the pending case and an award of attorneys' fees and costs. The Ports Authority specifically reserves its right to file a subsequent motion for sanctions pursuant to Rule 72, RPALC, Rule 11, SCRCP, and the South Carolina Frivolous Sanctions Proceedings Act, S.C. Code Ann. §§ 15-36-10 et seq.

CONCLUSION

For the reasons provided herein, the Cruise Opponents' Motion is meritless, contrary to the plain language of S.C. Code Ann. § 44-1-60, and can be dismissed out of hand and summarily denied. Accordingly, the Ports Authority requests the Court deny Cruise Opponents' frivolous motion.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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March 14, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control,	)	Docket No. 13-ALJ-07-0056-CC
Petitioners,	)	**CERTIFICATE OF SERVICE**
v.	)	
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Respondent South Carolina State Ports Authority's Response to Petitioners' Motion to Remand** by placing same in the care and custody of the United States Postal Service to the following:

Amy Armstrong, Esquire
Michael G. Corley, Esquire
South Carolina Environmental Law Project
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Charleston, SC 29405

Breanna M. Karns

Breanna M. Karns

Columbia, South Carolina
This 14th day of March 2013.

EXHIBIT A

CESAC-RD-SP
Application: SAC-2003-13026

MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Memorandum Documenting Nationwide Permit/Regional General Permit Verification

Applicant: South Carolina State Ports Authority

Reviewer: Nathaniel I. Ball **Date of Review:** April 18, 2012

On-Site review: ☐Yes ☒No **Off –Site Review:** ☒Yes ☐No

Project Location ***(Waterway, Section, Township, Range, City, County, State):*** Union Pier Terminal is located near the intersection of Market Street and Washington Street in Charleston, South Carolina.

Pre-Construction Notification Receipt Date: January 27, 2012 **Complete?** ☐Yes ☒No

Additional Information Requested Date: February 15, 2012, March 15, 2012, and April 5, 2012. The Corps requested additional information about the avoidance and minimization of potential impacts to waters of the United States, the method for installing the additional pilings, and clarification about the limits of waters of the United States on the project site.

Pre-Construction Notification Complete Date: April 16, 2012

Waters of the US: The existing pile supported deck and wharf are located in the Cooper River, a navigable water of the United States.

Authority: ☒Section 10 ☐Section 404 ☐Section 103

Project Description ***(Describe activities in waters of the U.S. considered for verification):*** The proposed activities in waters of the United States consist of the installation of additional pilings underneath a portion of a previously permitted pile supported wharf at Union Pier. The existing wharf is 2,470 feet long and includes several buildings that are currently used to support commercial shipping activities (break bulk cargo, Ro-Ro, passengers, etc). As described below, the SCSPA has operated a passenger facility at Union Pier for more than 40 years. Therefore, the renovation of Building 322 to consolidate existing activities at Union Pier and to increase the efficiency of the existing passenger facility is not considered a "change in use".

With regard to Nationwide Permit 3 (NWP 3), the existing wharf is considered a currently serviceable structure and the additional pilings and the proposed renovations to Building 322 are considered minor deviations in the existing structure's configuration that are required to comply with Federal regulations and current terminal security requirements that were established after September 11, 2001. In addition, renovating an existing building at Union Pier avoids and minimizes potential impacts to waters of the United States and will enable the SCSPA to continue operating the existing passenger facility at Union Pier while the necessary improvements are being constructed.

Site Assessment ***(Describe the present land use, cover type, and a qualitative assessment of the aquatic resources):*** The project site is developed as Union Pier Terminal and has been used for different types of commercial shipping for more than 100 years. The existing marine terminal has 2,470 linear feet of continuous pile supported wharf and berth space. The proposed pilings will be located **underneath** Building 322. This portion of Union Pier was redeveloped between 35 and 40 years ago. In order to construct this portion of the existing pile supported structure and Building 322, the SCSPA removed old pilings and structures and dredged approximately 50,000 cubic yards of dredged material, which was shifted back and forth across the project site to provide access for construction and pile driving equipment. The existing structure is operated and maintained by the SCSPA to meet the commercial shipping needs of their customers. The SCSPA maintains the existing berth at a depth of -45 feet Mean Low Water (MLW).

Type of Permit Requested: NWP 3 **RGP #**

Pre-construction Notification Required: ☒Yes ☐No Although the proposed activities in waters of the United States are considered minor, pre-construction notification is required because Union Pier Terminal is located adjacent to the Charleston Harbor Federal Navigation Project.

Waiver required to begin work ***(see GC 31 (a)(2) as applied to appropriate NWPs):***
☐Yes ☒ No
Rationale:

Coordination with Agencies/Tribes Needed: ☐Yes ☒No Date:
Resolution:

Commenting Agencies:
Coordination Needed/Required: ☐Yes ☒No
(If yes, check appropriate agency(s))
US Fish and Wildlife Service ☐
US Environmental Protection Agency ☐
National Marine Fisheries Service ☐
State Agency (list commenting state agencies) ☐
State Historic Preservation Office ☐
Other: ☐

Substantive Issues Raised and Corps Resolution ***(Consideration of Comments):***

Compliance with Other Federal Laws ***(If specific law is not applicable write N/A; however, you must provide an 'effects' determination):***

a) Endangered Species Act:
Name of species present: The following species are known to occur in Charleston County, South Carolina: West Indian manatee (*Trichechus manatus*), Kemp's ridley sea turtle (*Lepidochelys kempii*), Leatherback sea turtle (*Dermochelys coriacea*), Loggerhead sea turtle (*Caretta caretta*), Green sea turtle (*Chelonia mydas*), Shortnose sturgeon (*Acipenser brevirostrum*), and Atlantic sturgeon (*Acipenser oxyrinchus*).
Potential or Critical Habitat present: The proposed pilings are located underneath a pile supported wharf at an existing commercial shipping facility. The project site is not considered potential or critical habitat for any of the species that are identified above.
Effects determination: No Effect

Date of Service(s) concurrence: N/A
Basis for "no effect" determination: The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The proposed pilings will be installed using land based equipment and will have a negligible impact on aquatic resources or the available habitat underneath the existing wharf. According to the SCSPA, the pilings will be placed rather than dropped into the water to avoid potential impacts to marine life in the water column. Once installed the actual footprint of the additional pilings represents a very small area among the thousands of pilings that are already located underneath the existing pile supported structure. Therefore, the installation of these additional pilings is expected to have "no effect" on Federally listed threatened or endangered species that are known to occur in Charleston Harbor.
Additional information (describe steps taken to address concerns, as needed):

b) Magnuson-Stevens Act (Essential Fish Habitat):
Name of species present: The estuarine substrates, water column, and estuarine waters near the project site are considered Essential Fish Habitat (EFH) for white shrimp (*Litopenaeus setiferus*), brown shrimp (*Farfantepenaeus aztecus*), adult summer flounder (*Parlichthys dentatus*), and adult and juvenile blue fish (*Pomatomus saltatrix*).
Effects determination (Is this a project that "may adversely affect essential fish habitat?): No Effect
Date of Service(s) concurrence: N/A
Basis for "no effect" determination: The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The proposed pilings will be installed using land based equipment and will have a negligible impact on aquatic resources, estuarine waters, or the available habitat that is located underneath the existing wharf. In addition, the actual footprint of the additional pilings represents a very small area among the thousands of pilings that are already located underneath the existing pile supported structure. Therefore, the installation of these additional pilings is expected to have "no effect" on EFH.
Additional information (Describe steps taken to address concerns, as needed):

c) Section 106 of the National Historic Preservation Act:
Known site present: ☐ yes ☒ no
Survey required/conducted: ☐ yes ☒ no
Effects determination: No Potential to Cause Effect
Rationale: The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The DA permit (SAC-72-10-087-Revised) that authorized the construction of this portion of the wharf at Union Pier Terminal authorized the removal of old pilings and the excavation and backfilling of dredged material within the footprint of the structure. In order to provide both flotation and access for construction and pile driving equipment, approximately 50,000 cubic yards of dredged material was shifted back and forth across the project site during the construction of the existing structure.

As described above, the shallow open waters underneath the existing structure were disturbed by previous construction activities on the project site during the 1970s. According to our records, the entire pile supported wharf and the support facilities that are located on top of this structure have been extensively modified by previous work, including reconstruction, renovation, and/or extension at different times over the past 50 years. The existing wharf and Building 322, where the proposed

pilings will be located, is approximately 40 years old and is not considered eligible for the National Register of Historic Places.

The Corps acknowledges that a lawsuit has been filed in state court against Carnival Corporation, D/B/A Carnival Cruise Lines regarding the operation of the existing passenger terminal at Union Pier. In addition, the plaintiffs in the above referenced case have submitted "a request to be notified as consulting parties pertaining to any Section 106 review relating to Federal funding or permitting with respect to the Union Pier Cruise Terminal in Charleston, South Carolina." This request was submitted to several Federal agencies, including the Corps. Specifically, the plaintiffs expressed an interest in the preservation of historic properties that are located near the project site. However, for the reasons which follow, the Corps has determined that there is no potential to cause effects on historic properties and that no project-specific consultation is required under Section 106.

In accordance with the Standard Operating Procedures for the Regulatory Program dated July 2009, the Corps used 33 CFR 325 Appendix C, the Revised Interim Guidance for Implementing Appendix C dated April 25, 2005, and the Clarification of the Revised Interim Guidance for Implementing Appendix C dated January 31, 2007 to determine the "permit area" for the proposed project. As described in the Revised Interim Guidance, "(t)he limits of the "permit area" are constrained by the extent of Federal Control and responsibility over a particular project (i.e., the undertaking)." In this case, the proposed "undertaking" consists of the installation of additional pilings in waters of the United States underneath an existing, previously permitted pile supported wharf.

Similar to maintenance dredging, the installation of additional pilings underneath an existing wharf and the renovation of existing buildings that are located on a previously permitted pile supported structure, such as Building 322 at Union Pier, are considered maintenance activities. The "permit area" for this type of project is limited to the footprint of the proposed activities in waters of the United States. Therefore, the Corps' evaluation focuses on the footprint of the proposed pilings and any potential impacts associated with the installation of the additional pilings because of the limited scale and magnitude of the proposed undertaking.

Direct impacts associated with the installation of the additional pilings will occur underneath the existing wharf and have no potential to cause effects to historic properties pursuant to 36 CFR 800.3(a)(1). As described above, the Corps recognizes that Union Pier is located adjacent to historic properties, such as the U.S. Customs House. However, effects associated with the installation of additional pilings, such as noise associated with construction or pile driving equipment, will be short-term and negligible, and, therefore, will not directly or indirectly alter the listing or eligibility characteristics of any historic properties. Existing conditions on or near the proposed undertaking include busy city streets, an existing railroad spur, and the operation of an existing commercial shipping facility. In sum, the installation of additional pilings underneath an existing (and extensively modified) wharf is understood to be the type of activity that is of such limited nature and scope that it has no potential to cause effects to historic properties in or outside of the "permit area," even if such properties were deemed to be present within the permit area.

Date consultation complete (if necessary): N/A
Additional information (Describe steps taken to address concerns, as needed):

d) Section 401 Water Quality Certification: The effective date for the 2012 Nationwide Permits is March 19, 2012. At this time, the S.C. Department of Health and Environmental Control has not certified the new NWPs. Therefore, an individual Section 401 Water Quality Certification is required.

Individual certification required: ☒ yes ☐ no A special condition of this NWP requires the permittee to obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations prior to beginning the authorized work.
☐Issued ☐Waived ☐Denied

e) Coastal Zone Management Act: The effective date for the 2012 Nationwide Permits is March 19, 2012. At this time, the S.C. Department of Health and Environmental Control has not certified the new NWPs. Therefore, an individual Coastal Zone Consistency Determination and/or a Critical Area Permit is required.
Individual certification required: ☒ yes ☐ no A special condition of this NWP requires the permittee to obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations prior to beginning the authorized work.
☐Issued ☐Waived ☐Denied

Additional information (optional):
f) Wild and Scenic Rivers Act:
Project located on designated or "study" river: ☐ yes ☒no
Managing Agency:
Date written determination provided that the project will not adversely affect the Wild and Scenic River designation or study status:
Additional information (optional):

g) Other

Special Conditions Required *(include rationale for each required condition/explanation for requiring no special conditions)*: ☒ yes ☐ no The existing pile supported wharf and the additional pilings are located within navigable waters of the United States. Therefore, the following special conditions will be included in the Nationwide Permit verification letter:

That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful and knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

That the permittee agrees to provide all contractors associated with construction of the authorized activity a copy of the permit and drawings. A copy of the permit will be available at the construction site at all times.

That the permittee shall submit a signed compliance certification to the Corps within 60 days following completion of the authorized work <u>and any required mitigation</u>. The certification will include:

1. **A copy of this permit;**
2. **A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;**
3. **A statement that any required mitigation was completed in accordance with the permit conditions;**
4. **The signature of the permittee certifying the completion of the work and**

mitigation.

The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

It is recognized that this structure is to be constructed on/or adjacent to an area subject to a prism and/or disposal easement held by the United States in perpetuity in conjunction with a Congressionally authorized project for the maintenance and improvement of Charleston Harbor. This permit does not convey any property rights either in real estate or material or any exclusive use privileges; nor does it relinquish any right the United States has for the use of its easement or the maintenance and future widening or deepening of Charleston Harbor pursuant to its easement rights.

It is understood and agreed that if the District Commander determines this structure shall in any way in the future conflict with the improvement, operation, maintenance and widening or deepening of Charleston Harbor, the owners themselves, their heirs, successors and assigns will remove said structure within 45 days from the date that written notice is given by the District Commander, and there shall be no entitlement to compensation from the United States for damage or injury.

Conveyance of this permit applies only to the structure authorized and does not authorize the construction of any permanent structure or any structure suitable for habitation or any utility leading either to permanent structures suitable for habitation or to permanent structures within the bounds of areas on which the Corps of Engineers enjoys easement rights.

That permittee agrees that no permanent structures, beyond those authorized by this document, will be placed on the prism easement or on any adjacent disposal easement without written approval of the District Commander.

That the Secretary of the Army, representing the United States of America, hereby consents to the herein authorized facilities or structures to be located on or across easement lands vested in the United States of America for the construction and operation of Charleston Harbor. The permittee shall not engage in any act which may interfere with or abridge the easement interests of the United States, except those specifically authorized herein.

Compensatory Mitigation Determination: Has the applicant avoided and minimized impacts to the maximum extent practicable? ☒ yes ☐ no If "NO", Explain:

(1) Is compensatory mitigation required for unavoidable impacts to jurisdictional aquatic resources to reduce the individual and cumulative adverse environmental effects to a minimal level?

☐ yes ☒ no *[If "no," do not complete the rest of this section and include an explanation of why not here]* The proposed project consists of the installation of additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The potential impact to waters of the United States would affect a small area underneath an existing structure, and the additional pilings will be installed among thousands of pilings that are already located underneath this previously permitted structure. Therefore, compensatory mitigation is not required.

Is the impact in the service area of an approved mitigation bank? ☐ yes ☐ no

i. Does the mitigation bank have appropriate number and resource type of credits available? ☐ yes ☐ no

(2) Is the impact in the service area of an approved in-lieu fee program? ☐ yes ☐no

i. Does the in-lieu fee program have appropriate number and resource type of credits available? ☐ yes ☐ no

(3) Check the selected compensatory mitigation option(s):

☐ mitigation bank credits

☐ in-lieu fee program credits

☐ permittee-responsible mitigation under a watershed approach

☐ permittee-responsible mitigation, on-site and in-kind

☐ permittee-responsible mitigation, off-site and out-of-kind

(4) If a selected compensatory mitigation option deviates from the order of the options presented in §332.3(b)(2)-(6), explain why the selected compensatory mitigation option is environmentally preferable. Address the criteria provided in §332.3(a)(1) (i.e., the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project):

District Engineer's Decision:

The proposed activity would result in no more than minimal individual and cumulative adverse environmental effects and would not be contrary to the public interest.

PREPARED BY:

for Nathaniel I. Ball
Project Manager

20 April 2012
Date

REVIEWED BY:

Travis G. Hughes
Chief, Special Projects Branch
Regulatory Division

20 April 2012
Date

REVIEWED BY:

Tina B. Hadden
Chief, Regulatory Division

20 April 2012
Date

APPROVED BY:

Edward P. Chamberlayne, P.E.
Lieutenant Colonel, U.S. Army
Commander and District Engineer

20 APR 12
Date

EXHIBIT B

PORTS AUTHORITY

P.O. Box 22287
Charleston, S.C. 29413-2287 USA
(843) 856-7048
Fax: (843) 856-7067

January 27, 2012

Mrs. Rheta DiNovo, Director
Regulatory Programs Division
South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management
1362 McMillian Ave., Suite 400
Charleston, SC 29405

Dear Mrs. DiNovo:

Subject: Joint Federal & State Application Form for Activities Affecting Waters of The Unites States or Critical Areas of the State of South Carolina
Union Pier Cruise Facility – Renovation of Building 322
Union Pier Terminal – State Pier 2
Project Number CIF11E006B

The South Carolina State Ports Authority would like to submit the above referenced application for your review and approval. If you have any questions or require any additional information, please feel free to contact me.

Respectfully submitted,

Derrick L. Bellamy

Derrick L. Bellamy, P.E.
Staff Engineer

Enclosures

cc: Mr. Joe T. Bryant, SCSPA
Mr. David N. Smith, SCSPA

Joint Federal and State Application Form For Activities Affecting Waters of the United States Or Critical Areas of the State of South Carolina	This Space for Official Use Only Application No._____ Date Received_____ Project Manager_____ Watershed # _____

Authorities: 33 USC 401, 33 USC 403, 33 USC 407, 33 USC 408, 33 USC 1341, 33 USC 1344, 33 USC 1413 and Section 48-39-10 et. Seq of the South Carolina Code of Laws. These laws require permits for activities in, or affecting, navigable waters of the United States, the discharge of dredged or fill material into waters of the United States, and the transportation of dredged material for the purpose of dumping it into ocean waters. The Corps of Engineers and the State of South Carolina have established a joint application process for activities requiring both Federal and State review or approval. Under this joint process, you may use this form, together with the required drawings and supporting information, to apply for both the Federal and/or State permit(s).

Drawings and Supplemental Information Requirements: In addition to the information on this form, you must submit a set of drawings and, in some cases, additional information. A completed application form together with all required drawings and supplemental information is required before an application can be considered complete. See the attached instruction sheets for details regarding these requirements. You may attach additional sheets if necessary to provide complete information.

1. Applicant Last Name: Bellamy		11. Agent Last Name (agent is not required):	
2. Applicant First Name: Derrick		12. Agent First Name:	
3. Applicant Company Name: South Carolina State Ports Authority		13. Agent Company Name:	
4. Applicant Mailing Address: Post Office Box 22287		14. Agent Mailing Address:	
5. Applicant City: Charleston		15. Agent City:	
6. Applicant State: South Carolina	7. Applicant Zip: 29413-2287	16. Agent State:	17. Agent Zip:
8. Applicant Area Code and Phone No.: 843-856-7057		18. Agent Area Code and Phone No.:	
9. Applicant Fax No.: 843-856-7067		19. Agent Fax No.:	
10. Applicant E-mail: dbellamy@scspa.com		20. Agent E-mail:	
21. Project Name: Building No. 322 Renovation		22. Project Street Address: 32 Washington Street (Future 180 Concord St.)	
23. Project City: Charleston	24. Project County: Charlesotn	25. Project Zip Code: 29403	26. Nearest Waterbody: Cooper River
27. Tax Parcel ID: 459-00-00-009		28. Property Size (acres): 49.4	
29. Latitude: 32 47' 9"		30. Longitude: 79 55' 29"	

31. Directions to Project Site (Include Street Numbers, Street Names, and Landmarks and attach additional sheet if necessary):

Exit I-26 at Exit 219 - B (Morrison Drive & East Bay Street). From East Bay Street. turn left onto Calhoun Street. From Calhoun Street. turn right onto Concord Street. The Cruise Terminal will be at 180 Concord Street.

32. Description of the Overall Project and of Each Activity in or Affecting U.S. Waters or State Critical Areas (attach additional sheets if needed)

See Attached Sheet

33. Overall Project Purpose and the Basic Purpose of Each Activity In or Affecting U.S. Waters (attach additional sheets if needed):

See Attached Sheet.

34. Type and quantity of Materials to Be Discharged

Dirt or Topsoil:	_____	☐cubic yards
Clean Sand:	_____	☐cubic yards
Mud:	_____	☐cubic yards
Clay:	_____	☐cubic yards
Gravel, Rock, or Stone:	_____	☐cubic yards
Concrete:	_____	☐cubic yards
Other (describe):	_____	☐cubic yards
TOTAL:	_____	cubic yards

35. Type and Quantity of Impacts to U.S. Waters (including wetlands).

Filling:	_____ ☐acres	☐ sq.ft. _____	☐cubic yards
Backfill & Bedding:	_____ ☐acres	☐ sq.ft _____	☐cubic yards
Landclearing:	_____ ☐acres	☐ sq.ft _____	☐cubic yards
Dredging:	_____ ☐ acres	☐ sq.ft. _____	☐cubic yards
Flooding:	_____ ☐acres	☐ sq.ft. _____	☐cubic yards
Draining/Excavation:	_____ ☐acres	☐ sq.ft. _____	☐cubic yards
Shading:	_____ ☐acres	☐ sq.ft. _____	☐cubic yards
TOTALS:	_____ acres	_____ sq.ft.	_____ cubic yards

36. Individually list wetland impacts including mechanized clearing, fill, excavation, flooding, draining, shading, etc. and attach a site map with location of each impact (attach additional sheets if needed).

Impact No.	Wetland Type	Distance to Receiving Water body (LF)	Purpose of Impact (road crossing, impoundment, flooding, etc)	Impact Size (acres)
			Total Wetland Impacts (acres)	

37. Individually list all seasonal and perennial stream impacts and attach a site map with location of each impact (attach additional sheets)

Impact No.	Seasonal or Perennial Flow	Average Stream Width (LF)	Impact Type (road crossing, impoundment, flooding, etc)	Impact Length (LF)
			Total Stream Impacts (Linear Feet)	

38. Have you commenced work on the project site? ☒ YES ☐ NO If yes, describe all work that has occurred and provide dates.

New work has not commenced. Repairs to the building substructure has been started.

39. Describe measures taken to avoid and minimize impacts to Waters of the United States:

See Attached Sheet

40. Provide a brief description of the proposed mitigation plan to compensate for impacts to aquatic resources or provide justification as to why mitigation should not be required (Attach a copy of the proposed mitigation plan for review).

It is reasonably anticipated that the work planned will cause no adverse impacts to jurisdictional areas.

41. See the attached sheet to list the names and addresses of adjacent property owners.
A search is being performed to identify the names and addresses of the adjacent property owners.

42. List all Corps Permit Authorizations and other Federal , State, or Local Certifications, Approvals, Denials received for work described in this application.

#71-05-37 / #72-10-087 / 78-3R-337

43. Authorization of Agent. I hereby authorize the agent whose name is given on page one of this application to act in my behalf in the processing of this application and to furnish supplemental information in support of this application. [1]

Applicant's Signature Date

44. Certification. Application is hereby made for a permit or permits to authorize the work and uses of the work as described in this application. I certify that the information in this application is complete and accurate. I further certify that I possess the authority to undertake the work described herein or am acting as the duly authorized agent for the applicant. [1]

Derrick L. Bellamy 1-27-12

Applicant's Signature Date Agent's Signature Date

[1]The application must be signed by the person who desires to undertake the proposed activity or it may be signed by a duly authorized agent if the authorization statement in blocks 11 and 43 have been completed and signed. 18 U.S.C. Section 1001 provides that: Whoever, in any manner within the jurisdiction of any department of the United States knowingly and willfully falsifies, conceals, or covers up any trick, scheme, or disguises a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statements or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

32. Description of Overall Project and of Each Activity in or Affecting U.S. Waters or State Critical Areas

The South Carolina State Ports Authority's (SCSPA) first cruise sailing from Charleston seems to have been the Moore-McCormack Lines vessel, Brasil, which sailed from Charleston to Bermuda on April 30, 1967. Cruise activity in Charleston steadily grew resulting in a dedicated passenger facility and berth being constructed at Union Pier Terminal. The current passenger terminal was dedicated in October 1973. With continued growth of the cruise business and especially with the current terminal security requirements, the need for a new facility has become critical. To address the requirements of new Federal regulations, in 2007 the SCSPA entered into a Memorandum of Understanding with US Customs and Border Protection (CBP) for the conditional approval of ongoing cruise operations on a trial basis. That conditional approval has been renewed on an annual basis with the understanding that an improved facility would be needed for continued operations.

The current cruise operation involves the Passenger Terminal (Building #325), Buildings #302, #303 & #304 for stores and luggage. These buildings are denoted on Sheet 2 of 4.

The SCSPA evaluated several options for providing an improved facility satisfactory to CBP requirements. These options were explored in a study by Berimello Ajamil & Partners, Inc. completed September 2007 and in the Concept Plan for Union Pier Terminal completed in March 2010, by Cooper Robertson & Partners. Relocating the passenger facility to Building #322 is the preferred option. Building #322 is denoted on Sheet 2 of 4.

The only activity in the preferred option that will affect U.S. Waters or State Critical Areas will be the installation of five pile clusters driven to the marl to support three elevators and two escalators. All clusters will be within the footprint of the existing pile supported Building #322. Those locations are shown on the attached Sheet 3 of 4 with cross section shown on Sheet 4 of 4.

Other activities not affecting waters of the US, but relative to this project, will be general renovation of Building #322. The renovation will include a mezzanine accessed by ADA compliant elevators and escalators for boarding passengers to the cruise ships similar to the stairs and elevators serving the mezzanine of Building #325. Other landside improvements include renovation of the building's exterior and interior, canopies over pedestrian areas, and a loading dock for transferring ship stores from delivery trucks to the cruise ship. Ship store activity is now carried out in Buildings #302, #303, & #304. Building #330 (Sheet 2 of 4) will be demolished.

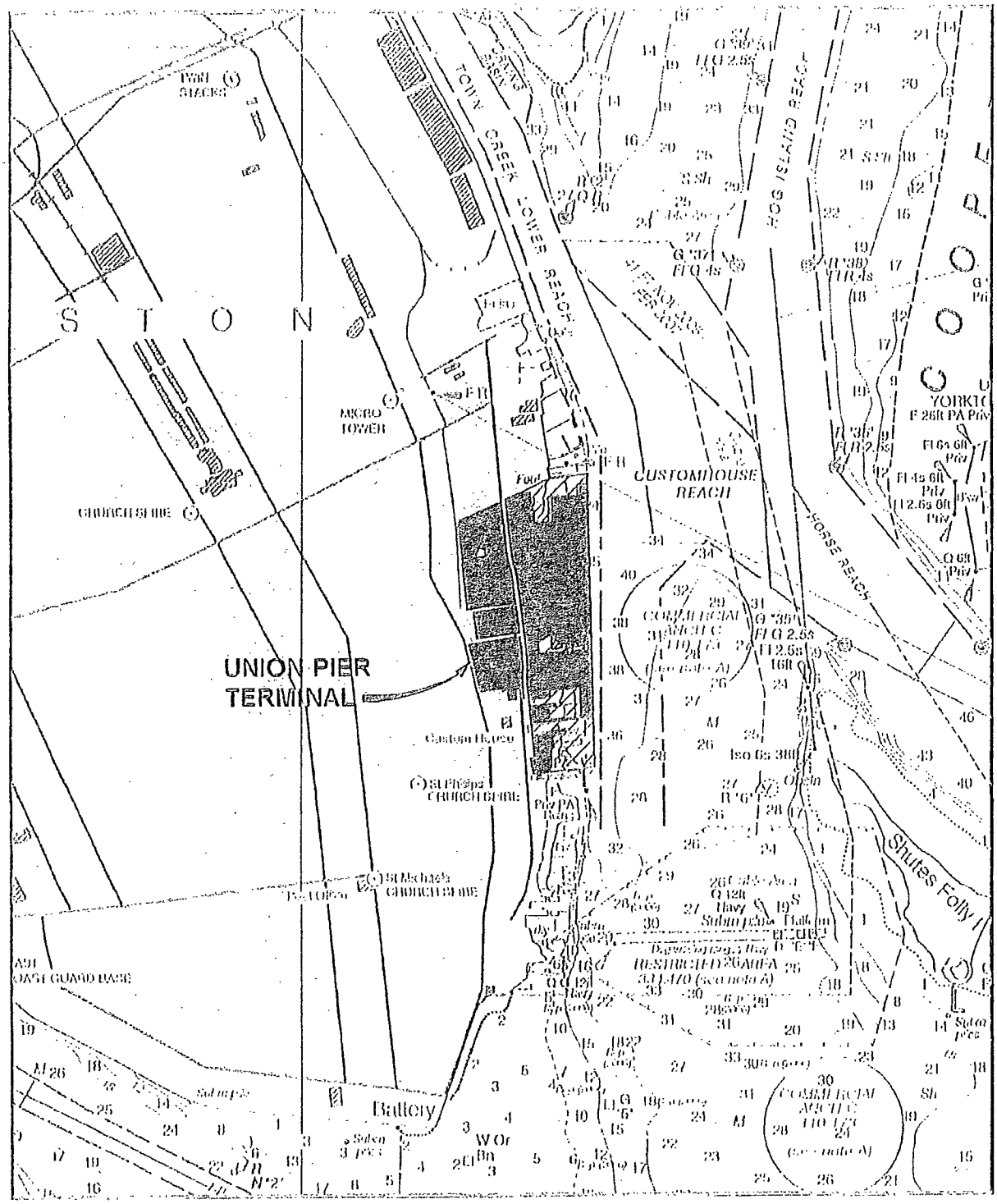
33. Overall Project Purpose...

The overall project purpose is to provide a passenger facility satisfactory for the continued handling of cruise vessels at Union Pier Terminal. The purpose of the installation of elevators and escalators (activity affecting US waters) is to provide ADA compliant access to the mezzanine level for boarding passengers.

39. Describe measures taken to avoid...

The use of Building #322 for cruise passenger operations reduces the impacts to US waters. Modifying the current Passenger Terminal (Building #325) by enlarging and improving its access to better accommodate current CBP requirements would impact wetlands immediately to the shore side of the building. Constructing a new facility on the footprint of Buildings #301 - #305 would involve, at a minimum, demolition of Buildings #301, #302, & #305 and reconstructing over water at the same site.

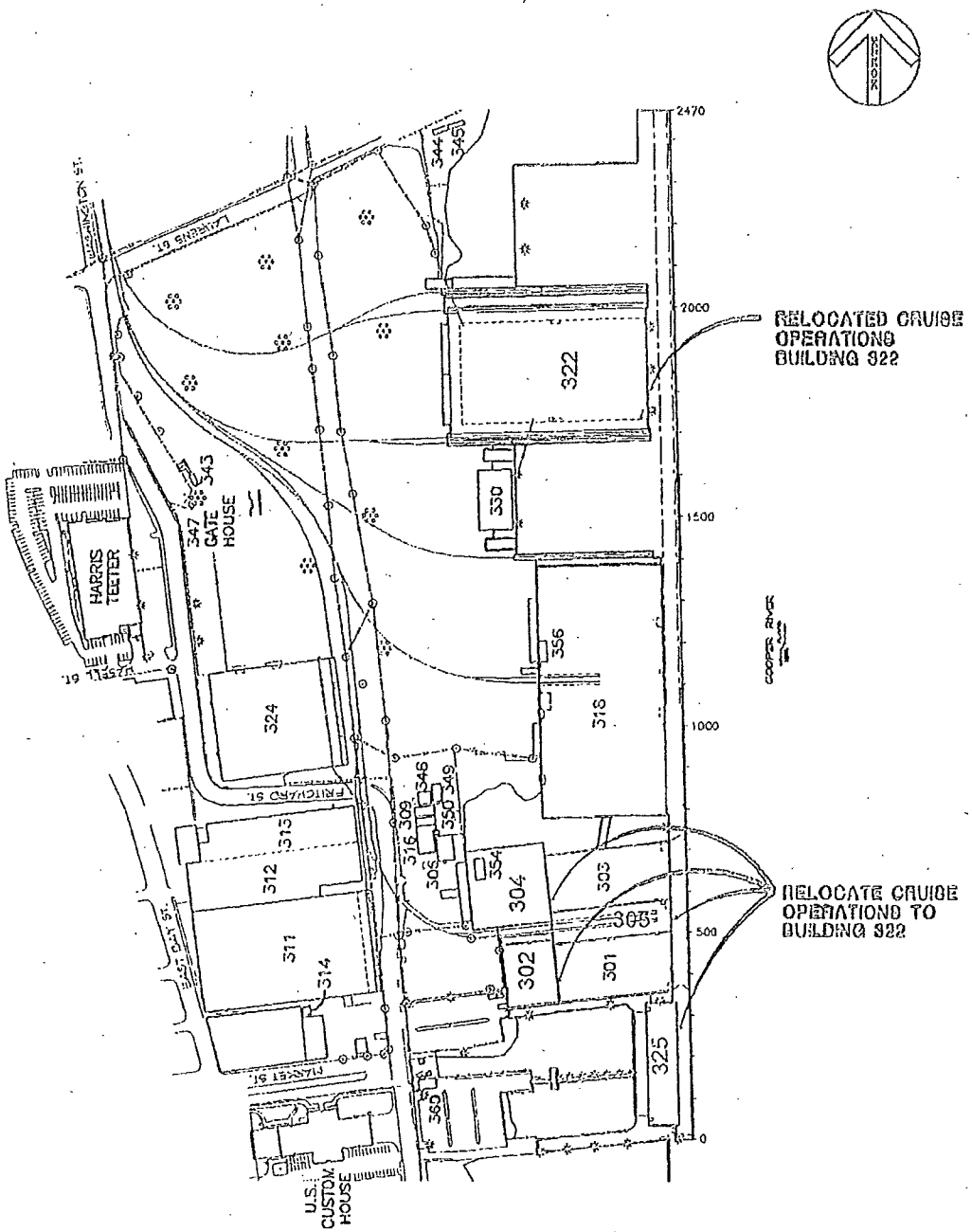
The use of Building #322 will also reduce the cargo capacity of Union Pier Terminal, since Building #325 (current passenger terminal) is not suitable for cargo. Its reuse would likely center around waterfront events, such as tall ships and other such water dependent activities. The use of Building #322 will also require the removal of existing rail service to Union Pier. This also affects Union Pier's cargo capability. The reduced cargo capacity and single passenger berth will result in a reduction in the number of large vessels calling Union Pier Terminal.



LOCATION

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E003B
FILE NAME: Upcplp1
DATE: DECEMBER 2011
SHEET: 1 OF 4

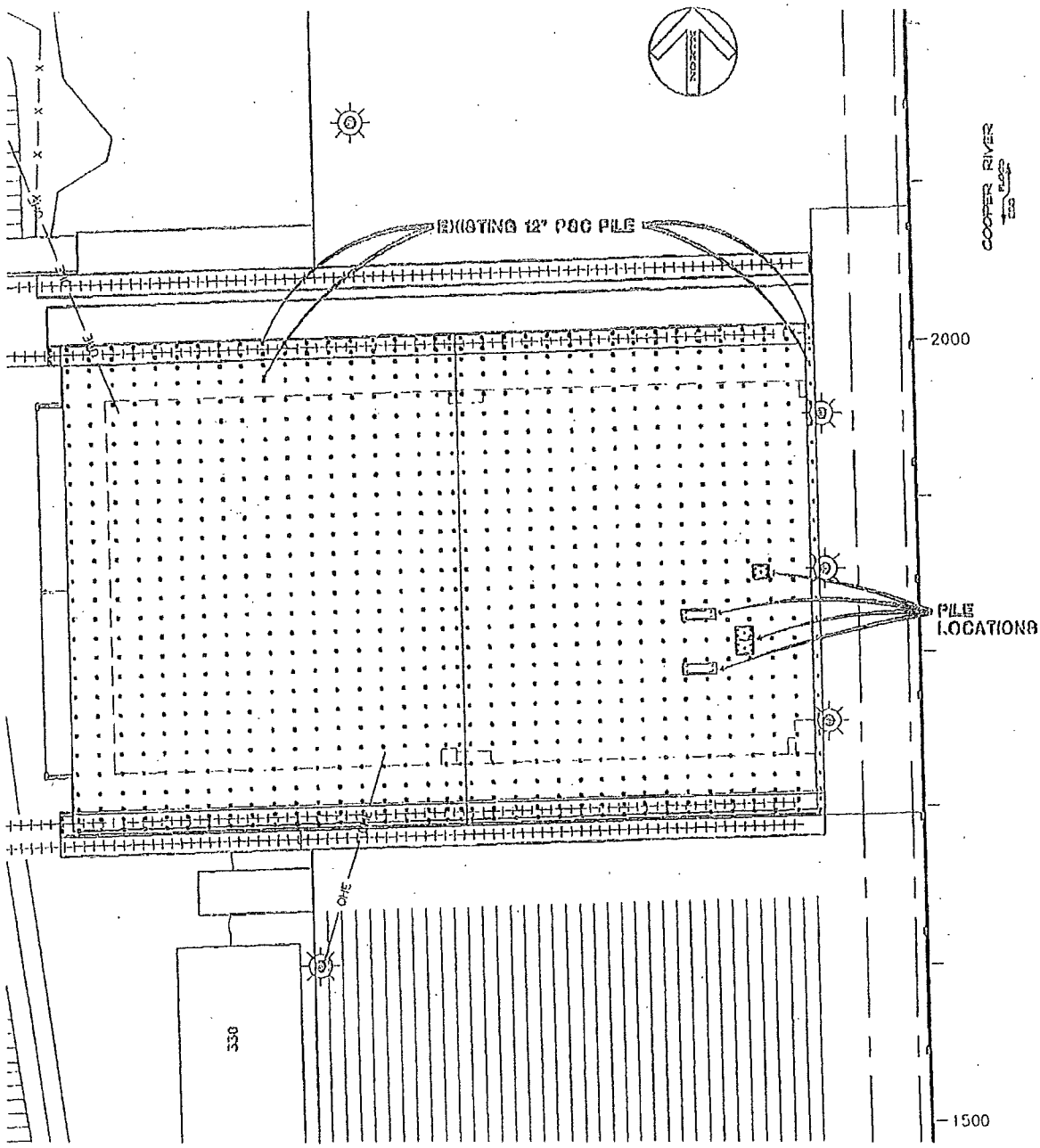


BUILDING LOCATION PLAN
UNION PIER TERMINAL

400 0 400
SCALE IN FEET

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E006B
FILE NAME: Upcplp2
DATE: DECEMBER 2011
SHEET: 2 OF 4



100 0 100

SCALE IN FEET

LEGEND

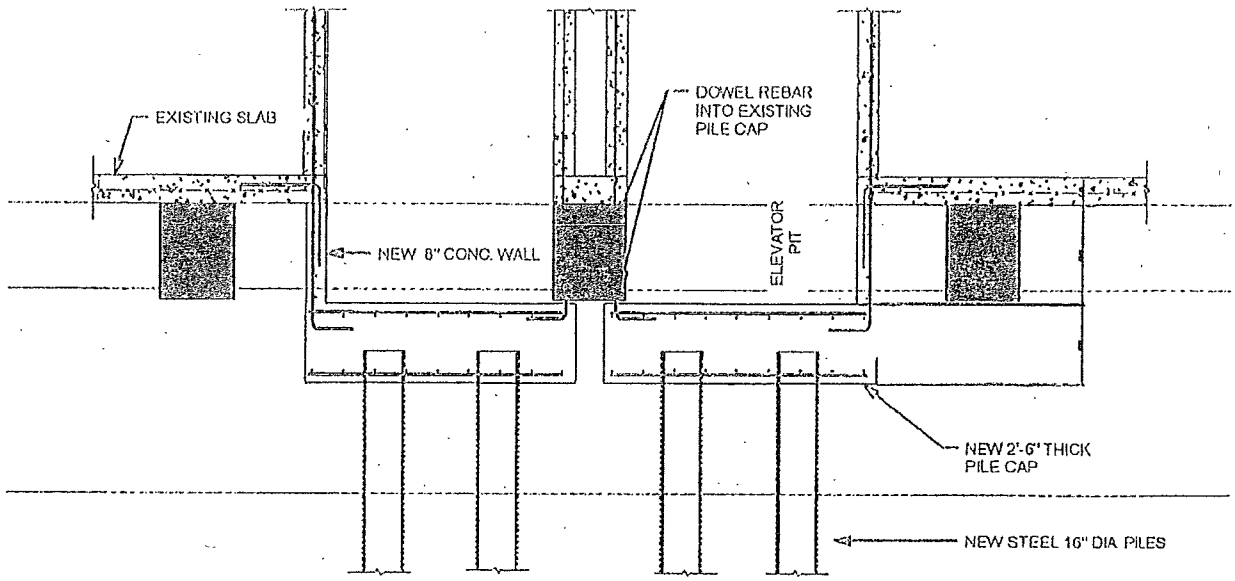
ELEVATORS

ESCALATOR

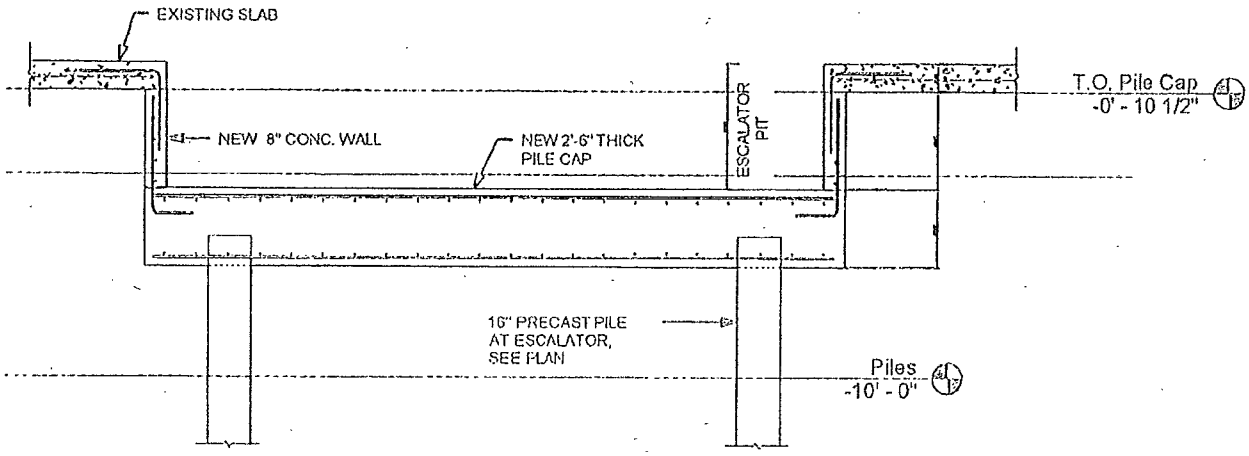
MODIFICATIONS (BUILDING 322)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E006B
FILE NAME: Upcp!p3
DATE: DECEMBER 2011
SHEET: 3 OF 4



A 65 SECTION ELEVATOR



B 65 SECTION ESCALATOR

MODIFICATIONS (CROSS SECTION)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E0008
FILE NAME: Upcplp1
DATE: DECEMBER 2011
SHEET: 4 OF 4

EXHIBIT C

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. Geathers, Administrative Law Judge

Case No. 07-ALJ-07-0107-CC
Case No. 07-ALJ-07-0108-CC

South Carolina Coastal Conservation League, ... Petitioner,

vs.

S.C. Department of Health and Environmental Control,
South Carolina Department of Transportation,
and South Carolina State Ports Authority, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI

James Blanding Holman
SOUTHERN ENVIRONMENTAL LAW CENTER
Mailing address: Post Office Box 609
Charleston, SC 29402
Office address: 38 Broad Street
Suite 200
Charleston, SC 29401
Telephone (843) 720-5270
FAX (843) 720-5240
W. Jefferson Leath
LEATH, BOUCH & CRAWFORD, L.L.P.
Mailing address: 92 Broad Street
P.O. Box 59
Charleston, SC 29402-0059
Telephone (843) 513-1071

Attorneys for the Petitioner

decision." S.C. Code Ann. § 44-1-60(F)(1).[3] The Board, or its designee, may request additional information and question anyone providing information at the conference, id. § 44-1-60(F)(1), with parties "encouraged" to "engage in mediation during the final agency review process, id. § 44-1-60(G)." Act 387 directs that DHEC "shall" comply with "all requirements for public notice" before making "a department decision," and states that "[a]ny statutory deadlines applicable to permitting and licensing programs administered by the department shall be extended to allow for this final review process." Id. §§ 44-1-60(B), (H).

The first step in this process is an initial DHEC staff decision, which becomes the agency's final decision "unless" a request for Board review is made within 15 days after notice is mailed by "certified mail, return-receipt requested" to the applicant. S.C. Code Ann. § 44-1-60(E). Here, DHEC staff mailed notice of the initial Terminal Permit decision to SPA by return-receipt request certified mailings deposited on October 31, November 2, and November 17, 2006. (Terminal R. p. 379; SPA Terminal Br. at 3, 15) Two requests for Board review were made regarding the Terminal Permit. The first was by SPA, on November 13, 2006. (Terminal R. pp. 146-154.). The second was by the League, which received late mailed written notice on November 20 and filed its request that day. (Terminal R. pp. 158-160).[4]

---

[3] The Board has the option of conducting a conference or not after a request for review is made. If the Board does not conduct a conference within 60 days, the staff decision becomes the "final agency decision"; if it does, as here, the Board's written decision becomes the final agency decision. S.C. Code Ann. § 44-1-60(F), (F)(2) (2007). An affected person "desiring to contest the final agency decision" may request a contested case hearing before the ALC. Id. § 44-1-60(F)(2).

[4] The League also filed a motion to intervene in SPA's request for review on December 6, 2006. (Terminal R. pp. 161-166.)

This the 20th day of January, 2009.

Respectfully submitted,

J. Blanding Holman IV
Southern Environmental Law Center
38 Broad Street, Suite 200
Mailing address:
P.O. Box 609
Charleston, SC 29402
(843) 720-5270

W. Jefferson Leath
Leath, Bouch & Crawford, L.L.P.
92 Broad Street
P.O. Box 59
Charleston, SC 29402-0059
(843) 513-1071

Attorneys for Petitioner

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority, and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-0056-CC **RETURN TO MOTION TO REMAND TO DHEC BOARD**

The South Carolina Department of Health and Environmental Control submits this Return to the Petitioners' Motion to Remand this matter to the DHEC Board (the "Board") for a final review, and respectfully asks this Court to deny the Petitioners' Motion to Remand. In support, the Department asserts that the Board's decision to decline a final review was within its discretion, and constitutes final agency action. The Petitioners' sole remedy is to pursue their case before the Administrative Law Court.

DISCUSSION

Petitioners relies almost exclusively on S.C. Code Ann. § 44-1-60(F), which states in part, "No later than sixty calendar days after the date of receipt of a request for final review, a final review *must* be conducted by the board, its designee, or a committee of three members of the board appointed by the chair" [Emphasis added.] (Petitioners seems to have erroneously cited

S.C. Code Ann. § 44-1-160(F), as the quoted language comes from S.C. Code Ann. § 44-160(F)). The Petitioners appear to be arguing that the plain meaning of the word "must" indicates that a final review is mandatory under the statute. As a general rule, however, courts attempt to construe statutes as a whole. Mills v. S.C. Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (S.C.,1998). The very next sentence in this code section states,

> If the board *declines* in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, *the staff decision becomes the final agency decision* and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court. S.C. Code Ann. §44-1-60(F) [Emphasis added.].

Here, the Board received a request for final review from the Petitioners (dated January 2, 2013), and it declined to review the staff decision on this matter January 10, 2013. The statute provides that a request for a contested case may be filed with the ALC within 30 days after "notice is mailed . . . that the board declined to hold a final review conference." S.C. Code Ann. § 44-1-60(G)(1). Here, Petitioners requested a contested case hearing before the ALC on February 11, 2013.

The Petitioners' sole remedy is to pursue its case in the ALC because the Board's decision not to schedule a final review conference was within its discretion, and constitutes final agency action. See, Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference, rendering the staff decision the final decision); Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, No. 2010-159446 (March 6, 2013) (noting the DHEC Board declined to hold a final review conference, allowing the case to proceed to the ALC).

CONCLUSION

For the foregoing reasons, the Department respectfully asks this Court to deny the Petitioners' Motion to Remand.

Respectfully submitted,

Bradley D. Churdar
S.C. Bar No. 12829
Chief Counsel for DHEC/OCRM
South Carolina Department of Health and Environmental Control
1362 McMillan Ave., Ste 400
North Charleston, SC 29405
Tel.: (843) 953-0213
Fax: (843) 953-0201
churdabd@dhec.sc.gov

Charleston, South Carolina
March 14, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, vs. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	DOCKET NO. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she has this day served copies of the ***Department's Return to Petitioner's Motion to Remand to the SCDHEC Board*** via Electronic Mail and U.S. Mail, postage pre-paid, on the following parties and counsel of record listed below:

The Honorable Ralph K. Anderson, III
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Randolph R. Lowell, Esquire
Willoughby & Hoefer
Post Office Box 8416
Columbia, SC 29202

Amy E. Armstrong, Esquire
Michael G. Corley, Esquire
South Carolina Environmental
Law Project
Post Office Box 1380
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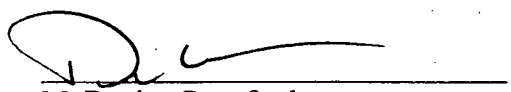

M. Denise Crawford

March 14, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **PREHEARING STATEMENT OF THE SOUTH CAROLINA PORTS AUTHORITY**

Pursuant to the Court's Order dated May 6, 2013, South Carolina State Ports Authority (Ports Authority) files its Prehearing Statement.

1. The nature of the proceeding:

This is a *de novo*, contested case proceeding brought by Petitioners Preservation Society of Charleston, Charleston Communities for Cruise Control, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Anson House Condominium Owners Association, Charleston Chapter of the Surfrider Foundation, and Historic Charleston Foundation (collectively, Cruise Opponents) challenging a decision by the South Carolina Department of Health and Environmental Control (DHEC) to authorize and permit a portion of a capital improvement project at the Union Pier Terminal (UPT) in Charleston, South Carolina by the Ports Authority.

The planned improvements to the UPT involve renovations to existing buildings on the terminal footprint, relocating certain port operations to other Ports Authority terminals and shifting passenger cruise operations to the northern end of UPT. The purpose of the planned improvements is multi-faceted, including, but not limited to: upgrading existing cruise facilities in order to comply with both current terminal security requirements mandated by federal law under the oversight of the United States Customs and Border Protection (CBP), as well as the Americans with Disabilities Act (ADA);[1] relocation of existing cargo facilities from the northern end of the UPT footprint to other Ports Authority-owned terminals, allowing the cessation of existing rail operations to UPT; relocation of existing cruise facilities from the southern end of the UPT footprint to the newly-vacated area on the northern end; implementation of an overall traffic management plan that will result in a net neutral traffic impact on the UPT; restoration of the southern end of UPT through the demolition of older structures; and the proposed redevelopment of much of the existing terminal acreage on the southern end for mixed use, green spaces, and restoration of the natural waterfront for public access.

To that end, on January 27, 2012,[2] the Ports Authority submitted a joint Federal (to the United States Army Corps of Engineers (Corps)) and State (to DHEC's Division of Ocean and Coastal Resource Management's (OCRM)) application for activities affecting the waters of the United States and critical areas of South Carolina. The actions implicating OCRM's permitting jurisdiction for this project are the installation of five pile clusters driven into the marl to support the construction of three elevators and two escalators in a renovated warehouse located on the northern end of the UPT footprint, Building #322, which will house the relocated cruise

[1] 42 U.S.C. §§ 12101, et seq. (2000).

[2] The application was subsequently resubmitted on February 27, 2012.

passenger operations.[3] The pile clusters—an additional five to the thousands of piles under th existing wharf and terminal—will provide further support for the structure of Building #322, within the existing footprint of the already-developed marine terminal.

On or about August 3, 2012, OCRM published the permit application public notice for the project, requesting comments be received by September 2, 2012. On or about December 18, 2012, OCRM issued notice that it was authorizing construction of five pilings under Building #322. Thereafter, on January 2, 2013, Petitioners filed Requests for a Final Review Conference of the OCRM Staff Decision by the DHEC Board. On January 10, 2013,[4] the DHEC Board voted unanimously to decline to hear the matter in a Final Review Conference.

2. The statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations:

The request for a contested case was filed by the Cruise Opponents pursuant to S.C. Code Ann. §§ 1-23-600, 44-1-60, and the Rules of Procedure of the Administrative Law Court (RPALC).

The specific substantive statutory and regulatory provisions applicable to this controversy include, but are not limited to, S.C. Code Ann. §§ 48-39-10 et seq.; 23A S.C. Code Ann. Regs. 30-1 et seq.; and the Coastal Management Program.

3. The issues presented for determination:

(a) Does the Ports Authority's permitted portion of a capital improvement project comply with applicable law?

(b) Did OCRM err in issuing permit OCRM-12-054-B?

---

[3] As most of the capital improvement project does not trigger permitting requirements, it may be undertaken without the DHEC permit.

[4] OCRM Staff also filed responses to the requests of Petitioners on January 10, 2013, recommending that the DHEC Board affirm OCRM's decision to issued the permit.

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations:

The Ports Authority requests this Court to:

(a) Dismiss this contested case for the Cruise Opponents' lack of standing; or, alternatively,

(b) affirm the terms, conditions, approval and issuance of permit OCRM-12-054-B by OCRM for the placement of the five UPT pile clusters; and

(c) grant such other relief as the Court may deem just and proper.

The Cruise Opponents have failed to satisfy the requisite burden under South Carolina to establish standing. Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 550 S.E.2d 287 (2001); see Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

DHEC and OCRM met their burden in issuing OCRM-12-054-B and that determination will be borne out through this *de novo* contested case hearing. This includes compliance with the criteria set forth in S.C. Code Ann. §§ 48-39-10 et seq.; 23A S.C. Code Ann. Regs. 30-1 et seq.; and the Coastal Management Program.

Further, the Ports Authority specifically reserves and does not waive any claim that no permit is required under South Carolina law as the permitted activity—the placement of 5 pile clusters—constitutes routine repair and maintenance and does not require any permit or license from DHEC.

5. A brief summary of the facts to be presented at the hearing:

The UPT is a 63-acre property located along the Cooper River near the downtown portion of the Charleston peninsula. UPT is owned and operated by the Ports Authority as a fully operational marine terminal and, as currently configured, accommodates upwards of 200 cargo

ships annually, in addition to the requisite trains and trucks necessary to service those cargo ships, as well as the designated cruise passenger terminal on the southern end of the property. UPT accommodates significant roll-on/roll-off cargo facilities used for automobiles, trucks and heavy equipment, and UPT has accommodated passenger vessel calls for almost 100 years, including cruise vessels, which have called on the UPT cruise passenger facility every year since 1973, the date of dedication for the existing cruise passenger terminal facility. Pursuant to its statutory obligations under, *inter alia*, S.C. Code Ann. § 53-3-130, the Ports Authority has sought to foster, stimulate, and increase water-borne commerce through cruise ship calls at UPT, including through the capital development plan at issue here.[5]

In order to accommodate the cruise passenger demand, the Ports Authority undertook a capital improvement plan for UPT that involves the relocation of certain operations to other Ports Authority terminals, and the renovation of facilities and relocation of the passenger cruise operations to the northern end of UPT. In order to bring the plan to fruition, the Ports Authority has issued and sold bonds totaling $35 million to date. The planned improvements to the UPT involve renovations to existing buildings on the terminal footprint, demolition of older structures, the proposed dedication of much of the existing terminal acreage to redevelopment, including public green spaces, restoration of the natural waterfront and other private development undertakings, and the improvements will all be done in both an economically efficient and environmentally sustainable way.

Further, the planned renovations to the UPT cruise facilities are necessary in order to bring the facilities in compliance with current terminal security requirements mandated by

[5] Charleston is a popular cruise destination and the cruise industry has taken note, as exhibited by Carnival Cruise Lines (Carnival) designating Charleston as the home port of one of its vessels, the Carnival Fantasy.

federal law under the oversight of the CBP. In 2007, the Ports Authority entered into a Memorandum of Understanding with the CBP for the conditional approval of ongoing cruise operations on a continuing trial basis, which has since been renewed annually, with the understanding that a passenger terminal facility with improved security would be needed for continued operations. In addition, the relocation of existing cargo facilities from the northern end of the UPT footprint will permit the cessation of existing rail operations to UPT and the accompanying traffic impediments, as a part of an overall traffic management plan that will result in a net neutral traffic impact on the UPT and surrounding areas. In short, the Ports Authority's capital improvement plan will aid the economic development and environment of Charleston.

Currently, the UPT cruise passenger operations are located on the southern end of the terminal footprint. The Ports Authority's proposed capital improvement plan involves renovating Building #322 on the northern end of the UPT footprint and relocating the cruise passenger operations, in their entirety, to the renovated Building #322. The installation of five additional pile clusters driven into the marl to support the construction of three elevators and two escalators in the renovated Building #322 will provide additional support for the existing structure of Building #322.

The renovations to Building #322 also include other activities which do not affect the waters of the United States, including remodeling of the mezzanine with ADA-compliant elevators and escalators, renovations to the interior and exterior of Building #322, canopies over pedestrian areas, and a loading area on the existing wharf for transferring ship stores from delivery trucks to the cruise ship. The entirety of the effect of this project is that current cruise operations will be moved to a location less than 600 yards to the north in a renovated warehouse,

still within the existing boundary of the Union Pier Terminal footprint. In anticipation of the successful completion of the capital improvement project and relocation of cruise operations less than 600 yards to the north, existing berth facilities which were used for cargo operations, and which handled upwards of 200 cargo vessel calls a year, have begun relocation to a different Ports Authority terminal facility. As a result of this relocation and the voluntary traffic management plan, emissions at the UPT, and thus also in the surrounding historic neighborhoods represented by Petitioners, will decrease. However, should the renovated northern end of the UPT not be utilized for cruise operations, it will continue to be used for cargo operations, along with the accompanying continuation of air emissions and truck and rail traffic necessary to a vigorous and productive waterfront commerce for Charleston and the State.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:

The Ports Authority expects to file a motion to dismiss for lack of standing. If such motion is denied, then the Ports Authority expects to file a motion to lift the automatic stay pursuant to S.C. Code Ann. § 1-23-600(H)(4). The Ports Authority may also file a motion or motions to dismiss and/or for partial or complete summary judgment on the issues presented, as appropriate. The Ports Authority may file motions related to discovery, evidentiary issues, or the conduct of the hearing should the Ports Authority deem such motions necessary. Additionally, the Ports Authority reserves the right to file any appropriate motion under the appropriate rule.

7. A list of proposed witnesses and exhibits:

At this time, the proposed witnesses on behalf of the Ports Authority include fact and expert witnesses as may be identified during discover, including but not limited to Robert Mitchell, Derrick Bellamy, and James Newsome. The Ports Authority may also call witnesses from other state and federal agencies. The Ports Authority reserves the right to call any witness

listed, named, or offered by any party and any other such witness whose testimony may be relevant to the subject matter of this dispute. There may be additional third-party witnesses that are identified through the course of discovery.

Exhibits may include the DHEC project file; submissions made by any party to any governmental entity and other government records; expert reports and analysis; technical and professional documents; correspondence; publicly available records and documents; any such documents or material as may be discovered; and any documents, materials, or evidence relevant to the subject matter of this dispute.

8. A statement regarding the necessity for discovery, if any:

Due to Petitioners' vagueness with respect to their membership and alleged injuries related to this project, the Ports Authority anticipates discovery may take between six to nine months to complete. Interrogatories, requests for production, requests to admit, and an expanded number of depositions are appropriate for this matter. The large number of witnesses already listed by Petitioners in discovery demonstrates that the case will require the scope of discovery to be broader than the limitations set forth in Rule 21, RPALC, and discovery should be allowed to proceed in accordance with the Rules 26-37, SCRCP.

9. The estimated length of the hearing:

The estimated length of a hearing on the merits on all issues is one week.

10. Any dates in the next one hundred (90) days when you will not be available for a hearing:

As of the date of this filing, the following are dates known to be unavailable for lead counsel for the Ports Authority: July 1-5, 8 and August 1-2, 23, 26, 2013. Counsel for the Ports Authority also is involved in a number of matters in state and federal court at the trial and

appellate levels that may not have scheduled argument on various matters and that may preclude availability on additional dates.

Counsel for the Ports Authority will endeavor to meet any hearing date or deadline established by the Court, but respectfully reserves the right to request a continuance depending on the circumstances at that point in time.

11. An email address where you can be reached:

Below is a table of counsel of record with email addresses. Communications and service may be directed to Randy Lowell and Philip Lawrence in lieu of all listed counsel.

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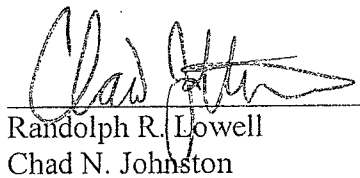
The Ports Authority reserves the right to supplement or amend this Prehearing Statement as it deems appropriate or necessary.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control,	)	Docket No. 13-ALJ-07-0056-CC
Petitioners,	)	**CERTIFICATE OF SERVICE**
v.	)	
South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control,	)	
Respondents.	)	

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Prehearing Statement of the South Carolina State Ports Authority** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
Michael G. Corley, Esquire
Jessie A. White, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
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North Charleston, SC 29405

Breanna M. Karns

Breanna M. Karns

Columbia, South Carolina
This 20th day of May 2013.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-056-CC **PREHEARING STATEMENT OF PETITIONERS**

1. The nature of this proceeding;

This is a contested case hearing requested by Petitioners to review the S.C. Department of Health and Environmental Control's ("DHEC") decision to grant a Critical Area Permit and Coastal Zone Consistency Certification to the South Carolina State Ports Authority ("SPA") authorizing the construction of pilings and structural changes to staging areas in and over the critical area to enable construction of new cruise ship terminal operations at SPA's Union Pier facility in the City of Charleston.

2. Statutory provisions conferring subject matter jurisdiction to the agency and other applicable statutes and regulations;

The statutory provisions conferring subject matter jurisdiction are (1) S.C. Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, 1-23-370, 1-23-600; (2) the S.C. Coastal Zone Management Act, S.C. Code Ann. § 48-39- 150; (3) the S.C. Pollution Control Act, S.C. Code Ann. § 48-1-10, *et seq.*; and (4) S.C. Code Ann. § 44-1-60.

Other applicable statutes and regulations: (1) the S.C. Coastal Zone Management Act, S.C. Code Ann. § 48-39-10, *et seq.*, and in particular §§ 48-39-20, 30, 150; (2) the Critical Area Regulations, S.C. Code Ann. Reg. 30-1, *et seq.*, and in particular, R. 30-11.C; and (4) the South Carolina Coastal Management Program ("CMP"), and in particular the policies set forth on page

III-14.

3. The issues presented for determination, including any claims or defenses expected to be raised;

Whether DHEC properly applied the Critical Area Regulations, the Coastal Zone Management Act and Coastal Management Program in issuing a permit to construct a new cruise ship terminal by installing pilings in the critical area; building two covered staging areas and making structural changes to a building located over the critical area. Specifically:

-whether OCRM gave proper consideration to the long-range and cumulative effects of the project within the context of the general character of the area, as required by S.C. Code Ann. Reg. 30-11.C.(1) and the Coastal Management Program at III-14;

-whether OCRM properly required that "all feasible safeguards are taken to avoid adverse environmental impact resulting from a project," as required by S.C. Code Ann. §48-39-150(A)(9) and S.C. Code Ann. Reg. 30-11(B)(9);

-whether the proposed project "avoid[s] the critical areas to the maximum extent feasible." S.C. Code Ann. Reg. 30-12.F(2)(b);

-whether DHEC failed to weigh the "extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state" by failing to consider the impacts to adjacent neighborhoods and businesses from noise pollution, air pollution, traffic congestion, and the historic qualities of the City of Charleston, as required by S.C. Code Ann. §48-39-150(A)(7) and S.C. Code Ann. Reg. 30-11(B)(7);

-whether DHEC properly considered the "extent to which the proposed use could affect the value and enjoyment of adjacent owners," as required by S.C. Code Ann. §48-39-150; and

-whether DHEC failed to give the highest priority to the identified primary value of the Geographic Area of Particular Concern ("GAPC"), the Charleston Historic District. In the case of a historic site, the priority is placed on uses "which preserve the historical or cultural values for which the site was placed on the National Register of Historic Places." Coastal Management Program at IV-25.

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations;

The Petitioners ask this Court to and issue an order reversing the proposed decision to issue the permit and certifications, or in the alternative remanding the decision back to staff with instructions to conduct an analysis of alternative terminal locations, traffic impacts, noise

impacts, air emissions, and impacts on the historic qualities of the Historic District of Charleston.

The requested relief is supported by Regulation 30-11.C.(1), which requires OCRM to consider the "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area;" S.C. Code Ann. §48-39-150(A)(9); S.C. Code Ann. Reg. 30-11(B)(9); and S.C. Code Ann. Reg. 30-12.F(2)(b), which require the applicant to undertake a feasible alternatives analysis to both avoid adverse environmental impacts and to avoid critical areas; S.C. Code Ann. §48-39-150(A)(7) and S.C. Code Ann. Reg. 30-11(B)(7), which require OCRM to weigh the benefits of preserving the historic district of Charleston and the economic benefits; S.C. Code Ann. §48-39-150, which requires OCRM to consider how the project will effect the value and enjoyment of adjacent owners; and Coastal Management Program at IV-25, which requires OCRM to give the highest priority to uses "which preserve the historical or cultural values for which" the historic district of Charleston "was placed on the National Register of Historic Places."

5. A brief summary of the facts to be presented at the hearing;

The Petitioners represent diverse and broad interests, which include seeking protection for the City of Charleston's historic neighborhoods and residents; protection of air and water quality; protection of the architectural, historical and cultural character of Charleston; appropriate management of mass tourism downtown; appropriate location of the terminal to provide broad regional preservation and economic benefit; and protection of the quality of life in historic Charleston.

The Union Pier facility is near and adjacent to the Charleston Historic District, and listed on the National Register of Historic Places, including the historic neighborhoods of Ansonborough and Charlestowne. Charleston is one of this nation's most historic cities, with one of the most intact inventories of National Register-listed and National Historic Landmark districts and properties. National Historic Landmark and National Register-listed historic districts were qualified for and depend on the maintenance of the character-defining qualities—such as historic setting, context, and small scale. The National Trust for Historic Preservation has formally recognized the endangerment to Charleston's historic resources by placing Charleston on "Watch Status" on the National Trust's 2011 List of America's Most Endangered Places.

These historic resources are immediately adjacent to the proposed cruise terminal and are within the project's area of potential effects. Both the Charleston Historic District and the Port of Charleston have been designated Geographic Areas of Particular Concern ("GAPCs") under DHEC's Coastal Management Program. GAPC designation requires heightened consideration in reviewing activities for consistency with the CMP.

On December 18, 2012, the DHEC staff issued notice that it was authorizing the construction of five (5) pilings consisting of 16" precast pile driven into the marl necessary to

construct three elevators and two escalators and make structural changes to Building #322 and two covered staging areas designed to handle passengers, luggage and loading and unloading of cruise ship supplies. The permit purports to authorize a change of use by "re-purposing" the new proposed site from a storage shed into a modern day cruise terminal.

The permit is a step towards new cruise ship home-basing operations in Charleston. Currently, SPA conducts cruise ship operations out of several buildings a quarter mile away. The existing facilities were not designed to serve as a home base for large, modern cruise vessels, i.e., those having 2,500 passengers or more, and without significant alteration and refurbishment these structures do not meet the operational and security requirements for such operations going forward.

The new cruise terminal authorized by the DHEC decision would enable cruise ship home-basing operations to continue and indeed expand both in number and size of ships. The Carnival Fantasy currently utilizing the Union Pier facility has a capacity of 2,054 passengers and ten decks. The next generation of Carnival ships has a capacity of 3,650 passengers and fifteen decks.

The permit allows SPA to increase both the size and quantity of cruise ships that dock in Charleston. Indeed, the Ports Authority submitted Affidavits to the DHEC Board in a Response to the Request for Final Review Conference which underline the concept that a massive, and long-term cruise line presence is contemplated. There are a host of environmental and social impacts created by the increased presence of docked cruise ships. Those impacts include increased air shed emissions, traffic volumes, traffic noise, and health impacts, along with depressed property values.

Particularly troubling is the spike in sulfur dioxide ("SO2") emissions that comes from a docked cruise ship. Currently the fuel burned by cruise ships is 667 times dirtier than diesel fuel burned by 18-wheel trucks. Cruise liners utilize this fuel which is high in sulfur and which generates particulate matter, nitrogen oxides and SO2 when burned. These emissions become very problematic when the ship is in port and the emissions are not being diffused because they are known to negatively impact human health.

New standards for cruise ship fuel should reduce the sulfur dioxide ("SO2") emissions from cruise ships, but those standards will not be in place until 2015, and even then, the fuel burned will be up to 67 times dirtier than diesel trucks. Moreover, the Cruise Line Industry Association, which represents all of the cruise trade organizations, is lobbying to overturn these new standards for cruise ship fuel.

Because the proposed project will enable cruise operations to continue and expand, impacts beyond the critical area itself include harmful air emissions of particulate matter, nitrogen oxides, SO2 and other pollutants; increased truck and car traffic; increased noise and congestion; decreased property values; and adverse health impacts. The evidence will show that

OCRM failed to look at the long-range, cumulative effects that may result within the context of the increased size and quantity of cruise ships, including adverse environmental impacts, health impacts, and impacts on value and enjoyment of adjacent owners.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;

The Petitioners do not anticipate filing any motions at this time.

7. A list of proposed witnesses and exhibits;

Witnesses:

Evan Thompson
Dana Beach
Katie Zimmerman
Megan Desrosiers
J. Randolph Pelzer
Carrie Agnew
Steven Gates
Jay Williams
Margot Rose
J. Anderson Berly III
Stephen I. Schabel, MD
Elizabeth M. Hagood
Kirkland Grant
Gilbert Baldwin, MD
Stephen Hanson
Winslow Hastie
Martin A. Morganello
Other members of the Petitioner groups, as needed for standing
Any witnesses listed by the other parties

Exhibits:

All documents in the OCRM file related to the permit that is the subject of this contested case.
Ground and aerial photographs in the area of the proposed project
Study entitled "Cruise Ship Industry in Charleston: A Clear Perspective"
Analysis of Proposed Alternative Uses produced by Dover Kohl
Maps depicting the area
Additional documents obtained through discovery

8. A statement regarding the necessity for discovery, if any;

Discovery, including interrogatories, request for production of documents, and depositions, will be necessary. The parties have already filed initial written discovery requests, but anticipate that more discovery will be needed to adequately prepare this matter for hearing.

9. The estimated length of the hearing;

Petitioners anticipate a 4-5 day hearing.

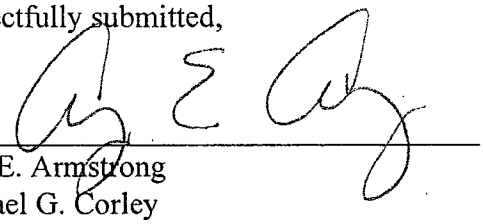
10. Any dates in the next ninety (90) days when you will not be available for a hearing; and

June 1-24; July 4, 5, 18; August 1-12; September 12, 13, 19, 20, 25; October 1-4.

11. An email address where you can be reached.

amy@scelp.org; michael@scelp.org; jessie@scelp.org; jl@leathbouchlaw.com

Respectfully submitted,



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Attorneys for the Petitioners

Georgetown, South Carolina

May 21, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing Prehearing Statement of Petitioner in the U.S. Mail addressed to:

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Willoughby & Hoefer, PA
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Philip L. Lawrence
General Counsel
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Post Office Box 22287
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Brad Churdar, Esquire
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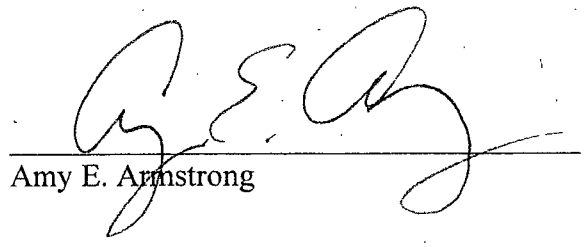

Amy E. Armstrong

Georgetown, South Carolina

May 21, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, vs. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	DOCKET NO. 13-ALJ-07-0056-CC **DEPARTMENT'S PREHEARING STATEMENT**

On behalf of Respondent South Carolina Department of Health and Environmental Control (the "Department"), the following information is submitted:

1. **Nature of the proceeding:**
This contested case arises as an appeal of the Department's issuance of permit number OCRM-12-054-B to the South Carolina State Ports Authority.

2. **The statutory provision(s) conferring subject matter jurisdiction and other applicable statues and regulations:**
The Court's subject matter jurisdiction arises from S.C. Code Ann. §§ 48-39-10, *et seq.* Other applicable statutory and regulatory provisions include:
23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2007). Specifically, S.C. Code Ann. § 48-39-150, § 48-39-30, and § 48-39-20. S. C. Code Reg. 30-4, 30-11, and 30-12.

3. **Issues to be presented for determination:**
Whether the Department properly applied the Coastal Zone Management Act and Critical Area Regulations in issuing permit number OCRM-12-054-B.

4. **Action of the Court, if any:**
The Department respectfully requests that Court affirm the Department's issuance of the permit.

5. **A brief summary of the facts to be presented at the hearing:**

This contested case arises out of Respondent South Carolina State Ports Authority's application for a permit to make improvements to an existing waterfront building on and adjacent to Cooper River at 32 Washington Street, South Carolina State Ports Authority – Union Pier Terminal, Charleston, Charleston County, South Carolina. Specifically, to install 5 pilings, consisting of a 16" precast pipe, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of the pile supported Building #322. Additional structural changes will be made to building 322 and two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies will be constructed. After reviewing the application submitted by the South Carolina State Ports Authority, the Department issued the permit with conditions.

The Petitioners contest the Department's issuance of the permit.

6. **Summary of motions expected to be raised at the hearing and the appropriate authority underlying the motion:**

The Department does not know what motions it may file at this time. However, the Department reserves the right to amend this Prehearing Statement to reflect the filing of additional motions filed prior to the hearing in this matter.

7. **A list of proposed witnesses and exhibits is as follows:**

Witnesses: Steven Brooks, DHEC-OCRM
Blair Williams, DHEC-OCRM
Any witness named by any other party to this litigation.

Exhibits: The exhibits will consist of the Department's permitting file.

The Department reserves the right to supplement this list of witnesses and exhibits as discovery progresses and the issues in this case are more fully developed.

8. **Discovery is necessary and the parties are in the process of conducting discovery.**

9. **The estimated time required for the hearing:**

The hearing in this matter should last approximately one day.

10. **Any dates in the next ninety (90) days when counsel is unavailable:**

Currently, Department's counsel has conflicts on May 22-31, 2013, June 7, 2013, June 14-28, 2013, July 8-16, 2013, August 2-12, 2013, and August 29, 2013.

11. **An e-mail address where counsel can be reached:**

churdabd@dhec.sc.gov
crawfomd@dhec.sc.gov

Respectfully Submitted,

Bradley D. Churdar
Chief Counsel
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
(843) 953-0213
(843) 953-0201 (fax)
churdabd@dhec.sc.gov
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May 21, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, vs. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	DOCKET NO. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this day she has served all parties in the above-captioned action with a copy of ***Department's Prehearing Statement*** by mailing a copy of the same by **U.S. First Class Mail,** postage prepaid to the following addresses:

The Honorable Ralph K. Anderson, III
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Willoughby & Hoefer
Post Office Box 8416
Columbia, SC 29202

Jessie A. White, Esquire
Michael G. Corley, Esquire
Amy E. Armstrong, Esquire
SC Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585

M. Denise Crawford

May 21, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **SOUTH CAROLINA STATE PORTS AUTHORITY'S MOTION TO DISMISS AND FOR SANCTIONS**

Respondent South Carolina State Ports Authority (Ports Authority) hereby moves this Court to impose sanctions, including the dismissal of this contested case, on the basis that Petitioners' Motion to Remand dated February 27, 2013 (Motion) was frivolous and unsupported by any reasonable legal theory. In addition, or by alternative, the Ports Authority submits that an award of costs and attorneys' fees for the time, money, and effort expended in responding to the meritless Motion is warranted because the Motion was frivolous, lacked any reasonable or defensible grounds of support, and was filed solely for purposes of delay. This motion is made pursuant to Rule 72, Rules of Procedure of the Administrative Law Court (RPALC), Rule 11, South Carolina Rules of Civil Procedure (SCRCP), and S.C. Code Ann. § 15-36-10 (the South Carolina Frivolous Civil Proceedings Sanctions Act (Sanctions Act)).

BACKGROUND

On December 18, 2012, DHEC, through its Division of Ocean and Coastal Resource Management (OCRM), issued a staff decision granting a critical area permit and coastal zone consistency certification to the Ports Authority authorizing construction of five pilings to facilitate the relocation of cruise operations within Union Pier Terminal (UPT) in the City of Charleston. Ex. A, Permit (OCRM-12-054-B) (Dec. 18, 2012). These planned renovations will bring the facilities into compliance with requirements mandated by federal law under the oversight of the United States Customs and Border Protection and the Americans with Disabilities Act.[1] See generally Ex. B, Corps Mem. for Record, SAC-2003-13026 (Apr. 20, 2012). The entire effect of this project is relocating the current cruise ship terminal from its existing location to a renovated warehouse less than 600 yards away but still within the existing boundary of the UPT footprint. Ex. A.

In response to the OCRM staff decision, on January 2, 2013, the Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conversation League, Charlestown Neighborhood Association, Charleston Chapter of Surfrider, and Charleston Communities for Cruise Control (collectively "Cruise Opponents") filed a request for a final review conference by the DHEC Board of the OCRM staff decision. Thereafter, on January 10, 2013, the DHEC Board voted unanimously to decline to hear the matter in a final review conference and issued a written notice of its decision not to conduct a final review conference the next day. In response, on or about February 11, 2013, the Cruise

[1] 42 U.S.C.A. §§ 12101, et seq.

Opponents filed a Request for Contested Case challenging the merits of DHEC's decision.[2]

Subsequently, on February 27, 2013, the Cruise Opponents filed a frivolous motion entitled "Motion to Remand to DHEC Board" even though they well knew that the motion contravenes established law.[3] The conclusion is inescapable that the Motion was filed with the sole purpose to delay these proceedings and harass the Ports Authority. The Ports Authority filed a response to the frivolous motion on March 14, 2013, and this Court issued an order denying the Motion without a hearing on May 3, 2013. The Ports Authority now moves to impose sanctions, including dismissal of this contested case, and to recover costs and attorneys' fees incurred in responding to the baseless Motion.

STANDARD

Rule 72 of the Rules of Procedure for the Administrative Law Court provides that "[i]f the presiding administrative law judge determines that a contested case, appeal, motion, or defense[4] is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, RPALC. Furthermore, the 2009 Revised Notes to Rule 72, RPALC provide that "in determining whether a case is frivolous, the

---

[2] Nowhere in the contested case request did Cruise Opponents reference the alleged procedural infirmity that forms the basis of their frivolous Motion to Remand to DHEC Board.

[3] Counsel for the Ports Authority consulted with Cruise Opponents' counsel and informed them that the Motion was frivolous and the Ports Authority would seek sanctions if the Cruise Opponents did not withdraw the frivolous Motion. Ex. C, Ltr. of Lowell to Armstrong, dated March 6, 2013.

[4] Rule 72, RPALC was expanded in 2013 to provide an ALJ with the authority to sanction party for interposing a defense which it determines to be frivolous or taken solely for the purposes of delay. See Note to 2013 Amendments.

administrative law judge may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act." See Rule 72, RPALC, 2009 Revised Notes; see also Final Order and Decision, Oconee County Assessor v. Douglas Chirillo, No. 09-ALJ-17-0079-CC, 2010 WL 6782538 (Nov. 23, 2011) (McLeod, J.) (summarizing the authority under which an administrative law judge may award sanctions, including Rule 72 and noting the permitted sanctions under the Sanctions Act). The purpose of sanctions should be to discourage similar conduct in the future and the determination of whether sanctions are warranted, as well as the amount and type of sanction, is committed to this Court's discretion. See Rule 72, RPALC; 2009 Revised Notes; see also Randolph R. Lowell, *The Contested Case Before the ALC*, in South Carolina Administrative Practice and Procedure, 184 (2d ed. 2008).

The Sanctions Act provides, in relevant part, that "[a]n attorney ... participating in a civil or *administrative* action or defense may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

...;

(i) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(ii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iii) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or

> adjudication of the claim or defense upon which the proceedings are based[.]

S.C. Code Ann. § 15-36-10(A)(4)(a) (emphasis added). Further, Section 15-36-10(B)(2) provides that "if ... an attorney ... has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation *any sanction* which the court considers just, equitable, and proper under the circumstances." (Emphasis added.) The Sanctions Act applies a "reasonable attorney" standard for evaluating sanctionable conduct. Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011).

Rule 11, SCRCP, requires filings with the Court to bear an implicit attestation of veracity and good faith by the filer. In pertinent part, Rule 11(a) provides that "[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." The South Carolina Supreme Court has interpreted Rule 11 as permitting a trial court to impose sanctions on a party, a party's attorney, or both for filing a document with the court that is meant for delay or for which no good grounds exist to support the filing. See Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 597-98, 713 S.E.2d 624, 628 (2011) (citing Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)).

In short, this Court is authorized to impose appropriate sanctions by Rule 72, RPALC, in conjunction with the Sanctions Act and Rule 11, SCRCP, where the purpose of a filing with this Court was solely for delay and harassment. Sanctions are warranted

in this case because the Motion lacked any basis in the law of this State and no reasonable attorney would have made such a claim or filed such a motion.

DISCUSSION

The Motion filed by Cruise Opponents represents precisely the type of filing contemplated by Rule 72, RPALC that gives this Court authority to act when proceedings before the Court are used for frivolous means. As this Court found in its May 3, 2013 Order, the Motion had no basis in law and was contrary to the plain language of the statute. The Cruise Opponents failed to substantiate their claim that DHEC Board review was mandatory and did so while espousing only one sentence of the applicable statute, deliberately ignoring the other operative portions of the same subsection and misconstruing the statute's intent in the name of further delay.

As determined by this Court's Order, S.C. Code Ann. § 44-1-60(F) clearly sets forth a discretionary standard in the DHEC Board that permits it to choose whether or not to conduct a final review conference. See May 3 Order at 3-4. The Cruise Opponents' citation to and reliance upon a single word in a single sentence within S.C. Code Ann. § 44-1-60(F) while ignoring the remainder of subsection -60(F) illustrates that their Motion and underlying argument was not presented in good faith, but instead designed to further delay the subject project and submit the Ports Authority to further cost and expense in responding to the meritless argument.[5]

[5] As explained in the Ports Authority's Response in Opposition to the Motion to Remand, clear and longstanding rules of statutory construction dictate that the DHEC Board has the discretion to decline to conduct a final review conference. See Ports Authority Resp. at 6 (citing Greenville Water v. S.C. Dep't of Health & Envtl. Control, No. 11-ALJ-07-0514-CC, Am. Order Granting Summ. Judg. (March 30, 2012) (Anderson, C.J.) ("In construing statutory language, a court must read the statute as a whole in light of its manifest purpose.") (citing Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354

The bad faith and intentional delay motivating the Motion is demonstrated by the fact that Cruise Opponent South Carolina Coastal Conservation League (League) and its counsel (*including the same counsel representing the Cruise Opponents in the present case*) affirmatively represented to the South Carolina Supreme Court in another case that a final review conference is optional and discretionary with the DHEC Board. Specifically, the League stated: "**The Board has the option of conducting a conference or not after a request for review is made.** If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F)." Ex. D, League Pet. for Writ of Cert. at 5 n.3, Nos. 07-ALJ-07-0107-CC, -0108-CC (Jan. 20, 2009) (emphasis added). Thus, the League and its counsel were undeniably aware that the DHEC Board has the discretion to conduct a final review conference *because they have previously acknowledged that final review by the Board is optional.*

Under these circumstances, the filing of the Motion warrants serious inquiry by the Court under Rule 72, RPALC and S.C. Code Ann. § 15-36-10(A)(4)(a) of the Sanctions Act. In view of the pertinent legal authorities as well as counsel's prior arguments with respect to DHEC Board review and the absence of any meritorious argument for changing the existing law, it is impossible to conclude that "a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law." S.C.

S.C. 18, 25, 579 S.E.2d 334, 338 (Ct. App. 2003)). Moreover, Cruise Opponents also ignored controlling case law of this and other courts in making their argument. See, e.g., Ports Authority Resp. at 10-11.

Code Ann. § 15-36-10(A)(4)(a)(ii). Indeed, opposing counsel has participated in this administrative process—including optional DHEC Board review—since 2006 when this structure was enacted by the General Assembly and it was not until this case that this issue was first raised. In fact, Ports Authority counsel believes this is the first instance since the statutory amendments in 2006 creating this process that any party or any counsel have made this claim to the DHEC Board or the ALC. Thousands of legal arguments have come and gone by learned counsel who have followed this statute—including Cruise Opponents' counsel—and only now, when delay and harassment are viewed as the best options given the lack of merit of the underlying claims, is this frivolous argument proffered.

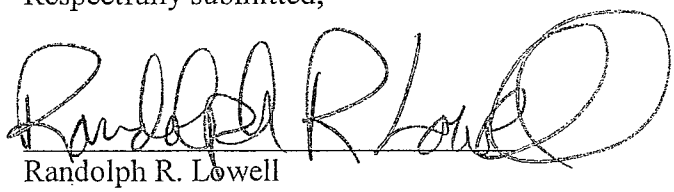
Given the longstanding practice and interpretation of the operation of this statute and counsel's willing participation in this scheme, no reasonable attorney in these circumstances would have filed the Motion. Moreover, an argument that is not reasonable or made in good faith necessarily is frivolous in nature and it is logical to infer that the argument is merely interposed for delay or harassment because it cannot serve any other legitimate purpose recognized by the law of this state. Id. § 15-36-10(A)(4)(a)(iv).

CONCLUSION

Cruise Opponents' conduct is egregious and falls squarely within Rule 72, RPALC, Rule 11, SCRCP, and the Sanctions Act. Consequently, due to the Cruise Opponents' willingness to misrepresent established South Carolina law in an effort to delay these proceedings, as well as the hardship imposed on the Ports Authority in defending the frivolous Motion, the Ports Authority submits the Cruise Opponents'

actions are indicative of the merits of the pending case, and an appropriate sanction for Cruise Opponents' conduct is the dismissal of this contested case, with prejudice. In addition, or in the alternative, the Court should impose an award of costs and attorneys' fees to the Ports Authority incurred in defending these meritless claims.

Respectfully submitted,



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Attorneys for the Respondent
South Carolina State Ports Authority

July 1, 2013
Columbia, South Carolina

EXHIBIT A

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

MEMORANDUM

TO: **All interested parties**

FROM: **STEVEN BROOKS**

RE: **SC State Ports Authority**
P/N# **OCRM-12-054-B**

DATE: **DECEMBER 18, 2012**

This letter is in reference to the following activities:

To make improvements to an existing waterfront building. Specifically, the permittee will install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of pile supported Building #322. Additionally, additional structural changes will be made to building 322 and two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies will be constructed. The purpose of the overall project is to facilitate the relocation of the cruise passenger facility to Building #322

Any person adversely affected by this decision has the right to appeal as outlined in the enclosed "Notice of Appeal Procedure."

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

Notice of Appeal Procedure

Pursuant to S.C. Code Section 44-1-60

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 calendar days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review accompanied by a filing fee in the amount of $100 is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a timely written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393. A filing fee in the amount of $100 made payable to SC DHEC must also be received by the Clerk within the time allowed for filing a request for final review. However, if a request for final review is filed by facsimile, the filing fee may be mailed to the Clerk of the Board if the envelope is postmarked within the time allowed for filing a request for final review.

   Clerk of the Board
   SC DHEC
   2600 Bull Street
   Columbia, SC 29201

3. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 calendar days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due. A request for final review will be returned to the requestor if the filing fee is not received on time as described above.

4. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding whether to conduct a final review conference
   c. a copy of the Department's decision for which review is requested

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures. If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within 30 calendar days after notice is mailed that the Board declined to hold a final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

July 1, 2010

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

December 18, 2012

Derrick Bellamy
SC State Ports Authority
P.O. Box 22287
Charleston, SC 29413-2287

Re: **P/N# OCRM-12-054-B**
SC State Ports Authority

Dear Mr. Bellamy:

The SCDHEC Office of Ocean and Coastal Resource Management has reviewed your application to make improvements to an existing waterfront building and adjacent to Cooper River at 32 Washington Street, South Carolina State Ports Authority - Union Pier Terminal, Charleston, Charleston County, South Carolina, and has issued a permit for this work. You should carefully read the description of the authorized project and any special conditions that have been placed on the permit, as these conditions may modify the permitted activity. In addition, there are a series of general conditions that should be reviewed. The original and one photocopy of the permit, as issued, are enclosed. After carefully reading the permit, if you wish to accept the permit as issued, sign and date in the signature block entitled "PERMITTEE" on the original version of the permit and return it to this Department. Keep the photocopy for your records.

PLEASE READ CAREFULLY: You are required to sign and return the original version of your permit to this Department. If this permit is not signed and returned within thirty (30) days of issuance, *OR* appealed within 15 days as described on the enclosed "Notice of Appeal Procedure", the Department reserves the right to cancel this permit. Please carefully review the enclosed "Notice of Appeal Procedure" for information and deadlines for appealing this permit.

We have also enclosed a "request for a construction placard" card. You must send in this card before the time you wish to start construction. At that time a construction placard will be sent to you to post at the construction site.

PLEASE NOTE: You are not authorized to commence work under the permit until we have received the original version of the entire permit signed and accepted by you, and a construction placard has been issued and posted at the construction site. The receipt of this permit does not relieve you of the responsibility of acquiring any other federal or local permits that may be required.

Sincerely,

Steven Brooks

Steven Brooks
Senior Regulatory Project Manager
Regulatory Programs Division

Cc: Blair Williams, Wetland Section Manager
Patrick Moore, SCSPA
Nathaniel Ball, USACOE

Enclosure

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
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D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

Notice of Appeal Procedure

Pursuant to S.C. Code Section 44-1-60

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 calendar days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review accompanied by a filing fee in the amount of $100 is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a timely written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393. A filing fee in the amount of $100 made payable to SC DHEC must also be received by the Clerk within the time allowed for filing a request for final review. However, if a request for final review is filed by facsimile, the filing fee may be mailed to the Clerk of the Board if the envelope is postmarked within the time allowed for filing a request for final review.

   Clerk of the Board
   SC DHEC
   2600 Bull Street
   Columbia, SC 29201

3. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 calendar days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due. A request for final review will be returned to the requestor if the filing fee is not received on time as described above.

4. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding whether to conduct a final review conference
   c. a copy of the Department's decision for which review is requested

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures. If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within 30 calendar days after notice is mailed that the Board declined to hold a final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

July 1, 2010

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
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SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

Permittee(s):	**SC State Ports Authority**
Permit Number(s):	**OCRM-12-054-B**
Date of Issuance:	**December 18, 2012**
Expiration Date:	**December 18, 2017**
Location:	**On and adjacent to Cooper River at 32 Washington Street, South Carolina State Ports Authority - Union Pier Terminal, Charleston, Charleston County, South Carolina. TMS#: 459-00-00-009.**

SEE SPECIAL CONDITION(S)

This permit is issued under the provisions of S. C. Code Ann. Section 48-39-10, *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2005). Please carefully read the project description and any special conditions that may appear on this permit/certification as they will affect the work that is allowed. If there are no special conditions, then the work is authorized as described in the project description and as modified by the general conditions. The general conditions are also a part of this permit/certification and should be read in their entirety. The S. C. Contractor's Licensing Act of 1999, enacted as S.C. Code Ann. Section 40-11-5 through 430, requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. **All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.**

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The work as shown on the attached plans will consist of making improvements to an existing waterfront building. Specifically, the permittee will install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of pile supported Building #322. Additionally, additional structural changes will be made to building 322 and two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies will be constructed. The purpose of the overall project is to facilitate the relocation of the cruise passenger facility to Building #322.

SPECIAL CONDITIONS

1. Provided that operations for the new passenger cruise facility at Union Pier Terminal are conducted in accordance with the attached Voluntary Cruise Management Plan (Attachment A). If there are any future changes proposed to the Voluntary Cruise Management Plan, the Department must be included in the notification process as outlined on the second page of the Voluntary Cruise Management Plan titled "Clarification Process of City Consultation Regarding Cruise Management Plan Alteration".

2. Provided that the construction detailed in this permit does not begin until after the Memorandum of Agreement, dated March 26, 2007 (as amended), between the State Ports Authority and the SCDHEC has been revised and finalized.

3. Provided that the SPA require its contractors, for the activities addressed under this permit, to:

    a. perform work in compliance with all applicable local, state, and federal environmental laws and requirements.

    b. use low emission vehicles that conform to the federal Tier 2 or higher emissions standards for all non road equipment between 100 and 750 horsepower.

    c. turn off construction equipment and vehicles not in active use.

    d. implement dust control using the best management practices that may include, but not be limited to, water spraying, applying mulch and establishing vegetation, applying polymers, and spraying tackifiers in compliance with state and federal environmental regulations.

    e. require that all diesel vehicles, construction equipment and generators on site use ultra-low sulfur diesel (15 ppm), a biodiesel blend approved by the original engine or equipment manufacturer with sulfur content of 15 ppm or less, or other clean burning alternative fuel such as propane, where such fuel is commercially and reasonably available.

4. Provided that any disturbed critical area adjacent to the construction site be restored to original contours and conditions upon project completion.

5. Once the project is initiated, it must be carried to completion in an expeditious manner in order to minimize the period of disturbance to the environment.

6. Provided that an as-built survey of the modified terminal facility must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all components of the new terminal facility, and must list the starting and ending coordinates of the new terminal facility in the SC State Plane Coordinate System, which can be obtained by survey-grade Global Positioning System equipment.

7. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5). BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

Permit Number: **OCRM-12-054-B**

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(PERMITTEE(S)) (DATE)
SC State Ports Authority

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

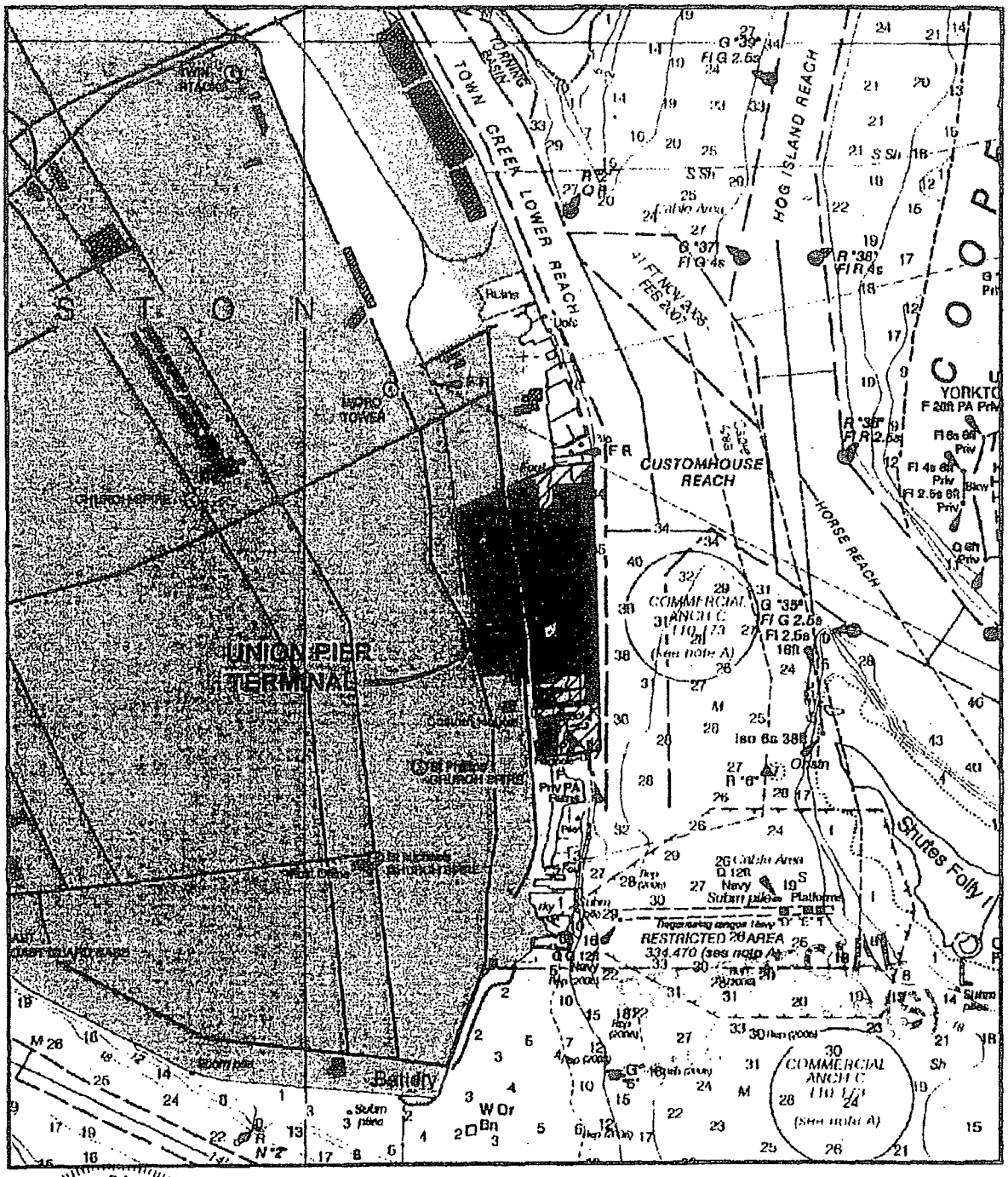
Steven Brooks 12/18/12

(PROJECT MANAGER, WETLAND SECTION) (DATE)
Steven Brooks
or her Designee
Other Authorized State Official

GENERAL CONDITIONS:

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than sixty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further, to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM.
8. That this permit may not be transferred to a third party without prior written notice to OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition, shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public's health, safety, or welfare, or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee, agent, or representative of OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.



SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

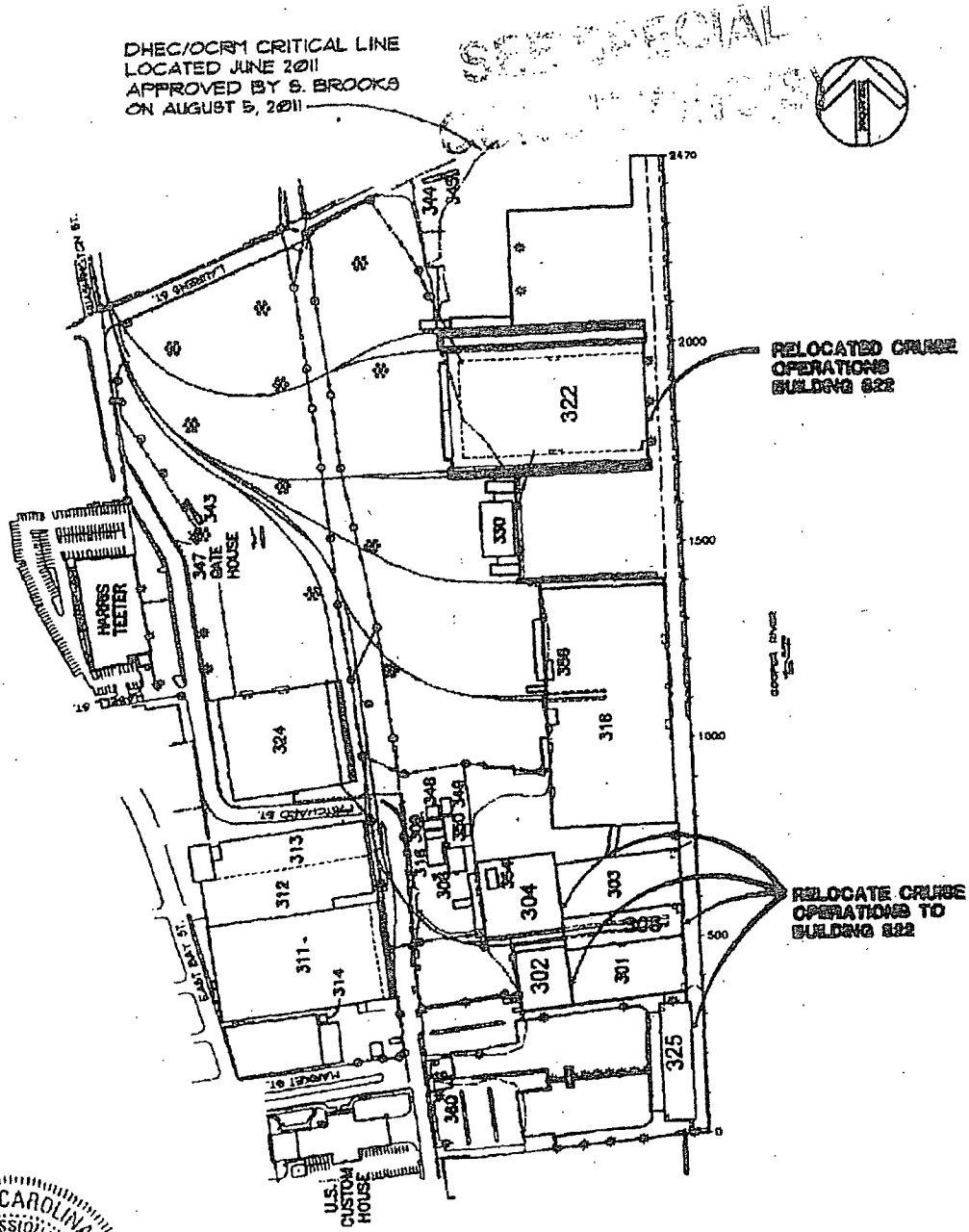
Derrick L. Bellamy

LOCATION

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

PROJECT NO.: CIF11E006B
FILE NAME: Upcptp1
DATE: JULY 2012
SHEET: 1 OF 11



SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

Derrick L. Bellamy

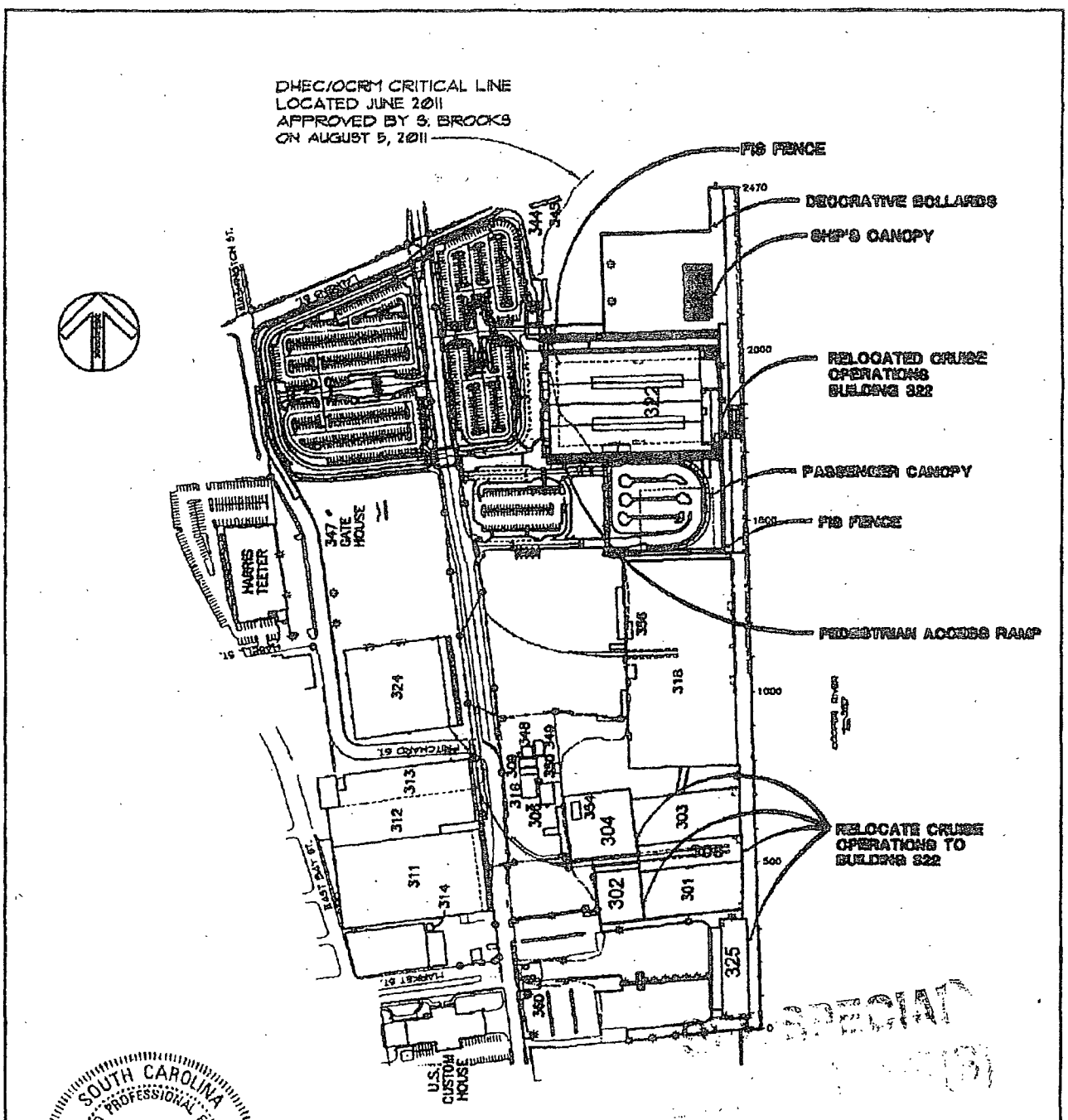
400 0 400
SCALE IN FEET

BUILDING LOCATION PLAN
UNION PIER TERMINAL

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

PROJECT NO.: CIF11E006B
FILE NAME: Upcplp2
DATE: MARCH 2012
SHEET: 2 OF 11



SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

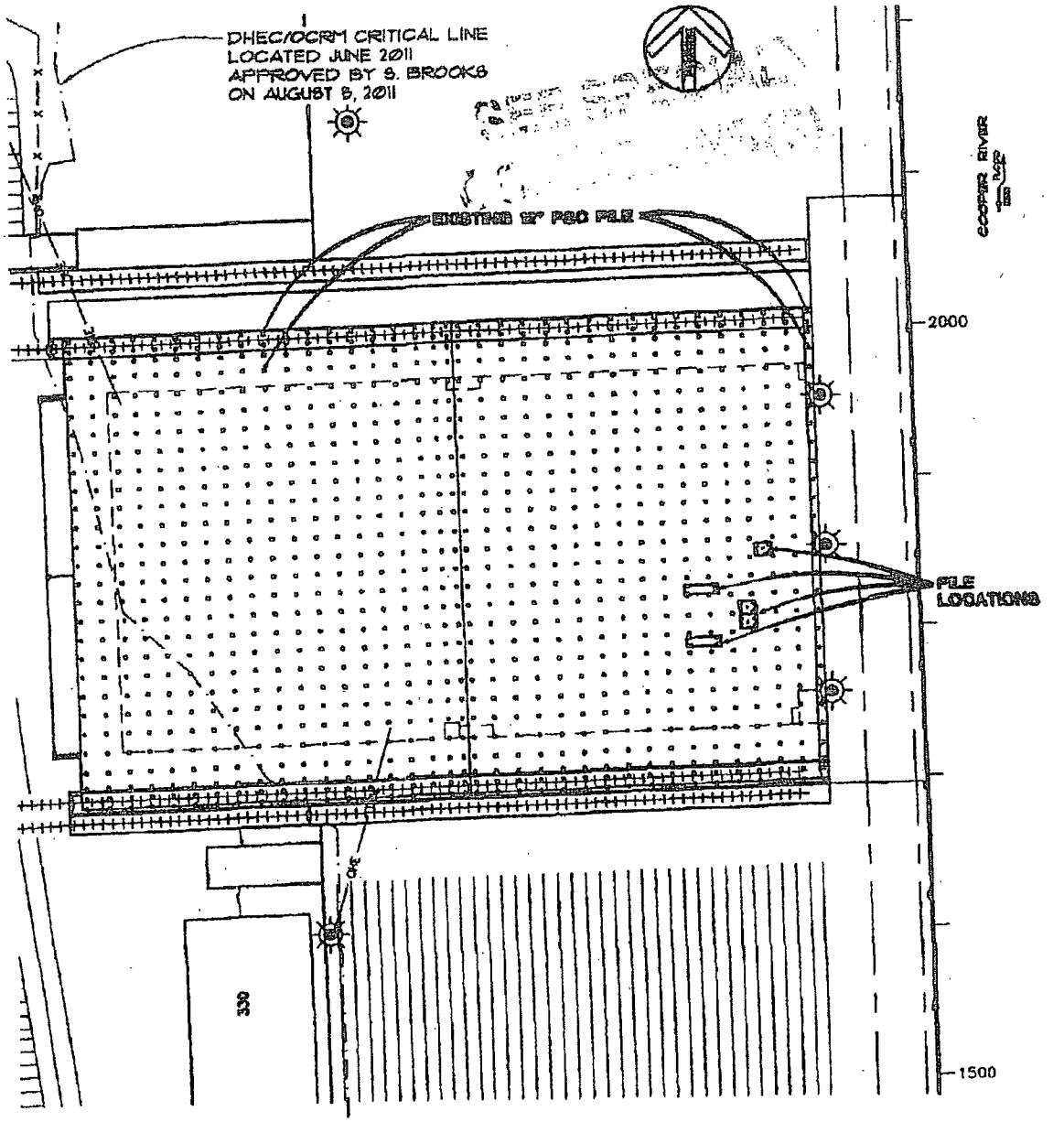
NEW BUILDING LOCATION PLAN
UNION PIER TERMINAL

400 0 400
SCALE IN FEET

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

PROJECT NO.: CIF11E006B
FILE NAME: Upcplp3
DATE: MARCH 2012
SHEET: 3 OF 11



LEGEND

B — ELEVATORS

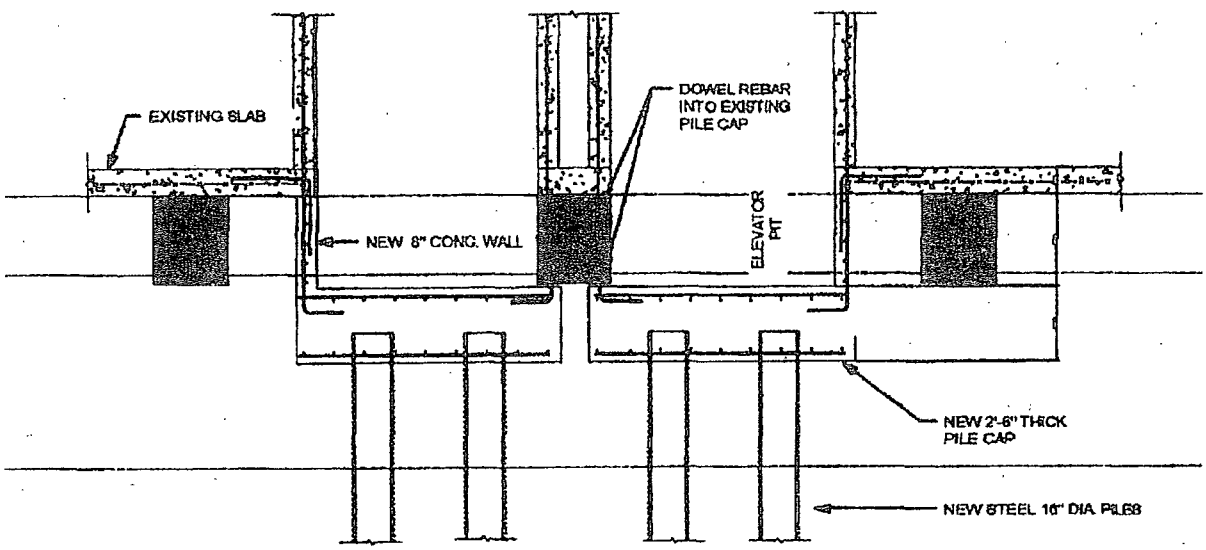
A — ESCALATOR

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

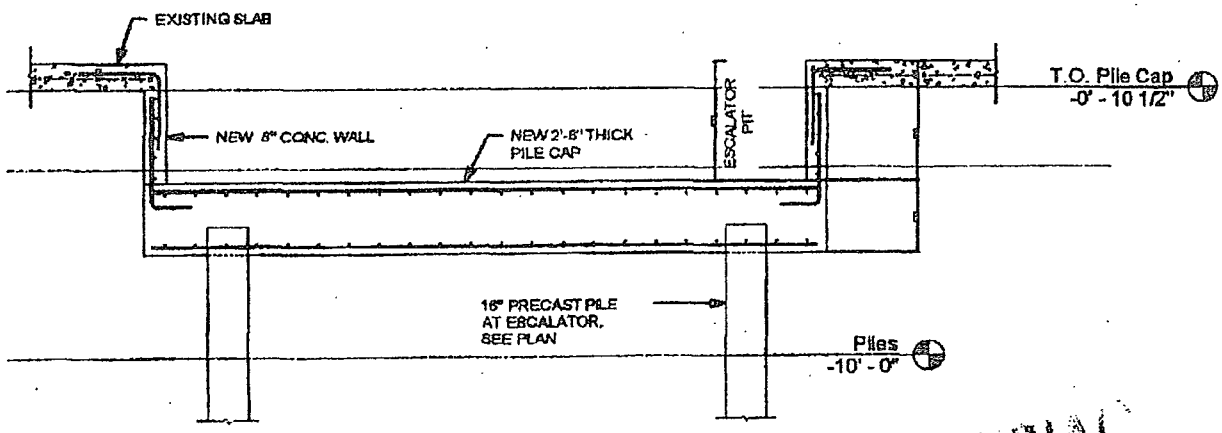
MODIFICATIONS (BUILDING 322)

South Carolina State PORTS AUTHORITY
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E0058
FILE NAME: Upptp4
DATE: JULY 2012
SHEET: 4 OF 11



A/6S SECTION ELEVATOR



B/6S SECTION ESCALATOR

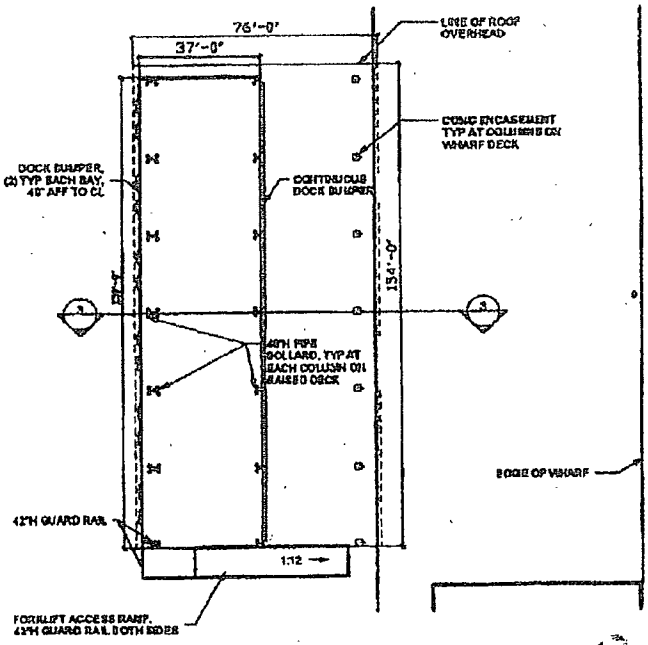
SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

David L. Bellamy

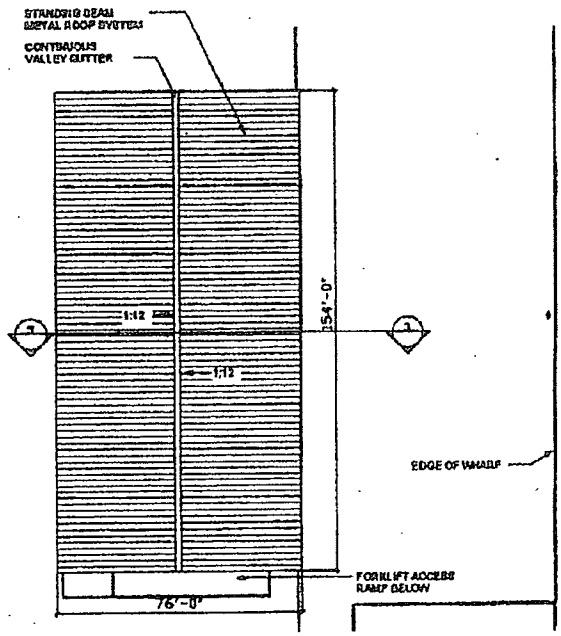
MODIFICATIONS (CROSS SECTION)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

GCRA-12-054-B
PROJECT NO.: CF11E006B
FILE NAME: Upcptp5
DATE: JULY 2012
SHEET: 5 OF 11



1 STORES CANOPY FLOOR PLAN



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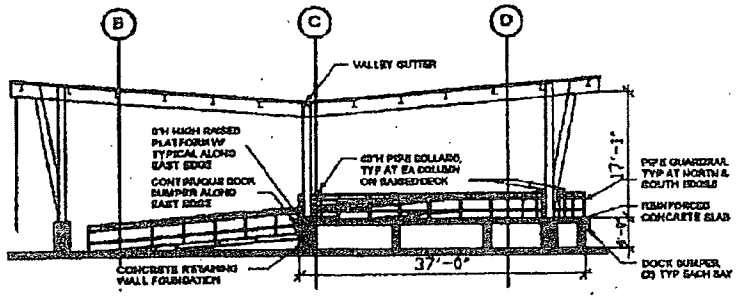


3 STORES CANOPY E-W SECTION

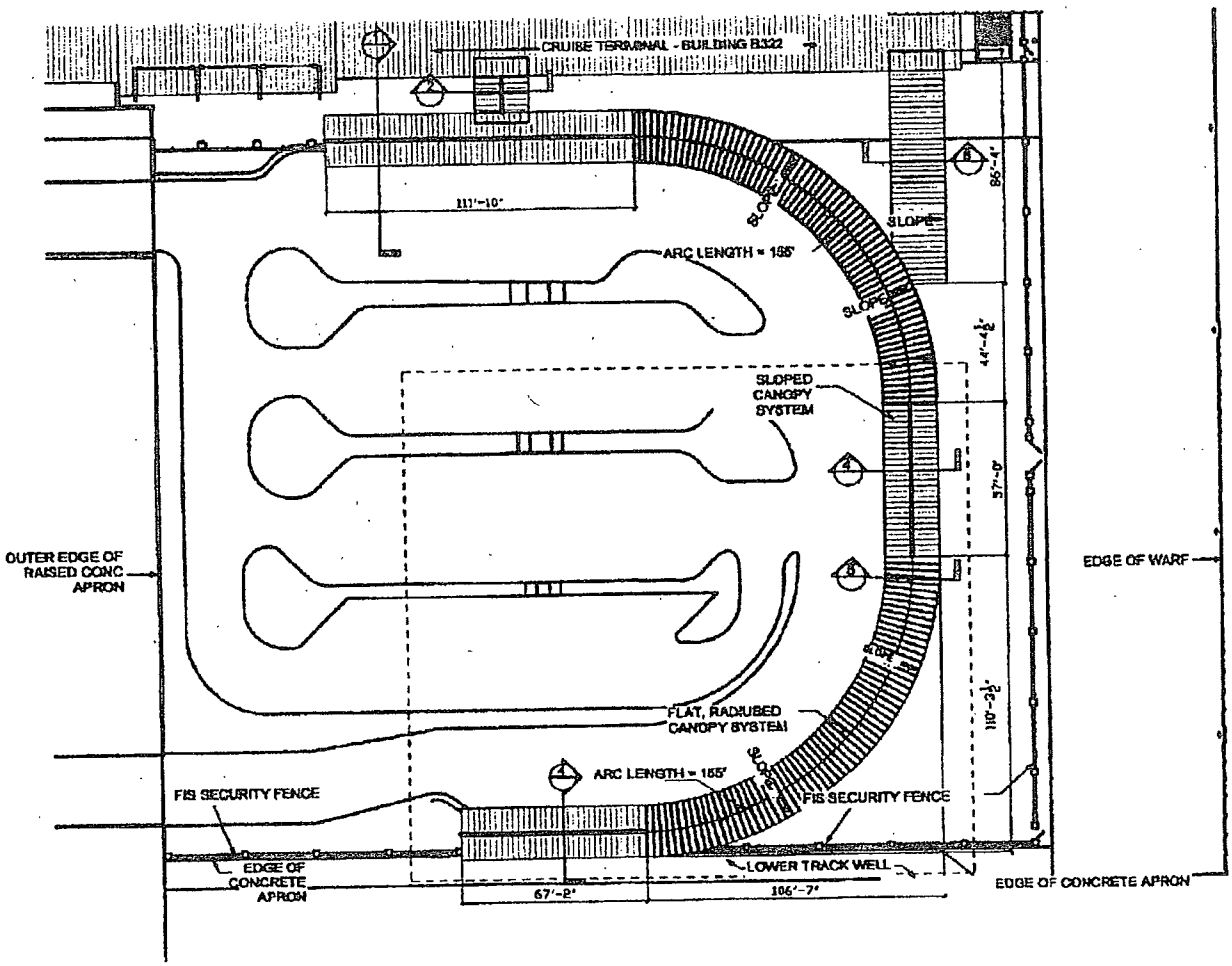
SOUTH CAROLINA PROFESSIONAL ENGINEER
LICENSED
No. 25448
7/24/12
DERRICK L. BELLAMY

MODIFICATIONS
NORTH APRON

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

PROJECT NO.: CF11E006B
FILE NAME: Upgdp6
DATE: JULY 2012
SHEET: 6 OF 11



PAX CANOPY PLAN

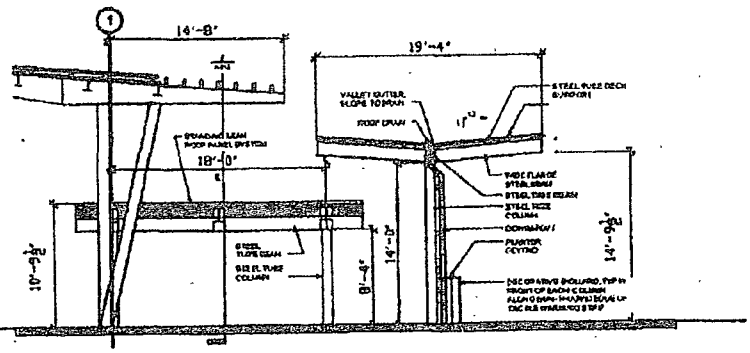
SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

Derrick L. Bellamy

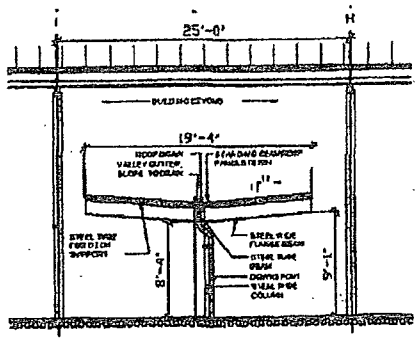
MODIFICATIONS
SOUTH APRON

South Carolina State ***PORTS AUTHORITY***
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

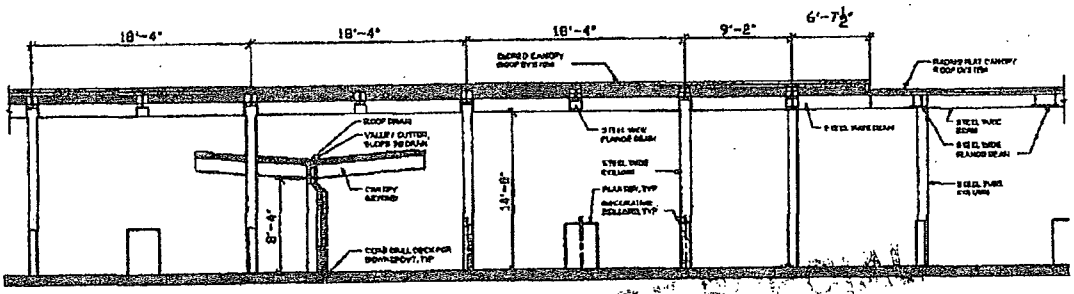
OCRM-12-054-B
PROJECT NO.: CIF11E0068
FILE NAME: Upcptp7
DATE: JULY 2012
SHEET: 7 OF 11



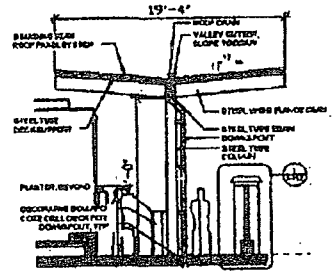
SECTION - PAX DROP OFF ZONE CANOPY



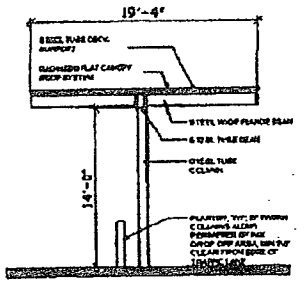
SECTION - PAX DROP OFF ZONE CANOPY @ BLDG INTERSECTION



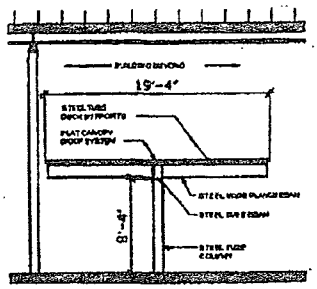
SECTION - PAX ACCESS CANOPY



SECTION - SOUTH PAX ACCESS CANOPY



SECTION - FLAT PAX ACCESS CANOPY



SECTION - FLAT POV BAG CANOPY

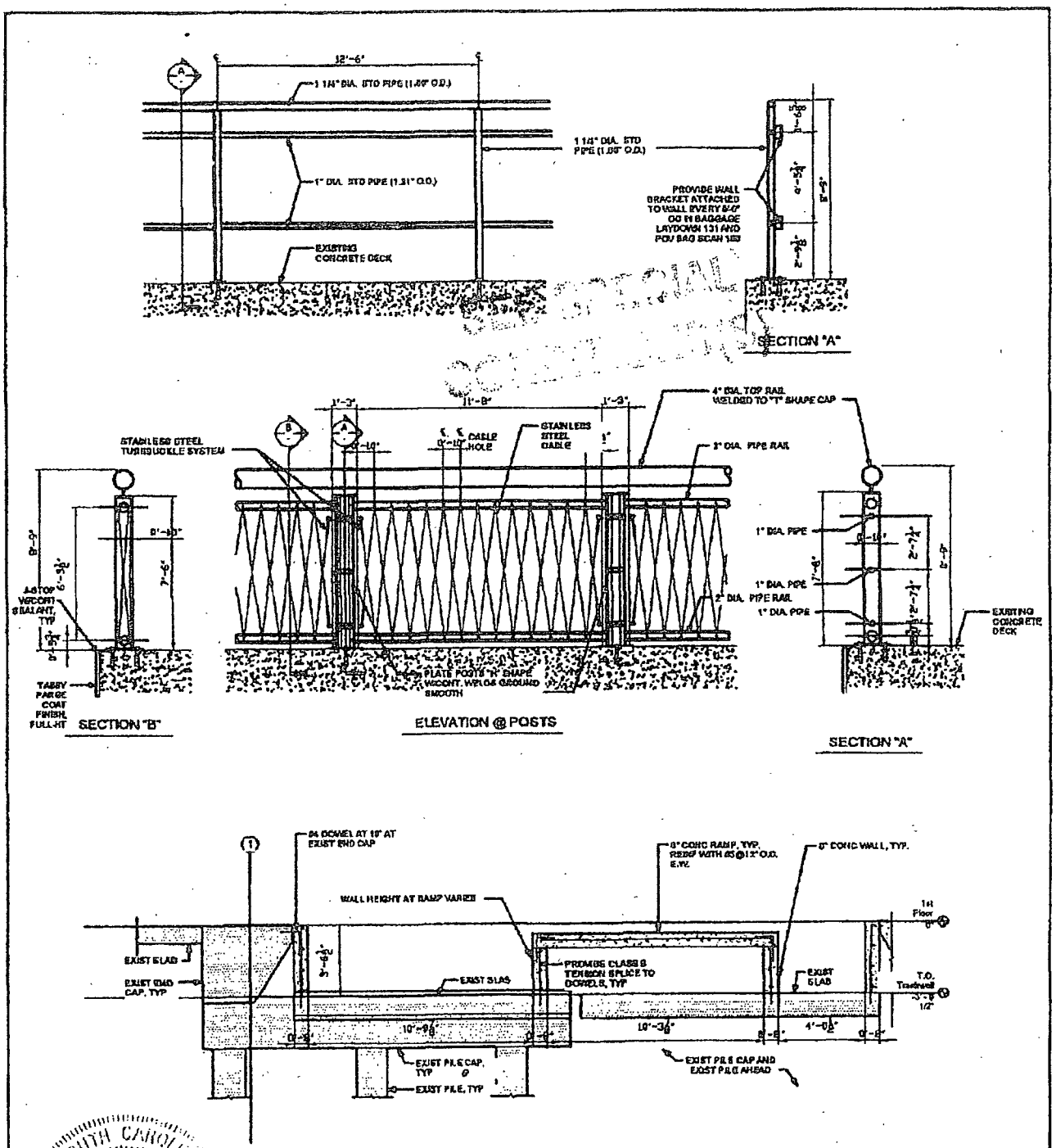
SOUTH CAROLINA PROFESSIONAL ENGINEER
LICENSED
No. 25448
7/24/12
DERRICK L. BELLAMY

Derrick L. Bellamy

MODIFICATION
SOUTH APRON - DETAILS

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp8
DATE: JULY 2012
SHEET: 8 OF 11



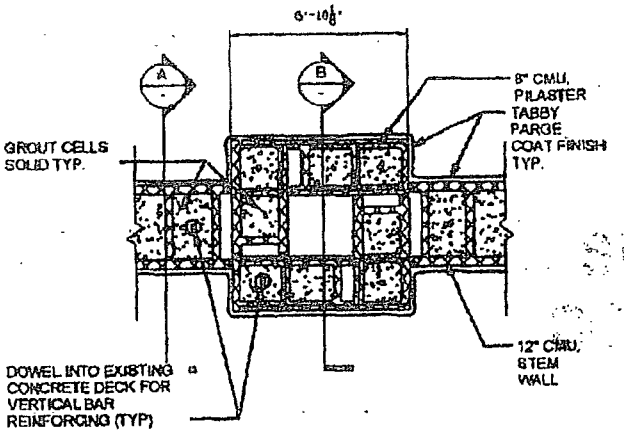
MODIFICATIONS
PEDESTRIAN ACCESS RAMP DETAIL

SOUTH CAROLINA PROFESSIONAL ENGINEER No. 25648 7/24/12 DERICK L. BELLAMY

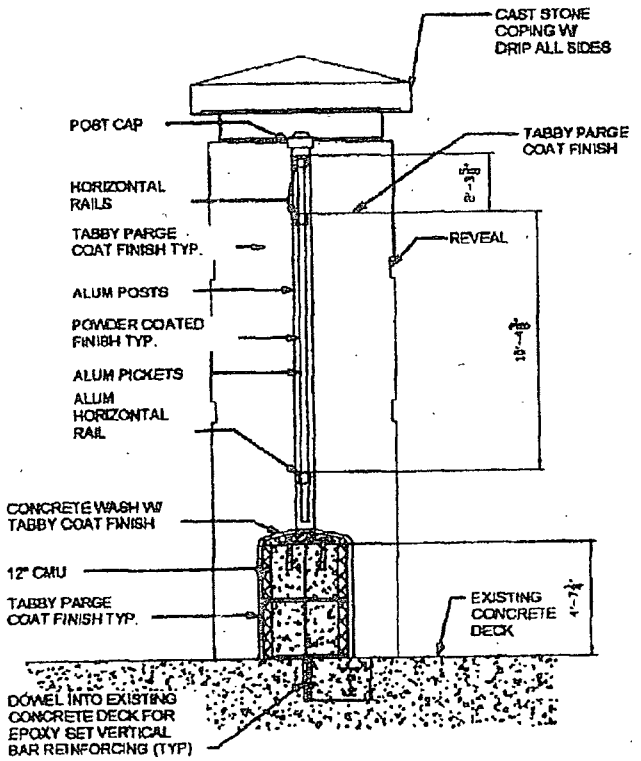
Derick L. Bellamy

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

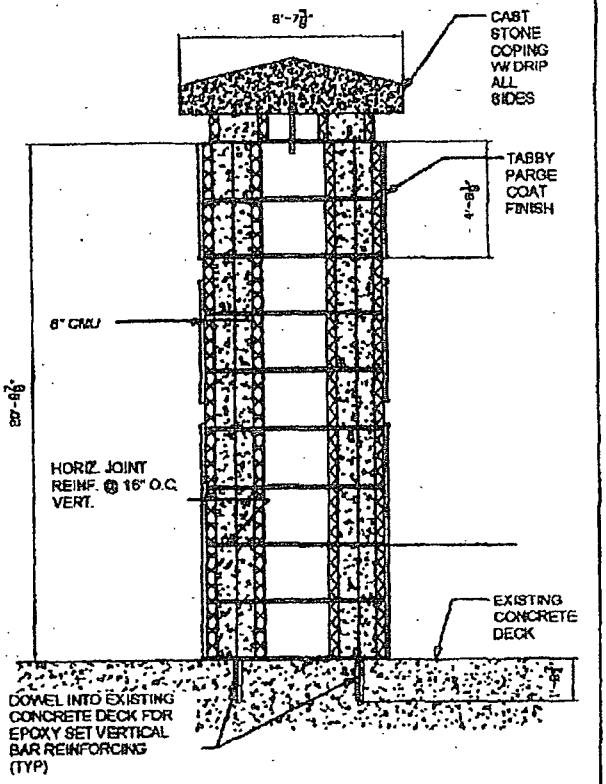
OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp9
DATE: JULY 2012
SHEET: 9 OF 11



PLAN DETAIL @ MASONRY PILASTER



WALL SECTION "A" @ MASONRY STEM WALL



WALL SECTION "B" @ MASONRY PILASTER

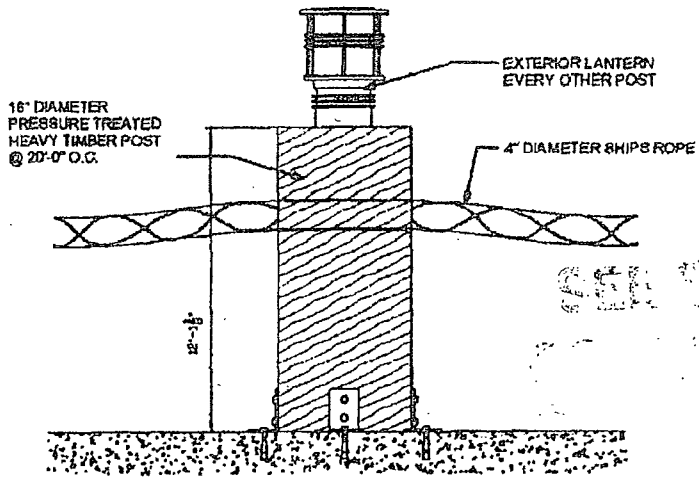
SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

Derrick L. Bellamy

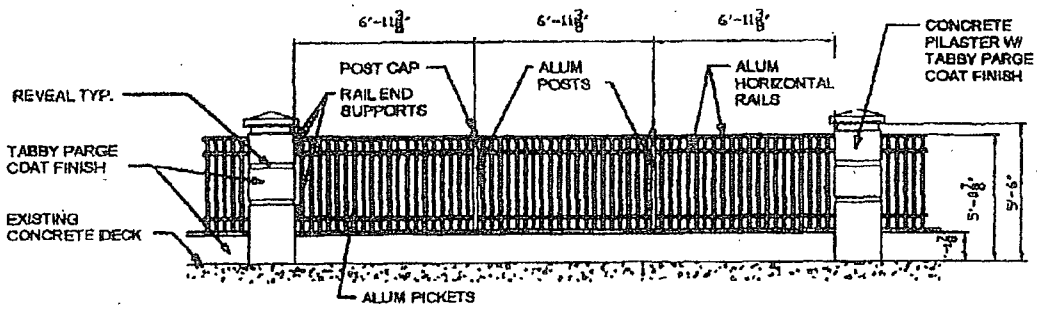
MODIFICATIONS
SECURITY FENCE DETAILS

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

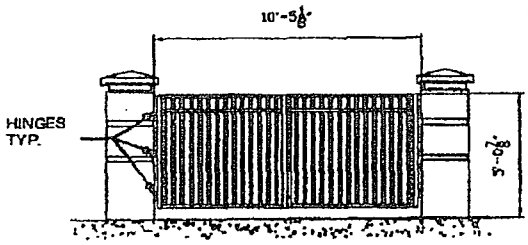
OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upoptp10
DATE: JULY 2012
SHEET: 10 OF 11



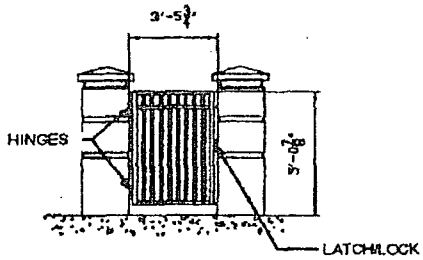
NORTH APRON DECORATIVE BOLLARDS



ELEVATION @ FIS SECURITY FENCE



ELEVATION @ ACCESS GATE



ELEVATION @ PED GATE

No. 15448
7/24/12

MODIFICATIONS
SECURITY FENCE DETAILS

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

6CRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcpfp11
DATE: JULY 2012
SHEET: 11 OF 11

VOLUNTARY CRUISE MANAGEMENT PLAN
SOUTH CAROLINA STATE PORTS AUTHORITY
AND
CITY OF CHARLESTON

(1) The number of cruise ships will be no more than 104 calls per calendar year.

(2) The port will host no more than one ship at a time at the cruise terminal.

(3) The terminal will be designed at the northern end of Union Pier to accommodate ships consistent with the size and profile that have called Charleston in the past (1,900 to 3,500 passenger design capacity)

(4) A Traffic Management Plan which removes maritime cruise traffic from City streets as soon as possible as well as continued coordination and communication with the Charleston City Police Department and the City Special Events Committee.

(5) A continued commitment by the SCSPA to contribute an allocation to the DASH Downtown Shuttle program, as described in the City Agreement with the SCSPA, providing free shuttle rides to those traveling in the downtown areas of the City.

ATTACHMENT A

CLARIFICATION OF PROCESS OF CITY CONSULTATION REGARDING CRUISE MANAGEMENT PLAN ALTERATION

Should the SCSPA, at any future date, deem that any material change should be made to the Voluntary Cruise Management Plan, at least one year prior to effecting any such change the following will be done:

(1) Written notification to the Mayor and City Council.

(2) Written notification to the Cruise Neighborhood Advisory Council.

(3) Written notification to Charleston Metro Chamber of Commerce and the Maritime Association of South Carolina.

(4) Written notification to the Historic Charleston Foundation and the Preservation Society.

(5) The convening of a community forum to discuss any material change to the plan.

(6) The solicitation of public input through one or more public hearings, including a public hearing at a City Council meeting.

(7) Careful and thoughtful consideration of the public input.

(8) Report to the Mayor and City Council of the SCSPA board and staff findings and decision.

EXHIBIT B

CESAC-RD-SP
Application: SAC-2003-13026

MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Memorandum Documenting Nationwide Permit/Regional General Permit Verification

Applicant: South Carolina State Ports Authority

Reviewer: Nathaniel I. Ball **Date of Review:** April 18, 2012

On-Site review: ☐Yes ☒No **Off –Site Review:** ☒Yes ☐No

Project Location ***(Waterway, Section, Township, Range, City, County, State):*** Union Pier Terminal is located near the intersection of Market Street and Washington Street in Charleston, South Carolina.

Pre-Construction Notification Receipt Date: January 27, 2012 **Complete?** ☐Yes ☒No

Additional Information Requested Date: February 15, 2012, March 15, 2012, and April 5, 2012. The Corps requested additional information about the avoidance and minimization of potential impacts to waters of the United States, the method for installing the additional pilings, and clarification about the limits of waters of the United States on the project site.

Pre-Construction Notification Complete Date: April 16, 2012

Waters of the US: The existing pile supported deck and wharf are located in the Cooper River, a navigable water of the United States.

Authority: ☒Section 10 ☐Section 404 ☐Section 103

Project Description ***(Describe activities in waters of the U.S. considered for verification):*** The proposed activities in waters of the United States consist of the installation of additional pilings underneath a portion of a previously permitted pile supported wharf at Union Pier. The existing wharf is 2,470 feet long and includes several buildings that are currently used to support commercial shipping activities (break bulk cargo, Ro-Ro, passengers, etc). As described below, the SCSPA has operated a passenger facility at Union Pier for more than 40 years. Therefore, the renovation of Building 322 to consolidate existing activities at Union Pier and to increase the efficiency of the existing passenger facility is not considered a "change in use".

With regard to Nationwide Permit 3 (NWP 3), the existing wharf is considered a currently serviceable structure and the additional pilings and the proposed renovations to Building 322 are considered minor deviations in the existing structure's configuration that are required to comply with Federal regulations and current terminal security requirements that were established after September 11, 2001. In addition, renovating an existing building at Union Pier avoids and minimizes potential impacts to waters of the United States and will enable the SCSPA to continue operating the existing passenger facility at Union Pier while the necessary improvements are being constructed.

Site Assessment ***(Describe the present land use, cover type, and a qualitative assessment of the aquatic resources):*** The project site is developed as Union Pier Terminal and has been used for different types of commercial shipping for more than 100 years. The existing marine terminal has 2,470 linear feet of continuous pile supported wharf and berth space. The proposed pilings will be located **underneath** Building 322. This portion of Union Pier was redeveloped between 35 and 40 years ago. In order to construct this portion of the existing pile supported structure and Building 322, the SCSPA removed old pilings and structures and dredged approximately 50,000 cubic yards of dredged material, which was shifted back and forth across the project site to provide access for construction and pile driving equipment. The existing structure is operated and maintained by the SCSPA to meet the commercial shipping needs of their customers. The SCSPA maintains the existing berth at a depth of -45 feet Mean Low Water (MLW).

Type of Permit Requested: NWP 3 **RGP #**

Pre-construction Notification Required: ☒Yes ☐No Although the proposed activities in waters of the United States are considered minor, pre-construction notification is required because Union Pier Terminal is located adjacent to the Charleston Harbor Federal Navigation Project.

Waiver required to begin work ***(see GC 31 (a)(2) as applied to appropriate NWPs):***
☐Yes ☒ No
Rationale:

Coordination with Agencies/Tribes Needed: ☐Yes ☒No Date:
Resolution:

Commenting Agencies:
Coordination Needed/Required: ☐Yes ☒No
(If yes, check appropriate agency(s))
US Fish and Wildlife Service ☐
US Environmental Protection Agency ☐
National Marine Fisheries Service ☐
State Agency (list commenting state agencies) ☐
State Historic Preservation Office ☐
Other: ☐

Substantive Issues Raised and Corps Resolution ***(Consideration of Comments):***

Compliance with Other Federal Laws ***(If specific law is not applicable write N/A; however, you must provide an 'effects' determination):***

a) Endangered Species Act:
Name of species present: The following species are known to occur in Charleston County, South Carolina: West Indian manatee (*Trichechus manatus*), Kemp's ridley sea turtle (*Lepidochelys kempii*), Leatherback sea turtle (*Dermochelys coriacea*), Loggerhead sea turtle (*Caretta caretta*), Green sea turtle (*Chelonia mydas*), Shortnose sturgeon (*Acipenser brevirostrum*), and Atlantic sturgeon (*Acipenser oxyrinchus*).
Potential or Critical Habitat present: The proposed pilings are located underneath a pile supported wharf at an existing commercial shipping facility. The project site is not considered potential or critical habitat for any of the species that are identified above.
Effects determination: No Effect

Date of Service(s) concurrence: N/A
Basis for "no effect" determination: The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The proposed pilings will be installed using land based equipment and will have a negligible impact on aquatic resources or the available habitat underneath the existing wharf. According to the SCSPA, the pilings will be placed rather than dropped into the water to avoid potential impacts to marine life in the water column. Once installed the actual footprint of the additional pilings represents a very small area among the thousands of pilings that are already located underneath the existing pile supported structure. Therefore, the installation of these additional pilings is expected to have "no effect" on Federally listed threatened or endangered species that are known to occur in Charleston Harbor.
Additional information (describe steps taken to address concerns, as needed):

b) Magnuson-Stevens Act (Essential Fish Habitat):
Name of species present: The estuarine substrates, water column, and estuarine waters near the project site are considered Essential Fish Habitat (EFH) for white shrimp (*Litopenaeus setiferus*), brown shrimp (*Farfantepenaeus aztecus*), adult summer flounder (*Parlichthys dentatus*), and adult and juvenile blue fish (*Pomatomus saltatrix*).
Effects determination (Is this a project that "may adversely affect essential fish habitat?): No Effect
Date of Service(s) concurrence: N/A
Basis for "no effect" determination: The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The proposed pilings will be installed using land based equipment and will have a negligible impact on aquatic resources, estuarine waters, or the available habitat that is located underneath the existing wharf. In addition, the actual footprint of the additional pilings represents a very small area among the thousands of pilings that are already located underneath the existing pile supported structure. Therefore, the installation of these additional pilings is expected to have "no effect" on EFH.
Additional information (Describe steps taken to address concerns, as needed):

c) Section 106 of the National Historic Preservation Act:
Known site present: ☐ yes ☒ no
Survey required/conducted: ☐ yes ☒ no
Effects determination: No Potential to Cause Effect
Rationale: The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The DA permit (SAC-72-10-087-Revised) that authorized the construction of this portion of the wharf at Union Pier Terminal authorized the removal of old pilings and the excavation and backfilling of dredged material within the footprint of the structure. In order to provide both flotation and access for construction and pile driving equipment, approximately 50,000 cubic yards of dredged material was shifted back and forth across the project site during the construction of the existing structure.

As described above, the shallow open waters underneath the existing structure were disturbed by previous construction activities on the project site during the 1970s. According to our records, the entire pile supported wharf and the support facilities that are located on top of this structure have been extensively modified by previous work, including reconstruction, renovation, and/or extension at different times over the past 50 years. The existing wharf and Building 322, where the proposed

pilings will be located, is approximately 40 years old and is not considered eligible for the National Register of Historic Places.

The Corps acknowledges that a lawsuit has been filed in state court against Carnival Corporation, D/B/A Carnival Cruise Lines regarding the operation of the existing passenger terminal at Union Pier. In addition, the plaintiffs in the above referenced case have submitted "a request to be notified as consulting parties pertaining to any Section 106 review relating to Federal funding or permitting with respect to the Union Pier Cruise Terminal in Charleston, South Carolina." This request was submitted to several Federal agencies, including the Corps. Specifically, the plaintiffs expressed an interest in the preservation of historic properties that are located near the project site. However, for the reasons which follow, the Corps has determined that there is no potential to cause effects on historic properties and that no project-specific consultation is required under Section 106.

In accordance with the Standard Operating Procedures for the Regulatory Program dated July 2009, the Corps used 33 CFR 325 Appendix C, the Revised Interim Guidance for Implementing Appendix C dated April 25, 2005, and the Clarification of the Revised Interim Guidance for Implementing Appendix C dated January 31, 2007 to determine the "permit area" for the proposed project. As described in the Revised Interim Guidance, "(t)he limits of the "permit area" are constrained by the extent of Federal Control and responsibility over a particular project (i.e., the undertaking)." In this case, the proposed "undertaking" consists of the installation of additional pilings in waters of the United States underneath an existing, previously permitted pile supported wharf.

Similar to maintenance dredging, the installation of additional pilings underneath an existing wharf and the renovation of existing buildings that are located on a previously permitted pile supported structure, such as Building 322 at Union Pier, are considered maintenance activities. The "permit area" for this type of project is limited to the footprint of the proposed activities in waters of the United States. Therefore, the Corps' evaluation focuses on the footprint of the proposed pilings and any potential impacts associated with the installation of the additional pilings because of the limited scale and magnitude of the proposed undertaking.

Direct impacts associated with the installation of the additional pilings will occur underneath the existing wharf and have no potential to cause effects to historic properties pursuant to 36 CFR 800.3(a)(1). As described above, the Corps recognizes that Union Pier is located adjacent to historic properties, such as the U.S. Customs House. However, effects associated with the installation of additional pilings, such as noise associated with construction or pile driving equipment, will be short-term and negligible, and, therefore, will not directly or indirectly alter the listing or eligibility characteristics of any historic properties. Existing conditions on or near the proposed undertaking include busy city streets, an existing railroad spur, and the operation of an existing commercial shipping facility. In sum, the installation of additional pilings underneath an existing (and extensively modified) wharf is understood to be the type of activity that is of such limited nature and scope that it has no potential to cause effects to historic properties in or outside of the "permit area," even if such properties were deemed to be present within the permit area.

Date consultation complete (if necessary): N/A
Additional information (Describe steps taken to address concerns, as needed):

d) Section 401 Water Quality Certification: The effective date for the 2012 Nationwide Permits is March 19, 2012. At this time, the S.C. Department of Health and Environmental Control has not certified the new NWPs. Therefore, an individual Section 401 Water Quality Certification is required.

Individual certification required: ☒ yes ☐ no A special condition of this NWP requires the permittee to obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations prior to beginning the authorized work.
☐Issued ☐Waived ☐Denied

e) Coastal Zone Management Act: The effective date for the 2012 Nationwide Permits is March 19, 2012. At this time, the S.C. Department of Health and Environmental Control has not certified the new NWPs. Therefore, an individual Coastal Zone Consistency Determination and/or a Critical Area Permit is required.
Individual certification required: ☒ yes ☐ no A special condition of this NWP requires the permittee to obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations prior to beginning the authorized work.
☐Issued ☐Waived ☐Denied

Additional information (optional):
f) Wild and Scenic Rivers Act:
Project located on designated or "study" river: ☐ yes ☒no
Managing Agency:
Date written determination provided that the project will not adversely affect the Wild and Scenic River designation or study status:
Additional information (optional):

g) Other

Special Conditions Required *(include rationale for each required condition/explanation for requiring no special conditions)*: ☒ yes ☐ no The existing pile supported wharf and the additional pilings are located within navigable waters of the United States. Therefore, the following special conditions will be included in the Nationwide Permit verification letter:

That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful and knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

That the permittee agrees to provide all contractors associated with construction of the authorized activity a copy of the permit and drawings. A copy of the permit will be available at the construction site at all times.

That the permittee shall submit a signed compliance certification to the Corps within 60 days following completion of the authorized work <u>and any required mitigation</u>. The certification will include:

1. **A copy of this permit;**
2. **A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;**
3. **A statement that any required mitigation was completed in accordance with the permit conditions;**
4. **The signature of the permittee certifying the completion of the work and**

mitigation.

The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

It is recognized that this structure is to be constructed on/or adjacent to an area subject to a prism and/or disposal easement held by the United States in perpetuity in conjunction with a Congressionally authorized project for the maintenance and improvement of Charleston Harbor. This permit does not convey any property rights either in real estate or material or any exclusive use privileges; nor does it relinquish any right the United States has for the use of its easement or the maintenance and future widening or deepening of Charleston Harbor pursuant to its easement rights.

It is understood and agreed that if the District Commander determines this structure shall in any way in the future conflict with the improvement, operation, maintenance and widening or deepening of Charleston Harbor, the owners themselves, their heirs, successors and assigns will remove said structure within 45 days from the date that written notice is given by the District Commander, and there shall be no entitlement to compensation from the United States for damage or injury.

Conveyance of this permit applies only to the structure authorized and does not authorize the construction of any permanent structure or any structure suitable for habitation or any utility leading either to permanent structures suitable for habitation or to permanent structures within the bounds of areas on which the Corps of Engineers enjoys easement rights.

That permittee agrees that no permanent structures, beyond those authorized by this document, will be placed on the prism easement or on any adjacent disposal easement without written approval of the District Commander.

That the Secretary of the Army, representing the United States of America, hereby consents to the herein authorized facilities or structures to be located on or across easement lands vested in the United States of America for the construction and operation of Charleston Harbor. The permittee shall not engage in any act which may interfere with or abridge the easement interests of the United States, except those specifically authorized herein.

Compensatory Mitigation Determination: Has the applicant avoided and minimized impacts to the maximum extent practicable? ☒ yes ☐ no If "NO", Explain:

(1) Is compensatory mitigation required for unavoidable impacts to jurisdictional aquatic resources to reduce the individual and cumulative adverse environmental effects to a minimal level?

☐ yes ☒ no *[If "no," do not complete the rest of this section and include an explanation of why not here]* The proposed project consists of the installation of additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The potential impact to waters of the United States would affect a small area underneath an existing structure, and the additional pilings will be installed among thousands of pilings that are already located underneath this previously permitted structure. Therefore, compensatory mitigation is not required.

Is the impact in the service area of an approved mitigation bank? ☐ yes ☐ no

i. Does the mitigation bank have appropriate number and resource type of credits available? ☐ yes ☐ no

(2) Is the impact in the service area of an approved in-lieu fee program? ☐ yes ☐no

i. Does the in-lieu fee program have appropriate number and resource type of credits available? ☐ yes ☐ no

(3) Check the selected compensatory mitigation option(s):

☐ mitigation bank credits

☐ in-lieu fee program credits

☐ permittee-responsible mitigation under a watershed approach

☐ permittee-responsible mitigation, on-site and in-kind

☐ permittee-responsible mitigation, off-site and out-of-kind

(4) If a selected compensatory mitigation option deviates from the order of the options presented in §332.3(b)(2)-(6), explain why the selected compensatory mitigation option is environmentally preferable. Address the criteria provided in §332.3(a)(1) (i.e., the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project):

CESAC-RD-SP
SUBJECT: Department of the Army Memorandum Documenting Nationwide Permit/Regional General Permit Verification for the Above-Numbered Permit Application

District Engineer's Decision:

The proposed activity would result in no more than minimal individual and cumulative adverse environmental effects and would not be contrary to the public interest.

PREPARED BY:

Nathaniel I. Ball
Project Manager

20 April 2012
Date

REVIEWED BY:

Travis G. Hughes
Chief, Special Projects Branch
Regulatory Division

20 April 2012
Date

REVIEWED BY:

Tina B. Hadden
Chief, Regulatory Division

20 April 2012
Date

APPROVED BY:

Edward P. Chamberlayne, P.E.
Lieutenant Colonel, U.S. Army
Commander and District Engineer

20 APR 12
Date

EXHIBIT C

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March 6, 2013

VIA E-MAIL AND FACSIMILE

Amy Armstrong, Esquire
Michael G. Corley, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Re: *Preservation Society of Charleston v. S.C. State Ports Authority*;
Docket No. 13-ALJ-07-0056-CC

Dear Amy, Michael, and Jeff:

I have received your filing letter and motion to remand dated February 27, 2013 requesting the above-captioned matter be remanded to the Department of Health and Environmental Control (DHEC) Board for a final review conference.

Aside from the inaccurate factual assertions, the motion has no basis or support in the law. In fact, the statute specifically and unambiguously enacts a process making a Board review conference *discretionary* with the Board—a process in which you and your clients have participated on numerous occasions. The statute specifically provides that the "if the Board declines in writing to schedule a final review conference or if a final review conference is not conducted," then the "staff decision becomes the final agency decision." S.C. Code Ann. § 44-1-60(F). The statute further provides that a request for contested case may be filed with the ALC within 30 days after "notice is mailed ... that the board declined to hold a final review conference." S.C. Code Ann. § 44-1-60(G)(1). Given the clear statutory scheme, your participation in numerous matters following this same scheme, and the appellate opinions that recognize this discretionary process, the only purpose for this motion is delay and harassment.

See Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control, No. 2010-155629 (Feb. 27, 2013) (C.J. Toal) (reciting the DHEC Board's decision not to conduct a final review conference and according the DHEC staff decision deference); *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference rendering the staff decision the final decision); *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, No. 2010-159446 (March 6, 2013) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC); *Dreher v. S.C. Dep't of Health & Envtl. Control*, 399 S.C. 259, 730 S.E.2d 922 (Ct. App. 2012) (petition for cert pending) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC).

Accordingly, the Ports Authority requests withdrawal of the Motion to Remand. Should the motion not be withdrawn by the close of business on Monday, March 11, please consider this letter as consultation and notice that the Ports Authority may file a motion under Rule 72, RPALC, Rule 11, SCRCP, and the S.C. Frivolous Sanctions Proceedings Act, S.C. Code Ann. §§ 15-36-10 *et seq.*, for appropriate sanctions.

If you have any questions or would like to discuss this further, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

Randolph R. Lowell

cc: Marshall Taylor, Esquire
Philip Lawrence, Esquire

EXHIBIT D

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. Geathers, Administrative Law Judge

Case No. 07-ALJ-07-0107-CC
Case No. 07-ALJ-07-0108-CC

South Carolina Coastal Conservation League, ... Petitioner,

vs.

S.C. Department of Health and Environmental Control,
South Carolina Department of Transportation,
and South Carolina State Ports Authority, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that the Petition for Rehearing was filed with the South Carolina Court of Appeals on November 25, 2008, and the Order Denying Petition for Rehearing was issued on December 19, 2008.

QUESTIONS PRESENTED

1. Whether the limitations period for requesting review of Department of Health and Environmental Control ("DHEC") decisions begins when the decision is deposited in the mail or when it is received, where the statute requires that notice be sent with requested proof of "receipt." S.C. Code Ann. § 44-1-60(E) (2007).

2. Whether S.C. Code Ann. § 44-1-60(E) repealed DHEC's pre-existing notice requirements.

3. Whether the Court of Appeals decision denying the League the right to notice and hearing violates State and Federal constitutional provisions guaranteeing due process.

4. Whether the claim filing period of § 44-1-60(E) circumscribes the DHEC Board's subject matter jurisdiction.

5. Whether the Administrative Law Court erred in striking as untimely a motion for reconsideration filed 13 days after mail service of a dismissal order where the rules provide 15 days to respond to an order served by mail.

STATEMENT OF THE CASE

I. INTRODUCTION

The Court of Appeals' decision in this case is the first appellate decision to construe a central timing provision of Act 387,[1] a statue enacted by the General Assembly in 2006 to reform of administrative procedure in South Carolina. Act 387 restructured decision-making within several agencies including the Department of Health and Environmental Control ("DHEC"). Most notably, Act 387 reversed the preexisting sequence whereby DHEC staff decisions were reviewed first by the Administrative Law Court ("ALC") and then by the Board of Health and Environmental Control, so that decisions are now first reviewed by the Board, and then by the ALC. See S.C. Code Ann. § 44-1-60 (2007). As discussed below, the Court of Appeals construed the newly enacted provisions to constrain markedly the rights of citizens and businesses to challenge DHEC decisions by requiring that challenges to any DHEC decision be filed within 15 days of the decision's deposit in the mail, regardless of when, or whether, it is received.

This was clear error. The statutory text requires that DHEC send notice of decisions by "return-receipt" certified mail, and makes no mention of deposit that would indicate actual receipt of notice was not the pertinent event. S.C. Code Ann. § 44-1-60(E). Moreover, under this Court's decision in Hamm v. S.C. Public Service Commission, statutory periods for challenging agency action *must* run from receipt of notice to prevent the absurdity of an agency's delayed or flawed notice operating to "preclude judicial review" of its actions. 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985).

[1] Act No. 387, 2006 S.C. Acts & Joint Resolutions (H. 3285, R. 398) (2006).

The Court of Appeals' interpretation, whereby the limitations period starts with deposit in the mail regardless of receipt, conflicts with plain statutory text, and with Hamm.

The Court of Appeals also erred by holding that Act 387 overrides existing legal requirements for DHEC to send timely mailed notice of its actions to interested parties that submit written, detailed letters expressing interest in, and objection to, proposed decisions. Longstanding DHEC rules required that notice be provided to the League, which sent multiple letters on behalf of thousands of members to DHEC objecting to approvals of a shipping terminal and related highway project detailing DHEC's disregard of practical measures to decrease air and water pollution from these massive projects. The Court of Appeals' failed to reconcile DHEC's existing notice requirements with Act 387, even though the latter explicitly requires DHEC to abide by "all" notice provisions.

The Court of Appeals also erred by concluding that the League's challenges were untimely even though the League did not receive timely mailed notice and even though it filed requests for review within one business day of actual notice. The League was entitled to notice under DHEC's rules and the constitution. A DHEC official told the League it was "on the list" to receive notice before failing to send timely written notification, and on what the Opinion holds is the last day of the limitations period, DHEC told the League that the relevant decision was made later than it in fact had been, leading the League to reasonably believe its request for review was due November 20, 2006 – the date the League actually filed. The court's vacatur of Board conferences for timing reasons borne of a lack of notice violated due process of law.

Rather than engage these record facts, the Court of Appeals construed the limitations period at issue to define the Board's subject matter jurisdiction. This too was

error. Subject matter jurisdiction concerns the power of a judicial tribunal to entertain a matter and cannot be interpreted or applied to prevent manifest injustice or fairness. Under this Court's precedent, the claims filing period of §44-1-60(E) does not delineate jurisdiction over the matter, but instead relates to exhaustion of administrative remedies. The Court of Appeals' mischaracterization of the time period, and its failure to consider the overwhelming unfairness and inequity caused by its rigid application to dismiss the League's challenges, were both erroneous.

Finally, the Court of Appeals erred in holding that that the League's motion for reconsideration before the ALC was untimely. The League's motion was filed well within the 15 day period allowed under the ALC's rules.

II. PROCEDURAL AND STATUTORY BACKGROUND

In early 2007, the DHEC Board conducted final review conferences on DHEC staff approvals of two related projects: a proposed 300-acre port terminal in Charleston (the "Terminal Permit"), and a four-lane highway that would connect the terminal to I-26 (the "Highway Permit").[2] As noted above, under Act 387, staff decisions are reviewed first by the Board for internal resolution before matters move to the ALC for evidentiary contested case hearings. See S.C. Code Ann. § 44-1-60. To carry out this new sequence, the Board is empowered to conduct public "review conferences" wherein affected parties can provide evidence "to support amending, modifying, or rescinding the department

[2] The permit applicant for the terminal was the South Carolina State Ports Authority ("SPA"). The permit applicant for the highway was the South Carolina Department of Transportation ("DOT"). Both are respondents in these consolidated cases. This petition refers to the record in the SPA Terminal Permit Matter, case No. 07-ALJ-07-0107-CC, as the "Terminal Record". The record in the DOT Highway Permit Matter, case No. 07-ALJ-07-0108-CC, is referred to as the "Highway Record."

decision." S.C. Code Ann. § 44-1-60(F)(1).[3] The Board, or its designee, may request additional information and question anyone providing information at the conference, id. § 44-1-60(F)(1), with parties "encouraged" to "engage in mediation during the final agency review process, id. § 44-1-60(G)." Act 387 directs that DHEC "shall" comply with "all requirements for public notice" before making "a department decision," and states that "[a]ny statutory deadlines applicable to permitting and licensing programs administered by the department shall be extended to allow for this final review process." Id. §§ 44-1-60(B), (H).

The first step in this process is an initial DHEC staff decision, which becomes the agency's final decision "unless" a request for Board review is made within 15 days after notice is mailed by "certified mail, return-receipt requested" to the applicant. S.C. Code Ann. § 44-1-60(E). Here, DHEC staff mailed notice of the initial Terminal Permit decision to SPA by return-receipt request certified mailings deposited on October 31, November 2, and November 17, 2006. (Terminal R. p. 379; SPA Terminal Br. at 3, 15) Two requests for Board review were made regarding the Terminal Permit. The first was by SPA, on November 13, 2006. (Terminal R. pp. 146-154.). The second was by the League, which received late mailed written notice on November 20 and filed its request that day. (Terminal R. pp. 158-160).[4]

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[3] The Board has the option of conducting a conference or not after a request for review is made. If the Board does not conduct a conference within 60 days, the staff decision becomes the "final agency decision"; if it does, as here, the Board's written decision becomes the final agency decision. S.C. Code Ann. § 44-1-60(F), (F)(2) (2007). An affected person "desiring to contest the final agency decision" may request a contested case hearing before the ALC. Id. § 44-1-60(F)(2).

[4] The League also filed a motion to intervene in SPA's request for review on December 6, 2006. (Terminal R. pp. 161-166.)

DHEC mailed notice of the initial Highway Permit to SCDOT by certified mail return-receipt requested on November 13, 2006. (See Highway R. p. 28.) Two requests for review were filed regarding the Highway Permit as well. The first was by the League, which had submitted written letters objecting to the highway and terminal matters, (e.g., Highway R. pp. 95-99), yet received no written notice of the Highway Permit. The League filed its request for review on November 30 after receiving notice by other means on November 29. (Highway R. p. 23.) The second request for review was filed by Magnolia Development, LLC, an owner of property through which the proposed highway would run. Magnolia, which also did not receive notice, filed its request for review on December 20, 2006. (Highway R. pp. 100-105; Terminal R. pp. 23-26.)

Review conferences were held by the Board on the Terminal and Highway Permits on January 11, 2007, with all parties participating. (Terminal R. pp. 20; Highway R. pp. 23). The Board concluded that the requests for review were timely because they had been made within 15 days of receipt of notice (Highway R. pp. 24; Terminal R. pp. 21), facts that have never been in dispute. On February 8, 2007 the Board rendered a written final agency decision on the Terminal Permit, rejecting the League's substantive challenges and incorporating changes to the permit negotiated by SPA and DHEC staff. (Terminal R. pp. 20-45.) The same day, the Board also concluded its conference on the Highway Permit and issued a written decision rejecting the objections raised by Magnolia and the League. (Highway R. pp. 23-41.)

Pursuant to S.C. Code Ann. § 44-1-60(F)(2) and § 1-23-610, the League filed requests for contested cases with the Administrative Law Court ("ALC") in both matters, on March 9, 2007. (Terminal R. pp. 18-45; Highway R. pp. 20-31.) SPA filed motions

to dismiss the contested cases for lack of jurisdiction over the matters, contending the Board had been without authority to conduct the final review conferences below. (Terminal R. p. 76; Highway R. p. 59.) The ALC granted SPA's motions, issuing dismissal orders on September 4 and September 24, 2007. (See Terminal R. pp. 3-15; 16.) The League appealed the ALC dismissals to the South Carolina Court of Appeals, which consolidated the terminal and highway matters on October 17, 2007. That court heard oral argument October 21, 2008, and issued its Opinion affirming dismissal on jurisdictional grounds on October 23, 2008. Rehearing was denied on December 19, 2008. This petition followed.

III. FACTUAL BACKGROUND

On January 24, 2003, SPA and DOT applied to DHEC and the U.S. Army Corps of Engineers ("Corps") for state and federal permits to construct a 300-acre shipping terminal and four-lane highway connecting the terminal to I-26 in Charleston, South Carolina. As relevant here, SPA and SCDOT each sought a water quality certification, a coastal zone consistency certification and critical area permit from DHEC. (Terminl R. p. 20; Highway R. p. 23). DHEC and the Corps, following joint permitting practice, published combined public notices of the applications on February 24, 2006 and a revised notice on March 17, 2006. (Highway R. pp. 71-74). The League filed multiple written letters with the Corps and DHEC expressing its objections to and interests in the applications, on behalf of thousands of members in the Charleston area and statewide. (See, e.g., Highway R. pp. 96-99.) The League's comment letters documented environmental consequences of the Project that had not been disclosed or analyzed, including the severe impact of 10,000 port-related vehicles on I-26, and soot emissions

that would cause Charleston to fail health-based air standards and earn the region "non-attainment" status under the federal Clean Air Act – a designation that would limit future economic development. The League has also objected that the projects would lower dissolved oxygen levels in the Cooper River below state water quality standards and increase the number of fatal ship strikes for the federally endangered Northern Atlantic right whale. Finally, the League also demonstrated that many impacts could be avoided or reduced by using better pollution control equipment, by routing some containers through other ports (such as a proposed privately run port terminal in Jasper County), and by having a rail connection at the terminal, a measure that would divert traffic from I-26, reduce air emissions, and obviate the need for a $250 million interstate widening project. (Terminal R. pp. 128-142.)

DHEC's regulations require that notice of proposed agency decisions be sent to parties who submit written comments. S.C. Code Ann. Regs. 61-101(G)(1)(d) (2007) (notice required to "those persons providing comment"); S.C. Code Ann. Regs. 30-2(E) (2007) (critical area permit notice provided of to those wishing notice who "notify [DHEC] within [the] written comment period"); S.C. Coastal Zone Management Program (V)(C)(2) (1993 rev.) (notice provided to "any person commenting upon" applications for coastal zone consistency certifications). DHEC's Assistant Bureau Chief for the Bureau of Water told the League it was "on the list" for notice and "should have received" it. (Terminal R. pp. 155; 74.) The League did not receive mailed written notice of the Terminal Permit until November 20, the day it filed its request for review. The League never received mailed written notice of the Highway Permit.

ARGUMENT

I. The Court of Appeals' Holding That the Limitations Period at S.C. Code Ann. § 44-1-60(E) Runs From Deposit In the Mail Rather Than Receipt Conflicts With Plain Statutory Text and This Court's Decision in Hamm v. S.C. Public Service Commission.

Where a statute directs that service be "by certified mail, return receipt requested," such service is "not complete until the date of delivery" such that the "applicable date for tolling the statute of limitations is the date of receipt." Dandy v. American Laundry Mach., 301 S.C. 24, 27, 389 S.E.2d 866, 868 (1990), overruled in part on other grounds Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993); see also Holman v. Warwick Furniture Co., 318 S.C. 201, 456 S.E.2d 894 (1995); Guyton v. J.M. Mfg., Inc., 1995 U.S. Dist. LEXIS 22365, *5 n.4 (D.S.C. Aug. 23, 1995).[5] Act 387 directs that DHEC send notice of staff decisions by certified mail, "return receipt requested." S.C. Code Ann. § 44-1-60(E). Accordingly, the day for tolling the statute of limitations "is the date of receipt." Dandy, 301 S.C. at 27, 389 S.E.2d at 868.

By specifying that mailing must be by certified mail, return-receipt requested, the General Assembly manifestly intended to ensure that "receipt for the mail is ensured." S.C. Fed. Sav. Bank v. Atl. Land Title Co., 314 S.C. 292, 296, 442 S.E.2d 630, 632 (S.C. Ct. App. 1994). The only reason to ensure such receipt is to ensure actual notice, which begins the limitations period. Given language this unambiguous and clear, there is no need to employ the rules of statutory construction and a court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292,

[5] The linkage between service "by registered or certified mail, return receipt requested" and receipt is made explicit in current Rule 8(d)(8), SCRCP, which provides that service of complaint or summons "is effective upon the *date of delivery as shown on the return receipt*." (emphasis added).

298 (2003); State v. Sweat, 379 S.C. 367, 375 (S.C. Ct. App. 2008). The Court of Appeals, however, construed the limitations period to begin with deposit of a staff decision in the mail. (See Slip Op. at 10-11.)[6]

The court did not explain how a statute that speaks explicitly in terms of "receipt" could mean deposit in the mail, nor did it address the return-receipt language at all. Instead, it ignored the term "receipt" entirely, rendering the General Assembly's use of the term superfluous and futile and contravening of this Court's admonition "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous," Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. Statutes § 346), and the presumption that the legislature does not intend a futile act. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

Compounding its disregard of clear statutory terms was the Court of Appeals' failure to honor the *lack* of language indicating that "mailing" means anything *other* than "receipt." Where the legislature intends deposit in the mail to act in lieu of receipt, it says so explicitly by using the term "deposit" and including safeguards to guarantee that receipt actually occurs in timely fashion. Thus, by statute, service of a complaint to corporate entities is perfected five days after "its deposit in the United States mail," but only if "mailed postpaid and correctly addressed to the address of the company's principal office." S.C. Code Ann. § 15-9-210(c) (2007). Likewise, notice of driver's license cancellation is given by "depositing the notice in the United States mail" with "postage prepaid" and "addressed to the person at the address contained in the driver's license records of the department," with notice deemed "complete ten days after the

[6] References are to the Slip Opinion available at the South Carolina judicial website, http://www.judicial.state.sc.us/opinions/displayOpinion.cfm?caseNo=4450.

deposit of the notice") S.C. Code Ann. § 56-1-360 (2007); See State v. Smith, 330 S.C. 237, 239 (S.C. Ct. App. 1998). Insurance policy cancellation may be delivered "by depositing it in the United States mail" as well, with "postage prepaid, addressed to the last address of the person" needed to form "sufficient proof of delivery." S.C. Code Ann. § 38-39-90 (2007); see Bowman v. State Roofing Co., 365 S.C. 112, 117 (S.C. 2005).[7]

Section 44-1-60(e) makes no mention of deposit. It includes no reference to the United States Postal Service. It contains no safeguards or limitations to ensure receipt, such as proper addresses or sufficient postage. This choice to omit terms and conditions used elsewhere is meaningful and should be respected. Resolution Trust Corp. v. Eagle Lake & Golf Condos., 310 S.C. 473, 476 (S.C. 1993). Deposit clearly is not intended to be the operative act, as § 44-1-60(E)'s explicit use of "receipt" confirms. Importantly, use of "receipt" in §44-1-60(E) fits within Act 387's repeated use of "receipt" as the trigger for contesting agency decisions[8] and other triggering events (*e.g.*, an agency's

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[7] See also Sec. 2434, Code of Laws of 1912 (repealed) (notice by "registered letter through the United States mail, by being deposited in the United States post office at the place where the seller has heretofore conducted business or nearest thereto, properly addressed to the respective creditors at the post office address given in such schedule, with proper postage affixed") (quoted in Nat'l City Bank v. Huey & Martin Drug Co., 113 S.C. 333 (S.C. 1920)). Under the South Carolina Rules of Civil Procedure, where "service by mail is permitted, it is complete when the document is deposited with the United States Postal Service," but only if "properly addressed with sufficient postage." Southbridge Properties, Inc. v. Jones, 292 S.C. 198, 199, 355 S.E.2d 535 (1987); Wiggins v. Todd, 296 S.C. 432, 373 S.E.2d 704 (S.C. Ct. App. 1998).

[8] E.g., Act 387 § 5 (judicial appeal period beings when party "receives" decision of ALC) [codified at § 1-23-610(B)]; §9 (State Employee Grievance Committee) (beginning period with "receipt" of decision) [§ 8-17-340(F)]; § 16 (Human Affairs Commission) (from "receipt" of notice sent by registered mail) [§ 31-21-130(O)]; § 18 (Solicitation of charitable funds) (from "receipt of certified notice") [§ 33-56-140(E)]; § 23 (Commission of Agriculture) (from "receipt of written notice") [§ 46-3-220]; § 24 (State Corps Pest Commission) (from "receipt of notice) [§ 46-9-90]; § 26 (Livestock-Poultry Health Department of Clemson) (from "receipt" of notice") [§ 47-17-50]; § 48 (DHEC) (Board

"decision"[9]) that this Court has held *must* mean "receipt." See In re: Appeals from Administrative Decisions, 2006 S.C. LEXIS 283, *1-2 (S.C. 2006) (holding that appeal timeline beginning with agency "decision" found in Act 387 § 5 must be read to run from "receipt" of decision); Hamm v. S.C. Pub. Serv. Comm'n, 287 S.C. 180, 336 S.E.2d 470 (S.C. 1985) (statute's use of "decision" must mean receipt of notice). The pervasive use of receipt to begin limitations periods in Act 387 reinforces the significance of the "return-receipt" notice requirement in § 44-1-60(E), and contrasts sharply with the dearth of references to "deposit" or indicia that deposit will suffice. The limitations period here begins with receipt pursuant to plain statutory words, and the Court of Appeals had no basis for its contrary reading.

Even if there were any textual basis for Court of Appeals' reading, construing the period to begin with deposit regardless of receipt conflicts directly with this Court's decision in Hamm v. S.C. Public Service Commission, 287 S.C. 180, 336 S.E.2d 470 (S.C. 1985). Hamm held that time period for challenging an agency's decision must run from actual receipt of notice of the decision to prevent an agency from insulating its decisions from review simply by delaying receipt of notice or omitting it altogether. Id. The 30-day claims filing period in that case began with the Public Service Commission's "decision." 287 S.C. at 181, 336 S.E.2d at 471; see S.C. Code Ann. § 1-23-380(b) (Supp.

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review requests from notice mailed "return-receipt"; ALC requests from "receipt" of Board decision) [§ 44-1-60].

[9] E.g., Act 387 § 2 (beginning judicial appeal period with "the final decision of the agency") [§ 1-23-380(A)(2)]; § 8 (State Ethics Commission) (beginning period with "service of an order") [§ 8-13-320(10)(m)]; § 11 (Procurement Review Panel) (from "date of . . . written determination") [§ 1-35-4410]; § 21 (Commission for the Blind) (from "notice of the decision") [§ 43-25-90]; § 28 (DHEC) (from "date of notice" of violation) [§ 48-20-160]; § 29 (DHEC Mining Council) (from "department's decision") [§ 48-20-190]; § 38 (Public Service Commission) (from "order or decision") [§ 58-5-330].

1984). The Commission issued its decision on March 30, 1984 and mailed it to the Consumer Advocate's office, which signed a return receipt dated April 2. Id. The acting Consumer Advocate, however, did not receive a copy of the decision until April 4 and filed action for judicial review 30 days afterwards. A motion to dismiss followed, contending the appeal was more than 30 days after the March 30 "decision." Id. Writing for a unanimous Court, Chief Justice Ness held that the statute "must be read to allow a party thirty days after *notice* of a decision to bring an appeal" and rejected a "literal reading" of the statute to the contrary. Id. (emphasis original). "However clear the language of a statute may be," the Court held, it "will reject that meaning when it leads to an absurd result not possibly intended by the legislature." Id. The absurd result discerned in Hamm was that if the "time to appeal ran from the date a decision was actually made, an agency could preclude judicial review in all cases simply by concealing its decision until the thirty days had run." Id. Because the legislature could not possibly have intended a construction that would permit such a result, the Court read "decision" to mean "receipt" of decision. Id.

Because the Court of Appeals' statutory construction requires that a party request DHEC Board review within fifteen days of a staff decision being deposited in the mail to a permittee with no guarantee with no guarantee of receipt (see Slip Op. at 10), actual receipt is irrelevant. Timely receipt is irrelevant. Proper postage nor proper address are required. The period inexorably begins with deposit, nothing more. Thus:

- A landowner whose development permit is arbitrarily denied could not challenge that denial if delivery of denial is delayed in the mail.
- A hospital that invests millions in medical equipment could not contest a competitor's illegally granted operating certificate if notice of that certificate is sent to the wrong address.

- Property owners could not challenge an illegally permitted landfill next door if no notice of the permit applications is sent.

These outcomes, absurd as they are unjust, could not have been what the legislature intended, and demonstrate that Hamm must control. The Court of Appeals reasoned differently. It found that the General Assembly intended to distinguish Hamm by using clear language. (Slip Op. at 11.) But the language of § 44-1-60(E) requires "return-receipt" certified mailing, which is consistent with Hamm, not contrary to it, and the provision includes no mention of "deposit" or the safeguards invariably included when deposit is intended.[10] As three Administrative Law Court judges have already recognized, this language does not preclude Hamm's application.[11] The Court of Appeals erred by disregarding clear statutory text and controlling precedent to conclude that the 15-day limitations period beings with deposit in the mail. The limitations period begins with actual notice, and because the League's requests were filed within 15 days of actual notice, its requests for Board review were timely and the Court of Appeals had not authority to vacate those proceedings.

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[10] Because Hamm requires receipt "[h]owever clear the language of a statute may be," 287 S.C. at 181 , 336 S.E.2d at 471, the limitations period would begin with receipt of notice even if the statute explicitly began the limitations period with "deposit" and included no measures to ensure receipt. As noted in our Petition for Rehearing, the Court of Appeals' decision to disregard Hamm in the current circumstances is certain to create confusion as to the continuing effect of that decision.

[11] See S.C. Dep't of Health & Envtl. Control v. Bellwood Manor, Docket No. 07-ALJ-07-0131-CC (S.C. ALC May 17, 2007) (Gossett, J.); Wilson v. S.C. Dep't of Health & Envtl. Control, Docket No. 06-ALJ-07-0799-CC, 2007 SC ENV LEXIS 29, *4 (S.C. ALC March 21, 2007) (McLeod, J.); MRI at Belfair v. S.C. Dep't of Health & Envtl. Control, Docket No. 06-ALJ-07-0714-CC, 2006 SC ENV LEXIS 99, *14-17 (S.C. ALC October 18, 2006) (Anderson III, J.); see also Amisub, Inc. v. S.C. Dep't of Health and Evt'l Control, Docket No. 08-ALJ-07-0063-CC (S.C. ALC Oct. 3, 2008) (Anderson III, J.). MRI at Belfair was viewed as controlling by the League and the DHEC Board in early 2007.

II. Act 387 Did Not Repeal DHEC's Pre-Existing Notice Requirements.

The Court of Appeals held that because § 44-1-60(E) "pre-empts" rights to notice under existing law (Slip Op. at 13), the League had no right to notice of DHEC's actions. As this case does not concern preemption, which governs the interaction of federal, state and local law, the question is whether DHEC's notice provisions were repealed by Act 387, a statute that explicitly requires that that DHEC "comply with all requirements for public notice" and "receipt of public comments." S.C. Code Ann. § 44-1-60(B).

The Court of Appeals focused on DHEC's water quality regulations, S.C. Code Ann. Regs. 61-101(G)(1)(d), and concluded that the notice provision contained there is in "conflict" with § 44-1-60(E) and was therefore "expressly preempted" by it. (Slip Op. at 13.) In particular, the court found the two provisions "irreconcilable" because the Reg. 61-101(G)(1)(d) requires notice to parties ("those persons providing comment") beyond those specified in § 44-1-60(E) ("applicant, permittee, licensee, and affected persons who have asked to be notified"). (Id.) This holding is erroneous in two regards. First, because § 44-1-60(E) does not specify how a party desiring notice must ask for notice, it opens space for Reg. 61-101(G)(1)(d) to specify that written comments on an application can suffice to request notice. Along similar lines, DHEC must also send notice of coastal zone consistency certifications to "any person commenting upon" applications, S.C. Coastal Zone Management Program (V)(C)(2) (1993 rev.), and send critical area permit notices to those wishing notice who "notify [DHEC] within [the] written comment period." S.C. Code Ann. Regs. 30-2(E). Because these provisions specify how parties may ask for notice, they effectuate § 44-1-60(E)'s directive that DHEC must give notice to those who ask.

Second, even if Reg. 61-101(G) were viewed as additional to § 44-1-60(E), nothing in the Act 387 forbids DHEC from complying with existing notice and comment requirements. To the contrary, that statute *directs* DHEC to comply with "all" notice and comment requirements, which would presumably include the notice provisions of Reg. 61-101.[12] The Court of Appeals was thus faced with whether the specific provisions of Reg. 61-101 were somehow repealed by implication.[13] "Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement." Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142 (S.C. 2006) (citing Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994)). The repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court is to so construe them. City of Rock Hill v. S.C. DHEC, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). Here, the Court of Appeals erred by holding these provisions in unavoidable conflict without attempting to reconcile them – a task it easily could have accomplished, since § 44-1-60(E) is consistent with and does not prohibit the notice provided by Reg. 61-101(G).

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[12] This conclusion is unchanged by Act 387's statement that it controls "to the extent" its provisions "conflict[]" with existing law. (See Slip Op. at 13 (citing Act No. 387, § 53, 2006 S.C. Acts & Joint Resolutions).) That provision simply requires that a court determine whether there is an actual conflict between Act 387 and existing requirements – something the Court of Appeals failed to do. Where the provisions can be reconciled, as here, there is no conflict and Act 387 does not repeal pre-existing requirements.

[13] DHEC regulations are subject to General Assembly approval and have the full force of law. Gaffney Ledger v. S.C. Ethics Comm'n, 360 S.C. 107, 600 S.E.2d 540 (2004).

III. The Court of Appeals' Decision Denying the League the Right to Notice And Hearing Violates State and Federal Constitutional Provisions Guaranteeing Due Process.

As a result of the Court of Appeals' decision to vacate the Board's deliberations, the League's rights to notice and to be heard were removed in disregard of due process. Due process is guaranteed under the Federal and State Constitutions, see U.S. Const. amends. V & XIV; S.C. Const. art. I, §§ 3 & 22, with South Carolina's Constitution specifically providing that no person "shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard." S.C. Const. art. I, § 22. As this Court has observed, "Section 22 is an additional guarantee of important due process rights, enacted in 1970 as legislators and judges noticed the increasing prevalence and influence of administrative agencies in daily life." Garris v. Governing Bd. of the State Reinsurance Facility, 333 S.C. 432, 444 (S.C. 1998). The Court of Appeals recognized, correctly, that the League "has a constitutional right to due process of law, including a right to notice and a meaningful opportunity to be heard" (Slip Op. at 18),[14] but it went on to vitiate those rights by vacating Board conferences that had been properly invoked.

The Board conferences were proper even under the Court of Appeals' erroneous reading of the limitations period, since both the League and SPA requested timely review

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[14] See Stono River Envtl. Prot. Ass'n v. S.C. DHEC, 305 S.C. 90, 93-94, 406 S.E.2d 340, 342 (S.C. 1991) (holding environmental groups entitled to due process including notice and an opportunity to contest a Section 401 water quality certification); League of Women Voters of Georgetown County v. Litchfield-by-the-Sea, 305 S.C. 424, 409 S.E.2d 378, 380 (1991) (holding coastal zone consistency determination reviewable) overruled in part on other grounds by Brown v. S.C. Dept. of Health & Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002). Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007).

of the Terminal Permit by acting within 15 days of that decision being deposited in the mail.[15] Moreovever, under the correct reading of S.C. Code Ann. § 44-1-60(E), the League's requests for review were timely because they were undisputedly filed within 15 days of receipt actual notice of DHEC's decisions, in fact the first business day after.[16] Regardless of which reading is used, however, DHEC failed to give the League required notice, the Court of Appeals' decision vacating the Board proceedings deprived the League of its right to a hearing *and* its right to notice, thus depriving it of two elements of due process.

Procedural due process requires efforts "reasonably calculated" to actually "apprise interested parties" of the pendency of an action, *i.e.*, notice consistent with that of "one desirous of actually informing" an affected party, "rather than efforts that are but a 'mere gesture.'" Plemons v. Gale, 396 F.3d 569, 575 (4th Cir. 2005) (quoting Mullane v. Coastal Hanover Bank & Trust, 339 U.S. 306, 314-15 (1950)). Where a party interested in a proceeding can be determined through "reasonably diligent efforts," it must be given actual notice. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983).[17] Here, DHEC made no effort to provide the League written notice of its

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[15] DHEC mailed the Terminal Permit on October 31, November 2 and November 17, 2006. See supra at 5. SPA filed its request for review on November 13, 2006. The League filed its request on November 20.

[16] Under Hamm, the limitations period must run from the League's receipt of notice. Even if it began with receipt by the a third-party applicant such as SPA, however, the League's request for review of the Terminal Permit occurred within 15 days of SPA having received mailed notice on November 3rd and 20th, while its request for review of the Highway Permit was filed within 15 days of DOT receiving mailed notice on November 6.

[17] See Tulsa Prof. Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988) ("actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in

decisions in time for the League to request final review conferences by the Opinion's ascribed § 44-1-60(E) deadline even though the League's name, address and stake in the decisions were not just reasonably ascertainable, but certain. The League sent multiple letters to DHEC announcing its interest in the proposed permits and setting forth objections to them in great detail. It was entitled therefore to notice as a constitutional matter, and it was entitled to notice under DHEC's own requirements.[18] After the League filed its letters, the DHEC official in charge of the water quality certification program told the League it was "on the mailing list" for notice and "should have received a copy" of DHEC's decision. (Terminal R. p. 155.) DHEC, however, only sent timely notice to other parties that it knew would not (and did not) pass along notice to the League. Then, on what the Opinion says was the last day to request review, a DHEC official told the League that the Terminal Permit had been issued on November 3, a day later than it had, and that the "15 day appeal window would be from that date" (Terminal R. p. 144), such that the filing date would have been November 20, 2006 – the day the League actually filed.[19]

These are not the actions of an agency "desirous of actually informing" the League of pending action with communications "reasonably calculated" to provide notice. Mullane, 339 U.S. at 314-15; see Elmco Props v. Second Nat'l Fed. Sav. Ass'n, 94 F.3d 914, 921 (4th Cir. 1996). Minimally acceptable notice "need not be inefficient or

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commercial practice, if its name and address are reasonably ascertainable") (quotations omitted).

[18] See infra at 8.

[19] DHEC's final conference guidelines provide that where the 15-day period expires on a weekend, it carries over to the next business day. See also Walton v. Canal Ins. Co., 331 S.C. 636, 644, 503 S.E.2d 727, 731 (1998).) The 15-day period from November 3 would have expired on Saturday November 18, and carried over to November 20, 2006.

burdensome," Tulsa Prof. Collection Servs., Inc. v. Pope, 485 U.S. 478, 489-90 (1988), since "mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice, id. at 490." But such minimally acceptable notice did not occur here, and the Court of Appeals affirmatively embraced its absence by vacating Board review conferences on timeliness grounds arising from the notice failure itself. This double due process violation requires reversal.[20]

It is essential to realize that the statute can be easily read to avoid the Court's unconstitutional outcome. The requirement in § 44-1-60(E) to give notice to "affected persons who have asked to be notified" provides a means for parties who may be unknown to the agency (because, for example, they failed to submit written comments) "to request such notice and thereby become ascertainable." Small Engine Shop, Inc. v. Cascio, 878 F.2d 883, 892-93 (5th Cir. 1989)); Davis Oil Co. v. Mills, 873 F.2d 774, 791 (5th Cir. 1989). Those persons must receive notice, as must all others entitled to it. This reading eliminates all constitutional problems and conforms to § 44-1-60(B), which requires DHEC to comply with "all" notice provisions, not just select ones before its decision becomes final. Because the Court of Appeals had a duty "to adopt that construction which will uphold the validity of the statute," Peoples Nat'l Bank v. S.C. Tax Com., 250 S.C. 187, 191 (S.C. 1967), its choice of a construction that violates due process protections was reversible error.

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[20] Nor is DHEC's failure to provide notice excused because the League could have submitted still additional letters to the agency entitling it to notice. Because the agency's "burden" to provide notice is constitutional, it cannot be removed by legislation, Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 545 (1985), or by a party's ability to take further steps to safeguard its interests. Mennonite Bd. of Missions, 462 U.S. at 799; Small Engine Shop, Inc. v. Cascio, 878 F.2d 883, 884 (5th Cir. 1989); USX Corp. v. Champlin, 992 F.2d 1380, (5th Cir. 1993).

IV. The Claim Filing Period of § 44-1-60(E) Does Not Circumscribe Subject Matter Jurisdiction.

The Court of Appeals' disregard of the above facts showing manifest unfairness to the League came hand-in-hand with use of a rigidly "jurisdictional" conception of limitations periods that makes consideration of such facts immaterial. (See Slip Op. at 23 (holding limitations period "jurisdictional" and analogous to judicial appeals where failure to "effect a timely appeal extinguishe[s] subject matter jurisdiction").)[21] Unique among time period provisions, limitations circumscribing jurisdiction over a matter are unaffected by facts showing that a strict or literal application violates principles of equity or fairness. See McClendon v. S.C. Dep't of Highways and Public Transp., 313 S.C. 525, 443 S.E.2d 539 (1994); Bowden v. United States, 106 F.3d 433, 437 (D.C. Cir. 1997).[22] This is because subject matter jurisdiction circumscribes "the power to hear and determine cases of the general class to which the proceedings in question belong," Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (internal quotation

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[21] The Opinion quotes and cites Botany Bay Marina, Inc. v. Townsend, 296 S.C. 330, 334, 372 S.E.2d 584, 586-587 (1988), overruled on other grounds by Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995), a case that speaks strongly of subject matter jurisdiction and that was introduced into this matter by SPA. However, SPA now agrees with the League that § 44-1-60(E) does not circumscribe subject matter jurisdiction. (Terminal R. p. 274.)

[22] See Pee Dee Indian Nation of Upper S.C. v. S.C. Dept. of Health & Envtl. Control, Docket No. 07-ALJ-07-0120-CC, 2008 SC ENV LEXIS 51 (S.C. ALC August 14, 2008) (Gossett, J.) ("[u]nlike subject matter jurisdiction, compliance with a statutory condition precedent may be waivable") (citing King v. Atl. Coast Line R.R. Co., 86 S.C. 510, 68 S.E. 769, 770 (1910)); S.C. Dept. of Transp. v. S.C. Dept. of Health & Envtl. Control, Docket No. 06-ALJ-07-0804-CC, 2007 SC ENV LEXIS 69, *54 (S.C. ALC March 7, 2007) (Anderson III, J.) (where the DHEC Board treated agency as a proper party to a final review conference "without an objection by the Respondents[, t]heir failure to object at the Final Review conference waived their right to object at [the ALC] stage of the case"); JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 64 (2d ed. 1994) (describing exhaustion of administrative remedies as an affirmative defense) (citing Hyde v. South Carolina Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994)).

marks omitted). Here, however, the legislature gave the Board the power to convene final review conferences. S.C. Code § 44-1-60. Such authority is "construed liberally when the agency is concerned with the protection of the health and welfare of the public." City of Columbia v. Bd. of Health & Envtl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987). Thus the time period of §44-1-60(E) does not define the Board's subject matter jurisdiction. Further, because the legislature did not mark the limitations period at §44-1-60(E) "as jurisdictional," it should be treated "as nonjurisdictional in character." Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006) (footnote omitted); see Connor Holdings, LLC v. Cousins, 373 S.C. 81, 88, 644 S.E.2d 58, 62 (S.C. 2007) (Toal, C.J., concurring) ("The federal courts have adopted a rule providing that when a statutory limitation is not expressly characterized as jurisdictional, courts should treat the restriction as non-jurisdictional in character. I would follow their lead.") (citing Arbaugh, supra). In fact, as this Court has held, a limitations period concerning exhaustion of administrative remedies *does not* "involve subject matter jurisdiction." Ward v. State, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000).[23]

The Court of Appeals' erroneous jurisdictional construct coincided with its complete refusal to consider facts bearing application of the limitations period. As already explained, DHEC failed to provide the League with required timely mailed notice even after telling the League it was "on the list" to receive notice, and on the last day of the appeal period established by the Opinion, made the League think that the Terminal

[23] "The doctrine of exhaustion of administrative remedies is a rule of 'policy, convenience and discretion, rather than one of law, and is not jurisdictional.'" Vaught v. Waites, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (S.C. Ct. App. 1989) (quoting Andrews Bearing Corp. v. Brady, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973)); see also Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

Permit decision been sent later than it had, such that a request was due the when the League filed it. The Board was well within its authority in these circumstances to conclude that the limitations period had *not* run, and to conduct a final review conference to cure notice defects and resolve objections to the staff decisions to minimize judicial appeals of the agency's final decision. Indeed, that is what the statute directs. See S.C. Code Ann. § 44-1-50 (2007) (empowering Board to conduct final review conferences "as [it] considers[] necessary" to affirm, amend or rescind staff decisions); § 44-1-60(I) (directing that "[a]ny statutory deadlines" applicable to DHEC permitting programs "shall be extended to allow for this final review process" (emphasis added)); City of Columbia, 292 S.C. at 202, 355 S.E.2d at 538. The Court of Appeals' holding that the Board lacked jurisdiction over the matter was erroneous, as was its complete disregard for facts bearing upon the Board's fair and just application of the limitations period.[24]

V. The ALC Erred in Striking As Untimely a Motion for Reconsideration Filed 13 Days After The Dismissal Order Was Served By Mail.

The Administrative Law Court preceded the Court of Appeals in erroneously construing § 44-1-60(E) to define jurisdiction over the matter and in ignoring record facts showing that application of a rigid deposit rule was manifestly unfair. (See Terminal R. p. 10.) The League sought reconsideration of the ALC's unexpectedly doctrinaire order, urging it to abandon of the erroneous jurisdictional framework and reconsider the record of facts showing that strict application of the timing provisions as interpreted by the ALC wrought unjust results that were unacceptable under established equitable principals.

[24] These facts are plainly in the record, (see, e.g.; Highway R. pp. 244, 246), and SPA's attempts to prevents their consideration by claiming they were not preserved on appeal is meritless. The League has argued these facts in the ALC, the Court of Appeals and now this Court. That the first two bodies ignored the facts based on dangerously incorrect "jurisdictional" grounds cannot mean the League abandoned them.

(E.g. Terminal R. p. 203, 229.) The ALC rules of procedure require that motions for reconsideration of a "final decision" be filed within ten days "after notice of the order concluding the matter before the administrative law judge," and further provide that where "notice is served upon [a party] by mail . . . five days shall be added to the prescribed period." Rules 29(D), 3(C), SCRALC. The ALC's first Order of Dismissal includes a certificate of service stating that it was "served" by depositing a copy "in the United States mail" on September 4, 2007. (Terminal R. p. 15.) Under the rules, reconsideration motions were due 15 days later, on September 19, 2007. The League's Motion for Reconsideration was filed September 18. (See Terminal R. p. 220). It was thus timely, and the ALC's decision to grant SPA's motion to strike (without awaiting a response from the League, see Rule 19(A), SCRALC) was a clear abuse of discretion.

CONCLUSION

For the foregoing reasons, the South Carolina Coastal Conservation League's Petition for Certiorari should be granted.

[SIGNATURE PAGE FOLLOWS]

This the 20th day of January, 2009.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I caused to be served the foregoing Petition for Certiorari of the South Carolina Coastal Conservation League on all parties by depositing a copy in the United States Mail, postage prepaid, addressed to their attorneys of record, as indicated below:

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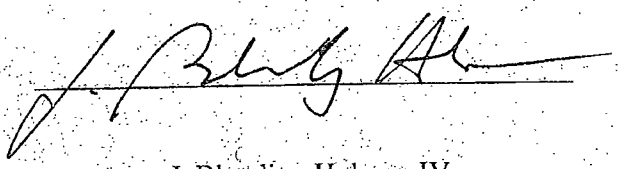

J. Blanding Holman IV
SC Bar# 72260

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control,	)	Docket No. 13-ALJ-07-0056-CC
Petitioners,	)	**CERTIFICATE OF SERVICE**
v.	)	
South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control,	)	
Respondents.	)	

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **South Carolina State Ports Authority's Motion to Dismiss and For Sanctions** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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Breanna M. Karns

Breanna M. Karns

Columbia, South Carolina
This 1st day of July 2013.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **SOUTH CAROLINA STATE PORTS AUTHORITY'S MOTION TO DISMISS FOR LACK OF STANDING**

The South Carolina State Ports Authority (Ports Authority) respectfully moves this Court to dismiss this action on the ground that there is no case or controversy because Petitioners have failed to establish standing to challenge the Critical Area Permit and Coastal Zone Consistency Certification (Permit No. ORCM-12-054-B) (collectively, Permit) issued by the South Carolina Department of Health and Environmental Control (DHEC) through its Division of Ocean and Coastal Resource Management (OCRM).

BACKGROUND AND PROCEDURAL HISTORY

This is a *de novo* contested case proceeding brought by Preservation Society of Charleston (Preservation Society), Historic Charleston Foundation (HCF), Historic Ansonborough Neighborhood Association (HANA), South Carolina Coastal Conservation League (League), Charlestowne Neighborhood Association (CNA), Charleston Chapter of the Surfrider Foundation (Surfrider), and Charleston Communities

for Cruise Control (Cruise Control) (collectively, Cruise Opponents) challenging a decision by DHEC to authorize and permit a portion of a capital improvement project by the Ports Authority at the Union Pier Terminal (UPT) in Charleston, South Carolina. Cruise Opponents allege that DHEC's decision violates the South Carolina Coastal Zone Management Act, S.C. Code Ann. 48-39-10, et seq., the South Carolina Code of Regulations 30-1, et seq., and the Coastal Management Program (CMP).

On January 27, 2012,[1] the Ports Authority submitted a joint federal and state application to the United States Army Corps of Engineers (Corps) and to OCRM for a permit to engage in activities affecting the waters of the United States and critical areas of South Carolina. Ex. 1, Ports Authority Joint Application (Jan. 27, 2012). The action ostensibly implicating OCRM's permitting jurisdiction[2] for this project is the installation of five pile clusters driven into the marl to support the construction of three elevators and two escalators in a renovated warehouse located on the northern end of the UPT footprint, Building #322, which will house the relocated cruise passenger operations.[3] The pile clusters—an additional five to the existing thousands—will provide further support for the structure of Building #322 within the existing footprint of the already-developed marine terminal. Ex. 2, Map of Pile Clusters.

On or about August 3, 2012, DHEC issued the public notice for the project permit application, requesting comments by September 2, 2012. On or about December 18,

[1] The application was resubmitted on February 27, 2012.

[2] The Ports Authority submitted its application in furtherance of intergovernmental cooperation. This project may be exempt from all regulation. The Ports Authority reserves its right to move for dismissal or make such an argument at any time during this proceeding or on appeal.

[3] Most of the capital improvement project does not trigger permitting requirements and those portions of the project may be undertaken without the DHEC permit.

2012, DHEC issued the Permit authorizing construction of five pilings under Building #322.[4] On January 2, 2013, Cruise Opponents filed Requests for a Final Review Conference of the staff decision by the DHEC Board. On January 10, 2013,[5] the DHEC Board voted unanimously to decline to hear the matter in a final review conference. On February 11, 2013, Cruise Opponents filed a request for contested case hearing.

STATEMENT OF FACTS

The UPT is located on 63 acres along the Cooper River on the Charleston peninsula. UPT is a fully operational marine terminal owned and operated by the Ports Authority that, as currently configured, accommodates upwards of 200 cargo ships annually in addition to the requisite trains and trucks necessary to service those cargo ships. The designated cruise passenger terminal is located on the southern end of the UPT. Although most known for commercial cargo facilities, UPT has accommodated passenger vessel calls for almost 100 years. Ex. 3, Aff. of James I. Newsome, III ¶7, (Aug. 22, 2011) (Newsome Affidavit). In fact, passenger vessels, including cruise vessels, have called on the UPT cruise passenger facility every year since 1973, the date of dedication for the existing cruise passenger terminal facility. Id. Pursuant to its statutory obligations under, *inter alia*, S.C. Code Ann. § 53-3-130, the Ports Authority has sought to foster, stimulate, and increase cruise ship calls at UPT and has taken

[4] DHEC's issuance of the Permit is unremarkable given the fact that, despite the proposed renovations to UPT, the capital improvements at issue—discussed more fully below—will not result in a change of use. Large ocean-going vessels have been a feature at UPT since its inception, including cruise vessels since the early 1970s. The project proposed by the Ports Authority simply renovates and modernizes facilities within the existing UPT footprint to comply with federal law, improve efficiency of existing cruise operations, and stimulate maritime commerce in an economically and environmentally sustainable manner.

[5] OCRM staff filed responses to the requests of the Cruise Opponents on January 10, 2013, recommending that the DHEC Board affirm OCRM's decision to issue the permit.

seriously its obligation to develop and improve its facilities in order to better accomplish its statutory purpose and obligations.[6]

Charleston is a popular tourist destination and, by consequence, the City has seen its popularity with the cruising public increase over the years. This increase in cruise vessel calls has benefited the City of Charleston and the State of South Carolina in numerous ways, including increased tourism revenue. See Ex. 5, Aff. of Joseph P. Riley, Jr. ¶4, (Aug. 22, 2011) (noting that the cruise industry has generated approximately $35 million and over 400 jobs). The cruise industry has also taken note of this successful partnership, as Carnival Cruise Lines (Carnival) presently has designated Charleston as the home port of one of its vessels, the Carnival Fantasy.

To aid in accommodating the cruise passenger demand at UPT, the Ports Authority initiated a capital improvement plan. The planned improvements involve:

- upgrading existing cruise facilities to comply with terminal security and accessibility requirements mandated by federal law under the oversight of the United States Customs and Border Protection (CBP)[7] and the Americans with Disabilities Act (ADA);[8]

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[6] Cruise Opponents' claims that cruise ships are significantly larger in scale than those ships that have historically called on UPT is simply inaccurate and unsupported by any facts. See Ex. 4, Ports Authority Ltr. dated Jan. 7, 2013 to DHEC Bd. at 7, (Building 322 is the white-roofed warehouse near the cargo ship). As is evident, the cruise ships that call on UPT, and specifically the Carnival Fantasy as shown in the southern berth of Exhibit 4, is not disproportionate in size or scale to the cargo ships (such as car carriers) that regularly call on UPT, as evidenced by the ship berthed in the northern berth of UPT (foreground ground of the picture) of Exhibit 4. In fact, much larger ships than the pictured cargo ship call on the Port of Charleston on a weekly basis.

[7] Ex. 6, U.S. Army Corps of Engineers, Mem. for Record, SAC-2003-13026, dated April 20, 2012 (stating the "proposed renovations to Building 322 are considered minor deviations in the existing structure's configuration that are required to comply with Federal regulations and current terminal security requirements that were established after

- relocating existing cargo facilities from the northern end of the UPT footprint to other Ports Authority-owned terminals, thereby terminating existing rail operations to UPT and lowering the traffic impact on the UPT and surrounding areas, see Ex. 4, Ports Authority Ltr. dated Jan. 7, 2013 to DHEC Bd., Ex. G (traffic diagram comparison);
- relocating existing cruise facilities from the southern end of the UPT footprint to the northern end, see Ex. 8, Map of Union Pier Terminal footprint (March 2012);
- implementing an overall traffic management plan that will result, at worst, in a net neutral traffic impact and probably in a benefit and positive reduction in traffic impact;
- restoring the southern end of UPT through the demolition of older structures; and
- dedicating much of the existing terminal acreage to public and private redevelopment and public green spaces, embracing a restoration of the natural waterfront.

These capital improvements will all be done in both an economically efficient and environmentally sustainable manner and will aid both the economic development and environment of Charleston.

September 11, 2001"). In 2007, the Ports Authority entered into a Memorandum of Understanding with the CBP for the conditional approval of ongoing cruise operations on a continuing trial basis with the understanding that a passenger terminal facility with improved security would be needed for continued operations. See Ex. 7, Ports Authority-CBP MOU (June 20, 2006). This MOU since has been renewed annually.

[8] 42 U.S.C.A. §§ 12101, et seq.

Given the hue and cry raised by Cruise Opponents, it is crucial to recognize that the renovations to Building #322 also include other activities which do not affect the critical area, including remodeling the mezzanine; renovating the interior and exterior of Building #322; installing canopies over pedestrian areas; and constructing a loading dock for transferring ship stores from delivery trucks to the cruise ship. Context in this permitting decision is key, as the proposed capital improvement plan construction, while adding a *de minimus* number of pilings to an existing support structure,[9] would actually decrease the amount of industrial cargo operations on the UPT footprint. The entirety of the effect of this capital improvement plan is that current cruise operations will be moved to a location less than 600 yards to the north in a renovated warehouse, still within the existing boundary of the UPT footprint. And, as part of this same capital improvement plan, the Ports Authority has started relocating to a different terminal facility existing berth facilities that are presently used for cargo operations.

The result of the relocation and the voluntary traffic management plan undertaken by the Ports Authority will reduce emissions at the UPT and in the surrounding historic neighborhoods. See Ex. 9, OCRM Technical Review at 8; see also Ex. 10, Trinity Consultants Study: Historical, Current and Future Criteria Pollutant Emissions at Union Pier Terminal, dated Dec. 6, 2012. Notably, however, should the capital improvements plan not be completed, UPT will be returned to full cargo operations, which will include air emissions and traffic congestion at prior levels within lawful parameters.

[9] See Ex. 4, Ports Authority Ltr. dated Jan. 7, 2013 to DHEC Bd. at 3 (providing the Court with a perspective of the current concentration of support pilings currently under Building #322); see also Ex. 2, Map of Pile Clusters (showing the placement of an additional five piles to the existing support structure).

In order to fund these capital improvements, the Ports Authority has issued and sold bonds totaling $35 million. See Ex. 3, Newsome Aff. at ¶10. The repayment of these bonds depends in large part on revenues derived from the successful ongoing operations of a cruise terminal. This successful operation in turn depends upon the long-term viability of the cruise terminal industry in Charleston and at UPT. The Ports Authority and Carnival originally made significant progress in negotiating a long-term contractual agreement, which would signify a regular and ongoing commitment by Carnival to sail from the UPT and, thus, would support the ongoing viability of the terminal. However, as a result of this and other lawsuits instituted as part of the Cruise Opponents' broader "anti-cruise" efforts, Carnival has indefinitely suspended its participation in the negotiations. This understandable reluctance in the face of the uncertainty inserted into the process by the Cruise Opponents' lawsuits places in jeopardy the viability of the Ports Authority's capital improvement plan for the UPT as well as the cruise industry in Charleston in general. See Ex. 3, Newsome Aff. at ¶11. This, in turn, undermines the significant environmental improvements that will result from the restructuring and relocations that are part of the capital improvement plan.

ARGUMENT

A contested case request challenging a permit issued by OCRM must necessarily take issue with the environmental impacts caused by the **permitted** activity. A review of the contested case request amply demonstrates that Cruise Opponents instead complain about the existence of the cruise terminal rather than the propriety of the permitting process that should be at issue here. This contested case challenge, rather than focusing

on the activity permitted by OCRM,[10] is simply another means of delay and dissuasion, and it represents the third legal action[11] filed on behalf of these same parties in their longstanding and continuing efforts to prevent any cruise ship vessels from calling on the Port of Charleston.[12] While cloaked in a purported challenge on the Permit merits, the contested case request gives scant mention to the permitted activity approved by OCRM. For the reasons stated below, the Court should dismiss the contested case request by Cruise Opponents for lack of standing.

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[10] League Executive Director Dana Beach, in describing his group's opposition to this capital improvement plan, succinctly and tellingly stated that "[t]his thing is not about five pilings." See Ex. 11, David Slade, Charleston Cruise-Ship Opponents Seize Opportunity to Battle New Passenger Terminal, Charleston Post & Courier, April 19, 2012, at 2. More pointedly, Mr. Beach also stated that "Union Pier is some of the most valuable real estate in the South. Using almost half for a terminal and surface parking is absurd." See Ex. 12, Keith Schneider, Historic City at Odds With Its Popularity as Cruise Port, New York Times, April 19, 2011, at 2. In other words, the League is litigating over its own policy view of land use rather than any legitimate concern over compliance with the law.

[11] The Cruise Opponents already have actions pending before the South Carolina Supreme Court, Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012), and the federal district court attacking the cruise industry in Charleston. Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs, No. 2:12-cv-2942-RMG (D.S.C. filed July 2, 2012).

[12] For example, Randy Pelzer, who is associated with the CNA and has been identified by Cruise Opponents as a witness in this proceeding, previously stated that "[i]t's good that people can enjoy this sort of inexpensive vacation, but we don't need to be the place for it" and that "Carnival Cruise Lines could attract 'the wrong type of tourists.'" See Ex. 13, David Slade, City's Cruise Plan Steams Ahead, Charleston Post & Courier, Originally Posted Sept. 15, 2010 at 1; Updated March 23, 2012. Although later denying he said that Carnival "attracts 'the wrong type of tourists,'" he did not deny the assertion that Charleston should not be the port for "this sort of inexpensive vacation" and, in fact, "doubled-down" on that assertion, acknowledging a suggestion that Charleston should focus its cruise-ship endeavors on the "luxury segment." See Ex. 14, Randy Pelzer, Don't Put New Cruise Terminal in the City's Historic District, Charleston Post & Courier, Orig. Posted Oct. 20, 2010 at 1; Updated March 19, 2012. In other words, Pelzer and CAN simply don't like the type of people who take Carnival cruises.

I. THE CRUISE OPPONENTS LACK STANDING TO CHALLENGE THE PERMIT.

Because the Cruise Opponents fail to establish standing, the Court should dismiss this case. The "irreducible constitutional minimum of standing contains three elements [:]" (1) injury-in-fact; (2) a causal connection between the injury and the conduct complained of by the party seeking to demonstrate standing; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). An association may bring an action on behalf of its members, but it is "substantially more difficult." Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing Lujan, 504 U.S. at 560-61). At bottom, whether an individual or an association, "[t]o have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest." Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 (citing Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 519 S.E.2d 567 (1999)). The party seeking to establish standing has the burden of proof. Id. Cruise Opponents have failed to meet this burden.

A. The Cruise Opponents have not suffered injury-in-fact from the issuance of the Permit because the injuries alleged pertain to cruise operations generally and not the permitted activity to install five cluster piles.

Because the basis of this action is a challenge to the issuance of the Permit by DHEC, Cruise Opponents must show an injury-in-fact resulting from that governmental action. An injury-in-fact is "an invasion of a legally protected interest [that] is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."

Id. (internal quotations omitted). There is no injury-in-fact when a party merely alleges harm indistinguishable from that suffered by the general public. Id. (finding that a person does not have standing unless actual or imminent injury exists that is concrete and particularized and "not merely a general interest common to all members of the public"); see also Warth v. Seldin, 422 U.S. 490, 501 (1975) (reasoning that the party seeking to establish standing must show "distinct and palpable injury to himself" even if a larger class of other possible litigants also share in the injury).

A review of the contested case request reveals that Cruise Opponents have not identified any injury-in-fact and have stated their case in terms of mere generalized grievances. For example, their interest in the litigation is stated as follows:

- Preservation Society's alleged stake in the matter is the "protect[ion] [of] the historic neighborhoods that continue to be at risk from expanded *cruise operations*," Pet'rs' Request at 2, ¶1, Feb. 11, 2013 (emphasis added);
- HCF's alleged stake in this matter is the impact of *cruise operations* on the historic resources of Charleston, Pet'rs' Request at 2, ¶2;
- HANA's alleged stake in this matter is that it has sought "legally binding regulations on the *cruise industry* in Charleston," Pet'rs' Request at 3, ¶3 (emphasis added); and
- The League, CNA, Surfrider, and Cruise Control collectively allege that *cruise operations* create pollution, congestion and noise that adversely affect the quality of life and enjoyment of Charleston's historic aesthetics, Pet'rs' Request at 3-4, ¶¶4-7.

All of these assertions are generalized grievances about the operations of the cruise industry as opposed to a concrete and particularized injury resulting from the Permit.

Cruise Opponents do not advance their cause anywhere in the contested case request. They allege that their members "commute along the streets of Charleston which are congested by cruise ship traffic" (Pet'rs' Request at 3, ¶4), that continued cruise operations will "increase[ ] ... congestion" on city streets (Pet'rs' Request at 7, ¶19), and that the "membership ... express[es] concerns about ... noise" (Pet'rs' Request at 4, ¶5). Cruise Opponents assert that "members ... breathe the air into which cruise ship emissions are discharged" (Pet'rs' Request at 3, ¶4). They claim that relocation of the cruise passenger terminal 600 yards north will result in "significant[ly] degrad[ed] [ ] air quality," (Pet'rs' Request at 13, ¶26), and will allegedly affect their members' "recreational, environmental, aesthetic and property interests" (Pet'rs' Request at 13, ¶2). Finally, Cruise Opponents also allege a "significant degradation of ... property values" (Pet'rs' Request at 13, ¶26) as a result of relocating the cruise operations within the existing marine terminal. In short, Cruise Opponents never articulate a concrete injury resulting from the **Permit** and, thus, fail to articulate allegations of harm any different from what may be suffered by the public generally. See Taubman Realty Group Ltd. P'Ship v. Mineta, 198 F.Supp.2d 744, 755 (E.D. Va. 2002) (stating that courts "do not sit to entertain generalized grievances that are shared by the public at large") (citing Lujan, 504 U.S. at 573-74).

The recitation of generalized grievances continue throughout the contested case request. Although asserting their environmental and community interests are adversely affected "[a]s a direct and proximate result" of the Permit, (Pet'rs' Request at 13, ¶2),

Cruise Opponents fail to allege any specific facts or circumstances to support this assertion. Instead, they complain that the Permit "authorized" a new cruise terminal and "enable[d]" cruise operations to persist in Charleston.[13] See Pet'rs' Request at 6, ¶15. This assertion is supported in part by League Program Director Katie Zimmerman, who states that "*[o]ngoing* and *increased* **cruise ship operations** injure the CCL and its members." Ex. 15, Aff. of Katie Zimmerman at ¶11 (April 19, 2013) (Zimmerman Aff.) (emphasis added). Preservation Society Executive Director Evan R. Thompson went further, arguing that "cruise *operations* are widely recognized around the world ... as threatening ... the cities where they locate." Ex. 16, Aff. of Evan R. Thompson at ¶17 (April 19, 2013) (emphasis added).

Cruise Opponents' Prehearing Statement further reflects their single goal of stopping cruise operations. The Cruise Opponents oppose the Permit because, in their eyes, it is a "step towards new cruise ship home-basing operations" and "would enable cruise ship home-basing operations to continue...." Pet'rs' Prehr'g Stmt. at 4.

Simply put, this controversy is not about the Permit[14] but about whether Charleston should embrace or reject the cruise industry. None of these contentions are sufficient to establish a concrete and particularized, a conclusion required by the recently-

[13] DHEC has no authority over cruise operations in this State because that authority is vested in the Ports Authority. See S.C. Code Ann. §§ 54-3-110 ("Through the [Ports] [A]uthority the State may engage in promoting, developing ... and operating the harbors and seaports within the State, namely Charleston ... and works of internal improvement incident thereto."); -120 (stating that the jurisdiction of the Ports Authority "extend[s] over the waters and shores" of any harbor or seaport within the State); -130 ("The Authority is created as an instrumentality of the State for the accomplishment of ... develop[ing] and improv[ing] the harbors or seaports of Charleston [and] foster[ing] and stimulat[ing] ... commerce through such ports.").

[14] See also n.10 & 12, supra, wherein Dana Beach sums up the League's position: "This thing is not about five pilings" and Randy Pelzer opines that Carnival could attract the wrong type of people to Charleston.

issued opinion of Town of Arcadia Lakes, et al. v. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Op. No. 5095 (S.C. Ct. App. filed Mar. 6, 2013) (Shearouse Ad. Sh. No.11 at 38), withdrawn, substituted, and refiled (S.C. Ct. App. filed June 12, 2013) (Shearouse Ad. Sh. No. 26 at 110). In Town of Arcadia Lakes, certain individuals and the Town of Arcadia Lakes (Town)[15] challenged the issuance of a permit to a private landowner and entity for developing a parcel of property, a portion of which contains wetlands and waters identified by the Corps as a jurisdictional wetland under the Federal Clean Water Act.[16] The project required a State storm water discharge permit and a Section 404 permit from the Corps for the filling of jurisdictional wetlands.[17] With respect to the storm water discharges related to the construction project, DHEC determined the project qualified under a general permit. Additionally, the Corps determined the impacts to the subject wetlands would be minimal and authorized the project to proceed under Nationwide Permits.[18]

This Court found that the individual petitioners challenging the permits for the project failed to satisfy their jurisdictional burden of standing. In particular, the Court found that the individual petitioners failed to establish injury-in-fact from the permitted

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[15] Although the Court of Appeals affirmed the ALC's Order finding the Town had not established standing to challenge the permitted conduct, the discussion of the Town's ability, as a political subdivision of the State, to bring an action to protect the interests of its citizens is not germane to the standing of Cruise Opponents.

[16] 33 U.S.C.A. §§ 1251 et seq.

[17] The need for a Section 404 permit from the Corps also triggered the requirement for a Section 401 Water Quality Certification from the DHEC.

[18] Because the project qualified under a Nationwide Permit, it also met the criteria for a water quality certification, issued by DHEC relating specifically to projects qualifying for a Corps Nationwide Permit.

conduct.[19] The Court of Appeals affirmed this Court's standing analysis. In doing so, it noted that the "injuries" alleged by the individual petitioners were really nothing more than concerns that the Stormwater Pollution Prevention Plan developed by the property owners was insufficient and would not be adequately implemented. The petitioners concerns were based on the current condition of the ponds adjacent to the property and the failure of previous work in the area to sufficiently follow through with mitigation planned measures. However this Court and the Court of Appeals correctly held that speculative concerns about the implementation of an appropriate mitigation plan are insufficient to establish a party's standing to challenge the as-of-yet unimplemented project permit. Town of Arcadia Lakes, Op. No. 5095.

Similarly, Cruise Opponents' injury allegations are based not on the permitted activity but on complaints about existing conditions and speculation regarding the effects of this capital improvement project on the cruise industry in Charleston going forward. All of this—which also implicates the causation element—is beyond the scope of this Court's inquiry, and none of these complaints are sufficient to satisfy Cruise Opponents' burden of proving standing under Sea Pines and its progeny.

This analysis demonstrates that Cruise Opponents have not shown the requisite particularized harm that is actual or imminent, as opposed to conjectural or hypothetical, and that affects them in a personal and individual way. See Sea Pines, 345 S.C. at 601-02, 550 S.E.2d at 291-92; see also Beaufort Realty, 346 S.C. at 303, 551 S.E.2d at 590

[19] The ALC also found that the Kaminer Station Appellants could not prove the necessary causal connection, or traceability, element required for standing under Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291. The Court of Appeals, affirming this Court's conclusion that the individual petitioners lacked standing to challenge the permitted conduct, found the Kaminer Station Appellants' inability to establish the requisite traceability to be dispositive.

(finding one must suffer an actual injury in fact, not a prospective concern of future harm, in order to satisfy the Lujan test); cf. Vt. Agency of Natural Res. v. Stevens, 529 U.S. 765, 772 (2000) ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing.") (internal citations omitted). A mere interest in a general dispute, no matter how profound, does not give rise to an injury-in-fact even if the challenged conduct is at odds with those interests. Beaufort Realty, 346 S.C. at 301, 551 S.E.2d at 588 ("An organization has standing only if it alleges that it or its members will suffer an *individualized* injury; a mere interest in a problem is not enough.") (emphasis added); Oliver v. S.C. Dep't of Health & Envtl. Control, 01-ALJ-07-0398-CC (Nov. 20, 2001) (Stevens, J.) ("An injury in fact must include a showing that the injury is one that is particular to the complaining person, not simply common to the general public.").[20]

The only allegation by the Cruise Opponents that even comes close to an injury-in-fact is the complaint about alleged "public and private nuisance" as a result of "noise, soot and visual pollution." (Pet'rs' Request at 12, ¶24). But even this is not enough,

[20] Other decisions by the ALC show that these types of generalized and conclusory allegations of injury are routinely dismissed by the ALC for lack of standing. See, e.g., Bryant vs. S.C. Dep't of Health & Envtl. Control, 01-ALJ-07-0350-CC (Aug. 31, 2001) (Stevens, J.) (finding Petitioner's assertion that the challenged permit creates a "threat to public health" failed to show a particularized harm); Morris v. S.C. Dep't of Health & Envtl. Control, 04-ALJ-07-0053-CC (June 24, 2004) (Stevens, J.) ("harm to the environment does not confer standing; standing requires harm to the Petitioners themselves"); O'Sullivan vs. S.C. Dep't of Health & Envtl. Control, 01-ALJ-07-0491-CC (Jan. 18, 2002) (Geathers, J.) (reasoning that Petitioner's allegation that a dock permit would adversely affect nearby oyster beds was insufficient to confer standing because it amounted only to a generalized concern); Norris v. S.C. Dep't of Health & Envtl. Control, 01-ALJ-07-0163-CC (June 28, 2001) (Stevens, J.) (finding that a general allegation that Petitioner's property located would be adversely affected by the challenged activity located adjacent to that property was not a particularized injury-in-fact); Connolly v. S.C. Dep't of Health & Envtl. Control, 09-ALJ-07-0278-CC (Sept. 21, 2009) (Durden, J.) (holding that a mere allegation of diminished property value without more is insufficient to establish injury-in-fact where Petitioners failed to submit adequate evidence on the matter and the challenged activity had been in place for years).

because nuisance allegations only fall within the jurisdictional scope of the ALC if they amount to a specific and individual threat to health and welfare.[21] See Democratic Reform at Big Creek vs. S.C. Dep't of Health & Envtl. Control, 98-ALJ-07-0556-CC (Mar. 8, 1999) (Anderson, C.J.) (opining that "nuisance factors" associated with a landfill permit "such as odors, dust and litter" may be considered only if they poses a "threat to [ ] health and welfare" and in the absence of such threat "[i]t is beyond the jurisdictional scope of the [ALC] ... to enjoin a potential future civil nuisance"); Beaverdam Community Ass'n vs. S.C. Dep't of Health & Envtl. Control, 00-ALJ-07-0671-CC (Sep. 6, 2001) (Anderson, C.J.) (finding that "a court of equity is the proper place to adjudicate" a claim of nuisance likely to affect use and enjoyment of property absent a threat to health and welfare); Citizens for Responsible Growth in Clemson vs. S.C. Dep't of Health & Envtl. Control, 00-ALJ-07-0317-CC (May 8, 2001) (Stevens, J.) (Finding that a claim of nuisance was "not a basis for denying a stormwater permit. Rather, proving such claims belong in a forum with jurisdiction to entertain actions founded in common law nuisance or nuisance, per accidens.").

Cruise Opponents have not stated any basis for concluding that the alleged "public and private nuisance" amounts to a threat to individual health and welfare created by issuance of the Permit. In fact, Cruise Opponents only assert that the cruise operations adversely affect a particular member's use and enjoyment of property and property value. To the extent these arguments are even cognizable by any Court, the allegations that nuisance factors affect property value and use are wholly outside the scope of ALC review. Moreover, any allegations of threats to health and welfare do not salvage Cruise

[21] Nonetheless, the Cruise Opponents fail to adequately allege standing to maintain any nuisance claim.

Opponents' standing, because conclusory allegations of prospective health concerns are not injury-in-fact.[22] See Beaufort Realty, 346 S.C. at 303, 551 S.E.2d at 590 (stating that a "[p]rospective concern falls far short of the standard of 'concrete and particularized and ... actual or imminent' harm set forth in Lujan") (internal citations omitted); Baur v. Veneman, 352 F.3d 625, 637 (2d Cir. 2003) (finding that "a plaintiff cannot rely solely on conclusory allegations of injury ... in order to find standing") (internal citations omitted); see also Mass. v. U.S. Envtl. Protection Agency, 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting) (stating that particularized injury "must be actual or imminent, not conjectural or hypothetical, real and immediate, and *certainly impending*") (emphasis added) (internal quotation omitted) (citing Lujan, 504 U.S. at 560–61, Los Angeles v. Lyons, 461 U.S. 95, 102 (1983), & Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

In sum, Cruise Opponents have failed to show injury-in-fact because their allegations pertain to cruise operations generally and not issuance of the Permit and, as such, they allege no more than a generalized set of grievances common to any member of the public. Moreover, because Cruise Opponents have not met their burden of asserting a single particularized injury from the permitted activity, there is no basis for evaluating the elements of causation and redressability. This case should be dismissed.

[22] The Cruise Opponents' complaints are ironic in light of studies demonstrating a substantial reduction in air emissions in the event of implementation of the capital improvement plan. See Ex. 9, OCRM Technical Review; see also Ex. 10, Trinity Consultants Study: Historical, Current and Future Criteria Pollutant Emissions at Union Pier Terminal, dated Dec. 6, 2012.

B. To the extent Cruise Opponents have alleged an injury-in-fact, it is not traceable to the Permit because cruise operations at Union Pier Terminal have been in existence for decades.

In addition to the failure to show injury-in-fact, Cruise Opponents have not alleged any basis for concluding that their alleged injuries are fairly traceable to or caused by the permitted activity at issue. Absent such a showing, an injury-in-fact will still fail for lack of a causal connection between the activity—the installation of five piling clusters under an existing structure and on the footprint of an existing marine terminal—and the alleged harm. See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 ("[T]here must be a causal connection between the injury and the conduct complained of—the injury must be 'fairly ... trace[able] to the challenged action of the defendant.'") (quoting Lujan, 504 U.S. at 559-61).

There is nothing in the contested case request to support a conclusion that the installation of five piling clusters as permitted by DHEC will cause any of the injuries alleged by Cruise Opponents. As noted above, the piling clusters will be installed to support certain construction activities as part of the capital improvements plan. There already are thousands of piling clusters in place at Building #322. Perhaps more importantly, UPT already is used for cruise operations and the installation of these five piling clusters in no way changes the preexisting operations at UPT. Simply put, the installation of five piling clusters will not cause any of the alleged injuries set forth by Cruise Opponents.

Cruise Opponents implicitly concede this conclusion through their statement that, "[b]ecause the proposed project will enable cruise operations to continue and expand," a variety of injury producing impacts will befall the City of Charleston and its residents.

Pet'rs' Prehr'g Stmt. at 4, ¶6. That is, for Cruise Opponents, it is ***continued*** cruise operations at UPT that give rise to injuries alleged. The proposed project to improve UPT draws Cruise Opponents' ire only insofar as it reinforces or enables continued use of UPT by cruise vessels. However, the permitted activities will not cause any of the injuries about which Cruise Opponents complain because those activities do not constitute any change from the present-day cruise operations at UPT.[23]

The ALC and the Court of Appeals have recognized and rejected a claim under similar circumstances in Bailey v. S.C. Department of Health & Environmental Control, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). In Bailey, a landowner challenged a modification permit issued by DHEC to a neighbor's dock on the grounds that the permit facilitated the continued and expanded use of the dock by boats, thereby prejudicially impacting the neighbor's use and enjoyment of the creek and his own property and dock. The ALC dismissed the case for lack of standing, finding no causal connection between the alleged injury and the permitted conversion of the dock "because the boats [that are the subject of the neighbor's challenge] had been docked there for years, and they would continue to be docked there regardless of the permitting decision." Id., 388 S.C. at 7, 693 S.E.2d at 429. On appeal, the Court of Appeals affirmed the ALC's decision.

This case is like Bailey. Cruise ships have called on UPT continuously since 1973 (and passenger vessels for over 100 years), they do so today, and may continue to call on UPT and the Charleston peninsula in the future regardless of whether the Ports Authority shifts operations less than 600 yards north. In fact, based on the longevity of use of UPT

[23] All of the alleged injuries are currently being felt by the Cruise Opponents, according to them. The horn, public announcements, traffic, air emissions, and general alleged nuisances by the presence of the cruise industry in Charleston is ongoing, and thus cannot as a matter of law be traceable to a permit for the installation of five pile clusters.

as a port of call for cruise ships, the traceability of the alleged injuries is much more attenuated than that existing in Bailey, especially since this case involves a publicly operated marine terminal not immediately adjacent to any property of the Cruise Opponents and the use of which for a marine terminal predates the existence of every Petitioner. See Town of Arcadia Lakes, Op. No. 5095, supra (in holding that Kaminer Station petitioners did not establish causation, Court noted that "Jackson [one of the Kaminer Station Appellants] also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves"); see also Beaufort Realty, 346 S.C. at 303, 551 S.E.2d 590 (affirming dismissal for lack of standing on grounds that the League had failed to establish a causal connection between the alleged injuries and the challenged conduct of filing of plats subdividing certain parcels).

In sum, Cruise Opponents have failed to establish that their alleged injuries are caused by or fairly traceable to issuance of the Permit. Analogous to the factual situations of Bailey and Beaufort Realty, the installation of five pile clusters itself—the activity DHEC permitted—does not injure Cruise Opponents. Instead, the "injuries" alleged by Cruise Opponents all relate to the continuing general cruise presence in Charleston. While Cruise Opponents seek to make this contested case hearing a referendum on cruise operations, Bailey and Beaufort require a conclusion that Cruise Opponents have failed to satisfy the second prong of the standing inquiry because they have not shown a causal connection between the alleged harm and the Permit.

C. To the extent Cruise Opponents can articulate an injury-in-fact, it is not redressable by a favorable decision of this Court on the Permit.

Aside from the Cruise Opponents' problems with injury-in-fact and a causal connection aside, they also have not established redressability. See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 (providing that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision) (citing Lujan, 504 U.S. at 560-61); see also Vt. Agency of Natural Res., 529 U.S. at 771 (stating that there must be "a '*substantial likelihood*' that the requested relief will remedy the alleged injury in fact") (emphasis added) (internal citations omitted). That is, the "injuries" alleged by Cruise Opponents would not be redressed even if the challenged Permit were denied because cruise ships and other marine container vessels call on Charleston today and may continue to call on UPT under its current configuration going forward. Cruise Opponents would therefore suffer all the alleged harmful effects of the cruise industry even in the absence of the permitted activity.[24] In fact, the number of ships would increase because the Voluntary Cruise Management Plan adopted by the Ports Authority as a part of the capital improvement plan and relocation of ship berths at UPT would not be implemented if the overall project is not achieved. Ex. 17, Voluntary Cruise Management Plan;[25] see

[24] Cruise Opponents continue to deliberately ignore the Voluntary Cruise Management Plan, notwithstanding the *beneficial* effects it would realize, as compared to the *status quo*, once implemented. See Ex. 4, Ports Authority Ltr. dated Jan. 7, 2013 to DHEC Bd. at 4. Cruise Opponents willful discounting of these positive effects further underscores the fact that their concerns are not with the permitted activity, or even benefiting the environment, but rather to rid Charleston of the cruise industry once and for all.

[25] As discussed above, currently, UPT receives over 200 cargo vessels per year, at an average of four a week, in addition to a maximum of 104 cruise vessel calls per year. As part of the Voluntary Cruise Management Plan proposed by the Ports Authority, cargo operations have already begun to be relocated to a different terminal facility and cruise vessel calls will be limited to 104 per calendar year. Ex. 17, Voluntary Cruise

Bailey, 388 S.C. at 7, 693 S.E.2d at 429-30 (finding it "not likely that [the neighbor']s alleged injury would be redressed by a favorable decision because the boats would remain at [the permittee']s dock regardless of whether the dock was a fixed or floating dock"); see also Sea Pines, 345 S.C. at 602-03, 550 S.E.2d at 292 (holding that, because both the petitioners' and DNR's plans sought to reduce the number of deer in the community, a favorable decision in the challenge action with respect to the means of reduction would not redress the petitioners' alleged injuries).

As discussed throughout, Cruise Opponents' goal with this and other pending litigation against the cruise industry in Charleston is nothing more than an attempt to delay, obfuscate, and deter. Anything short of a relocated cruise terminal—off of the Charleston peninsula entirely—is unacceptable to the Cruise Opponents. Consequently, while cloaked in the appearance of a challenge to the Permit, at issue is the larger war being waged by Cruise Opponents against the cruise industry, which is not the subject of the Permit and is beyond the scope of this Court's jurisdictional review. Accordingly, because this challenge is not tied to the activity authorized by the Permit, Cruise Opponents' "injury" cannot be redressed by a favorable decision of this Court. Sea Pines, 345 S.C. at 602, 550 S.E.2d at 292 ("Even if we assume Appellants have alleged a particularized harm, Appellants failed to present evidence the injury would be redressed by a favorable decision in this case.").

Finally, challenging the Permit in this case is the wrong method to seek redress from cruise operations at UPT. Instead, as Judge Geathers noted in Bailey, Cruise Opponents should seek redress of their concerns through other avenues (e.g., legislative

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Management Plan. In other words, there will be a dramatic net reduction in the amount of large, ocean-going vessel traffic at UPT, in the event the proposed plan is realized.

advocacy) instead of challenging the actual issuance of the permit.[26] Bailey, 07-ALJ-07-0583-CC (July 23, 2008) (Geathers, J.). Because Cruise Opponents' end cannot be reached through these means, their alleged injuries are not redressable by a decision of this Court and they have failed to satisfy their burden of proving standing to challenge this Permit.

D. The claims asserted by Cruise Opponents do not satisfy the associational standing requirement for bringing claims on behalf of an organization because the injuries alleged do not derive from membership in the association.

Cruise Opponents are a collection of organizations, each made up of individual members.[27] Rather than suing in their own name, the members of Cruise Opponents seek to share their resources to pursue a common, collective interest in removing the cruise industry from Charleston. "An organization has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Beaufort Realty, 346 S.C. at 301, 551 S.E.2d at 589 (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). However, in determining whether an association itself has standing, "a court conducts the same inquiry as in the case of an individual." Md. Highways Contractors Ass'n, Inc. v. Md., 933 F.2d 1246, 1250 (4th Cir. 1991) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982), & Allen v. Wright, 468 U.S. 737, 750 (1984)). The sufficiency of this allegation

[26] And in fact the Cruise Opponents have claims pending in both state and federal courts.

[27] Although this motion identifies the individual organizations generally as "Cruise Opponents," each of the Petitioners must independently satisfy this associational standing requirement with respect to its respective memberships. Satisfaction by one organization does not relieve the others from their burden of proof.

in turn depends upon the relief sought, which virtually always is declaratory or injunctive relief. Hunt, 432 U.S. at 343 ("'Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.'") (quoting Warth v. Seldin, 422 U.S. 490, 515 (1975)); see also Georgetown County League of Women Voters v. Smith Land Co., 393 S.C. 350, 360, 713 S.E.2d 287, 293 (2011) (dissenting opinion).

Cruise Opponents have failed to meet the prongs set forth in Beaufort Realty and Hunt and, thus, fail to show associational standing. They fail the first prong because their members would not have standing to sue in their own right. Hunt, 432 U.S. at 342 (holding that, in maintaining an action, the "'association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.'") (quoting Warth, 422 U.S. at 511); see also Smith Land, 393 S.C. at 360, 713 S.E.2d at 293 (dissenting opinion). That is, the petitioning associations cannot show injury-in-fact, causation and traceability, or redressability for the same reasons that no individual can make those showings here.

Cruise Opponents also fail the second prong because the permitted activity and the interests at stake in this litigation are not germane to the purposes of the organizations. Although the interest of removing the cruise industry from Charleston may be germane to Cruise Opponents' organizational purpose, only the Permit is at stake here. A review of the organizational purposes of each of the Cruise Opponents in light of the activities at issue in this case fully demonstrates the lack of standing on the part of each of the petitioning associations:

1. Preservation Society: "The Preservation Society of Charleston's mission is to inspire the involvement of all who dwell in the Lowcountry to honor and respect our material and cultural heritage." Pet'rs' Request at 2, ¶1.

   Lack of Standing Analysis: The Preservation Society's purpose has nothing to do with the permitted conduct of the Ports Authority, the installation of five pile clusters and the re-location of cruise operations to a different portion of the same marine container terminal. Further, the group does not allege how this challenge serves to inspire involvement in historic preservation, or even that the permitted conduct affects historic materials or Charleston's cultural heritage. As noted, UPT has been a marine terminal and received passenger cruise vessels for over 100 years. If anything, the continuation of cruise vessel facilities at UPT serves to preserve this longstanding activity, an activity that is as much a part of the fabric of the Charleston peninsula as other parts of its material and cultural heritage the Preservation Society seeks to honor and respect.

2. HCF: HCF is "dedicated to preserving and protecting the architectural, historical and cultural character of Charleston and its Lowcountry environs, and educating the public about Charleston's history and the benefits that are derived from preservation." Pet'rs' Request at 2, ¶2.

   Lack of Standing Analysis: HCF's purpose is unrelated to the permitted activity, which does not call for the modification or destruction of any building or site considered to add to the architectural, historical and cultural character of Charleston. UPT is a fully functioning marine terminal today and has been for over 100 years. Because UPT's use as a marine terminal, including for cruise

operations, is undisputed, the permitted activity must be put in the context of what exists today, has existed in the past, and what will continue to exist in the future, irrespective of this capital improvement project. It is also worth noting that UPT has co-existed with the architectural, historical and cultural character of Charleston for all of these years, which in fact predates the formation of these association petitioners. Cruise Opponents, including HCF, simply see this as an opportunity to impose their own vision on the future of the peninsula. However, because the challenges to the permitted activity are unrelated to the purpose of HCF, this challenge is not germane to its purpose and HCF lacks associational standing to bring these claims.

3. HANA: As described in the contested case request, HANA's purpose is to "address matters of importance to the historic residential neighborhood designated as Ansonborough … and to foster a spirit of community and cooperation with the Ansonborough Neighborhood." Pet'rs' Request at 3, ¶3.

   Lack of Standing Analysis: The germaneness inquiry here must be tailored to the permitted activity, as opposed to HANA and Cruise Opponents' end-game, *i.e.*, no cruise operations in Charleston. The contested case request admits that HANA is seeking such redress through neighborhood resolutions seeking binding regulations on the cruise industry, but does not ascribe any injury to the permitted activity.

4. League: The League did not see fit to include its purpose and mission in the request for contested case; therefore, under the burden of proof assigned to the

League in demonstrating its associational standing, the League has failed to meet its burden. Pet'rs' Request at 3, ¶4.

5. CNA: The CNA is a membership organization whose purpose is to "give Charleston residents a concerted voice when considering matters that concern the peace, tranquility and orderly well-being of the historic Charleston neighborhood", who, according to the contested case request, are "620 members consisting of residents living south of Broad Street." Pet'rs' Request at 4, ¶5.

   Lack of Standing Analysis: The entirety of UPT is many blocks and several hundred yards *north* of Broad Street in Charleston. Additionally, as noted throughout, the capital improvement project will re-locate cruise operations from the southern end of UPT, some 600 yards north—away from Broad Street—to the northern end of the UPT terminal footprint. As the CNA's self-described purpose is limited to activities south of Broad Street, CNA's interests are not germane to the interests at stake in this contested case challenge.

6. Surfrider: Surfrider's purpose is described as an "environmental organization dedicated to the protecting and enjoyment of the world's oceans, waves and beaches for all people, through conservation, activism, research and education." Pet'rs' Request at 4, ¶6.

   Lack of Standing Analysis: Surfrider fails to describe how the interests at stake in evaluating the permitted activity in this case will have any effect on the world's oceans, waves and beaches, as the planned improvements take place entirely on industrial and on a longstanding marine terminal facility within Charleston

harbor. Consequently, Surfrider's interests are not germane to those at stake in this contested case.

7. Cruise Control: Cruise Control's purpose is described as "finding a more appropriate location for the proposed new cruise ship terminal; establishing legally binding limits on the number, size and frequency of cruise ship visits; requiring onshore power to be used by cruise ships docking in Charleston; and providing all cruise lines visiting Charleston with the Charleston Cruise Ship Code of Conduct." Pet'rs' Request at 4, ¶7.

   Lack of Standing Analysis: Without a doubt, Cruise Control's purpose is germane to their efforts to eradicate the cruise industry in Charleston. In fact, Cruise Control should be pleased that its stated purpose of establishing "limits on the number, size and frequency of cruise ship visits" has been voluntarily incorporated into the capital improvement project by the Ports Authority through its Cruise Management Plan. See Ex. 17, Voluntary Cruise Management Plan. However, eradication of the cruise industry in Charleston is not an interest at stake in this litigation; therefore, Cruise Control has not satisfied its burden in establishing associational standing.

Moreover, the recent decision in Smith Land, 393 S.C. at 350, 713 S.E.2d at 287 includes a dissenting opinion in which Justice Hearn,[28] joined by Justice Kittredge,

[28] The majority found that the standing issue was not preserved for its review and therefore did not address the standing of Georgetown League of Women Voters in the case. Smith Land, 393 S.C. at 352 n.1, 713 S.E.2d at 288 n.1. However in reaching the issue, the dissent correctly points out that, because the lower court had found the League of Women Voters lacked standing, and that holding was not appealed, irrespective of whether the parties addressed the issue in the appellate briefs, the legal concept at issue

analyzes the third prong in light of the underlying purposes of associational standing. Smith Land, 393 S.C. at 360, 713 S.E.2d at 293.

Justices Hearn and Kittredge conclude that in order to satisfy the third prong of the Hunt test, the organization asserting its standing must show that the right it seeks to vindicate is common to the membership. Id., 393 S.C. at 360, 713 S.E.2d at 293. Further the organization must show that the interest at stake in the litigation, and which its members assert is harmed, must derive from their membership in the organization. Id. The dissent recognized that while the League of Women Voters alleged that its members suffered and would continue to suffer harm as a result of the permitted activity, the evidence presented by the League of Women Voters was limited to harm alleged by only one member.[29] Pertinent to the issues at hand, the dissent recognized that injury as to one member of an organization does not extend to the rest of the organization. Id., 393 S.C. at 361, 713 S.E.2d at 293 ("With harm occurring to only one member of the League [of Women Voters] and a cause of action thereby inuring only to that one member, the right the League is pursuing under the Act is not a common one."). Further, the dissent emphasized that the harm suffered by the individual does not, in and of itself, satisfy the associational standing requirement unless the injury suffered flows from the membership in the organization. Id.

Applying this sound reasoning to the instant case reveals a similar disconnect between the injuries alleged and the ability of the collective organizations making up

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was "law of the case"—not preservation—and therefore it was appropriate for the Court's consideration.

[29] Evidence was also presented by two other neighboring property owners; however, those neighbors were not members of the League of Women Voters. Smith Land, 393 S.C. at 360-61, 713 S.E.2d at 293.

Cruise Opponents to assert the rights of their members. The injuries allegedly suffered—pollution, noise, traffic, property values and aesthetic interests—by individual members do not flow from their membership in the respective associations bringing the action. Instead, these injuries, to the extent they exist, flow from their status as individual property owners. However, the Smith Land dissenting opinion instructs that the analysis should be concentrated on the interest individual members have in the organization: if that interest is not harmed, and the alleged injury is instead personal to the member, then the organization lacks associational standing to bring the claim on the member's behalf.

E. Alternatively, the case should be dismissed because the question of whether the State and City of Charleston should adopt a policy favorable to cruise operations is a non-justiciable political question.

Cruise Opponents' request for a contested case is a policy challenge masquerading as a permit dispute. Cruise Opponents are now seeking cover in adjudicative forums to save the anti-cruise policy that failed to generate meaningful support in both public and political forums.[30] However, the policy of "Cruise in Charleston" is not appropriate for judicial determination as it is appropriately delegated to and set by the political bodies of the State and local government. See, e.g., Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 121-22, 691 S.E.2d 453, 460 (2010) ("[T]he courts will not rule on questions that are exclusively or predominantly political in nature rather than judicial.") (internal citations omitted). "All considerations involving the wisdom, policy, or expediency of an act are addressed exclusively to

[30] For example, the League's Program Director Katie Zimmerman details numerous attempts to sway public opinion and officials via newsletters, letters to the editor, op-ed pieces, etc. in favor of an anti-cruise policy and laments that the "city, port, and Carnival refuse[d]" to adopt their recommendations governing cruise operations. See Ex. 15, Zimmerman Aff. at ¶¶ 7-10.

[publicly elected bodies]." Segars-Andrews, 387 S.C. at 123, 691 S.E.2d at 460-61 (quoting Elliott v. Sligh, 233 S.C. 161, 103 S.E.2d 923 (1958)). In other words, judicial review is precluded where controversies turn on policy choices. Id., 387 S.C. at 123, 691 S.E.2d at 460-61 (stating that the political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations") (citing Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221 (1986)).

Here, the Ports Authority has fulfilled its statutory obligation to stimulate maritime commerce within the State by investing capital in its cruise operations and facilities. See S.C. Code Ann. §§ 54-3-130 ("The [Ports] Authority is created as an instrumentality of the State for the accomplishment of ... develop[ing] and improv[ing] the harbors or seaports of Charleston ... [and] foster[ing] and stimulat[ing] ... commerce through such ports."); -110 ("Through the authority the State may engage in promoting, developing, constructing, equipping, maintaining, and operating the harbors or seaports within the State, namely Charleston ... and works of internal improvement incident thereto."). Moreover, on June 21, 2011, the General Assembly declared its support for the cruise industry and its appreciation for the positive economic impact Carnival and others bring to the State of South Carolina. See Ex. 18, S.968 Concurrent Resolution, 119th Session (2011). The Concurrent Resolution recognizes that the cruise business generated $37 million for South Carolina's economy in 2010 and projects to generate 407 jobs in the Tri-County region, which will produce $16,193,200 in labor income. The decision by the Ports Authority to invest in the future of the cruise industry in South Carolina, as well as enter into a long-term contract with Carnival Cruise—a

decision vehemently protested by Cruise Opponents—amounts to a statutorily sanctioned economic and political policy choice to foster and grow relations with the maritime industry. Thus, Cruise Opponents' challenge should be treated by the Court for what it is: a political question.

The crux of the Cruise Opponents' challenge, as evidenced by the arguments in their contested case request, is the decision by the Ports Authority to engage in commerce with the cruise industry. Pet'rs' Request at 6, ¶15 (arguing that the proposed modifications at UPT would "enable cruise ship home basing operations to continue and [ ] expand"). Cruise Opponents' allegations of violations in the permitting process are merely an attempt to ensnare this Court in a contentious public policy and political debate. However, if it is about anything, this case must be about the Permit authorizing the installation of five clusters under an existing structure and located within the footprint of a well-developed marine terminal—*nothing more*. The "injuries" and issues articulated Cruise Opponents are tangentially related to the specific activities authorized under the Permit, which serve to create a more efficient and modern cruise passenger terminal, while the predominant thrust of Cruise Opponents' allegations merely attack the merits of the cruise industry generally.[31]

[31] As further evidence that Cruise Opponents attempt to have this Court weigh in on policy considerations statutorily vested in the Ports Authority and otherwise left to the General Assembly. Cruise Opponents argue in the contested case request that "[t]here is proven economic benefit to cargo operations [and a] ... negative set of impacts ... in relation to the increase in cruise ships," essentially asking this Court to decide for the Ports Authority what kind of maritime industry it should operate at UPT. Pet'rs' Request at 13, ¶ 25. Further, Dana Beach of the League argues that a modern cruise terminal at UPT is a "bad investment of public funds" that "[n]o prudent businessman would make." Ex. 20, Charleston Magazine, All Aboard?, January 2012; see also discussion supra n.10 ("Using almost half [of UPT] for a terminal and surface parking is absurd.").

By filing the contested case request, Cruise Opponents have deliberately put this Court in direct conflict with a policy embraced not only by the Ports Authority, but also the General Assembly and the City of Charleston. See Segars-Andrews, 387 S.C. at 121-22, 691 S.E.2d at 460 ("The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government"); see also Ex. 18, S.968 Concurrent Resolution, 119th Session (2011). Additionally, contrary to the impression given by Cruise Opponents, not everyone in Charleston is against the cruise industry at UPT. In fact, the Ports Authority has the support of the Charleston City Council and Mayor in its efforts to modernize the cruise facilities at UPT and re-dedicate a significant portion of the southern end of the marine terminal to publicly-used green space. See Ex. 19, Charleston City Council Resolution, dated Sept. 14, 2010 ("I, Joseph P. Riley, Jr., Mayor, City of Charleston, and Charleston City Council pledge our support to the [Ports Authority] in their vital role to our City and State's continued economic development which includes 1) plans to redevelop [UPT] including a new passenger cruise terminal ... and 2) management of a cruise business.").

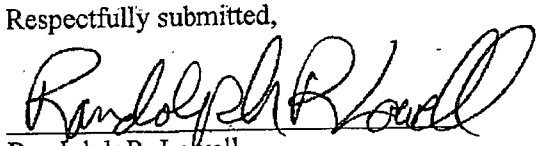
In light of the fact that Cruise Opponents' predominant challenge is to the merits of the cruise industry in Charleston and the policy adopted by the Ports Authority, embraced by both the General Assembly and City of Charleston, as opposed to the issuance of a pile cluster permit, this contested case presents only a non-justiciable political question and should be dismissed.

CONCLUSION

Cruise Opponents have failed to meet their burden of proving standing to challenge DHEC's Permit. All three elements of standing are lacking, as Cruise Opponents have failed to allege an actual or imminent injury-in-fact, the harm alleged is not traceable to the permitted activity giving rise to this contested case, and the "injuries" sustained by Cruise Opponents are not redressable by a decision of this Court. Further, Cruise Opponents have failed to clear the additional justiciability hurdle imposed on organizations wishing to bring causes of action on behalf of their memberships. Finally, even if this Court decides Cruise Opponents have standing to bring this contested case, the Court should dismiss the action on the ground that the issues presented amount to a non-justiciable political question that have been vetted and decided by the appropriate branch of government and are therefore inappropriate for judicial review. Accordingly, this Court should dismiss this case for lack of standing or, alternatively, dismiss this case as a non-justiciable political question.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,



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July 1, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-056-CC **PETITIONERS' RESPONSE TO MOTION TO DISMISS FOR LACK OF STANDING AND MOTION TO STRIKE**

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III

The Petitioners submit the following response to the South Carolina State Ports Authority's ("SPA")[1] motion to dismiss for lack of standing and move this honorable Court to strike exhibits attached to that motion.

INTRODUCTION

In this case we have a statutory framework and a regulatory program that expressly recognize the rights of affected citizens to comment upon and appeal permit decisions. Under Section 48-39-

[1]SPA goes out of its way to use the inflammatory label of "cruise opponents," when simple reference to "Petitioners" would suffice. But aside from SPA's label being inflammatory, it is plain wrong. Throughout this permitting and appeals process, the Petitioners have consistently advocated for adequate controls to preserve Charleston's historic resources; protect the health and welfare of its residents; and maintain the quality of life enjoyed by the Petitioners, among other goals. (See, e.g., Exhibit B, Affidavit of Virginia Lane; Exhibit C, Affidavit of Tommie Robertson).

150(B), OCRM must consider the views of interested parties in making permit decisions. S.C. Code Ann. § 48-39-150(B). Under Section 48-39-150(D), any person adversely affected by the granting of a permit has the right of appeal. S.C. Code Ann. § 48-39-150(D). The rights of citizens to participate in this process has been recognized as a constitutional due process right. League of Women Voters of Georgetown County v. Litchfield-by-the-Sea, 305 S.C. 424, 409 S.E.2d 378 (1991); Stono River Environmental Protection Association v. South Carolina Department of Health and Environmental Control, 305 S.C. 90, 406 S.E.2d 340 (1991); Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

In the context of a challenge to an agency permitting decision under this program, standing is satisfied where parties allege "an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment" of an affected area. South Carolina Wildlife Federation v. South Carolina Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 523; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). But rather than look to the Petitioners' allegations related to injury, the SPA distracts the Court with its misguided version of the Petitioners' position in, as well as the facts of, this case. Further, the SPA repeatedly cites to dissenting opinions of the South Carolina Supreme Court as though they were binding precedent, despite the Supreme Court's explicit rejection of SPA's interpretation of standing principles in Smiley v. S. Carolina Dept. of Health & Envtl. Control, 374 S.C. 326, 333, 649 S.E.2d 31 (2007).

STANDARD ON MOTION TO DISMISS

The South Carolina State Ports Authority ("SPA") spends the first eight pages of its motion arguing the merits of the case, including reference to twenty (20) exhibits. Only two of these

exhibits are even remotely relevant to the question of whether the Petitioners have standing and none of them are appropriate at the motion to dismiss stage. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2137 (1992). When it finally discusses the standing issue, SPA makes much of the "generalized grievances" alleged by Petitioners, ignoring the applicable requirements for demonstrating standing at this stage of the case. (Motion p. 11), Id. In deciding a motion to dismiss, the allegations made by the plaintiff, and all inferences reasonably deducible there from favorable to the plaintiff, must be taken as true. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (Ct. App. 1987). "At the pleading stage, **general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'"** Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990). The Administrative Law Court has adopted the same standard. South Carolina Department of Revenue v. Collins Entertainment Corp., ALJD Docket No. 98-ALJ-17-0288-CC, 1998 WL 916498 (S.C. Admin. Law Judge Div. October 23, 1998); South Carolina Department of Revenue v. Washington, ALJD Docket No. 94-ALJ-17-0117-CC, 1994 WL 925017 (S.C. Admin. Law Judge Div. August 18, 1994). See also, Rule 68 of the Rules of Procedure for the Administrative Law Court.

SPA acknowledges the Petitioners' allegations that the streets are congested due to cruise ship traffic; that increased cruise operations will increase congestion; that members are concerned about the noise impacts; that members breathe air into which cruise ship emissions are discharged and that degradation of air quality will result from increased cruise ship operations; and that property values will be degraded because of the new cruise ship terminal – each of which will be made worse by the new cruise ship terminal authorized under the permit (Motion p. 11). Yet SPA asks this Court

to ignore the directives of Toussaint v. Ham and Lujan v. National Wildlife Federation that these general factual allegations must be taken as true and that they suffice on a motion to dismiss and faults the Petitioners for making these "generalized grievances." The product of SPA's argument is suggesting that Petitioners must prove the merits at this stage of the case to establish standing. But regardless of the standard at motion to dismiss stage, the Petitioners are submitting Affidavits from members of each of the Petitioner groups describing in detail the concrete and imminent injuries that they will suffer but-for the permit issued by DHEC to SPA authorizing the construction of new cruise ship terminal on the North end of Union Pier terminal. (See Exhibits A-E).

I. PETITIONERS MEET THE TEST FOR STANDING

In Sea Pines Association v. SC Dept. of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001), the South Carolina Supreme Court adopted the basic legal test for standing announced in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992).[2] See also Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (2003). The three-pronged test arising from Lujan is as follows:

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the

[2]The South Carolina Supreme Court's rulings on standing in environmental cases have consistently followed the rulings of the United States Supreme Court and other federal courts. See, e.g., Sea Pines Association for the Protection of Wildlife, Inc. v. S.C Department of Natural Resources, 345 S.C. 594, 550 S.E. 2d 287 (2001), citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) and Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Energy Research Foundation v. Waddell, 295 S.C. 100, 367 S.E.2d 419 (1988), citing Sierra Club, supra., United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), and Conservation Council of North Carolina v. Costanzo, 505 F.2d 498 (4th Cir.1974). Accordingly, decisions of the federal courts are pertinent to this case.

> independent action of some third party not before the court' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan, 112 S. Ct. at 2136 (internal citations omitted).

Later, in Pye v. U.S., the Fourth Circuit reaffirmed the principle that "aesthetic and environmental injuries can constitute an injury in fact sufficient to support a plaintiff's standing." 269 F.3d 459, 469 (4th Cir. 2001) (citing Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693 (2000); Sierra Club v. Morton, 405 U.S. 727, 735, 92 S.Ct. 1361 (1972); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 73-4, 98 S.Ct. 2620 (1978)). The court in Pye noted that if those who are seeking to protect the environmental quality of the areas they use do not have standing, then "the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action." Pye v. U.S., 269 F.3d 459, 468 (4th Cir. 2001) (citing Society Hill Towers Owners' Assn. v. Rendell, 210 F.3d 168, 176 (3rd Cir. 2000).

A. Petitioners Meet the Test for Injury-in-Fact

Our courts have long held that precisely the type of aesthetic and recreational interests at stake here are sufficient to confer standing. In Smiley the Supreme Court held that a plaintiff must make claims as to "use and enjoyment" of an affected area. Smiley v. S. Carolina Dept. of Health & Envtl. Control, 374 S.C. 326, 333, 649 S.E.2d 31 (2007); see also, Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693 (2000); American Canoe Assn. v. Murphy Farms, 326 F.2d 505 (4th Cir. 2003).

The United States Supreme Court has stated that the injury required for standing purposes

need not be a substantial injury:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, . . . a $5 fine and costs, . . .; and a $1.50 poll tax . . . . [W]e see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that **an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.**" Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 613. See also K. Davis, Administrative Law Treatise ss 22.09--5, 22.09--6 (Supp. 1970).

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973) (Internal citations omitted) (emphasis added).

The "identifiable trifle" standard was re-affirmed by the Fourth Circuit. Friends of the Earth, Inc. v. Gaston Copper, 204 F.3d 149 (4th Cir. 2000): "the claimed injury 'need not be large, an identifiable trifle will suffice.'" 204 F.3d 149, 156, quoting Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation marks omitted). See also, Conservation Council of North Carolina v. Costanzo, 505 F.2d 498, 501 (4th Cir. 1974).

SPA alleges that the Petitioners "complain about the existence of the cruise terminal rather than the propriety of the permitting process that should be at issue" and accuse the Petitioners of seeking "to prevent any cruise ship vessels from calling on the Port of Charleston." (Respondent's Motion, pp. 7-8). SPA attempts to distinguish between the permitted activity at issue and its proposed expansion plans for the Union Pier terminal by claiming that the Petitioners' complaints relating to expanded cruise operations are wholly unrelated to the permit for pilings. However, SPA

admits that its "capital improvement plan" for renovating and modernizing the Union Pier terminal requires the permitted activities to accommodate subsequent cruise passenger demand. (Motion, pp. 3-4). Rather than take the reasonable requests and concerns of the public and residents most affected on a daily basis into consideration, SPA has continued to spin the Petitioners' pleas for protecting their well-being and use and enjoyment into anti-cruise, anti-growth blasphemy.

The Petitioners have never been of the position that they do not want cruise operations to exist at all, as asserted by SPA. The Petitioners have merely sought to secure legally binding limitations on cruise operations in the City, protections for the residents, cultural and historic resources, and to be able to have an honest discussion and analysis regarding alternative locations. As the testimony described below makes clear, the Petitioners do take issue with the impacts caused by the permit for pilings because that is the necessary first step in SPA's plan for expanded cruise operations at Union Pier. Since current cruise operations have and continue to cause harm to the Petitioners, and since SPA concedes its intention to expand and increase those operations following the permitted activity in the future, the Petitioners' injuries do in fact relate to, and flow from, the issuance of this permit.

In this case, the Petitioners have asserted far more than the "identifiable trifle" required to establish injury. United States v. Students Challenging Regulatory Agency Procedures (SCRAP) , 412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973); Friends of the Earth, Inc. v. Gaston Copper, 204 F.3d 149 (4th Cir. 2000). Christina Dodd testifies that she has lived at 42 Hassell Street within the Ansonborough neighborhood of Charleston for 12 years. (Exhibit A). Ms. Dodd is a member of the Preservation Society of Charleston, the Historic Ansonborough Neighborhood Association and Charleston Communities for Cruise Control. Id. Ms. Dodd testifies that since the Carnival

Fantasy cruise ship moving to Charleston and the attendant increase in cruise ship operations, she has:

> noticed a decrease in my overall quality of life. Specifically, for the past two years, I have been finding soot on the window sills inside by 1843 historic home, despite the fact that I have exterior storm windows. Additionally, this oily soot is now prominently found on our piazzas and outdoor furniture. It is very difficult to clean, and cleaning must be done much more frequently. I did not experience this problem before the influx of nearby cruise ships at Union Pier. I am obviously very concerned about what this residue from burned sulphur-heavy fuel is doing to my lungs and overall health, as I am breathing this pollution both inside and outside of my home.[3]

Id. at 2.

Ms. Dodd also notes that she has "difficulty completing everyday errands and reaching my own residence" due to the traffic congestion on days when the cruise ship is in town. Id. at 2. The increased traffic and congestion when the cruise ship is in town makes it "very difficult to navigate and enjoy my neighborhood and community." Id. at 2. Ms. Dodd states that the new terminal authorized by the permit would make these problems worse. Id. at 2.

Virginia Lane testifies that she lives and works at 10 Gillon Street in the historic district of Charleston, which is an apartment located above a commercial space from which she operates her architecture firm. (Exhibit B). Her building is located approximately two blocks from the Union Pier Terminal. (Id.) She serves on the Board of Trustees for the Historic Charleston Foundation ("the Foundation"), and is also a member of the Preservation Society of Charleston and Charleston Communities for Cruise Control. Collectively, these groups represent her interests, as well as the interests of other members, in seeking to preserve the rich cultural resources, air and water quality,

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[3]Though Petitioners disagree with SPA that an injury in fact requires proof that "health and welfare" be threatened (Motion p. 16), the Petitioners have described how the proposed project would pose a threat to their "health and welfare."

and quality of life for those living, working and visiting historic Charleston. (Exhibit B).

Mrs. Lane testifies that "the cruise ship industry has had a dramatic negative effect on my quality of life and day-to-day activities since large cruise ships began docking at Union Pier in 2010." (Exhibit B, p. 3). She explains that the "Carnival Fantasy holds close to 3,000 people who collectively have a tremendous detrimental impact on traffic and congestion in historic district." Id. She continues that:

> I was born and raised in Charleston and fell in love with the architecture in the historic district, which led me to pursue a career in architecture. The colonial architecture of the historic district feeds my soul and I derive much enjoyment and pleasure viewing Charleston's unique architecture. As I and other members and staff of the Foundation are walking anywhere in town we see the cruise ship and it overshadows the beauty of the architecture. The proposed new terminal is akin to killing the golden egg in that the brand of Charleston as a beautiful, small historic town will be forever lost if more and larger ships are allowed to port here, as contemplated by the permit. The cruise ships visually overpower the historic district, lessening my enjoyment in viewing the architecture. The height, scale and mass of the cruise ship overpowers the colonial fabric of historic Charleston, which is very upsetting and without a doubt has negative impacts on my enjoyment of the City.

Exhibit B, p. 4.

In addition to her personal enjoyment, Mrs. Lane explained how the proposed permit would likely effect her architecture business. Clients, interior designers, employees, engineers and others coming to her office located blocks from the terminal have expressed problems with being able to access the office due to cruise-related traffic. (Exhibit B, p. 4). She states that if "there is an increase in size and number of ships porting in Charleston, my business would stand to suffer even more harm because my clients' ability to access my office will be hindered even more than it is now." (Id.). Finally, Mrs. Lane expresses concern about the loss in her property values due to the decreased quality of life in the historic district of Charleston caused by expanded cruise ship operations. (Id.).

Tommie Robertson testifies that she lives at 2 Laurens Street, Unit 2C, which is "within a few hundred feet of the proposed cruise ships's smokestacks . . ." (Exhibit C). Mrs. Robertson is a member of the Coastal Conservation League and the Charleston Communities for Cruise Control. Id. Mrs. Robertson testifies that, on multiple occasions, she has:

> been on my terrace while the Carnival *Fantasy* was docked and departing and I have experienced the negative effects of the thick smoke being emitted from the ship's smokestacks firsthand. I saw the thick smoke move from the cruise ship toward my home and within seconds of breathing the emissions, my throat immediately began to hurt and I was forced to retreat indoors. These harmful emissions have become so unbearable that I can no longer open any windows or enjoy my terrace while the cruise ships are in town . . . I have been forced to alter my plans and daily activities and attempt to remain inside when the cruise ship is docked because I have personally experienced concerning health impacts in the form of a sore throat or difficulty breathing if I am outdoors while the cruise ship is docked at Union Pier and I seriously fear my experience will only get worse with increased and prolonged exposure. I must avoid enjoying my terrace and being outdoors in the city where I live when the cruise ships are docked because I do not want to exacerbate these health concerns with any more direct exposure to the emissions.

Id. at 2-3.

Mrs. Robertson further testifies that she has "never experienced pain in my throat while breathing when the cruise ships are not docked at Union Pier" and that her "terrace pillows, furniture and the patio itself are constantly accumulating dirty soot that is extremely time consuming and costly to clean. And after seeing what the particulate emissions are capable of doing to my property I'm also extremely concerned about what the sulfur dioxide emissions must be doing to my body." Id. at 3. Additionally, in contrast to the repeated SPA accusations that the Petitioners' complaints arise from "their single goal of stopping cruise operations", Mrs. Robertson explains that she has "never been opposed to cruise ships, but based on my personal experiences, I strongly believe there must be some enforceable limits and protections in place, including operating from a less-dense historic residential area." (Id. at 4). She is concerned that these problems will be exacerbated if there

are more and bigger cruise ships coming into Charleston as a result of the new cruise terminal authorized by the permit in dispute. (Exhibit C).

Stephen F. Gates testifies that he has lived at 59 Meeting Street for the past thirteen years. (Exhibit D). He is the President and a member of the Charlestowne Neighborhood Association. Id. Mr. Gates testifies that since the Carnival *Fantasy* began home basing operations at Union Pier, he has:

> noticed traffic congestion becoming increasingly unmanageable and it becoming unbearable to visit the cruise terminal area on the days the *Fantasy* is in port. At the same time, I experienced heavy and oily soot deposits on my piazza and my windows, and I felt the historic ambiance of the city being eclipsed by the disproportionately large and unsightly cruise ships as the docked in the middle of the historic downtown district. I moved to Charleston and purposefully purchased my home in the Charlestowne Neighborhood because I enjoyed the sense of place, the scale of the buildings, the charming walkability of the streets and the overall historic charm of the city. However, since the Carnival *Fantasy* began its home port operations, it has seriously detracted from the traditional historic city feel of Charleston to the point that it has interfered with my quality of life and use and enjoyment of my property and the historic district of Charleston.

Id. at 2.

Mr. Gates' testimony goes on to describe how his daily activities are impeded when the cruise ships are docked in town, stating that:

> The main arterial street of East Bay becomes gridlocked with cruise ship traffic heading for the Union Pier terminal, diverting me and most local drivers through the surrounding small residential streets to reach our destination, and clogging the entire downtown peninsula. What normally would be a 5-minute trip ends up taking 45 minutes, which has prevented me from undertaking activities that I otherwise enjoy, such as shopping and dining, and has decreased my use and enjoyment of historic Charleston . . . [A]lthough there is a convenient Harris Teeter located close to my home, it is extremely inconvenient to access it due to the traffic congestion and, instead, I must travel outside the city to West Ashley. Rather than being able to enjoy the quiet walks and quick drives that used to be part of my daily routine, I am now forced to waste my time, my energy, my gas and my peace of mind on a regular basis because of the location of cruise ship operations and my proximity to the consequences of those operations.

Id. at 2-3.

In addition, Mr. Gates explains that he has:

> to scrub my piazza and my windows more often and more vigorously as a result of the soot deposited from the Carnival *Fantasy*. The soot on my property is heavier and more oily than anything I had seen on my property prior to 2010 when Carnival began its cruise operations at Union Pier. I am personally concerned about the real and substantial risks posed by this soot and additional air emissions on my health, on the value of my property, and on the historic integrity of my neighborhood and the historic district of Charleston on the whole, particularly if cruise ship operations are increased and expanded as a result of the permit at issue in this case.

The testimonials from the Petitioners' members evidence distinct and individualized harms suffered as a result of cruise operations at Union Pier since 2010 when operations increased significantly. Specifically, the Petitioners' members have articulated substantial and concrete injuries that are real and that face an imminent threat of being exacerbated as a result of the permitted activity contested in this case.

SPA's suggestion that an injury amount to a "nuisance" or be a "threat to individual health and welfare"[4] in order to meet the test for injury in fact is misplaced and misguided. (Motion pp. 15-16). South Carolina courts have found injury in fact for use and enjoyment in aesthetic and recreational interests. In South Carolina Wildlife Federation v. South Carolina Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988), a case cited with approval in Sea Pines, it was held that where parties "alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment of the fish and wildlife of the wetlands" that would be affected by a Coastal Council certification, "these allegations are sufficient to show standing." 296 S.C. 187, 190, 371 S.E.2d 521, 523. In Ogburn-Matthews v. Loblolly Partners (Ricefields

[4]Though Petitioners disagree with SPA that an injury in fact requires proof that "health and welfare" be threatened (Motion p. 16), the Petitioners have described how the proposed project would pose a threat to their "health and welfare."

Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998), the plaintiff had standing where she alleged an injury to her use and enjoyment of a wetland adjacent to her home, even though the wetland was owned by a private developer. In Smiley v. S. Carolina Dept. of Health & Envtl. Control, 374 S.C. 326, 333, 649 S.E.2d 31 (2007), the plaintiff had standing where he alleged an adverse affect on his use and enjoyment of the beach at Isle of Palms from a permit that authorized the scraping of sand on that beach.

Actual and Imminent, not Conjectural or Speculative

SPA cites to the case of Town of Arcadia Lakes, et al. v. Roper Pond, LLC and SCHEC, Opinion No. 5095 (S.C. Ct. App. filed March 6, 2013), (Shearouse Adv. Sht. No. 11 at 38-55), withdrawn, substitued and refiled (Ct. App. filed June 12, 2013) (Shearouse Adv. Sht. No. 26 at 110-127) (certiorari pending), in support of its assertion that the Petitioners' concerns to an as-of-yet unimplemented project permit are speculative and not actual or imminent. SPA's assertion is misplaced and it misapplies Town of Arcadia Lakes. To make matters worse, SPA cites dicta in Beaufort Realty that was expressly rejected by the Supreme Court in Smiley v. DHEC in claiming that the injuries are not actual or imminent, but conjectural.

In Town of Arcadia Lakes, the Court of Appeals affirmed the ALC's standing analysis noting that the "injuries" alleged were insufficient because (1) the Petitioners did not have an ownership interest in the ponds that would be impacted by the proposed project and (2) the injuries pertained to possible mismanagement of the project or possible violations of the permit. The court did not hold that injury is speculative because the project has yet to be implemented, as stated by SPA, it held that concerns regarding mismanagement or potential violations were insufficient to challenge as-of-yet unimplemented project. Town of Arcadia Lakes, Opinion No. 5095 (S.C. Ct. App. filed

March 6, 2013), (Shearouse Adv. Sht. No. 11 at 38-55), withdrawn, substitued and refiled (Ct. App. filed June 12, 2013) (Shearouse Adv. Sht. No. 26 at 110-127) (certiorari pending). The Petitioners have not made allegations related to implementation of the permitted project or potential future violations of the permit. Rather Petitioners allege that if the proposed new terminal is constructed it will result in new and increased harms to their health, welfare, recreational and aesthetic interest, as well as their quality of life. (See Exhibits A-E). Similar allegations of harm have been found sufficient in key environmental standing cases.

In Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc. 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), the plaintiffs were held to have standing where affidavits and testimony asserted that "Laidlaw's discharges, and the **affiant members' reasonable concerns about the effects** of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." Friends of the Earth, 528 U.S. 167, 183-184, 120 S.Ct. 693, 705, 145 L.Ed.2d 610 (2000). The Court held that "[t]hese submissions present dispositively more than the mere 'general averments' and 'conclusory allegations' found inadequate" in Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). The Court also held that the affiants' "conditional statements – that they would use the [river] for recreation if Laidlaw were not discharging pollutants into it" – could not be equated with the speculative "'some day' intentions" to visit endangered wildlife species halfway around the world that the Court had held insufficient to show injury in fact in Lujan v. Defenders of Wildlife. 528 U.S. 167, 184, 120 S.Ct. 693, 705-706 (2000).

As for Beaufort Realty, SPA twice misstates that case for the proposition that prospective concern of future harm is insufficient to satisfy the Lujan test. (Motion p. 15 and p. 17). The South

Carolina Supreme Court addressed this point and flatly rejected it in Smiley: "to read Beaufort Realty as denying standing to an individual unless and until the 'injury' has been inflicted ignores the 'actual or imminent' requirement of Lujan/Sea Pines and elevates dicta in Beaufort Realty over its two holdings: that the environmental group was asserting speculative concerns rather than injury, and had failed to demonstrate a causal connection." Smiley v. S. Carolina Dep't of Health & Envtl. Control, 374 S.C. 326, 331, 649 S.E.2d 31, 33-34 (2007). The Petitioners need not show that injury has already occurred, they simply need to assert that the injuries alleged are actual or imminent once the permitted activity is conducted.

Widely-Shared Concerns Are Sufficient to Establish an Injury In Fact

SPA faults the Petitioner groups for having widely-shared concerns about the proposed new cruise ship terminal. (Motion p. 11). Indeed, it is not difficult to understand how a project this massive – requiring $35 million in bonds (Motion p. 7) – would effect many, many people, particularly those working and living in the area surrounding the proposed project. The far-reaching impacts of the project, however, do not defeat standing simply because they are widely-shared.

It is true that an environmental plaintiff must have a "personal stake" in the subject matter of the case, such that the injury is not "merely a general interest common to all members of the public." Florence Morning New, Inc. v. Building Comm'n., 265 S.C. 389, 218 S.E.2d 881 (1975). But an injury can be common to a great many members of the public, and still be sufficiently personal to a specific individual to give the individual standing to sue. See Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It is a well settled legal principle that the fact that a plaintiff is part of a large class of potential appellants is no reason to deny standing. As the United States Supreme Court noted in Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31

L.Ed.2d 636 (1972), while all citizens have the right to use public resources, not all citizens suffer an impact from a project affecting those resources:

> The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort.

405 U.S. at 735, 92 S. Ct. at 1366. The difference between those who have standing and those who do not, the Court concluded, was actual use of the area affected by the proposed changes.

The Sierra Club v. Morton Court ruled that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." Id. at 734. "To deny standing to persons who are in fact injured because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion." U.S. v. SCRAP, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973); see also Pye v. United States, 269 F.3d 459, 469 (4th Cir. 2001); Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992); Federal Election Comm'n. v. Akins, 524 U.S. 11, 118 S. Ct. 1777 (1988) (where a harm is concrete, though widely shared, the Court has found "injury in fact."); Covington v. Jefferson County, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, concurring) ("injury to all is injury to none" theory would "deny standing to every citizen such that no matter how badly the whole may be hurt, none of the parts could ever have standing to go to court to cure a harmful violation.")

The principles from Sierra Club v. Morton have been repeatedly affirmed and elaborated on in federal courts. The Fourth Circuit ruled that "[w]hile it is true that the Court has stressed that a generalized grievance shared by the population at large cannot be a basis for standing, . . . it is

equally true that merely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury." Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001) (internal citations omitted).

In this case it matters not whether others share the injuries alleged by the Petitioners, it matters only that these Petitioners will suffer an injury to their aesthetic and recreational interests, as well as their property interests. Unlike the plaintiffs in Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992), who could not differentiate themselves from the general public and could point to no particular legal interest in the county procurement decision, the Petitioners have demonstrated that they are among the class of users of the historic district of Charleston and its surrounding waterways that have a personal stake in the outcome of this case. See, e.g., Sloan v. School District of Greenville County, 342 S.C. 515, 525, 537 S.E.2d 299, 304 (2000).

B. There is a Causal Connection Between the Injuries and the Permitted Activity

The second component of standing requires that "there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Smiley v. S. Carolina Dep't of Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992)). In this case, the conduct complained of is the permit authorizing the construction of a pilings in the critical area which are necessary for a new cruise ship terminal at Union Pier. SPA explains that the piling clusters in the critical area are necessary to "support certain construction activities," i.e., the new terminal facility. (Motion p. 18).

SPA cites to Town of Arcadia Lakes in an attempt to argue that the Petitioners must establish proof on the merits in order to prove traceability. To the extent that the court in Town of Arcadia Lakes required proof on the merits in order to establish standing, such a holding is in conflict with a long line of cases holding just the opposite. For example, in Pitt County v. Hotels.com, L.P., 553 F.3d 308, 312 (4th Cir. 2009), the Fourth Circuit reversed the lower court noting that "the district court's analysis improperly conflated the threshold standing inquiry with the merits of the County's claim." Id. at 312. A plaintiff need not prove the merits of the case in order to prove an injury in fact sufficient to establish standing. Id. (citing Am. Library Ass'n v. FCC, 401 F.3d 489, 493 (D. C. Cir. 2005)). A "court has jurisdiction if 'the right of the [plaintiffs] to recover under their complaint will be sustained if the [applicable laws] are given one construction and will be defeated if they are given another'...." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting Bell v. Hood, 327 U.S. 678, 685, 66 S.Ct. 773, 90 L.Ed. 939 (1946)). To hold that a plaintiff must prove the merits in order to prove an injury in fact "would reduce all merits inquiries in cases of this type into standing inquiries." Pitt Cnty. v. Hotels.com, L.P., 553 F.3d 308, 312 (4th Cir. 2009).

Two United States Supreme Court opinions explain the distinction between a plaintiff's injury in fact and proof of violations or inadequacy of a permit. In Allen v. Wright, the U.S. Supreme Court explained the distinction as follows:

> **The "fundamental aspect of standing" is that it focuses primarily on the party seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated,"** (citing United States v. Richardson, 418 U.S. 166, 174, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (quoting Flast, 392 U.S., at 99, 88 S.Ct., at 1952). . . . the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief. If a plaintiff presents a nonjusticiable issue, or

> seeks relief that a court may not award, then its complaint should be dismissed for those reasons, and not because the plaintiff lacks a stake in obtaining that relief and hence has no standing. **Imposing an undefined but clearly more rigorous standard for redressability for reasons unrelated to the causal nexus between the injury and the challenged conduct can only encourage undisciplined, ad hoc litigation**, a result that would be avoided if the Court straight-forwardly considered the justiciability of the issues respondents seek to raise, rather than using those issues to obfuscate standing analysis.

Allen v. Wright, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984).

As succinctly put in another U.S. Supreme Court case, the "relevant showing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry ... is to raise the standing hurdle higher than the necessary showing for success on the merits . . ." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

SPA argues that "the installation of five piling clusters will not cause any of the alleged injuries set forth by" the Petitioners because "[t]here already are thousand of pilings in place" at the proposed new terminal location and "the installation of these five piling clusters in no way changes the preexisting operations at UPT." (Respondent's Motion, 18). However, SPA admits its intent to change cruise operations at UPT by virtue of its capital improvement plan and the terms of its Voluntary Management Agreement, which allow for larger and more frequent cruise ship visits than currently existing at UPT. Moreover, the pilings permit provides the necessary structural support and allows SPA to change the location of the passenger terminal, moving it from the southern end of the Union Pier property to the northern end, and even closer to the residents living next door to the Union Pier property who are already suffering adverse impacts from those cruise ship operations.

Mrs. Robertson continues her testimony stating that cruise operations at Union Pier and

the proposed changes SPA intends to carry out have and will continue to have a negative effect on the investment she made in purchasing her home and deciding to move to Charleston. (Exhibit C at 3). Mrs. Robertson testifies that she:

> was born and grew up in Charleston but I moved away after high school and lived most of my life in other cities. I have always cherished Charleston and my decision to move back was based on my desire to use and enjoy the historic district and its beauty once again. Unfortunately, my ability to use and enjoy my property has been substantially interefered with by the adverse consequences of the cruise ship operations as they are currently functioning. And that interference with use and enjoyment of my property will be increased if SPA is allowed to construct the new cruise ship terminal as permitted by DHEC starting with the pilings.

Id. at 4.

SPA alleges that "[c]ruise ships have called on UPT continuously since 1973 . . . and may continue to call on UPT and the Charleston peninsula in the future regardless of whether the Ports Authority shifts operations less than 600 yards north." (Respondent's Motion, 19). Then, SPA asserts that the traceability of the Petitioners' injuries is more attenuated than those in the Bailey case. to which it uses as a comparison because "this case involves a publicly operated marine terminal not immediately adjacent to any property of" the Petitioners. Id. at 20. Putting aside the fact that SPA's assertion is patently false, it once again misconstrues the Petitioners' injuries and the causal connection they share to cruise operations at Union Pier as they exist today and as they are proposed to exist in the future following the SPA's improvement project.

Petitioners describe the correlation between the injuries they have already experienced, based on Carnival Fantasy utilizing Union Pier Terminal, and the proposed new cruise ship terminal, which will exacerbate the existing injuries. (Exhibits A-E). As recited above, Mrs. Robertson testified to visibly witnessesing thick smoke being emitted from the cruise ships, traveling toward her property, and immediately causing her to experience a sore throat. In addition, she lives "on a street that is

zoned for high-density residential use" and her "home is among 60 others that are within a few hundred feet of the proposed cruise ship's smokestacks, and the city has approved construction for another 100 homes in this area as well." (Exhibit C). While the passenger terminal is currently located on the southern end of the Union Pier property, the installation of the piling clusters initiates the terminal's re-location, and Mrs. Robertson testifies that:

> If the SPA moves forward with its plan for expanded cruise ship operations, including moving the passenger terminal closer to my home on the North end of the Union Pier property, I will be close enough to the proposed cruise ship terminal to throw a rock onto the terminal site from my balcony. If the SPA conducts the permitted activity that is now at issue, then its plans for expanded cruise ship operations will surely be carried out and I will feel as though the cruise ships are practically docked right inside my living room, exacerbating the adverse effects that I am currently experiencing.

Id. at 2.

Mr. Gates' testimony described the heavy and oily soot being deposited on his property, that he has to expend extra effort to clean this soot to prevent it from causing permanent damage to the historical integrity of his home, and that it is unlike anything he had seen on his property prior to 2010 when Carnival began home port operations at Union Pier. (Exhibit D). Further, Mr. Gates testifies that he lives "approximately ten blocks from the Union Pier terminal property" and therefore experiences the impacts of cruise operations at Union Pier on a personal level. (Exhibit D).

Christina Dodd explains that she has reviewed information and seen presentations related to SPA's new cruise ship terminal at Union Pier and believes that the activities authorized by the permit "will only make worse these problems I have been experiencing over the last couple of years. The permit facilitates more cruise ships and more people, without the limitations needed to combat the problems of pollution and traffic." (Exhibit A at 2). Moreover, the location of the new cruise terminal will be closer to Ms. Dodd's house, bringing the smoke and soot even closer to her home.

(Exhibit A).

Petitioners complaints are based on personally known facts related to the existing operations at Union Pier and the fact that the new terminal would allow bigger and more ships to port in Charleston. Noticeably SPA does not dispute that cruise operations will expand as a result of the new cruise ship terminal whose construction is authorized by the permit at issue in this case. Further, SPA does not appear to dispute that the current cruise ship operations are injuring the Petitioners. (Motion p. 20). It logically follows that if cruise ship operations are increased, if larger ships are ported more frequently, then the harms complained of will increase. In this way, the present case is unlike Bailey v. SCDHEC, in which the same boats that had been docked for years would continue to be docked at the same location regardless of the permit decision. 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010).

SPA encourages a misapplication of the causation principle, which is further illustrated by analogy to a case involving the same question of causation. In Duke Power Co. v. Carolina Envtl. Study Group, Inc., the merits of the case involved the validity of the provisions of the Price-Anderson Act, which limited maximum liability in the event of any single nuclear incident to $560,000,000. 438 U.S. 59 (1978). The plaintiffs, who lived near the proposed construction site for two nuclear power plants, challenged the constitutionality of that Act. Id. at 67. For purposes of standing, the plaintiffs asserted injuries related to the possibility of a nuclear accident, as well as injuries related to the normal operation of the plants. Id. at 73-74. First, the Supreme Court concluded that it need not determine whether the injuries based on the possibility of a nuclear accident were "sufficiently concrete to satisfy constitutional requirements." Id. at 73. Rather, "several of the 'immediate' adverse effects'" of the nuclear plants, including "environmental and aesthetic

consequences" were of "the type of harmful effect which has been deemed adequate in prior cases." Id. at 73-74. In the same way, Petitioners have asserted immediate adverse effects resulting from completion of the permitted activity, i.e., construction of a proposed new cruise terminal leading to a relocation of cruise ship operations closer to some Petitioners (i.e., Tommie Robertson) and promoting an increase in the size and number of cruise ships.

As to causation, the Duke Power Court applied the **but-for standard.** Id. at 74-75. The plaintiffs position on causation was that but for the Act's limitation on liability, the nuclear plants would not be constructed, and the "immediate adverse effects" would then not occur. Id. at 74. The Court found a "substantial likelihood" of this "but for" relationship, and upheld causation and standing. Note that actual operation of the nuclear plants was not an issue on the merits, yet formed the basis for plaintiffs' standing. **The plaintiffs' injuries in fact had nothing to do with the plaintiff's claims on the merits, and the Court found that no such nexus was required.** Id. at 78.

Other cases have applied the same causation principle. Pye v. United States, 269 F.3d 459 (4th Cir. 2001) (adjacent landowners were held to have standing to challenge a wetlands permit based on alleged impacts on the cohesiveness and integrity of an area containing designated historic sites); see also American Canoe Assn. v. Murphy Farms, 326 F.2d 505 (4th Cir. 2003).

In the same way, the Petitioners have identified health, property, aesthetic and recreational injuries that would not occur but for the permit at issue in this case. This Court should apply the "but for" analysis, rather than requiring a new, heightened standard proposed by SPA.

C. The Petitioners' Injuries Can be Redressed by a Favorable Decision from this Court

SPA alleges that the Petitioners' injuries "would not be redressed even if the challenged

Permit were denied because cruise ships and other marine container vessels call on Charleston today and may continue to call on UPT under its current configuration going forward." (Respondent's Motion, 21). The Petitioners have not and do not argue that ocean-going vessels have called on the terminal in the past, or that Union Pier will cease operating as a marine terminal if the permit at issue is denied. Rather, the Petitioners seek to mitigate the adverse consequences they are experiencing and that they expect to intensify if SPA conducts the permitted activity because, as explained throughout and supported by the attached affidavits, expanded and increased cruise ship operations at Union Pier will assuredly follow installation of the pilings.

The fact that the "plan" to place some limitations on the new cruise terminal is termed a "Voluntary Cruise Management Plan" in itself gives the Petitioners serious concern that the plan is not enforceable or binding in the future, allowing SPA to increase the number and size of the ships after the permitted structure is complete.

Mr. Gates testifies that "the negative impacts that CNA members are currently experiencing will be perpetuated and exacerbated by allowing the SPA to install the pilings and construct its new expanded cruise ship terminal." (Exhibit D). In fact, he testifies that:

> the CNA membership by overwhelming vote adopted resolutions expressing concern over congestion, pollution, scale and other quality of life issues related to SPA's proposed cruise ship expansions at Union Pier. Moreover, the CNA members established our Cruise Ship Task Force to pursue a study of alternative cruise terminal sites, particularly the Columbus Street Terminal, and to pursue legal limitations on cruise ship activity in Charleston. Otherwise CNA's founding principles in preserving the historic quality of our neighborhood will continue to be directly threatened by the SPA's performance of the permitted activity for it will be immediately followed by increased and expanded cruise operations at Union Pier.

Id. at 4.

SPA then goes so far as to allege that the Petitioners' challenge to this permit is actually part

of "the larger war being waged by Cruise Opponents against the cruise industry[,]" that the Petitioners' goal is "to delay, obfuscate, and deter" and that "anything short of a relocated cruise terminal–off of the Charleston peninsula entirely–is unacceptable . . ." (Respondent's Motion, 22). As already stated above, the Petitioners are not and have never been opposed to the mere existence of cruise operations in Charleston. The Petitioners have repeatedly requested a comprehensive study to compare alternative locations that would results in less adverse impacts to local residents and the surrounding area. The Petitioners have repeatedly requested a seat at the table with SPA so that a compromise might be reached wherein cruise operations continue but with legally enforceable limits. But the Petitioners have never been the obstinate, anti-cruise radicals that SPA attempts to hold them out to be. And the SPA's clear contempt for the Petitioners and their complaints despite SPA's insistence that the activity at issue, the installation of pilings, is trivial and distinct from the larger picture of expanded cruise operations suggests the importance of this forum for the Petitioners to seek meaningful relief.

SPA mischaracterizes the nature of Petitioners' interests and the relief sought through this appeal.[5] Petitioners clearly articulated the relief sought in their Prehearing Statement and the grounds supporting that relief. Specifically, the Petitioners ask this Court to issue an order reversing the proposed decision to issue the permit and certifications, or in the alternative remanding the decision back to staff, on grounds that DHEC failed to:

1. consider the "extent to which long-range, cumulative effects of the project may result

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[5]SPA's statement that "anything short of a relocated cruise terminal – off of the Charleston peninsula entirely – is unacceptable" is plain wrong and further show the SPA's obstinance and unwillingness to listen to the voices of the taxpayers of the State that fund it. (Motion p. 22).

within the context of other possible development and the general character of the area," S.C. Code Ann. Reg. 30-11.C.(1);

2. evaluate feasible alternatives to both avoid adverse environmental impacts and to avoid critical areas, S.C. Code Ann. §48-39-150(A)(9), S.C. Code Ann. Reg. 30-11(B)(9) and S.C. Code Ann. Reg. 30-12.F(2)(b);

3. weigh the benefits of preserving the historic district of Charleston and the economic benefits, S.C. Code Ann. §48-39-150(A)(7) and S.C. Code Ann. Reg. 30-11(B)(7);

4. consider how the project will effect the value and enjoyment of adjacent owners S.C. Code Ann. §48-39-150; and

5. give the highest priority to uses "which preserve the historical or cultural values for which" the historic district of Charleston "was placed on the National Register of Historic Places," Coastal Management Program at IV-25.

This Court is empowered to grant that relief, should it agree with Petitioners on the merits.

D. Petitioners Meet the Test for Organizational or Associational Standing

An organization has representational standing when (1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 155 (4th Cir. 2000) (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). SPA acknowledges that the court must conduct the same inquiry to determine if an organization has standing as it would to determine if an individual has standing. (Motion p. 23, citing Md. Highways Contractors Ass'n, Inc.

v. Md., 933 F.2d 1246, 1250 (4th Cir. 1991). SPA's argument that there is no association standing is thus predicated on its prior arguments that not one single member of any of the Petitioner groups would suffer even an identifiable trifle of injury as a result of the new cruise ship terminal. SPA agrees that if a member of the groups has standing, then the group has standing. (Motion p. 23-24).

Without explanation, SPA takes the unusual step of citing to the dissenting opinion in Georgetown County League of Women Voters v. Smith Land, 393 S.C. 350, 713 S.E.2d 287, as if it were binding precedent, for the proposition that an organization only has standing if the interest is common to its membership.[6] (Motion, p. 29). The dissenting opinion is certainly not controlling law, and is in direct conflict with the law on associational or organizational standing, which holds that as long as one member has the right to sue in his or her own name, the organization has the right to sue on behalf of that member. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 155 (4th Cir. 2000); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

SPA apparently believes that it has a better understanding of the goals and missions of the Petitioner groups than the members of the Petitioner groups themselves, engaging in a misguided breakdown of each of the Petitioners' mission statements in an attempt to demonstrate how their interests in this case are not germane to their organizational purposes.

SPA claims that the Preservation Society "does not allege how this challenge serves to inspire involvement in historic preservation, or even that the permitted conduct affects historic materials or

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[6]Petitioners note that the dissent in Smith Land cites to a journal article authored by counsel for SPA for the proposition that no private cause of action exists under the Pollution Control Act. The majority of the Supreme Court flatly rejected Mr. Lowell's interpretation of that Act, yet he continues to cite a dissenting opinion as though it were law.

Charleston's cultural heritage." (Respondent's Motion, 25). Petitioners have alleged that the cumulative impacts of the permitted activity will adversely impact the historic buildings in the surrounding downtown area as well as the historic ambiance that makes Charleston the city that it is. Further, SPA alleges that "UPT has been a marine terminal and received passenger cruise vessels for over 100 years. If anything, the continuation of cruise vessel facilities at UPT serves to preserve this longstanding activity . . ." (Id.). Although this assertion borders on jest, if it is true–that cruise operations at Union Pier form part of the city of Charleston's material and cultural heritage warranting its preservation–then it follows that the Preservation Society's interest in the permitted activity is relevant to its organizational purposes in so preserving Charleston's heritage.

SPA alleges that "HCF's purpose is unrelated to the permitted activity, which does not call for the modification or destruction of any building or site considered to add to the architectural, historical and cultural character of Charleston." (Id.). However, the permitted activity calls for modification of the Union Pier terminal and the cruise operations it supports and those are changes that will impact the architectural and historical character of the downtown district, which the Historic Charleston Foundation has an established interest in. SPA claims that cruise operations at Union Pier have "co-existed with the architectural, historical and cultural character of Charleston for all these years" and that Petitioners "simply see this as an opportunity to impose their own vision on the future of the peninsula." (Id. at 26). Putting aside the fact that SPA attributes its own motives to the Petitioners, the permitted conduct will in fact change how cruise operations at Union Pier have co-existed with the architectural and historical character of Charleston and that is precisely what Historic Charleston Foundation is contesting in this case.

Again, SPA accuses the Petitioners, and HANA in particular, of fighting to end cruise

operations in Charleston and, for this purpose, imposes its own concept of HANA's position on this issue. SPA goes on to say that "HANA is seeking such redress through neighborhood resolutions seeking binding regulations on the cruise industry, but does not ascribe any injury to the permitted activity." (Id.). However, as belabored above, Ms. Dodd testifies to individual harm she has experienced as a member of HANA and attributed those harms to the permitted activity and the expanded cruise operations it invites.

SPA attempts to sardonically dismiss the Coastal Conservation League's standing claiming that it "did not see fit to include its purpose and mission in the request for contested case." (Id.). Mrs. Robertson's testimony clearly sets forth the Coastal Conservation League's organizational purpose in that it "seeks to protect the natural resources and quality of life in South Carolina communities, to promote appropriate development and to prevent projects that would excessively harm the state's natural resources and interfere with its residents' quality of life" and that such interests "would be adversely affected if the SPA is permitted to construct the pilings as currently proposed because the pilings are merely a preliminary step for the SPA in expanding the Union Pier terminal and increasing the cruise ship operations it will support." (Exhibit C, 1-2).

SPA alleges that "[a]s the CNA's self-described purpose is limited to activities south of Broad Street, CNA's interests are not germane to the interests at stake in this contested case challenged." (Respondent's Motion, 27). This overly narrow interpretation of the Charlestowne Neighborhood Association's organizational goals in relation to its interest in this case is unrealistic. Of course the members of the Charlestowne Neighborhood Associate *reside* in homes south of Broad Street, but they also *live* in the city of Charleston, particularly in the historic downtown district. As Mr. Gates testimony states, members of the Charlestowne Neighborhood Association are impacted

on a daily basis by cruise ship operations, their properties located all the way south of Broad Street are being damages and dirtied by soot deposits from the cruise ship's smokestacks, and they possess interests both north and south of Broad Street related to the permitted activity.

SPA claims that "Surfrider fails to describe how the interests at stake in evaluating the permitted activity in this case will have any effect on the world's oceans, waves and beaches . . ." (Respondent's Motion, 27). However, Marty Morganello, the President and a member of the Charleston Chapter of the Surfrider Foundation testifies that he is:

> concerned with the issuance of the permit for the State Ports Authority to install pilings and modify the Union Pier Terminal because that activity is a precursor to expanded cruise ship operations. The permit and the modifications it entails will allow the Union Pier Terminal to accommodate larger and more frequent cruise ships than it already does. With larger and more frequent ships calling on Union Pier, the amount of waste being dumped into the waters will increase as will the risks posed by contamination of those waters.

Exhibit E.

Further, Mr. Morganello states that he regularly enjoys the ocean and waterways for recreational and aesthetic uses and that "if the State Ports Authority installs the pilings to modify and expand cruise ship operations at Union Pier, it will decrease my ability to use and enjoy the waterways for fear of health impacts from increased cruise ships discharges." (Id.).

Finally SPA asserts that "Cruise Control should be pleased that its stated purpose of establishing "limits on the number, size and frequency of cruise ship visits" has been voluntarily incorporated into the capital improvement project by the Ports Authority through its Cruise Management Plan." (Respondent's Motion, 28). SPA continues that "[h]owever, eradication of the cruise industry in Charleston is not an interest at stake in this litigation" and, therefore, C4 fails to meet the burden of establishing association standing. Id. Once again, "eradication of the cruise industry in Charleston" is not and has never been an interest of C4, or any of the Petitioners. Rather,

as Mrs. Robertson's testimony explains:

> C4 represents members like myself who are concerned with the delicate balance between the historical residential port City of Charleston and the tourist experience of the City. These interests would be directly impacted if the SPA is permitted to construct the pilings as currently proposed because the pilings will allow the SPA to expand the Union Pier terminal rather than an alternative site and will increase cruise operations at Union Pier accordingly.

(Exhibit C, p. 2).

Mrs. Lane explains that the Board of the Historic Charleston Foundation[7] commissioned an objective study from Miley & Associates, Inc., entitled "The Cruise Industry in Charleston: A Clear Perspective." (Exhibit B). The study focuses on the benefits and costs associated with the cruise ship industry and its impacts on Charleston, concluding that there is a clear "non-alignment" of the benefits and costs since the bulk of the cruise industry benefits go the SPA while the bulk of the costs are borne by residents and businesses located in the surrounding downtown area. (Exhibit B). The conclusion that residents and businesses will bear the burden of the impacts from expanded cruise operations. The Foundation's challenge to the permit authorizing a new cruise ship terminal at Union Pier seeks to require adequate controls to preserve and protect the historical, architectural and material culture that make up Charleston's rich and irreplaceable heritage. This goal is most

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[7]The Foundation is the only non-member organization of the Petitioner groups. Federal courts have rejected challenges to plaintiff's capacity to assert organizational standing on the basis that an organization does not have members. Public Interest Research Group v. Magnesium Elektron, Inc., 123 F.3d 111,125 (3d Cir. 1997). The court in Public Interest Research Group cited to Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977), for the proposition that "to meet the requirements of organizational standing, [the organization].. need only prove that their members possess the 'indicia of membership' in their organizations." The Court in Hunt described those "indicia of membership" as (1) who elected the governing body of the organization and (2) who financed its activities. The purported members of the Foundation meet both these elements. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977). The Board of Trustees both elects the governing body, as well as bears responsibility for funding the organization.

certainly germane to the Foundation's mission as bearing directly on quality of life, preservation of historic resources and environmental impacts. (Exhibit B).

Again, at this stage of the proceedings, the Petitioners' affidavits on this point certainly take precedence over SPA's arguments related to its interpretation of the Petitioners' missions.

D. SPA's Suggestion That This Contested Case is a Non-Justiciable Political Question Should be Rejected

In the context of a motion to dismiss on standing, SPA's counsel apparently intends to decipher the subjective intent of the groups and individuals involved in this case and to extrapolate from his deciphering that this case is non-justiciable. In the face of sworn affidavits from the Petitioners on motion to dismiss, council's contradictory speculation on underlying intent could not have less relevance to the issue before the court. The Respondents' argument that this case is a non-justiciable political question is introduced exclusively for its inflammatory and undue prejudicial value, a strategy not scarce in Respondents' motion.

Under the Respondents' arguments, any important, controversial issue would inevitably be kicked out of the judicial system. Most all legal cases, but particularly those in the environmental field, touch on policy choices and value determinations. Most all legal cases, but particularly those in the environmental field, create conflicting opinions among those in different branches of government. The Petitioners are well aware that the mayor supports cruise expansion, but they are surprised to hear that his support is so weighty as to take this case out of the Court's hands. The Respondents' effort to list all those who supposedly support cruise ship expansion, under the guise of a legal argument, is admirable. But the fact remains that a contested case proceeding filed pursuant to the Administrative Procedures Act and the Coastal Zone Management Act presents the justiciable issue of whether or not an agency's permitting decision complies with the applicable

statute and regulations.

The case relied on most heavily by the Respondents relates to re-election of a judge by the legislatively created and designated Judicial Merit Selection Commission. Obviously this case does not fall in a category with Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109 (2010), but even pointing this out is an unjustified acknowledgment that the Respondents' political question argument had a purpose other than bluster.

II. THIS COURT SHOULD STRIKE EXHIBITS ATTACHED TO SPA'S MOTION TO DISMISS

A challenge to subject matter jurisdiction should be decided on a motion to dismiss. Posey v. Proper Mold & Engineering, Inc. 378 S.C. 210, 661 S.E.2d 395 (Ct. App. 2008); Glass v. Dow Chemical Co. 325 S.C. 198, 482 S.E.2d 49 (1997).

A motion to dismiss must be based solely on the allegations set forth in the complaint, and the court must presume all well-pled facts to be true. Gressette v. South Carolina Elec. and Gas Co. 370 S.C. 377, 635 S.E.2d 538 (2006), rehearing denied. When the allegations of a complaint are factually sufficient, but do not affirmatively show subject matter jurisdiction, a motion to dismiss may be supported by, and the court may consider, affidavits or other evidence proving lack of jurisdiction. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999), rehearing denied. In this case, the SPA includes numerous exhibits, including the permit application, a letter written by counsel for SPA to the DHEC Board, a study SPA commissioned to buy support for this project, maps of the project site, newspaper articles, and resolutions of the City of Charleston and the South Carolina Senate, among others. None of these exhibits are

relevant to the question of whether the Petitioners face an imminent threat of harm as a result of the activity authorized by the permit.

Affidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction. For instance, when the allegations of the complaint are factually sufficient under Rule 8(a)(1), SCRCP, but do not affirmatively show subject matter jurisdiction, the motion to dismiss may be supported by, and the court may consider, affidavits or other evidence proving lack of jurisdiction. Baird v. Charleston Cnty., 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (citing Woodard v. Westvaco Corp., 315 S.C. 329, 433 S.E.2d 890 (Ct. App.1993), vacated on other grounds by 319 S.C. 240, 460 S.E.2d 392 (1995)).

SPA attaches twenty (20) exhibits to its motion, only two of which are even remotely relevant to the issue of standing. See Exhibit 14, Affidavit of Katie Zimmerman & Exhibit 15, Affidavit of Evan R. Thompson. The vast majority of the exhibits are referenced in the section entitled "Statement of Facts" wherein SPA argues the merits of the case. (E.g., the project is "*de minimis*" (Motion p. 6); project would "reduce emissions" at the Union Pier terminal (Motion p. 6); project would "probably" result in a "benefit and positive reduction in traffic impact." (Motion p. 5)). Not only is it improper to argue the merits of a case in a motion to dismiss for lack of standing (as opposed to a motion for summary judgment), the Petitioners intend to raise objections to many of the exhibits attached to the motion if and when they are presented at the hearing of this matter. SPA's attempt to get in evidence without meeting the requirements of the Rules of Evidence, and on a motion to dismiss based on subject matter jurisdiction under SCRCP Rule 12(1) is improper and the exhibits should be stricken.

Respectfully submitted,

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Jessie White
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Georgetown, South Carolina

July 22, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing Response to Motion to Dismiss for Lack of Standing and Motion to Strike of Petitioner in the U.S. Mail addressed to:

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Chad N. Johnston
Willoughby & Hoefer, PA
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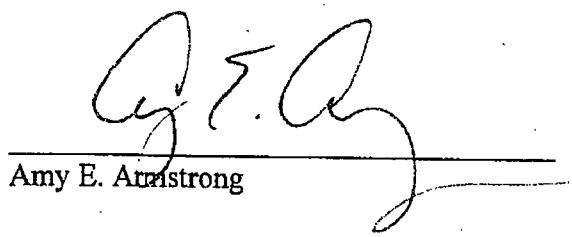

Amy E. Armstrong

Georgetown, South Carolina

July 22, 2013

Exhibit A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-0056-CC **AFFIDAVIT OF CHRISTINA DODD**

PERSONALLY APPEARED before me Christina Dodd who being duly sworn deposes and says:

I am a citizen and resident of Charleston, South Carolina. I reside at 42 Hassell Street, within the Ansonborough neighborhood of Charleston. I have resided on this property for the last 12 ~~13~~ years. I am a member of the Preservation Society of Charleston ("PSOC"), the Historic Ansonborough Neighborhood Association ("HANA"), and Charleston Communities for Cruise Control ("C4"), all of which are Petitioners in this case.

I am relying on these organizations to represent my opposition to Permit OCRM-12-054-B, which facilitates new cruise ship terminal operations at SPA's Union Pier facility in the City of Charleston. I am opposed to this permit and involved in this litigation because this permit threatens my quality of life, property value and health, and threatens the historic preservation values that I enjoy and appreciate with pollution and congestion.

In the last several years, with the Carnival Fantasy moving to Charleston and cruise operations increasing, I have already noticed a decrease in my overall quality of life. Specifically, for the past two years, I have been finding soot on the window sills inside my 1843 historic home, despite the fact that I have exterior storm windows. Additionally, this oily soot is now prominently found on our piazzas and outdoor furniture. It is very difficult to clean, and cleaning must be done much more frequently. I did not experience this problem before the influx of nearby cruise ships at Union Pier. I am obviously very concerned about what this residue from burned sulphur-heavy fuel is doing to my lungs and overall health, as I am breathing this pollution both inside and outside of my home.

With the influx of cruise traffic, I have also experienced problems with traffic congestion, including difficulty completing everyday errands and reaching my own residence. On occasion I have found myself ½ block from home, only to be redirected many blocks in the opposite direction. On days when the cruise ship is in town, between the increased automobile and pedestrian traffic, it has been very difficult to navigate and enjoy my neighborhood and community, with activities lasting many times longer than they normally would.

Through my involvement with PSOC, HANA and C4 I have seen many presentations and have reviewed a great deal of information related to the Union Pier project, and I have concluded that Permit OCRM-12-054-B will only make worse these problems that I have been experiencing over the last couple of years. The Permit facilitates more cruise ships and more people, without the limitations needed to combat the problems of pollution and traffic that I have already experienced.

In addition to making these existing problems worse, preservation is also at the heart of my concern with OCRM-12-054-B. I love Charleston because of the value it places on historical and architectural preservation, and I often observe and appreciate Charleston's historic aesthetic, starting in my neighborhood of Ansonborough and extending outward across the peninsula. This is one of the primary reasons I choose to live in Charleston and in Ansonborough. But in my experience, the preserved backdrop that both the city and neighborhood have cultivated is fragile. I do not believe that the backdrop of an early 19th century neighborhood can coexist with a disproportionately modern behemoth of a vessel looming on the skyline, without that neighborhood losing the values and aesthetics that I appreciate. It is totally incongruous, out of character, and I feel most unacceptable, to compromise the truly unique setting of the Charleston historic district, especially when alternative sites are available. Needless to say, I am confident that OCRM-12-054-B will detrimentally impact my enjoyment of the historically preserved setting that surrounds my home and neighborhood, as setting that I have paid a premium to live in and enjoy.

A new cruise ship terminal located just a couple blocks from my home would be a most unwanted addition to my historic neighborhood, a neighborhood which has already seen its quality of life diminished by the impact of these larger vessels over the past two years. To put the new terminal closer to my home, where even more and potentially larger ships would disgorge even more passengers and pollution, would pose a serious threat to many things I hold dear.

Christina Dodd

Christina Dodd

SWORN TO before me this

12 day of July, 2013.

Kimberly Taylor (SEAL)
Notary Public for South Carolina
My Commission Expires: Oct. 28, 2015

Exhibit B

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-0056-CC **AFFIDAVIT OF VIRGINIA LANE**

PERSONALLY APPEARED before me Virgina Lane who being duly sworn deposes and says:

I am a resident and citizen of Charleston, South Carolina. I reside at 10 Gillon Street in the historic district of Charleston. My residence is an apartment located above a commercial space from which I operate my architecture firm. My building is located approximately two blocks from the Union Pier Terminal operated by the State Ports Authority ("SPA") and the site of cruise ship operations in Charleston. The building housing my residence and my business is just north of Broad Street and east of East Bay Street.

I am on the Board of Trustees for the Historic Charleston Foundation ("Foundation"), and I have served on the Board for eight years. In my capacity as a Board Member, I also serve on the Advocacy Committee, which studied the proposed new cruise ship terminal and made recommendations to the Board, as well as Chair the Strategic Planning Committee. The Trustees set policy for the organization and take action by majority vote of a quorum of our thirty (30) member

Board.

The Trustees meet every other month, during which time we hear committee reports, discuss the strategic planning process and otherwise make decisions to set and guide the Foundation's policies and goals in furtherance of our mission. That mission is to preserve and protect the historical, architectural and material culture that make up Charleston's rich and irreplaceable heritage. As part of the Board's review and consideration of SPA's proposal to build a new cruise ship terminal at Union Pier, the Board commissioned an objective study from Miley & Associates, Inc., entitled "The Cruise Industry in Charleston: A Clear Perspective." The study focuses on the benefits and costs associated with the cruise ship industry and its impacts on Charleston. The Foundation sought this objective analysis to assess impacts on quality of life, preservation of historic resources and environmental impacts. The study found that cruise ship tourists use the City's police force, use the City streets, use electricity, and derive other benefits from the City of Charleston, but give no benefit in return. Moreover, Carnival is not an American company so there is no economic boost to an American business. In conclusion, the study found that there is a clear "non-alignment" of the benefits and costs since the bulk of the cruise industry benefits go the SPA while the bulk of the costs are borne by residents and businesses located in the surrounding downtown area.

Based on the Miley & Associates Study, as well as the review, analysis and recommendations of the Advocacy Committee, the Board by majority vote decided to challenge the permit issued to SPA by DHEC authorizing the construction of a new cruise ship terminal at Union Pier with the goal of adequate controls to preserve and protect the historical, architectural and material culture that make up Charleston's rich and irreplaceable heritage.

I am also a member the Preservation Society of Charleston ("PSC") and Charleston

Communities for Cruise Control ("C4").

PSC's mission is to inspire the involvement of all who dwell in the Lowcountry to honor and respect our material and cultural heritage. C4 includes residents, businesses, historic preservation and conservation groups concerned with the delicate balance between our historic residential port City and the tourist experience of those visiting. These groups collectively represent my interests, as well as the interests of other members, in seeking to preserve the rich cultural resources, air and water quality, and quality of life for those living, working and visiting historic Charleston.

On a personal level, the cruise ship industry has had a dramatic negative effect on my quality of life and day-to-day activities since large cruise ships began docking at Union Pier in 2010. While there have been cruise ships coming to Charleston for decades, the city became a "home port" to Celebrity Cruise lines in 2010, which left due to the norovirus episode. Celebrity was immediately replaced by Carnival Cruise Line. The Carnival Fantasy holds close to 3,000 people who collectively have a tremendous detrimental impact on traffic and congestion in historic district. As mentioned, I live and work a couple blocks from the Union Pier terminal. I work on one side of the terminal and my husband works on the other. We used to be able to meet for lunch in downtown Charleston, but we can no longer do so when the cruise ship is in port because the travel time around the terminal is approximately an hour. I enjoyed being able to meet my husband for lunch, and my enjoyment has been decreased as a result of SPA's operation of the cruise ship terminal at Union Pier. The SPA's proposed new terminal which would expand cruise ship operations will make what used to be a daily pleasure an impossibility.

More importantly, I am an architect by trade. I was born and raised in Charleston and fell in love with the architecture in the historic district, which led me to pursue a career in architecture. The colonial architecture of the historic district feeds my soul and I derive much enjoyment and pleasure

viewing Charleston's unique architecture. As I and other members and staff of the Foundation are walking anywhere in town we see the cruise ship and it overshadows the beauty of the architecture. The proposed new terminal is akin to killing the golden egg in that the brand of Charleston as a beautiful, small historic town will be forever lost if more and larger ships are allowed to port here, as contemplated by the permit. (See Special Conditions to DHEC permit, attached as Exhibit A). The cruise ships visually overpower the historic district, lessening my enjoyment in viewing the architecture. The height, scale and mass of the cruise ship overpowers the colonial fabric of historic Charleston, which is very upsetting and without a doubt has negative impacts on my enjoyment of the City.

I am also very concerned about the impacts of the proposed new terminal on my business. I have clients, interior designers, employees, engineers and others coming to my office who have expressed problems with being able to access my office due to cruise-related traffic. In fact, several contractors have suggested that we put signs on the Crosstown, Highway 17 running through the peninsula, to notify them of the days that the cruise ship is in town so that they will know not to come into town that day. In my observations, cruise-related traffic and congestion has impaired clients, interior designers, employees, engineers and others from getting to and accessing my office. If there is an increase in size and number of ships porting in Charleston, my business would stand to suffer even more harm because my clients' ability to access my office will be hindered even more than it is now. Indeed, if there are more and bigger ships, I may leave downtown because I simply cannot continue to cope with it.

Finally, I am concerned about the value of my property if the proposed new terminal is constructed as permitted. With the additional people that a larger ship will bring, we are pushing past the tipping point of what the peninsula can hold. The result is a decreased quality of life in the historic

district of Charleston, ultimately resulting in a decline in real estate prices.

While I am not against cruise ships *per se*, I strongly believe that we need adequate controls to preserve our historic resources as well as the benefits I derive from living and working in historic Charleston. Along with the Board of Trustees for the Foundation, it is my goal and desire to see sufficient controls required to protect the values that the Foundation seeks to protect.

FURTHER MORE THE AFFIANT SAYETH NOT.

Virginia Lane

V rginia Lane

SWORN TO before me this

22nd day of July, 2013.

(SEAL)

Notary Public for South Carolina

My Commission Expires: 7.13.17

Exhibit C

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-0056-CC **AFFIDAVIT OF TOMMIE ROBERTSON**

PERSONALLY APPEARED before me Tommie Robertson who being duly sworn deposes and says:

I am a property owner, resident and taxpayer of the City of Charleston, Charleston County, South Carolina. My home is located within the Anson House at 2 Laurens Street, Unit 2C, Charleston, South Carolina 29401.

I am also a member of both the Coastal Conservation League ("CCL") and the Charleston Communities for Cruise Control ("C4").

CCL is a non-profit organization that seeks to protect the natural resources and quality of life in South Carolina communities, to promote appropriate development and to prevent projects that would excessively harm the state's natural resources and interfere with its residents' quality of life. In particular, CCL represents me as a member and resident of Charleston whose quality of life is directly related to my ability to use and enjoy the aesthetic, historic, cultural and natural resources

of the City of Charleston and the greater coastal zone in which it sits. These interests would be adversely affected if the SPA is permitted to construct the pilings as currently proposed because the pilings are merely a preliminary step for the SPA in expanding the Union Pier terminal and increasing the cruise ship operations it will support.

C4 is a non-profit that was founded in 2010 with the primary purpose of finding a more appropriate location for cruise operations and establishing legally binding limitations on those operations. C4 represents members like myself who are concerned with the delicate balance between the historical residential port City of Charleston and the tourist experience of the City. These interests would be directly impacted if the SPA is permitted to construct the pilings as currently proposed because the pilings will allow the SPA to expand the Union Pier terminal rather than an alternative site and will increase cruise operations at Union Pier accordingly.

I live on a street that is zoned for high-density residential use by the City of Charleston. My home is among 60 others that are within a few hundred feet of the proposed cruise ship's smokestacks, and the city has approved construction for another 100 homes in this area as well. See **Exhibit 1**. The existing cruise ship terminal is on the South end of Union Pier. If the SPA moves forward with its plan for expanded cruise ship operations, including moving the passenger terminal closer to my home on the North end of the Union Pier property, I will be close enough to the proposed cruise ship terminal to throw a rock onto the terminal site from my balcony. If the SPA conducts the permitted activity that is now at issue, then its plans for expanded cruise ship operations will surely be carried out and I will feel as though the cruise ships are practically docked right inside my living room, exacerbating the adverse effects that I am currently experiencing .

On more than one occasion, I have been on my terrace while the Carnival *Fantasy* was

docked and departing and I have experienced the negative effects of the thick smoke being emitted from the ship's smokestacks firsthand. I saw the thick smoke move from the cruise ship toward my home and within seconds of breathing the emissions, my throat immediately began to hurt and I was forced to retreat indoors. These harmful emissions have become so unbearable that I can no longer open any windows or enjoy my terrace while the cruise ships are in town. I have never experienced pain in my throat while breathing when the cruise ships are not docked at Union Pier. I have been forced to alter my plans and daily activities and attempt to remain inside when the cruise ship is docked because I have personally experienced concerning health impacts in the form of a sore throat or difficulty breathing if I am outdoors while the cruise ship is docked at Union Pier and I seriously fear my experience will only get worse with increased and prolonged exposure. I must avoid enjoying my terrace and being outdoors in the city where I live when the cruise ships are docked because I do not want to exacerbate these health concerns with any more direct exposure to the emissions.

Not only are the emissions from the cruise ships entering my lungs, but they are also coating my home in filth. My terrace pillows, furniture and the patio itself are constantly accumulating dirty soot that is extremely time consuming and costly to clean. And after seeing what the particulate emissions are capable of doing to my property I'm also extremely concerned about what the sulfur dioxide emissions must be doing to my body.

I am deeply concerned that if the SPA constructs a new cruise ship terminal closer to my home, and if there are larger and more frequent ships, the adverse effects I experience will be significantly increased.

The location of cruise ship operations immediately adjacent to my home have negatively affected the investment I made when I decided to purchase property and move to Charleston. At the

time my husband and I purchased our property, I was shown city plans with green space and water features at the north end of Union Pier adjacent to Laurens Street, which I was told were part of a redevelopment project for the area, and which would have formed a reasonable barrier between my residence and the cruise ship terminal located at the southern end of the Union Pier property. These redevelopment plans for maintaining a clean and aesthetically pleasing environment around the Anson House and neighboring residential buildings were a major factor in deciding to purchase my property. I was born and grew up in Charleston but I moved away after high school and lived most of my life in other cities. I have always cherished Charleston and my decision to move back was based on my desire to use and enjoy the historic district and its beauty once again. Unfortunately, my ability to use and enjoy my property has been substantially interfered with by the adverse consequences of the cruise ship operations as they are currently functioning. And that interference with use and enjoyment of my property will be increased if SPA is allowed to construct the new cruise ship terminal as permitted by DHEC starting with the pilings.

I have never been opposed to cruise ships, but based on my personal experiences, I strongly believe there must be some enforceable limits and protections in place, including operating from a less-dense historic residential area.

Tommie Robertson

Tommie Robertson

SWORN TO before me this

17th day of July, 2013.

_____(SEAL)

Notary Public for South Carolina

My Commission Expires:_____

My Commission Expires August 22, 2016

Exhibit 1

2 Laurens Street (Residence Tommie Robertson)
Proposed Ship Docking Location
Google earth
Google earth
feet
meters
700
200

Exhibit D

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-0056-CC **AFFIDAVIT OF STEPHEN F. GATES**

PERSONALLY APPEARED before me Stephen F. Gates who being duly sworn deposes and says:

I am a property owner, resident and taxpayer of the City of Charleston, Charleston County, South Carolina. My home is located at 59 Meeting Street, Charleston, South Carolina 29401, where I have lived for the past thirteen years. I live approximately ten blocks from the Union Pier terminal property.

I am also a member and the President of the Charlestowne Neighborhood Association ("CNA"). Consisting of over 600 members, CNA was formed 40 years ago to represent the interests of residents like myself who live on the southern end of the Charleston peninsula and, specifically, to promote the orderly well-being of our historic neighborhood. The Charlestowne Neighborhood contains much of the original walled city of Charleston, including numerous properties that are listed on the National Register and residential National Historic Landmarks, and, in fact, our neighborhood

is entirely located within the Charleston Historic District, itself a National Historic Landmark.

Beginning in 2010, when the Carnival *Fantasy* began home port operations in Charleston, I noticed traffic congestion becoming increasingly unmanageable and it becoming unbearable to visit the cruise terminal area on the days the *Fantasy* is in port. At the same time, I experienced heavy and oily soot deposits on my piazza and my windows, and I felt the historic ambiance of the city being eclipsed by the disproportionately large and unsightly cruise ships as they docked in the middle of the historic downtown district. I moved to Charleston and purposefully purchased my home in the Charlestowne Neighborhood because I enjoyed the sense of place, the scale of the buildings, the charming walkability of the streets and the overall historic charm of the city. However, since the Carnival *Fantasy* began its home port operations, it has seriously detracted from the traditional historic city feel of Charleston to the point that it has interfered with my quality of life and use and enjoyment of my property and the historic district of Charleston. If the State Ports Authority constructs a new cruise ship terminal, these negative consequences I am currently experiencing will be increased.

The Carnival *Fantasy* brings 2,000+ passengers into the city and adds 500+ cars to our already busy streets. As a resident of the Charlestowne Neighborhood, it has essentially become impractical to go about my daily activities when the cruise ships are in town. The main arterial street of East Bay becomes gridlocked with cruise ship traffic heading for the Union Pier terminal, diverting me and most local drivers through the surrounding small residential streets to reach our destination, and clogging the entire downtown peninsula. What normally would be a 5-minute trip ends up taking 45 minutes, which has prevented me from undertaking activities that I otherwise enjoy, such as shopping and dining, and has decreased my use and enjoyment of historic Charleston.

As far as shopping, although there is a convenient Harris Teeter located close to my home, it is extremely inconvenient to access it due to the traffic congestion and, instead, I must travel outside the city to West Ashley. Rather than being able to enjoy the quiet walks and quick drives that used to be part of my daily routine, I am now forced to waste my time, my energy, my gas and my peace of mind on a regular basis because of the location of cruise ship operations and my proximity to the consequences of those operations. These harms will be significantly increased if the State Ports Authority constructs its new cruise ship terminal because the new terminal will allow larger (3,500+ passenger) and more ships to dock at Union Pier.

On top of the impacts I have felt to my quality of life and the use and enjoyment of my home and the historic district of Charleston, I believe my health is seriously threatened. I trust the reputable medical opinions of the Charleston County Medical Society and South Carolina Medical Association who have warned and advised local residents of the increased risks associated with low-grade sulfur emissions from cruise ships idling and debarking from port. I have to scrub my piazza and my windows more often and more vigorously as a result of the soot deposited from the Carnival *Fantasy* The soot on my property is heavier and more oily than anything I had seen on my property prior to 2010 when Carnival began its cruise ship operations at Union Pier. I am personally concerned about the real and substantial risks posed by this soot and additional air emissions on my health, on the value of my property, and on the historic integrity of my neighborhood and the historic district of Charleston on the whole, particularly if cruise ship operations are increased and expanded as a result of the permit at issue in this case.

CNA members have suffered a real and substantial diminution in the quality of their lives from the traffic congestion, noise, soot and skyline impairment caused by the increasing operations of cruise ships within the historic downtown district. The SPA has indicated that a new cruise

terminal is essential for ongoing and growing cruise industry in Charleston. Ongoing and increased cruise industry utilization of Union Pier is therefore attributable to the permit for pilings, since the terminal cannot be built or operate without these infrastructure improvements. Therefore, the negative impacts that CNA members are currently experiencing will be perpetuated and exacerbated by allowing the SPA to install the pilings and construct its new expanded cruise ship terminal.

In January and March 2011, the CNA membership by overwhelming vote adopted resolutions expressing concern over congestion, pollution, scale and other quality of life issues related to SPA's proposed cruise ship expansions at Union Pier. Moreover, the CNA members established our Cruise Ship Task Force to pursue a study of alternative cruise terminal sites, particularly the Columbus Street Terminal, and to pursue legal limitations on cruise ship activity in Charleston. Otherwise CNA's founding principles in preserving the historic quality of our neighborhood will continue to be directly threatened by the SPA's performance of the permitted activity for it will be immediately followed by increased and expanded cruise operations at Union Pier.

As a CNA member and resident of the downtown historic district, I have a personal stake in the outcome of this case because my quality of life and use and enjoyment of my property are at risk. If the SPA is allowed to move forward with its plan for expanded cruise ship operations at Union Pier by installing these pilings without agreeing to legal limitations on the scale and scope of those operations such as the use of shore power, then I am certain my quality of life and use and enjoyment will suffer further harm and the nationally treasured historic character of my neighborhood will be jeopardized and potentially lost forever.

Stephen F. Gates

SWORN TO before me this
17 day of July, 2013.

Megan L. Murdock (SEAL)
Notary Public for ~~South~~ North Carolina
My Commission Expires: 05/10/17

MEGAN L. MURDOCK
NOTARY PUBLIC
Jackson County
North Carolina
My Commission Expires May 10, 2017

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY'S MOTION TO DISMISS AND FOR SANCTIONS**

FILED
JUL 26 2013
ADMINISTRATIVE LAW COURT

INTRODUCTION AND SUMMARY

Due to a significant lack in the record below at the DHEC staff level, and due to the ambiguous language of the DHEC review procedures, Petitioners early in this procedure, sought remand of this matter to the full DHEC Board. Petitioners had earlier filed a Request for Final Review Conference with the DHEC Board, and the Remand Motion was in response to the Board's failure to schedule this Final Review Conference as at least one section of the governing statutory language mandates. This Court, in a detailed six page Order denied the Remand Petition, and in so doing, analyzed the competing sections of the statutory language, implicitly recognizing the ambiguities in the various statutory sections dealing with the manner of review by the DHEC full Board. This Order also explains and deals with the issue of Administrative

Deference - a concept which heretofore, to Petitioners' knowledge, had not been fully enunciated with regard to the scope of that concept as it applies to the Administrative Law Court. These two issues, never having been previously dissected and explained by the Court, clearly furnished a reasonable and legitimate underpinning for the Remand Motion, especially when it is clear Petitioners were seeking to flesh out a very thin staff record.

The SPA seeks to impose sanctions on a group of homeowners, residents, and conservation organizations for taking steps to attempt to have a more full review process of the issues which are important to the environmental and physical well-being of citizens of the low country, and which are of state-wide importance. It seeks to impose a chilling effect on any challenges to its authority to impose environmentally degrading commercial development as it - and it alone - sees fit - on these citizens. It seeks to use ALC Rule 72 as a club to cut off debate. This effort should not be countenanced, and Petitioners acted in good faith, and in a reasonable manner, and their actions should not be punished. Indeed, pursuant to the SPA theory, any party losing a Motion argument could be subject to sanctions. This is not, with all due respect, the precedent this Court should set. Please see attached Affidavit of John P. Linton.

DISCUSSION

As Petitioners noted in their Remand Motion:

> S.C. Code § 44-1-60 was enacted in 2006 by Act 387 and later amended in 2010. Prior to the passage of Act 387 in 2006, a party wishing to challenge an Agency decision was required to first file a Request for Contested Case Hearing in the Administrative Law Court ("ALC"). After a decision from the ALC, the party's next avenue of review was requesting DHEC Board review of the ALC's Final Decision and Order. The DHEC Board review was mandatory.
>
> A reading of the statutory scheme established through Act 387 clearly demonstrates an effort by the drafters to establish a process by which the agency would continue to formally review a staff decision to ensure that those decisions are consistent with Agency policy and supported by the administrative record.

> The requirement of a request for final agency review, and a mandatory requirement for a final review conference containing administrative review procedures, safeguards consistency within the Agency, allows it to ensure even-handed application of its regulations, and allows it to apply its specialized knowledge.
>
> The statute sets forth requirements in Section (F) for open public review conferences, presentation of evidence, required staff explanations with an administrative record necessary to support staff decisions. Additional information is also available to be supplied. After the final review conference, a written final agency decision is required, and it is required to be based upon the evidence presented. This written decision must explain the basis for the decision and must inform the parties of their right to request a contested case hearing before the Administrative Law Court.
>
> A central problem with this permit, as the Ports Authority inferentially admits, is that what is sought is not "maintenance" of an existing structure, but, rather, a "repurpose", in other words, a CHANGE in use. Thus, building 322 morphs from a shed having very occasional break-bulk cargo usage, to a full-time dedicated cruise line facility. The Ports Authority submitted Affidavits to the DHEC Board in a Response to the Request for Final Review Conference which underline the concept that a massive, and long-term cruise line presence is contemplated, and the Ports Authority and Carnival are only awaiting this final permitting process to ink a contract providing those terms. *See* Affidavits of James Newsome and Arnaldo Perez, attached as Exhibit A & B. The change in use from an occasional arrival of a relatively small cargo ship to an essentially permanent presence of 3,000-plus passenger hotels, docked, and idling, while burning bunker fuel, warrants review by the governing body of DHEC.

SPA's position is that "The conclusion is inescapable that the Motion was filed with the sole purpose to delay these proceedings and harass the Ports Authority." (SPA Motion, p. 3). In fact, nothing could be further from the truth, in that it is not correct that these Petitioners are or were unreasonable in their actions, and had every right to ask this Court to require DHEC to conduct the Final Review Conference which they had requested DHEC to conduct on January 2, 2013. Petitioners also had every right to request this Court to interpret the statutory ambiguity inherent in reading SC Code § 44-1-60(F) requiring a mandatory Final Review Conference, or declining in writing so to do. This Court performed just such an analysis with its well-reasoned

Order of May 2, 2013. This Order is not the type of summary denial of a frivolous motion interposed for a delay tactic which the SPA would urge.

Indeed, a review of several of the sanctions decisions cited pursuant to the S.C. Frivolous Civil Proceedings Statute, SC Code § 15-36-10, will demonstrate just how far the instant situation diverges from those instances that statute is designed to remedy.

A central requirement of a finding of a frivolous pleading is found in 15-36-10 (4)(a)(iv). Sanctions may be imposed therein only if "a reasonable attorney presented with the same circumstances would believe that the ...motion... is frivolous, interposed for merely delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based."

Aside from the *Bon Secours* decision, discussed by means of the attached Affidavit, very few decisions exist interpreting the above language. One which does so is the matter of *Rutland v. Holler, et al,* 637 S.E.2d 316 (Ct.App.2006). There, a lawyer had obtained a favorable result for a client, but the client manifestly harassed the lawyer, filing three consecutive malpractice suits against the lawyer, continuing to make the same baseless allegations. The Court found, as affirmed, that the purpose of the proceedings was in fact something other than the proper adjudication of a civil matter - perhaps anger or revenge. The court noted that having received a favorable judgment due to the lawyer's work, it was inconceivable that the client could have believed the claims in the three malpractice suits to have been valid.

PETITIONERS' MOTION TO REMAND WAS CLEARLY NOT FRIVOLOUS, ON THE CONTRARY, IT HAD THE LEGITIMATE AIM OF SECURING PROPER ADJUDICATION OF THE CLAIM

1. **SINCE THE DHEC DECISION IS ENTITLED TO DEFERENTIAL TREATMENT BY THE COURTS, THE MOTION TO REQUIRE THE DHEC BOARD TO FLESH OUT THE THIN TO NONEXISTENT STAFF RECORD WAS PROPER AND REASONABLE.**

As the Court explained in *Kiawah Development Partners II v. SC Dept. of Health and Envtl. Control*, 738 S.E.2d 455 (S.Ct. 2013), "In the instant case, DHEC's decision to refuse to conduct a Final Review Conference pursuant to § 44-1-60(F) of the South Carolina Code, is analogous to the Panel decision in Coastal to affirm the ALC's decision without analysis. In both situations, regardless of the mechanism, the staff decision became the agency decision and was entitled to deference."

Here, Petitioners are and were concerned about the effect of the staff's inadequate investigation and conclusory findings, lacking in evidentiary background and support. For example, staff's findings regarding Air Emissions cannot be deferentially treated. With no scientific backup, it is stated: "Shore power is extremely costly and is usually required only in areas that face air quality challenges. Charleston does not face the air quality challenges." It is a wholly legitimate purpose of the Remand Motion to ask this Court to have these types of conclusory statements examined more fully at the agency level if indeed any deference is likely or even possibly to be accorded to these statements.

Likewise, with regard to "Longterm Cumulative Effects" DHEC staff opines -again without any evidentiary support - "This is an activity that would be occurring on an existing commercial pier that is a SC State Port Authority pier." As noted above, in fact, the pier will be transformed completely into a wholly new operation, servicing far more and intrusive type vessels than are possible under the existing infrastructure. It is wholly reasonable to ask the DHEC Board to review these conclusory findings.

2. THE ALC RULES OF PROCEDURE THEMSELVES ENCOURAGE MOTIONS SUCH AS THE REMAND MOTION

In addition to the broad powers granted this Court pursuant to Rule 9, Rule 10 permits, and indeed encourages the Court to make an effort to simplify hearings. This Rule, entitled

"Simplification of Procedures" permits the limitation of pre-hearing procedures and simplification of the pre-hearing exchange of materials, and take other reasonable measures to streamline the process. As the notes to this section state: "This section provides specific direction to the administrative law judge to review the case and limit the prehearing procedures if they are unnecessary to a full development of the case."

Is it reasonable to assume that having a fully developed record pursuant to a full DHEC review with remand to staff to undertake a thorough analysis, if necessary, might streamline the Administrative Law Court's contested case procedure? Certainly it is, and a request for a Remand to fully develop a record is not only not frivolous, it is in fact a good procedure.

3. THE MOST RECENT SC HOUSE PROPOSAL TO AMEND § 44-1-60 EXPLICITLY RECOGNIZES THE RIGHT TO REQUEST REMAND TO THE FULL DHEC BOARD

It cannot be questioned that the present S.C. Code § 44-1-60 is confusing and inadequate. The contrast between the "must" language in present section (F) and "If" language in that same section is clearly inartfully drafted and is open to more than one interpretation. The current House proposal in Bill No. 3827 (attached) would accomplish exactly what Petitioners here attempted to accomplish with their Remand Motion. Thus, in proposed 44-1-60 (2)(c), it is provided: "Within ten days of receipt of the notice of assignment from the Administrative law Court, the permit or license applicant may file a written request for remand to the Board for further review. The Administrative Law Court shall grant this request for remand and shall retain jurisdiction over the matter as a contested case, which must be stayed during the remand."

Thus the new House proposal to amend this DHEC statute, not only provides a remand mechanism-exactly as Petitioners here requested-but also makes the Remand mandatory on the Administrative Law Court. This proposal goes on to state: "At the conclusion of the review or

upon the expiration of the sixty-day remand period, the department shall file a statement with the Administrative Law Court and the parties, setting forth revisions, modifications, amendments, or changes, if any, to the department decision."

Again - this is precisely what Petitioners here were seeking. This remand gives the DHEC the chance to correct wrong staff conclusion, and to "get it right" before the Administrative Law Court is required to deal with the matter. In this regard, this Remand Motion and Procedure can be seen as analogous to a Rule 59 Motion to Alter or Amend, under the South Carolina Rules of Civil Procedure. This procedure is to be encouraged, not sanctioned as the SPA urges.

CONCLUSION

No sanctions are warranted. The Petitioners' Motion to Remand was in no way frivolous, nor made with any motive other than to fully develop evidence and to encourage a well-reasoned Agency decision which could aid the parties and this Tribunal with its further review. This Motion for sanctions filed by the SPA would, if granted, have an inevitable chilling effect on any citizens attempting to bring a Contested Case in this Court. The Motion must be denied.

Jefferson Leath

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Charleston, South Carolina

Dated: July 26, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, vs. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

FILED
JUL 26 2013
OADMIN LAW COURT

This is to certify that I have caused to be served this day one (1) copy of *Petitioners' Memorandum in Opposition to Respondent South Carolina State Ports Authority's Motion to Dismiss and for Sanctions* with Exhibits by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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Charleston, South Carolina

Dated: July 26, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **AFFIDAVIT OF JOHN P. LINTON**

PERSONALLY APPEARED BEFORE ME JOHN P. LINTON, WHO BEING DULY DEPOSED ON OATH ALLEGES AND SAYS;

1. That he is a licensed South Carolina Attorney and has been so licensed for more than thirty years; since November 11, 1975- approaching 38 years.

2. That he is a Fellow of the American College of Trial Lawyers, is a permanent member of the United States Court of Appeals for the Fourth Circuit Judicial Conference, and has previously been appointed by the South Carolina Supreme Court as a member of that Court's Grievance Committee and additionally as a Bar Examiner. He was previously law clerk to the Honorable Justice Julius Ness of the Supreme Court. He has been appointed Special Referee in a matter that became Hale v. Finn, 388 S.C. 79, 694 S.E.2d 51 (Ct. App. 2010). His further biography is attached hereto. He currently serves as special counsel at Duffy and Young

Attorneys in Charleston, and submit the affidavit solely in his individual name.

3. That he has reviewed the Petitioners Motion to Remand filed on February 26, 2013, This Court's Order Denying Petitioners' Motion to Remand, the Motion to Dismiss and For Sanctions filed by the South Carolina State Ports Authority, and Petitioners' Memorandum in Opposition.

4. That he is familiar with the language of the South Carolina Frivolous Civil Proceedings Statute, SC Code Sec. 15-36-10.

5. That this Statute defines the filing of a frivolous Motion to consist of a situation wherein (15-36-10(4)(a)(iv) "a reasonable attorney presented with the same circumstances would believe the pleading, motion or document is frivolous , interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties or adjudication of the claim or defense upon which the proceedings are based."

6. That as a reasonable and experienced attorney, in no way did the conduct of Petitioners or their counsel violate the above Statute, and in no way could the Petitioners' Motion to Remand be considered frivolous. In fact, the undersigned is so perplexed by the seemingly meritless position of the motion for sanctions that I believe the court should conduct its own inquiry to determine whether an appropriate order should be issued to address the filing of the motion for sanctions, and to restrain the defendant from asserting sanctions motions in the future. Perhaps such an inquiry would demonstrate that the motions for sanctions, which should be denied, had enough merit to constitute a good faith assertion. However, even if there is a good faith assertion, motions such as the motion under consideration have potential impact of dire consequence to the judicial process. This particularly so when these parties or citizens, with

direct interest in the litigation, but not necessarily any private economic interest, and therefore, the motion for sanctions can have quite a chilling effect upon similar plaintiffs who are less stalwart than the current plaintiffs.

7. A review of the Motion at issue, and the timing of it-early in these proceedings and within forty six days of the DHEC Board's denial of the Petitioners' Request for Final Review Conference, demonstrates that this Motion was not only not interposed for any delay, but was a legitimate attempt to effect a SCDHEC Board review of its staff's decision.

8. That this Court's lengthy and well-researched Order denying the Motion to Remand demonstrates that a significant analysis of complicated legal issues was necessary to consider in light of the Motion, further demonstrating a reasonable rationale for its filing.

9. That there is no merit to the Sanctions Motion filed by the Ports Authority, and this Court should deny it.

FURTHER YOUR DEPONENT SAYETH NOT.

By: _____
JOHN P. LINTON

SWORN to before me this 26th
day of July, 2013.

Sarah E. Stives (SEAL)
Notary Public for South Carolina

My Commission Expires: Feb. 14, 2022

John P. Linton

In his more than thirty years handling civil matters for Plaintiffs and Defendants, Johnny Linton has handled a wide variety of cases. In addition to trials in counties throughout South Carolina and in five Divisions of the United States District Court, he has prevailed in appeals in the United States Court of Appeals for the Fourth Circuit, the South Carolina Supreme Court and the South Carolina Court of Appeals. He also argued an original jurisdiction case in the Supreme Court of the United States. Johnny continues a vibrant practice representing landowners in eminent domain proceedings and brings his problem-solving skills to bear for clients in business and fiduciary relation disputes, fiduciary administration matters, and personal injury matters for plaintiffs. In addition, Johnny is often called upon by his colleagues or courts to handle matters through alternative dispute resolution as a mediator, arbitrator, or special referee.

Johnny is a fellow of the American College of Trial Lawyers, serving on its State Committee, and is a permanent member of the United States Court of Appeals for the Fourth Circuit Judicial Conference. He is listed in Best Lawyers in America, Super Lawyers, and Chambers Best Business Lawyers in America (Litigation).

Locally, he has served as President of the Charleston County Bar and as President of the Coastal Chapter of American Board of Trial Advocates. He was previously appointed by the South Carolina Supreme Court as a South Carolina Bar examiner and as a member of the South Carolina Supreme Court's Grievance Committee. The United States District Court appointed him to a committee to review a Magistrate Judge's qualifications for re-appointment. A graduate of Wofford College, Johnny served on its Alumni Advisory Board. He also graduated from the University of South Carolina, and received its Compleat Lawyer Award in 2003. He is also a Life Fellow of American Bar Foundation.

Mr. Linton continues to practice full-time as Special Counsel at Duffy & Young. Johnny also remains very active in a number of civic undertakings as well. His civic interests and commitments have included his service on the Board of Directors and Executive Committee of the Trident United Way, the Board of the Coastal Community Foundation, and as Vice-Chairman of the Pinewood Preparatory School Board of Directors. He has received the Order of Palmetto from the Governor of the State of South Carolina for civic commitments.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **AFFIDAVIT OF TIMOTHY W. BOUCH**

Personally appeared before me Timothy W. Bouch, who being duly sworn on oath deposes and states:

1. I am an attorney practicing law in Charleston, South Carolina. I was admitted to the South Carolina Bar in 1979.

2. I have also been admitted and am in good standing in the Bars of the States of North Carolina, Texas, and Ohio.

3. In 2003, I was asked by the Chief Justice of the South Carolina Supreme Court to form and chair the South Carolina Rules Commission. The commission was responsible for the re-draft of the South Carolina Rules of Professional Conduct. Those rules and comments were adopted by the Court in October, 2005.

4. Since 2007, I have been an Adjunct Professor of Law at the Charleston School of Law, teaching Ethics and Professional Responsibility.

5. I was counsel for the appellants as to the sanctions issues in the case *Ex Parte Bon Secour – St. Francis Xavier Hospital, Inc.* 713 S.E. 2d 624, 393 S.C. 590 (S.Ct.2011).

6. I have been asked by my law partner, W. Jefferson Leath, Jr., to review the Motion for Sanctions, the Motion to Remand to the DHEC Board filed by the Petitioners, and this Court's Order Denying the Remand Motion.

7. Lawyers are ethically prohibited from asserting claims that are frivolous or would serve only to harass or maliciously injure another person. Under the S.C. Rules of Professional Conduct, like the Model Rules of Professional Conduct, a claimed defense or appeal is not considered to be frivolous if it is based either on existing law or good faith argument for the extension, modification, or reversal of existing law.

8. In S.C. Rules of Professional Conduct, Rule 3.1 governs conduct of attorneys along with S.C. Rule of Civil Procedure 11. Rule 3.1 requires that there be a basis in law and fact, both legally and factually. In this particular case involving the construction of S.C. Code Anno. §44-1-60(f) it is apparent that there is a patent ambiguity in the wording of the statute. That ambiguity arises when comparing the first sentence of section (f) which requires and makes mandatory a final review conference by the DHEC Board, yet later in that section it discusses actions taken if the Board does not conduct its mandatory review conference. This was the subject of the Petitioner's Motion to Remand.

9. There has been no recorded decision interpreting or otherwise resolving this ambiguity which had been raised by the Petitioner's pleadings. Indeed the administrative law

judge called upon to rule on the matter responded with a seven page order fairly discussing the ambiguity and the matters raised in by the Petitioner's papers.

10. Although there is no uniform definition of "frivolous", courts customarily describe a frivolous position as one lacking in factual legal merit. See, *e.g. Florida Bar v. Thomas*, 582 So.2d 11, 77 Fla. (Fla. 1991). Likewise the Restatement (third) of the Law Governing Lawyers, §110, Comment d, discusses a frivolous position as one "so lacking in merit that there is no substantial possibility that the tribunal would accept it". See, also, *Brunswick v. Statewide Grievance Commission*, 931 A 2d 319 (Conn. App. Ct. (207)). Comment 2 to the Model Rule 3.1 continues that a claim is not frivolous merely even if a lawyer believes his client will not ultimately prevail, certainly not a position asserted here by the Petitioners. It is noted by Professor Crystal, that as a policy matter frivolous should be conceptualized broadly enough to deter misuse of the legal system yet narrow enough not to chill zealous advocacy or discourage innovative lawyering. Crystal, Limitations on Zealous Representation in an Adversarial System, 32 Wake Forest Law Review, 671 (1997). Particularly under an objective standard, as adopted by the South Carolina Rules, a Court being asked to impose sanctions assesses frivolousness as a matter of law does so by examining the merits of the positions in light governing legal authority. As noted above, there is no governing authority prior to the filing of the Petition for Remand. See, also, *Florida Bar v. Richardson*, 591 So.2d 908 (Fla.1992).

11. Likewise, a lawyers legal and factual contentions if accompanied by an improper motive or purpose can be a subject of sanctions. Here there is absolutely no showing. Given the legal or factual contentions have merit, the claim must be against the lawyer's conduct if corrupt or the position is baseless. See, *e.g. In re: Levine*, 847 P.2d 1093 (Az.1993). Likewise the frivolous issue is customarily accompanied by focuses on existence scope and limits of the duty

lawyer to investigate. As noted above, there has been no showing of previous controlling legal authority on the ambiguity of S.C. Code Ann. §44-1-60.

12. Similarly, S.C. Rules of Civil Procedure 11 requires a lawyer who signs and files a pleading, motion or other paper certifies that the paper is well grounded in fact or supported by existing law, or a nonfrivolous argument for a change in the law. On whether subjective bad faith exists is a pre-requisite for sanctions under Rule 11. In my review of the materials submitted, there is a complete absence of any such allegation or conduct.

13. I have also been asked to comment upon a case cited by the Respondents, *Ex Parte Bon Secours – St. Francis Xavier Hospital, Inc.*, 713 S.E.2d 624, 393 S.C. 590 (S.Ct.2011). In *Bon Secours*, the South Carolina Supreme Court, by a 3-2 decision sustained some sanctions in a case in which trial counsel had successively removed a case to federal court on the same legal theory. As noted above, I served as appellant's counsel in that matter as it related to the sanctions issues. The trial judge assessed sanctions on the ground that the second removal, on the identical legal theory, took place hours prior to a long scheduled multi-week trial setting. The Supreme Court found that the defendant hospital had in its possession sufficient information to effect the removal to bring the issue to the attention of the state trial judge considerably earlier, which would have avoided the disruption of the court due to the last minute removal. The Supreme Court reversed the issuance of sanctions against the individual attorneys and reversed all sanctions addressed to damages which may have been suffered by the court system, leaving in place only the sanctions of payment of the Plaintiff's attorney's fee, which was disallowed by the Plaintiff's counsel pursuant to an earlier settlement.

FURTHER YOUR DEPONENT SAYETH NOT.

By: _____
Timothy W. Bouch

SWORN to before me this 25th
day of July, 2013.

_____ (SEAL)
Notary Public for South Carolina
My Commission Expires: 3-8-20

NETSCAN

2013 South Carolina House Bill No. 3827, South Carolina One Hundred Twentieth Session General Assembly - First Regular Session

SOUTH CAROLINA BILL TEXT

TITLE: A BILL TO AMEND SECTION 44-1-60, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO REQUESTS FOR FINAL REVIEW OF DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL DECISIONS BY THE DEPARTMENT BOARD, SO AS TO PROVIDE THAT A PARTY MAY REQUEST A CONTESTED CASE HEARING ON A DEPARTMENT DECISION BEFORE THE ADMINISTRATIVE LAW COURT OR MAY REQUEST A REVIEW OF THE DEPARTMENT DECISION BY THE BOARD; TO PROVIDE THAT IF A REVIEW BY THE BOARD IS REQUESTED, THE BOARD HAS SIXTY DAYS WITHIN WHICH TO CONDUCT ITS REVIEW AND ISSUE A DETERMINATION WHICH BECOMES THE FINAL AGENCY DECISION UNLESS A REQUEST FOR A CONTESTED CASE HEARING IS REQUESTED BEFORE THE ADMINISTRATIVE LAW COURT; TO PROVIDE THAT IF A CONTESTED CASE HEARING IS REQUESTED, THE PARTY MAY REQUEST THE ADMINISTRATIVE LAW COURT TO REMAND THE CASE TO THE BOARD FOR FURTHER REVIEW; TO PROVIDE THAT UPON REMAND, THE BOARD HAS SIXTY DAYS WITHIN WHICH TO CONDUCT ITS REVIEW AND ISSUE A STATEMENT WITH THE ADMINISTRATIVE LAW COURT AND THE PARTIES PROVIDING REVISIONS OR MODIFICATIONS, IF ANY, MADE TO THE DEPARTMENT DECISION; AND TO PROVIDE THAT IF AN EMERGENCY ORDER IS ISSUED BY THE DEPARTMENT, THE PERSON AGAINST WHOM IT IS ISSUED MAY APPLY TO THE ADMINISTRATIVE LAW COURT FOR RELIEF AND MUST BE AFFORDED A HEARING WITHIN FORTY-EIGHT HOURS.

VERSION: Amended/Substituted
May 29, 2013
Reps. Pitts and Loftis

Image 1 within document in PDF format.

SUMMARY: A BILL TO AMEND SECTION 44-1-60, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO REQUESTS FOR FINAL REVIEW OF DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL DECISIONS BY THE DEPARTMENT BOARD, SO AS TO PROVIDE THAT A PARTY MAY REQUEST A CONTESTED CASE HEARING ON A DEPARTMENT DECISION BEFORE THE ADMINISTRATIVE LAW COURT OR MAY REQUEST A REVIEW OF THE DEPARTMENT DECISION BY THE BOARD; TO PROVIDE THAT IF A REVIEW BY THE BOARD IS REQUESTED, THE BOARD HAS SIXTY DAYS WITHIN WHICH TO CONDUCT ITS REVIEW AND ISSUE A DETERMINATION WHICH BECOMES THE FINAL AGENCY DECISION UNLESS A REQUEST FOR A CONTESTED CASE HEARING IS REQUESTED BEFORE THE ADMINISTRATIVE LAW COURT; TO PROVIDE THAT IF A CONTESTED CASE HEARING IS REQUESTED, THE PARTY MAY REQUEST THE ADMINISTRATIVE LAW COURT TO REMAND THE CASE TO THE BOARD FOR FURTHER REVIEW; TO PROVIDE THAT UPON REMAND, THE BOARD HAS SIXTY DAYS WITHIN WHICH TO CONDUCT ITS REVIEW AND ISSUE A STATEMENT WITH THE ADMINISTRATIVE LAW COURT AND THE PARTIES PROVIDING REVISIONS OR MODIFICATIONS, IF ANY, MADE TO THE DEPARTMENT DECISION; AND TO PROVIDE THAT IF AN EMERGENCY ORDER IS ISSUED BY THE DEPARTMENT, THE PERSON AGAINST WHOM IT IS ISSUED MAY APPLY TO THE ADMINISTRATIVE LAW COURT FOR RELIEF AND MUST BE AFFORDED A HEARING WITHIN FORTY-EIGHT HOURS.

TEXT:

~~Indicates Matter Stricken~~

Indicates New Matter

AMENDED

May 29, 2013

H. 3827

Introduced by Reps. Pitts and Loftis

S. Printed 5/29/13--H.

Read the first time March 19, 2013.

A BILL

TO AMEND SECTION ~~44~~-1-60, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO REQUESTS FOR FINAL REVIEW OF DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL DECISIONS BY THE DEPARTMENT BOARD, SO AS TO PROVIDE THAT A PARTY MAY REQUEST A CONTESTED CASE HEARING ON A DEPARTMENT DECISION BEFORE THE ADMINISTRATIVE LAW COURT OR MAY REQUEST A REVIEW OF THE DEPARTMENT DECISION BY THE BOARD; TO PROVIDE THAT IF A REVIEW BY THE BOARD IS REQUESTED, THE BOARD HAS SIXTY DAYS WITHIN WHICH TO CONDUCT ITS REVIEW AND ISSUE A DETERMINATION WHICH BECOMES THE FINAL AGENCY DECISION UNLESS A REQUEST FOR A CONTESTED CASE HEARING IS REQUESTED BEFORE THE ADMINISTRATIVE LAW COURT; TO PROVIDE THAT IF A CONTESTED CASE HEARING IS REQUESTED, THE PARTY MAY REQUEST THE ADMINISTRATIVE LAW COURT TO REMAND THE CASE TO THE BOARD FOR FURTHER REVIEW; TO PROVIDE THAT UPON REMAND, THE BOARD HAS SIXTY DAYS WITHIN WHICH TO CONDUCT ITS REVIEW AND ISSUE A STATEMENT WITH THE ADMINISTRATIVE LAW COURT AND THE PARTIES PROVIDING REVISIONS OR MODIFICATIONS, IF ANY, MADE TO THE DEPARTMENT DECISION; AND TO PROVIDE THAT IF AN EMERGENCY ORDER IS ISSUED BY THE DEPARTMENT, THE PERSON AGAINST WHOM IT IS ISSUED MAY APPLY TO THE ADMINISTRATIVE LAW COURT FOR RELIEF AND MUST BE AFFORDED A HEARING WITHIN FORTY-EIGHT HOURS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Timely resolutions of disputes with minimal delay regarding determinations and decisions made by the South Carolina Department of Health and Environmental Control promote economic development, ensure the protection of the State's natural resources and environment, and allow earlier implementation of healthcare projects for the benefit of the State's citizens. The current process imposes unreasonable and unnecessary delay which may be eliminated by allowing challenges to Department decisions to be made directly to the South Carolina Administrative Law Court.

SECTION 2. Section ~~44~~-1-60 of the 1976 Code, as last amended by Act 278 of 2010, is further amended to read:

"Section ~~14~~ 1-60. (A) All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case ~~shall~~ must be made using the procedures set forth in this section.

(B) The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings.

(C) ~~The initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department shall be a staff decision.~~ The staff's decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department must be in writing and shall constitute a decision by the department as set forth in Subsection (D)(2). In making such a ~~staff~~ written department decision on ~~any~~ a permit, license, certification or other approval, the department staff shall take into consideration all material comments received in response to the public notice in determining whether to issue, deny or condition such permit, license, certification or other approval. ~~At the time that such staff decision is made,~~ The department ~~shall issue a department decision, and~~ shall base its department decision on the administrative record which shall consist of the application and supporting exhibits, all public comments and submissions, and other documents contained in the supporting file for the permit, license, certification or other approval. The administrative record may also include material readily available at the department, or published materials which are generally available and need not be physically included in the same file as the rest of the record as long as such materials are specifically referred to in the department decision. The department decision need not be issued for routine permits for which no adverse public comments have been received.

(~~E~~ D)(1) Notice of a department decision must be sent by certified mail ~~, returned receipt requested to the applicant, permittee, licensee, and affected~~ or electronic mail to the last known mailing address or electronic mail address to the applicant, permittee, or licensee, and persons who have requested in writing to be notified. ~~Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail.~~ Notice of ~~staff~~ decisions for which a department decision is not required pursuant to subsection (~~D~~ C) must be provided by electronic mail or mail ~~, delivery, or other appropriate means~~ to the applicant, permittee, licensee, and ~~affected~~ persons who have requested in writing to be notified.

(2)(a) The ~~staff~~ written department decision becomes the final agency decision fifteen calendar days after notice of the ~~staff~~ department decision has been mailed to the applicant, unless :

(i) a written request for ~~Final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person~~ a contested case is filed with the Administrative Law Court within fifteen calendar days after notice of the department decision is mailed to the applicant, permittee, or licensee, and persons who have requested in writing to be notified of the department decision and served upon the clerk of the board and applicant, permittee, or licensee; or

(ii) at the option of the applicant, permittee, or licensee, a written request for review is filed with the board by the applicant, permittee, or licensee within fifteen calendar days after notice of the department decision.

(b) If a request for review is made pursuant to item (ii), the board shall conduct any informal review it considers appropriate within sixty days of the request for review pursuant to procedures established by the board. Upon issuance of a written determination from the board, which must be the department decision and must be issued no later than sixty days from the date of the request for review, this decision becomes the final agency decision fifteen calendar days after notice of the decision has been mailed to the applicant, permittee, or licensee unless a written request for a contested case is filed with the Administrative Law Court within fifteen calendar days after notice of the decision is mailed to the applicant, permittee, or licensee, and persons

who have requested in writing to be notified of the department decision and served upon the clerk of the board and the applicant, permittee, or licensee.

(c) Within ten days of receipt of the notice of assignment from the Administrative Law Court, the permit or license applicant may file a written request for remand to the board for further review. The Administrative Law Court shall grant this request for remand and shall retain jurisdiction over the matter as a contested case, which must be stayed during the remand. The board must conduct any informal review it considers appropriate within sixty days of the order for remand pursuant to procedures established by the board. At the conclusion of the review or upon the expiration of the sixty-day remand period, the department shall file a statement with the Administrative Law Court and the parties setting forth revisions, modifications, amendments, or changes, if any, to the department decision.

(3) The ~~filing fee must be in the amount of one hundred dollars unless the department establishes a fee schedule by regulation after complying with the requirements of Article 1, Chapter 23, Title 1. This fee must be retained by the department in order to help defray the costs of the proceedings and legal expenses~~ Administrative Law Court shall give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge.

(~~F~~ E) A person to whom an emergency order is issued by the department may apply directly to the Administrative Law Court for relief and must be afforded a hearing within forty-eight hours. Regardless of whether a hearing is held, the department must revoke all emergency orders as soon as conditions or operations change to the extent that an emergency no longer exists.

~~No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court. The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten calendar days' written notice of the conference; and advise the applicant that evidence may be presented at the conference. The final review conference must be held as follows:~~

~~(1) Final review conferences are open to the public; however, the officers conducting the conference may meet in closed session to deliberate on the evidence presented at the conference. The burden of proof in a conference is upon the moving party. During the course of the final review conference, the staff must explain the staff decision and the materials relied upon in the administrative record to support the staff decision. The applicant or affected party shall state the reasons for protesting the staff decision and may provide evidence to support amending, modifying, or rescinding the staff decision. The staff may rebut information and arguments presented by the applicant or affected party and the applicant or affected party may rebut information and arguments presented by the staff. Any final review conference officer may request additional information and may question the applicant or affected party, the staff, and anyone else providing information at the conference.~~

~~(2) After the final review conference, the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented. The decision may be announced orally at the conclusion of the final review conference or it may be reserved for consideration. The written decision must explain the basis for the decision and inform the parties of their right to request a contested case hearing before the Administrative Law Court. In either event, the written decision must be mailed to the parties no later than thirty calendar days after the date of the final review conference. Within thirty calendar days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. The court shall give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge.~~

~~(3) Prior to the initiation of the final review conference, an applicant, permittee, licensee, or affected person must be notified of their right to request a transcript of the proceedings of the final review conference. If a transcript is requested, the applicant, permittee, licensee, or affected person making the request is responsible for all costs.~~

~~(G) An applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing within thirty calendar days after:~~

~~(1) notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or~~

~~(2) the sixty calendar day deadline to hold the final review conference lapses and no conference has been held; or~~

~~(3) the final agency decision resulting from the final review conference is received by the parties.~~

~~(H) Applicants, permittees, licensees, and affected persons are encouraged to engage in mediation during the final review process.~~

~~(I) The department may promulgate regulations providing for procedures for final reviews.~~

~~(J) Any statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all for this final review process. If any deadline provided for in this section falls on a Saturday, Sunday, or state holiday, the deadline must be extended until the next calendar day that is not a Saturday, Sunday, or state holiday.~~"

SECTION 3. All statutes and regulations must be interpreted to conform with this statutory amendment to allow challenges to department decisions to be filed directly to the South Carolina Administrative Law Court, and to the extent any existing provision in statute or regulation conflicts with this statutory amendment that provision is superseded.

SECTION 4. The repeal or amendment by this act of any law, whether temporary or permanent, does not affect pending actions, rights, duties, or liabilities founded on it, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 5. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 6. This act takes effect upon approval by the Governor.

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	**SOUTH CAROLINA PORTS AUTHORITY'S REPLY IN SUPPORT OF THE MOTION FOR SANCTIONS** Docket No. 13-ALJ-07-0056-CC

Respondent South Carolina State Ports Authority (Ports Authority) hereby submits this reply in support of its Motion for Sanctions filed July 1, 2013, requesting that this Court impose sanctions on the basis that Petitioners' Motion to Remand dated February 27, 2013 (Motion to Remand) was frivolous and unsupported by any reasonable legal theory. In addition, or by alternative, the Ports Authority submits that an award of costs and attorneys' fees for the time, money, and effort expended in responding to the meritless Motion is warranted because the Motion was frivolous, lacked any reasonable or defensible grounds of support, and was filed solely for purposes of delay.

On December 18, 2012, DHEC, through its Division of Ocean and Coastal Resource Management (OCRM), issued a staff decision granting a critical area permit and coastal zone consistency certification to the Ports Authority authorizing construction of five pilings to facilitate the relocation of cruise operations within Union Pier Terminal

(UPT) in the City of Charleston. On January 2, 2013, the Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conversation League, Charlestown Neighborhood Association, Charleston Chapter of Surfrider, and Charleston Communities for Cruise Control (collectively "Cruise Opponents") filed a request for a final review conference by the DHEC Board of the OCRM staff decision. Thereafter, on January 10, 2013, the DHEC Board voted unanimously to decline to hear the matter in a final review conference and issued a written notice of its decision not to conduct a final review conference the next day. In response, on or about February 11, 2013, the Cruise Opponents filed a Request for Contested Case challenging the DHEC's decision.

Subsequently, on February 27, 2013, the Cruise Opponents filed a frivolous motion entitled "Motion to Remand to DHEC Board."[1] The conclusion is inescapable that the Motion was filed with the sole purpose to delay these proceedings and harass the Ports Authority. The Ports Authority filed a response to the frivolous motion on March 14, 2013, and this Court issued an order denying the Motion without a hearing on May 3, 2013. The Motion for Sanctions was filed on July 1, 2013, and the Cruise Opponents responded on July 26, 2013. Nothing in the response justifies denial of the Motion for Sanctions or detract from the frivolousness of the Motion to Remand.

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[1] Counsel for the Ports Authority consulted with Cruise Opponents' counsel and informed them that the Motion was frivolous and the Ports Authority would seek sanctions if the Cruise Opponents did not withdraw the frivolous Motion. *See* Motion for Sanctions Ex. C, Ltr. of Lowell to Armstrong, dated March 6, 2013.

I. THE CRUISE OPPONENTS' STRATEGY IS TO USE THIS LITIGATION FOR DELAY AND HARASSMENT.

Rule 72 of the Rules of Procedure for the Administrative Law Court provides that "[i]f the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, RPALC. The Sanctions Act provides that an attorney may be sanctioned in an *administrative* action if a motion was filed to harass the other party or for delay. S.C. Code Ann. § 15-36-10(A)(4)(a).

The Cruise Opponents filed the Motion to Remand for the sole purpose of delaying the litigation and harassing the Ports Authority. The Cruise Opponents admit to the strategy of delay, delay, delay, which was brought to bear in this Court through a frivolous Motion to Remand.

- "Do you know if there are any ***plans to sue the state? It would seem that to tie them up, at least temporarily, might be a good idea***.... There's only one goal. Keeping cruise ships out of Union Pier—and we should focus only on that, nothing else."
  - Ex. 1, Jay Williams E-Mail, March 17, 2011 (emphasis added).
- "One of the things that is percolating around is ***litigation to slow this process down***. Blan Holman (who spoke at our last general membership meeting) says there are a number of grounds showing cause for a challenge to some of the Port's actions. He has some clients and is looking for others who want to join the group."
  - Ex. 2, Minutes from CNA Board Mtg., May 3, 2011 (emphasis added).

- "I think the ***only road block that will slow the port down is a lawsuit***."
  - Ex. 3, Harold Pratt-Thomas E-Mail, May 19, 2011 (emphasis added).
- "If we could put a nuisance suit together based on soot deposition it would be great."
  - Ex. 4, Dana Beach E-Mail, May 22, 2011.
- "***Lawsuits should be dropped in exchange for the SPA agreeing to put the cruise terminal on hold*** and conduct a long term, comprehensive planning process."
  - Ex. 5, Dana Beach E-Mail, July 7, 2011 (emphasis added).
- "***Unless the terminal is put on hold***, any study, biased or not, is irrelevant."
  - Ex. 6, Dana Beach E-Mail, July 25, 2011 (emphasis added).
- "It is important to note that our staying power, letters to the OCRM (Office of Ocean & Coastal Resource Management) regarding their duty to consider the long-term implications the pilings requested by the SPA would represent, and keeping the issue in the news are most likely several of the ***reasons that the SPA is well behind on the timetable*** it established for the new terminal."
  - Ex. 7, Carrie Agnew, July 3, 2012 (emphasis added).
- "No 'breaking news' this time.....but ***we have helped slow down the process*** and this is having an impact!!"
  - Ex. 8, Carrie Agnew E-Mail, April 13, 2013 (emphasis added).
- "No news on the various lawsuit fronts.... ***The terminal is stalled by the litigation. We are doing a great job and just need to 'keep on keeping on!'***"
  - Ex. 9, Carrie Agnew E-Mail, May 5, 2013 (emphasis added).

The Cruise Opponents condemn themselves with their own words.[2] Unquestionably, and by the Cruise Opponents own statements, delay is the foundation of their litigation strategy, which was represented by a frivolous and meritless Motion to Remand whose sole purpose was to kick this matter back to DHEC for additional time delay. Sanctions are clearly warranted.

II. THE DISCRETIONARY NATURE OF THE DHEC BOARD PROCESS CANNOT REASONABLY BE QUESTIONED.

A. As this Court recognized, the language is "clear" and the result "obvious" that the DHEC Board process is discretionary.

As this Court found in its May 3, 2013, Order, the Motion had no basis in law and was contrary to the language of the statute. The Cruise Opponents failed to substantiate their claim that DHEC Board review was mandatory and did so while espousing only one sentence of the applicable statute, deliberately ignoring the other operative portions of the same subsection and misconstruing the statute's intent in the name of further delay.

The Cruise Opponents rely on the Court's May 3 Order denying the Motion to Remand for support against the imposition of sanctions. However, the Court only devoted 57 lines to addressing the Cruise Opponents' inability to read a statute, of which 36 lines cited and quoted statutory and case law language in opposition to the Cruise Opponents' reading. The rest of the six-page May 3 Order was an introduction and discussion of the appropriate standard of deference.

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[2] Interestingly, the Cruise Opponents argue that the Supreme Court has found that sanctions are proper if the purpose of the proceedings is "in fact something other than the proper adjudication of a civil matter—perhaps anger or revenge." Resp. to Mot. For Sanctions at 4. Given the statements and admissions of the Cruise Opponents, it is clear that the motivation of the angry Cruise Opponents is anything but the proper adjudication of a matter.

As determined by this Court's Order, S.C. Code Ann. § 44-1-60(F) clearly sets forth a discretionary standard in the DHEC Board that permits it to choose whether or not to conduct a final review conference. See May 3 Order at 3-4. The Cruise Opponents' citation to and reliance upon a single word in a single sentence within S.C. Code Ann. § 44-1-60(F) while ignoring the remainder of subsection -60(F) illustrates that their Motion and underlying argument was meritless. As this Court noted, "[b]y stating that the Board can decline to consider a request, Section 44-1-60(F) ***obviously*** recognizes the existence of discretion.... When the statute is read as a whole, it is ***clear*** the Board has the discretion to decline to conduct a final review conference...." May 3 Order at 3-4 (emphasis added).

This result is obvious and clear because this Court and others have repeatedly recognized the discretionary nature of conducting a review conference. *See, e.g., Trident Medical Center, LLC, v. S.C. Dep't of Health & Envtl. Control*, Docket Nos. 09-ALJ-07-0332-CC, 09-ALJ-07-0333-CC (Consolidated), 09-ALJ-07-0336-CC (Consolidated), 2012 WL 7187635, (Sept. 26, 2012) (McLeod, J.) ("If the Department Board does not hold a final review conference, the staff decision becomes the final agency decision unless an applicant or affected person timely requests a contested case hearing before the Administrative Law Court."); *Wise v. S.C. Dep't of Health & Entvl. Control*, Docket No. 10-ALJ-07-0851-CC, 2011 WL 2413274 (Feb. 23, 2011) (McLeod, J.) ("The Board can either conduct a review conference and issue a final agency decision, or decline to conduct a review conference, in which case the staff decision becomes the final agency decision.") (citing S.C. Code Ann. § 44-1-60(F)), *rev'd on other grounds* Op. No. 2013-UP-072 (Ct. App. Filed Feb. 13, 2013); *Hill v. S.C. Dep't of Health & Envtl. Control*,

Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666, (Dec. 9, 2010) (Anderson, C.J.) ("The DHEC Board [] has sixty days within which to hold a review conference. [] The Board **may** (1) hold a final review conference and issue a decision; (2) decline in writing to hold a final review conference; or (3) take no action within the sixty-day period. [] If the Board either declines in writing to schedule a final review conference or allows the sixty days to lapse without any action, then the staff decision becomes the final agency decision and an affected party may request a contested case hearing before the ALC pursuant to Section 44-1-60(G).") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); *Pinckney Point, LLC v. S.C. Dep't of Health & Envtl. Control*, Docket No. 08-ALJ-07-0363-CC, 2009 WL 6527323, (Nov. 13, 2009) (Anderson, C.J.) ("A staff review does not require the presentation of evidence in a hearing, and ***the Board's review is discretionary, not a matter of right.***") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); *McNair v. S.C. Dep't of Health & Envtl. Control*, Docket No. 09-ALJ-07-0040-CC, 2009 WL 6527328, (Nov. 9, 2009) (Anderson, C.J.) (same); *Charles Sarrio v. S.C. Dep't of Health & Envtl. Control*, Docket No. 08-ALJ-07-0381-CC, 2009 WL 8167917, (Oct. 23, 2009) (Anderson, C.J.) (same).

The DHEC Board's discretionary right to conduct a final review conference has also been recognized by multiple appellate courts of this State. *See e.g., Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control*, No. 2010-155629 (Feb. 27, 2013) (C.J. Toal) (reciting the DHEC Board's decision not to conduct a final review conference and according deference to the DHEC staff decision) (opinion and decision still subject to further consideration and revision); *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board

declined to hold a final review conference rendering the staff decision the final decision); *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, No. 2010-159446 (March 6, 2013) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC); *Dreher v. S.C. Dep't of Health & Envtl. Control*, 399 S.C. 259, 730 S.E.2d 922 (Ct. App. 2012) (petition for *certiorari* pending) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC).

In the face of such authority—including three orders recognizing the discretion by this very Court—the Cruise Opponents still sought remand. In fact, their quotation of a *Kiawah Development* opinion affirming that if DHEC declines to conduct a final review conference then the "staff decision [becomes] the agency decision" undercuts any basis that the Cruise Opponents could argue that a failure to conduct a final review conference is unlawful. The Cruise Opponents cannot claim they were preserving this issue for appeal, as the Response to the Motion for Sanctions and filed affidavits essentially concede the correctness of the Court's order and functionally abandons any appealable issue on this statutory point.[3]

Nor can they legitimately argue that they needed to flesh out the record. The Cruise Opponents discussion of the "record" evinces a misunderstanding of the administrative process. A contested case at the ALC—which is the pending matter—provides for discovery and the taking of evidence and the ALC has the authority to render a final agency decision based on the facts and law presented as this is a *de novo*

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[3] Indeed, since the remand was meant solely for delay, and the delay failed, an appeal on this statutory point is meaningless.

proceeding. *See* May 3 Order at 4-6; *cf.* Randolph R. Lowell, *The Contested Case Before the ALC*, in S.C. Administrative Practice and Procedure (2d ed. S.C. Bar 2008). Moreover, the claim of needing information from DHEC rings hollow when they did not even receive a copy of the DHEC file and administrative record in discovery until April 26. Thus, the Cruise Opponents can offer no legitimate claim that they needed more information from DHEC or complain about the DHEC record when this is a contested case, *de novo* proceeding.

B. The League and Petitioners' Counsel argued the discretionary nature of the DHEC Board process to the South Carolina Supreme Court.

The bad faith and intentional delay motivating the Motion is demonstrated by the fact that Cruise Opponent South Carolina Coastal Conservation League (League) and its counsel (*including the same counsel representing the Cruise Opponents in the present case*) affirmatively represented to the South Carolina Supreme Court in another case that a final review conference is optional and discretionary with the DHEC Board. Specifically, the League stated: "**The Board has the option of conducting a conference or not after a request for review is made.** If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F)." Resp. to Mot. To Remand, Ex. D, League Pet. for Writ of Cert. at 5 n.3, Nos. 07-ALJ-07-0107-CC, -0108-CC (Jan. 20, 2009) (emphasis added). Thus, the League and its counsel were undeniably aware that the DHEC Board has the discretion to conduct a final review conference *because they have previously acknowledged that final*

review by the Board is optional.[4] The Cruise Opponents and its counsel completely ignore this inconsistent representation and fail to offer any explanation why the same party in litigation against the same party can say one thing to the Supreme Court and a different thing to the ALC.

III. THE FILED AFFIDAVITS OFFER NO JUSTIFICATION FOR THE CRUISE OPPONENTS' BEHAVIOR.

The Cruise Opponents offer two affidavits that opine that no sanctions are warranted. Neither affidavit is useful. Both Affiants Linton and Bouch purport to tell the Court what the result of the motion should be. However, as Judge John Hayes stated in responding to an attorney affidavit, the court "can reason for itself." Ex. 10, *City of Tega Cay v. Tega Cay Water Serv., Inc.*, Order, C.A. No. 99-CP-46-1724 (Dec. 15, 1999). In fact, for this very reason the affidavits carry no value or weight and should be disregarded.

The Supreme Court's opinion in *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), controls. In general, expert testimony on issues of law is inadmissible." *Dawkins*, 580 S.E.2d at 437. In *Dawkins*, an affidavit from a law school professor "primarily contained legal arguments and conclusions," and the Court held it was properly excluded. *Id.* There, as here, the proffered affidavit "inappropriately attempted to usurp the trial court's role in determining" a matter of law. *Id.* There, as here, the "affidavit reads as if it could have been [the parties'] oral argument to the trial court...."

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[4] More recently, the League and its counsel told the Supreme Court that "[r]emand to the agency only results where there [sic] agency error *is determined by the ALC.*" *Kiawah Development Partners, II v. S.C. Dep't of Health and Envtl. Control*, League Return to SRMC *Amicus* Brief filed June 12, 2013 at 6 n.2.

Id. Thus, the affidavits cannot be considered as they only seek to tell the Court what the ultimate legal conclusion should be.

Neither proffered affidavit is based on any fact nor reasonable expert opinion, and in fact neither affidavit establishes that either affiant is an expert in this area of the law. For example, there is no indication in the affidavit and no discovered record that Mr. Linton has ever appeared before either the Administrative Law Court or the DHEC Board under S.C. Code Ann. § 44-1-60. Thus, it does not appear why he would be in a position to instruct the Court through affidavit on how to interpret an administrative statute or tell the Court what procedure or course of action it should undertake.

The affidavit of Mr. Bouch—not referenced directly in the Response—does not aver that Mr. Bouch has reviewed the relevant filings before this Court.[5] Moreover, it is expected that Mr. Bouch, whose firm represents the Cruise Opponents in this case, would opine that no sanctions are warranted for a motion filed by his firm. Mr. Bouch would instruct the Court on the standard, which is mere argument and legal opinion of no evidentiary use or value to the Court. *See Dawkins*, 580 S.E.2d at 437. The affidavit is just another, unauthorized, petitioners' brief.

Additionally, an affiant must have personal knowledge of the matter. "Rambling affidavits filed by the lawyers reciting facts known from file reviews or with legal arguments may fail this test miserably." W. Moise, *Common Civil Litigation Errors: Don't Let Them Happen To You!*, S.C. Lawyer (Nov. 2004). The Bouch affidavit fails to

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[5] He does aver that he was "asked ... to review" the relevant filings, but is silent on whether he actually reviewed them.

aver that the affiant has personal knowledge of anything related to this case. Instead, it impermissibly opines about what the ultimate legal conclusion should be.

Over a half-page of the Bouch affidavit is devoted to discussing a case in which affiant was counsel for the supposed prevailing side.[6] *Cf.* Ex. 10, *City of Tega Cay*, Order, C.A. No. 99-CP-46-1724 (Dec. 15, 1999) (In addressing an attorney affidavit in which counsel averred that he was the prevailing attorney in a cited case, the "court extends its congratulations" and then discounts the attorney's affidavit in full.). The case—*Ex parte Bon Secours-St. Francis Xavier Hospital*, 393 S.C. 590, 713 S.E.2d 624 (2011)—was cited by the Ports Authority in its brief only once and as follows:[7]

> The South Carolina Supreme Court has interpreted Rule 11 as permitting a trial court to impose sanctions on a party, a party's attorney, or both for filing a document with the court that is meant for delay or for which no good grounds exist to support the filing. *See Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597-98, 713 S.E.2d 624, 628 (2011) (citing *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)).

Motion for Sanctions at 5. As the court itself stated in the case: "A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing." *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 628 (2011). Thus, it is hard to discern value in the affidavit's exposition.

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[6] The Supreme Court found that sanctions were warranted for the misconduct, but held that sanctions beyond an award of attorneys' fees and costs were an abuse of discretion. *Ex parte Bon Secours-St. Francis Xavier Hosp.*, 393 S.C. 590, 713 S.E.2d 624 (2011). Thus, the discussion of the case offers only an example where dismissal was found inappropriate, but award of attorneys' fees and costs was appropriate.

[7] Mr. Bouch's recitation of the procedural history appears to accurately duplicate the court's description printed in the case itself.

The two affidavits offer only legal argument against the imposition of sanctions and thus provide no utility to the Court. *See Dawkins*, 580 S.E.2d at 437 (an affidavit of "legal argument" should not be considered). In short, the subject affidavits afford no value to the Court in determining whether to sanction the Cruise Opponents for their misconduct.

IV. THE PROFFERED ARGUMENT ON THE PROPOSED LEGISLATION IS DISINGENUOUS.

The Cruise Opponents suggest a proposed statutory amendment as possible support for their argument[8] and opine that the proposed legislation, House Bill No. 3827 (Bill), "provides a remand mechanism—exactly as [Cruise Opponents] here requested...." Resp. to Mot. For Sanctions at 6. However, a reading of the whole Bill exposes this representation as wholly without probative value.[9] The Bill, if passed, would remove the DHEC Board from the initial review process and allow review only if requested by the permit or license applicant. Under the Bill, a would-be obstructionist would have no right to DHEC Board review and no right to a remand. In other words, the Bill is intended to prevent the very delay tactic of remand attempted by the Cruise Opponents here. The plain language of the Bill would remove any challenge by the Cruise Opponents to the DHEC Board and remove a right to a remand by the Cruise

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[8] It is unclear why the Cruise Opponents attached a copy of the proposed legislation printed from Westlaw with the heading "For Educational Use Only."

[9] Ironically, it was just this sort of cribbed and selective reading of statutory law that resulted in the sanctionable conduct in the first instance. *See* May 3 Order ("[A] thorough reading of the statute" reflects that the Cruise Opponents' interpretation was wrong and stating that "[w]hen the statute is read as a whole, it is ***clear*** the Board has the discretion....") (emphasis added).

Opponents. The misrepresentation of the plain language of the Bill, as support for its frivolous motion to remand, supports sanctioning the Cruise Opponents.

V. THE PURPOSE OF SANCTIONS IS TO DETER SIMILAR CONDUCT IN THE FUTURE.

The Cruise Opponents complain that if their misconduct is sanctioned that it would "have an inevitable chilling effect...." An important remedial purpose of sanctions is to discourage similar conduct in the future. As the Supreme Court has stated, if sanctions are warranted, then a Court may select from any number of remedies. These include:

- an order to pay the reasonable costs and attorney's fees incurred by the party defending against the frivolous action;
- an order to pay a reasonable fine to be paid to the court;
- a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith; and/or
- if appropriate under the facts of the case, an order for a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith.

Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) (emphasis added). In other words, the purpose of the sanction is to deter future misconduct. What is clear from the Cruise Opponents own statements is that delay is the cornerstone of their ultimate goal to kill the entire cruise industry in Charleston. The abuse of the administrative process which the Cruise Opponents undertook in filing a frivolous motion is an

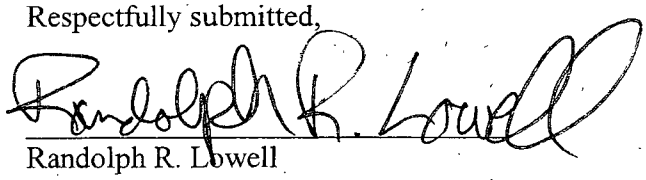
intentional and deliberate waste of the Court's time and resources and the Ports Authority's time and resources. This "delaying action" is exactly the sort of misbehavior that should be chilled, and the Ports Authority seeks a remedy to effectuate that goal.

CONCLUSION

Under these circumstances, the filing of the Motion to Remand was baseless, meritless, frivolous, and taken for the sole purpose of delay and warrants sanctions under Rule 72, RPALC and the Sanctions Act to discourage repetition. Consequently, the Ports Authority submits that an appropriate sanction for Cruise Opponents' conduct is the dismissal of this contested case, with prejudice. In addition, or in the alternative, the Court should impose an award of costs and attorneys' fees to the Ports Authority incurred in defending these meritless claims, order that a monetary fine be paid to the Court, and grant such other relief as the Court may deem just and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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Attorneys for the Respondent
South Carolina State Ports Authority

August 2, 2013
Columbia, South Carolina

Exhibit 10

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	C.A. No.: 99-CP-46-1724
City of Tega Cay, Plaintiff,	)	RE: Attorney's Fees
vs.	)	
Tega Cay Water Service, Inc., Defendant.	)	

Defendant, pursuant to §15-77-300, et. seq. S.C. Code Ann. (Supp. 1998), petitions the court for an award of attorney's fees.

Initially, Plaintiff questions the timeliness of the Petition. The court finds the Petition timely under §15-77-310. Final disposition of this case occurred with the filing of this court's Order denying Plaintiff's Motion for Reconsideration on October 27, 1999. Section 15-77-310 required the Defendant to file such petition within thirty (30) days of that date. The thirtieth day in this case would, under the South Carolina Rules of Civil Procedure have been November 29, 1999. (See Rule 6). Defendant's Petition is dated November 29th, 1999, and while the file does not reflect a mailing date, Plaintiff's response establishes a mailing date of November 29, 1999. Even though the Petition was filed with the Clerk of Court on December 1, 1999, more than thirty days after the court's last order, the Petition under the rules was timely.

Plaintiff has filed with the court an Affidavit of one Steve A. Matthews, an attorney with the law firm of Sinkler and Boyd, P.A. Before further addressing Defendant's Petition, the court feels compelled to address the affidavit and its attachments since it is a matter of record. Oddly, the affidavit is not referred to in Plaintiff's Return and was filed with the court the day after the

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filing of the Return. Also of interest is the absence of any indication to the court that Mr. Mathews has been the attorney for Plaintiff during pendency of the controversy underlying the instant litigation (See Motion to intervene in 97-CP-40-0923 dated April 10, 1997). See also memorandum of understanding dated June 29, 1992, and water supply agreement dated June 22, 1993. Mr. Matthews' possible interest in this matter as Plaintiff's attorney during the pendency of this "water controversy" should have been noted for the court.

Plaintiff, has, as stated filed with the court, a "second opinion" of Mr. Matthews along with his affidavit and a copyrighted and very impressive resume. Since Plaintiff has been so kind to provide this information to the court at perhaps some expense, the court would deem it ill mannered not to address Mr. Matthews' support of Plaintiff's position and his criticism of the court's Order of October 26, 1999. The undersigned does this out of courtesy as it cannot find the Rule pertaining to second opinions, most probably due only to the court's ineptness.

While referred to as a second opinion, the court is laboring under the burden of not having the first opinion, which Mr. Matthew's opinion seconds. The court will note that the second opinion post dates the dismissal of Plaintiff's Complaint and addresses the court's October 26, 1999 order and thus could not constitute anything upon which Plaintiff relied in filing this suit. (Plaintiff does note in its return having consulted with Mr. Matthews and one Roy D. Bates, Esq. Each stated to be of the belief that Plaintiff's position was substantially justified. The record contains no affidavit or opinion of Mr. Bates.)

Mr. Matthews, in his affidavit, was kind enough to alert the court to his representation of the prevailing party in City of Beaufort v. Beaufort - Jasper County Water and Sewer Authority, 325 S.C. 174, 480 S.E.2d 728 (1997). First, the court extends its congratulations. Next, City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority was a suit by two parties to a

contract against another party to the contract. The court's review of the case finds no issue regarding the Plaintiff's standing to sue Defendant in the Supreme Court's opinion. Cursory review of the case establishes the issue under review was the validity the contract, not standing.

Second, the instant action is not one in anti-trust and the Complaint alleges no "conspiracy in restraint of trade". Plaintiff, here seeks to prohibit Defendant, a party to a contract to which Plaintiff is not a party from enforcing rights regarding its relation with a third party (York County) under the contract. Third, is hard to conceive a phrase stating "other examples at law exist of third parties attempting to invalidate contracts" being of any value to the court. The court takes the statement at face value as the Circuit Court rules require counsel to make submissions to the court in good faith. However, without more (or without the court's independent excursion into this land of litigation) the statement is, as stated, of absolutely no value.

Third, the complaint, in the court's humble opinion, does claim a right to injunctive relief under a contract between Defendant and York County and thus does rest "on the legal rights and interests of TCWS and York County." Paragraph 34(b) of the complaint avers that "TCWS has <u>no legal right</u> to enforce the provision in the water supply agreement preventing York County from selling . . . water to the City." The attempt to spin Plaintiff's claim in its complaint into a claim resting on contractual rights the City wishes to establish with York County is just that, a spin.

Fourth, it is interesting to note that fault is found with the court not adding York County as a party. Initially, "ain't nobody asked the court yet to add York County as a party." Second, Plaintiff brought the suit, if York County was an indispensable party, why didn't the party bringing the suit, include it? The court can't tell a party who to sue and is not inclined to drag

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parties into litigation without at least one of the litigants issuing an invitation to that party.

Last, the existing facts presuppose a "yes" answer to the suggested imaginary interrogation of a County representative (See page 3 of Matthews' letter). The problem is the contract between TCWS and the County does have the "offensive language" in it. What plaintiff wants and what York County may want under a different set of facts is of absolute no help in determining the issue of standing, and is not dispositive of any issue raised herein.

If counsel for Plaintiff was truly interested in a meaningful determination on the standing issue, it should have sought it from a body that has the ear of the trial bench, an Appellate Court. And, oh yes, the court is not in the business of protecting its orders and further can reason for itself. This is certainly a novel approach to jurisprudence as the court understands it. (This Judge has yet to appeal one of his orders or file briefs or argue in support of any such order). And finally, rightly or wrongly, the court intends to continue to do its own reasoning and leave it to an authoritative body to point out in print for the world to see the faults therein.

As to the merits of Defendant's Petition, the court must exercise the analysis required by Heath v. County of Aiken, 295 S.C. 416, 368 S.E.2d 904 (1988) (Heath I)

First, is Defendant the prevailing party within the purview of the statute? Defendant prevailed, true, but it prevailed on a procedural matter and not on the merits. A dismissal of Plaintiff's Complaint for lack of standing by its nature precludes resolution of suit on its merits. Jasper County Board of Education v. Jasper County Grand Jury, 303 S.C. 49 , 398 S.E.2d 498 (S.C. 1990) clearly envision an award of attorney's fees under §15-77-300 to a party prevailing "on the merits".

The Supreme Court in Jasper County Board of Education party upheld a denial of an award of attorney's by a trial judge that had found the Plaintiff had acted with substantial

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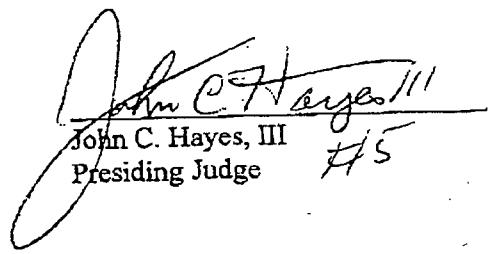
justification (The analysis second prong) where the court had dismissed the case on a party's motion based on lack of jurisdiction. Of guidance to the undersigned, however, is the Supreme Court's determination that Petitioner, the apparent victor did not qualify as the "prevailing party". The Court stated:

> We find no abuse of discretion in the denial of attorney's fees here. Publisher does not qualify as a "prevailing party" entitled to recover attorney's fees under §15-77-300 because there was never a resolution on the merits. In *Heath II*, we defined "prevailing party" as:
>
> > The one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention, and in whose favor the decision or verdict is rendered and judgment entered.
>
> *Id.* at ___, 394 S.E.2d at 712. A procedural dismissal offers no aid in this evaluation. 398 S.E.2d at 500.

The undersigned must find under the posture of this case in light of Jasper County Board of Education, that Defendant does not qualify as the prevailing party and thus the analysis need go no farther.

Necessarily, Defendant's Petition for attorney's fee is DENIED.

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge

December 15, 1999
York, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control,	)	Docket No. 13-ALJ-07-0056-CC
Petitioners,	)	**CERTIFICATE OF SERVICE**
v.	)	
South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control,	)	
Respondents.	)	

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **South Carolina State Ports Authority's Reply In Support of the Motion For Sanctions** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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Columbia, South Carolina
This 2nd day of August 2013.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **SOUTH CAROLINA STATE PORTS AUTHORITY'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF STANDING**

The South Carolina State Ports Authority (Ports Authority) respectfully files this Reply to the Response (Response) of the Petitioners Preservation Society of Charleston (Preservation Society), Historic Charleston Foundation (HCF), Historic Ansonborough Neighborhood Association (HANA), South Carolina Coastal Conservation League (League), Charlestowne Neighborhood Association (CNA), Charleston Chapter of the Surfrider Foundation (Surfrider), and Charleston Communities for Cruise Control (Cruise Control) (collectively, Cruise Opponents) and in support of its Motion to Dismiss (Motion) this action for lack of standing.[1]

[1] The Ports Authority will not identify or rebut every misstatement of the Cruise Opponents in its Response, of which there are many. A lack of specific denial is not an admission or acknowledgement of any statement or assertion or argument by the Cruise Opponents, and the Ports Authority specifically denies and contests any claim not specifically rebuked herein.

INTRODUCTION

Under longstanding jurisprudence, the party bringing an action has the burden of satisfying the Court's standing requirements. The party asserting standing bears the burden of proving all of its elements. Georgetown Cnty. League of Women Voters v. Smith Land Co., Inc., 393 S.C. 350, 358, 713 S.E.2d 287, 292 (2011) (citing Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)). "Moreover, a plaintiff must demonstrate standing separately for each form of relief sought." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000).

Notwithstanding this basic tenet of standing jurisprudence, Cruise Opponents take issue with their burden of proving standing at this stage of the litigation. See Response at 4-5. Instead, to escape having to meet this burden, they argue that bare-bone factual assertions and conclusory statements should be sufficient to survive this motion. Id. However, the law requires an actual inquiry into the groups' standing at this stage different from the "free pass" advocated by Cruise Opponents. See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291. "Elements of standing, however, 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case'; therefore, 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stage of the litigation.'" Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control, Opinion No. 5095 (S.C. Ct. App. June 12, 2013) (Shearouse Adv. Sh. No.

The Ports Authority apologizes to the Court for the length of this reply. However, given the misstatements of law and fact, it simply requires additional exposition to "set the record straight" and there is significant and substantial support for the Ports Authority's positions.

26 at 110). Consequently, Cruise Opponents carry the full burden of satisfying all of the elements of standing at this stage.

Cruise Opponents have fallen short of meeting their burden. The Response and its supporting affidavits highlight the disconnect between the conduct alleged by Cruise Opponents to have caused the alleged injury-in-fact and the discrete permit at issue in this contested case. By the Cruise Opponents' own admission, the infrastructure constructed and owned by the Ports Authority has not caused the alleged injuries. Instead, those alleged injuries derive from the actions of third parties not before the Court.

Despite Cruise Opponents' attempt to evade the issue, should this permit be denied, the Ports Authority is under no obligation to further pursue the relocation of cruise operations to the northern end of Union Pier Terminal (UPT) and later redevelopment of the southern end; rather, the *status quo* of unlimited cargo and cruise operations—along with everything that goes with those operations—will be maintained at current or increased levels.[2] Simply put, the cruise operations complained of are beyond this Court's jurisdiction in this contested case. Consequently, the denial of this permit sought by Cruise Opponents will not and cannot redress the injuries alleged.

ARGUMENT

I. THE CRUISE OPPONENTS MISAPPREHEND PROPER PROCEDURE FOR RAISING AND ANSWERING QUESTIONS OF JUSTICIABILITY.

The Cruise Opponents mistakenly assert that in analyzing whether standing exists, evidence outside the pleadings may not be considered. Response at 34. Notwithstanding the fact that Petitioners attach five exhibits to their Response, this argument reflects a

[2] See, Ex. 1, Aff. of Peter O. Lehman (Lehman Affidavit) ¶¶8-11. Indeed, the alleged injuries complained of are actually mitigated by relocating cruise operations to the north end of the UPT.

misunderstanding of the applicable standard. As succinctly stated in The Charleston Endoscopy Center, LLC v. South Carolina Department of Health and Environmental Control, "under South Carolina law, a challenge to standing ***is not [[an objection to the adequacy of the pleading***." 03-ALJ-07-0133-CC (Aug. 27, 2003) (Stevens, J.) (emphasis added). Proper review of the issue, therefore, cannot by its very nature be concerned with only those matters raised in the pleadings (assuming, of course, that "pleadings," as contemplated by Cruise Opponents' argument, even exist in the ALC.[3] See Notes to 2013 Amendments to Rule 18, RPALC ("Former Rule 18, which provided for pleadings, has been repealed....")).

Because "an objection to standing is an objection to subject matter jurisdiction,"[4] the "duty of the adjudicating body is to examine the evidence placed before it and determine whether the elements of jurisdiction have been met." Charleston Endoscopy Center, 03-ALJ-07-0133-CC (Aug. 27, 2003) (Stevens, J.) at 1-2 (citing, *inter alia*, Lennon v. S.C. Coastal Council, 330 S.C. 414, 498 S.E.2d 906 (Ct. App. 1998) (jurisdiction is not invoked without standing) and Woodward v. Westvaco Corp., 315 S.C. 329, 332, 433 S.E.2d 890, 892 (Ct. App. 1993), vacated on other grounds by 319 S.C. 240, 460 S.E.2d 392 (1995) ("the motion to dismiss may be supported by, and the court may consider, affidavits or other evidence proving lack of jurisdiction")); see also White Tail Park, Inc. v. Stroube, 413 F.3d 451 459 (4th Cir. 2005) (When a defendant raises a motion to dismiss for lack of standing the court "may consider evidence outside

[3] Moreover, neither a request for a contested case nor a prehearing statement constitutes a "pleading."

[4] The term "subject matter jurisdiction" is used loosely here. There can be no serious doubt that the ALC has jurisdiction over the "subject matter" of a challenge to a DHEC decision. Rather, the question is really one of justiciability and whether the existing subject matter jurisdiction can be properly invoked.

the pleadings without converting the proceeding to one for summary judgment.") (citations omitted).

II. THE INJURIES ALLEGED BY CRUISE OPPONENTS REFLECT CONCERNS WITH THE *STATUS QUO* OF CRUISE OPERATIONS.

A. The Cruise Opponents complain about existing operations and offer unsupported speculation and mere conclusory statements about potential future injury.

The Cruise Opponents take great care in the Response and supporting affidavits to document individual grievances with the ***current*** operation of cruise passenger vessels on the Charleston peninsula. In fact, while vigorously opposing the Ports Authority's perceived misconstruction of their injuries, Cruise Opponents reinforce the point the Ports Authority made in the Motion: taking Cruise Opponents' grievances at face value, they amount to nothing more than a condemnation of the ***existing*** cruise industry.

However, the constitutional requirement of standing requires injury-in-fact to be "an invasion of a legally protected interest [that] is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal citations omitted). Recognizing the insufficiency of such claims, the Response and affidavits are littered with *ipse dixit* conclusory statements claiming that, once cruise operations are moved to the northern end of UPT, Cruise Opponents' alleged injuries will increase. See, e.g., Response at 12, 14, 20, 22. These statements, which serve as the only basis on which Cruise Opponents attempt to tie the permitted activity to future harm, are professed with certitude but are really nothing more than conjecture. Cruise Opponents can, and are, attacking the cruise industry as a whole (including existing operations) in

other venues.[5] While this particular challenge is part-and-parcel of the overall strategy of delaying on all fronts, injuries based on existing cruise operations are beyond the scope of this Court's inquiry, and none of these complaints are sufficient to satisfy Cruise Opponents' burden of proving injury-in-fact under Sea Pines and its progeny. See also Beaufort Realty, 346 S.C. at 303, 551 S.E.2d at 590 (finding one must suffer an actual injury in fact, not a prospective concern of future harm, and a "[p]rospective concern falls far short of the standard of 'concrete and particularized and ... actual or imminent' harm set forth in Lujan"); see also Baur v. Veneman, 352 F.3d 625, 637 (2d Cir. 2003) (finding that "a plaintiff cannot rely solely on conclusory allegations of injury ... in order to find standing") (internal citations omitted).

B. The Cruise Opponents seek to minimize and lower the bar they must meet rather than meet the requisite standing test.

Rather than meet their burden, Cruise Opponents instead rely upon federal cases which purport to set the standing bar at a level that would reduce the constitutional requirement to an afterthought.[6] See Response at 5-7. For example, the Cruise Opponents rely heavily on United States v. Students Challenging Regulatory Agency

[5] The Cruise Opponents already have actions pending before the South Carolina Supreme Court, Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012), and the federal district court attacking the cruise industry in Charleston. Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs, No. 2:12-cv-2942-RMG (D.S.C. filed July 2, 2012).

[6] The Cruise Opponents assertion that an "identifiable trifle" is the standard for injury-in-fact is at odds with the "irreducible constitutional minimum of standing" set forth in Lujan and adopted by South Carolina's Supreme Court. See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 (citing Lujan, 504 U.S. at 560–61). Our Supreme Court's adoption of Lujan is binding precedent on this Court. Therefore, this Court must apply the Lujan injury-in-fact standard: "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." 504 U.S. at 559-61.

Procedures (SCRAP), 412 U.S. 669 (1973), a case which has been rebuked by courts across the country, including later opinions of the authoring Supreme Court, and has never been adopted by courts of this state. The Supreme Court in Lujan v. National Wildlife Federation expressly departed from the standing analysis in SCRAP and embraced a more rigorous standard for satisfying the injury-in-fact requirement. 497 U.S. 871, 889 (1990) ("The SCRAP opinion, whose expansive expression of what would suffice ... has never since been emulated by this Court...."); see also United States v. AVX Corp., 962 F.2d 108, 118 (1st Cir. 1992) ("In light of Lujan, the continued vitality of SCRAP as a divining rod for locating associational standing is highly questionable."); Sierra Club v. Peterson, 185 F.3d 349, 361 n.13 (5th Cir. 1999) vacated on reh'g, 228 F.3d 559 (5th Cir. 2000) ("[I]t seems safe (and sage) to note that Lujan likely eviscerated certain prior cases that afforded procedural rights [to] plaintiffs['] standing where the three-part test was not met, see, e.g., [SCRAP].").

Indeed, the Supreme Court of Delaware rejected the same sort of reliance on the SCRAP and Duke Power cases that the Cruise Opponents offer here. See Oceanport Indus., Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892, 904 n.16 (Del. 1994). Specifically, in finding that the appellant lacked standing, the Supreme Court of Delaware found that the appellant's reliance on SCRAP and Duke Power "as controlling law in the area of environmental standing, [is] misleading and incorrect. These cases have long been called into question, and narrowed to the point of invalidation." Id. (citing Whitmore v. Arkansas, 495 U.S. 149 (1990); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871; Lujan, 504 U.S. 555).

Nor does the case of Pye v. United States provide any aid to the Cruise Opponents. 269 F.3d 459 (4th Cir. 2001). First, the alleged injury in Pye was procedural in nature and arose under federal statutes. "Those challenging procedural rights face a lower standing burden, because they can assert their rights 'without meeting all the normal standards for redressability and immediacy.'" Harrison v. U.S. Dep't of Army, CIV.A. 3:08CV-105-H, 2009 WL 3347109 (W.D. Ky. Oct. 14, 2009) (unpublished) (citing Lujan). Here, however, the Cruise Opponents have filed a contested case, *de novo* review (supposedly) to adjudicate the merits, which is significantly different than an administrative record review under federal law for procedural compliance.[7]

Additionally, Pye was an individual who filed an action based on his property interest as an adjacent landowner. This status is important because of the unique and individualized "bundle of rights" that is associated with property ownership. Not a single Cruise Opponent is an adjacent landowner. To the extent any affiant makes such an assertion, none of the affiants are parties and do not occupy the same position as Mr. Pye, as Mr. Pye was a party (in stark contrast to the affiants). Here not a single individual landowner is a party, and the organizations, who lack property interests such as Mr. Pye held, cannot claim standing. See discussion infra, § VI (arguing that the Cruise Opponents lack associational standing).

Furthermore, Cruise Opponents continue to ignore the beneficial aspects of Voluntary Cruise Management Plan (Plan) adopted by the Ports Authority as a part of the

[7] Notably, the Cruise Opponents have filed an action pending in the Federal District Court regarding procedural challenges to the federal permitting for the project. While Pye may (but not necessarily) be useful in that case, Pye is of no aid in this case.

capital improvement plan.[8] See Motion, Ex. 17, Voluntary Cruise Management Plan. The Plan, including the traffic management component thereof, will reduce traffic and reduce emissions at the UPT and in the surrounding historic neighborhoods, a fact which Cruise Opponents ignore. See Motion, Ex. 9, OCRM Technical Review at 8; Ex. 10, Trinity Consultants Study: Historical, Current and Future Criteria Pollutant Emissions at Union Pier Terminal, dated Dec. 6, 2012. The discounting of the improvements that will be achieved under the Plan further underscores the Cruise Opponents' tunnel vision with respect to ridding Charleston of the cruise industry altogether.

The Cruise Opponents failed to identify any imminent injury resulting from the Permit in their request for contested case and prehearing statement. Once challenged, the proffered affidavits similarly fail to provide any real claim of reasonable injury that is not mere conjecture. Therefore, the Cruise Opponents have failed to articulate an injury-in-fact and this matter should be dismissed.

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[8] Rather than acknowledge these benefits, Cruise Opponents instead make the attenuated argument that the name "voluntary" renders the plan as a whole meaningless and unenforceable. Cruise Opponents contend that the Plan is not binding on the Ports Authority and will allow it to "increase the number and size of the ships after the permitted structure is complete." Response at 24. However, the Court of Appeals rejected this kind of pre-emptive hand-wringing with respect to an as-of-yet unimplemented project condition. Town of Arcadia Lakes v. S.C. Dep't of Health and Envtl. Control, Op. No. 5095 (S.C. Ct. App. filed Mar. 6, 2013) (Shearouse Ad. Sh. No.11 at 38), withdrawn, substituted, and refiled (S.C. Ct. App. filed June 12, 2013) (Shearouse Ad. Sh. No. 26 at 110).

In Town of Arcadia Lakes, the Court of Appeals noted that the "injuries" alleged by the individual petitioners were really nothing more than concerns that the Stormwater Pollution Prevention Plan developed by the property owners was insufficient and would not be adequately implemented. The petitioners' concerns were based on the failure of previous work in the area to sufficiently follow through with mitigation planned measures. Cruise Opponents' concerns with the implementation of the Plan are similarly insufficient and speculative to satisfy their burden of proving an injury-in-fact that is not conjectural or hypothetical. See Sea Pines, 345 S.C. at 601-02, 550 S.E.2d at 291-92; see also Beaufort Realty, 346 S.C. at 303, 551 S.E.2d at 590 (finding one must suffer an actual injury in fact, not a prospective concern of future harm, in order to satisfy Lujan).

III. THE INJURIES ALLEGED BY CRUISE OPPONENTS ARE NOT TRACEABLE TO THE PORTS AUTHORITY'S PERMIT APPLICATION.

To the extent that Cruise Opponents' speculation amounts to injury-in-fact, the Response conclusively confirms that the alleged injuries are not fairly traceable to or caused by the permitted activity in this contested case. See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'") (quoting Lujan, 504 U.S. at 560–61). Notwithstanding a finding of injury, a claim will still fail the Lujan test for standing where a causal connection between the permitted activity—here, the installation of five piling clusters under an existing structure of a longstanding marine terminal—and the alleged harm is not present. See id. It is undisputed that the UPT is already used for marine container traffic and cruise operations. The installation of the five pile clusters permitted by DHEC in no way alters the pre-existing use and operation of the UPT and is wholly divorced from the injuries alleged by Cruise Opponents.[9]

A. The injuries alleged are caused by the actions of third parties not before the Court.

As an initial matter, the standard set forth in Lujan makes clear that Cruise Opponents conveniently ignore another factor in setting forth their injuries related to the deposition of soot from cruise vessels, which weighs heavily in the analysis of whether their alleged injuries are traceable to the permit at issue. The elephant in the room, of course, is that the UPT is a fully-operational marine container terminal. Deposition of

[9] As discussed above, because the injuries alleged by Cruise Opponents exist today, they cannot be traced to the permit for the installation of the additional five pile clusters.

soot could, and most likely is, attributable to a combination of factors, including, but not limited to, marine cargo operations, cruise operations, railroad operations, and automobile and truck traffic. To lay blame exclusively on cruise operations, while expedient for the purposes of Cruise Opponents' challenge, willfully disregards the multitude of other sources.[10]

In fact, Cruise Opponents' own actions in opposing the cruise industry through multiple case filings are instructive. The case pending before the Supreme Court was filed by these same Cruise Opponents. See Ex. 2, First Am. Compl., Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012) Therein, Cruise Opponents seek a declaratory judgment order permanently enjoining cruise operations at the UPT on the basis of the very same alleged injuries to person and property asserted in this contested case. Compare First Am. Compl. at 5-9 (complaining that "vessels emit noise pollution ... and burning diesel fuel emits visible particulate soot from ship funnels," traffic problems related to cruise passengers embarking and debarking the ship, pollution to surrounding waters, including ballast water, hull coatings, gray water, and black water, as well as an outbreak of norovirus) with Pet'rs' Prehearing Statement and Response. Tellingly, however, Cruise

[10] This is common sense. There are more emissions from cargo vessels and the intendant terminal equipment, operations, and trains than from cruise vessel operations. See Motion, Ex. 10, Trinity Consultants Study: Historical, Current and Future Criteria Pollutant Emissions at Union Pier Terminal, dated Dec. 6, 2012. Indeed, the Cruise Opponents and the affiants cannot connect the supposed deposition of soot to the cruise vessels. There is no evidence, just mere conjecture and speculation.

As one cruise supporter wrote in a letter to DHEC, even assuming the claims of soot deposition were true, "I am curious to know if this building pollution has been tested to determine if it is indeed Carnival soot or if perhaps it is a culmination of varied soot from all the container ships that port various times during the day ... every day." Ex. 3, Ltr. of Nancy Infinger to DHEC, DHEC-SCPA 000088-89.

Opponents did not sue the Ports Authority in that action. Instead, ***Cruise Opponents averred through pleadings that the above injuries were solely the result of the Carnival Corporation***, d/b/a Carnival Cruise Lines.[11] Again, these are the same injuries-in-fact which Cruise Opponents attest to this Court are solely the result of the permitted activity of the Ports Authority.

The recurring theme amongst the statements and pleadings of Cruise Opponents is that the positions taken by Cruise Opponents across its many battlefronts are inconsistent and are made as a matter of convenience. The fact that Cruise Opponents sued only Carnival Cruise Lines for these actions in circuit court is proof alone, based on their own pleadings and admissions, that the injuries alleged by Cruise Opponents derive not from actions of the Ports Authority but a third party not before the Court.

B. The causal link between the alleged injuries and the governmental action is superseded by actions of third parties not before the Court.

Other courts, including the United States Supreme Court, have similarly found the causal link between a challenged governmental action and alleged injuries to be broken where the action itself does not cause the injury, but rather independent actions of third parties who are not before the Court. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Allen v. Wright, 468 U.S. 737 (1984). In Simon, individuals and representative groups brought an action against the Secretary of Treasury and Commissioner of the Internal Revenue Service (IRS) asserting that the IRS had violated the Internal Revenue Code and the Administrative Procedures Act in issuing a revenue ruling affording favorable tax treatment to nonprofit hospitals that allowed those

[11] The Ports Authority subsequently, on its own initiative, intervened in the action and was made a party.

hospitals to serve only indigent individuals to the extent of the hospital's financial ability. The plaintiffs alleged this revenue ruling and interpretation encouraged hospitals to deny treatment to indigents and was therefore invalid. The Supreme Court rejected these claims on the grounds that the plaintiffs failed to meet their burden in proving standing. Specifically with respect to the redressability of the asserted injuries, the Court found that the chain of causation necessarily presumed the "independent action[s] of some third party not before th[is] court" and that it was "purely speculative whether the denials of service specified in the complaint" would be remedied by an exercise of the Court's remedial powers. Simon, 426 U.S. at 42-43. The Court recognized the unlikelihood of fashioning a remedy where the remediation was dependent on predicting the acts of an interest group that was unrepresented in the litigation, particularly where the group is composed of many individual actors, each of whom must react to other market or regulatory factors. Id. at 42-46; see also Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996) (discussing and citing to Simon).

Similarly, in Allen v. Wright, the Supreme Court evaluated a claim against the IRS that it had failed to ensure that racially discriminatory private schools were denied tax-exempt status. The Court found that the plaintiffs had alleged a judicially cognizable injury in the form of a reduced ability to attend a racially integrated school. However, the Court found the causal connection between the alleged injury and the challenged government conduct was too attenuated to overcome the standing doctrine and would further run afoul of the idea of separation of powers in that the plaintiffs sought to undo an apparatus established by the Executive Branch to fulfill its legal duties. See Allen, 468 U.S. at 759 ("The links in the chain of causation between the challenged Government

conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.") (citing Simon). The Court went on to note that it was "entirely speculative ... as to whether withdrawal of a tax exemption from any particular school would lead the school to change its policies," and that "it is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status." Id.

This concept has also been applied in two more recent opinions. In Florida Audubon Society, environmental organizations and an activist sued the Secretary of Treasury and Commissioner of the IRS under the National Environmental Policy Act (NEPA) for its failure to prepare an environmental impact statement (EIS) on the effects of a tax credit issued by the IRS for the ETBE fuel additive. 94 F.3d 658. In analyzing the causation standard for standing, the full panel of the D.C. Circuit emphasized that "a protracted chain of causation fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury," which the court found to be "far weaker than even the [causal connection] alleged in Simon." Id. at 670 (citing Cal. Ass'n of the Physically Handicapped, Inc. v. Federal Commc'ns Comm'n, 778 F.2d 823, 829 n. 4 (D.C. Cir. 1985) (Wald, J., dissenting) (explaining that the "double layer" of speculation in Allen made its causal chain far weaker than the chain the Supreme Court rejected in Simon)). "As in Allen, then, the presence and number of third-party links in this causal chain independently corroborate that appellants' claim of causation is 'entirely speculative' and insufficient for standing." Id. (citing Simon, 426 U.S. at 46

(Stewart, J., concurring) (observing that suits challenging a third party's taxes are not justiciable, except for First Amendment challenges)).

Likewise, the Fourth Circuit recently relied upon this same line of reasoning in dismissing a claim alleging injuries related to an Executive Order of President Obama removing prior limitations on federally funded human embryo stem cell research. Doe v. Obama, 631 F.3d 157 (2011). The court found that the plaintiffs lacked standing to challenge the Executive Order's funding restrictions included a superseding antecedent involving an independent third party not before the court. The Fourth Circuit held that "Allen and Simon illustrate a fundamental tenet of standing doctrine: where a third party such as a private school or hospital makes the independent decision that causes an injury, that injury is not fairly traceable to the government." 631 F.3d at 162. Further, "[w]here government policy not only allows [third parties] to choose what to do ... but also safeguards the independence of their decision with strict conditions, the connection between injury and policy is a 'purely speculative' one." Id. (citing Simon, 426 U.S. at 42).

The import of Simon, Allen, Florida Audubon Society, and Doe v. Obama is clear. Government's role, including instrumentalities like the Ports Authority, is to set policy and provide infrastructure and related service to be used by its citizens in a lawful way. Just as the government is not liable for every traffic accident that takes place on its roads, or as an airport is not liable for mistakes made by individual airlines, so too are the collateral effects of the companies who use the Ports Authority's port facilities ***not*** attributable to the Ports Authority for putting in place the necessary infrastructure to accommodate cruise passenger vessels.

C. Cruise Opponents' failure to address the Bailey case and reliance on the Duke Power Company case is instructive.

Cruise Opponents fail to address or distinguish the standing analysis in Bailey v. S.C. Department of Health & Environmental Control, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), notwithstanding the fact that the Ports Authority's Motion to Dismiss relied on this case to demonstrate Cruise Opponents' failure to show both causation and redressability. Cruise Opponents terse argument against Bailey can be summed up as follows: Bailey does not apply, because Bailey involved the "same boats that had been docked for years would continue to be docked at the same location regardless of the permit decision," which they claim is distinguishable from the Permit challenge because cruise ship operations and resulting adverse effects will increase (setting aside that even under the Cruise Opponents' interpretation of Bailey, after implementation of the Permit, the "same boats that had been docked for years" at the UPT "would continue to be docked at the" UPT "regardless of the permit decision"). See Response at 22.

However, the petitioner in Bailey did not merely challenge the dock permit on grounds that it would facilitate continued use of the dock by existing vessels, as suggested by Cruise Opponents, but instead alleged the challenged permit would facilitate increased commercial development in the area because the dock was slowly being converted into a marina. See Bailey v. S.C. Dep't of Health & Envtl. Control, 07-ALJ-07-0583-CC (July 23, 2008) (J. Geathers). In other words, the Bailey petitioner was making the exact same argument as Cruise Opponents here. This Court did not accept the petitioner's line of reasoning, countering that the "concerns with commercial development ... and its impact ... are best addressed through the enforcement of local zoning ordinances" and not a permit challenge. Id. Cruise Opponents fail to demonstrate

how the facts in this case render Bailey inapplicable and why concerns about the impact of future commercial development—in this case cruise industry expansion—should not be similarly dismissed. (And, in fact, in other litigation the Cruise Opponents have sought to challenge the lack of applicability of the local zoning ordinances on cruise.)

Moreover, causation in Bailey was found lacking not simply because the "same boats ... would continue to be docked at the same location regardless of the permit decision," but more importantly, because the "the potential of having boats mooring at the dock would still exist" regardless of the permitting decision. Bailey, 388 S.C. at 7, 693 S.E.2d at 430; see also Bailey, 07-ALJ-07-0583-CC (July 23, 2008) (Geathers, J.) ("An adverse decision might make the permitting process more onerous and cost-prohibitive for [Respondent], but it would not affect [Respondent's] letting friends use her dock nor alter the dock's footprint or impact"). This is a subtle but critical difference that Cruise Opponents ignore. Causation in Bailey was lacking ***because a pre-existing use***, *i.e.*, letting friends moor at a dock, would be unaffected by a permitting decision, not merely because the same boats or number of boats would moor at the same dock. Similarly, cruise operations have existed at the UPT for decades and the potential of having cruise vessels call at the UPT—with greater or lesser frequency—will still exist regardless of the permitting decision. See Ex. 1, Lehman Aff. ¶¶9-11. Accordingly, Cruise Opponents' argument that denying the Permit will redress alleged harms arising from expanded cruise operations is fatally undercut and they have failed to satisfy their burden in proving traceability to the Ports Authority's actions.

Similarly, Cruise Opponents' reliance on the causation analysis in the Duke Power case is misplaced and, in any event, fails to demonstrate a causal connection

between the harms alleged and the issuance of the Permit. 438 U.S. 59 (1978). Cruise Opponents rely on Duke Power in an attempt to show that their alleged injuries are fairly traceable to the issuance of the Permit. See Response at 23. However, Cruise Opponents misconstrue the holding in Duke Power, in which the Court held that the District Court's analysis of causation, based on the particular facts of that case, was not "clearly erroneous." 438 U.S. at 77 ("Considering the documentary evidence and the testimony in the record, we cannot say we are left with 'the definite and firm conviction that' the finding by the trial court of [causation] is clearly erroneous; and, hence, we are bound to accept it.").

In any event, the facts in this case are clearly distinguishable from Duke Power. There, Plaintiffs challenged the Price-Anderson Act, limiting liability of nuclear power producers in the event of a substantial nuclear accident, on constitutional grounds. See Duke Power, 438 U.S. at 67. Plaintiffs' allegations of injury consisted of immediate and potential harms posed by certain nuclear power plants under construction by Duke Power in vicinity of their residences. Id.

In this case, the Ports Authority is not proposing to build a nuclear power plant near private residences ***where one did not previously exist***. More importantly, however, in Duke Power, the injury alleged by Plaintiffs was caused by the named Defendant's conduct. As discussed above, Cruise Opponents themselves have argued that the alleged injury-producing parties are not party to this action, making causation even more attenuated than in Duke Power, which has been heavily criticized by jurists and scholars alike, and is considered the outer-bound of causal analysis, if not obsolete. See, e.g., Daniel A. Farber, Uncertainty As A Basis for Standing, 33 Hofstra L. Rev. 1123, 1125

(2005) ("Scholars have been equally skeptical [of the standing analysis in Duke Power] and have tended to view the case as an example of the manipulation of standing doctrine to obtain a desired outcome."); Duke Power, 438 U.S. at 102-03 (Stevens, J. concurring) ("The string of contingencies that supposedly holds this litigation together is too delicate for me ... It is remarkable that such a series of speculations is considered sufficient ... to establish appellees' standing."); Id. (Stewart, J. concurring) ("I think ... the appellees were without standing to initiate this litigation."); see also Simon, 426 U.S. 26, 41-42 (1976) (finding the causation requirement not met where injury arises from "from the independent action of some third party not before the court") (cited with approval in Lujan, 504 U.S. at 560).

Nevertheless, the Supreme Court departed from the Duke Power standing analysis in Lujan, applying a much stricter standard for causation and redressability.[12] See e.g., Oceanport Indus., Inc., 636 A.2d at 904 n.16 (stating that reference to Duke Power as controlling law on standing is "misleading and incorrect" and that Duke Power has "long been called into question" and "narrowed to the point of invalidation" by subsequent case law, in particular Lujan). The South Carolina Supreme Court's adoption of Lujan is binding on this Court. Thus, Cruise Opponents must comply with the "irreducible

[12] Subsequent case law also undermines Cruise Opponents' reliance on Duke Power for the proposition that injury-in-fact requires no nexus to the actual claims on the merits. See, e.g., Oceanport Indus., Inc., 636 A.2d at 904 n.17 ("[Appellant] misstates the law when it claims that 'Under Duke Power, [Appellant] is not required to show that there is some nexus between its alleged injury ... and the claim on the merits.' As previously stated, Duke is old law and Lujan ... makes that point perfectly clear").

constitutional minimum of standing" set forth in Lujan. This they have yet to do. See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291.[13]

In any event, even if the Court applies the Duke Power analysis, this case is distinguishable and the Cruise Opponents still fail to demonstrate causation. Critical to the Duke Power case was testimony of nuclear industry officials and components parts suppliers that they would be "categorical[ly] unwilling to participate in the development of nuclear power absent guarantees of a limitation on their liability." 438 U.S. at 75. Accordingly, the injury-producing conduct of Duke Power, *i.e.*, the construction of two nuclear facilities, would not occur in the absence of the Price-Anderson Act. Indeed as the full panel of the D.C. Circuit noted in rejecting an application of Duke Power that "the challenging parties put forth testimony from Duke Power officials, stating that they would have had to consider withdrawing their plans for new nuclear plants in the absence of the act." Florida Audubon Society, 94 F.3d at 671.

The same, however, cannot be said in this case. At no point has the Ports Authority or the cruise industry unequivocally stated that cruise operations would no longer exist *or* grow at the UPT in the absence of the five pilings in a manner analogous to the public proclamations made by nuclear industry officials in Duke Power. In fact, the opposite is true. The Ports Authority has averred that cruise operations at approximately the same level and same scope will continue regardless of whether the operations are at the north or south end of the UPT. Ex. 1, Lehman Aff.¶11. Here, the alleged injury-producing conduct may continue and indeed expand, with or without the

[13] Curiously, Cruise Opponents begin their causation analysis by citing the standard in Lujan and then conclude by requesting this Court adopt the older and heavily criticized standard in Duke Power.

issuance of the Permit. The UPT, in its present state, retains the infrastructure to support an increasing size and frequency of cruise ships for the foreseeable future.

In sum, Cruise Opponents have failed to meet their burden in establishing that their alleged injuries are caused by or fairly traceable to the issuance of the Permit, rather than the actions of third parties not before the Court; therefore, the Court should dismiss Cruise Opponents' challenge to the permit on this ground.

IV. THIS COURT CANNOT REDRESS THE ALLEGED INJURIES.

Should the Court find it necessary to reach the redressability prong of its standing analysis, Cruise Opponents' Response leaves little doubt that a favorable decision by this Court will not redress the speculative injuries of Cruise Opponents. See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 (providing that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision) (citing Lujan, 504 U.S. at 560-61); see also Vt. Agency of Natural Res., 529 U.S. at 771 (stating that there must be "a '***substantial likelihood***' that the requested relief will remedy the alleged injury in fact") (emphasis added) (internal citations omitted); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 162 (4th Cir. 2000) ("The redressability requirement ensures that a plaintiff 'personally would benefit in a tangible way from the court's intervention.'").

Cruise Opponents are caught in a net of their own making. On the one hand, as discussed above, the injuries alleged to have been sustained by Cruise Opponents, and which, according to the conclusory arguments made in the Response, will inevitably be "exacerbated" by the relocation of cruise operations to the northern end of UPT, cannot be remedied short of cessation of all cruise operations on the Charleston peninsula.

However, while not acknowledging the unavoidable fact that the continuation of cruise operations at the UPT is not, and cannot be, at issue under the Court's limited jurisdiction in this contested case, Cruise Opponents are exercised to argue that they "have never been of the position that they do not want cruise operations to exist at all [at UPT]." See Response at 7.[14] These two positions—the injuries alleged and disavowing of the only way to remedy said injuries—are logically incompatible. Instead, Cruise Opponents "seek [only] to mitigate the adverse consequences they ***are experiencing***." Id. (emphasis added). This admission that the requested relief is merely mitigation for current conditions rather than a remedy for the alleged future injury-in-fact is conclusive evidence that the remedy sought by Cruise Opponents is insufficient to satisfy the redressability prong of this Court's standing analysis.

However, Cruise Opponents seem still to be operating under the misconception that, should the permit be denied, cruise operations will cease to take place at the UPT or will operate under terms sought by Cruise Opponents. The UPT is a fully functioning marine container terminal that currently accommodates both cruise vessels and operations and cargo vessels and operations. See Ex. 1, Lehman Aff. ¶7. The UPT has accommodated passenger vessel calls for at least 100 years. See Motion, Ex. 3, Aff. of James I. Newsome, III ¶7, (Aug. 22, 2011) (Newsome Affidavit); see also Ex. 1, Lehman

[14] By contrast, and tellingly, Cruise Opponents do seek precisely this remedy in the state litigation pending before the Supreme Court. See Ex. 2, First Am. Compl., Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012) (wherein Cruise Opponents seek an order of the Supreme Court declaring "the illegality and unreasonableness of ... the use of Union Pier Terminal and surrounding areas and attached structures for cruise operations", further enjoinment of "violations of law by Defendant Carnival [Cruise Lines]", and the "abat[ion] of cruise operations."); see Ex. 4, Jay Williams E-Mail, Cruise Opponents 010056-58 (stating "[UPT] as a location for the future is not acceptable ... the terminal site at [UPT] must be defeated" to which Dana Beach and Randy Pelzer concur).

Aff. ¶6. Moreover, passenger vessels, including cruise vessels, have called on the UPT cruise passenger facility since at least 1973, the date of dedication for the existing cruise passenger terminal facility. Id. Importantly, should the federal or state environmental permits be reversed or denied, the Ports Authority will continue to accommodate and berth cruise vessels at the UPT, including but not limited to the Carnival *Fantasy*. Id. ¶¶9-10. Regardless of where cruise operations occur on the UPT, the cruise operations will be of similar scope and size, including the frequency of vessel calls and the size of cruise vessels that can be accommodated and berthed, and the operational characteristics of the cruise vessels, such as emissions, will not affected by location on the southern end of the UPT. Id. ¶11.

Conversely, Cruise Opponents seek a remand to DHEC for further evaluation of the permit on terms they impose, a remedy that will not address the injuries alleged in this request for contested case and supporting affidavits. However, the request for a remand to DHEC for further consideration and evaluation of alternative sites for cruise operations ignores a crucial fact: because cruise operations are not at issue in this permit, should remand be ordered by this Court, the Ports Authority, as permittee, is under no obligation to further pursue the permit under any modified form.[15] The Ports Authority could simply walk away from the permit and continue to accommodate cruise vessels at

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[15] As summarized in the administrative record:

> There are only two options for Union Pier:
>
> • It will continue to be used exclusively for maritime purposes, including cargo and cruise ships.
>
> • Or the passenger terminal will be relocated to the northern portion of the property, and more than half of Union Pier will become available for both public and private uses.

Ex. 5, What Kind of Future Do You Want?, SCPA 002630.

the UPT under the current configuration with potential modifications to the existing terminal that likely would not require additional permitting. See id. ¶¶9-11.

In light of this fact, what is interesting is that in the Cruise Opponents zeal to stop cruise at the UPT, they wholly ignore the environmental mitigation and lessened impacts that would accompany the redevelopment of the south end of the UPT. Indeed, the injuries complained of from cruise operations are lessened, ameliorated, and mitigated through implementation of the capital improvement plan.[16] The only alleged injury left unbowed is the presence of cruise ships altogether. However, the mitigation of this alleged injury is not within the purview of this Court to grant, as this Court lacks the authority to ban cruise ships from Charleston, and further, reversing the permit will not result in a cessation of cruise operations, maintaining and continuing the alleged injuries found in the Cruise Opponents' filings and affidavits.

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[16] The Cruise Opponents' goal is the removal of cruise from Charleston altogether. However, there are only two options—renovate under a plan that mitigates for impacts and opens up waterfront access to the citizens or maintain the *status quo*. See Ex. 5, What Kind of Future Do You Want?, SCPA 002630-640. Indeed, the concept plan for the renovated UPT includes:

- Removal of 200 cargo ships, trains, tracks, and trucks;
- Extends Market Street to the waterfront;
- Restores a natural shoreline;
- Creates green spaces and view corridors;
- Stabilizes Bennett's Rice Mill;
- Provides public and private uses; and
- Creates jobs and economic vitality.

Ex. 6, UPT Presentation of Riley and Newsome, SCPA 001218-225; see Ex. 7, Existing v. Proposed Drawing Comparison, SCPA 001217; see also Ex. 1, Lehman Aff. Ex. B SCPA 001253-366 (Concept Plan for Union Pier Waterfront dated Sept. 2010) (discussing renovation and restoration initiatives at the UPT).

None of the alleged injuries are a direct result of the driving of five pile clusters, and this Court has no power or authority to address cruise operations in the context of this contested case. The Cruise Opponents' alleged injuries, as they have presented them, result from the emissions and "cruise operations" of a third-party that is not before the Court. In sum, because the remedy sought by Cruise Opponents in this litigation will not redress the injuries alleged, Cruise Opponents have failed to satisfy their burden of proving standing to challenge this permit.

V. THE PROFFERED AFFIDAVITS FAIL TO ESTABLISH ANY OF THE ELEMENTS FOR STANDING.

Cruise Opponents proffer five affidavits submitted to "describ[e] in detail the concrete and imminent injuries that [the Cruise Opponents] will suffer but-for the permit issued by DHEC to SPA authorizing the construction of [a] new cruise ship terminal on the North end of Union Pier Terminal." See Response at 4 & Exs. A-E. However, these affidavits—none of which state that they are based on the affiants' personal knowledge or even upon "information and belief"—merely set forth the issues the affiants allegedly have experienced in the past or are presently experiencing due to the existence of the cruise industry in Charleston. Other than this, the affidavits are nothing more than a stew of conclusory statements, opinion, speculation, and rambling exposition against cruise in a clear attempt to manufacture enough allegations to continue the litigation strategy of delay and harassment through a continuation of this suit.

The affidavits read like supplemental briefs, full of conclusory statements, legal conclusions, opinion, and speculation.[17] The vast majority of the statements in each

[17] And this is exactly how Cruise Opponents' counsel utilizes these affidavits—by quoting affidavit sections as argument in the Response. See Response at 7-12.

affidavit are inadmissible. Notably, none of the affidavits state that the affiant is competent to offer testimony, and therefore the affidavits should be disregarded. Further, affidavits must be made on ***personal knowledge*** and set forth ***facts*** admissible in evidence. See Dawkins v. Fields, 354 S.C. 58, 64-66, 580 S.E.2d 433, 436-37 (2003). None of these affiants state that the averments are based on personal knowledge or on information and belief nor offer any semblance of a basis for qualification as an expert, so none of the opinions espoused in these affidavits are admissible or proper for consideration.[18]

Nonetheless, although submitted to support the contention that the permitted activity will contribute to the Cruise Opponents' claimed future injuries, the affidavits instead only demonstrate that all of the alleged harms ***are already occurring*** and in no way show that the permitted installation of five pile clusters or even that relocation of the existing cruise operations will increase or exacerbate or intensify the alleged injuries from the existing cruise operations. To the extent competency and personal knowledge can be inferred and the affidavits considered, the affidavits merely stand for the proposition that ***current*** operations cause an injury.

- "***In the last several years***, with the Carnival Fantasy moving to Charleston and cruise operations increasing, ***I have already noticed*** a decrease in my overall quality of life."
    - Aff. Christina Dodd at 2.

[18] For example, Stephen Gates purports to testify on behalf of all CNA members and makes conclusions about the project construction effects for which he is unqualified. Further, it is worth noting that the Gates family has a long history of opposition to the Ports Authority, as his wife Laura Gates is a former board chair for the League and was a leading opponent to the Ports Authority's construction of a marine terminal at the former Charleston Navy Base.

- "*[F]or the past two years*, I have been finding soot on the window sills:…"
    - Aff. Christina Dodd at 2.
- "[M]y enjoyment ***has been decreased*** as a result of SPA's operation of the cruise ship terminal at Union Pier."
    - Aff. Virginia Lane at 3.
- "The location of the cruise ship operations immediately adjacent to my home ***have negatively affected*** the investment I made when I decided to purchase property and move to Charleston."
    - Aff. Tommie Robertson at 3.
- "On more than one occasion, ***I have been*** on my terrace while the Carnival Fantasy was docked and departing and ***I have experienced*** the negative effects of the thick smoke being emitted from the ship's smokestacks firsthand."
    - Aff. Tommie Robertson at 2.
- "Unfortunately, my ability to use and enjoy my property ***has been substantially interfered*** with by the adverse consequences of the cruise ship operations ***as they are currently functioning.***"
    - Aff. Tommie Robertson at 4.

- "***Beginning in 2010***, when the Carnival Fantasy began home port operations in Charleston, ***I noticed*** traffic congestion becoming increasingly unmanageable."
    - Aff. Stephen F. Gates at 2.
- "***I am now forced*** to waste my time, my energy, my gas and my peace of mind on a regular basis because of the location of the cruise ship operations and my proximity to the consequences of those operations."
    - Aff. Stephen F. Gates at 3.

Each of these statements (and many others like them in the affidavits) is in the past or present tense and complains of the effects of the cruise industry or the cruise terminal in general. There is no averment that a denial of the permit will remedy these supposed injuries. These statements therefore provide no support for the contention that the installation of the five pilings, which has not yet occurred, will cause the Cruise Opponents' alleged injuries.

In sum, none of these affidavits contain averments of personal knowledge that are permissible for consideration, and even if considered, none of the affidavits provide a basis for standing.

VI. THE CRUISE OPPONENTS FAIL TO SATISFY THE ASSOCIATIONAL STANDING ELEMENTS.

The Cruise Opponents misunderstand the governing law on associational standing, and that misapprehension is a fatal flaw. "An organization has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, *[2] the interests at stake are germane to the organization's purpose,* ***and*** *[3] neither the claim asserted nor the relief requested requires the*

participation of individual members in the lawsuit." Beaufort Realty, 346 S.C. at 301, 551 S.E.2d at 589 (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)) (emphasis added) (the Hunt test). Alternatively, an organization "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Md. Highways Contractors Ass'n, Inc. v. Maryland, 933 F.2d 1246, 1250 (4th Cir. 1991) (citing Warth v. Seldin, 422 U.S. 490, (1975)).

Here, the Cruise Opponents have offered no facts, no evidence, no support, and no argument for injury in the organization's own right. Instead, the Cruise Opponents—all organizations—seek to establish standing through its membership (*i.e.*, the Hunt test). However, the Cruise Opponents fail to meet those requirements.

As a threshold matter, because the Cruise Opponents offer no argument as to the individual organization and have offered no facts, no evidence, no support, and no argument in opposition to the Ports Authority's position that it fails to satisfy the third element of the Hunt test, the Ports Authority's position is uncontested and conceded, and the Court should dismiss this case on those grounds. See, e.g., Kissi v. Panzer, 664 F.Supp.2d 120, 123 (D.D.C. 2009) ("Because the plaintiff's opposition fails to address the defendants' arguments, the Court may treat the defendants' motion as conceded."); Ziino v. Baker, No. 5:07-CV-217-Oc-10GRJ, 2007 WL 2433902, at *2 (M.D. Fla. Aug. 22, 2007) (unpublished) ("Indeed, the Plaintiff tacitly conceded the validity of the Defendant's argument ... by failing to address this issue in response to the motion to dismiss."); cf. In re Paoli R.R. Yard PCB Litig., No. 86–2229, et al., 1992 WL 323589, at *2 (E.D. Pa. Oct. 21, 1992) (unpublished) ("Plaintiffs' response to this motion

completely fails to address Defendants' position with respect to [this issue] and is therefore deemed to admit and concede its correctness.").

Nevertheless, assuming *arguendo* that the affidavits can be considered, the affidavits themselves demonstrate the individualized and particular nature of the allegations that would, even if sufficient to establish standing on behalf of the individual (which the Ports Authority disagrees with), require participation by individuals in this matter, thus negating any ability to utilize the concept of organizational standing.

Four of the five affidavits[19] make allegations about their personal labors over alleged soot, personal fears of breathing air, their redirection of personal driving routes due to traffic concerns associated with the cruise operations, their personal beliefs as to cruise operations and its appropriateness in Charleston, and their contention that property value may be reduced. However, this creates a serious problem in that the third prong of the Hunt test cannot be met "when conflicts of interest among members of the association

[19] Mr. Morganello's affidavit should be disregarded in its entirety. It is not affirmed to be made on "personal knowledge." Indeed, Mr. Morganello does not live on the Charleston peninsula (but rather, according to his affidavit, in West Ashley near Folly Beach). And although failing to establish in any way how Mr. Morganello is competent to testify on such matters, it nevertheless contains Mr. Morganello's opinion on the practices of cruise ships and the apparent risks such practices have on the general public. These descriptions are not statements of fact made upon personal knowledge.

Further, accompanying these unsupported assertions are Mr. Morganello's own conclusions based on what he believes could happen should the permitted activity go forward. Mr. Morganello's fear about what potentially could happen does not factually demonstrate a "real threat" that he will be harmed as a result of even increased cruise operations. The affidavit complains about the supposed *status quo*, but does not discuss how any of the fears or concerns (such as they are) are attributable to the Permit.

Moreover, Mr. Morganello claims only to "regularly swim and kayak in our state's waterways," but nowhere does he claim that he actually swims and fishes in the federal navigation channel or the waters surrounding the UPT.

require that the members must join the suit individually in order to protect their own interests." Maryland Highways Contractors Assn, 933 F.2d at 1252.

In light of the proposed capital improvement plan, many people, including members of these organizations, may be better off. The capital improvement plan would (1) reduce air emissions, (2) reduce traffic, (3) remove cargo vessels and trains from the UPT, and (4) redevelop and devote to public green space over 35 acres of the southern end of the UPT. See Ex. 1, Lehman Aff. Ex. B. Indeed, if the affiants' allegations of injury are to be believed, then they would be better off through implementation of the capital improvement plan since it mitigates and reduces the alleged injuries. Nevertheless, setting aside the minority of vocal elitists whose end goal is "no cruise,"[20] with a reduction in vessel and train traffic and 35 plus acres of green space, property values would rise, air emissions would be reduced, and their traffic concerns would be addressed.[21] While the affiants may be anti-cruise, many of the organizations' members

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[20] As one downtown resident explained in a letter to DHEC supporting the Project, "[m]ost people I know are supportive of the new terminal and we need to make our positions more vocal. The opposing groups just make more noise. There are not more of them." Ex. 8, Ltr. of Sarah Christopher to DHEC, DHEC-SCPA 000727.

Indeed, the positions of the Gates-Pelzer-Rose triumvirate within CNA was referred to by a CNA member and former board member as a "hostile takeover" and the rush by these anti-cruise individuals to present a proposal for the CNA to sue the Ports Authority was "a blitzkrieg." Ex. 10, Minutes of May 9 CNA Mtg., Cruise Opponents 001729-001733. This individual noted that the CNA had become antagonistic and "so split over the issue of cruise ships." Id. Clearly the affiants and interlocking leadership (for example, Pelzer, Gates, Rose, Williams, Agnew) seek to control a number of organizations and speak for all of them, regardless of what the majority of the actual membership believes.

[21] In trying to drum-up more support, Randy Pelzer called another landowner in the same building as Ms. Robertson (Laurens Place). He reported that neither the individual he contacted (Sally Harley) nor Doug Robertson (Ms. Robertson's husband) "seemed particularly concerned about the movement of the cruise terminal to property adjoining them, citing either interest in watching the ships come and go or a belief that the traffic situation may improve with the removal or rail lines or that cruise ship pollution and

would benefit may not be, creating a conflict within the membership as all members would benefit as to the alleged injuries with the lone exception of the "no cruise" agenda, which may not be the position of the membership in any event. For example, a CNA member and former board member of the Preservation Society wrote to DHEC in support of the Project, stating that he is "one hundred percent in favor of approval" of the Permit because the "installation of five new pilings ... will not harm anything" and that moving the cruise operations to the north end of the UPT "is the most environmentally sound and cost effective method of achieving this long needed goal." Ex. 9, Ltr. of Theodore D. Stoney, Jr., DHEC-SCPA 001085-87.

Further, if these "interests" are common to all members of the organization, then, given the nature of the interests and the claims, the association cannot bring this challenge because such interests and claims would inure to every single member of not just the organization but the general public.[22] See Citizens for Lee Cnty., Inc. v. Lee Cnty., 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992) ("Moreover, such imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of

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notice may be better than existing cargo ships." Ex. 11, Randy Pelzer E-Mail, Cruise Opponents 008806.

[22] Indeed, the claim related to soot deposition is really a claim about particulate matter emissions. Particulate matter may be dispersed over and across states and even countries. Under the Cruise Opponents' claims against "soot" and air emissions, everyone in the United States and beyond could make a claim.

Further, it is notable that a medical doctor residing downtown at Laurens Place, the residential complex closest to the UPT, rebuked a public accusation made by a certain neighbor that thick smoke from the Carnival *Fantasy* drove that individual off her terrace, calling it "utter nonsense," while pointing out that he lived closer to the cruise terminal than this individual and never smelled cruise ship emissions. The doctor then went on to characterize Cruise Opponents as a "small but tightly knit group of miscreants determined to have its way" and noted that "so-called neighborhood associations" were passing anti-cruise resolutions at meetings with only a minority of the membership attending. Ex. 12, Ltr. of S.D. Thomas, M.D. to DHEC, DHEC-SCPA 000731-32.

general interest common to all members of the public."); see also Georgetown Cnty. League of Women Voters v. Smith Land Co., 393 S.C. 350, 361, 713 S.E.2d 287, 293 (2011) (Hearn, J., dissenting) ("With harm occurring to only one member of the League [of Women Voters] and a cause of action thereby inuring only to that one member, the right the League is pursuing under the Act is not a common one."). However, if these alleged injuries are so unique and distinct to these affiants, such as their individual property valuations, then the affiants themselves should have challenged the Permit and should have been named parties, as the organizations cannot represent their interests without their participation. In either scenario, the Cruise Opponents are not proper parties, are not the real parties in interest, and cannot satisfy the standing requirements, and thus this case should be dismissed.

VII. CRUISE OPPONENTS FAIL TO ARTICULATE HOW THIS CONTROVERSY IS ANYTHING MORE THAN A POLITICAL QUESTION MASQUERADING AS A PERMITTING DISPUTE.

As a threshold matter, the Cruise Opponents have failed to offer any substantive response or counter to the political question argument, thus conceding that this case presents a political question and should be dismissed on that ground. Rather than articulate why the controversy is not predominantly political in nature, Cruise Opponents only offer the Court a "parade of horribles" analogy and aver that any important, controversial issue "would inevitably be kicked out of the judicial system."[23] Response at 32. Hyperbole and *ad hominem* attacks are not legal argument. As the Cruise Opponents have offered no legal response to the political question argument, the Cruise

[23] The irony of the Cruise Opponents making this claim after having filed not one but three legal actions in every forum available—the state courts, the federal courts, and the ALC—to try and stop cruise in Charleston should not be lost on the Court.

Opponents have conceded this argument. See Kissi, 664 F.Supp.2d at 123; Ziino, 2007 WL 2433902, at *2; In re Paoli R.R. Yard PCB Litig., 1992 WL 323589, at *2.

To assure the Court of the correctness of the political question argument and provide additional support (from the Cruise Opponents own admissions), the Ports Authority notes that in determining whether a question is political and nonjusticiable, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 122, 691 S.E.2d 453, 460 (2010) (citing Coleman v. Miller, 307 U.S. 433, 454–55 (1939)). "Therefore, the courts will not rule on questions that are exclusively or predominantly political in nature rather than judicial. Segars-Andrews, 387 S.C. at 122, 691 S.E.2d at 460 (2010) (citing S.C. Pub. Interest Found., 369 S.C. at 143, 632 S.E.2d at 278; Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

The stated goal of Cruise Opponents is to stop all cruise operations at the UPT and have that property devoted to their own purposes. Land use of the UPT is the political question Cruise Opponents want to debate in the guise of a permit challenge. Discerning the predominant political and policy nature of this controversy and the underlying intent of Cruise Opponents does not require the services of a soothsayer. Cruise Opponents have been vocal and overt about their intentions surrounding UPT redevelopment.

- ***"The larger issue is not whether we should have 104 cruise ships a year ... it is nothing less than a decision of what legacy we will leave for generations of***

Charlestonians ... Union Pier is, simply put, the most important transitional urban place in South Carolina. So far, the city and the SPA have treated it as if this were a debate over a proposal for a new hotel or shopping mall ... ***Now is the time to shelve the SPA's proposal*** ... to make big plans, to chart a future great enough to be worthy of our unique and historic city."

- Ex. 13, Dana Beach E-Mail, Cruise Opponents 002292 (emphasis added).

- The "***only real issue—is using Union Pier***, arguably the most valuable undeveloped waterfront parcel on the East Coast, ***for cruise ship docking/car parking***...."
  - Ex. 14, Jay Williams E-Mail, Cruise Opponents 008042 (emphasis added).
- **"[P]ollution from cruise ships" is a "side issue"** distracting the debate from the use of the UPT property.
  - Ex. 14, Jay Williams E-Mail, Cruise Opponents 008042 (emphasis added).
- Charleston must either decide to be "a destination of culture and heritage or a hub for discount travelers," but it cannot "brand [itself] to be Myrtle Beach and Northeast Harbor, Maine at the same time."[24]
  - Ex. 15, Dana Beach E-Mail, Cruise Opponents 002801.
- Accusing the Ports Authority of trying to "overrun the most valuable undeveloped land in Charleston for a cruise terminal."
  - Ex. 16, Jay Williams E-Mail, Cruise Opponents 003313.

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[24] The contempt the Cruise Opponents have for Carnival cruise passengers is palpable. For example, when discussing the withdrawal of the Carnival cruise business from Mobile, Alabama, Cruise Opponents' Evan Thompson stated that the result would be that "a few T-shirt shops will be closing in Mobile, and there will be some vacancies in the Econolodge." Ex. 20, Evan Thompson E-Mail, Cruise Opponents 003498.